 74932-3

NO. 74932-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

A. SHANE ROESER,

Appellant

v.

ESTATE OF KIMBERLY ANN BLOWERS,

Respondent

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Court of Appeals
Division I
State of Washington

BRIEF OF APPELLANT

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I. INTRODUCTION

Kimberly Ann Blowers, a resident of Florida, died in a single-car accident near Colfax, Washington in July 2015. At that time she and appellant A. Shane Roeser had been living together in Tampa, Florida for three years. Ms. Blowers and Mr. Roeser had planned to marry. Their wedding was to take place only a short time after the date on which Ms. Blowers died.

Ms. Blowers' sole heir is her minor daughter, Layla. Daniel Leininger, also a Florida resident, is Layla's father. He and Ms. Blowers were married at one time, but had been divorced for many years at the time of Ms. Blowers' death.

The accident occurred while Jonathan Scholz, a friend of Mr. Roeser's, was taking Ms. Blowers for a drive. Both Ms. Blowers and Mr. Scholz died at the scene. Ms. Blowers did not leave a will. The only significant asset of her estate is the cause of action against the estate of Mr. Scholz for the negligence that caused Ms. Blowers' death.

Although a probate proceeding was opened in Florida in August 2015, that matter proceeded slowly. As late as November 16, 2015, no personal representative had been appointed in Florida. To ensure that the negligence action against the tortfeasor's estate would be prosecuted promptly and solely for Layla's benefit, Mr. Roeser commenced a

Washington probate proceeding on September 30, 2015, and was appointed as personal representative. On behalf of Ms. Blowers' estate, Mr. Roeser filed a creditor's claim and then a negligence action against the estate of Mr. Scholz.

After he was finally appointed as personal representative of Ms. Blowers' estate in Florida, Mr. Leininger filed a motion to dismiss the Washington probate proceeding. A court commissioner granted the motion, and the superior court denied Mr. Roeser's motion for revision of the commissioner's order.

The superior court erroneously concluded that the Washington proceeding was improperly commenced because Mr. Roeser did not give Layla advance notice of Mr. Roeser's application for nonintervention powers. The court also erred in dismissing the Washington probate proceeding on this basis.

Without a recognized legal basis for doing so, a superior court may not decline to exercise its jurisdiction over a case that is properly before it. In this case the court dismissed the Washington probate proceeding because it simply chose not to exercise its jurisdiction. Because it had no statutorily or judicially recognized basis for abandoning the case, the superior court erred.

Dismissal of the Washington probate proceeding was also mistaken because the decedent died in Washington, death was the result of an act committed in Washington, and the only asset of the estate is the resulting cause of action against a Washington defendant.

The evidence shows that as personal representative, Mr. Roeser had done and would have continued to do a better job of protecting Layla's interests than Mr. Leininger had done or will do in that role. The court therefore erred in finding that dismissal of the Washington probate proceeding would not prejudice Layla. In dismissing the proceeding, the court also erred by effectively removing Mr. Roeser as personal representative without cause.

Finally, the court erred by depriving Mr. Roeser of what should be his right, as the surviving partner in a committed intimate relationship, to serve as personal representative of Ms. Blowers' estate.

This Court should reverse the decision of the superior court and should direct that court to reinstate the Washington probate proceeding and to restore Mr. Roeser to his role as personal representative.

II. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

A. Assignments of Error

1. The superior court erred in dismissing the Washington probate proceeding. CP 42.

2. The superior court erred in cancelling the letters of administration that had been issued to Mr. Roeser. CP 42.

3. The superior court erred in finding or concluding that "this Washington probate was commenced without advance notice to the minor sole heir required by law of his [Mr. Roeser's] application for nonintervention powers," to the extent the court concluded that such advance notice was required for proper commencement of the probate proceeding. CP 41.

4. The superior court erred in dismissing the Washington probate proceeding on the ground that it was "commenced without advance notice to the minor sole heir required by law of his [Mr. Roeser's] application for nonintervention powers." CP 41-42.

5. The superior court erred in dismissing the Washington probate proceeding on the ground that "a Personal Representative has been

appointed in Florida who may proceed with the wrongful death action in this State." CP 42.

6. The superior court erred in finding that "no prejudice to the minor heir will accrue if this matter is dismissed in its entirety." CP 42.

7. The superior court erred in dismissing the Washington probate proceeding on the ground that "no prejudice to the minor heir will accrue if this matter is dismissed in its entirety." CP 42.

8. The superior court erred in declining to exercise its jurisdiction without any legally recognized ground for doing so. CP 42.

B. <u>Issues Pertaining to Assignments of Error</u>

1. Did the superior court err in dismissing the action based on its finding that Mr. Roeser failed to give advance notice to the minor heir of Mr. Roeser's application for nonintervention powers? (Assignments of Error 1, 2, 3, and 4).

2. Did the superior court err in declining to exercise its jurisdiction without any legally recognized ground for doing so? (Assignments of Error 1, 2, 5, 6, 7, and 8).

3. Because a probate proceeding in Washington is appropriate in a case in which the decedent died in Washington, death was the result of an act committed in Washington, and the only asset of the estate is the resulting cause of action against a Washington defendant, did the superior

court err in dismissing the probate proceeding? (Assignments of Error 1, 2, 5, 6, 7, and 8).

4. Did the trial court err in finding that no prejudice to the minor heir would result from dismissal of the Washington probate proceeding and in dismissing the proceeding on that basis? (Assignments of Error 1, 2, 6, and 7).

5. In dismissing the probate proceeding, did the superior court err by removing Mr. Roeser as personal representative without cause? (Assignments of Error 1 and 2).

6. Should the surviving partner in a committed intimate relationship have a right to serve as personal representative of the deceased partner's estate, and if so did the superior court err by depriving Mr. Roeser of that right? (Assignments of Error 1 and 2).

III. STATEMENT OF THE CASE

A. Mr. Roeser's Relationship with Ms. Blowers and Layla

Mr. Roeser was born and raised in Washington State. CP 51. His father founded Transmarine Propulsion Systems, Inc., a Seattle-based marine engineering and repair company that services large ocean-going vessels. Id. Mr. Roeser has worked for or run Transmarine since 1996. CP 151. In 2007, he moved to Tampa, Florida to open Transmarine's operations facility there. CP 51, 151.

Ms. Blowers had at one time been married to Mr. Leininger, but at the time Ms. Blowers died she and Mr. Leininger had been divorced for many years. CP 29. Her relationship with her ex-husband was strained, distant, and usually in conflict. CP 51.

At the time of her death, Ms. Blowers and Mr. Roeser had been in a romantic relationship for several years. CP 149. They had been living together for three years in Mr. Roeser's home in Tampa. Id. They were engaged to be married. Id. Their wedding was to take place only a short time after the date on which Ms. Blowers died. CP 92. Ms. Blowers was the love of Mr. Roeser's life. CP 53.

Throughout the period while Mr. Roeser and Ms. Blowers lived together, Mr. Roeser provided all of Ms. Blowers' financial support. CP 52. She was never employed during that time. Id. Mr. Roeser provided her with a home, all costs of living, and vehicles to use. Id. He also paid health insurance premiums for both Ms. Blowers and Layla. Id. Mr. Roeser provided health insurance for Layla because her father, Mr. Leininger, was unable to provide that insurance. Id. Mr. Leininger has a somewhat difficult employment history and is not able to provide much in the way of financial support to Layla. CP 150.

During the three years preceding her death, Ms. Blowers, Layla, and Mr. Roeser were very much a family. CP 52. Ms. Blowers shared

custody of Layla with Mr. Leininger, who lived ninety miles from Tampa. Id. But Layla spent virtually every weekend all year long with Ms. Blowers and Mr. Roeser. Id. Since Mr. Leininger would not transport Layla to or from Tampa, Mr. Roeser and Ms. Blowers would often drive to pick up Layla on Fridays, spend the weekend with her in Tampa, and then drive Layla back to Mr. Leininger's home in time for her to be at school on Monday morning. Id. Layla also spent Thanksgiving, Christmas, and Easter with Ms. Blowers and Mr. Roeser. Id. She also spent all of the summer of 2014 and the summer of 2015, up to the time of Ms. Blowers' death, with Mr. Roeser and Ms. Blowers. Id.

Mr. Roeser took Ms. Blowers' connection to her daughter seriously and embraced Layla as his own. CP 52. The three of them enjoyed many wonderful times together as a family. Id. Mr. Roeser was concerned about Layla's welfare, her physical and emotional health, and her comfort and support. Id. Layla prospered with the attention, concern, and affection that Mr. Roeser, together with Ms. Blowers, devoted to her.

B. <u>The Accident and its Immediate Aftermath</u>

Beginning in June 2015, Mr. Roeser, Ms. Blowers, and Layla drove in an RV across the country from Florida to California, and then to Washington where they visited Mr. Roeser's friends and family. CP 53. Along the way they stayed with Ms. Blowers' brother in Austin,

Texas. Id. This same brother, Travis Cody Whittle, signed a declaration supporting Mr. Roeser's appointment as personal representative in the Washington probate proceeding. CP 53, 146-148.

On their eastward journey back to Tampa, Ms. Blowers, Layla, and Mr. Roeser stopped to visit Mr. Roeser's friend Jonathan Scholz at the farm where Mr. Scholz lived near Colfax, Washington. CP 53. Everyone, including Layla, had a great time. Id. The last night they were there, Mr. Roeser went to bed early since he was to resume driving them back to Tampa the next morning. Id.

When Mr. Roeser went to bed, Ms. Blowers and Mr. Scholz were still up talking. CP 54. A few hours later Mr. Roeser was awakened by the police and informed that Mr. Scholz had taken Ms. Blowers on a drive, had lost control of his car at high speed, and had killed both of them. Id. The available information indicates that the accident was due solely to the fault of the driver, Mr. Scholz. CP 99, 156-160.

Mr. Roeser then took care of all that needed to be done. CP 54. He told Layla what had happened to her mother, comforted Layla, and flew back to Florida with her. Id. He paid to bring Layla back home to Florida. Id. He took care of all issues and expenses relating to Ms. Blowers' death. Id. Insurance that he carried on his motorhome paid for the funeral home expenses in Colfax, where Ms. Blowers was cremated

after the medical examiner did an autopsy. Id. Mr. Roeser arranged and paid for the memorial service in Vero Beach, Florida which was held at the hotel where Ms. Blowers most liked to stay when she and Mr. Roeser traveled there. Id. And he continued to pay for Layla's health insurance. Id.

C. Mr. Roeser's Qualifications as Personal Representative in the Washington Probate Proceeding

Mr. Roeser is the CEO and President of Transmarine Propulsion Systems, Inc. CP 51. Through Mr. Roeser's efforts the Transmarine operation in Tampa, which he started from nothing in 2007, is now the main business operation of the company and services marine vessels operating in the Gulf of Mexico and the nearby Atlantic. Id. He is a prudent, responsible, successful and conscientious business person. CP 51, 151-152. He is well suited to carry out the responsibilities of a personal representative. CP 51.

Although he now lives in Florida, Mr. Roeser has strong connections to Washington, the state where the negligence action against Mr. Scholz's estate must be prosecuted. CP 51, 151. He was born and raised in Washington, runs the Transmarine operating facility in Seattle, and maintains business and personal properties in the Seattle area. CP 51,

151. He travels to Washington frequently on both business and personal matters. CP 51, 151.

D. The Two Probate Proceedings and the Negligence Action against Mr. Scholz's Estate

Ms. Blowers did not leave a will. CP 117, 166. Her property at the time of her death consisted only of tangible personal property of limited value. CP 117, 166. The only significant asset of Ms. Blowers' estate is the cause of action against the estate of Mr. Scholz for the negligence that caused her death. CP 153. The sole beneficiary of any compensation obtained through that action – and the sole heir of Ms. Blowers -- is Layla. CP 30, 117, 152.

Although Ms. Blowers' father, Timothy Blowers, opened a probate proceeding in Florida in August 2015, that matter proceeded slowly. CP 43-46, 55, 167. As late as November 16, 2015 – four months after Ms. Blowers' death -- no personal representative had been appointed in Florida. CP 43-46.

To ensure that the negligence action would be prosecuted promptly and solely for Layla's benefit, Mr. Roeser commenced a Washington probate proceeding on September 30, 2015, by petitioning the superior court for his appointment as personal representative. CP 166-168. Both of Ms. Blowers' siblings filed declarations in support of the appointment of

Mr. Roeser. CP 144-148. They both declared that they trusted Mr. Roeser, that he was well-qualified, and that he would be the best personal representative of Ms. Blowers' estate. Id.

On October 12, 2015, the court appointed Mr. Roeser as personal representative. CP 138-139. The order of that date also granted Mr. Roeser nonintervention powers, directed the clerk to issue letters of administration to Mr. Roeser, and authorized him to pursue any available wrongful death or survival actions for the exclusive benefit of Layla. Id. In the event such an action was successful, the order (1) required Mr. Roeser to petition the court for a final order authorizing distribution of the proceeds of the action solely for Layla's benefit, (2) declared that such distribution would be for her sole benefit, and (3) required Mr. Roeser to secure such proceeds to assure that they be used solely for Layla's health, safety, welfare and upbringing. Id.

Mr. Roeser sought to become the personal representative not only to advance the negligence action for Layla's benefit, but also to prevent Mr. Leininger, Ms. Blowers' aunt, and Ms. Blowers' father from personally acquiring any of the proceeds from that action. CP 55-56. Mr. Roeser was concerned that one or more of these relatives would seek to acquire some of the proceeds and divert them to their own use. CP 56.

On November 16, 2015, Mr. Roeser filed a creditor's claim on behalf of Ms. Blowers' estate against the estate of Mr. Scholz in the superior court for Whitman County, where Mr. Scholz had lived. CP 53, 56, 99-100. In an email dated November 24, 2015, Mr. Roeser advised Layla's father Daniel Leininger, and through him Layla, that Mr. Roeser had been appointed as personal representative in the Washington probate proceeding and that the creditor's claim had been filed. CP 56, 92. He attached to that email a copy of the order that had appointed him and that had granted him nonintervention powers. CP 56, 91-95.

On November 17, 2015, Mr. Leininger, Ms. Blowers' ex-husband, was appointed as personal representative in the Florida probate proceeding CP 132.

On December 15, 2015, the estate of Jonathon Scholz rejected the creditor's claim that Mr. Roeser had filed on behalf of Ms. Blowers' estate. CP 103. As personal representative of Ms. Blowers' estate, Mr. Roeser then filed a negligence action against Mr. Scholz's estate. CP 29.

E. Dismissal of the Washington Probate Proceeding and the Resulting Removal of Mr. Roeser as Personal Representative

1. The court commissioner's ruling

On December 22, 2015, Mr. Leininger filed a motion to dismiss the Washington probate proceeding. CP 116-122. In ruling on the motion on January 4, 2016, a court commissioner made the following findings:

> (1) "that this Washington probate administration was commenced without advance notice to the minor sole heir required by law of his [Mr. Roeser's] application for nonintervention powers;"
>
> (2) "that a Personal Representative has been appointed in Florida who may proceed with the wrongful death action in this State;" and
>
> (3) "that no prejudice to the minor heir will accrue if this matter is dismissed in its entirety." CP 41-42.

Based on these findings, the court commissioner dismissed the Washington probate proceeding and cancelled the letters of administration that had been issued to Mr. Roeser. CP 42.

By crossing out the following language in Mr. Leininger's proposed order, the court commissioner expressly rejected his arguments:

(1) that the Washington probate administration "was commenced based on substantial and relevant misrepresentations by the petitioner Shane Alexander Roeser;"

(2) "that this Estate appears to be insolvent and nonintervention powers were improperly granted;"

(3) "that Mr. Roeser, upon being appointed, failed to provide the notice to the sole heir required by law of his appointment and pendency of the probate;"

(4) that "for all of the above reasons the above-captioned proceeding lacks jurisdiction over the rights of the sole heir"; and

(5) that "the Petition of Mr. Roeser was improvidently granted based on his misrepresentations." CP 41-42.

2. The motion for revision of the commissioner's ruling, and the decision of the superior court

Mr. Roeser then filed his motion for revision of the commissioner's order. CP 28-36. Mr. Roeser first argued that Washington's superior courts have jurisdiction over the administration of the estate of a nonresident who dies in Washington, that there were no sufficient grounds for dismissing the Washington proceeding, and that the court commissioner therefore erred by doing so. CP 28-30, 32-33. He further argued that Washington was the logical jurisdiction in which to

probate Ms. Blowers' estate, since she died in Washington and since the only asset of the estate was an action against the estate of a Washington resident -- Mr. Scholz – for negligently causing her death. CP 32-33.

Second, Mr. Roeser argued that Washington law grants the surviving spouse first priority to serve as personal representative, that the surviving partner in a committed intimate relationship should be given that same priority, and that he was in such a relationship with Ms. Blowers. By dismissing the Washington probate proceeding, Mr. Roeser concluded, the commissioner wrongfully deprived Mr. Roeser of what should be his right to serve as personal representative. Instead, the commissioner effectively elevated Mr. Leininger to a preferred status, despite the absence of any legal justification for conferring such status on a long-divorced ex-spouse. CP 9-10, 33-34.

Third, Mr. Roeser contended that by dismissing the Washington probate proceeding, the commissioner effectively removed Mr. Roeser as personal representative without any evidence of the malfeasance required by statute. CP 34-35.

Fourth, Mr. Roeser argued that he was and would continue to be a better personal representative than Mr. Leininger, that Mr. Leininger sought to serve as personal representative for his own personal gain, and that Mr. Roeser – by contrast -- would ensure that the proceeds of the

negligence action would be applied solely to Layla's benefit. CP 8, 12, 15, 17, 29-31, 35, 54-57.

Fifth, Mr. Roeser argued that because a personal representative was appointed in Washington before one was appointed in Florida, the commissioner should not have dismissed the Washington proceeding. CP 35.

Sixth, Mr. Roeser maintained that he had provided adequate notice of his actions to Layla. CP 35-36.

In an order dated February 19, 2016, the superior court denied Mr. Roeser's motion for revision of the commissioner's order. CP 4-5. The superior court declared that the court commissioner's order "shall be the Order of the Superior Court." CP 4.

IV. ARGUMENT

A. The Ruling to Be Reviewed, and the Standard of Review

When an appeal is taken from a superior court judge's ruling on a motion for revision of a commissioner's decision, this Court reviews the superior court's decision, not the commissioner's. *In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075, 1079 (2008).

Where the parties' arguments before the superior court were based on written materials only, this court stands in the same position as the superior court and reviews the record *de novo*. *Indigo Real Estate*

Services, Inc. v. Wadsworth, 169 Wn. App. 412, 417, 280 P.3d 506, 508 (2012). In this case the decision below was based entirely on written materials. There was no oral testimony at either the show cause hearing or the hearing on the motion for revision. Accordingly, this court reviews the record *de novo.* Id

B. The Superior Court Erred in Dismissing the Proceeding Based on Its Finding that Mr. Roeser Failed to Give Advance Notice to Layla of His Application for Nonintervention Powers

The court commissioner found that the Washington probate proceeding "was commenced without advance notice to the minor sole heir required by law of his [Mr. Roeser's] application for nonintervention powers." CP 41. This was one of the grounds on which the commissioner dismissed the action. CP 42. The superior court then adopted the commissioner's order as its own. CP 4.

It is true that when one petitions the court for nonintervention powers, he or she must notify the heirs at least ten days in advance of the hearing on the petition. RCW 11.68.041(2) & (3).[1] After he had been appointed as personal representative, Mr. Roeser provided Layla, through Mr. Leininger, with a copy of the order that had granted him nonintervention powers. CP 56, 91-95. Mr. Roeser did not, however, notify Layla in advance of his application for those powers. But the

[1] There are exceptions to this requirement, but none of exceptions applies here.

superior court's decision to dismiss the probate proceeding on this basis was wrong for at least two reasons.

First, contrary to the superior court's conclusion, providing advance notice of a request for nonintervention powers is not a requirement for *commencing* a probate proceeding. The superior court erred in concluding that by failing to give such advance notice, Mr. Roeser failed to commence the proceeding in the manner "required by law." CP 41.

Indeed, except in the case of a surviving spouse or registered domestic partner, commencement of a probate proceeding does not require advance notice to the heirs of *anything*. A person may commence a proceeding for probate of the estate of an intestate decedent simply by filing an application for appointment of a personal representative and for issuance of letters of administration. RCW 11.28.110. If there is a surviving spouse or registered domestic partner, that spouse or partner is entitled to advance notice of the hearing on the appointment of a personal representative. RCW 11.28.131. Otherwise, no advance notice to the heirs is required. Id.; RCW 11.28.110.

At the time of her death, Ms. Blowers was unmarried and had no registered domestic partner. Therefore, to commence the probate

proceeding, Mr. Roeser was not required to give Layla any advance notice.

The Washington probate proceeding was properly commenced. In conformance with RCW 11.28.110, Mr. Roeser filed a petition asking to be appointed as personal representative and asking the court to issue letters of administration to him. The court then properly appointed him as personal representative and directed the clerk to issue letters of administration. CP 138-139. Advance notice to the heirs of the petitioner's request for nonintervention powers is simply not a requirement for proper commencement of a probate proceeding.

Second, the lack of advance notice to Layla of Mr. Roeser's request for nonintervention powers was not a ground on which the superior court could properly dismiss the Washington probate proceeding. Although RCW 11.68.041 requires such notice, nothing in that statute states that the failure to give the notice warrants dismissal of the entire proceeding. There appears to be no case law requiring dismissal on this ground either. CP 121.

Moreover, the initial grant of nonintervention powers is not cast in stone. If at any time after the grant of nonintervention powers it appears that the personal representative has abused his or her powers or has neglected the estate, an heir may ask the court to restrict those powers or

to remove him or her entirely. RCW 11.68.070; RCW 11.28.250. In addition, RCW 11.68.050(2) expressly contemplates that *after* the court has granted nonintervention powers to the personal representative, an heir may petition the court to restrict those powers.[2]

In other words, if an heir is dissatisfied with the exercise of the personal representative's powers, the heir has a remedy that neither requires nor even contemplates dismissal of the probate proceeding itself. Layla, through Mr. Leininger, received actual notice that the court had granted nonintervention powers to Mr. Roeser. CP 56, 91-95. Given the remedies provided by RCW 11.68.070, 11.28.250, and 11.68.050(2), the fact that Layla received no advance notice of Mr. Roeser's application for nonintervention powers did not deprive her of the opportunity to contend that those powers should be restricted or withdrawn. The superior court erred by dismissing the Washington probate proceeding based on the lack of advance notice of Mr. Roeser's request for nonintervention powers.

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[2] "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."

C. The Superior Court Erred by Declining to Exercise Its Jurisdiction without any Legally Recognized Ground for Doing So

1. The court had jurisdiction over this matter and over the determination of Layla's rights

The superior courts of this state have "original subject matter jurisdiction over the probate of wills and the administration of estates of . . . deceased individuals in all instances, including without limitation . . . (b) When a nonresident of the state dies in the state." RCW 11.96A.040. Ms. Blowers, a resident of Florida, died in Washington. The superior court plainly had jurisdiction over the administration of Ms. Blowers' estate.

Although Mr. Leininger argued that the Washington court lacked jurisdiction, the superior court correctly rejected that argument. The court commissioner crossed out the portion of Mr. Leininger's proposed order that read, "for all of the above reasons the above-captioned proceeding lacks jurisdiction over the rights of the sole heir." CP 42. Nothing in the commissioner's order indicates that the court lacked jurisdiction over the estate or the rights of Layla, the sole heir. The superior court ruled that the commissioner's order "shall be the Order of the Superior Court." CP 4. Thus, the superior court agreed that it had jurisdiction over this matter

and over the determination of Layla's rights with regard to the negligence action against Scholz's estate.

2. Without a legally recognized ground, a superior court may not decline to exercise its jurisdiction

Absent some legally recognized ground for doing so, a superior court may not simply choose not to exercise its jurisdiction. The person who commenced the proceeding over which the court has jurisdiction is entitled to have the court exercise that jurisdiction, unless a statute or established rule of law allows the court to do otherwise.

In *Acme Finance Co. v. Huse*, 192 Wash. 96, 73 P.2d 341 (1937), the plaintiff sought a declaration that the Washington Small Loans Act, enacted but not yet in effect, was unconstitutional. Id. at 97-98, 101. Plaintiff proceeded under the Washington Declaratory Judgment Act, which at the time provided: "'A person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of . . . validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.'" *Acme Finance*, 192 Wash. at 101 (quoting Rem.Rev.Stat. § 784-2, Supp.). The trial court ruled in plaintiff's favor, finding the Small Loans Act unconstitutional. Id. at 100. Defendants, the State Director of Licenses

and the State Attorney General, contended that the trial court did not have subject matter jurisdiction over the action. Id. at 99.

Rejecting defendants' argument, the Washington Supreme Court held not only that the trial court had jurisdiction over the matter but that the trial court was *required to exercise that jurisdiction*. *Acme Finance*, 192 Wash. at 108. Because the plaintiff's complaint presented a justiciable controversy, the superior court was "*compelled to take jurisdiction and render judgment*" under the Declaratory Judgment Act. Id. at 108 (emphasis added). The court further held that by proceeding under the Declaratory Judgment Act, a plaintiff may "*require* our courts to declare, in the form of a judgment, whether or not a statute is constitutional." Id. at 107 (emphasis added).

By stating that a person whose rights are affected by a statute "may have determined any question of . . . [its] validity," the Declaratory Judgment Act conferred jurisdiction on the superior courts to determine such questions. *Acme Finance*, 192 Wash. at 101, 108 (quoting Rem.Rev.Stat. § 784-2, Supp.). Having been granted that jurisdiction, the superior courts are required to exercise it. Id. at 107-108. Here, RCW 11.96A.040 vests the superior courts with "original subject matter jurisdiction over the probate of wills and the administration of estates…when a nonresident of the state dies in the state." As was the trial

court in *Acme Finance,* the superior court in the present case was required to exercise the jurisdiction conferred on it by statute.

Of course, there are recognized circumstances under which a court may properly decline to exercise its jurisdiction. Some of these are statutory. For example, under the Uniform Child Custody Jurisdiction and Enforcement Act, "A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." RCW 26.27.261(1). The statute goes on to specify the factors that the court must consider in making such a determination.[3]

One of the examples recognized by case law is the principle of interstate comity. Under this doctrine, a Washington court may decline to exercise jurisdiction over an action against another state if assumption of jurisdiction "'would impinge unnecessarily upon the harmonious interstate relations which are part and parcel of the spirit of cooperative federalism.'" *Fernandez v. State ex rel. Dep't of Highways*, 49 Wn.App. 28, 38, 741 P.2d 1010 (1987) (quoting *Simmons v. State*, 670 P.2d 1372, 1385 (Mont.1983)).

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[3] The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act includes a similar section authorizing the court to decline jurisdiction and listing the factors to be considered in making that decision. RCW 11.90.250.

Under the appropriate circumstances the doctrine of primary jurisdiction permits a court to decline the exercise of its jurisdiction, referring the case instead to an administrative agency. When both the court and an administrative agency have jurisdiction over an issue, the doctrine of primary jurisdiction is applied to determine whether the court should retain the action or refer the issues to an administrative agency for the initial decision. *D.J. Hopkins, Inc. v. GTE Northwest, Inc.*, 89 Wash.App. 1, 7, 947 P.2d 1220 (1997).

Washington courts also recognize the doctrine of *forum non conveniens*. Under this doctrine, a Washington court may decline to exercise jurisdiction over a case when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum. *Sales v. Weyerhaeuser Corp.*, 163 Wn.2d 14, 20, 177 P.3d 1122 (2008). "In deciding whether to decline its own jurisdiction in favor of another forum, a court must balance certain private and public factors that determine the convenience of litigation in the alternative forum as opposed to the host forum." Id.

3. Here the court declined to exercise its jurisdiction, but without any statutorily or judicially recognized reason

The superior court dismissed the Washington probate proceeding on the grounds (1) that Mr. Leininger, as personal representative in the

Florida proceeding, could pursue the wrongful death action in Washington; and (2) that dismissal of the Washington probate proceeding would not result in any prejudice to Layla. CP 4, 41-42.[4] Neither of these, of course, is a reason for dismissing a probate proceeding over which the superior court plainly had jurisdiction. Although the court did not expressly say so, it dismissed the case because it declined to exercise its jurisdiction.

But neither Mr. Leininger nor the superior court cited any legally recognized basis on which the court could properly decline to exercise jurisdiction. Mr. Leininger did not point to any statute or judicial doctrine that would permit the court to refuse to act on a case that was properly before it. And the court identified no such statute or doctrine.

Accordingly, the superior court was required to exercise the jurisdiction conferred on it by statute. *Acme Finance*, 192 Wash. at 107-108. With no statutorily or judicially recognized reason for declining to exercise its jurisdiction, the court erred in dismissing the Washington probate proceeding.

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[4]The superior court also dismissed the case because it was "commenced without advance notice to the minor sole heir required by law of his [Mr. Roeser's] application for nonintervention powers." CP 41-42. Mr. Roeser has already explained that the superior court erred in dismissing the case on that basis.

D. A Probate Proceeding in Washington Is Appropriate in a Case in which the Decedent Died in Washington, Death Was the Result of an Act Committed in Washington, and the Only Asset of the Estate Is The Resulting Cause of Action against a Washington Defendant

"A right of action for wrongful death is an asset sufficient in itself to warrant the appointment of an administrator, or an administratrix as the case may be, although that is the only property of the decedent within the jurisdiction." *Lund v. City of Seattle*, 163 Wash. 254, 262-263, 1 P.2d 301 (1931). The situs of a cause of action is the jurisdiction where it may be enforced. *In re Breese's Estate*, 51 Wn.2d 302, 307, 317 P.2d 1055 (1957). Thus, the cause of action against Mr. Scholz's estate for the death of Ms. Blowers exists in Washington, where Mr. Scholz resided and where his estate is being probated. The existence of the cause of action in Washington warranted the commencement of a probate proceeding and the appointment of a personal representative in this state. *Lund*, 163 Wash. at 262-263.

On facts with a more distant relationship to Washington than those of the present case, the Washington Supreme Court has upheld the appointment of a personal representative in this state for the prosecution of an action arising out of a nonresident's death. *In re Waldrep's Estate*, 49 Wn.2d 711, 306 P.2d 213 (1957). In that case an Alabama resident, on a flight from Japan to Washington, died when the plane crashed in British

Columbia. Id. at 712. The decedent's sole heir was a minor daughter who lived in New Mexico. Id. The superior court of Walla Walla County, Washington appointed a personal representative of the decedent's estate. Id. at 715. The personal representative, in turn, brought a wrongful death action in federal district court in Washington against the airline, which did business in Washington and which allegedly committed acts of negligence in Washington. Id. at 712, 714.

The airline filed a petition to revoke the letters of administration issued to the personal representative, contending that the superior court lacked jurisdiction. *Waldrep's Estate*, 49 Wn.2d at 712-713. The Washington Supreme Court held that the superior court had jurisdiction and that appointment of a personal representative in Washington was appropriate. Id. at 714-716.

In the present case the connection to Washington is stronger than in *Waldrep's Estate*. In both cases the negligence occurred in Washington and the defendant was subject to suit in Washington, but in the present case the decedent also died in Washington. The commencement of a probate proceeding in Washington and the appointment of a personal representative of Ms. Blowers' estate here were appropriate.

E. The Trial Court Erred in Finding that Layla's Interests Would Not Be Prejudiced by Dismissal of the Washington Probate Proceeding, and in Dismissing the Proceeding on that Basis

As the moving party, Mr. Leininger bore the burden of proving any facts on which the court based its decision to dismiss the Washington probate proceeding and to cancel the letter of administration that had been issued to Mr. Roeser. The court's finding that dismissal of the Washington probate proceeding would not prejudice Layla's interests necessarily included a finding that Mr. Leininger would protect Layla's interests as well as Mr. Roeser would. The evidence does not support such a finding.

The evidence shows that Mr. Roeser is dedicated to diligently pursuing the action against the Scholz estate and to ensuring that all the proceeds from that action go to Layla's benefit. CP 54-57. While Mr. Leininger, Ms. Blowers' father, and Ms. Blowers' aunt were squabbling about what to do, Mr. Roeser was the person who actually took the necessary steps to prosecute the action against the Scholz estate. CP 55-57. As late as November 16, 2015 – more than four months after Ms. Blowers' death -- no personal representative had been appointed in Florida. CP 43-46. Mr. Leininger's declaration offers no explanation for this delay. CP 123-124. It was Mr. Roeser who moved forward, securing his appointment as personal representative in Washington, filing a

creditor's claim against the Scholz estate, and then suing the Scholz estate on Layla's behalf. CP 29, 53, 56, 99-100.

Both of Ms. Blowers' brothers submitted declarations in support of Mr. Roeser's appointment as personal representative. CP 144-148. Both these brothers declared that they trusted Mr. Roeser, that he was an experienced and reputable business person, and that Mr. Roeser was the best person to serve as personal representative. Id. There are no declarations from anyone, other than Mr. Leininger himself, supporting Mr. Leininger's appointment as personal representative in Florida.

In his December 29, 2015 declaration, Mr. Roeser testified about his concern that Mr. Leininger would seek to access the proceeds of the action against the Scholz estate for himself. CP 56. Mr. Leininger offered no testimony in response to this evidence.

The evidence shows that Mr. Roeser has done and would have continued to do a far better job of protecting Layla's interests as personal representative than Mr. Leininger did or will do. Denial of Mr. Leininger's motion to dismiss the Washington probate proceeding would have allowed Mr. Roeser to continue serving Layla's best interests. Dismissal of the Washington proceeding, on the other hand, gave Mr. Leininger control over the action against the Scholz estate and any proceeds from that action. The evidence fails to support the court's

finding that dismissal of the Washington proceeding will not prejudice Layla. Since this finding is not supported by the evidence, the superior court erred in dismissing the proceeding based on this finding.

F. In Dismissing the Probate Proceeding, the Superior Court Erred by Removing Mr. Roeser as Personal Representative without Cause

The dismissal of the probate proceeding had the effect of removing Mr. Roeser as personal representative. The Washington State Supreme Court has held that a personal representative may be removed only for fiduciary malfeasance. Because there was no evidence that Mr. Roeser had breached his fiduciary duty or engaged in any wrongful conduct as personal representative, the superior court erred in removing him.

A court may remove a personal representative only if certain circumstances are present:

> 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.[5]

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[5] *See also* RCW 11.68.070 (Allowing removal only "[i]f 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."); *Matter of Estate of Hookom*, 52 Wn. App. 800, 805, 764 P.2d 1001, (1988) ("Under this statute (RCW

RCW 11.28.050

No party has ever alleged that Mr. Roeser has engaged or will engage in fiduciary malfeasance. Thus, the superior court's decision can only be based on the language allowing removal "for any other cause or reason which to the court appears necessary." But the Washington State Supreme Court has interpreted this provision to be limited. "The court may remove a personal representative under the 'for any other cause' provision **only if the conduct is similar to the other grounds listed in the statute**." *In re Estate of Jones*, 152 Wash. 2d 1, 11, 93 P.3d 147, 152 (2004) (emphasis added). The other grounds listed in the statute are (1) waste, embezzlement, or mismanagement, (2) fraud, (3) incompetence, or (4) neglect.

There is no evidence that Mr. Roeser engaged in any wrongful conduct of any kind, let alone any malfeasance of the sort described in RCW 11.28.050. Rather, he has expressed his commitment to prosecuting the action against the tortfeasor's estate for the purpose of assisting Layla. Because there were no grounds upon which the court could have properly removed Mr. Roeser as personal representative, and because dismissal of

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11.68.070), the court may remove or restrict the powers of a nonintervention executor only if it is shown the executor has not faithfully discharged his trust, and, as a result, has damaged an interested party.")

the probate proceeding in fact removed him, the court erred by dismissing the Washington proceeding.

G. The Superior Court Erred by Depriving Mr. Roeser of What Should Be His Right, as Surviving Partner of a Committed Intimate Relationship, to Serve as Personal Representative

A surviving spouse has first priority to serve as personal representative of a decedent's estate. RCW 11.28.120(1). Although no Washington case has yet held expressly that the surviving partner in a committed intimate relationship ("CIR") is entitled to the same priority as a surviving spouse, the trend is toward expanding the rights of CIR partners. Mr. Roeser was in a CIR with Ms. Blowers. Accordingly, and since at the time of her death Ms. Blowers was closer to Mr. Roeser than to any other adult, the superior court should have allowed Mr. Roeser to continue serving as personal representative of Ms. Blowers' estate. By dismissing the Washington probate proceeding, the superior court erroneously deprived Mr. Roeser of that opportunity.

In 1984, the Washington Supreme Court adopted a general rule requiring a just and equitable division of property after the end of what was then called a meretricious relationship and is now called a CIR. *In re Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984).[6] Before

[6] Recognizing the negative connotations associated with the earlier term "meretricious relationship," the supreme court substituted the term "committed intimate relationship" in *Olver v. Fowler*, 161 Wn.2d 655, 657 n.1, 168 P.3d 348 (2007).

Lindsey, Washington courts had followed the general rule that property acquired by a man and a woman not married to each other, but living together as husband and wife, belongs to the one in whose name the legal title to the property stands. Id. at 302. *Lindsey* gave formal recognition to the rights of partners in a CIR.

In 1995, the court enhanced the ability of CIR partners to protect their rights by holding that property acquired during the relationship is presumed to be owned by both parties and is therefore before the court for a fair and equitable division. *Connell v. Francisco*, 127 Wn.2d 339, 351-352, 898 P.2d 831 (1995). In so holding, the court observed that "income and property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage." Id. at 351.

Neither *Lindsey* nor *Connell* involved the termination of a meretricious relationship by the death of a partner. But *Olver v. Fowler*, 161 Wn.2d 655, 168 P.3d 348 (2007), presented that scenario. In *Olver* the supreme court held that the law of CIRs applies not only when the partners end the relationship while they are both alive, but also when the CIR is terminated by a partner's death. Id. at 668-672.

Finally, in *In re Estate of Langeland*, 177 Wn.App. 315, 312 P.3d 657 (2013), the court considered the effect of two conflicting

presumptions. One was the presumption that the estate inventory is correct. Id. at 319. The other was the presumption in favor of the surviving partner in a CIR, when the other partner dies, that all income and property acquired during the relationship were jointly owned. Id. at 325. The court held that the CIR presumption prevailed over the presumption that an estate inventory is correct. *Id.* at 319, 327.

As this history demonstrates, Washington courts have steadily expanded the rights of CIR partners and have recognized that the surviving partner is entitled to special consideration under the law. This logic can be readily extrapolated to the appointment of a personal representative. Just as property acquired during the CIR is presumed to be jointly owned in the same manner that property acquired during a marriage is presumed to be community property, so when it comes to service as personal representative a surviving CIR partner should be entitled to the same preferred status as a surviving spouse.

Mr. Roeser qualifies for this preference because he was in a CIR with Ms. Blowers at the time of her death. When analyzing whether a relationship qualifies as a CIR, courts look to the following factors: (1) cohabitation, (2) duration, (3) purpose of the relationship, (4) pooling of resources, and (5) intent of the parties. *Connell*, 127 Wn.2d at 346. Here, Mr. Roeser and Ms. Blowers had been in a long-term committed

relationship, cohabitated for a number of years, and intended to marry very soon. Mr. Roeser made his resources available to Ms. Blowers, providing all of her financial support.

Given the existence of the CIR in this case and the trend toward greater recognition of the rights of surviving CIR partners, Mr. Roeser had a right to serve as personal representative of Ms. Blowers' estate. By dismissing the case, the superior court erroneously deprived Mr. Roeser of the opportunity to exercise that right.

V. CONCLUSION

The Washington probate proceeding was properly commenced. Because Ms. Blowers died in Washington, because her death resulted from negligent acts committed here, and because the only asset of her estate is the cause of action against a Washington resident, maintenance of a probate proceeding in Washington was entirely appropriate. The superior court had jurisdiction, but without any legally recognized basis for doing so, the court simply declined to exercise its jurisdiction.

Because the evidence failed to show that as personal representative Mr. Leininger would protect Layla's interests as well as Mr. Roeser would in that role, the court erred in finding that dismissal of the Washington proceeding would not prejudice Layla. The court may not remove a personal representative without evidence of his or her malfeasance as a

fiduciary. Yet despite the absence of any such evidence, the court effectively removed Mr. Roeser as personal representative when it dismissed the Washington proceeding. As the surviving partner in a committed intimate relationship, Mr. Roeser should have the right to serve as personal representative of Ms. Blowers' estate. By dismissing the probate proceeding, the superior court deprived him of that right.

This Court should reverse the decision of the superior court and should remand the case for further proceedings. The Washington probate proceeding should be reinstated, and Mr. Roeser should be restored to his position as personal representative.

Dated this 5th day of August, 2016.

By: _____

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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

A. SHANE ROESER, Appellant, vs. ESTATE OF KIMBERLY ANN BLOWERS, Respondent.	)))))))))))	No. 74932-3-I **CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below a copy of Appellant's Brief was served as follows:

Eric Nelsen
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- [x] U.S. Mail, First Class Postage Prepaid
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 5th day of August, 2016.

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