

No. 74932-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Estate of

KIMBERLY ANN BLOWERS,

Deceased.

A. SHANE ROESER,

Appellant,

and

DANIEL LEININGER,

Respondent.

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Court of Appeals
Division I
State of Washington

BRIEF OF RESPONDENT AND
MOTION IN BRIEF TO DISMISS APPEAL
FOR LACK OF STANDING

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I. INTRODUCTION

Alexander Shane Roeser has appealed dismissal of the Washington probate for which he was the appointed Administrator. As a result of the dismissal, his Letters of Administration were of course revoked. The Superior Court dismissed the Washington probate because there is a pending probate administration in Florida (the decedent's State of domicile); because Mr. Roeser had made procedural errors that deprived the estate's sole heir of due process; and because dismissal would cause no prejudice to the Estate or its sole heir, the decedent's 11-year-old daughter, Layla Leininger.

This appeal should be dismissed for lack of standing because Mr. Roeser is not an aggrieved party. The Court's dismissal of the Washington probate impaired no right or interest belonging to Mr. Roeser. He is unrelated to the decedent or the heir. He has no legal or beneficial interest in the estate assets. His removal has no impact on him personally or on the Estate.

Even had Mr. Roeser standing to appeal, the Court correctly exercised its discretion to dismiss the Washington probate. The sole asset of the Estate in Washington is a pending wrongful death action. There is

an existing probate in the decedent's State of domicile, Florida, the Administrator there being Respondent Daniel Leininger, Layla's father. Under Washington law a foreign domiciliary Administrator has authority to directly pursue a wrongful death action in Washington courts. The probate in Washington was superfluous.

This Court should award reasonable attorney fees and costs to Mr. Leininger on this appeal. The Estate's only means to pay its attorney fees would be from wrongful death proceeds that otherwise would go to benefit Layla. She should not bear the cost of defending against Mr. Roeser's appeal, and RCW 11.96A.150 permits the court to award of attorney fees in its discretion.

II. RESTATEMENT OF ISSUES ON APPEAL

A. Should this appeal be dismissed for lack of standing because Mr. Roeser is not an aggrieved party, when the Order has no effect on his legal interests, he has no pecuniary interest in the Estate or familial relationship with any interested party, and the Estate suffers no diminution by his removal as Administrator?

B. Was the probate court within its discretion to dismiss the Washington probate in deference to the probate in Florida, the decedent's state of domicile, when the Florida probate was started first, its Administrator is the father of the sole heir, the sole estate asset in Washington is a pending wrongful death action, and the Florida Administrator is empowered to pursue the action without need of a Washington ancillary probate?

C. Should this court award reasonable attorney fees and costs to respondent on appeal, because RCW 11.96A.150 gives the court discretion to make such award, and Mr. Roeser's appeal should not be allowed to cause diminishment of the funds going to the decedent's sole heir, her 11-year-old daughter?

III. RESTATEMENT OF THE CASE

A. Background Facts.

Decedent Kimberly Ann Blowers died at age 32 as the passenger of a motor vehicle in a single-car accident in Whitman County, Washington, on July 15, 2015. CP 156-157. According to the police report, the vehicle went off the road into a ditch, "launched and struck a sign post then started rolling and tumbling until it impacted a cluster of trees and caught fire. The [two] occupants died on scene and were consumed by fire." CP 157. The driver was Jonathan Scholz, age 37. CP 156.

Ms. Blowers was unmarried and her sole heir at law is her minor daughter Layla Leininger, who is 11 years old at the time of this appeal. CP 117. No Will has been found. CP 166. Appellant Alexander Shane Roeser was in a relationship with Ms. Blowers but they were not married. CP 167. Respondent Daniel Leininger is Layla's father. CP 117.

It is uncontested that all parties involved are domiciled in Florida.¹ Mr. Roeser lives in Tampa, Florida. CP 167. Ms. Blowers lived with him for a few years prior to her death. CP 149, 166. Mr. Leininger lives in Casselberry, Florida. CP 117. Layla lives with her father in Casselberry, though Mr. Roeser's petition claims she lives at "Tampa, FL." CP 117, 167. (Misrepresentations concerning Layla are addressed in the procedural history, below.)

Ms. Blowers had no known assets at the time of her death, other than her personal effects. CP 166. She had been unemployed for multiple years. CP 166. Her daughter Layla is the sole statutory beneficiary of any potential wrongful death action. CP 167. The sole connection between Ms. Blowers and Washington is that she died while visiting the state.

B. Procedural History.

Initial Florida filing. On August 20, 2015, about a month after Ms. Blowers's death, her father, Timothy Bowers, filed a petition for

¹ The record refers to "residence" rather than domicile; and the terms are admittedly distinct. "'Residence' indicates where a person lives while 'domicile' signifies the place where a person intends a fixed and permanent home." *In Re Estate of Tolson*, 89 Wn.App. 21, 36, 947 P.2d 1242 (1997). But here, there is no suggestion by any party that anyone lived anywhere other than Florida. In that case, residence is the same as domicile.

administration of her estate in the Circuit Court for Hillsborough County, Florida, probate division. As best as can be gleaned from that court's docket listing, no hearing occurred and no order on the petition was entered. CP 46.

Initial Washington filing. On September 30, 2015, to commence the probate from which this appeal is taken, Mr. Roeser filed a "Petition for Appointment of Personal Representative, Grant of Non-Intervention Powers without Bond, and Issuance of Letters Testamentary [sic]." CP 166-168. The petition confirms that Ms. Blowers died on July 15, 2015; that there is a potential wrongful death claim; that there is no known Will; that Ms. Blowers's estate "has de minimus [sic] value" and that funeral and burial expenses had been incurred but Mr. Roeser had paid them because Ms. Blowers had no money. CP 166. Note that on these facts, Ms. Blowers' estate is insolvent.

Rather than simply identifying the sole heir at law, Mr. Roeser's Petition purports to list the persons "most closely related to the decedent," including himself as her "fiancé," and also listing Ms. Blowers' daughter, father, and two brothers. CP 167. He lists "Tampa, FL" as Layla's address.

Id. He also states, "I would like the Court to be aware that Timothy Blowers, Kimberly's father, has opened a Florida probate." *Id.*

Initial Washington Order. On October 5, 2015, Mr. Roeser filed a Declaration he signed on September 17, 2015, which among other things requests waiver of bond.² CP 153:13-14. Mr. Roeser's Declaration also made certain assertions portraying Layla's circumstances. Mr. Roeser stated that "Layla's father...is not able to provide much support to help Layla..." and that Ms. Blowers "shared custody of Layla, but most of the time Layla lived with us since she attended school near my house and it was easier on her to live there." CP 150:22-24; CP 151:1. He further states that "I am not interested in, and would never take, any money from any legal proceedings brought as a result of Kimberly's death... I am firmly of the mind that any recovery made should be solely preserved for the benefit of Layla." CP 152:11-13, 15-17.

Neither the Petition nor Mr. Roeser's supporting Declaration address issues of notice to the heir. Nor do they cite any statute or case law whatsoever, whether regarding qualifications for appointment; standards

² Mr. Roeser also at that time filed Declarations by Ms. Blowers' two brothers, supporting his petition for appointment but stating nothing directly relevant to this appeal. CP 144-145, 146-148.

for waiver of bond, determination of solvency or granting of nonintervention powers ("NPs"); the effect of the probate petition already filed in the decedent's state of domicile; or any other issue that the Court needed to address based on the facts presented. The applicable law simply was not briefed. CP 149-154, 166-168.

On October 5, 2015, the Court entered an Order appointing Mr. Roeser as Personal Representative ("PR"),³ waiving bond, granting NPs "subject to the distribution approval referenced below," directing issuance of Letters Testamentary [sic], authorizing Mr. Roeser to pursue "any wrongful death or survival actions permissible under the law for the benefit of the Estate [sic]," and directing Mr. Roeser to petition the Court for approval prior to distribution of any funds resulting from the actions. CP 142-143.

Second Florida filing. Meanwhile, in Florida on that same date, October 5, 2015, Mr. Leininger filed a Petition for Administration of Ms. Blowers's Estate under the same caption and case number as Ms. Blowers's father's Petition. CP 135-136. By Notice filed October 27, 2015, a hearing on the petition was set for November 17, 2015. CP 46.

³ Personal Representative, or PR, is the generic equivalent term for Administrator, which is specific to an intestate estate.

Washington Letters issued. On October 12, 2015, in the Washington probate, an amended Order was entered correcting the reference to "Letters Testamentary" to "Letters of Administration." CP 138-139. Letters of Administration were issued to Mr. Roeser in Washington on October 12, 2015. CP 137.

Florida Letters issued. On November 16, 2015, Ms. Blowers's father filed a Waiver of Priority, Consent to Appointment, and Waiver of Notice and Bond in support of Mr. Leininger. CP 134. On November 17, 2015, an Order appointing Mr. Leininger was entered and Letters of Administration issued to him. CP 132, 133.

First informal notice of Washington action to Mr. Leininger. On November 24, 2015, 43 days after Mr. Roeser's appointment, Mr. Roeser called Mr. Leininger and sent a follow-up email, in which Mr. Roeser confirmed that he had been appointed as PR in Washington. CP 92. This was the first time that Mr. Leininger had heard of Mr. Roeser's actions in Washington—Layla (and Mr. Leininger) received no other notice. CP 124.

Motion to Dismiss Washington probate. On December 22, 2015, Mr. Leininger filed a Motion to Dismiss Probate Administration in Washington. CP 116-122. Mr. Leininger confirmed in his supporting

Declaration that contrary to Mr. Roeser's representations, Mr. Leininger had been the full-time caregiver to his daughter Layla since she was two years old, and that Layla "has and continues to reside with me full time" in Casselberry, Florida, a 2-1/2 to 3 hour drive from Mr. Roeser's home in Tampa. CP 123-124. Mr. Leininger produced copies of Layla's school transcripts to demonstrate that she had been enrolled in Casselberry schools since kindergarten. CP 127-130.

In his Declaration in Opposition dated December 29, 2015, Mr. Leininger admitted that "in my prior declaration I made a misstatement to the effect that Layla lived with Kimberly and I and attended school. That is not correct." CP 52:12-13. In his Declaration he also, for the first time, disclosed that on November 16, 2015, he had filed a creditor claim in the Estate of Jonathan Scholz, the driver of the vehicle in which Ms. Blowers died. CP 56, 99-101. And, that the claim had been rejected by the Mr. Scholz's Estate, by Notice dated December 15, 2015. CP 57, 103.

On January 4, 2016, the Court Commissioner heard argument and granted the Motion to Dismiss, stating in its Order that

...this Washington probate administration was commenced without advance notice to the minor sole heir required by law of his [Mr. Roeser's] application of nonintervention powers; that a personal representative has been appointed in

Florida who may proceed with the wrongful death action in this State; that no prejudice to the minor heir will accrue if this matter is dismissed in its entirety.

CP 41-42.⁴ On January 14, 2016, Mr. Roeser filed a Motion for Revision of Commissioner's Order. CP 28-36. Mr. Leininger filed an Opposition, CP 19-27.

On February 9, 2016, Mr. Roeser filed the first of two Replies to Mr. Leininger's Opposition. CP 12-18. Contrary to his statement in the Petition that he would never take any portion of litigation funds that would otherwise go to Layla, Mr. Roeser asserts that he paid for Ms. Blowers' funeral and burial expenses, and that he is "entitled to reimbursement from the estate for those advances and thus has 'standing' to serve as personal representative." CP 13:18-19.

On February 19, 2016, after hearing argument, the Court denied the Motion for Revision without making any written findings, but affirmed that the Order dated January 4, 2016, "shall be the Order of the Superior Court." CP 4-5.⁵

⁴ The Commissioner's oral ruling is not in the record on appeal. Mr. Roeser did not request any report of proceedings.

⁵ The Judge's oral ruling also is not in the record on appeal. Mr. Roeser did not request any report of proceedings.

On March 18, 2016, Mr. Roeser filed Notice of this appeal. CP 1-3.

IV. RAP 10.4(d), RAP 17.4(d) MOTION IN BRIEF

TO DISMISS FOR LACK OF STANDING

A. A Removed Administrator Who Has No Financial or Familial Interest in the Estate Is Not an Aggrieved Party and Has No Right to Appeal.

Mr. Leininger moves per RAP 10.4(d) and RAP 17.4(d) that the Court dismiss this appeal for lack of standing. Only an aggrieved party may seek review by the appellate court. RAP 3.1. "An appellant must have an interest in the subject matter of the appeal." *Cairns v. Donahey*, 59 Wash. 130, 132, 109 P. 334 (1910). "The appellant must be aggrieved or prejudiced by the judgment or order of the court. Some personal right or pecuniary interest must be affected." *State ex rel. Simeon v. Superior Court*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944).

The mere fact that one may be hurt in his feelings, or be disappointed over a certain result, or feels that he has been imposed upon, or may feel that ulterior motives have prompted those who instituted proceedings that may have brought about the order of the court of which he complains does not entitle him to appeal. He must be 'aggrieved' in a legal sense.

Id. (quoting *Elterich v. Arndt*, 175 Wash. 562, 564, 27 P.2d 1102 (1933)).

In *Cairns*, the appellant Administrator was removed after a Will was

discovered and the named Executor appointed under the Will. 59 Wash. 130. The Administrator "was a stranger to the will and the estate." *Id.* at 132. The appeal was dismissed. In *Simeon*, the appellant Administrator had been removed and a new person appointed. 20 Wn.2d 88. The appeal was dismissed, citing *Cairns*. *Id.* at 90. In *Elterich*, a non-probate matter, the appellant was an individual member of a Board of Commissioners of Clallam County, which Board was subject to a temporary restraining order that was the subject of the appeal. 175 Wash. 562. In dismissing the appeal, the court stated:

The damage or grievance which entitles a party to a writ of error or an appeal...must be a direct and positive one, effected by the judgment concluding and acting upon his rights....Persons aggrieved, in this sense, are...only those who have rights which may be enforced at law, and whose pecuniary interests might be established in whole or in part by the decree...

Id. at 564. Here, Mr. Roeser has no pecuniary interest, as detailed below.

1. Mr. Roeser has no familial or inheritance interest that would grant him standing.

Pecuniary interests granting standing include, for example, being the surviving spouse, an heir, and named as Executor in the decedent's Will. *In re Estate of Wood*, 88 Wn. App. 973, 947 P.2d 782 (1997). A surviving spouse similarly may appeal denial of a motion to vacate the

order appointing another as Administrator of the deceased spouse's estate. *In re Sutton's Estate*, 31 Wash. 340, 71 P. 1012 (1903). Here, Mr. Roeser is unrelated to the decedent or the sole heir. CP 167. While he was in a relationship with Ms. Blowers, they were not married. *Id.* Even assuming arguendo that Mr. Roeser and Ms. Blowers were in an unmarried "committed intimate relationship" (formerly known as a "meretricious relationship"), the surviving partner of such a relationship does not have the status of surviving spouse for purposes of inheritance. *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 253, 778 P.2d 1022 (1989). At most, the survivor is entitled to an equitable division of the decedent's assets accumulated in a community-like fashion during the relationship. *In re Estate of Langeland*, 177 Wn. App. 315, 329, ¶28, 312 P.2d 657 (2013). But here, it is uncontested that Ms. Blowers had no assets, community-like or otherwise. CP 166. Mr. Roeser therefore has no such claim. With no legal relation to the heir or to the decedent and no recognizable pecuniary interest, Mr. Roeser is not an aggrieved party to the Order dismissing the probate.

2. **Mr. Roeser's status as a potential creditor of an estate with no assets, and where he also has disavowed any intention to be reimbursed from wrongful death proceeds, does not grant standing to appeal his removal.**

Even if an order that removes a fiduciary affects his personal liability for attorney fees or his right to compensation, he has no standing to appeal the removal itself. *In re Guardianship of Lasky*, 54 Wn. App. 841, 776 P.2d 695 (1989). In *Lasky*, the Guardian was removed, was denied an award of attorney fees, and had CR 11 sanctions imposed against him. *Id.* at 843. On appeal, the Court granted him standing to appeal the attorney fees and sanctions but denied standing to appeal his removal. *Id.* at 848, 850. Similarly, in *Cairns*, the court noted that the removed Administrator had no interest in the estate "other than for compensation that may be due him," but no order on compensation had been made. *Cairns*, 59 Wash. at 134. "Had such an order been made and had he been aggrieved thereby, he would have had such an interest as would entitle him to an appeal." *Id.* Here, the Order dismissing the probate makes no determination concerning Mr. Roeser's compensation, no award of attorney fees or costs, and no mention of Mr. Roeser's potential creditor claim for reimbursement for funeral and burial expenses. CP 41-42. And, as is undisputed, the Estate has no assets, and Mr. Roeser specifically disavowed any intention to be reimbursed from wrongful death proceeds that would otherwise be paid to Layla. CP 152:11-13, 15-17. Mr. Roeser

also has made no claim for fees or costs. Given all these circumstances, any hypothetical claim that he might make remains entirely unimpaired except by his own waiver. And, even if the Order here had affected those rights, it would not grant him standing to appeal his removal. *Cairns*.

3. No diminution of the estate results from Mr. Roeser's removal.

A PR also may have standing if his removal and termination of the probate would cause a diminution of the decedent's estate. *In re Estate of Ludwig*, 49 Wn.2d 312, 301 P.2d 158 (1956). However, the mere transfer of a wrongful death action from a Washington PR to an out-of-state PR causes no such diminution. *Id.* In *Estate of Ludwig*, a Nebraska resident died in Nebraska, and probate proceedings were commenced in Nebraska by the widow. *Id.* at 312. At the widow's request, a Washington resident, H. C. Wilson, sought and was granted appointment as PR in King County, Washington, solely to pursue an action against tobacco companies in the Federal courts of Washington, under the Nebraska wrongful death statute. *Id.* Mr. Wilson initiated the wrongful death action, and the tobacco companies filed a motion to dismiss the Washington probate, contending that Mr. Wilson had not filed a bond and had not given the required notice under the probate statutes of Washington. *Id.* at 313. The court revoked his

Letters and dismissed the probate. *Id.* Mr. Wilson appealed, and the tobacco companies moved to dismiss the appeal on the grounds that Mr. Wilson was not a "party aggrieved" by the order dismissing the probate. *Id.* at 314. Mr. Wilson argued in response that he had standing because as Washington PR, he was the only person who could pursue the wrongful death action within the State, and his removal and dismissal of the probate would terminate the action to the detriment of the Estate. *Id.* at 315. The Supreme Court disagreed:

Numerous cases and authorities clearly hold that a domiciliary administrator under statutes like that of the state of Nebraska may institute a wrongful death action in a foreign jurisdiction without the necessity of instituting ancillary proceedings therein.

Id. at 316.⁶ Dismissal of the Washington probate accordingly "will not necessarily result in a diminution of the estate of the decedent because... the action in Federal court can be maintained by the domiciliary [*i.e.*, Nebraska] wrongful death administratrix." *Id.* at 317. Here, the same situation pertains. A Washington wrongful death claim, as in Nebraska, is not subject to estate debts and belongs to the statutory beneficiaries.

⁶ The Nebraska statute provides that the claim, though brought by a personal representative, is for the benefit of the widow and next of kin and is not subject to claims against the estate. *Id.* at 315.

RCW 4.20.020; *Gray v. Goodson*, 61 Wn.2d 319, 327, 378 P.2d 413 (1963). Mr. Leininger as domiciliary PR in Florida is fully empowered to pursue the wrongful death action in Washington courts. Mr. Roeser has no standing to appeal his removal on the basis of potential diminution of the estate, and therefore, this appeal should be dismissed.

V. RESPONSE ARGUMENT ON THE MERITS

The Order dismissing probate should be affirmed because the Court was within its discretion to decline jurisdiction. The sole Estate asset in Washington was a wrongful death action, domiciliary probate proceedings were pending in Florida, and the Florida PR could directly pursue the wrongful death action. The Washington probate therefore was superfluous and was properly dismissed.

Mr. Roeser's arguments and authority concerning standard of review and the court's discretion to decline jurisdiction are based largely on a fundamental misunderstanding of the court's role in probate. Mr. Roeser generally cites to cases pertaining to litigation. But in a probate,

The probate court is not merely a referee in a contest between private disputants. Instead, it is the agency primarily charged with the important function of administering decedents' estates...This is done through its own duly appointed officers [i.e., personal representatives].

In re Peterson's Estate, 12 Wn.2d 686, 722, 123 P.2d 733 (1942). To that end, "if it becomes apparent to the court that a mistake has been made at some earlier stage, the court should immediately take steps to remedy the situation insofar as that is possible." *Id.* at 722-723. The Court is not merely a neutral as in litigation, but an active participant in insuring that a probate is properly administered. This fundamental misunderstanding colors all of Mr. Roeser's arguments.

A. Standard of Review: a Probate Court's Decision as to Whether or Not to Decline Jurisdiction Is Reviewed for Abuse of Discretion.

In probate, a lower court's decision to decline or accept jurisdiction "is a matter resting largely in the discretion of the court." *Murphy v. Murphy*, 42 Wash. 142, 149, 84 P. 646 (1906). The court has discretion to refuse to commence administration when there appears to be no need for one. *In re Peterson's Estate*, 137 Wash. 137, 241 P. 964 (1926). Even after one has been commenced, the court may revoke the Administrator's Letters "for the sole purpose of ending an unnecessary administration." *Murphy* at 150. The decision to appoint or remove a PR in general rests in the discretion of the court, and will not be disturbed in the absence of a clear showing of abuse of discretion. *In re St. Martin's Estate*, 175 Wash.

285, 289, 27 P.2d 326 (1933). Here, the Court's Order concerns its jurisdiction: It dismisses the probate proceeding entirely and, as a consequence, cancels (revokes) Mr. Roeser's Letters. CP 41-42. The proper standard of review is abuse of discretion.

Mr. Roeser argues that the standard of review is *de novo* because the lower court's decision was based on written materials only.⁷ But *Indigo Real Estate* involved an unlawful detainer action – litigation, not probate administration. Also, the issue on review there was not an overall question of jurisdiction, but went to the merits of the tenant's defense to eviction. *Id.* at 417. As to probate jurisdictional questions, the proper standard of review here is abuse of discretion. *Murphy*, 42 Wash. 142.

Mr. Roeser also argues that the Court is required to exercise its jurisdiction in all circumstances, unless a specific exception applies.⁸ Again, Mr. Roeser misapplies the jurisdictional standards for litigation. His cited authority, *Acme Finance Co.*, concerns the Washington Declaratory Judgment Act, and litigation between two parties as to the

⁷ Appellant Brief, Section IV(A), p. 17-18 (citing *Indigo Real Estate Services, Inc. v. Wadsworth*, 169 Wn.App. 412, 280 P.3d 506 (2012)).

⁸ Appellant Br., Section IV(C)(2), pp. 23-25 (citing *Acme Finance Co. v. Huse*, 192 Wash. 96, 73 P.2d 341 (1937)).

constitutionality of the Small Loans Act. *Id.* at 98. The Court's requirement to take jurisdiction over a justiciable controversy between two parties is not relevant to its discretion to take jurisdiction over probate of a decedent's assets.

Continuing from the incorrect premise that the Court is required to exercise jurisdiction unless under specific exceptions, Mr. Roeser identifies three such exceptions and argues they do not apply: interstate comity,⁹ primary jurisdiction,¹⁰ and forum non conveniens.¹¹ Mr. Leininger agrees that these exceptions do not apply, because the original premised rule does not apply.

In *Fernandez*, the court declined to assert jurisdiction over the State of Oregon in a suit alleging that the State of Oregon and the State of Washington were joint tortfeasors liable for the injuries of the plaintiff, who had fallen from a bridge crossing the Columbia River between the states. 49 Wn.App. at 38. The doctrine of interstate comity, as a matter of

⁹ Appellant Br., Section IV(C)(2), p. 25 (citing *Fernandez v. State ex rel. Dep't of Highways*, 49 Wn.App. 28, 741 P.2d 1010 (1987)).

¹⁰ Appellant Br., Section IV(C)(2), p. 26 (citing *D.J. Hopkins, Inc. v. GTE Northwest, Inc.*, 89 Wn.App. 1, 947 P.2d 1220 (1997)).

¹¹ Appellant Br., Section IV(C)(2), p. 26 (citing *Sales v. Weyerhaeuser Corp.*, 163 Wn.2d 14, 177 P.3d 1122 (2008)).

determining whether one State should allow its courts to be used to sue another State, is not applicable here.

Mr. Leininger also agrees that the doctrine of primary jurisdiction, which concerns whether a court should retain an action or defer the issues to an administrative agency for initial decision, is inapplicable here.

Finally, Mr. Leininger agrees that forum non conveniens does not apply because it is only relevant to litigation, not probate administration. The cited case, *Sales*, concerned whether an asbestosis personal injury action in Pierce County, Washington, should be dismissed on grounds that Arkansas was a more convenient forum. 163 Wn.2d at 18. The factors involved in a forum non conveniens analysis simply do not apply to probate.

The Court should note, however, that under each of these doctrines under which a court may decline to exercise jurisdiction, the decision is always reviewed on an abuse of discretion standard. *Fernandez* at 38 (interstate comity); *D.J. Hopkins* at 7-8 (primary jurisdiction); *Sales* at 19, ¶8 (forum non conveniens). The general principle is upheld in all contexts, that where a court has discretion to decline jurisdiction, it is reviewed on an abuse of discretion standard, and not de novo.

B. The Court Properly Dismissed the Ancillary Washington Probate in Favor of the Domiciliary Florida Probate.

The primary probate of a will generally lies with the court of the state and county in which the decedent was domiciled. *Estate of Tolson*, 89 Wn.App. at 31 (citing *In re Estate of Stein*, 78 Wn.App. 251, 261, 896 P.2d 740 (1995)). Ancillary probate may lie in any state in which the property the decedent has a situs. *Id.* (citing *Hatch v. United States*, 29 F.2d 213 (N.D.N.Y. 1928)). Ancillary probate is unnecessary when the only asset within that state is a cause of action that the domiciliary personal representative is capable of pursuing directly. *See Estate of Ludwig*, 49 Wn.2d 312; *see also* Section IV(A)(3), above. Here, it is undisputed that Ms. Bowers was domiciled in Florida, as are all the parties. The only asset in Washington state is the wrongful death cause of action, which Mr. Leininger may pursue directly as the Florida PR.

C. The Court Properly Dismissed the Probate Due to Mr. Roeser's Misrepresentations and Procedural Failures.

Where Letters are "procured by fraud or a false statement or suggestion as to a material fact," revocation of the Letters is proper. *In re Olson's Estate*, 194 Wash. 219, 226, 77 P.2d 781 (1938) (quoting 23 C.J. p. 1101, §277 [sic]). Here, Mr. Roeser's petition for appointment made a

misleading impression on multiple fronts. He implied that he had a relevant legal connection to Ms. Blowers, that he had some direct relationship to the minor heir Layla, and that Layla lived in Tampa (implying that she lived with him) instead of in Casselberry with Mr. Leininger. Where it is customary (and most relevant) to only identify the heirs at law in the petition, he listed himself as "fiancé" and listed Ms. Blowers' father and brothers along with Layla, thus avoiding any clear statement of inheritance or interest in the estate. He falsely asserted that Layla lived with him and went to school nearby. He offered disjointed facts sufficient to infer that the estate is insolvent but made no clear statement; did not mention that he gave no notice of application for NPs; and provided no legal briefing to indicate that notice was necessary and that an estate must be solvent before NPs may be granted. He requested waiver of bond, but neglected to brief the court on the standards for waiving bond. These omissions and misstatements are not only material but critical given the court's responsibility in probate matters.

This obligation of the court is heightened because of the large number of proceedings incident to administration which are entirely ex parte, throwing upon the court the duty of safeguarding the rights of interested parties who are not present to do so for themselves.

Peterson's Estate, 12 Wn.2d at 722. The ethical duty in ex parte presentations is also correspondingly higher. "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." RPC 3.3(f). Here, Mr. Roeser made an ex parte submission with no notice to the heir, on a misleading and obfuscating petition, and did not brief the issues for the court. This Court may affirm the lower court decision even on grounds not presented to the lower court "if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a). Any theory established by the pleadings and supported by the proof is permissible, "even if the trial court did not consider it." *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 32, 864 P.2d 921 (1993), citing *see LaMon v. Butler*, 112 Wash.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989). The Order dismissing this probate should be affirmed on the basis of Mr. Roeser's misrepresentations.

D. The Court's Finding Regarding Lack of Notice of Application for NPs Was Not the Sole Dispositive Issue.

Mr. Roeser argues that the Court's finding regarding lack of notice of application for NPs was insufficient ground to dismiss the probate,

because NPs can be granted separately, after a petition for appointment is granted, and the notice requirements differ.¹² Mr. Roeser is correct that there is a difference between the notice requirements for appointment as Administrator and for grant of NPs. A petition for appointment does not require advance notice to anyone other than a surviving spouse. RCW 11.28.131. Instead, within 20 days after appointment, the Administrator must give notice to all heirs, legatees, and devisees, by personal service or by mail, with proof of service by affidavit to be filed in the cause. RCW 11.28.237. In contrast, a petition for NPs requires notice at least 10 days in advance to all heirs, legatees, and devisees, by personal service or by mail, with proof of service by affidavit to be filed in the cause. RCW 11.68.041. What Mr. Roeser neglects to mention is that he petitioned for both appointment and NPs simultaneously, and so was required to give advance notice of the petition under RCW 11.68.041. While in theory he could have separated the two, he did not do so. *See* CP 166-168. He further neglects to mention that he gave none of the required statutory notices to Layla, before or after his appointment. Instead, 43 days after his appointment, he called Mr. Leininger and sent him an email. No statutory

¹² Appellant Br., Section IV(B), pp. 18-21.

notices were ever served or mailed, and no proofs of service were filed.

Where an heir has been deprived of the required notice, there is a denial of procedural due process rendering the probate entirely voidable as to that heir. *In re Estate of Little*, 127 Wn.App. 915, 921, 113 P.3d 505 (2005); *In re Estate of Walker*, 10 Wn.App. 925, 930, 521 P.2d 43 (1974); *Hesthagen v. Harby*, 78 Wn.2d 934, 942, 481 P.2d 438 (1971). The Court was entirely justified in dismissing the probate as voidable for procedural defects violating the due process rights of the sole heir.

E. The Court Was Within Its Discretion to Dismiss the Probate As Superfluous, Regardless of Whether the Probate Was Permissible.

Mr. Roeser argues that a Washington probate was permissible because the wrongful death action was property within the state subject to probate.¹³ Mr. Leininger does not dispute that a Washington court could have jurisdiction in this circumstance, where a nonresident dies within the state and a cause of action arises from it. But this appeal is not about whether Washington could maintain the probate, but whether the court had discretion to decline jurisdiction. The case law cited by Mr. Roeser is

¹³ Appellant Br., Section IV(D), pp. 28-29. Mr. Roeser cites *Lund v. City of Seattle*, 163 Wash. 254, 1 P.2d 301 (1931); *In re Breese's Estate*, 51 Wn.2d 302, 317 P.2d 1055 (1957); *In re Waldrep's Estate*, 49 Wn.2d 711, 306 P.2d 213 (1957).

inapposite because no competing probates were involved. *Lund* involved a question as to whether, after a probate had been closed, it could be re-opened when the only asset to administer was a wrongful death action. 163 Wash. at 262-263. *Breese's Estate* holds that an insurance policy indemnity clause protecting a decedent from an anticipated lawsuit is sufficient property interest to allow probate. 51 Wn.2d at 304. *Waldrep's Estate* holds that the Warsaw Convention places a right of action for damages occurring on an international flight at the place of destination, which is sufficient to allow probate within that state. 49 Wn.2d at 715. Again, the question here is whether the court was within its discretion to decline jurisdiction, in view of the domiciliary probate already pending in Florida, and in view of the misrepresentations and procedural errors by Mr. Roeser in his Washington petition.

F. Mr. Roeser Cites No Authority Supporting His Argument Re Prejudice to the Estate.

Mr. Roeser creatively interprets the notion of "prejudice to the estate," as if it were a matter of personalities and competing support from relatives.¹⁴ He cites no authority for this argument. In fact, the correct

¹⁴ Appellant Br., Section IV(E), pp. 30-32. He also asserts that Mr. Leininger has "no declarations from anyone" supporting his Florida

(continued...)

standard regards potential diminution to the estate. *Estate of Ludwig*, 49 Wn.2d at 316-317. There is no potential diminution to the estate because Mr. Leininger as Florida PR is fully authorized to pursue the wrongful death action in Washington courts, without need of an ancillary probate in Washington.

G. This Probate Was Dismissed and the Letters Revoked; Mr. Roeser's Authority Regarding Removal of a PR for Cause Is Inapposite.

A useful distinction could be made between revocation and removal, in that "revocation" implies that the Letters themselves should not have been issued, whereas "removal" implies that the Administrator should not be allowed to continue in office. 33 C.J.S. Executors and Administrators p. 826, §125. The terms are used interchangeably in the case law, but the distinction is important to this case. Mr. Roeser was not removed for malfeasance (though this Court could find that his substantial misrepresentations upon petition for appointment are sufficient independent grounds to warrant his removal). The lower Court's order dismisses the probate and "cancels" (revokes) the Letters. CP 42. This is

¹⁴(...continued)
petition. *Id.* at p. 31. But, Ms. Blowers' father filed a waiver and consent to Mr. Leininger's appointment. CP 134.

consistent with a decision declining jurisdiction, rather than finding malfeasance by the PR.

Even under the standard of misconduct, dismissal of the probate and revocation of Mr. Roeser's Letters was proper. Mr. Roeser argues that there was no evidence of wrongful conduct sufficient to meet the standard of misbehavior under RCW 11.28.250 and *In re Estate of Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004).¹⁵ However, there is abundant evidence that Mr. Roeser made substantial misrepresentations in his petition to be appointed, which is sufficient ground to warrant removal. *In re Olson's Estate*, 194 Wash. 219.

H. A Surviving Spouse's Statutory Rights Are Not Granted To Committed Intimate Relationship Partners.

Finally, Mr. Roeser argues for an extension of existing law, and urges the court to find that his alleged status as the surviving partner of a committed intimate relationship ("CIR") with Ms. Blowers should give him the same priority as a surviving spouse.¹⁶ Mr. Roeser cites several cases regarding the division of property between CIR partners, both before and after death. It is true that at the end of such a relationship, Washington

¹⁵ Appellant Br., Section IV(F), pp. 32-34.

¹⁶ Appellant Br., Section IV(G), pp. 34-37.

case law requires a "just and equitable division of property" accumulated during the CIR. *Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984). Income and property accumulated during the CIR is characterized under the same presumptions as under community property. *Connell v. Francisco*, 127 Wn.2d 339, 351, 898 P.2d 831 (1995). If one partner dies, the probate court is required to make the same "just and equitable division" between the estate and the surviving partner. *Estate of Langeland*, 177 Wn.App. 315, 325, ¶18, 312 P.3d 657 (2013). However, distribution of property is not at issue here. Mr. Roeser seeks to assert a priority of appointment as PR equivalent to a surviving spouse, but the Supreme Court has clearly stated that CIR is not the equivalent of surviving spouse for inheritance purposes. *Peffley-Warner v. Bowen*, 113 Wn.2d at 253; accord, *Estate of Langeland* at 329-330, ¶30.

VI. REQUEST FOR AWARD OF ATTORNEY FEES AND COSTS

RCW 11.96A.150 gives the Court broad discretion to award attorney fees and costs in any probate or guardianship action "as the court determines to be equitable." The award is not automatic to the prevailing party, but is based in equity. *Id.* Washington law favors the protection of estates and trusts through the award of attorney fees and costs. *Laue v.*

Estate of Elder, 106 Wn. App. 699, 712, 25 P.3d 1032 (2001), *review denied*, 145 Wn.2d 1036 (2002). Here, as between Mr. Roeser and Ms. Blowers' Estate and Layla its sole heir, Mr. Roeser should bear the cost of this action. An award requiring Mr. Roeser to pay the Estate's attorney fees and costs is appropriate.

One purpose of an attorney fee award is to preserve trust or estate funds and prevent injury to the beneficiaries. *Tucker v. Brown*, 20 Wn.2d 740, 838, 150 P.2d 604 (1944). Here, Mr. Roeser has fought to maintain control of an Estate despite having no actual pecuniary interest, causing the Estate to incur attorney fees and costs that could only be paid from wrongful death proceeds which are entirely for Layla's benefit. As Mr. Roeser has no actual interest in the estate and is not even an aggrieved party to the Order from which he appeals, his action primarily harms Layla's interests. He should not be allowed to diminish the funds for Layla's support by forcing the Estate to bear the cost of opposing his appeal. The Estate should be awarded judgment against Mr. Roeser in the amount of the Estate's reasonable attorney fees and costs.

VII. CONCLUSION

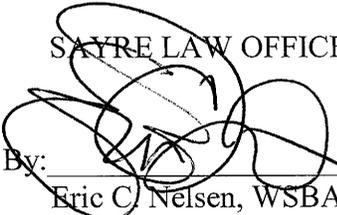
Mr. Roeser brings this appeal but is not an aggrieved party. No right or interest of his was impaired by dismissal of the Washington probate and cancellation of his Letters. Nor was the Estate harmed. The Court should dismiss this appeal for lack of standing.

In the alternative, even had he standing to bring the appeal, the Superior Court correctly declined jurisdiction in favor of the domiciliary probate in Florida, which is capable of pursuing the wrongful death action in Washington courts without necessity of ancillary probate in Washington. The Court should affirm the Order dismissing the Washington probate.

The only effect of Mr. Roeser's appeal is to cause the Estate, and by extension its 11-year-old sole heir, considerable expense to oppose it. The Estate should be awarded reasonable attorney fees and costs against Mr. Roeser.

Respectfully submitted,

DATE: September 2, 2016.

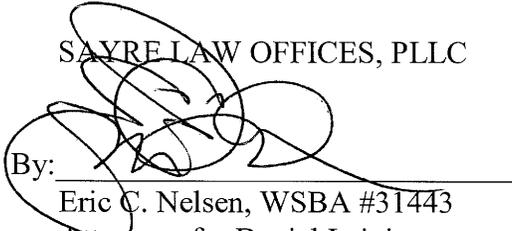
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CERTIFICATE OF MAILING

I certify that on September 2, 2016, I sent via email, and mailed,
postage prepaid, a copy of the foregoing Brief of Respondent to:

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