

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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Division I
State of Washington

**REPLY BRIEF OF APPELLANT AND
ANSWER TO RESPONDENT'S MOTION
TO DISMISS APPEAL**

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I. INTRODUCTION

Mr. Roeser has standing to appeal because the superior court's order deprived him of what should be his personal right to serve as personal representative (PR). He also has standing because the order, by allowing Mr. Leininger to control the wrongful death action, will diminish the estate.

Because dismissal of the Washington probate deprived Mr. Roeser of what should be his right to act as PR, the order not only gives Mr. Roeser standing but was also erroneous. In addition, the superior court had no discretion to decline to exercise jurisdiction over the Washington probate. The order prejudiced Layla and the estate by allowing Mr. Leininger to divert proceeds of the wrongful death action to his own use. Neither "procedural defects" nor the alleged "misrepresentations" warranted dismissal of the Washington probate. Mr. Roeser should not be required to pay Mr. Leininger's attorneys' fees.

II. ARGUMENT IN ANSWER TO MOTION TO DISMISS APPEAL

A. Mr. Roeser Has Standing to Appeal the Trial Court's Order Because It Deprived Him of What Should Be His Personal Right, Based on His Status as Survivor of a Committed Intimate Relationship, to Serve as Personal Representative

An appellant is "aggrieved" and therefore has standing to appeal under RAP 3.1 if the superior court's order substantially affected his or

her “personal right.” *State ex rel. Simeon v. Superior Court*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944); *Cooper v. City of Tacoma*, 47 Wn.App. 315, 316, 734 P.2d 541(1987). A surviving spouse has first priority to serve as PR of a decedent’s estate. RCW 11.28.120(1). The surviving partner in a committed intimate relationship (“CIR”) should have the same right as a spouse to act as PR of the deceased partner’s estate. The superior court deprived Mr. Roeser of that personal right.

1. **The right of a surviving spouse or state-registered domestic partner to be the personal representative**

RCW 11.28.120 establishes a hierarchy of the persons who are entitled to serve as PR (or administrator) of the estate of a decedent who left no will. Of all the designated classes, the highest order of preference belongs to the surviving spouse or state-registered domestic partner.

Administration of an estate if the decedent died intestate . . . 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,

RCW 11.28.120.¹

Recognizing the special significance of the surviving spouse’s right to serve as PR, the Legislature provided it with a unique protection.

¹ Even where the decedent left a will appointing someone other than his or her spouse as executor/PR, the surviving spouse is entitled to administer the community property. RCW 11.28.030; *In re Odman’s Estate*, 49 Wn.2d 612, 612-614, 304 P.2d 1044 (1956).

The surviving spouse or state registered domestic partner is the only class of persons entitled to advance notice of the hearing on the appointment of a PR and issuance of letters of administration. RCW 11.28.131.

2. Extending the right to serve as personal representative to the surviving partner in a CIR is appropriate

a. Denying the surviving CIR partner the right to be personal representative is arbitrary

The sense of love, devotion, and commitment between partners in a CIR is often as strong as or stronger than that between spouses in a formal marriage. Indeed, recognition of the relationship as a CIR requires a far stronger showing of these characteristics than merely showing the existence of a marriage. To achieve the status of a legally married couple, the putative spouses need only obtain a license and then declare in the presence of a religious or judicial official and two witnesses that they take each other as spouses. RCW 26.04.140; 26.04.070.

Recognition of a CIR, by contrast, requires considerable proof of the partners' *already-existing* commitment to each other. 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 v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). An on-and-off relationship is not sufficient. There must be continuous cohabitation, and the relationship

must be stable. *In re Pennington*, 142 Wn.2d 592, 603, 14 P.3d 764 (2000). While there is no specific requirement for the length of the relationship, “duration is a significant factor.” *Connell*, 127 Wn.2d at 346.

There must be evidence-based on the couple’s actual conduct and not merely a vow of intentions—concerning the purposes of the relationship. These purposes should include friendship, love, and mutual support and caring. See *Pennington*, 142 Wn.2d at 605. The couple must have actually pooled their resources over a period of time. *Id.* at 606-607. And they must have demonstrated a mutual intent to be in a CIR. *Id.* at 604. A mutual intent to marry supports the existence of this factor; refusal of one of the partners to marry the other has the opposite effect. *Id.*

In short, if the relationship has achieved the status of a CIR, the demonstrated conduct of the partners says a lot more about their commitment to each other than the words “I do.” The facts of the present case illustrate this concept.

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.* Throughout that period, Mr. Roeser provided all of Ms. Blowers’ financial support. CP 52.

Mr. Roeser took Ms. Blowers' connection to her daughter seriously and embraced Layla as his own. CP 52. Layla spent virtually every weekend all year long with Ms. Blowers and Mr. Roeser, spent holidays with them, and spent all of the summer of 2014 and the summer of 2015, up to the time of Ms. Blowers' death, with them. *Id.* Mr. Roeser paid for Layla's health insurance. *Id.*

In the cruelest of ironies, if Ms. Blowers had lived only a week or so longer, Mr. Roeser would have been the surviving spouse and therefore entitled under existing law to serve as PR. The two were engaged to be married. CP 149. They were planning to marry a week before Ms. Blowers' death. CP 92. They then decided to delay the wedding until they had returned to Florida at the end of their trip, so that Mr. Roeser's mother could attend. *Id.* They were on their way back to Florida and would have been married upon their return if Ms. Blowers had survived the trip. *Id.* Under these circumstances, denying Mr. Roeser the right to serve as PR is arbitrary, archaic, and pointless.

b. The evolution of the law concerning CIRs supports granting the surviving partner the right to serve as personal representative

As Mr. Roeser explained in his opening brief, Washington law has evolved to expand the rights of partners in CIRs. Washington courts now recognize the following principles:

1. There must be a just and equitable division of property when partners in a CIR end the relationship during their lifetimes. *In re Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984);
2. Income and property acquired during a CIR should be characterized in a similar manner as income and property acquired during marriage. *Connell*, 127 Wn.2d at 351;
3. Property acquired during a CIR is presumed to be owned by both parties. *Id.* at 351-352;
4. 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. *Olver v. Fowler*, 161 Wn.2d 655, 668-672, 168 P.3d 348 (2007); and
5. The presumption in favor of the surviving CIR partner that income or property acquired during the relationship is jointly owned prevails over the presumption that the estate inventory is correct. *In re Estate of Langeland*, 177 Wn.App. 315, 319, 327, 312 P.3d 657 (2013).

Before *Lindsey*, the law presumed that CIR partners intended that property should be distributed according to the name in which it was held. 101 Wn.2d at 302-304. The *Lindsey* court described this rule as “archaic,” “constricting,” and “onerous.” 101 Wn.2d at 303-304. The basis for recognizing the rights of CIR partners is equity. “The equitable law governing the property of committed intimate partners has evolved over the past 90 years.” *Olver*, 161 Wn.2d at 664.

The direction of that evolution has been toward expanding the rights of CIR partners. Fairness, reason, and equity support granting the surviving partner in a CIR the right to serve as PR.

c. Giving the surviving CIR partner the right to be personal representative is also consistent with the general expansion of rights for partners in relationships other than traditional marriage

In 2007 the Legislature extended many of the same benefits enjoyed by married opposite-sex couples to unmarried same-sex couples and to unmarried partners age 62 years and older. It did so by creating the institution known as state-registered domestic partnerships. Laws 2007 Ch. 156, e.g., §§ 1, 4, 8. In 2009 it expressly conferred on domestic partners all the same rights and benefits as persons in a marriage. Laws 2009 Ch. 521, § 1. In 2012 the Legislature passed Washington's same-sex marriage law. Laws 2012 Ch. 3. And in 2015, the United States Supreme Court held that same-sex couples have a constitutionally protected right to marry. *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584, 2604-2605, 192 L.Ed.2d 609 (2015).

These changes in the law are part of an accelerating trend toward expansion of the rights of partners in intimate relationships not constituting traditional marriage. That trend, in turn, reflects modern society's view that as long as the partners are truly committed to each

other, non-traditional intimate relationships between two adults should be entitled to legal recognition. Consistent with that view and with the associated trend in the law, Washington courts should extend to the surviving partner in a CIR the same right that a surviving spouse has to serve as PR.

- d. **Mr. Roeser does not seek an inheritance or a share of the proceeds from the wrongful death action; he wishes only to serve as personal representative and thereby to protect the interests of Ms. Blowers' daughter**

Mr. Leininger points to Washington cases holding that a partner in a CIR is not the equivalent of a surviving spouse *for inheritance purposes*. E.g., *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 253, 778 P.2d 1022 (1989). But Mr. Roeser does not ask the court to hold that a surviving CIR partner is entitled to the same inheritance rights a spouse. Nor does he ask the court to hold that a surviving CIR partner should be regarded as a beneficiary of a wrongful death action.

Instead, Mr. Roeser asks the court only to grant the survivor of a CIR the right to serve as PR of the deceased partner's estate. As a result of his love for both Ms. Blowers and her daughter, Mr. Roeser has a strong commitment to ensuring that Layla receives the maximum amount of compensation from the wrongful death action and to ensuring that Mr. Leininger does not access the proceeds for his own use. Mr. Roeser's

continued service as PR would allow him to act on that commitment. As he said, Layla “has already suffered the loss of her mother but being able to protect her financially in the years ahead is one the few things I can do now which is positive and constructive.” CP 153.

This wish to do something positive and constructive stems from the natural desire of the survivor – whether of a marriage or of a CIR – to administer the decedent’s affairs in a way that the survivor believes the decedent would consider appropriate. The law currently provides that opportunity to a surviving spouse by giving him or her the first right to serve as PR. Because the survivor of a CIR has just as strong a desire to administer the decedent’s affairs in a manner consistent with the decedent’s wishes, he or she should have that same right.

B. Mr. Roeser Has Standing Because the Decision Below, by Permitting Mr. Leininger to Control the Wrongful Death Action, Will Diminish the Estate

As Mr. Leininger acknowledges, a PR has standing to appeal if the superior court’s decision may diminish the estate. Br. Resp. at 15; *In re Cannon’s Estate*, 18 Wash. 101, 104-106, 50 P. 1021 (1897). The superior court’s order allowed Mr. Leininger to control the wrongful death action. Mr. Roeser testified about his concern that Mr. Leininger, once he had control, would seek to access the proceeds of the action for himself. CP 55-56. Mr. Leininger did not testify in response to this evidence.

Thus, the only evidence in the record on this issue supports a finding that Mr. Leininger will use his control of the wrongful death action to apply the proceeds to his own personal benefit rather than to Layla's.

By dismissing the Washington probate and shifting control of the wrongful death action to Mr. Leininger, the superior court's order threatens to diminish the estate. Because a personal representative "must have the right to appeal from an order" that "would materially diminish the estate," Mr. Roeser has standing to appeal. *Cannon*, 18 Wash. at 106.

III. ARGUMENT IN SUPPORT OF REPLY

A. Because the Surviving Partner of a Committed Intimate Relationship Should Have the Right to Serve as Personal Representative, the Superior Court Erred by Depriving Mr. Roeser of that Right

As Mr. Roeser has explained above in discussing his standing to appeal, this Court should rule that the survivor of a CIR has the first right to act as PR of the deceased partner's estate. This same conclusion requires reversal of the superior court's decision on the merits. If Mr. Roeser had the right to serve as PR, then dismissal of the Washington probate was error because it deprived him of that right.

B. The Superior Court Had No Authority to Decline to Exercise Its Jurisdiction

Mr. Leininger concedes that the superior court had jurisdiction over this matter. Br. Resp. at 26. He also acknowledges that the superior

court declined to exercise its jurisdiction. *Id.* at 17, 26. As he notes, the issue is whether the court had the discretionary authority to do so. *Id.*

Mr. Leininger does not dispute the general concept, supported by *Acme Finance Co. v. Huse*, 192 Wash. 96, 73 P.2d 341 (1937), that absent some recognized ground for doing so, a superior court with jurisdiction over the subject matter may not simply walk away from the case. But Mr. Leininger argues that probate proceedings present an exception to this rule. Citing *Murphy v. Murphy*, 42 Wash. 142, 84 P. 646 (1906), Mr. Leininger contends that in every probate case, the superior court has discretion to decline or accept jurisdiction.

Murphy, however, does not stand for this proposition. In *Murphy*, the will of the decedent was admitted to probate in Iowa, the state of his previous domicile. 42 Wash. at 144. His will called for equal distribution of the residue of his estate to his widow, his son, and his daughter. *Id.* The Iowa probate was fully settled and closed after the assets had been distributed. *Id.*

Eleven years after the decedent's death, his widow opened a probate proceeding in Washington concerning certain real property, located in this state, to which the decedent held equitable title. *Id.* at 144-145. A Washington trustee held the property in trust for the decedent's

benefit. *Id.* at 144. The Washington court appointed a PR, who sought an order requiring the trustee to convey the property to the PR. *Id.* at 145.

The son and daughter then appeared in the Washington probate and opposed the widow's request for conveyance of the real property to the PR. 42 Wash. at 145-146. They alleged that the widow had instituted the Washington proceeding to secure a widow's allowance for herself, and to harass the son and daughter. *Id.* at 146. The trial court entered an order revoking the PR's letters of administration and directing the trustee to convey to the widow her undivided interest in the real property. *Id.* at 146-147. The widow and the PR appealed. *Id.* at 147.

True, the *Murphy* court said, "The question of necessity for administration . . . appears to be a matter resting largely in the discretion of the court." 42 Wash. at 149. But this comment was *dictum* because it was not necessary to the court's resolution of the case.

The supreme court affirmed the judgment because (1) title to the real property had already passed instantly to the heirs and devisees upon the death of the decedent and (2) the Iowa court had already determined that under the will the residue of the estate was to be divided equally among the widow, the son, and the daughter. *Id.* at 148-150. Because the property had already descended directly to the heirs and devisees upon death, the trial court could not have directed the trustee -- as the widow

requested -- to convey the property to the Washington PR. There was nothing left to convey.

Moreover, the trial court in *Murphy* did not decline to exercise its jurisdiction. On the contrary, the trial court reached the merits of the case. It rejected the widow's request that the property be conveyed to the PR. 42 Wash. at 145, 147. This decision precluded the widow from securing the widow's allowance that she apparently sought. *Murphy* does not support the proposition that the superior court in the present case had the right to simply abandon a case over which it had jurisdiction.²

Mr. Leininger also cites *In re Peterson's Estate*, 12 Wn.2d 686, 123 P.2d 733 (1942), for the rather unremarkable proposition that if the court learns that a mistake was made at some earlier stage in the proceeding, it should take steps to remedy the situation. This concept, however, does not support the proposition that the court may abandon a matter over which it has jurisdiction, unless some statute or recognized legal principle gives it the right to do so. Mr. Leininger has identified no such statute or established legal ground that would apply in this case.

Finally, Mr. Leininger cites *In re Estate of Ludwig*, 49 Wn.2d 312, 301 P.2d 158 (1956), in support of his contention that the court has

² Mr. Leininger also cites *In re Peterson's Estate*, 137 Wash. 137, 241 P. 964 (1926). That case, involving an attempt to open a probate proceeding twenty-six years after the decedent's death, is distinguishable. Here Mr. Roeser promptly petitioned for his appointment as PR.

discretion to decline jurisdiction in probate cases. But no party in *Ludwig* argued that the court lacked such discretion, and the *Ludwig* court did not address the issue. The court held only that the PR had no standing to appeal the dismissal of the Washington probate because he was not “aggrieved.” *Id.* at 317.

The superior court did not have discretion to decline the exercise of its jurisdiction. It therefore erred in dismissing the case.

C. The Decision Below Prejudices Layla’s and the Estate’s Interests Because It Allows Mr. Leininger to Control the Wrongful Death Action, Despite the Evidence that He Will Use the Proceeds for His Own Benefit

Mr. Leininger appears to admit that dismissal of a Washington probate is erroneous if it will diminish the estate. *Ludwig*, cited by Mr. Leininger, supports this proposition. In *Ludwig* the court rejected the particular argument made by the Washington PR that dismissal would diminish the estate. But the court implicitly recognized that *if* the dismissal of the Washington probate would diminish the estate, the Washington probate should be allowed to proceed. 49 Wn.2d at 315-317.

In his opening brief and while demonstrating his standing in this brief (section II., B. above), Mr. Roeser explained that allowing Mr. Leininger to control the wrongful death action will diminish the estate and Layla’s recovery because Mr. Leininger will use that control to divert the

proceeds to his own use. Although he had the opportunity below to testify in response to this allegation, Mr. Leininger did not do so. His brief in this Court is entirely silent on the subject.

The only evidence on the issue supports the conclusion that with control over the wrongful death action, Mr. Leininger will diminish the estate and will prejudice Layla's interests by siphoning off the proceeds for his own benefit. Because dismissal of the Washington probate gave Mr. Leininger control over the wrongful death action, it was error.

D. None of the "Procedural Defects" Constitutes Adequate Grounds for Dismissing the Washington Probate

Mr. Leininger complains that Mr. Roeser failed to give Layla advance notice of his request for non-intervention powers. He also notes that Layla did not receive notice of Mr. Roeser's appointment as PR until after the end of the 20-day period specified by RCW 11.28.237. But contrary to Mr. Leininger's argument, neither of these "procedural defects" deprived Layla of due process. Accordingly, neither defect warranted dismissal of the Washington probate.

It is undisputed that on November 24, 2015, Mr. Leininger – and through him Layla -- received actual notice that Mr. Roeser had been appointed as PR in Washington, and that he had been granted nonintervention powers. CP 56, 91-95. Mr. Leininger then moved to

dismiss. At that time, of course, the court had not distributed any assets or made any determination of Layla's rights. On these facts, none of the cases cited by Mr. Leininger supports the conclusion that Layla was denied her right to due process.

In re Estate of Little, 127 Wn.App. 915, 921, 113 P.3d 505 (2005); *Hesthagen v. Harby*, 78 Wn.2d 934, 942, 481 P.2d 438 (1971); and *In re Estate of Walker*, 10 Wash.App. 925, 930-931, 521 P.2d 43 (1974) all stand for the proposition that a *decree* of distribution (or a *decree* declaring a nonintervention probate complete) is voidable as a violation of due process as to an heir who did not receive notice. In each of those cases, a final decree had been entered without any notice to the heirs in question. Here, no decree had been entered and Layla obviously had an opportunity to be heard. There was no denial of due process, and none of the "procedural defects" warranted dismissal.

E. Mr. Roeser's Alleged "Misrepresentations" Do Not Support Dismissal of the Washington Probate

Mr. Leininger says that in his petition for appointment as PR, Mr. Roeser deceptively implied that he had a "legal connection to Ms. Blowers." Br. Resp. at 23. There was nothing deceptive or misleading about his description of his relationship to her. He identified himself as her fiancé. CP 167. This was true. He said Ms. Blowers had lived with

him for the last three years and that he supported her financially. CP 149, 166. This was also true. Mr. Leininger also says that Mr. Roeser falsely implied that he had some “direct” relationship to Layla. Br. Resp. at 23. Mr. Roeser implied no such thing. He did not say that Layla was his daughter. He said that he helped to support her, that he did his best to help Ms. Blowers raise her, and that he wanted to serve as PR in order to prosecute the wrongful death claims solely for Layla’s benefit – all true statements. CP 150-153, 166-167. Mr. Leininger says Mr. Roeser “avoid[ed] any clear statement of inheritance. Br. Resp. at 23. On the contrary, Mr. Roeser clearly stated his understanding that under both Florida and Washington law Layla is Ms. Blowers’ sole heir. CP 152. This is also true. CP 30, 117, 152.

Finally, Mr. Leininger notes that Mr. Roeser mistakenly stated that Layla lived most of the time with Ms. Blowers and him in Tampa and went to school nearby. Mr. Roeser acknowledged this mistake in his opposition to the motion to dismiss. CP 52. But it is undisputed that Layla spent virtually every weekend, Thanksgiving, Christmas, Easter, all of the summer of 2014, and most of the summer of 2015, with Mr. Roeser and Ms. Blowers. *Id.*

For his argument that these alleged misrepresentations were grounds for dismissing the Washington probate, Mr. Leininger relies on *In*

re Olson's Estate, 194 Wash. 219, 77 P.2d 781 (1938). *Olson* is clearly distinguishable. The decedent's widow was appointed in Washington as PR. The court affirmed the trial court's finding that the widow had "falsely and fraudulently and with intent to deceive the court, at the time she applied for letters of administration of her husband's estate, testified that both she and decedent were residents of Washington, although as a matter of fact both were residents of Montana at the time of the husband's death." *Id.* at 221. Moreover, this fraud was highly material because Washington law provided far greater benefits for the widow than Montana law. *Id.* at 228-229.

Here there was no finding that Mr. Roeser had testified fraudulently or with intent to deceive the court about anything. Indeed, the superior court expressly rejected such findings. CP 41-42. And Mr. Roeser's mistaken testimony that Layla lived most of the time in Tampa secured no pecuniary benefit to him. Finally, the superior court's rejection of proposed findings concerning Mr. Roeser's alleged misrepresentations shows that they were not material to his appointment as PR.

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F. **The Court Should Deny the Request for an Attorneys' Fee Award against Mr. Roeser**

1. **If Mr. Leininger does not prevail, the Court should not award fees**

Mr. Leininger asks the Court to order Mr. Roeser to pay the attorneys' fees and costs that he incurred (allegedly on behalf of the Estate) on appeal. He requests this fee award whether or not he is the prevailing party. While RCW 11.96A.150 permits an award of fees to an unsuccessful litigant, Washington courts have repeatedly denied fee requests where the requesting party lost or where there was no prevailing party. *In re Estate of Duxbury*, 175 Wn.App. 151, 173, 304 P.3d 480 (2013) (party requesting fees under RCW 11.96A.150 did not prevail); *Barovic v. Pemberton*, 128 Wn.App. 196, 202, 114 P.3d 1230 (2005) (same); *In re Estates of Jones*, 170 Wn.App. 594, 612-613, 287 P.3d 610 (2012) (no prevailing party because each party won on at least one major issue). If Mr. Leininger is not the prevailing party, the Court should deny his request for a fee award against Mr. Roeser.

2. **Even if Mr. Leininger is the prevailing party, the Court should deny his request because his instigation of this litigation did not benefit the estate**

A court may properly decline to require an opposing party to pay the estate's attorneys' fees where the position taken by its PR does not benefit the estate. *Jones*, 170 Wn.App. at 612. *See also Boris v. Korry*

Testamentary Marital Deduction Trust, 56 Wn.App. 749, 755-756, 785 P.2d 484 (1990) (party's failure to benefit the trust supported decision to deny its request for fees under predecessor of RCW 11.96A.150). Indeed, this is the only factor expressly identified in the relevant statute. "In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include *whether the litigation benefits the estate or trust involved.*" RCW 11.96A.150(1) (emphasis added).

Mr. Roeser commenced the Washington probate proceeding on September 30, 2015, in order to ensure that the wrongful death action would be prosecuted promptly and solely for Layla's benefit. By contrast, nothing was accomplished in the Florida probate for months. As late as November 16, 2015 – four months after Ms. Blowers' death – there was not even a PR in the Florida matter. CP 43-46.

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. It was Mr. Roeser who moved forward, securing his appointment as PR, filing a creditor's claim against the Scholz estate, and then timely suing the Scholz estate on Layla's behalf when the creditor's claim was rejected. CP 29, 53, 56, 99-100.

It was Mr. Leininger who initiated the dispute that is now before this court. By moving to dismiss the probate that was protecting Layla's interests through prosecution of the wrongful death action, Mr. Leininger conferred no benefit on the estate. Mr. Leininger seeks only to control the wrongful death action so he may obtain access to its proceeds for his own personal use. He has not shown that he either has done or will do a better job as PR than Mr. Roeser. The evidence is entirely to the contrary. Because the litigation instigated by Mr. Leininger in the Washington probate was not designed to benefit the estate and in fact has not benefitted it, Mr. Roeser should not be required to pay Mr. Leininger's attorneys' fees.

3. **Even if Mr. Leininger prevails and even if the litigation benefitted the estate, the Court should deny his request for fees because Mr. Roeser's appeal has raised a legitimate and novel issue of significant public importance**

Under RCW 11.96A.150, the court may properly decline to require the losing party to pay the prevailing party's attorneys' fees on appeal, where the case presented novel, unique, or difficult legal issues. *Estate of Burks v. Kidd*, 124 Wn.App. 327, 333, 100 P.3d 328 (2004), review denied, 154 Wn.2d 1029 (2005).

In *Boris v. Korry Testamentary Marital Deduction Trust*, 56 Wn.App. 749, 785 P.2d 484 (1990), the children of Alice Korry Clark

were residual beneficiaries of a trust. *Id.* at 751. The trust, however, gave Ms. Korry Clark a testamentary power to appoint any other person or entity as recipient of trust property. *Id.* In her will, she purported to give to several charities all the funds over which she held power of appointment. *Id.* The children argued, however, that their mother had not exercised the power of appointment as required by statute, and thus that the funds belonged to the trust rather than to the charities. *Id.* at 751-752. The trial court agreed with the children, and the court of appeals affirmed. *Id.* at 750-751.

The trial court allowed the children's legal fees to be paid out of the trust corpus. 56 Wn.App. at 752. This, of course, diminished the trust corpus available to the children. They appealed on that issue, arguing that the trial court should have required the charities to pay the children's fees under the predecessor of RCW 11.96A.150. *Id.* at 756.

The court of appeals affirmed the trial court's ruling on the fee issue as well. 56 Wn.App. 756. Even though the children were the prevailing parties, the court held that the charities should not be required to pay the children's fees because the charities raised a plausible constitutional argument and did not act in bad faith. *Id.*

Here, Mr. Roeser has made a persuasive argument on an issue of public importance – i.e., whether the surviving partner in a CIR should

have the right to serve as PR of the deceased partner's estate. And there is no evidence that Mr. Roeser pursued this appeal in bad faith. Accordingly, even if the Court affirms the superior court's dismissal of the Washington probate, the Court should deny Mr. Leininger's request for a fee award against Mr. Roeser.

4. **Even if Mr. Leininger prevails, he should personally bear his attorneys' fees and costs because his instigation of this litigation conferred no benefit on the estate**

According to Mr. Leininger, the issue of who should pay his attorneys' fees on appeal is a choice between only two payors: (1) Mr. Roeser, or (2) the estate. But a third alternative may be the most appropriate here. Mr. Leininger himself should pay his attorneys' fees.

In probate, the attorney-client relationship exists between the attorney and the PR of the estate, not between the attorney and the estate. *Trask v. Butler*, 123 Wash.2d 835, 840, 845, 872 P.2d 1080 (1994). Therefore, opposing counsel in this case represents Mr. Leininger, not the estate. Unless a court allows the PR to be reimbursed for his attorneys' fees out of the estate or orders another party to pay those fees, then the PR must use his or her own funds to pay the attorney.

Even if this Court affirms the dismissal of the Washington probate, the court in the Florida probate may decide that Mr. Leininger should personally bear the cost of his opposition to Mr. Roeser's appeal.

IV. CONCLUSION

The motion to dismiss the appeal should be denied. The Court should reverse the decision of the superior court. The Washington probate proceeding should be reinstated, and Mr. Roeser should be restored to his position as PR. Mr. Leininger's request for attorneys' fees should be denied.

Dated this 3rd day of October, 2016.

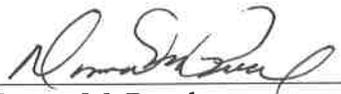
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 3rd day of October, 2016.



Donna M. Pucel