

January 2007

Reconciling the Wyoming Death Act with the Wyoming Probate Code: The Legislature's Wake-up Call for Clarification

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Available at: <https://scholarship.law.uwyo.edu/wlr/vol7/iss2/5>

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COMMENT

Reconciling the Wyoming Wrongful Death Act with the Wyoming Probate Code: The Legislature's Wake-up Call for Clarification

GRANT HARVEY LAWSON*

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I. INTRODUCTION

This comment is intended to help provide useful information to the Wyoming Legislature and Wyoming attorneys and judges related to unanswered questions regarding the Wyoming Wrongful Death Act (“Wrongful Death Act” or “Act”).¹ Specifically, this comment will address whether provisions of the Wyoming Probate Code (“Probate Code”) must be referred to when using the Wrongful Death Act, and what the Wyoming Legislature must do to successfully amend the Act.²

For an understanding of the issues presented herein it is helpful to consider this hypothetical: Ms. Pitiable, a young woman fresh out of law school, decides

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¹ Wyoming Wrongful Death Act, WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

² Wyoming Probate Code, WYO. STAT. ANN. §§ 2-1-101 to 2-16-112 (LexisNexis 2005).

that she is not ready for the stresses of the legal world and moves to Wyoming to become a roughneck in the oil patch to pay off her enormous student loans. Not having a penny to her name, she takes the first job offer she gets from Colossal Oil Corporation and soon finds her way to the scenic and beautiful area known as the Jonah Field in western Wyoming. While working her fourth straight day without any significant sleep, Ms. Pitable is taking part in a drilling operation with fellow employees and employees from other corporations when she is killed by a complication in the drilling procedure due to the negligence of several parties.

Mr. Greenback, who is Ms. Pitable's brother, decides to bring a wrongful death action pursuant to the Wrongful Death Act against all liable parties. Although the incident occurred in Wyoming, and the responsible parties are all from corporations domiciled in Wyoming, Mr. Greenback brings the action in the Federal District Court of Wyoming, claiming diversity of citizenship under 28 U.S.C. § 1332 because he is a resident of California.³ Mr. Greenback is appointed personal representative of Ms. Pitable by the district court, according to the requirements of the Wrongful Death Act.⁴

As any well-trained attorney should do, counsel for the Colossal Oil Corp. proceeds to dissect the applicable provisions of the Wrongful Death Act. In doing so, counsel focuses on the requirement that a personal representative must be appointed on behalf of the deceased.⁵ However, counsel finds no definition of "personal representative" in the Wrongful Death Act.⁶ Counsel then examines other Wyoming statutes to find a pertinent definition. After much scrupulous research and many billable hours, counsel discovers a reference to "personal representative" in the Probate Code.⁷ After even further research, counsel determines that another Probate Code provision is helpful in determining the validity of the appointment of Mr. Greenback as the personal representative of Ms. Pitable. Probate Code section 2-4-201(c) states that if a person seeking to be appointed as an administrator of a decedent's intestate estate is not a Wyoming citizen, then a Wyoming co-administrator must be appointed for a decedent's intestate estate to be subject to probate matters.⁸

Counsel for Colossal exclaims, "Eureka!" as he recognizes a potential problem with Mr. Greenback's compliance with the Wrongful Death Act. Counsel files a motion to dismiss Mr. Greenback's wrongful death action, arguing that because no Wyoming co-administrator, or in-state co-personal representative,

³ 28 U.S.C. § 1332 (2005).

⁴ See WYO. STAT. ANN. § 1-38-102 (LexisNexis 2005).

⁵ WYO. STAT. ANN. § 1-38-102(a) (LexisNexis 2005).

⁶ See WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

⁷ See WYO. STAT. ANN. § 2-1-301(a)(xxviii) (LexisNexis 2005).

⁸ See WYO. STAT. ANN. § 2-4-201(c) (LexisNexis 2005).

was appointed, Mr. Greenback has not complied with the Wrongful Death Act. Additionally, counsel argues that the two-year condition precedent requirement in the Wrongful Death Act has passed, leaving Mr. Greenback no opportunity to appoint an in-state co-personal representative and amend his complaint, essentially preventing Mr. Greenback from having his day in court.⁹ To top it off, counsel for Colossal finds a discrepancy relating to Mr. Greenback's diversity with the liable parties under 28 U.S.C. §§ 1332(c)(2), as it is unclear whether he represents his sister's heirs, or his sister's estate, which could prevent him from claiming his own domicile for purposes of diversity.

In the State of Wyoming, when a person dies due to another's negligence or wrongdoing, a surviving family member has the option of bringing a wrongful death action against a responsible party under the Wrongful Death Act.¹⁰ Certain conditions must be met to bring the action, including a requirement that the action "shall be brought by and in the name of the personal representative of the deceased person."¹¹ However, the Wrongful Death Act does not contain a definition of "personal representative," a provision relating to the requirements for the appointment of a personal representative, or a provision listing the beneficiaries for whom an action can be brought.¹² These aspects of the Wrongful Death Act remain unclear and unsettled. In fact, according to the Wyoming Supreme Court in *Corkill v. Knowles*, the Wrongful Death Act, when read as a whole is ambiguous.¹³

There are no references in the Wrongful Death Act to the Probate Code, nor does the Probate Code specifically mention the Act. However, the Wyoming Supreme Court, in struggling to interpret the Wrongful Death Act, has at times resorted to using definitions and provisions found in the Probate Code. The reasoning behind the Wyoming Supreme Court's reference to the Probate Code boils down to the intrinsic structure and function of the Wrongful Death Act and the lack of guidance it provides. The silence in the Wrongful Death Act regarding the applicability of Probate Code provisions and the lack of definitions in the Act has left the Wyoming Supreme Court to play pin the probate provision tail on the wrongful death donkey.

Whether certain Probate Code provisions apply to the appointment process of a personal representative for a wrongful death action is an important issue. Several provisions of the Probate Code, if found applicable to the Wrongful Death Act, could have serious implications, such as creating problems when obtaining

⁹ See WYO. STAT. ANN. § 1-38-102(d) (LexisNexis 2005).

¹⁰ WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

¹¹ WYO. STAT. ANN. § 1-38-102(a) (LexisNexis 2005).

¹² See WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

¹³ *Corkill v. Knowles*, 955 P.2d 438, 439 (Wyo. 1998).

diversity jurisdiction in a federal court.¹⁴ Also, for wrongful death actions brought in either state or federal court, an out-of-state personal representative would be required to find an adequate in-state co-personal representative, which could prove to be difficult. The Wyoming Legislature did not identify these concerns in the original drafting of the Wrongful Death Act or in subsequent amendments to the Act.¹⁵ The question of whether the related Probate Code provisions apply to the Wrongful Death Act must be addressed by the Wyoming Legislature.

The issues presented in this comment are not entirely new to the Wyoming Legislature or practicing attorneys in this state. The Wyoming Legislature has previously been directed to the complications presented by the Wrongful Death Act.¹⁶ A comment written by the Honorable V.J. Tidball in 1947, which was published in the *Wyoming Law Journal*, called for the Wyoming Legislature to amend the Wrongful Death Act to provide better guidance for who can be considered as a beneficiary in a wrongful death action and to clarify the status and role of the “personal representative” in wrongful death actions.¹⁷ However, Judge Tidball’s recommendations were never implemented by the Wyoming Legislature. Much of the confusion which plagued Wyoming attorneys in the 1940s was never eliminated, and after nearly sixty years, the Wyoming Legislature is once again presented with the same issues that need to be addressed.¹⁸

This comment recommends that the Wyoming Legislature clarify, complete, and amend the Wrongful Death Act. It first addresses the background of the Wrongful Death Act and the Probate Code, and discusses how the Wyoming Supreme Court and the Federal District Court of Wyoming have interpreted the relationship between the two. Next, this comment looks to other states that have addressed whether out-of-state personal representatives should be allowed to bring actions in the decedent’s state and examines the approaches these states have adopted for those allowed to bring wrongful death actions. In doing so, it considers how states with similar wrongful death acts and the courts interpreting them have addressed similar issues. Additionally, this comment addresses how the Federal Diversity Jurisdiction Statute, 28 U.S.C. § 1332(c)(2), impacts Wyoming

¹⁴ See 28 U.S.C. § 1332(c)(2) (2005). Section 1332 is the federal diversity statute and subsection (c)(2) pertains to representatives of a decedent’s estate and presents an issue of whether a personal representative in a wrongful death action represents the decedent’s estate or the heirs of the decedent for diversity purposes. *Id.*

¹⁵ Note: No legislative history addressing these concerns and issues could be located.

¹⁶ See V.J. Tidball, *Probate Jurisdiction in Wrongful Death Actions*, 2 WYO. L.J. 109 (1947).

¹⁷ *Id.*

¹⁸ Tidball’s comment focused on the issue of whether the probate court had jurisdiction over wrongful death actions, approval of settlements of claims, and control of the personal representative to account to the probate court for the proper distribution of the sum recovered in wrongful death actions. Tidball, *supra* note 16.

wrongful death actions in federal courts and examines the true meaning of “personal representative” for purposes of the Wrongful Death Act.

Overall, whether the Probate Code applies to the Wrongful Death Act, completely or in part, is a complex question. It is the Wyoming Legislature’s responsibility to navigate through the murky water in order to clarify what is required under the Wrongful Death Act and provide clear and concise provisions for those bringing a wrongful death action.

II. BACKGROUND

A. *Wyoming Wrongful Death Act*

The Wrongful Death Act was enacted for the purpose of benefiting persons who have been injured because of a relative’s death.¹⁹ The Wrongful Death Act is Wyoming’s version of Lord Campbell’s Act, which created a statutory remedy for a wrongful death in England in 1846.²⁰ Prior to 1846, no action existed at common law to “recover damages for wrongfully causing the death of a human being.”²¹ Lord Campbell’s Act “created a new cause of action based upon the defendant’s wrongful act, neglect or default, limited recovery to certain named beneficiaries, and measured damages with respect to the loss suffered by these beneficiaries.”²²

¹⁹ See *Ashley v. Read Const. Co.*, 195 F. Supp. 727, 729 (D. Wyo. 1961).

²⁰ STUART M. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 1.7 (1st ed. 1966). See also *McDavid v. United States*, 213 W. Va. 592 (W. Va. 2003) (providing a good synopsis of the history of wrongful death actions); *Coliseum Motor Co. v. Hester*, 3 P.2d 105, 106 (Wyo. 1931), providing Lord Campbell’s Act as follows:

That whensoever the death of a person shall be caused by the wrongful act, neglect, or default of another and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. That every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the before-mentioned parties in such shares as the jury, by their verdict, shall direct.

Coliseum, 3 P.2d at 106.

²¹ *Tuttle v. Short*, 288 P. 524, 529 (Wyo. 1930).

²² SPEISER, *supra* note 20, at § 1.7.

Not long after the English Parliament's passage of Lord Campbell's Act, many states in the U.S. adopted wrongful death statutes.²³

Wyoming adopted its Wrongful Death Act in 1871, and patterned it almost exclusively after West Virginia's Wrongful Death Act, which will be addressed below.²⁴ The Wyoming Wrongful Death Act states:

Whenever the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action to recover damages if death had not ensued, the person who would have been liable if death had not ensued is liable in an action for damages, even though the death was caused under circumstances as amount in law to murder in the first or second degree or manslaughter. If the person dies, the action may be brought against the executor or administrator of his estate. If he left no estate within the state of Wyoming, the court may appoint an administrator upon application.²⁵

For a wrongful death action to accrue, there are certain statutory requirements. Section 1-38-102 of the Wrongful Death Act requires:

- (a) Every such action shall be brought by and in the name of the personal representative of the deceased person.
- (b) If the deceased left a husband, wife, child, father or mother, no debt of the deceased may be satisfied out of the proceeds of any judgment obtained in any action brought under the provisions of this section.
- (c) The court or jury, as the case may be, in every such action may award such damages, pecuniary and exemplary, as shall be deemed fair and just. Every person for whose benefit such action is brought may prove his respective damages, and the court or jury may award such person that amount of damages to which it considers such person entitled, including damages for loss of probable future companionship, society and comfort.

²³ *Id.* § 1.8.

²⁴ *Coliseum*, 3 P.2d at 106; *see also* *Corkill v. Knowles*, 955 P.2d 438, 441 (Wyo. 1998).

²⁵ WYO. STAT. ANN. § 1-38-101 (LexisNexis 2005); *see* W. VA. CODE § 55-7-5 (2006).

- (d) Every such action shall be commenced within two (2) years after the death of the deceased person.²⁶

Provisions under section 1-38-102 require that two important condition precedents must be met in order to bring an action.²⁷ First, a personal representative of the decedent must be appointed to bring the action.²⁸ Second, the personal representative must bring the action within two years of the decedent's death.²⁹ For purposes of this comment, it is the first condition that will be considered and analyzed. The Wrongful Death Act is silent with regard to the definition of "personal representative" and the procedure for the appointment of a personal representative, thereby creating a multitude of problems for those attempting to comply with the Act and for courts overseeing compliance with the Act. Not only does the Wrongful Death Act fail to provide a definition of "personal representative," it does not point to another location where one can be found.³⁰

B. Wyoming Probate Code

The Probate Code is a collection of statutes relating to probate matters. *Black's Law Dictionary* defines probate as "the judicial procedure by which a testamentary document is established to be a valid will," and "loosely, a personal representative's actions in handling a decedent's estate," and also "loosely, all the subjects over which probate courts have jurisdiction."³¹ According to *Black's*, the phrase "probate code" is defined as "a collection of statutes setting forth the law (substantive and procedural) of decedent's estates and trusts."³² The definition of "estate" in the Probate Code is "the real and personal property of a decedent, a ward or a trust, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions, additions or substitutions, or diminished by any decreases and distributions therefrom."³³

²⁶ WYO. STAT. ANN. § 1-38-102 (LexisNexis 2005) (entitled "Action to be brought by personal representative; recovery exempt from debts; measure and element of damages; limitation of action.").

²⁷ *Id.*

²⁸ *Bircher v. Foster*, 378 P.2d 901 (Wyo. 1961). The court in *Bircher* held that the appointment of a personal representative must be done by a state district court sitting in probate. *Id.* at 903. Nowhere in the provisions of the Wrongful Death Act is this requirement stated, setting forth the issue of whether this was the legislature's true intent. *Id.*

²⁹ WYO. STAT. ANN. § 1-38-102(d) (LexisNexis 2005).

³⁰ See WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

³¹ BLACK'S LAW DICTIONARY 557 (2nd pocket ed. 2001).

³² *Id.*

³³ WYO. STAT. ANN. § 2-1-301(a)(xiv) (LexisNexis 2005). It is important to note that the Wyoming Probate Code is located in Title 2 of the Wyoming Statutes, whereas the Wyoming Wrongful Death Act is located in Title 1 of the Wyoming Statutes, the Civil Code.

Under the Probate Code, a “personal representative” includes an executor or administrator.³⁴ Generally, administrators handle the estates of persons dying intestate (without a will), while executors are appointed from the will of a testate decedent. An “administrator of an estate is empowered to take into his possession all of the estate of the decedent, real or personal, to collect all debts due to the decedent or to the estate, ultimately to probate, administer and distribute the estate for the benefit of the heirs.”³⁵ An executor is “any person appointed by the court to administer the estate of a testate decedent,” and generally the duty of the executor is to execute the will of the decedent.³⁶

Alternatively, the personal representative appointed for a wrongful death action is only “required to collect the amount received as damages from the wrongful death action and to distribute it in the manner provided by law.”³⁷ The award does not benefit the decedent’s estate.³⁸ Thus, the function of a personal representative in collecting damages for the beneficiaries of the wrongfully deceased has no connection to “administration” of a decedent’s estate.

Nowhere in the Probate Code is there a reference to the Wrongful Death Act.³⁹ The essential focus of the Probate Code on a person’s estate at death presents an immediate problem when Probate Code definitions are commingled with terms in the Wrongful Death Act. Any award from a wrongful death action is not considered part of a decedent’s estate for purposes of probate.⁴⁰ The Wrongful Death Act’s purpose is to compensate family members for their loss and is not to enhance the decedent’s estate.⁴¹

Probate Code section 2-4-201, and whether it applies to the Wrongful Death Act, presents several issues. Section 2-4-201(a) states that a relative can be an administrator of a decedent’s estate only when entitled to succeed to the decedent’s personal estate or some portion thereof.⁴² The list given for those entitled to administer under section 2-4-201 contains a provision for the creditors of the decedent, and a provision for any legally competent person.⁴³ These provisions

³⁴ WYO. STAT. ANN. § 2-1-301(a)(xxviii) (LexisNexis 2005).

³⁵ *Ashley v. Read Const. Co.*, 195 F. Supp. 727, 729 (D. Wyo. 1961); *see also* WYO. STAT. ANN. § 2-1-301(a)(i) (LexisNexis 2005).

³⁶ WYO. STAT. ANN. § 2-1-301(a)(xv) (LexisNexis 2005). *See also* BLACK’S LAW DICTIONARY 259 (2nd Pocket ed. 2001).

³⁷ *Ashley*, 195 F. Supp. at 729.

³⁸ *Id.*

³⁹ *See* WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

⁴⁰ *See Ashley*, 195 F. Supp. at 728.

⁴¹ *Id.*

⁴² WYO. STAT. ANN. § 2-4-201(a) (LexisNexis 2005).

⁴³ WYO. STAT. ANN. § 2-4-201(a)(viii) (LexisNexis 2005).

present problems for the appointment of a personal representative for a wrongful death action and also contain language contrary to the purpose and limitations of the Wrongful Death Act.

Section 2-4-201 conflicts with the Wrongful Death Act, in that “the amount recovered [in a wrongful death action] does not become a part of the decedent’s estate and is not liable for debts of the estate or subject to estate administration.”⁴⁴ Section 2-4-201(a)(viii) allows creditors to administer a decedent’s estate for recovering debts owed and damages recovered under a wrongful death action, which is not permissible under the Wrongful Death Act.⁴⁵ Subsection (c) of section 2-4-201 states “[n]o nonresident of the state of Wyoming shall be appointed as administrator unless a resident of Wyoming is appointed as coadministrator.”⁴⁶ Provisions like section 2-4-201(c), which require an in-state personal representative, are typically for the protection of creditors of the decedent’s estate.⁴⁷

An important concern to note, regarding linking Probate Code provisions with the Wrongful Death Act, is the possible adoption of the Uniform Probate Code (“UPC”) in Wyoming, which is currently being considered by the Wyoming Legislature.⁴⁸ If the Wyoming Legislature adopted the UPC, it could implicate certain provisions of the Wrongful Death Act. Although it is uncertain whether Wyoming will adopt the UPC, the Wyoming Legislature should recognize this possibility and amend the Wrongful Death Act now to prevent any further complications.

⁴⁴ *DeHerrera v. Herrera*, 565 P.2d 479, 482 (Wyo. 1977) (quoting *Jordan v. Delta Drilling Co.*, 541 P.2d 39, 42 (Wyo. 1975)). The conflict lies within the intestate statute, *see* WYO. STAT. ANN. § 2-4-201(a)(viii) (LexisNexis 2005).

⁴⁵ WYO. STAT. ANN. § 2-4-201(a)(viii) (LexisNexis 2005); *see also Ashley*, 195 F. Supp. at 728.

⁴⁶ WYO. STAT. ANN. § 2-4-201(c) (LexisNexis 2005). However, it must be noted that the requirement for an in-state co-representative does not apply to “executors” of decedents’ estates. *See* WYO. STAT. ANN. §§ 2-1-101 to 2-16-112 (LexisNexis 2005).

⁴⁷ *See Elliot v. Stevenson*, 218 F. Supp. 90, 91-92 (D. Or. 1962).

⁴⁸ The UPC is a collection of provisions related to probate matters. U.P.C. § 1-102 (1977). Wyoming has not adopted the UPC. Recently, Senate Bill 06LSO-0468 was introduced in the Legislature to form a joint legislative and executive task force to research the possibility of adopting the UPC in Wyoming. S.F. 0110, 58th Leg., (Wyo. 2006). The bill failed and the Joint Judiciary Committee is currently considering forming a task force to research the possibility of adopting the UPC. If Wyoming were to adopt the UPC, the question arises whether there will be provisions which answer whether the Probate Code must be followed and cross-referenced when using the Wrongful Death Act. At this point, it is pure speculation whether Wyoming will adopt the UPC. Additionally, it would be a guessing game as to which UPC provisions would be adopted. Regardless of whether the state adopts the UPC, the Probate Code should have no affect or control over the Wrongful Death Act. The best solution for the Wyoming Legislature would be to avoid this complication by simply amending the Wrongful Death Act and establish its intent clearly. The Wrongful Death Act itself should provide all the necessary provisions, terms, definitions, and references, in order to circumvent the need for reliance on the Probate Code or UPC if adopted.

C. Wyoming Case Law

In some circumstances, the Wyoming Supreme Court and the Federal District Court of Wyoming have applied Probate Code provisions when deciding wrongful death cases, but the decisions are somewhat contradictory and give no clear guidance as to how, where, and by whom a wrongful death action can be brought. The Wyoming Supreme Court has held that at least one probate provision must be referenced when using the Wrongful Death Act, and that provision relates to who may recover for injuries in a wrongful death suit.⁴⁹ Further, the Federal District Court of Wyoming has distinguished between an administrator acting as a personal representative for a wrongful death action and an administrator of a decedent's estate.⁵⁰ However, the consequences of these rulings are unclear. In addition, it remains unclear whether a co-personal representative is required if the original personal representative is an out-of-state resident.⁵¹

1. Beneficiaries in a Wrongful Death Action

Currently, the Wrongful Death Act does not contain a provision relating to those who are entitled to recover in wrongful death actions.⁵² To address this deficiency, the Wyoming Supreme Court, in *Butler v. Halstead*, held that Probate Code section 2-4-101, relating to intestacy succession, was applicable to the Wrongful Death Act.⁵³ Thus, spouses, children, parents and siblings, as well as grandparents, uncles, aunts, and cousins can recover.⁵⁴ The court noted that “[i]n our judgment, extending to those related persons the opportunity to participate in a wrongful death action does not unduly extend the class of persons for whose benefit such actions may be brought to the point that it would be unmanageable.”⁵⁵ The *Butler* case is one of the few examples where the Wyoming Supreme Court has tied the Probate Code to the Wrongful Death Act.⁵⁶ It is important to recognize, however, that the court limited the applicability of the intestate succes-

⁴⁹ *Butler v. Halstead*, 770 P.2d 698, 700 (Wyo. 1989). The issue in *Butler* was whether a decedent's mother and siblings are included in the statutory phrase “every person for whose benefit such action is brought” under the Act. *Id.* at 698. The district court in *Butler*, in relying on a previous holding from *Wetering v. Eisele*, 682 P.2d 1055 (Wyo. 1984), which stated that the child of a father who was wrongfully killed was the only person for whose benefit a wrongful death action can be brought, overruled this decision by holding that Probate Code § 2-4-101 contains the list of those for whom wrongful death actions are brought. *Id.* at 698-700.

⁵⁰ *Ashley v. Read Const. Co.*, 195 F. Supp. 727, 729 (D. Wyo. 1961).

⁵¹ See WYO. STAT. ANN. § 2-4-201 (LexisNexis 2005).

⁵² See WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

⁵³ *Butler*, 770 P.2d at 700.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

sion statute under the Probate Code, stating that “the distribution of any proceeds will be controlled by [the Wrongful Death Act and not the Probate Code]”⁵⁷ The holding from *Butler*, establishing who may benefit from a wrongful death action, points out a deficiency in the Wrongful Death Act and demonstrates the Wyoming Supreme Court’s superimposed role as the Legislature in this matter.

2. *The Personal Representative Requirement*

A handful of Wyoming Supreme Court cases have discussed the personal representative requirement in the Wrongful Death Act and its relation to the probate provisions. In *Corkill v. Knowles*, the court found that the definition of “personal representative” in the Probate Code should be referenced when looking to the personal representative requirement under the Wrongful Death Act.⁵⁸ Similarly, in *Wetering v. Eisele*, the court held that “the wrongful death action . . . is brought by the personal representative in his capacity as administrator of the decedent’s estate.”⁵⁹

In *Bircher v. Foster*, the Wyoming Supreme Court considered a wrongful death action in a case where there was no probate pending and no administrator or executor appointed.⁶⁰ The *Bircher* court held that “it would seem clear that this court in the past has been consistent in holding that the only person who could bring an action for wrongful death was the personal representative of the deceased, the executor or administrator of decedent’s estate.”⁶¹

Without a clear definition of “personal representative” located in the Wrongful Death Act or elsewhere in the Civil Code, it appears that presently the only option is to refer to the Probate Code.⁶² However, use of the Probate Code’s definition of “personal representative” presents unanswered questions. For example, can a personal representative appointed for the wrongful death action be different

⁵⁷ *Id.*

⁵⁸ *Corkill v. Knowles*, 955 P.2d 438, 444 (Wyo. 1998). The court held that “a personal representative may bring a wrongful death action within two years of the date on which the decedent is identified so the court may appoint a personal representative.” *Id.* at 439. The court, in searching for a definition of personal representative, pointed to the definition found in the Probate Code § 2-1-301(a)(xxviii). *Id.* at 444.

⁵⁹ *Wetering v. Eisle*, 682 P.2d 1055, 1062 (Wyo. 1984). This statement by the court is both correct in part and incorrect in part. The personal representative, in a wrongful death action does act as an administrator of a decedent’s intestate estate in that recovery from a wrongful death action is for the benefit of those listed in the Probate Code. But the personal representative does not represent the decedent’s estate, contrary to this statement in *Wetering*. See *Ashley*, 195 F. Supp. 727 (D. Wyo. 1961); *Jordan v. Delta Drilling Co.*, 541 P.2d 39 (Wyo. 1975); *DeHerrera v. Herrera*, 565 P.2d 479 (Wyo. 1977).

⁶⁰ *Bircher v. Foster*, 378 P.2d 901, 902 (Wyo. 1963).

⁶¹ *Id.*

⁶² See WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

from the personal representative appointed to administer or execute a decedent's estate?⁶³

The decisions from *Butler*, *Corkill*, *Wetering*, and *Bircher* illustrate the Wyoming Supreme Court's view that the provisions under the Wrongful Death Act are somewhat tied to the provisions under the Probate Code.⁶⁴ However, other Wyoming cases emphasize the differences between probate matters and wrongful death actions.⁶⁵ In *Ashley v. Read Const. Co.*, the Federal District Court of Wyoming stated, "[w]e must not confuse an administrator acting as a personal representative with an administrator of an estate whose duties and powers are set out in [the probate statutes]." The court explained:

It is not within the province of this court to qualify the statutory provision 'personal representative' by interpolating the words 'who is a resident of this state,' or 'who is appointed in this state,' or 'who is amenable to the jurisdiction of this state.' It would appear to make little difference what title the special representative might possess, whether it be administrator or executor, foreign or domestic, so long as the amount collected inures to the benefit of the persons designated by law.⁶⁶

The *Ashley* court emphasized that a wrongful death cause of action is brought to benefit those who would share in the distribution of the decedent's estate as if the decedent died intestate, but not to enhance the estate of the deceased.⁶⁷ The amount recovered in a wrongful death action may not be "tapped to pay the debts or liabilities of the deceased."⁶⁸

Similarly, the Wyoming Supreme Court case, *Jordan v. Delta Drilling Co.*, sets forth two important distinctions between the position of the personal representative in a wrongful death action and an administrator in a probate proceeding.⁶⁹

⁶³ *Id.* The Wyoming Wrongful Death Act is located under the Civil Code of the Wyoming Statutes. *Id.*

⁶⁴ *Butler v. Halstead*, 770 P.2d 698 (Wyo. 1989); *Corkill v. Knowles*, 955 P.2d 438 (Wyo. 1998); *Wetering*, 682 P.2d 1055.

⁶⁵ *See Ashley v. Read Const. Co.*, 195 F. Supp. 727 (D. Wyo. 1961); *Jordan v. Delta Drilling Co.*, 541 P.2d 39 (Wyo. 1975); *DeHerrera v. Herrera*, 565 P.2d 479 (Wyo. 1977).

⁶⁶ *Ashley*, 195 F. Supp. at 729.

⁶⁷ *Id.* at 728.

⁶⁸ *Id.*

⁶⁹ *Jordan*, 541 P.2d at 42. In *Jordan*, the decedent was killed in the oil field and the decedent's illegitimate child brought the wrongful death action as the personal representative and administratrix of the decedent's estate. *Id.* at 40. The trial court held that the illegitimate child was not an heir and, therefore, the intestacy laws of Wyoming barred the child from recovery. *Id.* On appeal to the Wyoming Supreme Court, the court held that Wyoming's wrongful death statute could not constitutionally deny an illegitimate child the right to bring a wrongful death action to recover damages for the death of his or her parent. *Id.*

The court still referred to the personal representative in a wrongful death action as an administrator, but said that the “administrator acts but in the capacity of a trustee.”⁷⁰ This conceptualization of a personal representative as a “trustee” has no parallel in the Probate Code, which defines “personal representatives” as either administrators or executors of a decedent’s estate.⁷¹ In *Jordan*, the court also recognized that “the Wyoming Statute authorizing wrongful death actions is part of the civil code of this state and not a part of the probate code.”⁷² This opinion echoes Judge Tidball’s previous comments that “the Wyoming Statute giving a right of action for wrongful death is not a part of the Probate Code, but of the Civil Code,” and that the personal representative acts as a trustee and not as an administrator or executor.⁷³ It is essential that the Wyoming Legislature make this distinction when amending the Wrongful Death Act.

In *DeHerrera v. Herrera*, the Wyoming Supreme Court distinguished the roles a personal representative has in the wrongful death context and a survival action context.⁷⁴ In doing so, the court noted that although an administrator must be appointed for a wrongful death action:

[t]he designation of an administrator as a trustee is only a device to provide a party to file suit and pay over any damages collected to the beneficiaries designated by statute. The amount recovered does not become a part of the decedent’s estate and is not liable for debts of the estate or subject to estate administration.⁷⁵

Contrary to a wrongful death action, the court stated that “a survival statute permits recovery by the decedent’s personal representative on behalf of the estate,” and “the wrongful death statute creates a new cause of action for the benefit of designated persons who have suffered the loss of a loved one and provider.”⁷⁶

Since the decision in *DeHerrera*, the court has added to the confusion regarding the status of the personal representative in wrongful death actions. While in *DeHerrera*, the Wyoming Supreme Court said a personal representative in a

⁷⁰ *Id.*; see also *Bircher v. Foster*, 378 P.2d 901. The *Bircher* court stated that the only person entitled to bring the action was the administrator or executor of the decedent’s estate. *Id.* at 902. However, a personal representative in a wrongful death action acts as trustee and not as an administrator or executor of a decedent’s estate, as it has been pointed out that wrongful death actions do not benefit the estate of the decedent. *Jordan*, 541 P.2d at 42.

⁷¹ WYO. STAT. ANN. § 2-1-301(a)(xxviii) (LexisNexis 2005).

⁷² *Jordan*, 541 P.2d at 42.

⁷³ Tidball, *supra* note 16, at 109.

⁷⁴ *DeHerrera v. Herrera*, 565 P.2d 479, 482 (Wyo. 1977).

⁷⁵ *Id.* at 482.

⁷⁶ *Id.*

wrongful death action is not related to the administrator of the decedent's probate estate, it contradicted itself in *Corkill*, saying that the personal representative is the same thing as an executor of a decedent dying with a will or an administrator of a decedent dying intestate.⁷⁷

Corkill is the most recent discussion by the Wyoming Supreme Court on this topic.⁷⁸ In *Corkill*, the court referred directly to the definition in the Probate Code for "personal representative."⁷⁹ However, the court did not address whether the Wyoming Legislature intended for the Probate Code definition to apply to the Wrongful Death Act. Thus, the actual intent of the Legislature remains unclear.⁸⁰

The classification of a personal representative in the wrongful death context with that of an administrator or executor in the probate context fails to recognize two important concepts. First, as the Wyoming Supreme Court and Federal District Court of Wyoming have already established, a personal representative for a wrongful death action must not be confused with an administrator or executor for probate matters.⁸¹ Second, the decedent's estate for purposes of probate is entirely separate from the wrongful death action, and the current definition under the Probate Code presumes that a decedent will have an estate, whether he or she dies intestate or testate.⁸² However, it is possible for a decedent to die and leave no estate, ruling out the possibility of a personal representative in either category of administrator or executor. There is clearly a distinction between a wrongful death action and probate matters. Thus, it would be reasonable to assume that the Wrongful Death Act does not require the personal representative for a wrongful death action to be the same person as the probate administrator or executor. While this is contrary to the decision in *Bircher*, it seems to be the most logical conclusion.⁸³

⁷⁷ *Id.*; *Corkill v. Knowles*, 955 P.2d 438, 444 (Wyo. 1998).

⁷⁸ *Corkill*, 955 P.2d at 441.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Ashley v. Read Const. Co.*, 195 F. Supp. 727, 729 (D. Wyo. 1961).

⁸² WYO. STAT. ANN. § 2-1-301(a)(xxviii) (LexisNexis 2005).

⁸³ *Bircher v. Foster*, 378 P.2d 901 (Wyo. 1963). The Wyoming Supreme Court held that because the father of the decedent did not timely file for personal representative of his son for a wrongful death action, the time had passed and his claim had to be dismissed. *Id.* The father attempted to be appointed as personal representative after the two year limitation period and after he filed his complaint for the wrongful death of his son. *Id.* The court, in addressing whether the father could bring the action without being appointed as the personal representative, stated that "it would seem clear that this court in the past has been consistent in holding that the only person who could bring an action for wrongful death was the personal representative of the deceased, the executor or administrator of the decedent's estate." *Id.* at 902.

A recent Federal District Court of Wyoming case, *Schwartz v. Hawkins & Powers Aviation, Inc.*, sheds some light on the personal representative requirement.⁸⁴ The *Schwartz* court stated that “while generally, the personal representative is an executor or administrator of the decedent’s estate, this is not a requirement. The personal representative simply acts as a trustee for any beneficiaries or heirs, collecting any damages, and paying them over to those entitled to share in the estate.”⁸⁵ Through the court’s opinion in *Schwartz*, it is apparent that the *Ashley* case is still relied upon and provides important guidance in this area of law for the Federal District Court of Wyoming.⁸⁶ In *Ashley*, the court addressed the residency requirement of the personal representative and stated, “there is nothing whatever in this statute which indicates any intention on the part of the Wyoming Legislature to exclude a non-resident administrator from acting as personal representative. Certainly he or she can resort to the federal court under diversity provisions of the Code.”⁸⁷ In *Ashley*, a California resident appointed as the personal representative in California brought the wrongful death suit in the Federal District Court of Wyoming under the Wrongful Death Act and the court held that this was proper and allowed under the Act.⁸⁸

Neither the Wyoming Supreme Court, nor the Wyoming Legislature has addressed the question of whether Probate Code section 2-4-201(c), which would require the appointment of an in-state co-administrator, applies to the Wrongful Death Act. The question is what real purpose would this requirement serve? The general rule is that an out-of-state personal representative (foreign personal representative) for probate purposes has no capacity to sue outside the state of his or her appointment.⁸⁹ However, the modern trend, sometimes referred to as “the modern liberal doctrine,” excludes this rule from applying to foreign personal representatives in wrongful death actions.⁹⁰ The personal representative in a wrongful death action

sues not in his capacity as such, but in the capacity of a trustee for such beneficiaries, and, as the doctrine denying the personal representative right to sue in a jurisdiction other than that of his appointment is predicated on the idea that local creditors must be first satisfied before the representative may be permitted to

⁸⁴ *Schwartz v. Hawkins & Powers Aviation, Inc.*, 2006 WL 1028392 * 8 (D. Wyo. 2006).

⁸⁵ *Id.* (citing *Ashley*, 195 F. Supp. at 729).

⁸⁶ *See id.*

⁸⁷ *Ashley*, 195 F. Supp. 727, 729 (D. Wyo. 1961).

⁸⁸ *Id.* at 728-29.

⁸⁹ E.H. Schopler, Annotation, *Capacity of Foreign Domiciliary, or of Ancillary, Personal Representative to Maintain Action for Death, Under Statute of Forum Providing for Action by Personal Representative*, 52 A.L.R.2d 1048 § 2 (2006).

⁹⁰ *Id.*

recover local assets and remit them to another jurisdiction, the reason for the rule ceases to exist when the recovery is not subject to claims of deceased's creditors, but is to be distributed among the statutory beneficiaries.⁹¹

D. *Wrongful Death in Other States*

1. *The Personal Representative Approach*

The Wyoming Wrongful Death Act follows the majority of states in requiring that a personal representative must bring the action.⁹² The basic question for the Wrongful Death Act is whether out-of-state personal representatives should be allowed to bring wrongful death actions in Wyoming and, if so, must in-state co-personal representatives be appointed in such cases.

As mentioned above, the Wyoming Wrongful Death Act was modeled almost entirely after the West Virginia Wrongful Death Act.⁹³ The West Virginia Act, like Wyoming's, contains a provision that "every such action shall be brought by and in the name of the personal representative of such deceased person"⁹⁴ However, unlike the Wyoming Wrongful Death Act, it continues on to state "who has been duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country."⁹⁵ Thus, out-of-state personal representatives may bring wrongful death actions in West Virginia. This was not always the case. Prior to 1967, the West Virginia Wrongful Death Act merely stated that "every such (wrongful death) action shall be brought by and in the name of the personal representative of such deceased person."⁹⁶ In 1940, a federal court held, in *Rybolt v. Jarret*, that the West Virginia Legislature intended to prohibit non-resident personal representatives from suing in West Virginia.⁹⁷ The West

⁹¹ *Id.* at § 4[a].

⁹² States which limit wrongful death actions to be brought by the decedent's personal representative also include, Alaska, California, Illinois, Kentucky, Maine, Massachusetts, Michigan, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, and Washington. See statutes of individual states. For states that have chosen to take the personal representative-only approach with their wrongful death statutes, most contain a separate provision or language within the statute addressing for whose benefit wrongful death actions are brought. See statutes of individual states. For example South Dakota's Wrongful Death Act states that an action shall be brought in the name of the personal representative of the deceased person for the "exclusive benefit of the wife or husband and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused." S.D. CODIFIED LAWS § 21-5-5 (2006). This example is typical of most states that follow the personal representative requirement approach.

⁹³ *Coliseum Motor Co. v. Hester*, 3 P.2d 105, 106 (Wyo. 1931).

⁹⁴ W. VA. CODE § 55-7-6(a) (2006) (emphasis added).

⁹⁵ *Id.*

⁹⁶ See *Rosier v. Garron, Inc.*, 199 S.E.2d 50, 52 (W. Va. 1973).

⁹⁷ See *id.*

Virginia Legislature disagreed with the court's decision and amended the wrongful death statute in 1967 to clearly state that non-resident personal representatives are allowed to sue under the wrongful death statute.⁹⁸

Like West Virginia, the Virginia wrongful death statute is similar to that of Wyoming in that it requires wrongful death actions to be brought by, and in the name of, the personal representative of the deceased person.⁹⁹ Until 1996, the Virginia statute contained a provision which stated "a natural person, not a resident of this Commonwealth *shall not* be appointed or allowed to qualify or act as personal representative . . . of any decedent . . . unless there is also appointed to serve with the nonresident personal representative . . . a person resident in this Commonwealth . . ." ¹⁰⁰ However, in 1996, this condition was removed by the Virginia Legislature, which amended the provision to state "a natural person, not a resident of this Commonwealth, *may* be appointed or allowed to qualify or act as personal representative, or trustee under a will, of any decedent . . ." ¹⁰¹

The purpose of the amendment to Virginia wrongful death statute was to remove "the requirement that nonresident fiduciaries must have resident co-fiduciaries to be allowed to qualify as personal representatives, trustees, or guardians."¹⁰² As discussed above and will be addressed further below, having an in-state co-administrator (co-personal representative) is a concern for creditors of a decedent's estate, which is not an issue with wrongful death actions.¹⁰³

The Alaska wrongful death statute is also similar to that of Wyoming's Wrongful Death Act, and provides that "only a duly appointed personal representative can institute and prosecute the same for the benefit of the widow and children of the decedent."¹⁰⁴ The Federal District Court of Oregon, in *Elliot v. Stevenson*,

⁹⁸ *Id.* See also W. VA. CODE § 55-7-6 (1967). An out-of-state appointed personal representative must meet the conditions of posting a bond with a corporate surety authorized to do business in the state, pay all costs adjudged against him or her, and comply with the provisions of the wrongful death act. *Id.*

⁹⁹ VA. CODE ANN. § 8.01-50 (2006).

¹⁰⁰ *Wackwitz v. Roy*, 418 S.E.2d 861, 863 (Va. 1992) (citing VA. CODE ANN. § 25-59 (1992)) (emphasis added).

¹⁰¹ VA. CODE ANN. § 26-59 (2006) (emphasis added).

¹⁰² Virginia General Assembly, 1996 Session (October 2006), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses+961&ctyp=bil&val=hb347>. In Virginia, to qualify as a personal representative or trustee of any decedent, that person will be subject to VA. CODE ANN. § 64.1-116.

¹⁰³ See *supra* note 89, *infra* note 107 and accompanying text; see also *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602, 613 (W.D.Va. 2002). It does appear that Virginia considers personal representatives to be of the same status as administrators for probate matters, and the 1996 amendment permits nonresidents to be "appointed or allowed to qualify as administrator so long as they consent to service of process in matters related to administration of the estate and post bond with surety." *Id.*

¹⁰⁴ *Elliot v. Stevenson*, 218 F. Supp. 90, 91 (D. Or. 1962). See ALASKA STAT. § 09-55-580 (2006).

clarified the question of whether out-of-state personal representatives may bring wrongful death action under the Alaska wrongful death statutes.¹⁰⁵ Here, the United States District Court of Oregon was presented with the issue of whether a personal representative, who was appointed in Alaska, could bring a wrongful death action under the Alaska wrongful death statute against an Oregon citizen in the Oregon Federal District Court.¹⁰⁶ The court, in considering the defendant's argument that the personal representative cannot act in her representative capacity in a state other than the one in which she received her appointment, stated:

[T]he authority of a personal representative to sue does not extend beyond the territorial jurisdiction of the court from which he derives his appointment. *The rule which prohibits foreign administrators from bringing an action is founded upon policy reasons wherein the state seeks to protect local creditors who are entitled to recover their claims from the local assets of the deceased.* Most courts have, however, recognized an exception to the rule and permit an action by the foreign administrator where recovery is sought for designated beneficiaries under a wrongful death statute which provides that the action shall be brought by the personal representative of the decedent's estate. *The primary reason for this exception to the rule is that the personal representative merely acts as a nominal plaintiff under the statute and that any recovery will not become a part of the estate of the deceased to which local creditors might assert a claim.*¹⁰⁷

The *Elliot* court went on to state that:

[t]he rule barring foreign administrators from our courts is just and reasonable only if applied in cases, first, where there are domestic creditors, and second, where the foreign administrator sues to recover a fund in which such creditors may share. *Obviously, no prejudice threatens local creditors of the decedent if the wrongful death statute makes no provision for recovery on behalf of the general estate and, in fact, bars creditors' claims against the proceeds.* Suing under such a statute, plaintiff acts, not as an officer of the foreign court appointed by it as alter ego for the estate, but as a trustee for the designated beneficiaries, the actual and real parties in interest. In such a case, the amount recovered truly constitutes a special fund for their exclusive benefit, and, since it is not subject to the claims of others, no danger exists that failure

¹⁰⁵ *Elliot*, 218 F. Supp. 90.

¹⁰⁶ *Id.*

¹⁰⁷ *Elliot*, 218 F. Supp. at 92 (emphasis added).

to require local qualification may harm or prejudice domestic creditors. With the primary and, perhaps, only reason for the rule thus removed, the rule itself has no sensible application and should not be invoked in this class of case.¹⁰⁸

This line of reasoning laid out in *Elliot* is important for considering whether to apply section 2-4-201(c) to the appointment of a personal representative under the Wrongful Death Act.

2. *The Heir Approach*

Unlike Wyoming, West Virginia, and Virginia, a wrongful death action under Kansas law “may be commenced by any one of the heirs at law of the deceased who has sustained a loss by reason of the death.”¹⁰⁹ Thus, Kansas’ approach eliminates the need for a personal representative.¹¹⁰ Kansas’ approach is unique in allowing any heir at law to commence the suit, and the Kansas statute does not mention whether personal representatives appointed for a decedent are allowed to bring an action.¹¹¹ This approach is simplistic and recognizes that all wrongful death actions are brought for the benefit of the decedent’s heirs.

3. *The Dual Approach*

While some states have chosen to take the “personal representative” approach for those allowed to bring wrongful death actions and others the “heir” approach, a third group of states have chosen to incorporate the two approaches into what is known as the “dual approach.”¹¹² At least fourteen states currently use the dual approach, which allows wrongful death actions to be brought by either the decedent’s heirs *or* a personal representative of the decedent.¹¹³ Thus, those who are entitled to recover under these state’s wrongful death statutes may bring the action directly, or through a personal representative, if preferred.

¹⁰⁸ *Id.* (emphasis added).

¹⁰⁹ KAN. STAT. ANN. § 60-1902 (2006).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² For example, Arkansas, Utah, and Wisconsin are several states that have chosen to allow both personal representatives and decedent’s heirs to bring wrongful death actions. *See* ARK. CODE ANN. § 16-62-102(b) (2006) (quoted in text below); UTAH CODE ANN. § 78-11-7 (2006) (“His heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death . . .”); WIS. STAT. § 895.04 (2005) (“An action for wrongful death may be brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs.”).

¹¹³ Other states which have chosen to take the dual approach are Arizona, Arkansas, Delaware, Hawaii, Idaho, Mississippi, Missouri, North Dakota, Oklahoma, Pennsylvania, Tennessee, and Texas.

Among the dual approach states, North Dakota's Wrongful Death Act provides a straightforward system for determining who may bring an action:

The action shall be brought by the following persons in the order named:

1. The surviving husband or wife, if any.
2. The surviving children, if any.
3. The surviving mother or father.
4. A surviving grandparent.
5. The personal representative.
6. A person who has had primary physical custody of the decedent before the wrongful act.

If any person entitled to bring the action refuses or neglects so to do for a period of thirty days after demand of the person next in order, that person may bring the action.¹¹⁴

Hawaii is another state that has incorporated the dual approach.¹¹⁵ Hawaii's wrongful death statute provides that the deceased's legal representative, or any of the persons enumerated in a sub-provision of the statute may maintain an action against the responsible parties.¹¹⁶ Arkansas also follows the dual approach, requiring that "every action shall be brought by and in the name of personal representative of a deceased person. If there is no personal representative, then the action shall be brought by the heirs at law of the deceased person."¹¹⁷ Arizona statute section 12-612 is another example of the dual approach, providing that a wrongful death action:

[S]hall be brought by and in the name of the surviving husband or wife, child, parent or guardian, or personal representative of the deceased person for and on behalf of the surviving husband or wife, children or parents, or if none of these survive, on behalf of the decedent's estate.¹¹⁸

The approach used by Arizona presents an interesting issue as it allows an action to be brought on behalf of the decedent's estate if no other person qualifies.¹¹⁹ Allowing this would possibly present an issue with 28 U.S.C. § 1332(c)(2), as discussed above. The Arizona statute, like most states' wrongful death statutes,

¹¹⁴ N.D. CENT. CODE § 32-21-03 (2006).

¹¹⁵ HAW. REV. STAT. § 663-3 (2006).

¹¹⁶ *Id.*

¹¹⁷ ARK. CODE ANN. § 16-62-102(b) (2006).

¹¹⁸ ARIZ. REV. STAT. § 12-612 (2006).

¹¹⁹ *Id.*

regardless of the approach taken, explicitly lists who may recover from a wrongful death action, unlike Wyoming's Wrongful Death Act.¹²⁰

Interestingly, prior to 1987, Montana followed the dual approach for wrongful death actions.¹²¹ However, the Montana statute was amended in 1987 to eliminate the ability of the decedent's heirs to bring suit and clarified that only the personal representative of the decedent's estate, may bring a wrongful death action.¹²²

E. Federal Diversity Jurisdiction Statute, 28 U.S.C. § 1332

Determining the meaning and status of a personal representative for wrongful death actions under the Wrongful Death Act is imperative for determining whether diversity will exist in a federal court. Title 28, § 1332 of the United States Code requires diversity of citizenship between all plaintiffs and all defendants before a case can be brought in federal court.¹²³ The title was amended in 1988 to include §1332(c)(2), which states:

*The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.*¹²⁴

Section 1332(c)(2) was added to the federal diversity of citizenship statute as part of the Judicial Improvements and Access to Justice Act of 1988.¹²⁵ The purpose of this federal act was to curb the federal courts' inundation of diversity-based cases.¹²⁶ However, Congress did not definitively answer how, or if,

¹²⁰ *Id.*

¹²¹ MONT. CODE ANN. § 27-1-513 (1986) (stating in part "when the death of one person . . . caused by the wrongful acts or neglect of another, *his heirs or personal representatives* may maintain an action for damages against the person causing the death . . .") (emphasis added).

¹²² MONT. CODE ANN. § 27-1-513 (1987). The Montana State Senate Judiciary Committee Minutes of the Meeting on consideration of Senate Bill 375 contain discussion from various proponents and opponents of the bill. Mont. Legis. History, Chapter 449, S.B. 375 (1987). The main emphasis from the discussion of the purposed changes of the statute appears to focus on the issue of double recovery from both wrongful death actions and survival actions. *Id.* The change was intended to allow one court to handle the recovery from the two separate actions. *Id.* Prior to the amendment, the wrongful death action could be brought by the heirs of the decedent, whereas survival actions were brought by the decedent's personal representative. *Id.* The proposed changes simplified the process by eliminating the possibility of multiple recovery, *a concern presented by insurance providers.* *Id.* (emphasis added).

¹²³ 28 U.S.C. § 1332 (2005).

¹²⁴ 28 U.S.C. § 1332(c)(2) (2005) (emphasis added).

¹²⁵ Heather N. Hormel, Comment, *Domicile for the Dead: Diversity Jurisdiction in Wrongful Death Actions*, 2001 U. CHI. LEGAL. F. 519, 520 (2001).

¹²⁶ *Id.* at 535-36.

§ 1332(c)(2) applied to representatives in the wrongful death context.¹²⁷ Questions immediately arise: Is a personal representative of a decedent in a wrongful death action under Wyoming law a “legal representative” of the decedent’s estate?¹²⁸ Is an opened wrongful death action appropriately labeled a wrongful death estate?¹²⁹ To date, there is a split in the federal courts regarding whether § 1332(c)(2) applies to representatives for wrongful death actions.¹³⁰ This provision could be interpreted to disallow Wyoming wrongful death actions in federal court by out-of-state personal representatives.

The Tenth Circuit considered the status of a personal representative for diversity purposes under the Kansas Wrongful Death Act in *Tank v. Chronister*.¹³¹ In *Tank*, the defendants filed a motion to dismiss the out-of-state plaintiff’s wrongful death action in federal district court, arguing that a wrongful death plaintiff in Kansas is deemed to be a citizen of the same state as the decedent, and therefore, did not qualify for diversity jurisdiction.¹³² The court initially held that “one who brings a wrongful death action under Kansas law is a ‘legal representative of a decedent’s estate’ for purposes of [diversity jurisdiction] and is, therefore, deemed to be a citizen of the same state as the decedent.”¹³³ The plaintiff in *Tank* moved for reconsideration, and the district court reversed its ruling, “holding [that] § 1332(c)(2) did not apply to individuals who are authorized by state statute to pursue—in their individual capacities and not on behalf or for the benefit of decedent’s estate—a claim for wrongful death.”¹³⁴ On appeal, the Tenth Circuit, after addressing the legislative history of § 1332(c)(2), held that “although the

¹²⁷ *Id.* at 520.

¹²⁸ Wrongful death actions are not on behalf of nor to enhance the decedent’s estate, but in fact a civil action brought on behalf of the decedent’s heirs. See *Ashley v. Read Const. Co.*, 195 F. Supp. 727, 728 (D. Wyo. 1961); *Jordan v. Delta Drilling Co.*, 541 P.2d 39, 42 (Wyo. 1975); Tidball, *supra* note 16, at 109.

¹²⁹ Although, referred to as separate estates, or “separate creatures” by at least one Wyoming Supreme Court Justice, it is not appropriate to label a wrongful death action as a wrongful death estate. See *Saffels v. Bennett*, 630 P.2d 505, 513 (Wyo. 1981) (Raper, J., dissenting). Justice Raper stated “we must understand that the ‘estate’ concept that is utilized in a wrongful death action is an entirely different sort of creature than the probate estate which administers the worldly assets left by a decedent.” *Id.* (emphasis added).

¹³⁰ Hormel, *supra* note 125, at 530-35. The comment by Hormel addresses the split in views in considering § 1332(c)(2) applicable to representatives, and it lists several different methods courts have used to answer the question of whether the provision applies. Note: since the time Hormel’s comment was written, *Steinlage v. Mayo Clinic Rochester* overruled *Green v. Lake of the Woods County* in the 8th Circuit. *Steinlage v. Mayo Clinic Rochester*, 435 F.3d 913 (8th Cir. 2006).

¹³¹ *Tank v. Chronister*, 160 F.3d 597 (10th Cir. 1998).

¹³² *Id.* at 598.

¹³³ *Id.*

¹³⁴ *Id.*

named plaintiff does serve as a representative, the plaintiff represents only the other heirs and not the estate itself,” and § 1332(c)(2) is, therefore, not triggered.¹³⁵

When examining the decision from *Tank*, it is important to note the distinction between the Kansas Wrongful Death Act and the Wyoming Wrongful Death Act. A wrongful death action in Kansas, may be brought by any one of the heirs of the deceased, whereas in Wyoming a wrongful death action must be brought by a personal representative.¹³⁶ This highlights the problem created by the ambiguity of the term “personal representative.” The Wyoming Legislature must confront the confusion of whether a personal representative is bringing the action on behalf of the estate as an administrator or executor, or on the behalf of the beneficiaries as a trustee and make the proper amendments to the Wrongful Death Act.

Recently, the Eighth Circuit in *Steinlage v. Mayo Clinic Rochester* addressed the issue of the legislative intent of § 1332(c)(2) with respect to the meaning of “legal representative.”¹³⁷ The question had been considered previously by the Federal District Court of Minnesota in *Green v. Lake of the Woods County*.¹³⁸ The *Green* court determined that it would be contrary to the purpose of § 1332(c)(2) to hold that the trustee provided for in Minnesota’s wrongful death statute was not a “legal representative” of the decedent’s estate, and, therefore, the domicile of the decedent was controlling for purposes of diversity and not that of the personal representative.¹³⁹ On the other hand, the Eighth Circuit, in *Steinlage* stated that, “[i]n *Green*, . . . the court . . . found it clear that Congress chose the single term ‘legal representative’ as a simple—and encompassing—term . . . [but] the court did not address the question of whether the wrongful death trustee actually represented the estate.”¹⁴⁰ In addressing the statement made by the court in *Green* regarding the term “legal representative” applying broadly to trustees,

¹³⁵ *Id.* Note: At least one federal district court has held that § 1332(c)(2) refers to a claim brought under a survival statute and not a wrongful death statute. See *Winn v. Panola-Harrison Electric Cooperative, Inc.*, 966 F. Supp. 481 (E.D. Tex. 1997) (citing *Marler v. Hiebert*, 960 F. Supp. 253 (D. Kan. 1997)).

¹³⁶ KAN. STAT. ANN. § 60-1902 (2006); WYO. STAT. ANN. § 1-38-102 (LexisNexis 2005).

¹³⁷ *Steinlage v. Mayo Clinic Rochester*, 435 F.3d 913 (8th Cir. 2006) (discussing the different views taken by federal district courts and circuit courts regarding the applicability of § 1332(c)(2) to those bringing wrongful death actions under respective state law.); See also *Green v. Lake of the Woods County*, 815 F. Supp. 305 (D. Minn. 1993), *overruled by Steinlage*, 435 F.3d 913.

¹³⁸ *Green*, 815 F. Supp. 305 (D. Minn. 1993), *overruled by Steinlage*, 435 F.3d 913. Minnesota’s wrongful death statute states that “[w]hen death is caused by the wrongful act or omission of any person or corporation, the trustee appointed . . . may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission.” MINN. STAT. § 573.02 (2006). For a good discussion of the comparison of the different federal court views on the issue of whether § 1332(c)(2) applies to a wrongful death plaintiff, see *Hormel*, *supra* note 128, at 520.

¹³⁹ *Green*, 815 F. Supp. at 308.

¹⁴⁰ *Steinlage*, 435 F.3d at 920 (internal quotations omitted).

administrators, and executors, the court in *Steinlage* stated that “*substance rather than labels should drive analysis*,” and that “we believe that it remains necessary to determine whether representative plaintiffs, variously labeled by a state legislatures [sic], represent the estates of decedents.”¹⁴¹

As seen in the Eighth and Tenth Circuits, when faced with a challenge regarding diversity in wrongful death actions, some courts approach the problem by identifying the classification of those allowed to bring wrongful death actions under the applicable state law.¹⁴² However, the Fourth Circuit, takes a strict approach to § 1332(c)(2).¹⁴³ The court requires that, regardless of the nomenclature of those allowed to bring wrongful death actions, “it is the deceased, not the beneficiary of the deceased or their estate, who must be diverse under § 1332(c)(2).”¹⁴⁴

Therefore, the Wyoming Legislature must clarify the actual status of a “personal representative” under the Wrongful Death Act or diversity jurisdiction will remain a guessing game for the federal courts. Similar to the holding in *Tank*, the Federal District Court of Wyoming in *Ashley* found that Wyoming wrongful death actions are “brought neither on behalf [n]or for the benefit of the estate, but only on behalf and for the benefit of the heirs.”¹⁴⁵ However, the Wyoming Legislature has yet to demonstrate its intention by clarifying who a personal representative represents in a wrongful death action and how it applies to federal diversity jurisdiction cases.

III. ANALYSIS

It is crucial that the Wyoming Legislature address the uncertainties the personal representative requirement has created in the wrongful death context. Should the Wyoming Legislature choose to keep the personal representative requirement in the Wrongful Death Act, it should be amended to include the following:

1. A definition of “personal representative” separate and distinct from that of the Probate Code. This definition could include administrators and executors previously appointed for a decedent’s estate, but it must explicitly provide who can and cannot be appointed as a personal representative.

¹⁴¹ *Id.* (emphasis added).

¹⁴² See *Tank v. Chronister*, 998 F. Supp. 1160 (10th Cir. 1998); *Steinlage*, 435 F.3d 913.

¹⁴³ See *Holt v. Middlebrook*, 214 F.2d 187 (4th Cir. 1954).

¹⁴⁴ *Brumfield v. Farley*, 243 F. Supp. 2d 574, 576 (S.D.W.V. 2002) (citing *Kimzey v. Cuento*, 1999 WL 33320923 at *2 (W.D.N.C. 1999)).

¹⁴⁵ *Tank*, 160 F.3d at 599; see also *Ashley v. Read Const. Co.*, 195 F. Supp. 727, 728 (D. Wyo. 1961).

2. A provision that lists those persons for whose benefit wrongful death actions can be brought. While beneficiaries have been specified in case law, the Wyoming Legislature should address this specifically within the Wrongful Death Act.
3. A provision clarifying the meaning of the “personal representative” as a representative of the heirs or beneficiaries and not a representative of the decedent’s estate. Such a provision would resolve the current uncertainty about wrongful death cases qualifying for federal diversity jurisdiction under 28 U.S.C. § 1332(c)(2).

A. A Statement Addressing the Application of the Probate Code § 2-4-201(c) to the Wrongful Death Act.

One of the most troubling dilemmas the Wyoming Legislature must address is whether the Probate Code section 2-4-201 should be applied to the Wrongful Death Act. To understand the ramifications of each of the Wyoming Legislature’s possible options, it is useful to revisit Mr. Greenback. As discussed earlier, counsel for Colossal has moved to dismiss Mr. Greenback’s wrongful death action from federal district court. Counsel argues that Probate Code section 2-4-201 applies to the Wrongful Death Act and requires an in-state co-personal representative in a wrongful death action. Mr. Greenback does not have an in-state co-filer, and it is too late to appoint one and amend the complaint. If the federal district court were to apply the law as it presently stands, it would be forced to decide on its own whether Probate Code section 2-4-201 applies. Wyoming case law provides no definite answer to this question. Although the Federal District Court of Wyoming in *Ashley* and *Schwartz* has left the door open for out-of-state personal representatives to bring wrongful death actions in federal court, it could decide that a personal representative is in fact the administrator of a decedent’s estate, like the Wyoming Supreme Court has previously done in *Corkill*, *Wetering*, and *Butler*.¹⁴⁶ If the court made this decision, it would require an out-of-state personal representative to have an in-state co-personal representative according to section 2-4-201(c).¹⁴⁷

Applying section 2-4-201(c) to Mr. Greenback’s situation would require that he, as a resident of another state, must have an in-state co-personal representative.¹⁴⁸ Even if the court allowed Mr. Greenback to find an in-state

¹⁴⁶ See *Corkill v. Knowles*, 955 P.2d 438 (Wyo. 1998); *Wetering v. Eisle*, 682 P.2d 1055 (Wyo. 1984); *Butler v. Halstead*, 770 P.2d 698 (Wyo. 1989); WYO. STAT. ANN. § 2-4-201(c) (LexisNexis 2005).

¹⁴⁷ WYO. STAT. ANN. § 2-4-201(c) (LexisNexis 2005).

¹⁴⁸ *Id.*

co-representative, diversity would be ruined. The in-state co-personal representative would effectively destroy diversity, as the citizenship of Mr. Greenback would no longer be considered. Therefore, his case could not be brought in federal court. Mr. Greenback would then be left without the ability to bring suit against those responsible for the death of his sister. This situation would set a dangerous precedent, in denying relief to those injured by a wrongful death. This is certainly not the intent of the Wyoming Legislature.¹⁴⁹ Moreover, the entire rationale for having co-administrators (or co-personal representatives) when the original administrator is from out-of-state, is to protect local creditors, which has no relevance to wrongful death actions.¹⁵⁰

Therefore, it would be improper for the court to officially determine that section 2-4-201(c) must be applied in this situation, without clear direction from the Wyoming Legislature. Furthermore, the outcome of applying section 2-4-201(c) to the Wrongful Death Act would be contrary to the policy of fairness for those bringing wrongful death actions and would, in essence, punish those seeking justice for the wrongful death of a loved one. Although Mr. Greenback's situation is merely hypothetical, the Wyoming Supreme Court has recently received a certified question from the Federal District Court of Wyoming on the exact question of whether section 2-4-201(c) applies to the Wrongful Death Act.¹⁵¹ Regardless of the Wyoming Supreme Court's answer, it is the Wyoming Legislature's responsibility to clarify the Wrongful Death Act.

B. Addressing the Federal Diversity Statute and the Wrongful Death Act

On the other hand, if the Federal District Court of Wyoming found that Probate Code section 2-4-201 did not apply to Mr. Greenback's situation, he would still be faced with the issue of whether he is considered a legal representative of Ms. Pitable's estate, or rather, a representative of the heirs for purposes of diversity under § 1332(c)(2). Case law supports both interpretations.¹⁵² If the court decided that Mr. Greenback represents his sister's estate, the residency

¹⁴⁹ Wrongful death actions are civil actions, which are to be "liberally construed to promote its object and assist the parties in obtaining justice." WYO. STAT. ANN. § 1-1-101 (LexisNexis 2005). Restricting those bringing wrongful death actions from prosecuting their cases in a federal court does not assist the parties in obtaining justice. "[T]he Wyoming Legislature has expressed a social policy that favors compensation to ameliorate the certain damage to relational interests resulting from the death of a family member." *Corkill v. Knowles*, 955 P.2d 438, 441 (Wyo. 1998) (citing *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171, 1175 (Wyo. 1990)).

¹⁵⁰ Schopler, *supra* note 89, at § 4.

¹⁵¹ See *Order Certifying Question to the Wyoming Supreme Court*, *Gunter v. Halliburton Energy Services, Inc.*, Case No. 05-CV-231-D (D. Wyo. 2006).

¹⁵² See *Corkill*, 955 P.2d at 443; *Bircher v. Foster*, 378 P.2d 901, 902 (Wyo. 1961); *Wetering v. Eisele*, 682 P.2d 1055, 1062 (Wyo. 1984); *Coliseum Motor Co. v. Hester*, 3 P.2d 105, 106 (Wyo. 1931); *Ashley v. Read Contr. Co.*, 195 F. Supp. 727, 728-29 (D. Wyo. 1961); *Jordan v. Delta Drilling Co.*, 541 P.2d 39, 42 (Wyo. 1975); *DeHerrera v. Herrera*, 565 P.2d 479, 482 (Wyo. 1977); *Schwartz v. Hawkins & Powers Aviation, Inc.*, 2006 WL 1028392, *8 (D. Wyo. 2006).

of Ms. Pitiable would be controlling for determining diversity.¹⁵³ Once again, Mr. Greenback's case would be dismissed for lack of diversity.¹⁵⁴ The Wyoming Legislature must clarify the role of the personal representative and make clear that the role is that of a "trustee" of the decedent's heirs, not a representative of the decedent's estate.

C. Other Approaches for Allowing Wrongful Death Actions

Many other states have formulated their respective wrongful death statutes in ways that significantly resolve the problems currently facing the Wyoming Wrongful Death Act. Mr. Greenback would not face the same problems if Wyoming followed one of these other approaches. If, for example, Wyoming followed the heir approach used by Kansas or the dual approach used by other states such as North Dakota, Mr. Greenback would likely have no problem bringing his action in federal court.¹⁵⁵

The heir approach followed by Kansas allows a suit to be brought by "any one of the heirs at law of the deceased who has sustained a loss by reason of death."¹⁵⁶ The heir approach does not require an in-state co-heir to bring the suit. Furthermore, an heir is not considered to represent the decedent's estate under § 1332(c)(2), but rather, represents all the beneficiaries. In Mr. Greenback's situation, as his sister's heir, he could bring the action in federal court without worries of obtaining an in-state co-heir, or being considered as representing his sister's estate.

Under the dual approach, which allows either heirs or personal representatives of decedents to bring actions, Mr. Greenback would fit both roles, as heir to his deceased sister and as the appointed personal representative. This method allows any heir, who is allowed under the law to recover for the wrongful death action, to bring the action, but also allows the heir(s) to have a personal representative appointed to bring the action. The all-encompassing dual approach provides every means possible for a wrongful death action to be pursued and is the most efficient method for allowing family members to recover for the death of a loved one. This method keeps in mind that a decedent's estate may have a personal representative already appointed for probate matters, who may be in the best position to act as

¹⁵³ See *Tank v. Chronister*, 160 F.3d 597 (10th Cir. 1998); *Steinlage v. Mayo Clinic Rochester*, 435 F.3d 913 (8th Cir. 2006).

¹⁵⁴ This result seems unlikely in light of *Ashley, Jordan*, and *DeHerrera* cases which stand for the proposition that, although a personal representative in a wrongful death action does act as an administrator of a decedent's estate, it does not represent the decedent's estate. *Ashley*, 195 F. Supp. at 728; *Jordan*, 541 P.2d at 42; *DeHerrera*, 565 P.2d at 482. However, the possibility of a different outcome in Mr. Greenback's situation highlights the importance of this issue to the Wyoming Legislature.

¹⁵⁵ KAN. STAT. ANN. § 60-1902 (2006); N.D. CENT. CODE § 32-21-03 (2006).

¹⁵⁶ KAN. STAT. ANN. § 60-1902 (2006).

the personal representative for the wrongful death action. It also considers the fact that wrongful death actions are brought for the purpose of compensating the heirs and allows the heirs to bring the action directly.

D. Policy Considerations

From a policy perspective, parties should be given the ability to bring wrongful death actions in federal court if the representative, trustee or heir bringing the action has a different domicile than those parties against whom the action is brought.¹⁵⁷ According to the Federal District Court of Tennessee in *Winn v. Panola-Harrison Elec. Co-op., Inc.*, “although § 1332(c)(2) may have been enacted in an attempt to prevent the collusive appointment of out of state parties to create diversity jurisdiction, to construe [§ 1332(c)(2)] in the manner . . . [that where a person brings an action to recover damages for the death of the decedent, such person is acting as the ‘legal representative’ of the estate of the decedent], would unduly restrict the ability to bring wrongful death actions in federal court.”¹⁵⁸

The analysis from *Steinlage v. Mayo Clinic Rochester* is on point for determining what the Wyoming Legislature intended by requiring that a personal representative bring a wrongful death action under the Wrongful Death Act, and whether the personal representative represents the estate or the beneficiaries.¹⁵⁹ A personal representative, in an action under the Wrongful Death Act, is not a “legal representative” for purposes of § 1332(c)(2). The plaintiff in a wrongful death action represents only the heirs/beneficiaries and not the estate itself.¹⁶⁰ If the Wyoming Legislature maintains the personal representative requirement, it needs to make it clear that those bringing wrongful death actions are not classified as a legal representative of the decedent’s estate. As other state legislatures have done, this can be easily accomplished by including language in the Wrongful Death Act that clarifies that the personal representative acts on behalf of the beneficiaries and not the decedent’s estate.

In formulating a recommendation for the amendment of the Wrongful Death Act, it is important to look at the Act for what it actually is: a statutory device to allow those who have been injured by the loss of a loved one to seek justice.¹⁶¹ The Federal District Court of Wyoming has said, “the whole import of the wrongful death act is to benefit those persons who have been injured because of the death of their relatives.”¹⁶² Further, the first section of the Wyoming Civil Code, states

¹⁵⁷ See *Winn v. Panola-Harrison Elec. Coop., Inc.*, 966 F. Supp. at 481, 483 (E.D. Tex. 1997).

¹⁵⁸ *Id.* at 483.

¹⁵⁹ *Steinlage v. Mayo Clinic Rochester*, 435 F.3d 913, 920 (8th Cir. 2006).

¹⁶⁰ *Ashley v. Read Const. Co.*, 195 F. Supp. 727, 729 (D. Wyo. 1961).

¹⁶¹ WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

¹⁶² *Ashley*, 195 F. Supp. at 729.

that the Code of Civil Procedure and all proceedings under it “shall be liberally construed to promote its object and assist the parties in obtaining justice.”¹⁶³ Poor statutory construction should not be responsible for hindering the furthering of this policy in the Wrongful Death Act. As discussed above, the only rationale for requiring co-personal representatives is to protect the rights of creditors in collecting against a decedent’s probate estate.¹⁶⁴ There exists no plausible argument as to why a plaintiff in a wrongful death action should be required to have an in-state appointed co-representative, like the requirement in section 2-4-201(c).¹⁶⁵ The Wyoming Legislature should amend the Wrongful Death Act with this policy in mind.

IV. CONCLUSION

The Wyoming Legislature should amend the Wrongful Death Act to provide clear, unambiguous provisions which set forth its true intention, and allow those seeking justice for the wrongful death of a loved one to bring an action successfully. The amendments should provide attorneys, judges, and those attempting to comply with the Wrongful Death Act with straightforward conditions to be followed. The Wrongful Death Act was initially enacted to allow those who suffered a loss due to the wrongful death of a loved one the ability to have their day in court. A plaintiff in a wrongful death action should be allowed to bring a case in the court of his or her choice. Probate matters, which involve concerns of creditors and debts associated with the probate estates of decedents, are not and should not be a concern in wrongful death actions. Without a clear statement of intent by the Wyoming Legislature regarding whether out-of-state personal representatives must have a corresponding in-state co-personal representative, diversity questions will continue to confront the courts and deny relief to plaintiffs. Plaintiffs should not be barred from bringing wrongful death actions due to a flawed technicality in the law.

The appropriate amendments to the Wrongful Death Act should include, at a minimum, a clear definition of personal representative, an explicit statement of who may benefit from wrongful death actions, and clarification that the heirs or beneficiaries of the decedent are represented in an action and not the estate of the decedent. Further, the Wyoming Legislature should consider adopting the dual approach, thus allowing wrongful death actions to be brought by an heir *or* a personal representative of the deceased. This approach would both simplify the law and allow the most flexibility in providing relief for those injured by a wrongful death. Above all, the Wrongful Death Act should be disentangled from

¹⁶³ WYO. STAT. ANN. § 1-1-101 (LexisNexis 2005).

¹⁶⁴ *Elliot v. Stevenson*, 218 F. Supp. 90, 92 (D. Or. 1962).

¹⁶⁵ WYO. STAT. ANN. § 2-4-201(c) (LexisNexis 2005).

the Probate Code and allowed to stand on its own as a clear statement from the Wyoming Legislature that persons injured by the wrongful death of their loved ones are able to obtain justice in all Wyoming courts.