67195-2

67195-2

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2012 JAN 17 PM 3:43

No. 67277-1-I and No. 67195-2-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

No. 67277-1-I

RHODA CASSELL, Plaintiff/Appellant

v.

DOUGLAS A. PORTELANCE, M.D. and EASTSIDE INTERNAL MEDICINE, PLLC
Defendants/Respondents

No. 67195-2-I

In re the Estate of:

DAVID DANIEL FINCH

Deceased.

APPELLANT'S OPENING BRIEF

Mark Leemon, WSBA #5005
Leemon + Royer PLLC
2505 Second Avenue, Suite 610
Seattle, WA 98121
(206) 269-1100
Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

Page

Table of Contents.....i

Table of Authorities.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....3

A. Judge Eadie Erred in Granting Dr. Portelance's Motion for Intervention.....4

B. Judge Eadie Erred in Removing Ms. Cassell as Personal Representative.....4

C. Judge Middaugh Erred in Dismissing the Medical Negligence Case Brought Against Defendants by Ms. Cassel After Her Appointment as Personal Representative of Her Husband's Estate.....4

III. STATEMENT OF THE CASE.....4

A. Facts Underlying the Original Appointment of Rhoda Cassell as Personal Representative of her Deceased Husband's Estate.....4

B. Procedural Facts.....12

IV. ARGUMENT.....18

A. The Trial Court Did Not Have Jurisdiction to Enter The Order Proposed by Dr. Portelance.....19

1. Dr. Portelance Is Not In the Statutory Class of Persons Permitted to File a Will Contest.....21

2. The Question of Standing Here is Jurisdictional.....28

3. *In Re Estate of Little* Has No Application to This Case.....31

B. Regardless of the Validity of the Will, Ms. Cassell Should Not Have Been Removed as Personal Representative.....32

1. There were no grounds for Removing Ms. Cassell.....33

2. *Nunc Pro Tunc*.....34

3. *De Facto* Personal Representative.....36

C. There Was No Reason to Dismiss the Medical Malpractice Suit.....38

1. Removal of the Personal Representative Does Not Affect the Validity of Her Actions.....38

2. Even Under Real Party in Interest Analysis, Dismissal of the Medical Malpractice Case Was Unnecessary and Erroneous.....42

V. CONCLUSION.....46

TABLE OF AUTHORITIES

WASHINGTON CASES

Bruce v. Bruce, 48 Wn.2d 635,
296 P.2d 310 (1956).....34

Estate of Boyd, 5 Wash. App 32,
485 P.2d 469 (1971).....25

Garrett v. Byerly, 155 Wash. 351, 354-59, 284 P. 343,
68 A.L.R. 254 (1930).....29

Hesthagen v. Harvey, 78 Wn.2d 934, 942,
481 P.2d 438 (1971).....31

In re Estate of Aaberg, 25 Wash. App 336, 339,
607 P.2d (1980).....19

In re Estate of Ardell, 96 Wash. App 708, 718-20
980 P.2d 771 (1999).....19

In re Estate of Bobbitt, 60 Wash. App. 630, 632,
806 P.2d 254 (1991).....19

In re Estate of Carter, 14 Wash. App 271, 274,
540 P.2d 474 (1975).....34

In re Estate of Coates, 55 Wn.2d 250, 256,
347 P.2d 875 (1959).....19

In re Estate of Hitchcock, 140 Was. App 526,
167 P.3d 1180 (2007).....24

In re Estate of Jones, 152 Wn.2d 1, 9,
93 P.3d 147 (2004).....19

In re Estate of Kordon, 157 Wn.2d 206,
137 P.3d 16 (2006).....20, 21, 28

In Re the Estate of Little, 127 Wash. App. 915,
113 P.3d 505 (2005).....15, 16, 21, 31, 32

In Re the Estate of Little, 127 Wash. App. 915, 113 P.3d 505 (2005) *review denied,* 156 Wn.2d 1019 (2006).....25

In Re Estates of McGill, 49 Wn.2d 242 299 P.2d 847 (1956).....34

In Re Estate of Odman, 49 Wn.2d 612 304 P.2d 1044 (1956).....34

In Re the Estate of Peterson, 102 Wash. App 456, 9 P.3d 845 (2000).....30

In Re Estate of Toth, 138 Wn.2d 650, 981 P.2d 439 (1999).....29, 30, 32

In Re Estate of Van Dyke, 54 Wash. App 225, 228, 772 P. 2d 1049 (1989).....20

In Re Guardianship of Bouchat, 11 Wash. App. 369, 522 P.2d 1168 (1974).....36

In Re the Irrevocable Trust of Michael A. McKean, 144 Wash. App 333, 183 P.2d 317 (2008).....36, 37

In Re Marriage of Pratt, 32 Wash. App. 665, 668, 649 P.2d 141 (1982), *reversed on other grounds, In re Marriage of Pratt,* 99 Wn.2d 905, 665 P.2d 400 (1983).....28

In Re O'Brien's Estate, 13 Wn.2d 581, 126 P.2d 47 (1942).....21, 22, 23, 24, 25

In Re Romano's Estate, 40 Wn.2d 796, 246 P.2d 501 (1952).....25

In Re Upton's Estate, 199 Wash. 447 92 P.2d 210 (1939).....26, 27, 28, 35, 38, 41

King v. Sells, 193 Wash. 294, 75 P.2d 130 (1938).....36

Lindgren v. Lindgren, 58 Wash. App. 588, 596 794 P.2d 526 (1990) *review denied* 116 Wn.2d 1009, 805 P.2d 813 (1991).....33

McCausland v. McCausland, 129 Wash. App. 390, 395,
118 P.3d 944(2005).....29

Moe v. Judd, 121 Wash. 14,
208 P. 82 (1922).....38

Pascua v. Heil, 126 Wash. App. 520, 527,
108 P.3d 1253 (2005).....29

Pratt v. Pratt, 99 Wn.2d 905, 909,
665 P.2d 400 (1983).....29

Rinke v. Johns-Manville Corp., 47 Wash. App. 22
734 P.2d 533 (1987).....3, 42, 43, 44, 45

State v. Dixon, 159 Wn.2d 65, 75-76,
147 P.3d 991 (2006).....35

State, ex rel. Lauridsen v. Superior Court,
179 Wash. 198, 37 P.2d 209, 213.....38

State v. Rosenbaum, 56 Wash. App. 407, at 410-ll,
794 P.2d 166 (1989).....28

FOREIGN CITATIONS

In Re Bankers Trust, 403 F.2d 16, 21 (7th Cir. 1968).....37

In Re Hardy's Estate, 35 Minn. 193
28 N.W. 219.....27, 28

In Re Mayo's Estate, 60 S.C. 401, 38 S.E. 634, 635
54 L.R.A. 660.....27

Petit v. Morton, 28 Ohio App. 227, 235, 162 N.E.
627, 629 (1928).....22

Ray v. Sommer, 14 Ariz. App. 160, 162
481 P.2d 530, 532 (Ariz. App. Div. 2 1971).....38

OTHER AUTHORITIES

RCW 11.02.005(6).....25

RCW 11.24.010.....2, 14, 15, 20, 21, 29, 31

RCW 11.24.020.....28

RCW 11.24.040.....41

RCW 11.28.030.....17, 34

RCW 11.28.120(1).....34

RCW 11.28.250.....19, 33

RCW 11.28.280.....34

RCW 11.48.010.....41

RCW 11.60.050.....33

RCW 11.68.070.....19, 24

RCW 11.68.090(1).....42

RCW 11.96A.020(1).....37

RCW 11.96A.020(2).....37

CR 6(e).....29

CR 17(a).....42, 44, 45, 46

CR 24(a)(2).....29

CR 60(b)(4) and (11).....15, 33

APPENDICES

A. RCW's

B. Washington Court Civil Rules

I. INTRODUCTION

These consolidated appeals arise out of the tragic and untimely death of plaintiff/appellant's husband, David Finch, on September 5, 2007. Plaintiff/appellant in these matters is Rhoda Cassell, the surviving spouse, sole heir and personal representative of the estate of her late husband.

Neither respondents nor anyone else has ever alleged that Ms. Cassell is not the appropriate person to act as personal representative of the estate of her late husband. They had no children, and everyone in Mr. Finch's family approves of Ms. Cassell being his sole heir and personal representative. There is no allegation that she has ever violated her duties as personal representative. Nonetheless, despite the fact that as personal representative, she filed the medical negligence action arising out of her husband's death well within the applicable statute of limitations, she now finds herself appealing dismissal of that lawsuit precisely on statute of limitations grounds as a result of trial court decisions flatly at odds with previous case law.

Indeed, with all due respect to the judges below, it is difficult to imagine one litigant being subjected to two such clearly wrong rulings by two different Superior Court judges in the same matter. Despite the fact that Dr. Portelance, by his own admission, is a complete stranger to Mr. Finch's estate, having no "interest" in that estate as defined by previous case law, Judge Eadie allowed Dr. Portelance to intervene and

reopen the estate matter and removed Ms. Cassell as personal representative pursuant to a Will signed by her late husband, expressing his wishes and agreed to by all members of his family who might actually have any interest in his estate. This action flies in the face of express statutory language that states, "If no person files and serves a petition [to contest the will] within the time under this section [four months], the probate or rejection of such shall be binding and final." RCW 11.24.010.

Having removed Ms. Cassell as personal representative pursuant to appointment under her husband's Will because of a perceived defect in the witnessing of the Will, Judge Eadie nonetheless immediately reappointed Ms. Cassell (in the same hearing). Nevertheless, and despite the fact that the correct person had been identified as personal representative in the first instance, and that she had recently been reappointed personal representative, Judge Middaugh dismissed Ms. Cassell's medical negligence claim on the grounds that when it was filed, she was not "properly" named personal representative, without citation to authority to the effect that Ms. Cassell's previous actions as personal representative were invalid or void and without ever considering whether her reappointment related back to the filing of the original lawsuit.

Judge Middaugh's ruling likewise was made without considering whether there was any prejudice to the defendant, which there was not. Dr. Portelance knew who was suing him and why from the inception of

the lawsuit. Even if Judge Eadie had not been so clearly wrong in removing Ms. Cassell as personal representative, her reappointment should clearly have related back to the filing of the original lawsuit under the plain holding of this Court in *Rinke v. Johns-Manville Corp.*, 47 Wash. App. 222, 734 P.2d 533 (1987).

Permitting a person with no interest in an estate, let alone a defendant in a wrongful death action resulting in the death of the plaintiff's decedent, to intervene, reopen and challenge the appointment of the personal representative of the estate is contrary to established probate law. It is an open invitation to wrongful death defendants to pursue discovery and litigation in probate matters in hopes of escaping liability. Finally, allowing the defendant in a wrongful death case to upset the probate court's appointment of a personal representative without any interest of the defendant, or any prejudice to the defendant being at issue, elevates form over substance to such a degree as would inevitably lead to a manifest injustice.

Ms. Cassell has suffered precisely such an injustice in this matter. This court should reverse the trial court's orders and remand this matter to Superior Court for the trial of her medical malpractice claim to which Ms. Cassell is entitled.

II. ASSIGNMENTS OF ERROR

A. Judge Eadie erred in granting Dr. Portelance's motion for intervention.

1. Is a defendant in a wrongful death action brought by a personal representative a "person interested in the estate" who can invoke the jurisdiction of the probate court for a will contest?

2. Does the failure of a personal representative to give notice of her appointment to legitimate heirs of the Estate toll the running of the statute of limitations for will contests as to once who was never entitled to such notice?

3. Is the jurisdiction of the trial court to conduct a will contest in a non-intervention Estate strictly limited by the provisions of the pertinent statutes?

B. Judge Eadie erred in removing Ms. Cassell as personal representative.

C. Judge Middaugh erred in dismissing the medical negligence case brought against Defendants by Ms. Cassel after her appointment as personal representative of her husband's estate.

III. STATEMENT OF THE CASE

A. Facts Underlying the Original Appointment of Rhoda Cassell as Personal Representative of her Deceased Husband's Estate.

David Daniel Finch died on September 2, 2007 of colon cancer.

CPE 4.[1] It is appellant's contention that defendant Dr. Portelance failed, on December 10, 2004, to diagnose this colon cancer. CPM 4.

After the diagnosis of Mr. Finch's cancer, he and Ms. Cassell decided that he should have a Will because they had been told that things go easier that way, and they thought that it was the right thing to do. CPE 193. They had no children, and Ms. Cassell's children from a previous marriage were adults. It was therefore their intention that their property, virtually all of which was community property, would therefore pass to Ms. Cassell. They had consulted with an attorney named David Richardson about bringing a medical malpractice case against Dr. Portelance, who had told David not to worry about his rectal bleeding, that it was only hemorrhoids. CPE 193-4. In June or July 2007, Mr. Richardson referred them to Michael DuBeau, another attorney in his building. Ms. Cassell and Mr. Finch met with Mr. DuBeau together. Mr. Finch was completely aware of the proceedings and their agreement with having Mr. DuBeau prepare the Will. CPE 194, 246-7.

In August 2007, Mr. Finch took a turn for the worse. Ms. Cassell called Mr. DuBeau and asked him to prepare the Will. Mr. DuBeau obtained the necessary information and prepared draft wills and a community property agreement for Ms. Cassell and Mr. Finch. CPE 194,

---

[1] Since there are two appeals that have been consolidated herein, and therefore two sets of clerk's papers, appellant will refer to them as CPE, referring to the estate case, Court of Appeals No. 67195-2-I, and CPM, for the medical malpractice case, Court of Appeals No. 67277-1-I.

247. Mr. DuBeau emailed the drafts to Ms. Cassell on August 27, 2007. He did not then hear from Ms. Cassell or Mr. Finch until after Mr. Finch's death. CPE 247.

Because of Mr. Finch's deteriorating condition, he and Ms. Cassell decided the Will should be completed soon. The same day it was emailed to them, Ms. Cassell asked their neighbors, Tim and Gwen McClellan, if they would be witnesses. The McClellans came over to their house and sat at the dining room table. Another friend of Ms. Cassell, Judie Skagen, had come over to serve as notary public. As Ms. Cassell relates it, "without thinking, I brought the Will in to Davy, and he did the best he could signing it. The signatures on the Will over his name are in fact his. While he was physically very weak, he was still mentally able to comprehend what was going on and to communicate to me his wishes. The provisions of the Will were what he wanted. I asked him if he could do this, and he responded that he could." CPE 194. According to all present, the McClellans were close enough to hear Ms. Cassell talking to Mr. Finch through the open door, and Mr. Finch knew that the McClellans were going to witness the Will for him. CPE 194. Mr. Finch signed the Community Property Agreement at the same time. CPE 406-410.

The genesis of the entire controversy herein occurred in the next few moments. When Ms. Cassell came out of the bedroom, she "realized that we probably should have had Davy and the McClellans sign in each

other's presence." CPE 195. She said as much to the McClellans and suggested that they come into the bedroom and watch Davy sign it again. However, they did not want to go into the bedroom. They had watched Davy go from being a big robust man to a shadow of himself. They did not want to put him through signing again, and Ms. Cassell also felt that they may not have wanted to see him like that. CPE 195. Ms. Skagen, the notary public, corroborated Ms. Cassell's account. She testified at her deposition that Ms. Cassell indicated that perhaps the McClellans should go back and have Davy re-sign this. According to Ms. Skagen, "and we all said oh, come on, we don't need to put Davy through that again, 'cause he was extremely weak." CPE 276. After the signing of the Will, Ms. Skagen went in to say goodbye to Mr. Finch. She went in and picked up his hand and held it, and he opened his eyes and looked at her. She told him that she loved him, and he closed his eyes. She then reached down and kissed his forehead. CPE 286-7. It was her belief that Mr. Finch knew who she was and what she was doing there. CPE 289.

It is absolutely undisputed that it was David Finch's wish, joined in by his entire family, that his wife act as the personal representative of his estate. Faced with respondent's wild accusations of "inexplicable fraud," Ms. Cassell was forced to explain herself:

> "After Davy died, I got in touch with Mr. DuBeau, and he took care of having the Will admitted to probate. The Will named me as executor, and I was named personal representative of the estate. Davy never considered

> anyone else being executor. We loved and took care of each other. He was my best friend, and I was his. I left work to nurse him through his final illness. Davy had no children, and his sibling and elderly parents live in Wisconsin. I was and am the natural person to look after his affairs.
>
> Davy knew about and approved of the lawsuit against Dr. Portelance. He and I together retained Mr. Richardson to represent us in that lawsuit. Davy knew I would carry it on after he passed away."

CPE 195.

The source of defendant's motion to intervene and have Ms. Cassell removed as personal representative was one notation in a hospice record. In that record, the hospice nurse described Mr. Finch's mental status as "2 – comatose – responds to (sic)." CPE 116. This was obviously picked from a choice of responses on a computer. One would imagine that the computer screen would probably finish the phrase "responds to". From this one notation, respondent jumped to the wild assertion that Ms. Cassell's appointment as the personal representative of Mr. Finch's estate "is based on misconduct and false and fraudulent misrepresentations in the procurement of the Will and the probate action before this court." CPE 25. Respondent alleged that Mr. Finch was unable and incompetent to sign his Will, and, in fact, the signatures on the Will were not his. Interestingly, the same notation that indicated that Mr. Finch was "comatose" also indicated that he had no impairment of his vision and that he could see medication labels and newsprint without

difficulty (CPE 115), that he had difficulty that morning being transferred to the bathroom (CPE 119), and that he was requiring pain medication every two hours or less. (CPE 115). A note from the following day indicated that Mr. Finch opened his eyes when his name was called. CPE 131.

More to the point is the sworn testimony of people who were actually in Mr. Finch's home the week he died. One of these was his 83-year-old mother. She stated, "I have been told that the lawyer for Dr. Portelance is claiming that David was comatose on the day he signed his Will. This is absolutely false." CPE 290. Mrs. Finch continued, "I talked to David and he was able to talk to me up until the day before he died. The day he signed the Will was a Monday. David did not die until the following Sunday. All during that week I visited with him and until Saturday, the day before he died, he was able to talk to me. During all of that time, although David was very sick and was taking medication for pain, he was mentally sound, could understand what I was saying and talked to me responsively." CPE 290. As to the appointment of Ms. Cassell as personal representative, Mrs. Finch declared:

> "We knew that David and Dodie [Ms. Cassell's nickname] had prepared a Will, and we knew and expected that Dodie would be the executor of his Will, as well as the beneficiary of whatever property he was leaving. Certainly my husband and I did not need or expect any inheritance from David.

> We were perfectly comfortable with David naming Dodie as the executor of his Will. David adored Dodie, and she loved and took care of him.
>
> Any implication that Dodie did anything underhanded or sneaky in the matter of David's Will, or the disposition of his property, is both insulting and absolutely false."

CPE 291.

Mr. Finch's 85-year-old father declared as follows:

> "I have been told that the lawyer for Dr. Portelance is claiming that David was "comatose" on the day he signed his Will. That is absolutely untrue.
>
> David's mother and I were staying with David and Dodie in the weeks before he died. I talked to David and he talked to me every day until the day before he died. The Will was signed about a week before David died. I think it was on a Monday. All of us knew that David and Dodie had prepared a Will, and I know for a fact that David wanted to have this Will signed, and that it represented his wishes. He told me so.
>
> On the day David signed the Will, I was sitting in the room outside of David's bedroom. I saw Dodie go in with the Will, and saw her come out with it signed, and I heard her talking to David. David's signature wasn't much, but he was very sick and it was the best that he could do.
>
> ...
>
> David was very sick and weak. From time to time he would drop off to sleep. However, when he woke up he was mentally capable. He could understand what I was saying to him and he responded to me appropriately. Anyone who says that he was in a coma during this week simply does not know what they are talking about.
>
> I knew that Dodie was going to be the executor of David's estate. I was and still remain completely comfortable with that. David loved Dodie and she loved him. It was only right that she would inherit whatever possessions he had.

> Certainly I never expected or needed any inheritance from my son.
>
> . . .
>
> Dodie is a member of our family. She was a good wife to David and did her best to take care of him while he was sick. I can't understand why anyone would accuse her of doing something wrong in the handling of David's estate. She was David's only beneficiary and the whole family understood that it was right for her to take care of David's estate. I don't think it is the right of any stranger to question the way David's affairs have been handled."

CPE 292-294.

Attorney Michael DuBeau filed a probate action regarding the estate of Daniel Finch on November 25, 2008. On the same day, Judge Eadie signed an order admitting Mr. Finch's Will to probate and appointing Ms. Cassell personal representative and an order of solvency, granting Ms. Cassell non-intervention powers. CPE 247, 250-251. Four months passed on March 25, 2009, without any interested party filing a petition contesting the validity of the will. CPE 247. The petition for appointment of personal representative identifies Ms. Cassell as the sole heir of her late husband. CPE 1. Mr. DuBeau filed a probate notice to creditors and published a notice as required by law. CPE 16, 18-19. Mr. DuBeau did not serve and/or file notice to all potential heirs, most likely because they were Mr. Finch's siblings and parents, all of whom approved of the appointment of Ms. Cassell and the distribution of the estate, and all of whom had been present during Mr. Finch's last illness

and attended his memorial service in Washington. CPE 197-201, 363-370, 290-294. The order appointing Ms. Cassell personal representative was filed on November 25, 2008.

B. Procedural Facts

Plaintiff Rhoda Cassell filed a complaint for medical negligence and wrongful death against Dr. Portelance and Eastside Internal Medicine, PLLC, his corporation, on December 1, 2008. This was less than eighteen (18) months after her husband's death in September 2007. This matter was ultimately scheduled for trial before Judge Laura Gene Middaugh on September 13, 2010. On September 10, 2010, defendants filed a motion to dismiss for "failure to state a claim". CPM 35. In that motion, defendant alleged that Mr. Finch's Will was signed "while the decedent was comatose and obviously without capacity to contract or appoint anyone to act in his behalf". CPM 35. Defendant went so far as to raise the specter of "fraud on this court" and urged that this "fraud" would deprive Ms. Cassell of her standing to pursue the lawsuit, and even the court's jurisdiction to hear the matter. CPM 36. Defendant alleged that "medical evidence" "established" that Mr. Finch did not have the requisite capacity to execute the document on the date the Will was purportedly signed, and further alleged that the Will was "apparently not drafted by counsel" both of which allegations were false. CPM 37. Defendant claims to have just "discovered" that Mr. Finch's Will appointing Ms. Cassell was dated

August 27, 2007, notwithstanding the fact that the order admitting the will to probate and appointing Ms. Cassell was entered nearly two years earlier. CPM 36, CPE 13.

At the hearing of the motion, counsel for defendant continued to allege that Ms. Cassell was guilty of "improprieties, to say the least". RP 9/13/2010, 6:21. Judge Middaugh correctly refused to hear the probate issue, and plaintiff's counsel agreed to a continuance so that defense counsel could "investigate" this matter. RP 9/13/10 at 8-10.

On February 7, 2011, defendant Portelance filed a motion in the estate case seeking to intervene and vacate the order appointing Ms. Cassell personal representative. Supp. CPE 1.[2] Once again, defendant alleged that "Ms. Cassell procured her representative status of Mr. Finch's estate through false and fraudulent acts and misrepresentations" and that this deprived her of "standing" to pursue the medical malpractice lawsuit. Supp. CPE 1. Dr. Portelance frankly acknowledged that he "has no interest in Mr. Finch's estate and is not otherwise a claimant for purposes of applying the four month rule contest limitation under RCW 11.24.010." Supp. CPE 1. Thus, Dr. Portelance never argued that the four month limitation for a Will contest had

[2] Defendant's motion, out of which the estate appeal arises, apparently was inadvertently not ordered with the clerk's papers. A supplemental designation of the clerk's papers has been filed. Since the motion itself is the only document to be so ordered, it is anticipated that the numbers of these supplemental clerk's papers will follow the numbering of the motion, and designations will be made accordingly.

somehow been tolled. Rather, he was arguing that the Will contest statute simply didn't apply to him.

Again, defendant alleged that Mr. Finch did not sign the Will in question, and again relied on the computerized hospice record notations for this conclusion. By this time, of course, defense counsel well knew that the evidence he relied on was contested by every person who knew Mr. Finch and had been present at his house. Supp. CPE 3 to 5.

Dr. Portelance claimed his right to intervene in the estate matter not from RCW 11.24.010, but rather, under the general intervention rule, CR 24(a)(2). Supp. CPE 6. Again, Dr. Portelance freely admitted that he had "no interest in Mr. Finch's estate and is otherwise not a claimant" pursuant to RCW 11.24.010. Supp. CPE 6.

Defendant alleged that Ms. Cassell "fraudulently represented to the court that the Will was valid, notwithstanding the fact that she knew the witnesses had not actually witnessed Mr. Finch signing the document. He further alleged as fact that Ms. Cassell falsely represented that Mr. Finch had the requisite mental capacity to contract at the time he purportedly signed his Will. Supp. CPE 10-11. He alleged as fact that Mr. Finch's lack of testamentary capacity "is beyond dispute". Supp. CPE 11. Not only was this "fact" not beyond dispute, but it is flatly disputed by Mr. Finch's parents, by Ms. Cassell, and by the notary public who saw Mr. Finch on the day he signed his Will. CPE 193 to 196, 290 to 294.

This alleged "fraud" was the only basis urged by defendant for vacating the order appointing Ms. Cassell the representative of Mr. Finch's estate. Defendant relied on CR 60(b)(4) and (11), alleging fraud and misconduct. Supp. CPE 6 to 7. Dr. Portelance was careful not to rely on the procedural irregularity in the witnessing of the Will, perhaps recognizing that such an allegation amounts to a Will contest and would subject Dr. Portelance to the four month statute of limitations in RCW 11.24.010.

At the hearing of defendant's motion on April 1, 2011, Judge Eadie ruled that a proceeding attacking the validity of a Will is necessarily a Will contest and subject to the provisions of RCW 11.24. However, Judge Eadie, on his own, suggested that the four month statute of limitations in RCW 11.24.010 would be tolled under the provisions of *In Re the Estate of Little*, 127 Wash. App. 915, 113 P.3d 505 (2005). This ruling was based on the court's finding that interested parties (Mr. Finch's relatives) had not been provided notice of the admission of the Will to probate. CPE 176 to 180; RP 4/1/11 at 19 to 20.

Judge Eadie made clear the basis for his ruling in findings entered on April 4, 2011. He indicated that the four month statute of limitations for a Will contest would be tolled because the personal representative failed to give notice to the heirs and devisees of David Finch within the time prescribed by statute. The invalidity of the Will was given as the reason for withdrawing the appointment of the personal representative.

Nowhere did Judge Eadie even mention the issue as to whether Dr. Portelance was a person who had a right to contest the Will. CPE 186 to 7.

It is clear from his statements at the hearing that Judge Eadie was of the impression that, simply the fact that Ms. Cassell did not give notice of her appointment or the probate of the Will to the heirs and/or devisees by itself invalidated her appointment without consideration of the fact of whether a complete stranger to the estate had any right to raise this issue. RP 4/1/11 25:10 to 12.

Ultimately, Judge Eadie reduced all of his findings and conclusions to an order. He found that the will was not properly witnessed and that the personal representative failed to give notice to the heirs and devisees within the time prescribed by statute. No finding of any kind accusing Ms. Cassell of wrongdoing, and certainly not fraud, was made. CPE 392. Based on this, the court ruled that the four month statute of limitations would be tolled under the holding of *Estate of Little*. He indicated that the appointment of the personal representative was based on her nomination in the will and, therefore, was invalid. And the court then ordered Ms. Cassell removed as personal representative, changing the language of the conclusions of law prepared by the defendant, which indicated that the appointment was withdrawn. CPE 393. Immediately thereafter, at the same hearing, Judge Eadie reappointed Ms. Cassell personal

representative, noting the consent of all of Mr. Finch's siblings, parents, and even his ex-wife. CPE 395. Finding that Ms. Cassell was the surviving spouse of the decedent, that there are no children of the decedent, that Ms. Cassell is otherwise qualified and willing, and that RCW 11.28.030 provides that a surviving spouse shall be entitled to administer community property, Judge Eadie reappointed Ms. Cassell personal representative, leaving a determination of the effect of his order on the medical malpractice case to Judge Middaugh. CPE 396 to 7. Immediately following her appointment as personal representative, Ms. Cassell ratified all prior actions she had previously made as personal representative. CPE 399. The total time that elapsed between the filing of the order granting the motion to intervene and remove Ms. Cassell as personal representative, and her ratification of her previous actions, was twelve (12) minutes. CPE 392, 399.

The matter then returned to Judge Middaugh. On May 9, 2011, she signed an order dismissing Ms. Cassell's medical malpractice case (even Ms. Cassell's pre-death loss of consortium claim, which was personal to her and did not have to be brought by the personal representative). CPM 266 to 268. The judge noted that:

> The orders issued by Judge Eadie are somewhat ambiguous in that he finds the will invalid and removes Ms. Cassell as personal representative then continues the estate under the same case number as an estate without a will and appoints Ms. Cassell as personal representative of the estate. This indicates a continuation of the estate and, while leaving the

> removed personal representative arguably personally liable for her acts, would not have invalidated the actions she took when acting under an invalid will. However, in the ORDER GRANTING DOUGLAS A. PORTELANCE, MD'S MOTION TO INTERVENE AND VACATE ORDER APPOINTING PERSONAL REPRESENTATIVE Judge Eadie signed the order that specifically granted their request to "vacate" the order appointing Ms. Cassell as personal representative. To vacate to means to nullify, cancel, make void or invalidate and thus any actions taken by the personal representative would also be cancelled or void. [The judge cited no authority for this proposition.]

CPM 267 to 68.

Judge Middaugh went on to say that, "Because this order is based substantially on the interpretation of another judge's order, it is anticipated that the judge or a party may wish to clarify the order. Judge Eadie is on leave until May 17, 2011. Therefore the court in extending the time for a motion for reconsideration of this order to be filed to May 25, 2011." CPM 268.

As indicated in plaintiff's Motion to Stay Appeal and Permit Further Proceedings in the Trial Court filed previously herein and referred to this panel by the clerk, appellant's counsel never received a copy of Judge Middaugh's order until well after May 25, 2011, at a time when the appeal of the estate matter had already been filed and only a matter of days remained to file the appeal in the malpractice case. Accordingly, these appeals followed.

IV. ARGUMENT

A. The Trial Court Did Not Have Jurisdiction to Enter the Order Proposed by Dr. Portelance.

Ms. Cassell was appointed personal representative by an order finding the estate to be solvent and granting her non-intervention powers. CPE 13-14. The entry of such an order deprives the court of further jurisdiction over the Estate. *In re Estate of Coates*, 55 Wash.2d 250, 256, 347 P.2d 875 (1959). In order for the Court to reassert jurisdiction, application must be made by one of the persons identified, and under the limitations specified in the appropriate statutes. *In re Estate of Jones,* 152 Wash. 2d 1, 9, 93 P.3d 147 (2004); *In re Estate of Bobbitt*, 60 Wash. App.630, 632, 806 P.2d 254 (1991).

One of the ways this can be done is by a direct petition to remove the personal representative pursuant to RCW 11.28.250 and RCW 11.68.070. *In re Estates of Aaberg*, 25 Wash.App. 336, 339, 607 P.2d (1980). However, such a removal can only be sought for statutory reasons all of which entail a violation of the personal representative's fiduciary duty to the Estate, and then only by persons specified in the pertinent statutes. *In re Estate of Ardell*, 96 Wash.App. 708, 718-20, 980 P.2d 771 (1999). No serious allegation can be made of any action taken by Ms. Cassell in derogation of the welfare of the Estate, nor is Dr. Portelance a person statutorily entitled to make such a claim in the first instance.

Rather, Portelance contested the validity of the execution of the Will and as such the motion he filed, as found by judge Eadie, was a will contest, governed by RCW 11.24.010. *In re Estate of Kordon,* 157 Wn.2d 206, 137 P.3d 16 (2006). All grounds urged by Portelance involve the invalidity of the will by virtue of alleged incapacity of the testator or deficiencies in the execution of the will, matters that are specifically covered by this statute.

> A will contest is purely a statutory proceeding, and the court must be governed by the provisions of the applicable statute. ... The jurisdiction of the trial court is derived exclusively from the statute, and may be exercised only in the mode and **under the limitations** there prescribed.

In re Estate of Van Dyke, 54 Wn.App 225, 228, 772 P. 2d 1049 (1989) (internal citations omitted, emphasis added.) Likely because he knew that he could not meet the statutory limitations, Portelance took the position that that because the petitioner "has no interest in Mr. Finch's estate ... ," (Supp CPE 1) the four month will contest limitation under RCW 11.24.010 did not apply. Portelance failed to cite any authority for that bare assertion, nor does such authority exist. Indeed, the pertinent statutes state that only those who do possess such an interest may contest the will.

The statute further states that 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. In this case, no person appeared to contest the will within the four months statutorily provided,

and as such the probate of the will appointing Cassell as the Personal Representative is "binding and final". *See, Estate of Kordon, supra.*

1. Dr. Portelance Is Not in the Statutory Class of Persons Permitted to File a Will Contest.

While the trial court's ruling, based on *In re Estate of Little,* 127 Wash. App 915, 113 P. 3d 505 (2005), considered the question of **when** a will contest may be filed, nothing in *Estate of Little* addresses the question of **who** can bring a will contest. The law of Washington is clear that Dr. Portelance is not a person who could **ever** bring a will contest. The court would not have jurisdiction to consider his petition, even if it were filed the day after the will was admitted to probate.

RCW 11.24.010 provides that a will contest may be brought by "any person interested in any will." While other portions of this statute describe the time limitations for bringing a will contest, the description of "any person interested in any will" limits the class of persons who can bring a will contest.

The phrase was authoritatively defined by the Supreme Court in *In re O'Brien's Estate*, 13 Wn.2d 581, 126 P. 2d 47 (1942). That case involved a will contest brought by a man who was named executor in a 1931 will. Following the death of the testator, a 1938 will was admitted to probate appointing two others as co-executors of the will. The executor of the 1931 will was not related to the testatrix, nor was he a legatee or devisee of either will. The trial court found in favor of the will contestant

on the issue of mental capacity of the testatrix, revoked the probate of the later will and admitted the prior will to probate. On appeal, the Supreme Court considered the preliminary question, "Was respondent, as an executor named in the earlier will, authorized to contest the later will as a 'person interested' within the meaning of the statute." *Id.* at 582-3. The Supreme Court noted that,

> Generally, it has been held, not only under statutes such as ours, but also in the absence of statute, that, to contest a will, a person must have an interest therein, and that this interest must be a direct, pecuniary one. In other words, the contestant must stand to lose directly in a financial way if the will which he seeks to attack is permitted to stand.

Id. at 583.

The court went on to quote, with approval from *Petit v. Morton*, 28 Ohio App. 227, 235, 162 N.E. 627, 629 (1928):

> [A] "person interested" is one who has a direct, immediate and legally ascertained pecuniary interest **in the devolution of the testator's estate**, such as would be impaired or defeated by the probate of the will or benefited by the declaration that it is invalid. The pecuniary interest must be direct and not of a sentimental nature and it must have the characteristics of a property right and not of a mere personal privilege.

Quoted in *O'Brien, supra,* at 583 (emphasis added).

Taking that definition, the *O'Brien* court surveyed the conflicting cases with regard to whether the named executor of a prior will is a "person interested" in the will admitted to probate. The analysis is directly relevant here.

> To contest a will, one must have a direct, pecuniary interest therein. An executor under a prior will has no interest other than the prospect of receiving compensation for this services, and that interest is not a direct, pecuniary one because, even if the prior will should be established, the executor would take no part of the decedent's estate thereunder, the fees which he would receive being, in theory at least, the exact equivalent of the value of the services to be rendered by him. ...
>
> In practical application precluding an executor under a prior will from prosecuting a contest should not prove unduly restrictive. Our statute allows six months after probate of a will in which to contest its validity. The executor named in a prior will has ample time in which to give notice to the devisees and legatees, and thus afford them an opportunity to act should they care to do so. If such executor considers the latter will invalid for any reason, it should not be difficult for him to persuade one of them to join with him in a contest petition. **And if none of the beneficiaries under the prior will are interested, if all have waived or are desirous of foregoing their right to contest the later will, it would seem that the executor should not be permitted to proceed contrary to their wishes.** Sometimes it happens that a later will will make no change at all in the disposition of the testator's estate, but merely nominates a different executor. **In such a case why should the estate be burdened by will contest proceedings for the sole purpose of determining which of two rival claimants shall be permitted to act as executor.**

Id., at 592 to 3 (emphasis added).

This analysis clearly applies here. As is indicated by the declarations and waivers of notice filed herein by the actual heirs to Mr. Finch's estate, they both knew that Ms. Cassell would be the executor of her husband's will and were perfectly satisfied with that state of affairs. As the Supreme Court made clear in *O'Brien*, this is a matter of concern

solely to the heirs and legatees of Mr. Finch, and certainly not to Dr. Portelance, whose only relationship to Mr. Finch or his estate is that he has been sued by the estate for malpractice. Why indeed should the estate be burdened by a will contest, as asked by the Supreme Court in *O'Brien*, by a person who is, at best, only a potential wrongdoer in the eyes of the estate?

Later cases on this issue have uniformly followed the Supreme Court's holding in *O'Brien*. An example is the Court of Appeals opinion in *In re Estate of Hitchcock*, 140 Wn.App 526, 167 P.3d 1180 (2007). That case involved a suit by the grandson of a decedent seeking to have the personal representatives of his grandfather's estate (his uncles) removed as personal representatives and have a new personal representative appointed. The grandson was the beneficiary of a trust established by the will. Despite this, the Court of Appeals held that he had no standing to file a petition to remove or restrict the personal representatives' non-intervention powers. This holding was based on a strict interpretation of the relevant statute RCW 11.68.070, which states that only heirs, devisees, legatees, or creditors of an estate have the right to file a petition to remove or restrict a personal representative's non-intervention powers. Because the grandson's father was alive at the time the will was admitted to probate, the grandson was not an heir.

This case is interesting because it expressly considers the application of *In re Estate of Little*, 127 Wn.App 915, 113 P.3d. 505 (2005), *review denied*, 156 Wn.2d 1019 (2006). Apparently, the grandson was arguing that since his father was now dead, he should be considered an heir and, as to him, the time limitation for filing a petition to remove a personal representative should not apply. The Court of Appeals, however, stated that *Estate of Little* hurt rather than helped his case. The court pointed out that the court's holding in *Little* depended on the application of the definition of "heir" contained in RCW 11.02.005 (6). Since the grandson was not an heir at the time the will was admitted to probate, he was not entitled to bring a petition to remove personal representative.

Other Washington cases are to the same effect. Thus, in *Estate of Boyd,* 5 Wn.App 32, 485 P.2d 469 (1971), the Court of Appeals held that the grandmother of the decedent and "family matriarch" had no standing to bring a will contest, notwithstanding the fact that she appeared within four months of the admission of the will to probate. Her filing was considered to be a nullity and her attempt later on to add legitimate heirs to the will contest after four months had expired could not cure the standing problem. Likewise, in *In re Romano's Estate*, 40 Wn.2d 796, 246 P.2d 501 (1952), the Supreme Court reaffirmed *O'Brien*, *supra*, in stating that the executrix of a former will is not a "person interested" with the power to institute a will contest.

The precise question raise here was considered under an earlier, though materially identical statute in *In re Upton's Estate,* 199 Wash. 447, 92 P.2d 210 (1939). There the testator and his wife who was named in the will as executrix both died in Indiana as a result of a car accident. Their son petitioned for and was granted administration of the will. He subsequently filed as personal representative a wrongful death suit in Indiana against two defendants.

Precisely as Portelance did here,

> [D]efendants in the Indiana action, filed a petition in the probate proceeding for annulment of the letters issued to the administrator, alleging: 'That in the above captioned probate proceeding in this court no notice in conformity with the requirements of [the applicable statutes], ... and that persons interested in said estate were not advised ten days prior to the hearing by the posting of notices in three public places of such hearing... .

Upton, supra at 449. The trial court initially granted the petition, finding the defect of notice to be jurisdictional, and then reversed himself finding that the technical defect did not affect the court's jurisdiction.

The Supreme court affirmed, based not on the jurisdictional question (which as shown above is contrary to Washington law), but rather on the precise ground raised here by Ms. Cassell: that the wrongful death defendants had no standing to attack the appointment of the son as administrator.

> But assuming the notice to have been [inadequate] and that, for this reason, the order appointing the administrator

> is voidable on direct attack in the probate proceeding by an interested party, we are of the opinion, nevertheless, that the court's denial of the petition to vacate the order of appointment was correct. The posting of notice is provided by the statute as a substitute for the service of personal notice upon all persons having an interest in the appointment of a qualified and proper person to administer the estate.
>
> The appellants, non-residents of the state, are not embraced within any of the classes designated by the statute as qualified for appointment; they were not heirs, distributees, or creditors of the estate. Their only relation to it was that of possible debtors. It would be of no moment to them whom the court appointed as administrator.

Upton at 452-3.

The Court supported its position, quoting with approval from *In Re Mayo's Estate*, 60 S.C. 401, 38 S.E. 634, 635, 54 L.R.A. 660, a wrongful death case against a railroad in which the railroad attempted to attack the appointment of the estate's administrator as follows:

> The railroad company, however, was not entitled to be made a party to such proceedings. It was neither next of kin, distributee, nor creditor of Mayo, the intestate, and therefore does not fall within the class of those interested in the grant of administration. Its relation to the administration was only as a defendant in a suit for damages by the administrator, and its only interest is to defeat the action. Every debtor to an intestate's estate would have a similar interest to defeat administration, but we are not aware that a debtor was ever heard in a probate court in opposition to proceedings for administration of his creditor's estate.

Quoted in *Upton* at 453. The Washington Court also relied on a similar railroad wrongful death case from Minnesota, *In Re Hardy's Estate*, 35 Minn. 193, 28 N.W. 219. There the court held:

> A mere debtor of a decedent's estate may have a personal preference as to who shall be appointed administrator, but in law that is a question in which he has no interest, and therefore its determination in one way or another cannot aggrieve him in any legal sense. His simple duty is to pay his debt to the administrator, whoever he may be. How the estate is administered, or by whom, is nothing to him.

Quoted in *Upton* at 454.

As our Supreme Court has clearly held, Dr. Portelance has no legally recognized interest in the appointment of Mr. Finch's personal representative. Judge Eadie was plainly in error to rule otherwise. RP 4/22/10, 17:20-19:19.

2. The Question of Standing Here is Jurisdictional.

Washington appellate courts have been uniform in holding that the limitations in statutes pertaining to the probate of wills are jurisdictional. Thus, the Supreme Court held in *In re Estate of Kordon, supra*, that the court had no jurisdiction to hear and determine a will contest even though timely filed by an heir because of a failure to issue a citation to the personal representative in accordance with RCW 11.24.020. The court held that this failure was jurisdictional, notwithstanding the fact that the will contestant had mailed a copy of the petition for will contest to the personal representative's attorney.

In an attempt to avoid the statutory limitations, Defendant cited CR 24 as authority for Dr. Portelance's appearance in a will contest in this

matter. However, despite his creative editing of CR 24(a)(2), the rule itself requires an interest in the estate matter.

> **RULE 24. INTERVENTION**
>
> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties

Dr. Portelance has always admitted that he had no interest in the estate matter. How the estate is managed (in terms of asset distribution, payments, etc.) such action, or inaction, has no effect on Portelance. CR 24 is of no assistance to him.

More important, CR 24 cannot be the basis of supplying jurisdiction to the court to hear his will contest in contravention of the statutory definition of "person interested in the will". This is the holding of the Supreme Court's opinion in *In re Estate of Toth,* 138 Wn.2d 650, 981 P.2d 439 (1999). In that case, admittedly interested parties were notified of a will contest by mail. The contest was filed within three days after the running of the statutory four-month period for the filing of will contests, and the contestant sought to utilize CR 6(e) to extend the four-month period by three days. The Court of Appeals agreed with this proposition and the Supreme Court unanimously reversed. The court held that the clear language of RCW 11.24.010 provided that a person contesting a will

shall do so "within four months immediately following" the will's admission to probate. The court quoted approvingly from a commentator as follows:

> The four-month period is absolute. There are no exceptions to the rule and no equitable doctrines to afford any flexibility. If the Will contest is not filed prior to the expiration of the four-month period, the contest will be absolutely barred.

Toth, at 656.

Recognizing the harshness of this rule, the court stated:

> We are not unmindful of the inequities of this case. However, factual inequities do not justify circumventing a clear rule articulated by the legislature.

Id., at 657.

To the same effect is *In re the Estate of Peterson,* 102 Wash. App 456, 9 P.3d 845 (2000). This case involved a will contest brought by heirs claiming fraud and duress and challenging the legality of the marriage of the decedent. The will contest was brought outside the four-month statutory limit and the heirs sought to apply the discovery rule to the period of limitation, arguing that they could not discover evidence of the fraud until after the four-month period had run. The Court of Appeals reiterated that will contests were strictly governed by statute and the discovery rule could not be used to extend the statutory four-month period.

However Dr. Portelance describes his asserted connection to the estate of David Finch, it is plain that he is not a "person interested" in Mr.

Finch's will. The trial court simply did not have jurisdiction to hear a will contest brought by him, and no reason exists for this Court to disregard the clear language of RCW 11.24.010.

3. *In Re Estate of Little* has no Application to This Case.

Assuming *arguendo* that Dr. Portelance has some standing to appear in the probate matter, the trial court clearly erred in applying *In re Estate of Little* to relieve Dr. Portelance of the effect of the four month statute of limitations for will contests. A purported failure of Ms. Cassell to give notice to legitimate heirs of Mr. Finch of the admission of the will to probate has no bearing on a petition to contest a will brought by a stranger to the estate.

As shown above, Washington courts have repeatedly held that the four-month statutory limit for a will contest must be strictly applied. *Little* is clearly an exception to that rule and the Court of Appeals clearly stated its reasons therefor.

> The failure to give due notice to heirs as required by statute is a denial of procedural due process that "amounts to a jurisdictional defect **as to them, ...**

Little, at 921, quoting from *Hesthagen v. Harvey*, 78 Wn.2d 934, 942, 481 P.2d 438 (1971) (emphasis added).

The Court makes clear that, **as to legitimate heirs**, barring them from initiating a will contest where they had not been notified of the admission of the will to probate as required by the relevant statutes had the

effect of depriving them of property without due process. They were entitled to due process because the statutes required them to be notified. Dr. Portelance is, of course, in a different position. He was not entitled to any notice. Thus, the application of the four-month statutory limitation **as to him** raises no due process issues. Unlike legitimate heirs, Dr. Portelance was not entitled to **any** process with regard to the probate of Mr. Finch's will in the first place.

As stated in *In re Estate of Toth*, *supra*, will contests must be governed by the strict provisions of the applicable statutes. *In re Estate of Little* simply does not apply in a case such as this one. *Little* was not concerned with parties not entitled to notice. The personal representative's statutory duty is to locate and notify heirs.

The personal representative of course owed no duties with respect to Dr. Portelance, who has no relationship whatsoever to Mr. Finch or his will. There is simply no authority for allowing Dr. Portelance to take advantage of the rights of heirs to be notified of the appointment of Mr. Finch's personal representative to toll the applicable four-month statute. The admission of Mr. Finch's will to probate, and with it the appointment of Ms. Cassell as his personal representative, is, in the words of the statute, "binding and final."

B. Regardless of the Validity of the Will, Ms. Cassell Should Not Have Been Removed as Personal Representative

1. There Were No Grounds for Removing Ms. Cassell.

Even assuming Dr. Portelance could overcome the insuperable standing and limitations issues, it was error for Judge Eadie to order Ms. Cassell removed as personal representative. It is undisputed that Ms. Cassell is qualified to be personal representative, as plainly shown by her immediate reappointment, from which Dr. Portelance has not appealed. No serious argument has ever been made that Ms. Cassell was subject to removal under the statutory requirements of RCW 11.28.250 or restriction of her authority pursuant to RCW 11.60.050. (See Appendix).

Dr. Portelance cavalierly charges that the admission of Mr. Finch's will to probate and the appointment of Ms. Cassell were "fraudulent", and that her removal was warranted by CR 60(b)(4) and (11). However, no such finding of fraud was made by Judge Eadie, nor could there have been.[3] A motion under CR 60 (b) is part of the original proceeding. *Lindgren v. Lindgren,* 58 Wash.App. 588, 596, 794 P.2d 526 (1990), *review denied,* 116 Wash.2d 1009, 805 P.2d 813 (1991). As shown above, Dr. Portelance was not and could not be a party to the estate matter in which he had no interest.

---

[3] There was nothing fraudulent about any of Ms. Cassell's actions, as there was clearly no fraudulent intent on her part. See *In re Estate of Kessler* , 95 Wash.App. 358, 977 P.2d 591 (1999.) (Nine elements of fraud must be proved by clear cogent and convincing evidence.) Indeed although Judge Eadie found the attestation of the will was insufficient, even this is not entirely certain under the circumstances. See, e.g., *In re Chambers' Estate*, 187 Wash. 417, 60 p.2d 41 (1936); *In re Adams' Estate*, 120 Wash. 189, 206 P. 947 (1922).

More to the point, Ms. Cassell always had the right to administer her husband's estate. She has a statutory priority as the surviving spouse to administer her husband's estate. RCW 11.28.120(1). Furthermore, in light of the community property agreement, Ms. Cassell, as a surviving spouse is **absolutely** entitled to administer the estate, which was all community property. CPE 406-410; RCW 11.28.030. No reason was given for Ms. Cassell's removal as personal representative save the invalidity of the will. However, in light of the fact that she was undoubtedly the correct personal representative with or without a will, no good reason exists why she should have been removed from that position. See, *In Re Estates of McGill,* 49 Wash.2d 242, 299 p.2d. 847(1956); *In re Estate of Odman.* 49 Wash.2d 612, 304 P.2d 1044 (1956). *See* RCW 11.28.280.

2. *Nunc Pro Tunc*

Courts have the inherent power to enter judgments *nunc pro tunc,* and should do so as justice requires. *In re Estate of Carter,* 14 Wn.App. 271, 274, 540 P.2d 474 (1975). An order *nunc pro tunc* is used to record actions actually taken by the court at a previous time, and is within the sound discretion of the Court. *Bruce v. Bruce,* 48 Wash.2d 635, 296 P.2d 310 (1956). Here, the simple truth is that the court in the first instance appointed the correct personal representative to administer the estate. Ms Cassell was entitled to such an appointment **at the time she was**

appointed. *McGill, supra; Odman, supra.* As argued above, she should not have been removed, but if the Court felt this necessary, her re-appointment should have been *nunc pro tunc* to the time of her original appointment, precisely to remove any doubt as the legitimacy of the perfectly appropriate actions she had taken on behalf of the estate. No one intended to rescind each and every creditor payment, to require a refund on the payment of the expenses of last illness, or to deny the myriad of other steps that may have been taken in the ordinary course of events. The record should therefore speak the truth: a personal representative was meant to be appointed that could lawfully administer the estate, and the subsequent re-appointment reaffirmed what the court had done previously and serves equity.

While the trial court has discretion in entering *nunc pro tunc* orders, in this instance failure to enter the order appointing Ms. Cassell, *nunc pro tunc* to the date of her original appointment is an abuse of discretion. An abuse of discretion occurs if the court's decision is manifestly unreasonable or rests on untenable grounds. *State v. Dixon*, 159 Wash.2d 65, 75–76, 147 P.3d 991 (2006). Judge Eadie failed to order Ms. Cassell's appointment *nunc pro tunc*, as he felt that this was properly considered in the malpractice action. RP 4/22/10 at 10-15. This is clearly wrong. As the Court held in *Estate of Upton*, *supra*, at 451-2, the proper appointment of an administrator is a matter that can only be considered

directly in the estate case, and not collaterally in some other proceeding. The estate case was the appropriate place to consider this matter, and failure to enter the appointment order *nunc pro tunc* was a manifest abuse of discretion.

3. *De Facto* Personal Representative.

The Washington Courts have held that where a guardian or a trustee is appointed, but the basis for the appointment is later declared invalid, the guardian or trustee serves in a *de facto* capacity. *In re Guardianship of Bouchat,* 11 Wash. App. 369, 522 P.2d 1168 (1974); *In re the Irrevocable Trust of Michael A. McKean,* 144 Wn.App 333, 183 P.2d 317 (2008). This Court held, in *Bouchat,* that an order appointing a guardian was void where notice to the ward was defective, but it approved reimbursement of funds the *de facto* guardian expended in good faith for the ward's benefit. 11 Wn.App, at 371-72. In *King v. Sells,* 193 Wash. 294, 75 P.2d 130 (1938), the Supreme Court assumed without deciding that a person was a *de facto* guardian and that a *de facto* guardian's duties are "measured by the same standard as a legally appointed guardian." 193 Wash., at 296.

In *McKean,* the question presented was "whether the trial court in this action could appoint a corporate trustee as the trustee after the Court of Appeals invalidated the dissolution court's order requiring appointment of a corporate trustee. "It was asserted once the Court of Appeals

rendered the dissolution court's appointment void, all subsequent orders based on that ruling were also void." 144 Wash. App., at 340.

The Court rejected this argument, finding that pursuant to RCW 11.96A.020(1) the court had plenary power to act, and if there was any question, RCW 11.96A.020(2) provides that if that section should, in any case or under any circumstances, be inapplicable, insufficient, or doubtful with reference to the administration and settlement of estates and estate matters, the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court. *See also*, 144 Wash. App, at 343.

The court affirmed the appointment of the corporate trustee as a *de facto* trustee, and further found that a *nunc pro tunc* order was not required because the corporate trustee "was a *de facto* trustee when it commenced the action ... then the order appointing the trustee converted the corporate trustee from a *de facto* trustee to a legal trustee." As a result, it was not necessary to validate the trial court's prior orders or the trustee's prior acts. *McKean,* at 344; *citing In re Bankers Trust,* 403 F.2d 16, 21 (7th Cir. 1968) (*de facto* trustee's actions are binding on third persons).

The same is true of actions by a personal representative, even if subsequently removed.

> "Where letters of administration have been granted on the estate of a decedent to one not entitled to the appointment, the acts of such administrator are valid although the order appointing such person may be voidable in a direct proceeding instituted by those having a superior right. This rule rests upon the doctrine that in such cases the essential basis of jurisdiction exists, and the appointment of the wrong person is but an irregularity, subjecting the order of appointment to direct attack, but not invalidating acts done in pursuance of the law, in the course of administration by him who has been erroneously appointed.'

Estate of Upton, supra at 451-2, quoting from *State ex rel. Lauridsen v. Superior Court,* 179 Wash. 198, 37 P.2d 209, 213.

C. There Was No Reason to Dismiss the Medical Malpractice Suit.

1. Removal of the Personal Representative Does Not Affect the Validity of Her Actions.

The quote from *Upton* immediately above clearly supports the position of Appellant that the timely filing of the medical malpractice lawsuit by Ms. Cassell as personal representative was effective in tolling the statute of limitations even were she to be properly removed at some later time. As the court stated, " 'the appointment of the wrong person is but an irregularity, subjecting the order of appointment to direct attack, but **not invalidating acts done in pursuance of the law, in the course of administration** by him who has been erroneously appointed.'" (Emphasis added.) Any other holding would severely damage the conclusiveness necessary to the administration of probate law. See also *Moe v. Judd*, 121

Wash. 14, 208 P. 82 (1922); *Ray v. Sommer*, 14 Ariz.App. 160, 162, 481 P.2d 530, 532 (Ariz.App. Div. 2 1971).

A complete analysis of the meaning of Judge Eadie's order and Judge Middaugh's is included in the Motion previously filed with this Court to Stay Appeal and Permit Further Trial Court Proceedings and will not be repeated. However one central point must be mentioned about the way Judge Middaugh came to her conclusion. Judge Middaugh found ambiguity in Judge Eadie's order. On the one had she notes that

> 2. ...he **finds the will invalid** and **removes Ms. Cassell as personal representative**, then **continues the estate as an estate without a will** and appoints Ms. Cassell as personal representative of the Estate.

She goes on to recognize that,

> This indicates a continuation of the estate and, while leaving the removed personal representative arguably personally liable for her acts [[4]], would not have invalidated the actions she took when acting under an invalid will.

Later she seems to come to the correct conclusion based on her analysis of the facts:

> 4. Had Judge Eadie **declared the will invalid, removed Ms. Cassell as personal representative** and **continued the estate as one without a will**, Ms. Cassell's actions as personal representative, including her actions in filing the instant action would remain valid.

CPM 267-8 (Emphasis added.) Of course, that is what Judge Eadie in fact did, as she herself found two paragraphs earlier, even changing the order

[4] This is likely incorrect. See RCW 11.24.040.

to read that Ms. Cassell was removed as personal representative instead of that her appointment was withdrawn as suggested by Defendant. CPE 393. No new estate was opened. Ms. Cassell simply replaced herself as personal representative. Judge Middaugh, in this understanding of the law is correct. The acts of Ms. Cassell under her initial appointment should be unaffected by the "change" in personal representative.

Nonetheless, Judge Middaugh was apparently persuaded otherwise by the **name** Dr. Portelance gave to his motion. He originally styled his motion a Motion to Intervene and Vacate order appointing Personal Representative. Supp. CPE 1. Although the substance of what Judge Eadie ruled is clear, Judge Middaugh, apparently swayed by the part of his order that read that the motion, styled as named by defendant was Granted, and apparently using some dictionary definition of the word "vacate", decided that an order "vacating" the order appointing Ms. Cassell personal representative of her husband's estate would mean that the order appointing her was "nullif[ied], cancel[ed], ma[d]e void or invalidate[d]" CPM 268. From this she concluded that "thus any actions taken by the personal representative would also be cancelled or void". She followed this by stating that, "by entering an order vacating the order that appointed her as personal representative, her actions, including her action of filing the instant lawsuit are void and nullified." No authority is cited for this proposition, nor for its perceived corollary, "Ms. Cassell, as the newly

appointed personal representative would have to re-file the lawsuit... ."

CPM 268

Leaving aside the facts that Judge Middaugh's order does not cite the source of the definitions of "vacate" given, that the "synonyms" identified do not necessarily mean the same thing legally, and the inherent error in basing her ruling on the name of the motion as opposed to its operative effect, her conclusion is plainly wrong. As the Supreme Court said in *Upton, supra,* at 451-2, "the acts of such administrator are valid although the order appointing such person may be voidable ... , and the appointment of the wrong person is but an irregularity, subjecting the order of appointment to direct attack, but not invalidating acts done in pursuance of the law, in the course of administration by him who has been erroneously appointed."

Judge Middaugh's ruling is likewise at odds with the pertinent statutes. RCW 11.48.010 expressly gives the personal representative the right to bring suit to recover property for the estate. Pursuant to RCW 11.24.040, even in the case of a validly brought will contest, the personal representative is not liable for any act taken in good faith prior to the revocation of her appointment. It is inconceivable that such actions would nonetheless somehow be seen as a nullity. Finally, with regard to the broad powers of a personal representative under a non-intervention estate third parties to transactions conducted by a non-intervention personal

representatives are entitled to have it conclusively determined that the transaction is necessary for the administration of the decedent's estate, thus providing complete protection for persons in a position such as Dr. Portelance's. RCW 11.68.090(1).

Ms. Cassell had an absolute right to be personal representative of her husband's estate. She was the only beneficiary of the lawsuit she brought, and the purpose of the lawsuit was to benefit the estate. Her actions in this regard were valid and binding, notwithstanding Judge Eadie's erroneous order removing her as personal representative.

2. Even Under Real Party in Interest Analysis, Dismissal of the Medical Malpractice Case Was Unnecessary and Erroneous.

Even if Judge Middaugh were correct that the order removing Ms. Cassell somehow made it as if she were never appointed, dismissal of the malpractice suit was error. In this case the matter would be controlled by ***Rinke v. Johns-Manville Corp.***, 47 Wash.App. 222, 734 P.2d 533 (1987), and dismissal of plaintiff's complaint would be inappropriate under any circumstance. This case holds, put simply, that a civil defendant has no interest to be protected in the selection of any particular Personal Representative of a plaintiff's estate, so long as the plaintiff is in fact the Personal Representative.

The issue is purely one of the chosen personal representative being the Real Party in Interest pursuant to CR 17(a). This rule protects a party

from multiple litigation where there is a concern that the named party is not the party entitled to bring the action. Because of the limited interest involved, dismissal for this reason is prohibited unless sufficient time is allowed after objection for ratification of the commencement of the action by or substitution of the real party in interest. Under the relation back doctrine of that rule, such ratification or substitution has the same effect as if the action had been commenced by the real party in interest. Ms. Cassell having been reappointed and having ratified her previous actions taken as personal representative, there is simply no basis for dismissal of the malpractice action.

Ms. Cassell's case here is stronger in every way than the plaintiff's case in ***Rinke***. On July 4, 1979, Martin Rinke died of lung cancer. On September 12, **1980**, his widow, Regina, filed a complaint for personal injury and wrongful death against several defendants. However, she had not as of the date of filing been appointed personal representative. Some of the defendants answered by challenging her capacity to bring the suit.

On July 30, **1984**, nearly four years after the filing of the lawsuit she was in fact appointed personal representative. On September 24, 1984, the defendants noted a motion to dismiss for lack of personal representative. On October 18, 1984, in her capacity as personal representative, she approved and ratified her previous actions in filing the wrongful death suit. At that time, she stated by affidavit that the delay in

her appointment came about because she and her husband had signed a community property agreement which she erroneously believed made her personal representative. The trial court held following a hearing on the Motion to Dismiss on November 2, 1984, that too much time had passed between the objection in the Answer and the appointment of a personal representative, and granted the motion, dismissing the suit.

This Court unanimously reversed the dismissal. To reach this result, the Court analyzed the reason for the Real Party in Interest rule set out in CR 17(a). The Court ruled that the mere passage of time was not sufficient reason to dismiss for failure to remedy the Real Party in Interest problem:

> The rule is not intended as a method by which the trial court may sanction dilatory plaintiffs; rather, it is meant to insure that the real party in interest will be made a party to the suit at a time when the interests of the defendants will be protected.

Id. at 226.

The reasons for the Court's ruling are equally applicable here. "First, the relevant portion of the rule is phrased as a restriction on the court's authority to dismiss, not as a grant of authority to dismiss. ... Under this provision, the trial court should allow the plaintiff a reasonable time to join the real party in interest, even if the problem does not become apparent until late in the proceedings." *Id.*

Further, the Court reviewed the history of the rule to determine its purpose:

> [the 1966 provision was added] simply to protect the defendant against a subsequent action by the party actually entitled to re-cover, and to insure generally that the judgment will have its proper effect as *res judicata.*
>
> ... As long as no prejudice is shown, the real party in interest may be added at any time, even after trial.

The Court went on to consider whether Rinke's appointment as personal representative related back to the filing of the action. The Court noted that the relation back language in CR 17(a) itself is unqualified, and that some courts have held it should be applied literally. Even those that don't, however apply relation back in cases of "honest mistake" or "understandable mistake." *Id.* at 228. The Court quoted with approval, "Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed." *Id.*

With regard to what constitutes an understandable or honest mistake, this Court gleaned some factors from the relevant cases. First, "a mistake can be an 'honest mistake' or an 'understandable mistake' even though the plaintiff could have ascertained the proper party who should sue or the proper method in which to sue. ... Second, the doctrine of relation back under CR 17(a) is restricted to 'honest mistakes' or 'understandable mistakes' in order to prevent plaintiffs from using the rule

to join or substitute persons whose interests were not contemplated from the beginning of the suit." *Id.* at 229.

The application of the holding in the *Rinke* case to the facts present here clearly shows that dismissal of the medical malpractice lawsuit was error no matter how Judge Eadie's order is interpreted. Leaving the validity of the will aside, Ms. Cassell, as the surviving spouse (and in this case only heir and statutory beneficiary) has a statutory preference for appointment as personal representative. Every other potential heir has agreed to her appointment, and it is clear that everyone in David Finch's family expected her to be Personal Representative and approved of this outcome. See waivers of notice and Declarations of June and Alvin Finch, filed in the Estate case. CPE197-201, 291-294, 361-370.

Once reappointed, she, like Ms. Rinke, ratified her actions taken in filing this lawsuit. CPE 399. Pursuant to CR 17(a), her appointment as Personal Representative must relate back to the filing of the lawsuit, and the medical negligence case should have continued to trial.

In this respect Ms. Cassell's position is stronger than Ms. Rinke's was. Ms. Cassell actually was appointed Personal Representative. If it was an understandable error for Ms. Rinke not to have been appointed at all, certainly it is understandable that Ms. Cassell would believe that her husband's wishes expressed in his will should be followed notwithstanding a technical defect in the witnessing of the will..

IV. CONCLUSION

There has always been a kind of malevolent irony about Dr. Portelance complaining about the appointment of Ms. Cassell as personal representative of the estate of her late husband. His interests are and always have been inimical to those of the Estate. As long as the alignment of parties would give him the protection of *res judicata*, the identity of the Personal Representative is none of his business. Dr. Portelance's only relationship to the Estate of David Daniel Finch is as a potential debtor. He has no legally recognized interest in the manner of execution of David Finch's will. As the court stated in *Upton, supra*, at 453, "Certainly, appellants would have no standing in court to voice a preference as to whom the court should appoint. Judgments or orders are not set aside to vindicate abstract law." Rhoda Cassell is entitled to a trial on the medical negligence case she timely filed against the defendants for the benefit of the statutory beneficiaries. There is simply no sensible reason to dismiss this case.

Dated this 17th day of January, 2012.

Respectfully submitted:

Mark Leemon, WSBA #5005
Counsel for Appellant

CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury of the laws of the State of Washington, that on this 17th day of January, 2012, I sent for delivery a true and correct copy of **Appellant's Opening Brief** via US Mail, postage prepaid, and via electronic mail to:

Lory R. Lybeck, WSBA #14222
Lybeck Murphy
7525 SE 24th Street, Suite 500
Mercer Island, WA 98040
(206) 230-4255
lrl@lybeckmurphy.com
mk@lybeckmurphy.com

Mary H. Spillane, WSBA #11981
Williams, Kastner & Gibbs, PLLC
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600
mspillane@williamskastner.com

Terry Asbert

Terry Asbert

APPENDIX A

RCW's

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.02. General Provisions (Refs & Annos)
11.02.005. Definitions and use of terms

When used in this title, unless otherwise required from the context:

(1) "Administrator" means a personal representative of the estate of a decedent and the term may be used in lieu of "personal representative" wherever required by context.

(2) "Codicil" means a will that modifies or partially revokes an existing earlier will. A codicil need not refer to or be attached to the earlier will.

(3) "Degree of kinship" means the degree of kinship as computed according to the rules of the civil law; that is, by counting upward from the intestate to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of these two counts.

(4) "Executor" means a personal representative of the estate of a decedent appointed by will and the term may be used in lieu of "personal representative" wherever required by context.

(5) "Guardian" or "limited guardian" means a personal representative of the person or estate of an incompetent or disabled person as defined in RCW 11.88.010 and the term may be used in lieu of "personal representative" wherever required by context.

(6) "Heirs" denotes those persons, including the surviving spouse or surviving domestic partner, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate.

(7) "Internal Revenue Code" means the United States Internal Revenue Code of 1986, as amended or re-numbered as of January 1, 2001.

(8) "Issue" means all the lineal descendants of an individual. An adopted individual is a lineal descendant of each of his or her adoptive parents and of all individuals with regard to which each adoptive parent is a lineal descendant. A child conceived prior to the death of a parent but born after the death of the deceased parent is considered to be the surviving issue of the deceased parent for purposes of this title.

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

(9) "Net estate" refers to the real and personal property of a decedent exclusive of homestead rights, exempt property, the family allowance and enforceable claims against, and debts of, the deceased or the estate.

(10) "Nonprobate asset" means those rights and interests of a person having beneficial ownership of an asset that pass on the person's death under a written instrument or arrangement other than the person's will. "Nonprobate asset" includes, but is not limited to, a right or interest passing under a joint tenancy with right of survivorship, joint bank account with right of survivorship, payable on death or trust bank account, transfer on death security or security account, deed or conveyance if possession has been postponed until the death of the person, trust of which the person is grantor and that becomes effective or irrevocable only upon the person's death, community property agreement, individual retirement account or bond, or note or other contract the payment or performance of which is affected by the death of the person. "Nonprobate asset" does not include: A payable-on-death provision of a life insurance policy, annuity, or other similar contract, or of an employee benefit plan; a right or interest passing by descent and distribution under chapter 11.04 RCW; a right or interest if, before death, the person has irrevocably transferred the right or interest, the person has waived the power to transfer it or, in the case of contractual arrangement, the person has waived the unilateral right to rescind or modify the arrangement; or a right or interest held by the person solely in a fiduciary capacity. For the definition of "nonprobate asset" relating to revocation of a provision for a former spouse upon dissolution of marriage or declaration of invalidity of marriage, RCW 11.07.010(5) applies. For the definition of "nonprobate asset" relating to revocation of a provision for a former spouse upon dissolution of marriage or declaration of invalidity of marriage, see RCW 11.07.010(5). For the definition of "nonprobate asset" relating to testamentary disposition of nonprobate assets, see RCW 11.11.010(7).

(11) "Personal representative" includes executor, administrator, special administrator, and guardian or limited guardian and special representative.

(12) "Real estate" includes, except as otherwise specifically provided herein, all lands, tenements, and hereditaments, and all rights thereto, and all interest therein possessed and claimed in fee simple, or for the life of a third person.

(13) "Representation" refers to a method of determining distribution in which the takers are in unequal degrees of kinship with respect to a decedent, and is accomplished as follows: After first determining who, of those entitled to share in the estate, are in the nearest degree of kinship, the estate is divided into equal shares, the number of shares being the sum of the number of persons who survive the decedent who are in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the decedent but who left issue surviving the decedent; each share of a deceased person in the nearest degree shall be divided among those of the deceased person's issue who survive the decedent and have no ancestor then living who is in the line of relationship between them and the decedent, those more remote in degree taking together the share which their ancestor would have taken had he or she survived the decedent.

(14) References to "section 2033A" of the Internal Revenue Code in wills, trust agreements, powers of appointment, beneficiary designations, and other instruments governed by or subject to this title shall be deemed to refer to the comparable or corresponding provisions of section 2057 of the Internal Revenue Code, as added by

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

section 6006(b) of the Internal Revenue Service Restructuring Act of 1998 (H.R. 2676, P.L. 105-206); and references to the section 2033A "exclusion" shall be deemed to mean the section 2057 deduction.

(15) "Settlor" has the same meaning as provided for "trustor" in this section.

(16) "Special administrator" means a personal representative of the estate of a decedent appointed for limited purposes and the term may be used in lieu of "personal representative" wherever required by context.

(17) "Surviving spouse" or "surviving domestic partner" does not include an individual whose marriage to or state registered domestic partnership with the decedent has been terminated, dissolved, or invalidated unless, by virtue of a subsequent marriage or state registered domestic partnership, he or she is married to or in a domestic partnership with the decedent at the time of death. A decree of separation that does not terminate the status of spouses or domestic partners is not a dissolution or invalidation for purposes of this subsection.

(18) "Trustee" means an original, added, or successor trustee and includes the state, or any agency thereof, when it is acting as the trustee of a trust to which chapter 11.98 RCW applies.

(19) "Trustor" means a person, including a testator, who creates, or contributes property to, a trust.

(20) "Will" means an instrument validly executed as required by RCW 11.12.020.

Words that import the singular number may also be applied to the plural of persons and things.

Words importing the masculine gender only may be extended to females also.

CREDIT(S)

[2011 c 327 § 1, eff. Jan. 1, 2012; 2008 c 6 § 901, eff. June 12, 2008; 2007 c 475 § 1, eff. July 22, 2007; 2005 c 97 § 1, eff. July 24, 2005; 2001 c 320 § 1; 2000 c 130 § 1; 1999 c 358 § 20; 1998 c 292 § 117; 1997 c 252 § 1; 1994 c 221 § 1; 1993 c 73 § 1; 1985 c 30 § 4. Prior: 1984 c 149 § 4; 1977 ex.s. c 80 § 14; 1975-'76 2nd ex.s. c 42 § 23; 1965 c 145 § 11.02.005. Former RCW sections: Subd. (3), RCW 11.04.110; subd. (4), RCW 11.04.010; subd. (5), RCW 11.04.100; subd. (6), RCW 11.04.280; subd. (7), RCW 11.04.010; subd. (8) and (9), RCW 11.12.240; subd. (14) and (15), RCW 11.02.040.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.12. Wills (Refs & Annos)
11.12.020. Requisites of wills--Foreign wills

(1) Every will shall be in writing signed by the testator or by some other person under the testator's direction in the testator's presence, and shall be attested by two or more competent witnesses, by subscribing their names to the will, or by signing an affidavit that complies with RCW 11.20.020(2), while in the presence of the testator and at the testator's direction or request: PROVIDED, That a last will and testament, executed in the mode prescribed by the law of the place where executed or of the testator's domicile, either at the time of the will's execution or at the time of the testator's death, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state.

(2) This section shall be applied to all wills, whenever executed, including those subject to pending probate proceedings.

CREDIT(S)

[1990 c 79 § 1; 1965 c 145 § 11.12.020. Prior: 1929 c 21 § 1; 1917 c 156 § 25; RRS § 1395; prior: Code 1881 § 1319; 1863 p 207 §§ 53, 54; 1860 p 170 §§ 20, 21. FORMER PART OF SECTION; re nuncupative wills, now codified as RCW 11.12.025.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.12. Wills (Refs & Annos)
11.12.030. Signature of testator at his or her direction--Signature by mark

Every person who shall sign the testator's or testatrix's name to any will by his or her direction shall subscribe his or her own name to such will and state that he or she subscribed the testator's name at his or her request: PROVIDED, That such signing and statement shall not be required if the testator shall evidence the approval of the signature so made at his or her request by making his or her mark on the will.

CREDIT(S)

[2010 c 8 § 2011, eff. June 10, 2010; 1965 c 145 § 11.12.030. Prior: 1927 c 91 § 1; 1917 c 156 § 27; RRS § 1397; prior: Code 1881 § 1320; 1863 p 207 § 54; 1860 p 170 § 21.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.12. Wills (Refs & Annos)
11.12.230. Intent of testator controlling

All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them.

CREDIT(S)

[1965 c 145 § 11.12.230. Prior: 1917 c 156 § 45; RRS § 1415; prior: Code 1881 § 1338; 1863 p 210 § 75; 1860 p 172 § 42.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.24. Will Contests
11.24.010. Contest of probate or rejection--Limitation of action--Issues

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.

CREDIT(S)

[2007 c 475 § 4, eff. July 22, 2007; 1994 c 221 § 21; 1971 c 7 § 1; 1967 c 168 § 6; 1965 c 145 § 11.24.010. Prior: 1917 c 156 § 15; RRS § 1385; prior: 1891 p 382 § 8; Code 1881 § 1360; 1863 p 213 § 96; 1860 p 176 § 63.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.24. Will Contests
11.24.040. Revocation of probate

If, upon the trial of said issue, it shall be decided that the will or a part of it is for any reason invalid, or that it is not sufficiently proved to have been the last will of the testator, the will or part and probate thereof shall be annulled and revoked and to that extent the powers of the personal representative shall cease, but the personal representative shall not be liable for any act done in good faith previous to such annulling or revoking.

CREDIT(S)

[1994 c 221 § 22; 1965 c 145 § 11.24.040. Prior: 1917 c 156 § 18; RRS § 1388; prior: Code 1881 § 1364; 1863 p 214 § 100; 1860 p 177 § 67.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.28. Letters Testamentary and of Administration (Refs & Annos)
11.28.030. Community property--Who entitled to letters--Waiver

A surviving spouse or surviving domestic partner shall be entitled to administer upon the community property, notwithstanding any provisions of the will to the contrary, if the court find such spouse or such domestic partner to be otherwise qualified; but if such surviving spouse or surviving domestic partner do not make application for such appointment within forty days immediately following the death of the deceased spouse or deceased domestic partner, he or she shall be considered as having waived his or her right to administer upon such community property. If any person, other than the surviving spouse or surviving domestic partner, make application for letters testamentary on such property, prior to the expiration of such forty days, then the court, before making any such appointment, shall require notice of such application to be given the said surviving spouse or surviving domestic partner, for such time and in such manner as the court may determine, unless such applicant show to the satisfaction of the court that there is no surviving spouse or surviving domestic partner or that he or she has in writing waived the right to administer upon such community property.

CREDIT(S)

[2008 c 5 § 913, eff. June 12, 2008; 1965 c 145 § 11.28.030. Prior: 1917 c 156 § 49; RRS § 1419.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.28. Letters Testamentary and of Administration (Refs & Annos)
11.28.120. Persons entitled to letters

Administration of an estate if the decedent died intestate or if the personal representative or representatives named in the will declined or were unable to serve shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order:

(1) The surviving spouse or state registered domestic partner, or such person as he or she may request to have appointed.

(2) The next of kin in the following order: (a) Child or children; (b) father or mother; (c) brothers or sisters; (d) grandchildren; (e) nephews or nieces.

(3) The trustee named by the decedent in an inter vivos trust instrument, testamentary trustee named in the will, guardian of the person or estate of the decedent, or attorney-in-fact appointed by the decedent, if any such a fiduciary controlled or potentially controlled substantially all of the decedent's probate and nonprobate assets.

(4) One or more of the beneficiaries or transferees of the decedent's probate or nonprobate assets.

(5)(a) The director of revenue, or the director's designee, for those estates having property subject to the provisions of chapter 11.08 RCW; however, the director may waive this right.

(b) The secretary of the department of social and health services for those estates owing debts for long-term care services as defined in *RCW 74.39A.008; however the secretary may waive this right.

(6) One or more of the principal creditors.

(7) If the persons so entitled shall fail for more than forty days after the death of the decedent to present a petition for letters of administration, or if it appears to the satisfaction of the court that there is no next of kin, as above specified eligible to appointment, or they waive their right, and there are no principal creditor or creditors, or such creditor or creditors waive their right, then the court may appoint any suitable person to administer such estate.

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

CREDIT(S)

[2007 c 156 § 28, eff. July 22, 2007; 1995 1st sp.s. c 18 § 61; 1994 c 221 § 23; 1985 c 133 § 1; 1965 c 145 § 11.28.120. Prior: 1927 c 76 § 1; 1917 c 156 § 61; RRS § 1431; prior: Code 1881 § 1388; 1863 p 219 § 122; 1860 p 181 § 89.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.28. Letters Testamentary and of Administration (Refs & Annos)
11.28.250. Revocation of letters--Causes

Whenever the court has reason to believe that any personal representative has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his or her charge, or has committed, or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such personal representative, or for any other cause or reason which to the court appears necessary, it shall have power and authority, after notice and hearing to revoke such letters. The manner of the notice and of the service of the same and of the time of hearing shall be wholly in the discretion of the court, and if the court for any such reasons revokes such letters the powers of such personal representative shall at once cease, and it shall be the duty of the court to immediately appoint some other personal representative, as in this title provided.

CREDIT(S)

[2010 c 8 § 2020, eff. June 10, 2010; 1965 c 145 § 11.28.250. Prior: 1917 c 156 § 74; RRS § 1444; prior: Code 1881 § 1414; 1863 p 218 § 112; 1860 p 186 § 114.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.28. Letters Testamentary and of Administration (Refs & Annos)
11.28.280. Successor personal representative

Except as otherwise provided in RCW 11.28.270, if a personal representative of an estate dies or resigns or the letters are revoked before the settlement of the estate, letters testamentary or letters of administration of the estate remaining unadministered shall be granted to those to whom the letters would have been granted if the original letters had not been obtained, or the person obtaining them had renounced administration, and the successor personal representative shall perform like duties and incur like liabilities as the preceding personal representative, unless the decedent provided otherwise in a duly probated will or unless the court orders otherwise. A succeeding personal representative may petition for nonintervention powers under chapter 11.68 RCW.

CREDIT(S)

[1997 c 252 § 6; 1974 ex.s. c 117 § 26; 1965 c 145 § 11.28.280. Prior: 1955 c 205 § 8; 1917 c 156 § 77; RRS § 1447; prior: Code 1881 § 1428.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.36. Qualifications of Personal Representatives
11.36.010. Parties disqualified--Result of disqualification after appointment

The following persons are not qualified to act as personal representatives: Corporations, minors, persons of unsound mind, or persons who have been convicted of any felony or of a misdemeanor involving moral turpitude: PROVIDED, That trust companies regularly organized under the laws of this state and national banks when authorized so to do may act as the personal representative of decedents' or incompetents' estates upon petition of any person having a right to such appointment and may act as executors or guardians when so appointed by will: PROVIDED FURTHER, That professional service corporations regularly organized under the laws of this state whose shareholder or shareholders are exclusively attorneys may act as personal representatives. No trust company or national bank may qualify as such executor or guardian under any will hereafter drawn by it or its agents or employees, and no salaried attorney of any such company may be allowed any attorney fee for probating any such will or in relation to the administration or settlement of any such estate, and no part of any attorney fee may inure, directly or indirectly, to the benefit of any trust company or national bank. When any person to whom letters testamentary or of administration have been issued becomes disqualified to act because of becoming of unsound mind or being convicted of any crime or misdemeanor involving moral turpitude, the court having jurisdiction shall revoke his or her letters. A nonresident may be appointed to act as personal representative if the nonresident appoints an agent who is a resident of the county where such estate is being probated or who is an attorney of record of the estate, upon whom service of all papers may be made; such appointment to be made in writing and filed by the clerk with other papers of such estate; and, unless bond has been waived as provided by RCW 11.28.185, such nonresident personal representative shall file a bond to be approved by the court.

CREDIT(S)

[1983 c 51 § 1; 1983 c 3 § 14; 1965 c 145 § 11.36.010. Prior: 1959 c 43 § 1; 1917 c 156 § 87; RRS § 1457; prior: Code 1881 § 1409; 1863 p 227 § 164; 1860 p 189 § 131.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.48. Personal Representatives--General Provisions--Actions by and Against (Refs & Annos)
➡➡ 11.48.010. General powers and duties

It shall be the duty of every personal representative to settle the estate, including the administration of any nonprobate assets within control of the personal representative under RCW 11.18.200, in his or her hands as rapidly and as quickly as possible, without sacrifice to the probate or nonprobate estate. The personal representative shall collect all debts due the deceased and pay all debts as hereinafter provided. The personal representative shall be authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character.

CREDIT(S)

[1994 c 221 § 30; 1965 c 145 § 11.48.010. Prior: 1917 c 156 § 147; RRS § 1517; prior: Code 1881 § 1528; 1854 p 291 § 141.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.68. Settlement of Estates Without Administration (Refs & Annos)
11.68.011. Settlement without court intervention--Petition--Conditions--Exceptions

(1) A personal representative may petition the court for nonintervention powers, whether the decedent died testate or intestate.

(2) Unless the decedent has specified in the decedent's will, if any, that the court not grant nonintervention powers to the personal representative, the court shall grant nonintervention powers to a personal representative who petitions for the powers if the court determines that the decedent's estate is solvent, taking into account probate and nonprobate assets, and that:

(a) The petitioning personal representative was named in the decedent's probated will as the personal representative;

(b) 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; or

(c) The personal representative was not a creditor of the decedent at the time of the decedent's death and the administration and settlement of the decedent's will or estate with nonintervention powers would be in the best interests of the decedent's beneficiaries and creditors. However, the administration and settlement of the decedent's will or estate with nonintervention powers will be presumed to be in the beneficiaries' and creditors' best interest until a person entitled to notice under RCW 11.68.041 rebuts that presumption by coming forward with evidence that the grant of nonintervention powers would not be in the beneficiaries' or creditors' best interests.

(3) The court may base its findings of facts necessary for the grant of nonintervention powers on: (a) Statements of witnesses appearing before the court; (b) representations contained in a verified petition for nonintervention powers, in an inventory made and returned upon oath into the court, or in an affidavit filed with the court; or (c) other proof submitted to the court.

CREDIT(S)

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

[2008 c 6 § 925, eff. June 12, 2008; 1997 c 252 § 59.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.68. Settlement of Estates Without Administration (Refs & Annos)
11.68.021. Hearing on petition for nonintervention powers

A hearing on a petition for nonintervention powers may be held at the time of the appointment of the personal representative or at any later time.

CREDIT(S)

[1997 c 252 § 60.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.68. Settlement of Estates Without Administration (Refs & Annos)
11.68.041. Petition for nonintervention powers--Notice requirements--Exceptions

(1) Advance notice of the hearing on a petition for nonintervention powers referred to in RCW 11.68.011 is not required in those circumstances in which the court is required to grant nonintervention powers under RCW 11.68.011(2) (a) and (b).

(2) In all other cases, if the petitioner wishes to obtain nonintervention powers, the personal representative 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:

(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

(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.

(3) The notice required by this section 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. The notice must contain the decedent's name, the probate cause number, the name and address of the personal representative, and 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.;

(b) The petition for an order granting nonintervention powers has been filed with the court;

(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 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 representat-

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

ive.

(4) If notice is not required, or all persons entitled to notice have either waived notice of the hearing or consented to the entry of an order granting nonintervention powers as provided in this section, the court may hear the petition for an order granting nonintervention powers at any time.

CREDIT(S)

[1997 c 252 § 61.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.68. Settlement of Estates Without Administration (Refs & Annos)
11.68.050. Objections to granting of nonintervention powers--Restrictions

(1) If at the time set for the hearing upon a petition for nonintervention powers, any person entitled to notice of the hearing on the petition under RCW 11.68.041 shall appear and object to the granting of nonintervention powers to the personal representative of the estate, the court shall consider the objections, if any, in connection with its determination under RCW 11.68.011(2)(c) of whether a grant of nonintervention powers would be in the best interests of the decedent's beneficiaries.

(2) The nonintervention powers of a personal representative may not be restricted at a hearing on a petition for nonintervention powers in which the court is required to grant nonintervention powers under RCW 11.68.011(2)(a) and (b), unless a will specifies that the nonintervention powers of a personal representative may be restricted when the powers are initially granted. In all other cases, including without limitation any hearing on a petition that alleges that the personal representative has breached its duties to the beneficiaries of the estate, the court may restrict the powers of the personal representative in such manner as the court determines to be in the best interests of the decedent's beneficiaries.

CREDIT(S)

[1997 c 252 § 62; 1977 ex.s. c 234 § 21; 1974 ex.s. c 117 § 17.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.68. Settlement of Estates Without Administration (Refs & Annos)
11.68.060. Death, resignation, or disablement of personal representative--Successor to administer nonintervention powers--Petition

If any personal representative of the estate of the decedent dies, resigns, or otherwise becomes disabled from any cause from acting as the nonintervention personal representative, the successor personal representative, or a person who has petitioned to be appointed as a successor personal representative, may petition the court for nonintervention powers, and the court shall act, in accordance with RCW 11.68.011 through 11.68.041 and 11.68.050.

CREDIT(S)

[1997 c 252 § 63; 1977 ex.s. c 234 § 22; 1974 ex.s. c 117 § 18.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.68. Settlement of Estates Without Administration (Refs & Annos)
11.68.070. Procedure when personal representative recreant to trust or subject to removal

If any personal representative who has been granted nonintervention powers fails to execute his or her trust faithfully or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, upon petition of any unpaid creditor of the estate who has filed a claim or any heir, devisee, legatee, or of any person on behalf of any incompetent heir, devisee, or legatee, such petition being supported by affidavit which makes a prima facie showing of cause for removal or restriction of powers, the court shall cite such personal representative to appear before it, and if, upon hearing of the petition it appears that said personal representative has not faithfully discharged said trust or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, then, in the discretion of the court the powers of the personal representative may be restricted or the personal representative may be removed and a successor appointed. In the event the court shall restrict the powers of the personal representative in any manner, it shall endorse the words "Powers restricted" upon the original order of solvency together with the date of said endorsement, and in all such cases the cost of the citation, hearing, and reasonable attorney's fees may be awarded as the court determines.

CREDIT(S)

[2010 c 8 § 2057, eff. June 10, 2010; 1977 ex.s. c 234 § 23; 1974 ex.s. c 117 § 19.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.68. Settlement of Estates Without Administration (Refs & Annos)

11.68.080. Vacation or restriction of nonintervention powers following insolvency--Notice--Determinations affecting prior grants of nonintervention powers upon petition--Endorsement on prior orders

(1) Within ten days after the personal representative has received from alleged creditors under chapter 11.40 RCW claims that have an aggregate face value that, when added to the other debts and to the taxes and expenses of greater priority under applicable law, would appear to cause the estate to be insolvent, the personal representative shall notify in writing all beneficiaries under the decedent's will and, if any of the decedent's property will pass according to the laws of intestate succession, all heirs, together with any unpaid creditors, other than a creditor whose claim is then barred under chapter 11.40 RCW or the otherwise applicable statute of limitations, that the estate might be insolvent. The personal representative shall file a copy of the written notice with the court.

(2) Within ten days after an estate becomes insolvent, the personal representative shall petition under RCW 11.96A.080 for a determination of whether the court should reaffirm, rescind, or restrict in whole or in part any prior grant of nonintervention powers. Notice of the hearing must be given in accordance with RCW 11.96A.110 .

(3) If, upon a petition under RCW 11.96A.080 of any personal representative, beneficiary under the decedent's will, heir if any of the decedent's property passes according to the laws of intestate succession, or any unpaid creditor with a claim that has been accepted or judicially determined to be enforceable, the court determines that the decedent's estate is insolvent, the court shall reaffirm, rescind, or restrict in whole or in part any prior grant of nonintervention powers to the extent necessary to protect the best interests of the beneficiaries and creditors of the estate.

(4) If the court rescinds or restricts a prior grant of nonintervention powers, the court shall endorse the term "powers rescinded" or "powers restricted" upon the prior order together with the date of the endorsement.

CREDIT(S)

[1999 c 42 § 615; 1997 c 252 § 65; 1977 ex.s. c 234 § 24; 1974 ex.s. c 117 § 20.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Title 11. Probate and Trust Law (Refs & Annos)
Chapter 11.68. Settlement of Estates Without Administration (Refs & Annos)
11.68.090. Powers of personal representative under nonintervention will--Scope--Relief from duties, restrictions, liabilities by will

(1) Any personal representative acting under nonintervention powers may borrow money on the general credit of the estate and may mortgage, encumber, lease, sell, exchange, convey, and otherwise have the same powers, and be subject to the same limitations of liability, that a trustee has under chapters 11.98, 11.100, and 11.102 RCW with regard to the assets of the estate, both real and personal, all without an order of court and without notice, approval, or confirmation, and in all other respects administer and settle the estate of the decedent without intervention of court. Except as otherwise specifically provided in this title or by order of court, a personal representative acting under nonintervention powers may exercise the powers granted to a personal representative under chapter 11.76 RCW but is not obligated to comply with the duties imposed on personal representatives by that chapter. A party to such a transaction and the party's successors in interest are entitled to have it conclusively presumed that the transaction is necessary for the administration of the decedent's estate.

(2) Except as otherwise provided in chapter 11.108 RCW or elsewhere in order to preserve a marital deduction from estate taxes, a testator may by a will relieve the personal representative from any or all of the duties, restrictions, and liabilities imposed: Under common law; by chapters 11.54, 11.56, 11.100, 11.102, and 11.104A RCW; or by RCW 11.28.270 and 11.28.280, 11.68.095, and 11.98.070. In addition, a testator may likewise alter or deny any or all of the privileges and powers conferred by this title, and may add duties, restrictions, liabilities, privileges, or powers to those imposed or granted by this title. If any common law or any statute referenced earlier in this subsection is in conflict with a will, the will controls whether or not specific reference is made in the will to this section. However, notwithstanding the rest of this subsection, a personal representative may not be relieved of the duty to act in good faith and with honest judgment.

CREDIT(S)

[2011 c 327 § 3, eff. Jan. 1, 2012; 2003 c 254 § 3, eff. July 27, 2003; 1997 c 252 § 66; 1988 c 29 § 3; 1985 c 30 § 7. Prior: 1984 c 149 § 10; 1974 ex.s. c 117 § 21.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

APPENDIX B

CIVIL RULES

C

West's Revised Code of Washington Annotated Currentness
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
4. Parties (Rules 17-25)
RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

(-) Designation of Parties. The party commencing the action shall be known as the plaintiff, and the opposite party as the defendant.

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or Be Sued. [Reserved.]

(c) Infants, or Incompetent Persons.

(1) *Scope.* Generally this rule does not affect statutes and rules concerning the capacity of infants and incompetents to sue or be sued.

(2) *Guardian Ad Litem for Infant.* [Reserved. See RCW 4.08.050.]

(3) *Guardian Ad Litem for Incompetents.* [Reserved. See RCW 4.08.060.]

(d) Actions on Assigned Choses in Action. [Reserved. See RCW 4.08.080.]

(e) Public Corporations.

(1) *Actions By.* [Reserved. See RCW 4.08.110.]

(2) *Actions Against.* [Reserved. See RCW 4.08.120.]

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
4. Parties (Rules 17-25)
RULE 24. INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action:

(1) When a statute confers a conditional right to intervene; or

(2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirements, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all the parties as provided in rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

Current with amendments received through 11/15/11

(C) 2012 Thomson Reuters.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

West's Revised Code of Washington Annotated Currentness
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
7. Judgment (Rules 54-63)
RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) *Motion.* Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) *Notice.* Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) *Service.* The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) *Statutes.* Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

CREDIT(S)

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.