77697-5

NO. 77697-5-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

LORRAINE FRANULOVICH,

Appellant,

v.

LUBJICA FRANULOVICH,

Personal Representative of the Estate of Anthony Franulovich

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Laura Riquelme, Superior Court Judge

APPELLANT'S OPENING BRIEF

THOMAS E. SEGUINE, WSBA # 17507
COUNSEL FOR APPELLANT

1023 South Third Street
Mount Vernon, WA 98273
Ph: (360) 755-1000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Treatises

I. INTRODUCTION

The trial court committed error by denying the Plaintiff's motion for summary judgment and concurrently dismissing Plaintiff's case. The matter should be remanded to the trial court for entry of judgment in favor of Plaintiff, as originally requested from the trial court, and reversing and vacating the order of dismissal.

II. ASSIGNMENTS OF ERROR; ISSUES ON REVIEW

Assignments of Error

1. The trial court erred in denying the Plaintiff's motion for summary judgment.
2. The trial court erred in summarily and *sua sponte* dismissing the Plaintiff's case against the estate without requiring that the estate separately file a motion for summary judgment.
3. The trial court incorrectly ruled that there was a *de facto* amendment of the original divorce petition, and/or that there should have been an amended petition filed.
4. The trial court incorrectly ruled that Tony had to be personally served with the documents related to entry of the decree containing the

$750,000 judgment and/or an amended petition separately pleading the $750,000 provision.

5. The trial court erred in ruling that Tony was deprived of due process.
6. The trial court erred in ruling that the estate was deprived of due process.
7. The trial court erred in ruling that the divorce court was deprived of jurisdiction to enter the $750,000 judgment.
8. The trial court erred in ruling implicitly that the estate had standing to assert the constitutional rights of Tony Franulovich.
9. The trial court improperly declined to apply principles of *res judicata* to preclude the estate's attack on the judgment.
10. The trial court erred in ruling that this "defense" was not a *de facto* collateral attack on the judgment subject to the rules of CR 60.
11. The trial court erred in ruling that it had jurisdiction to vacate the judgment after the death of Tony.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred in ruling that the underlying default judgment against Tony was void for lack of procedural due process?

2. Whether the trial court erred in ruling that the divorce court was without jurisdiction to enter the $750,000 money judgment in favor or Lorraine?
3. Whether the trial court erred in dismissing Lorraine's action against the estate for enforcement of the $750,000 judgment arising from the divorce decree between Tony and Lorraine?
4. Whether a party (the wife) to a divorce for which a default has been entered after proper personal service on the other party (the husband) of a conventional divorce petition requesting general equitable relief in a sum uncertain, who has additionally provided valid service by mail upon the husband of both notice of a hearing for entry of a judgment in the divorce action, with contemporaneous service of all pertinent documents proposing an equitable reconciliation and division of the marriage, must further personally serve such documents on the husband to secure jurisdiction over the husband for purposes of the judgment entered?
5. Whether a party in default in an equitable family law/divorce proceeding default is deprived of some form of constitutional or other procedural due process when a divorce decree is entered containing, *inter alia*, an equitable money judgment following the default, after the party presenting the judgment provides prior adequate service by

mail of 1) notice of the hearing on the proposed judgment and 2) copies of all the proposed judgment documents, including a request for a $750,000 money judgment, notwithstanding the entry of the default order, and the party against whom the judgment is entered fails to respond?

6. Whether a party receiving copies by US Mail after-the-fact of judgment documents entered in a court is obligated to move for vacation of such judgment within a certain time frame, according to case law or court rule, before asserting that the judgment is void?
7. Whether the estate of a deceased person can vicariously assert the constitutional rights of such person, after the deceased person failed to exercise them for a prolonged period of time, in this case over five years?
8. Whether the trial court should have *sua sponte* issued summary judgment against Lorraine here without requiring the estate to file a separate motion for summary judgment?
9. Whether an estate should be precluded, under principles of *res judicata,* from denying the validity of a judgment which the deceased failed to challenge for approximately five years before his death?
10. Whether a court loses the jurisdiction to modify a divorce decree, directly or collaterally, after the death of one of the spouses?

III. STATEMENT OF THE CASE

1. General background

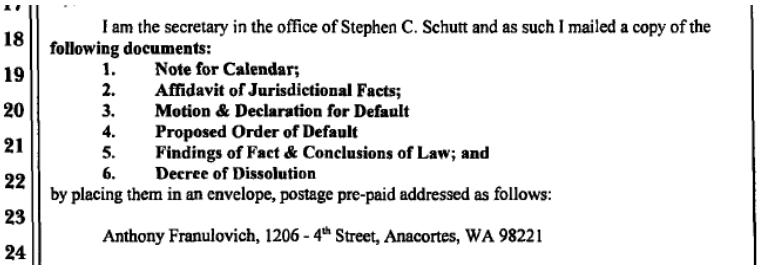
Lorraine Franulovich (hereafter Lorraine) was married to Anthony Franulovich (hereafter Tony) from 1997-2009. CP 1; 6. In 2009 she filed a divorce petition in Skagit County Superior Court. CP 14. Lorraine's divorce counsel used a conventional state approved divorce petition form. CP The divorce petition requested a general equitable division of the property, including generally the debts and liabilities of the parties. CP The form indicated that the "[t]he division of property should be determined by the court at a later date." *Id.* There was no request for any money judgment or certain sum.

Tony was personally served with the summons and petition at the very end of 2009. CP 17. The process server found him at his home at that time, on 4th Street in Anacortes. *Id.* Following that, for some nine months, Tony failed to respond to the petition; there was no notice of appearance from any person and no answer to the petition. CP 14.

In September 20, 2010, Lorraine's counsel, notwithstanding the default, calendared the case for a hearing on Skagit County's regular Friday morning domestic relations calendar, affixing a hearing date of October 29, 2010. CP 19; The calendar note listed the purpose of the hearing to be

"Presentation of Order." CP 20. Apparently no other documents were filed with the court at that time.

On October 8, 2010, Lorraine's counsel's assistant, Cathy Thompson mailed a set of documents to Tony in anticipation of the October 29, 2010 hearing. Her declaration of mailing at the time recited that the following documents were included:



I am the secretary in the office of Stephen C. Schutt and as such I mailed a copy of the following documents:

1. **Note for Calendar;**
2. **Affidavit of Jurisdictional Facts;**
3. **Motion & Declaration for Default**
4. **Proposed Order of Default**
5. **Findings of Fact & Conclusions of Law; and**
6. **Decree of Dissolution**

by placing them in an envelope, postage pre-paid addressed as follows:

Anthony Franulovich, 1206 - 4th Street, Anacortes, WA 98221

CP 22. That declaration was incorrect; it neglected to recite that another document prepared by Lorraine and her counsel in anticipation of the hearing was included, namely, the "Affidavit of Petitioner in Support of Judgment" described below. CP 251-57. That document was signed by Lorraine in August of 2010, and naturally would have been included in the package of documents mailed to Tony. *Id.* This document detailed certain aspects of the marital relationship which Lorraine characterized as lopsided, certainly from an equitable vantage point, and expressly asked the court to consider entering, as part of the decree, a money judgment against Tony in the amount of $750,000. CP 29-32. Similarly, beyond that affidavit, the proposed

documents plainly indicated that Lorraine was seeking an equitable award of $750,000 as part of the divorce. CP 35, 40.

Despite service of these documents on Tony well in advance of the hearing, Tony failed to appear. The documents were presented to the court. The judge reviewed them an entered them as presented. CP 24;27; 29; 31; 35.

After the hearing, Lorraine's counsel mailed Tony copies of court-entered-and-filed documents. CP 53. This time the "Affidavit of Petitioner in Support of Judgment" was included in the declaration of mailing. *Id.* The documents were once again mailed to Tony at the 4th Street address in Anacortes. Again, there is no evidence that those documents were not delivered or not received by Tony.

2. Failure of Tony to seek relief from judgment.

Since that time, in November 2010, there was been no further action of any type in the dissolution file. That is, Tony did nothing. He did not bring an appeal. He did not bring any motion to vacate the judgment.

3. Death of Tony; Rejection of creditor claim; filing of suit.

Tony died in 2016. Following his passing his estate was opened by his sisters in a probate in Skagit County. Lorraine filed her creditor claim for collection of the money judgment from the decree plus accrued interest. CP

55. The estate rejected the creditor claim asserting that the judgment and/or decree was void. CP 58.

4. Complaint & answer to decree/judgment

Lorraine was compelled to bring this suit after the claim rejection. Lorraine's complaint asserted the validity of the decree, including the $750,000 provision. CP 62. Notwithstanding the undisputed content of the dissolution documents, and the facts set forth above, the answer strangely seems to pretend they do not exist, summarily denying plain facts asserted in the complaint as to the very existence of the dissolution pleadings and activity, as recited above and as contained in the records of this very court. *Id.*

5. MSJ, response & rebuttal

Lorraine filed a motion for summary judgment seeking a declaration and/or affirmation of the judgment. CP 67 *et seq.* In response the estate asserted that the judgment was fatally invalid and void because the original petition had not provided notice of the yet-to-be-determined $750K award. CP 193 *et seq.* According to the estate, such notice had to be somehow provided somewhere along the line before ensuing judgment could be legally binding on either Tony or the estate. *Id.* In addition, the estate's briefing asserted that court ought to grant summary judgment to it because there were no undisputed facts at issue. *Id.* at 193, 202. Additionally, the

estate asserted that the divorce court lacked jurisdiction because an amended petition specifying the $750,000 request had not been personally served on Tony. *Id.* at 203-207.

Lorraine refuted the estate's arguments by asserting a series of well-established legal principles. The first was that *res judicata* barred the estate from denying the validity of the judgment. CP 281. The second was that the court was without jurisdiction to modify the decree without resort to CR 60. CP 289. Third was that the notice and procedural due process now demanded was not required, or alternatively, to the extent it may have been, the process provided prior to and after the hearing for entry of the judgment was sufficient. CP 292. As to the issue of cross summary judgment, *sua sponte,* Lorraine provided no response, as the estate never presented any formal motion.

6. Summary judgment hearing and decision

On October 26, 2017 Judge Riquelme conducted a summary judgment hearing. Arguments referencing the briefing were presented. The estate's "kryptonite" argument was that the judgment is void *ab initio,* whether or not Tony was alive or deceased:

> I don't think any of this matters because it's a void judgment. There's no obligation for Tony to move to vacate it. It's an unenforceable judgment from the start, whether he was alive or

> dead. I'm not criticizing them for filing this lawsuit. They had to do it. I think because of that statute this Court has the jurisdiction it needs to either enforce the judgment, find it void, or vacate.

RP 18, ln. 4.

> I think there's little question. There's no dispute on what law applies to testing whether a judgment is void. There's no question those elements are satisfied here.

Id., ln. 21.

To this, in part, Lorraine's counsel pointed out some of what is argued below, namely that the due process argument is and was deeply flawed because this proceeding was fundamentally one of equity for something other than a sum certain.

> And in terms of due process, that's where these cases are really coming from, he got notice of the divorce. The divorce petition, by the way, said I want – you know, with the form, you saw it. It says I want an equitable distribution of the assets.

RP 21, ln. 18.

> Ms. Franulovich does not have to sit there and wait, you know, until Mr. Franulovich is ready to get a divorce. I mean she waited nine months fof some response to come out of Mr. Franulovich. None was coming. So Mr. Schutt, as her attorney, gave him actual notice, legal notice by mailing these things to the address where everybody, I guess, apparently agrees he was living. He had three weeks to respond to it. And the documents on the face of them, and I think I counted, there's maybe five different places, made reference to the $750,000. He put it on the domestic relations calendar. He did not show up on the ex-parte, as counsel's briefing seemed to suggest. And Commissioner Paxton reviewed documents, which had been presented to him and made a decision to enter that, but that's not all, Your Honor. That's not all. . . .

> [paragraph omitted]
>
> So, you know, this idea that we are conceding that, you know, this line of cases with the complaint being outside the relief outside the boundaries of the petition, ***we don't agree to that.*** I mean it would be one thing. Here's the other thing I would say to that your honor. It would be one thing if the petition said, you know, we're going to to in and seek a money judgment against you of $50 or $100. A lot of those cases come out of that. ***That's not what happened here. It said an equitable distribution of the assets. And later on Mr. Franulovich gets documents which assert what an equitable distribution is. He chooses not to act.***

RP 23-24 (italics and bold added).

Judge Riquelme took the matter under advisement and issued an written order and decision on November 3, 2017. CP 331. Her order denied Lorraine's summary judgment motion and *sua sponte* granted the estate's motion to dismiss the entire action. *Id.* She started her analysis by concluding that either 1) some form of amended petition should have been filed and served on Tony, specifically asking for the $750K judgment, or 2) that the documents later presented to the court containing the $750K judgment were *de facto* amended pleadings for which personal service was required.

> CR 15 requires that amended pleadings be served according to CR 5, which states that "[n]o service need be made on the parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served in the manner provided for service of summons in Rule 4."

CP 335, ln. 19. She agreed with the estate that the original judgment was void as to the $750,000 provision only.

> Plaintiff sought a significant money judgment that far exceeded the relief she requested in the complaint. While subsequent documents contained a proposed judgment amount of $750,000, *none of them were personally served on Mr. Franulovich as would be required had Plaintiff properly amended her petition to include that request.* Regardless of whether the amount was properly supported, *the Court lacked jurisdiction to grant Plaintiff's request for the $750,000 judgment.*

CP 336. Judge Riquelme ruled that this *ab initio* argument precluded Lorraine's CR 60 argument. CP 336-337. As to Lorraine's objection to the estate's position on principles of *res judicata,* the court again referenced a lack of jurisdiction:

> *Because the request for judgment was never properly served upon Mr. Franulovich, he was not a party to the underlying case for purposes of that issue and is not bound by res judicata, which only applies to parties to the original case. Id. Restatement (Second) of Judgments § 34 (1982). Because the Court lacked jurisdiction to enter the judgment of $750,000 against Mr. Franulovich in the dissolution case, that judgment is void and unenforceable.* Issues outside of the dissolution court's jurisdiction to issue judgment are collateral matters that cannot be addressed under this cause.

CP 337 (italics added).

This appeal was timely filed following the November 3, 2017 order.

IV. SUMMARY OF ARGUMENT

Void judgment. The trial court errantly determined that the underlying divorce decree and judgment was void *ab initio* for a lack of some form of due process, particularly that relating to alleged deficient service of process of the

underlying divorce decree documents following Tony's default. The family law proceeding was in equity; all reference to that case law pertaining to money judgments is inapposite. Regardless, Tony was accorded substantial and surplus due process. He was personally served with the divorce petition, by all accounts. He was allowed an excessively long grace period to respond to the petition but ultimately failed to do so before an order of default was entered. Thereafter, notwithstanding the default, he received notice of the hearing to enter the judgment and its contents; all prospective documents were mailed to him in advance. Following the hearing for which Tony already had notice, Lorraine's counsel mailed copies of the final documents to Tony at the same address. None of the documents were ever returned and no motion was ever made for the judgment to be vacated. Those documents – now in final form – unambiguously disclosed a money award of $750,000 to Lorraine. These circumstances simply do not and cannot justify the court's decision here to declare the judgment void, especially under any due process theory. Tony knew of the judgment and consciously chose to avoid and ignore it.

Res judicata. The court's analysis of the application of *res judicata* is deficient. Tony had a full and fair opportunity to contest the divorce, however he wanted to do it, *ab initio*, until his death. He failed to take any steps, particularly now with reference to the $750,000 provision, to contest it. Now Lorraine by virtue of this court's ruling is saddled with an impossible task, to

somehow reopen the divorce and somehow relitigate the factors addressed in her affidavit to the court when the decree was entered. The estate is in privity with Tony for purposes of the judgment. Application of the doctrine prevents the estate from asserting after death what Tony could not do during life.

Estate's vicarious assertion of Tony's constitutional rights. The estate does not have the legal right to assert Tony's constitutional rights of due process. They were personal to Tony and there was no impediment to him exercising them during his life. Similarly, Tony manifested a voluntary and conscious waiver of his rights to due process.

Dismissal of Plaintiff's case without motion. The court's spontaneous dismissal of Lorraine's case was improper. Though some circumstances can exist where such could occur, this was not one of them. The court could have simply denied the request, and denied Lorraine's motion for summary judgment, allowing the matter to proceed to trial.

V. ARGUMENT

1. Standard of review is de novo

The standard of review of this summary judgment order is of course de novo.

2. Tony received appropriate and proportionate due process of law; the trial court improperly denied Lorraine's MSJ.

i. There was no amended complaint/petition for which personal service was required.

Judge Riquelme just got it wrong from the beginning when she alluded to CR 15. She implicitly accepted the estate's argument that there should have been an amended petition filed. Her ruling starts by making reference to CR 15 and linking it to CR 4 and CR 5, while at the same time ignoring various cases under CR 55, which was directly in point. At the same time her ruling seems to state that *there should have been* some form of amended petition, and that amended petition, if it existed, *should have been* personally served on Tony. The problem with this analytical approach is twofold. One is that it simply ignores the other facts in the case relating to the process actually provided. The second is that it ignores the plain fact that there was never any amended petition at issue. It is thus incorrect to premise her decision on a hypothetical fact, especially in a summary judgment setting. If the primary and central issue is lack of notice under a due process theory, then certainly, the court should have more scrupulously examined and evaluated the notice actually provided. Ironically – and errantly – she chose instead to inject an idea of a fact – that *if* an amendment had been sought and secured then it would *have had to have been* served personally on Tony – and ignore the others which were centrally on point, as discussed below.

ii. There was no "new or additional claim" asserted against Tony.

Similarly, there was no assertion of some "new or additional claim" under CR 5(a) as Judge Judge Riquelme asserted. Rather this was a case under CR 55(b)(2), in which there was no request for any sum certain. The petition sought an equitable division of the property related to the marriage, and naturally asked that such be determined at a later point in time. This is materially different from a request for a $100 money judgment followed by a $100,000 judgment. The term "equitable" necessarily encompasses a variety of broad considerations, tangible and intangible, which arise during the evaluation of a marital relationship, as was well-discussed by the estate in its response to the summary judgment motion. CP 204-206. As the petition was necessarily and conventionally vague, and there were no stated amounts, Tony was put on notice that all possibilities were open.

> Relying on CR 52(c) [4], Boondock's contends that the defaulting party has a due process right to be notified of the hearing and findings referred to in CR 55(b)(2). A party who fails to timely appear in an action is not entitled to notice of subsequent proceedings, including the presentation of findings and conclusions and the entry of the default judgment. RCW 4.28.210; See *Pedersen v. Klinkert,* 56 Wash.2d 313, 352 P.2d 1025 (1960). CR 52(c) requires notice of the presentation of findings to defeated parties, not to parties adjudged to be in default. Allison's complaint notified Boondock's she was seeking an unspecified amount of money damages based on the allegations of permanent injury and lost wages. The court awarded damages for permanent disability and lost wages. The relief granted did not exceed or differ from that requested in the complaint. Because Boondock's was properly served but did not answer or otherwise appear, the court properly entered an order of default against it. Being in default, Boondock's was not entitled to notice of any subsequent proceedings.

> Pedersen. The judgment was not void for lack of due process. The court properly denied the motion to vacate on that ground.

Allison v. Boondocks, 36 Wn.App. 280, 283-84 (Div. I 1983)(underlining added); *compare Hockley v. Hargitt*, 82 Wn.2d 337, 346-47, 510 P.2d 1123 (1973)(addition of citations to statutes in complaint is not new or additional claim).

Here there was no new claim at issue, just the articulation of what was originally described in the petition as an equitable division of the assets, as conventionally required, by statute, in divorce cases:

> **Disposition of property and liabilities—Factors.**
>
> In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, <u>as shall appear just and equitable after considering all relevant factors including, but not limited to</u>:
>
> (1) The nature and extent of the community property;
>
> (2) The nature and extent of the separate property;
>
> (3) The duration of the marriage or domestic partnership; and
>
> (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

RCW 26.09.080 (underlining added). As further discussed below, these opinions and this statute allow\ for effective service of similar pleadings as

occurred here without personal service of some amended petition. The $750,000 provision was a byproduct and extension and extrapolation of the inequity of the marriage over time, which was clearly generally alleged in the petition originally, which Tony had already received. The request was ultimately supported by Lorraine's sworn and necessarily[1] generalized account of the ins and outs and ups and downs of the marriage, and further detailed the abuse and neglect she suffered during it. At the end of the day, Lorraine was left in a giant financial hole because of the sacrifices she had made. [2] This a conventional equitable reconciliation, as contemplated by the original conventional petition, which could not foresee what action or inaction Tony might take in response to it. It is not a money judgment or sum certain case. There is nothing new or additional, except a presentation of the truth, notwithstanding the legal spin put in play by the estate and the personal representative, neither of which by the way knew about the intricacies of the relationship.

iii. Even if documents at issue here amount to some form of *de facto* amended petition, personal service under CR 4 was NOT required.

[1] Because Tony was failing to respond.

[2] For example, the estate asserted that the amount (the $750,000) could not be supported by accounting or wage records; Lorraine attested that she either could not work because of the marriage, or alternatively, that she had worked for nothing for the family and the family fishing business.

Judge Riquelme's states that "[w]hile subsequent documents contained a proposed judgment amount of $750,000, *none of them were personally served* on Mr. Franulovich as would be required had Plaintiff properly amended her petition to include that request." CP 336, ln. 10(italics added). Judge Riquelme seems to therefore suggest that the infusion of the $750,000 was some sort of de facto amendment. Even if it was, there was absolutely no requirement that Tony receive personal service of that hypothetical amended document under the court rules. Tony had been served with the original petition and summons personally. Those two documents gave him sufficient notice of the action itself. The court thereby secured personal jurisdiction over him. The court also acquired subject matter jurisdiction over him, to make – as the petition clearly set out – an equitable division of the property, including but not limited to legal debts and legal liabilities.[3] It did not thereafter somehow magically disappear. It was a reckoning and all things were possible <u>because</u> nothing was set out in the petition. Nor was was it possible to delineate such things at that point. The filing and service of the summons and complaint was plainly the beginning of that process, the road trip to the end. That is all the notice that was required.

[3] A tribunal lacks subject matter jurisdiction only when it attempts to decide "a type of controversy over which it has no authority to adjudicate." *Sloans v. Berry*, 189 Wn.App. 368, 358 P.3d 426 (Div. I 2015), *citing Marley v. Dep't of Labor & Indus.*,125 Wn.2d 533, 539,886 P.2d 189(1994)

Following the court's securing of service on Tony, there was no requirement for personal service of any further document, including an amended petition – if there had been one. The controlling rule is not that which Judge Riquelme identified under CR 5(a), with reference to CR 4. The controlling provision is in CR 5(b), which specifically allows mailing of subsequent papers after original service is achieved:

> **(b) Service – How Made**
>
> (1) *On Attorney or Party.* Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service directly upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the party or the party's attorney or by mailing it to the party's or the party's attorney last known address . . .

CR 5(b)(1). Rule 15, also cited by Judge Riquelme, also supports this reading, by the way. After personal service of the original complaint is achieved, any amendment to that petition may occur either by agreement or by motion.

> If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion. If a motion to amend is granted, the moving party shall thereafter file the amended pleading and pursuant to rule 5, serve a copy thereof on all other parties.

CR 15 (a). The motion would be subject to the service rules of CR 5(b)(1) and (2). There is nothing in this rule which requires that the amended pleading be personally served on the opposing party, especially in a default setting. Affirmation of this is found in the discussion above in the *Boondock* opinion

which, ironically, was cited by Judge Riquelme in her ruling. Ultimately, examination of these rules and this opinion contradict her.

iv. Any deficiency in due process was cured with the *pro se* advance USPS notice of the hearing with the prospective documents to Tony, later followed by the USPS mailing of the final documents endorsed by and filed with the court.

The central argument of the estate, largely adopted by the court, was that there was no jurisdiction insofar as the judgment included the $750,000 provision. The court isolated that to the original petition. According to her, if there had been notice in the original petition of the request for the $750,000 money judgment, there would be no issue in this case. Judge Riquelme ruled that to be the fatal flaw. It was that failure that was Judge Riquelme's linchpin. At the same time she made that ruling, using that lynchpin, she ignored the other arguments put forth by Lorraine about the other process accorded to Tony in terms of notice of the $750,000. To the extent her ruling fails wholly to address that aspect of the case, and those undisputed facts, it is deficient.

The notice received by Tony after the petition is pertinent and relevant to any assessment of due process. That notice in this case can be broken down into two episodes or stages, the first coming before the hearing and the second occurring after. *Even though Tony had defaulted,* and was thereby not entitled to any notice of future proceedings, such notice was in fact provided to him in the first instance before the hearing. To the extent there was some form of de

facto amendment, Tony got advance notice of it well before the hearing where the judgment was entered. *Compare Fonseca v. Hobbs*, 7 Wn.App. 235, 498 P.2d 894 (Div. I 1972)(party received notice of hearing with relief beyond complaint; burden shifts to party in default who fails to appear or respond to additional notice). Moreover, as has been pointed out otherwise, requiring personal service in this setting makes no sense. As discussed above, Tony had notice of the case being filed and of what it was about. The plain truth is that he did nothing to respond to it at all. To suggest that he would have done something different is just ridiculous, especially after he received the documents after the fact and did nothing for years.

The view taken by the estate and the court, in relying on these cases, is in opposition not only to those set forth in Lorraine's briefing to the trial court, but also to those cases which recite that a defaulting defendant bears the risk of surprise at the size of a default judgment, especially there is an amount uncertain at issue. *J-U-B Engineers v. Routsen*, 69 Wn.App. 148, 848 P.2d 733 (Div. 3 1993); *Conner v. Universal Utils.*, 105 Wash.2d 168, 712 P.2d 849 (1986); *Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.*, 36 Wash.App. 280, 673 P.2d 634 (1983), *rev. granted*, 101 Wash.2d 1001, *rev. dismissed*, 103 Wash.2d 1024 (1984). This principle is clearly laid out in Washington Practice, as follows:

Notice of presentation, effect. Occasionally plaintiff's counsel will choose to give notice of presentation to the defendant even though the defendant has already been found to be in default, and thus notice is not technically required. The notice will inform the defendant that on a specified date, the plaintiff will present a judgment for entry, and that the court may hear evidence and argument on the content of the judgment. The burden then, in effect, shifts to the defendant, and if the defendant fails to appear at the hearing, the defendant cannot later object to the relief granted, even if the judgment exceeds the demand in the complaint, Fonseca v. Hobbs, 7 Wash. App. 235, 498 P.2d 894 (Div. 1 1972) (where defendants, well in advance of agreed hearing date, had been served with copy of proposed findings, conclusions and judgment and affidavit which detailed items of damages claimed by the complaint but defendants did not appear at the hearing to raise any objections they might have had, default judgment was valid regardless of whether the judgment was substantially in excess of or different from damages based on breach of contract sought in the complaint).

Washington Practice, Vol. 4, 358 (CR 55. DEFAULT AND JUDGMENT§14 Default judgment – Relief limited by complaint).

Process provided before the hearing. In terms of due process, counsel for Lorraine gave Tony more than he was entitled to, certainly by court rule. In any case, to the extent Judge Riquelme and the estate argued there was a deficiency in not filing an amended petition, that deficiency was cured as a matter of law by the notice of the hearing sent to Tony before the hearing. Contrary to what was argued to the trial court, this was not an *ex parte* hearing; it was a hearing with a person who fairly should be treated – and was treated – as a *pro se* respondent who had failed to respond to notice of hearing on a designated domestic relations calendar in Skagit County Superior Court.[4]

[4] Not an *ex parte* proceeding, because of the notices mailed to Tony.

This is the virtually the same as the circumstances described above in Washington Practice and in the *Fonseca* case, which was presented to the trial court.

Process provided after the hearing. Similarly, as discussed above, this was not a case where Lorraine and her counsel ran rampant and reckless over Tony and his rights, omitting him from participating in the proceedings occurring after the default. That general approach continued past the hearing when Lorraine's counsel mailed copies of the final documents to Tony at his last known address, which happened to be the one he lived at all along. This was not required, but Lorraine's counsel did it anyway. And those documents of course contained the reference to the $750,000 which has become the subject of this dispute with the estate. Unless one presumes that Tony did not get his mail and he did not read it, by law he is charged with knowledge of it. In this case he should be charged with knowledge of the $750,000 for all the reasons that the estate now argues (fraud, outside the scope of the petition, etc.). These were documents that were at that time signed by a judicial official; they were no longer "proposed" or "prospective." Tony had a chance to go to the hearing and object to all or any part of the proposed judgment; similarly, *after* receiving those documents in final form he could have done the same in any number of ways. But again one comes back to the same thing, namely, that Tony did nothing. He did not call Lorraine and tell her she was crazy. He

did not call Steve Schutt, the attorney who got the documents entered and tell him he was crazy (though they lived in the same town and knew one another). He did not at any time go into court *pro se* or with counsel and try to get the $750,000 vacated or stricken. He did not file an appeal within thirty days of the decision into this court. Whatever umbrage and outrage the estate may now have about that number, $750,000, Tony who absolutely knew about it did not share the same feeling. As far as he was concerned it was real and he was obligated.

3. The trial court incorrectly ignored res judicata.

The trial court brushed aside the res judicata argument by reference to the voidness claim. CP 337. She reasoned that Tony "was not a party to the underlying case for purposes of that issue and is not bound by res judicata, which only applies to parties in the original case," citing *Lejeune v. Clallam County*, 64 Wn.App. 257, 266 (1992), for that proposition. Ironically, this case too relies upon the issue of notice, and rules that parties who are without notice are not bound by *res judicata.*

> A party is entitled to claim the benefits of res judicata with respect to determinations made while he or she was a party, subject to exceptions not pertinent here. Restatement (Second) of Judgments § 34(2) (1982); Nagle v. Lee, 807 F.2d 435, 440 (5th Cir.1987). A party is one who appears and participates in the proceeding, 1 Restatement (Second) of Judgments § 34 comment a, at 348 (1982), or one "whose interests are properly placed Before the court." 1B Moore, supra, 0.411, at 390-91. Here, the neighbors were entitled to notice pursuant to RCW 58.17.090, they were given notice, they

> appeared, and they actively contested approval of the plat. Had they lost at the 1985 Board hearing, they would have been treated as parties--they were required to appeal within 30 days, RCW 58.17.180, and upon failure to timely appeal, they would have been bound by the rules of res judicata. See South Hollywood Hills Citizens Ass'n v. King Cy., 101 Wash.2d 68, 77, 677 P.2d 114 (1984) (neighbors' appeal dismissed for failure to timely join landowner, thereby binding them to administrative decision below); North Street Ass'n v. Olympia, 96 Wash.2d 359, 367-69, 635 P.2d 721 (1981), disapproved on other grounds in Sidis v. Brodie/Dohrmann, Inc., 117 Wash.2d 325, 331-32, 815 P.2d 781 (1991) (same). Having won--they persuaded the Board to disapprove the plat--they were no less entitled to be treated as parties, and as parties they could claim res judicata.

Lejeune v. Clallam County, 64 Wn.App. 257, 823 P.2d 1144, (Div. 2 1992)

This citation does not support the court's ruling, and seems to suggest that Lorraine's claim for application of the doctrine was appropriate. It recites that parties who have received notice and who have participated in a proceeding are entitled to the benefit of application of the doctrine, not the converse.

The policy considerations for applying the doctrine here against the estate were briefed and argued to the trial court, notwithstanding the voidness argument, principally based upon *Pederson v. Potter*, 103 Wn.App. 62, 70 (Div. 3 2000). CP 281-89. They won't be repeated here. It is and has been fundamentally unfair for the trial court to simply ignore wholesale res judicata. Its application here was so especially poignant; because Tony had passed away without doing anything, because he never responded to anything, he and

his estate should be bound by the prior proceeding. This second proceeding, the new complaint asserting certification of the validity of the old proceeding, had all the hallmarks of res judicata. Because Lorraine could not go back in time and bring Tony back into the litigation, she was and is now severely prejudiced by the second proceeding thrust upon her by the rejection of the creditor claim. Again all of this falls on Tony. If Tony thought or believed that the supposed outrageous $750,000 provision was out of order he could have and should have said so at the time, or shortly after, or sometime in the ensuing five years before he died. He never did. As a matter of policy, the current voidness attack and related policy concerns amplify the need for the application of this principle against the estate.

4. The estate cannot assert Tony's constitutional rights

i. General principles of standing

> One substantive limitation, applicable to all litigation, is the standing doctrine. In actions under the Uniform Declaratory Judgment Act (UDJA), the Washington Supreme Court "has established a two-part test to determine standing." *Grant County Fire Prot. Dist. v. Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). First, the test asks "whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute" in question. Id. (internal quotation and citation omitted). Second, "the test considers whether the challenged action has caused injury in fact, economic or otherwise, to the party seeking standing." Id. (internal quotations omitted). The issue of standing is reviewed de novo by appellate courts. *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011). Standing is a jurisdictional concern that can be presented for the first time on appeal. RAP 2.5(a)(1); *Int'l Ass 'n of Firefighters, Local 1789 v.*

> *Spokane Airports*, 146 Wn.2d 207, 212-13 n.3, 45 P.3d 186 (2002). An appellate court can even raise the issue sua sponte.[12] *In re Recall of West*, 156 Wn.2d 244, 248, 126 P.3d 798 (2006); *Branson v. Port of Seattle*, 152 Wn.2d 862, 875 n.6, 101 P.3d 67 (2004).

Spokane Entrepreneurial Center v. Spokane Moves to Amend Constitution, 185 Wn.2d 97 (2016).

There is no action brought here under the UDJA, admittedly. Yet the principles of standing are always relevant. Moreover, to the extent that due process is invoked here under an umbrella of constitutional law by the estate, as opposed to the now-deceased Tony, similar constitutional principles of third-party standing are in play. Parties cannot indiscriminately assert the constitutional rights of third parties; on that note the United States Supreme Court has spoken:

> First, we have asked whether the party asserting the right has a "close" relationship with the person who possess the right. Second, we have considered whether there is a "hindrance" to the [rights] possessor's ability to protect his own interests.

Kowalski v. Tesmer, 543 U.S. 125 (2004). Moreover, in the context of constitutional law, a manifest error of constitutional magnitude may be raised for the first time on appeal. RAP 2.5(a)(3). As discussed below, the fundamental issue being raised here is not of jurisdiction, but of constitutional due process; "lack of jurisdiction" is the remedial semantic mechanism invoked.

ii. The estate cannot vicariously assert Tony's constitutional rights

Judge Riquelme's ruling about lack of jurisdiction emanates from those cases indicating that there was an embedded issue of due process, namely that the process provided was insufficient. CP 336, ln. 3-10. The due process rights at issue originate in constitutional law.

> In our consideration of the jurisdictional question, we find a very similar situation to the one before us was presented in *Ermey v. Ermey,* 18 Wash.2d 544, 139 P.2d 1016. We held that a defendant has a right to allow a default to be taken against him secure in the knowledge that the judgment or decree will not exceed the demand of the complaint. The principle upon which such a rule rests is that the court is without jurisdiction to grant relief beyond that which the allegations and prayer of the complaint may seek. If upon the hearing of the matter Before the court the complaining party desires additional relief, or if the court feels that other or additional relief should be awarded, the defendant is entitled to have notice given to him and an opportunity to be heard on the merits thereof; <u>otherwise he is denied procedural due process of law in violation of § 3, art. I, of our constitution</u>. *In re Groen,* 22 Wash. 53, 60 P. 123.

Adams v. Pierce County Sup. Ct., 36 Wn.2d 868, 872 (1950)(underlining added).

> A party has a due process right to "assume that the relief granted on default will not exceed or substantially differ from that described in the complaint and may safely allow a default to be taken in reliance upon this assumption." *Columbia Valley Credit Exchange, Inc. v. Lampson,* 12 Wash.App. 952, 954, 533 P.2d 152 (1975). A judgment rendered in excess of the relief requested in the complaint without giving the defendant notice and an opportunity to be heard is void to the extent it differs from the complaint. *State ex rel. Adams v. Superior Ct.,* 36 Wash.2d 868, 872, 220 P.2d 1081 (1950). The judgment may be challenged by a CR 60(b)(5) [1] motion brought within a

> reasonable time after the entry of judgment. Columbia Valley Credit at 956, 533 P.2d 152.

Allison v. Boondocks, 36 Wn.App. 280, 282 (Div. I 1984)

Close relationship to person whose rights are being allegedly violated. Those constitutional rights belong to Tony, personally. When Tony died, his constitutional rights died with him; they were not passed on to the estate. Under the reasoning of *Kowalski*, there is no close relation between a deceased person and that person's estate. None of the cases cited by the estate or Judge Riquelme address this anomaly. For example, the supposed leading case cited by the estate in support of its reply and dismissal request was *In re Marriage of Powell*, 84 Wn.App. 432 (1996). In fact, *every* case cited by the estate on this issue involves action by the living person, whose due process rights have allegedly been violated, asserting those rights. The estate's briefing to the trial court goes so far as to assert that it is "on all fours" with this case. CP 204. But in that case, the living husband sought to vacate the money judgment segment of the divorce decree (which had been entered after constructive service by publication, by the way). The fact that Tony has passed and his estate as his proxy is asserting the due process violation is completely distinguishing. Thus, if Tony were objecting to enforcement of the judgment, he would allege that he had been personally deprived of his right to due process. At that point Lorraine and her counsel could have challenged that

assertion. In fundamental fairness, no such claim should be allowed by the estate here. The estate is his family, specifically his siblings. They were no parties to the original divorce. Lorraine did not marry them.

No hindrance to Tony in exercising his due process rights. But even if there were some sufficient nexus, under the second part of the *Kowalski* test, there is no set of facts in this case which support the idea that Tony was hindered in exercising his due process rights, assuming they were not up to snuff. As pointed otherwise here, he was in fact personally served with the original process which did not specify the relief sought, thereby (contrary to the arguments of the estate) put him on fair notice that all bets were off and anything was possible. Following that, after he did nothing for months, he received the paperwork that announced the up and coming hearing and the proposed documents which contained the proposed $750,000 judgment. Certainly at that time he was on notice, if he believed things had gone awry or had taken a turn for the worse, that he could have done something – anything – to stop the ship from sailing. Yet he did nothing, and there is nothing to suggest there was some impediment at play that would have stopped him from then exercising his constitutional right to participate. Prior to the hearing he took no action. He then failed to attend the hearing. After the hearing, he received the final documents in the mail. Again, he took no action, at all, for some six years, until he died. There is no evidence of anything in the record

which would account for his failure to act, that is, some condition or event that foreclosed him from going back to the Superior Court or the Court of Appeals or any court or even any person, to dispute the $750,000 provision. Unfortunately for the estate, there simply was no such evidence and the contrary is demonstrably true, that Tony knew he was divorced because he saw the documents. And because he knew he was divorced, he knew he was indebted to Lorraine for the $750,000. He thus consciously accepted that judgment and purposefully chose not to challenge it. Any other interpretation, including that advanced by the estate and adopted by Judge Riquelme, is pure fiction.

iii. Tony waived his constitutional rights to due process

Similarly, during his life, knowing that the judgment had been entered with the $750,000 provision, Tony took no action. A person can be deemed to waive a constitutional right when he or she knowingly, intelligently and voluntarily waives that right. Again, Lorraine is a bit prejudiced here by the fact that Tony has passed away. Still facts exist which support the finding of a waiver of that constitutional right. First, Tony was by all accounts aware of the action as he had been personally served with the petition. Second the petition itself in turn indicated that there would some time in the future be some form of equitable division of the marital assets, likewise defining the rights of the parties as to one another coming out of the divorce. Third, despite

his receipt of the summons and complaint he took no action whatsoever of any kind to respond to it for nine months. Fourth, in that following September Tony received by mail another set of documents which indicated there was going to be a hearing to address the default and finalize the divorce. Fifth, that notice and those documents clearly indicated that Lorraine was seeking a divorce which included a provision that he pay her $750,000. Sixth, despite that second notice, along with its details, made aware of the hearing for entry of the judgment, including the $750K provision, before the actual hearing, Tony decided to blow it off and not appear. Seventh, after the hearing Tony was served with the final documents, again by mail as he had already been served with the original process; following his receipt of those documents, he took the same tack, that he was not going to take any tack and simply ignore the entire problem. He did not move to vacate the final order and judgment, he did not take any appeal. Eighth, some five years went by and the same condition persisted, that is, that Tony did nothing.

Under these circumstances this court can and should conclude that Tony knowingly, voluntarily and intelligently waived his due process rights. At any one of those junctures he could have exercised his due process rights, because in each instance he was actually notified of the action and its progression through the court system. He deliberately chose not to challenge

the decree. It is an abomination of justice for the estate to do that at this point, and further, for the court to countenance such an argument.

5. The trial court should not have dismissed the action *sua sponte*.

The estate never filed its own summary judgment motion. It merely briefed a case or two saying that such can occur in certain settings. Lorraine maintains that it should have been compelled to file its own summary judgment motion to compel the court to evaluate the case in light most favorable to Lorraine. What is plain from the argument above is that she did not do that, for example, in ignoring the *res judicata* issue. In addition, as discussed above, she ruled that there *should have been* an amended petition while ignoring the fact that any due process deficiencies were cured by the subsequent notice provided by Lorraine's counsel. In this sense, the entire ruling is written entirely from the standpoint of the estate, and not at all from the Lorraine's vantage point. For this decision to be appropriately analyzed, much less balanced, it should have examined the issues presented from the Lorraine's vantage point. This was argued in the briefing. But all of that was given short shrift by the court; in fact it was given little if any shrift. All that was analyzed was whether Tony – and the estate -- was deprived of due process. There was no assessment of the due process being denied to Lorraine,

who is and was equally entitled to it. Had a motion been filed, such might have been possible. From the standpoint of a motion for summary judgment, at minimum, Lorraine was deprived of that.

VI. CONCLUSION

Based on the foregoing, the court here should reverse the order of dismissal against Lorraine and grant her motion for summary judgment against the estate, determining along the way that the entire judgment from the divorce decree, including the $750,000, is valid and it is not void.

DATED this 13th day of July, 2018.

By: ___/s/ Thomas E. SeGuine_____
THOMAS E. SEGUINE, WSBA # 17507
Counsel for Appellant

DECLARATION OF DELIVERY

I, Thomas E. SeGuine, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, [XX] reciprocal electronic service through the electronic filing service of Division One of the Court of Appeals, a true and correct copy of the document to which this declaration is attached, to:

Court Administrator/Clerk
Washington Court of Appeals, Division Two
950 Broadway, Sutie 300
Tacoma WA 98402-4454

Lafcadio H. Darling
Holmes Weddle & Barcott PC
999 3rd Ave. Ste 2600
Seattle WA 98104-4011
ldarling@hwb-law.com
Counsel for Respondent

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Mount Vernon, Washington this 13th day of July, 2018.

/s/ Thomas E. SeGuine
NAME

July 13, 2018
DATE

LAW OFFICE OF TOM SEGUINE

July 13, 2018 - 4:53 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77697-5
Appellate Court Case Title:	Lorraine Franulovich, Appellant v. Lubjica Franulovich, Respondent
Superior Court Case Number:	17-2-00532-3

The following documents have been uploaded:

- 776975_Briefs_20180713165239D1500837_3906.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was Appellant Opening Brief no776975 Franulovich 71318 .pdf

A copy of the uploaded files will be sent to:

- klavoie@hwb-law.com
- ldarling@hwb-law.com

Comments:

Sender Name: Thomas Seguine - Email: northcascadeslegal@gmail.com
Address:
1023 S 3RD ST
MOUNT VERNON, WA, 98273-4301
Phone: 360-755-1000

Note: The Filing Id is 20180713165239D1500837