CASE NOTE

TORT LAW—Overruled! Wyoming's Novel Interpretation of the Wrongful Death Act's Personal Representative; *In re Estate of Johnson*, 231 P.3d 873 (Wyo. 2010)

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Introduction

Wyoming's Wrongful Death Act (Act), as old as the state itself, requires a personal representative to bring a wrongful death action.[1] However, the Act never expressly defines the term "personal representative" or specifies where to find a definition.[2] Courts and practitioners therefore have looked to Wyoming's Probate Code to fill this legislative gap and provide the definition of and process for appointing the personal representative.[3] Potential personal representatives simply petition probate courts for appointment pursuant to the well-developed process provided by the Probate Code and then bring a wrongful death action as a civil matter.[4]

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[1] *See* Wyo. Stat. Ann. § 1-38-102(a) (2010) ("Every [wrongful death] action shall be brought by and in the name of the personal representative of the deceased person."); 1871 Wyo. Sess. Laws 89 ("Every [wrongful death] action shall be brought by and in the name of the personal representative of such deceased person."); Ashley v. Read Const. Co., 195 F. Supp. 727, 728 (D. Wyo. 1961) ("[O]nly the personal representative of the decedent may bring an action for her death caused by the wrongful act of another."); Tuttle v. Short, 288 P. 524, 529 (Wyo. 1930) ("Under the Wyoming statutes it is plain that an action for death by wrongful act can be brought only by and in the name of the personal representative."). Wyoming enacted its initial wrongful death statutes while it was a territory, nineteen years before becoming a state. *See* Debora A. Person, *Wyoming Pre-Statehood Legal Materials: An Annotated Bibliography*, 7 Wyo. L. Rev. 50, 60 (2007) (describing how Wyoming became a state in 1890).

[2] Grant Harvey Lawson, Comment, *Reconciling the Wyoming Wrongful Death Act with the Wyoming Probate Code: The Legislature's Wake-up Call for Clarification*, 7 Wyo. L. Rev. 409, 415 (2007).

[3] *See In re* Estate of Johnson, 231 P.3d 873, 882 (Wyo. 2010) (Hill, J., dissenting) ("For so long as the wrongful death statute has existed in this state, there can be no legitimate doubt or ambiguity, whatsoever, that by its use of the phrase 'personal representative,' the legislature intended that it have the same meaning as that expressed in [the probate code]."); *infra* notes 13–24 and accompanying text (discussing the history of Wyoming wrongful death cases which incorporated the Probate Code in defining the personal representative).

[4] *See* Jordan v. Delta Drilling Co., 541 P.2d 39, 42 (Wyo. 1975) ("The designation of an administrator is no more than a statutory device to provide a party for a civil action to collect damages and pay them over to the persons entitled."), *overruled by* Wetering v. Eisele, 682 P.2d

However, in deciding *In re Estate of Johnson*, the Wyoming Supreme Court overruled *Bircher v. Foster* with the result that this predictable, reliable interpretation of the Act no longer applies.[5] This case involved a dispute between Larry Johnson's surviving wife and his father as to who should bring an action for his wrongful death.[6] Since his father submitted the initial petition for appointment as a probate action and the Probate Code grants a surviving spouse highest preference, the court should have appointed Larry Johnson's wife as his personal representative.[7] This case note argues the Probate Code should control the appointment of a personal representative in a wrongful death action as the legislature intended because the Probate Code provides predictability through its structure and comports with a long history of Wyoming case law.[8]

This case note begins by outlining the development and current state of Wyoming's Wrongful Death Act.[9] In addition, this case note traces the period of legislative activity in the late 1970s and early 1980s from the Act's relocation to the Probate Code and subsequent return to the Civil Code.[10] This case note then surveys previous wrongful death cases in Wyoming supporting the contention that courts appointing the wrongful death action's "personal representative" should follow the Probate Code.[11] By analyzing the plain language of the Act, examining legislative history, reviewing Wyoming case law, and understanding other states' wrongful death actions, this case note asserts the *Johnson* court should have required the lower court to follow the Probate Code in appointing a personal representative in a wrongful death action.[12]

1055 (Wyo. 1984), *as recognized in Johnson*, 231 P.3d at 879; Bircher v. Foster, 378 P.2d 901, 903 (Wyo. 1963) ("[T]here is no authority in this State either by statute or decision whereby a district court, unless sitting in probate, would be authorized to appoint . . . the personal representative . . . for the purposes of a death action."), *overruled by Johnson*, 231 P.3d at 879; *infra* notes 37–42 and accompanying text (explaining Wyoming's Probate Code).

[5] *See Johnson*, 231 P.3d at 879 (majority opinion) ("*Bircher* is overruled prospectively to the extent that it requires a wrongful death action to be brought in probate court, and to the extent that it requires a wrongful death personal representative to be the administrator or executor of the decedent's estate in probate."); *supra* notes 3–4 and accompanying text.

[6] *Johnson*, 231 P.3d at 875.

[7] *See* WYO. STAT. ANN. § 2-4-201(a) (2010) ("The relatives of the deceased . . . are entitled to administer in the following order: i) The surviving husband or wife; ii) The children; iii) The father or mother."); Petition for Appointment of Personal Representative for Purposes of a Wrongful Death Action Pursuant to W.S. § 1-38-102 at 1, *In re* Estate of Johnson, Probate No. 08-43 (Uinta Cnty. Dist. Ct. Sep. 18, 2008).

[8] *See* Lawson, *supra* note 2, at 419 ("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."); *infra* notes 119–71 and accompanying text.

[9] *See infra* notes 13–42 and accompanying text.

[10] *See infra* notes 25–36 and accompanying text.

[11] *See infra* notes 43–66 and accompanying text.

[12] *See infra* notes 119–71 and accompanying text.

BACKGROUND

Wyoming's Wrongful Death Act

Originally, under common law, an individual could not bring a civil action against someone for causing the death of another.[13] By passing Lord Campbell's Act in 1846, the English Parliament created the first action to benefit people injured by the wrongful death of a relative.[14] This created a statutory right for someone injured by the wrongful death of another to bring a civil action against an individual responsible for that death.[15] Many United States jurisdictions followed suit, enacting similarly-worded statutes based on the English Act.[16] To this day, many states' wrongful death statutes share similar language, terms, and phrasing—evidencing their common origin.[17] In 1871, and while still a territory, Wyoming patterned its Wrongful Death Act after West Virginia's statute, which was similar to Lord Campbell's Act.[18]

Wyoming's first Wrongful Death Act stated:

> Whenever the death of a person shall be caused by wrongful act . . . the person who . . . would have been liable if death had not ensued, shall be liable to an action for damages . . . .
>
> Every such action shall be brought by and in the name of *the* personal representative of such deceased person.[19]

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[13] 12 AM. JUR. *Trials* 317 § 2 (2010); Lawson, *supra* note 2, at 413 (citing Tuttle v. Short, 288 P. 524, 529 (Wyo. 1930)).

[14] 22A AM. JUR. 2D *Death* § 4 (2010); THOMAS M. COOLEY, THE ELEMENTS OF TORTS 93 (1895). Massachusetts passed a statute related to wrongful death six years before Lord Campbell's Act, but it only provided a "quasi-criminal remedy," not a right to bring a civil action. John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 733–34 (2000).

[15] 12 AM. JUR. *Trials* 317 § 2 (2010).

[16] 22A AM. JUR. 2D *Death* § 4 (2010); COOLEY, *supra* note 14, at 93 ("Most of the legislation in America on the subject is modeled after [Lord Campbell's] [A]ct."); FRANCIS B. TIFFANY, DEATH BY WRONGFUL ACT 5, 21 (1893) ("[Lord Campbell's Act] has served as the model for similar acts in most of the states in this country."). For a detailed discussion on the early development of wrongful death in the United States, see generally STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH (3d ed. 1992).

[17] *See* 22A AM. JUR. 2D *Death* § 4 (2010) (noting Lord Campbell's Act was closely followed by many wrongful death statutes in the United States).

[18] *See* Corkill v. Knowles, 955 P.2d 438, 441 (Wyo. 1998) ("The [Wrongful Death] [A]ct was similar to Lord Campbell's Act and was almost an exact copy of West Virginia's wrongful death law."); Lawson, *supra* note 2, at 413–14 (discussing the origins of Wyoming's Wrongful Death Act).

[19] 1871 Wyo. Sess. Laws 88–89 (emphasis added). Since enacting the statutes, the legislature has only modified this provision by replacing the phrase "such deceased person" with "the deceased person." *Compare* WYO. STAT. ANN. § 1-38-102(a) (2010) ("Every such action shall be brought by

While the Act has never explicitly defined or provided criteria for the appointment of the personal representative, the original Act expressly incorporated the Probate Code by distributing the proceeds of a wrongful death action according to the Probate Code's intestate succession provision.[20] Since 1871, the Wyoming State Legislature substantially modified the Act's wording four times, each time changing who can benefit from the action or how to determine and award the proceeds.[21] These changes resulted in a more expansive distribution of damages, allowing any potential beneficiary the opportunity to prove damages before a court or jury.[22] The legislature also protected the proceeds of a wrongful death action from being used to satisfy any debt of the deceased.[23] While these modifications removed express incorporations of the Probate Code, the legislature preserved the original language identifying the personal representative as the sole party to bring a wrongful death action, without further clarification.[24]

Legislative Confusion

A period of legislation in the late 1970s and early 1980s created a confusing record but illustrates the legislature's understanding that the Wrongful Death Act relates to the Probate Code.[25] This examination serves to diminish the importance the *Johnson* majority conferred on the placement of the Act outside the Probate

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and in the name of the personal representative of *the* deceased person." (emphasis added)), *with* 1871 Wyo. Sess. Laws 89 ("Every such action shall be brought by and in the name of the personal representative of *such* deceased person." (emphasis added)).

[20] *See* WYO. STAT. ANN. § 1-38-102; 1871 Wyo. Sess. Laws 89; *see also In re* Estate of Johnson, 231 P.3d 873, 879 n.1 (Wyo. 2010) ("In 1963, when *Bircher* issued, there was a connection within the wrongful death act to the intestacy statutes."). Specifically, the Act stated: "[T]he amount recovered in every such action shall be distributed to the parties and in the proportions provided by law, in relation to the distribution of personal estates left by persons dying intestate." 1871 Wyo. Sess. Laws 89.

[21] *See* 1973 Wyo. Sess. Laws 149 (modifying the distribution of proceeds from a wrongful death action judgment and adding a section protecting such proceeds from the decedent's creditors); 1947 Wyo. Sess. Laws 156–57 (rewording the provision for how damages should be determined and distributed); 1939 Wyo. Sess. Laws 166–67 (adding to the provision concerning the distribution and award of damages); 1909 Wyo. Sess. Laws 5 (rewording the provision relating to damages).

[22] *See* WYO. STAT. ANN. § 1-38-102(c) ("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.").

[23] *Id.* § 1-38-102(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.").

[24] *See* Lawson, *supra* note 2, at 415 ("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."); *supra* notes 18–23 and accompanying text.

[25] *See infra* notes 27–35 and accompanying text.

Code.[26] As part of a larger effort in 1977 to update the entire Wyoming Code, the legislature renumbered the wrongful death statutes.[27] In 1979, the legislature passed another housekeeping act renumbering the wrongful death statutes and moving them from the Civil Code to the Probate Code.[28] The following year, the legislature once again renumbered the wrongful death statutes but kept them within the Probate Code.[29]

In 1981, the legislature mistakenly repealed the Wrongful Death Act from the Probate Code, believing it was duplicated in the Civil Code.[30] But the statutes were not duplicative, since earlier legislation had completely moved the Act to the Probate Code.[31] The legislature soon realized it had repealed all instances of wrongful death and subsequently passed a corrective act in 1982 that attempted to void its 1981 repeal of the wrongful death statutes in the Probate Code.[32] Since the 1981 repeal was legally effective and therefore not voidable, the legislature recreated the Wrongful Death Act outside the Probate Code, in the Civil Code.[33] However, the Wyoming legislature clearly stated it solely intended to correct the inadvertent repeal of the Act in the Probate Code and did not intend to change existing wrongful death case law or interpretation of the Act.[34] Absent the mistaken repeal in 1981, the Act would currently exist in the Probate Code, as originally intended by the 1979 legislation.[35] Since the legislature clearly intended wrongful

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[26] *See In re* Estate of Johnson, 231 P.3d 873, 878 (Wyo. 2010) ("Of primary significance is that the separate purposes of the [probate and wrongful death] statutes are entirely distinct."); *infra* notes 27–35 and accompanying text.

[27] 1977 Wyo. Sess. Laws 771, 916–17 (passing the act solely "to eliminate obsolete or fully executed statutes, to conform conflicting statutes, to eliminate duplicitous or archaic language; conforming the numbering of sections and subsections to a uniform numbering system").

[28] 1979 Wyo. Sess. Laws 257, 311 (passing the act for the purpose of "ordering the powers and procedures of the court concerned with the affairs of decedents and certain others").

[29] 1980 Wyo. Sess. Laws 267–69, 370–71.

[30] 1981 Wyo. Sess. Laws 237, 242 (passing the act for the purpose of "repealing wrongful death statutes which duplicate [Civil Code statutes]").

[31] *See* 1979 Wyo. Sess. Laws 311; *supra* notes 27–30 and accompanying text.

[32] 1982 Wyo. Sess. Laws 93. Only if the legislature could not void the 1981 repeal of the statutes in the probate code would the act create wrongful death statutes in the Civil Code. *Id.* at 94.

[33] *Id.* at 92–94. This legislation created the wrongful death statutes currently in effect within the Civil Code. WYO. STAT. ANN. §§ 1-38-101 to -102 (2010).

[34] 1982 Wyo. Sess. Laws 93–94 (stating the 1981 repeal of the wrongful death statutes in the Probate Code was "inadvertent and unintentional" and its purpose in that repeal "was not to eliminate or affect in any way causes of action for wrongful death").

[35] *See id.* at 93.

death case law to remain unaffected, decisions before and after this period are more relevant in addressing interpretation than inferring a statute's purpose by its section number.[36]

"Personal Representative" in the Wyoming Code

Wyoming's Probate Code defines a decedent's personal representative as the estate's executor or administrator.[37] It also provides the procedure for appointing a personal representative to represent a person who dies intestate.[38] The Code prioritizes certain relationships, granting the surviving spouse highest consideration, then children, followed by the decedent's parents.[39] Upon appointment, the personal representative must publish notice in order to provide interested parties the opportunity to contest the appointment.[40] Specifically, the representative must send a copy of this notice to the surviving spouse and children.[41] Other references to a decedent's "personal representative" in the Wyoming Code do not specify criteria or authority for appointment but incorporate the Probate Code by associating the term with estate fiduciaries, such as an administrator or executor.[42]

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[36] *See* Heidi L. Neuendorf, Note, *The Judicial Impediment on Legislative Lawmaking in* Stratmeyer v. Stratmeyer, 44 S.D. L. REV. 115, 139 (1999) (stating if the legislature disagreed with the court's interpretation of a statute, it would pass a correcting amendment); *supra* notes 27–35 and accompanying text.

[37] WYO. STAT. ANN. § 2-1-301 ("'Personal representative' includes executor and administrator."); *id.* § 2-3-802 ("'Fiduciary' means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator and a person performing substantially the same function.").

[38] *Id.* §§ 2-4-201 (specifying a priority list of relatives of the deceased entitled to administer), -203 (defining exceptions to those entitled to administer by reason of incompetence), -205 (describing how to petition the court for appointment as administrator), -206 (allowing interested parties to contest and oppose a petition for appointment), 2-7-205 (requiring notice of administration of estates to the surviving spouse and all heirs at law of the decedent).

[39] *Id.* § 2-4-201.

[40] *Id.* § 2-7-201 ("[P]ersonal representative shall cause to be published once a week for three (3) consecutive weeks in a daily or weekly newspaper of general circulation in the county in which the probate is pending, a notice of . . . the appointment of the personal representative.").

[41] *Id.* § 2-7-205.

[42] *See id.* §§ 1-1-109 ("'Claimant' means a natural person, including the personal representative of a deceased person."), 1-43-103 ("The privilege under this section may be claimed by a representative of the party or by a party, his guardian or conservator, the personal representative of a deceased party, or the successor."), 4-10-103 ("'Fiduciary' means a trustee under a testamentary or other trust, an executor, administrator, or personal representative of a decedent's estate, or any other party including a trust advisor or a trust protector, who is acting in a fiduciary capacity for any person, trust or estate."), 12-9-102 ("'Designated member' . . . also includes the appointed and qualified personal representative and the testamentary trustee of a deceased individual owning an ownership interest in a distributor's business."), 15-1-101 ("'Person' means any individual, firm, partnership, corporation or other business entity, or the executor, administrator, trustee, receiver, assignee or personal representative thereof."), 17-16-850 ("'Director' or 'officer' includes, unless

Prior Case Law

Generally, states grant jurisdiction to a special court to handle a decedent's affairs.[43] Accordingly, Wyoming established a "probate court," a district court sitting in probate that oversees matters relating to a deceased person.[44] The statute also grants a probate court jurisdiction over other civil actions that a district court would typically hear.[45] Since the Wrongful Death Act requires a personal representative without providing a definition or appointment process, attorneys and courts in Wyoming have consistently relied on the Probate Code's provisions and consequently petitioned probate courts for the appointment.[46] As early as

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the context requires otherwise, the estate or personal representative of a director or officer."), -860 ("'Related person' means . . . [a] domestic or foreign . . . [i]ndividual, trust or estate for whom or of which the director is a trustee, guardian, personal representative or like fiduciary."), 33-30-202 ("'Person' means any individual . . . whether or not acting as a principal, trustee, fiduciary, receiver, or as any other kind of legal or personal representative."), 34-13-114 ("'Personal representative' means an executor, administrator, successor personal representative or special administrator of a decedent's estate or a person legally authorized to perform substantially the same function."), 34.1-5-102 ("'Successor of a beneficiary' means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including . . . an administrator, executor, [and] personal representative."), 39-19-101 ("'Personal representative' means the executor, administrator or trustee of the estate of the decedent, or, if there is no executor appointed, qualified and acting within Wyoming, then any person in actual or constructive possession of any property of the decedent.").

[43] 31 AM. JUR. 2d *Executors and Administrators* § 90 (2010) ("In many states, jurisdiction of the administration of estates is given to special courts, designated by such names as probate . . . courts.").

[44] *See* WYO. STAT. ANN. § 2-2-101 ("[D]istrict courts of the state have exclusive original jurisdiction of all matters relating to the . . . granting of letters testamentary and of administration . . . . The court granting the letters has exclusive jurisdiction of all matters touching the settlement and distribution of the estates for which letters have been granted.").

[45] *Id.* ("[J]urisdiction over subject matter of the district court sitting in probate, sometimes referred to . . . as the 'probate court,' is coextensive with the jurisdiction over subject matter of the district court in any civil action.").

[46] *See* Corkill v. Knowles, 955 P.2d 438, 443 (Wyo. 1998) ("The statute requires every wrongful death action to be brought by and in the name of the decedent's personal representative, *i.e.*, the executor or administrator of the decedent's estate."); Wetering v. Eisele, 682 P.2d 1055, 1062 (Wyo. 1984) ("We further hold that the wrongful death action now is brought by the personal representative in his capacity as administrator of the decedent's estate."); Jordan v. Delta Drilling Co., 541 P.2d 39, 42 (Wyo. 1975) ("[T]he administrator or executor [of the estate as appointed under the probate code] must bring the action."), *overruled by Wetering*, 682 P.2d 1055, *as recognized in In re* Estate of Johnson, 231 P.3d 873, 879 (Wyo. 2010); Bircher v. Foster, 378 P.2d 901, 902–03 (Wyo. 1963) ("[T]here is no authority in this State either by statute or decision whereby a district court, unless sitting in probate, would be authorized to appoint a father as the personal representative of a deceased son for the purposes of a death action."), *overruled by Johnson*, 231 P.3d at 879; Coliseum Motor Co. v. Hester, 3 P.2d 105, 105 (Wyo. 1931) ("This [wrongful death] action was brought by [the] administratrix of the estate."); Lawson, *supra* note 2, at 415 ("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.").

1931, the Wyoming Supreme Court stated in *Coliseum Motor Co. v. Hester* that a personal representative for a wrongful death action is the same as the administrator of the estate but acts as a trustee for the beneficiaries in bringing the civil action.[47] In that case, the court emphasized that while the wrongful death action is not brought to benefit the decedent's estate, the estate's administrator is the party required to bring the action.[48]

The Honorable V.J. Tidball authored a 1947 article explaining that while the wrongful death statutes lie outside the Probate Code, the probate court appoints the representative to pursue that civil action.[49] The representative then pursues the wrongful death action in the district court, outside of probate.[50] Upon completing the action, the representative reports back to the probate court, which then discharges him of his duties.[51] Whether the decedent names an administrator prior to death or dies intestate, the probate court appoints the representative who performs two roles—one as the representative of the estate and another as a trustee for the beneficiaries in a wrongful death action.[52] While Judge Tidball focuses on how the representative distributes a wrongful death action's proceeds, he reiterates the widely held belief by practitioners at the time that the Probate Code controls the appointment of the personal representative.[53]

Sixteen years later in 1963, the Wyoming Supreme Court reinforced its position in *Bircher v. Foster*, which the *Johnson* majority overruled in 2010.[54] In *Bircher*, the court held the executor or administrator of a decedent's estate was the only person who may bring a wrongful death action.[55] The decision specifically

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[47] *See* 3 P.2d at 108 ("The administrator acts but in the capacity of a trustee.").

[48] *Id.*

[49] V.J. Tidball, *Probate Jurisdiction in Wrongful Death Actions*, 2 WYO. L.J. 109, 109 (1947) ("[T]he only jurisdiction the District Court, sitting as a Probate Court, has in such actions is to appoint an administrator or executor, fix his bond and discharge him when he reports to the Probate Court that he has performed his duties regarding such action.").

[50] *Id.*

[51] *Id.*

[52] *Id.* ("The personal representative appointed by the Probate Court acts in a dual capacity. He acts as executor or administrator of the estate under the jurisdiction of the Probate Court and he acts as a trustee in the wrongful death action . . . entirely outside the jurisdiction of the Probate Court.").

[53] *See id.* at 109–10.

[54] *See* Bircher v. Foster, 378 P.2d 901, 902 (Wyo. 1963), *overruled by In Re* Estate of Johnson, 231 P.3d 873, 879 (Wyo. 2010).

[55] *Bircher*, 378 P.2d at 902 ("[T]his 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. We see no reason why these views should now be altered.").

affirmed the probate court's exclusive authority to appoint a decedent's personal representative.[56]

In 1975, the court, in *Jordan v. Delta Drilling Co.*, allowed the acting administrator of the estate to bring a wrongful death action while acknowledging the Wrongful Death Act's placement outside the Probate Code.[57] Despite the Act's placement in the Civil Code, the court reasoned it must appoint someone as the personal representative of the decedent and the Probate Code provides the appropriate process to do so.[58] Two years later and just as the legislature began renumbering statutes, the court again, in *DeHerrera v. Herrera*, reinforced the Act's reliance on the Probate Code.[59] In that case, the court held that while the Act is in the Civil Code, the Probate Code controls the appointment of the wrongful death action's personal representative.[60]

In 1984, following the period of statutory revisions discussed earlier, the Wyoming Supreme Court stated, in *Wetering v. Eisele*, the administrator of the decedent's estate appropriately brought the wrongful death action.[61] In 1998 the court again, in *Corkill v. Knowles*, expressly incorporated the Probate Code by equating the wrongful death action's personal representative to the executor or administrator of the decedent's estate.[62] The court noted the Probate Code contained significant definitions, which provide that a personal representative includes an administrator of the estate of an intestate decedent.[63] The following year the Wyoming Supreme Court went even further and held, in *Butler v. Halstead*, Wyoming's Probate Code identifies the wrongful death action's beneficiaries.[64] As

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[56] *See id.* at 903 (stating a district court not sitting in probate lacks the authority to appoint a personal representative for the purpose of bringing a wrongful death action).

[57] 541 P.2d 39, 41 (Wyo. 1975) ("The plaintiff-appellant was appointed, qualified and is the acting administratrix of the estate."), *overruled by* Wetering v. Eisele, 682 P.2d 1055 (Wyo. 1984), *as recognized in Johnson*, 231 P.3d at 879.

[58] *Jordan*, 541 P.2d at 42 ("[D]esignation of an administrator is no more than a statutory device to provide a party for a civil action to collect damages and pay them over to the persons entitled."); *see, e.g.*, Note, *Minor's Rights in a Wrongful Death Suit*, 10 GONZ. L. REV. 226, 228 (1974) (addressing the conceptually confusing role of the personal representative in wrongful death actions because she acts both as a trustee for the beneficiaries of the action and as a fiduciary for the estate).

[59] DeHerrera v. Herrera, 565 P.2d 479, 482 (Wyo. 1977).

[60] *Id.*

[61] 682 P.2d at 1062 ("[T]he wrongful death action now is brought by the personal representative in his capacity as administrator of the decedent's estate."); *see supra* notes 25–36 and accompanying text (discussing the statutory revisions).

[62] 955 P.2d 438, 443 (Wyo. 1998).

[63] *Id.* at 443 n.4 ("The pertinent definitions, found in Wyoming's Probate Code, provide that a personal representative includes an executor and administrator.").

[64] *See* 770 P.2d 698, 700 (Wyo. 1989) ("[T]he persons for whose benefit a wrongful death action is brought are all of those persons identified in § 2-4-201 [of the Probate Code].").

in earlier decisions, the *Butler* court restricted the Probate Code from applying to the proceeds from a wrongful death action, as the Wrongful Death Act contains provisions for distributing awarded damages.[65] This long history of wrongful death cases in Wyoming demonstrates a consistent practice of incorporating the Probate Code's definitions and provisions to wrongful death actions, particularly when appointing the personal representative.[66]

Other States' Wrongful Death Acts

Many United States jurisdictions enacted wrongful death statutes around the same time as Wyoming and based commonly on Lord Campbell's Act.[67] Accordingly, other states' interpretations and case law are instructive when discussing a term's plain meaning and a legislature's intent in creating the statute.[68] The majority of state wrongful death statutes use terms referencing the decedent's estate such as administrator, executor, or personal representative.[69] Particularly, the District of Columbia and West Virginia's wrongful death statutes mirror Wyoming's language specifying a wrongful death action "shall be brought by and in the name of the personal representative of the deceased person."[70] Eighteen states also require the decedent's personal representative to bring wrongful death actions and in some instances alternatively allow a surviving spouse to directly bring the action.[71] Eight states are even more specific and expressly reference probate codes or incorporate references to the decedent's estate in their wrongful death statutes.[72] In the absence of a specific statutory link to the probate code, courts

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[65] *Id.* (stating the wrongful death action's award damages are controlled by the Wrongful Death Act, not by the Probate Code).

[66] *See supra* notes 46–65 and accompanying text.

[67] *See* SPEISER ET AL., *supra* note 16, § 1:9 (discussing the history of American wrongful death statutes); *supra* notes 18–35 and accompanying text (explaining the development of Wyoming's wrongful death statutes).

[68] *See generally* SPEISER ET AL., *supra* note 16, at app. A (providing a complete, detailed listing of state wrongful death statutes).

[69] *See* SPEISER ET AL., *supra* note 16, § 11:28 ("In roughly half of the states the wrongful death act provides: 'Every such action *shall* be brought by and in name of the personal representative.'"). Additionally, the federal death statutes designate the personal representative "as the party plaintiff" and general maritime law grants the personal representative standing to sue for "the nonstatutory remedy for wrongful death." *Id.* § 11:29.

[70] D.C. CODE § 16-2702 (2010); *accord* W. VA. CODE ANN. § 55-7-6 (2010) (using the phrase "such personal representative").

[71] *See* SPEISER ET AL., *supra* note 16, at app. A (detailing wrongful death statutes for Alabama, Alaska, Arkansas, Florida, Illinois, Indiana, Kentucky, Nebraska, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Virginia, and Washington).

[72] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-612 (2010) ("'[P]ersonal representative' includes any person to whom letters testamentary or of administration are granted."); MICH. COMP. LAWS § 600.2922 (2010) ("Every [wrongful death] action . . . shall be brought by, and in the name of, the personal representative of the estate of the deceased."); SPEISER ET AL., *supra* note 16, at app. A

in these jurisdictions consistently interpret the term "personal representative" to refer to the executor or administrator of the estate.[73] For example, in a federal West Virginia case decided in 2007, the district court stated a wrongful death action's "personal representative must generally be the administrator of the estate."[74] Similarly, in a 2010 decision from the District of Columbia, the court concluded that in the context of a wrongful death action, the term "personal representative is strictly construed . . . to mean only the decedent's executor or administrator."[75]

The remaining twenty-two states' wrongful death statutes are less similar to Wyoming's Wrongful Death Act and are generally less restrictive than the majority of jurisdictions, allowing alternative plaintiffs or providing detailed definitions of terms.[76] However, as in the majority of states, references to the executor, administrator, and representative in the context of wrongful death actions consistently refer to the decedent's estate.[77] For example, Georgia and Rhode Island explicitly allow a surviving spouse, child, or parent to bring an action for wrongful death but otherwise require the administrator or executor

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(listing complete wrongful death statutes for Arizona, Kansas, Maine, Massachusetts, Michigan, Montana, New Jersey, and South Carolina). Maine's wrongful death statute exists in the state's probate code. ME. REV. STAT. tit. 18, § 2-804 (2010).

[73] *See, e.g.*, Hatas v. Partin, 175 So. 2d 759, 761 (Ala. 1965) ("The words 'personal representative' . . . can only mean the executor or administrator of the injured testator or intestate."); Gresham v. Strickland, 784 So. 2d 578, 580 (Fla. Dist. Ct. App. 2001) ("[T]he right to bring a punitive damages claim for wrongful death belongs exclusively to the personal representative of the estate."); *In re* Estate of Hutman, 705 N.E.2d 1060, 1065 (Ind. Ct. App. 1999) ("[T]he determination of who becomes a special administrator does not rest solely upon who wins the proverbial race to the courthouse. Rather, the person chosen must also be qualified under the [Probate Code]."); Bennett v. Nicholas, 250 S.W.3d 673, 675 (Ky. Ct. App. 2007) ("[A] wrongful-death action can only be brought by the estate's lawful representative, either the executor or administrator."); Henkel v. Hood, 156 P.2d 790, 794 (N.M. 1945) (Bickley, J., concurring specially) ("When the Legislature employed the phrase 'personal representative' they meant executor or administrator of the estate of the deceased."); Ramsey v. Neiman, 634 N.E.2d 211, 214 (Ohio 1994) ("[Wrongful death actions] must be brought in the name of a person appointed by a court to be the administrator, executor, or personal representative of the decedent's estate."); SPEISER ET AL., *supra* note 16, § 11:30 ("It is also a principle that a personal representative must have been validly and legally appointed to administer the decedent's estate . . . in order to bring a wrongful death action.").

[74] Thomas v. Brooks Run Mining Co., 504 F. Supp. 2d 121, 127 (S.D. W. Va. 2007).

[75] Estate of Manook v. Research Triangle Inst. Int'l, 693 F. Supp. 2d 4, 17 (D.C. 2010).

[76] *See* SPEISER ET AL., *supra* note 16, at app. A (detailing wrongful death statutes for California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, North Dakota, Rhode Island, Tennessee, Texas, Utah, and Wisconsin); *infra* notes 77–82 and accompanying text.

[77] *See, e.g.*, Isaac v. Mount Sinai Hosp., 557 A.2d 116, 117 (Conn. 1989) ("[A wrongful death action] may be maintained only by an executor or administrator of an estate."); Young v. Marshburn, 180 S.E.2d 43, 44 (N.C. Ct. App. 1971) ("[Only] the executor, administrator, or collector of an estate can maintain an action for wrongful death."); SPEISER ET AL., *supra* note 16, § 11:30 ("It is also a principle that a personal representative must have been validly and legally appointed to administer the decedent's estate . . . in order to bring a wrongful death action.").

of the estate to bring the action.[78] Twelve states have more liberally constructed statutes, allowing a range of interested parties or beneficiaries to bring a wrongful death action.[79] Delaware's statute, in particular, does not identify who may bring a wrongful death action but was interpreted in 1985 to allow the decedent's personal representative or named beneficiaries as plaintiffs.[80] New Hampshire is unique because it also allows any interested party to initiate an action but requires that an appointed administrator pursue the action.[81] Lastly, four states have the most complete and detailed wrongful death statutes—providing priority lists, criteria for appointment, and giving first priority to the surviving spouse and children over the surviving parents, similar to Wyoming's Probate Code.[82]

As this survey demonstrates, in states with wrongful death statutes using the term "personal representative," courts consistently relate the term to the administrator or executor of the decedent's estate, therefore incorporating the

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[78] GA. CODE ANN. § 51-4-5 (2010) ("When there is no [surviving spouse, children, or parents] entitled to bring an action for the wrongful death of a decedent . . . the administrator or executor of the decedent may bring an action for . . . the next of kin."); R.I. GEN. LAWS §§ 10-7-1.2, -2 (2010) (specifying a wrongful death action must be brought by the executor or administrator of the deceased, but allowing parents to bring actions for a child's wrongful death).

[79] *See* LA. CIV. CODE ANN. art. 2315.2 (2010) (listing who may bring an action and giving the surviving spouse and children highest priority); MO. REV. STAT. § 537.080 (2010) ("[Wrongful death actions may be brought by] the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased."); UTAH CODE ANN. § 78B-3-106 (West 2010) ("[The decedent's] heirs, or his personal representatives for the benefit of his heirs, may maintain [a wrongful death] action."); WIS. STAT. § 895.04 (2010) ("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."); Hanson v. Valdivia, 187 N.W.2d 151, 156 (Wis. 1971) ("When there is a surviving spouse the action must be brought by or on behalf of that spouse."); SPEISER ET AL., *supra* note 16, at app. A (providing wrongful death statutes for Delaware, Hawaii, Idaho, Louisiana, Maryland, Minnesota, Mississippi, Montana, Nevada, Texas, Utah, and Wisconsin).

[80] *See* DEL. CODE ANN. tit. 10, § 3724 (2010); Johnson v. Physicians Anesthesia Servs., P.A., 621 F. Supp. 908, 916 (Del. 1985) ("[T]he Court finds that actions under the new wrongful death act can be brought either by the personal representative 'for the benefit of' the wife, husband, parents, and child of a deceased person or by the named beneficiaries themselves.").

[81] *See* N.H. REV. STAT. ANN § 556:19 (2010) ("Any person interested in the estate of a person deceased may begin an action as administrator . . . if the administrator then or afterward appointed shall . . . prosecute it as plaintiff."); *see also* Tanner v. King, 157 A.2d 643, 644 (N.H. 1960) ("[T]he Legislature in the interest of expediency wanted to allow any interested person to initiate such an action provided it be prosecuted thereafter by an administrator.").

[82] *See* CAL. CIV. PROC. CODE § 377.60 (West 2010) ("A [wrongful death action] may be asserted by . . . the decedent's personal representative [or the] decedent's surviving spouse, domestic partner, children, [or] the persons . . . who would be entitled to the property of the decedent by intestate succession."); COLO. REV. STAT. § 13-21-201 (2010) (allowing a wrongful death action to be brought by the deceased's surviving spouse, heir or heirs, designated beneficiary, or parents if the deceased is an unmarried minor, in that order); SPEISER ET AL., *supra* note 16, at app. A (detailing wrongful death statutes for California, Colorado, North Dakota, and Tennessee).

probate code.[83] State legislatures intending to grant the right to bring a wrongful death action to individuals other than an administrator or executor, consciously either omitted the term "personal representative" or, more importantly, specifically identified alternative plaintiffs.[84] Accordingly, the Wyoming legislature's choice to designate the personal representative as the sole party to bring a wrongful death action is significant, and the court should construe the designation as a conscious and deliberate use of the term.[85]

PRINCIPAL CASE

Larry Johnson died intestate in March 2008.[86] In September 2008, his father petitioned the probate court for appointment as his son's personal representative in order to file a wrongful death claim.[87] The probate court approved the petition and appointed him the personal representative without providing notice to Larry Johnson's surviving wife and two children.[88] In October 2008, the wife petitioned the court, requesting the court revoke the father's appointment and appoint her as the personal representative instead.[89] Her petition cited the priority list contained in the Probate Code, which gives her preference.[90] The district court denied her petition and upheld the father's appointment as the personal representative.[91]

The wife appealed to the Wyoming Supreme Court, contending the trial court, sitting in probate, abused its discretion by ignoring the Probate Code.[92] She argued the trial court's disregard of the Probate Code's provisions leaves a judge

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[83] *See* SPEISER ET AL., *supra* note 16, § 11:28 ("Under such a provision, the action must be brought and maintained by the personal representative of the person for whose death the damages are sought."); *supra* notes 69–75 and accompanying text.

[84] *See* SPEISER ET AL., *supra* note 16, § 11:28 ("On the other hand, a personal representative is not entitled to bring a death action where the right of action is granted to designated persons other than the decedent's personal representative."); *supra* notes 76–82 and accompanying text.

[85] *See* Morris v. CMS Oil & Gas Co., 227 P.3d 325, 333 (Wyo. 2010) (stating the lack of additional words clarifying a term in a statute is an intentional act by the legislature and does not provide a reason to add additional meaning); Keats v. State, 64 P.3d 104, 113 (Wyo. 2003) ("We are not . . . free to ignore any word that the legislature has chosen to place in a statute, and every word is presumed to have a meaning."); *supra* notes 18–35 and accompanying text (explaining the development and legislative history of Wyoming's Wrongful Death Act).

[86] *In re* Estate of Johnson, 231 P.3d 873, 876 (Wyo. 2010).

[87] *Id.*

[88] Brief of Appellant at 5, *Johnson*, 231 P.3d 873 (No. S-09-0040), 2009 WL 1701477 [hereinafter Appellant's Brief].

[89] *Id.*

[90] *Id.*; WYO. STAT. ANN. § 2-4-201 (2010) ("The relatives of the deceased . . . are entitled to administer in the following order: (i) The surviving husband or wife, or some competent person whom he or she may request to have appointed; (ii) The children; (iii) The father or mother.").

[91] *Johnson*, 231 P.3d at 876.

[92] Appellant's Brief, *supra* note 88, at 8 (arguing the court disregarded established Wyoming law and relevant statutes which give the wife priority).

free to appoint any individual as the personal representative—regardless of his or her interest in the case—ultimately resulting in petitioners racing to the court for appointment.[93] In reply, the father contested the wife's standing to challenge his appointment and bring the appeal.[94] Additionally, he argued the Probate Code does not govern decisions in appointing a personal representative for the purposes of bringing a wrongful death claim, because the Wrongful Death Act fails to define personal representative or to refer to the Probate Code.[95] He contended since the personal representative acts as a fiduciary for all those who can bring a claim in the wrongful death action, it does not matter who is appointed.[96]

Majority Opinion

In writing for the majority, Chief Justice Voigt, joined by Justices Kite and Burke, first addressed the issue of the wife's standing to challenge the appointment.[97] Both the majority and dissent agreed Larry Johnson's wife had standing due to her substantial interest in the outcome of a wrongful death action brought in his name.[98] As a potential personal representative, claimant, and mother of two other possible claimants, her personal stake in the action sufficiently warranted her challenge.[99] The court also noted the decedent's spouse is given the highest priority as administrator under the Probate Code.[100] Having determined the wife had standing to appeal the decision, the court focused the bulk of its discussion on addressing whether the Probate Code governs the appointment of a personal representative for the purposes of bringing a wrongful death action, and if it does not, what should.[101]

In addressing this issue, the majority began by listing the statutes at issue in the appeal, specifically pointing out that the Wrongful Death Act exists outside and separate from the Probate Code.[102] Noting its "brevity," the court addressed the Act's susceptibility to inconsistent judicial interpretation as well as the legislative confusion in the early 1980s concerning its place and purpose in the Wyoming code.[103] The court ultimately concluded that the probate court

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[93] *Id.* at 17.

[94] Appellee's Brief at 6, *Johnson*, 231 P.3d 873 (No. S-09-0040), 2009 WL 1872373.

[95] *Id.* at 8.

[96] *Id.* at 13–15.

[97] *Johnson*, 231 P.3d at 875–77, 882.

[98] *Id.* at 876.

[99] *Id.*

[100] *Id.*

[101] *See id.* at 875–76.

[102] *Id.* at 876–78.

[103] *Id.* at 878.

should not have accepted any petition for appointment as personal representative to bring a wrongful death action and that such was the province of the district court, not sitting in probate.[104] In reaching this conclusion, the court stated the appointment of a personal representative for the purpose of bringing a wrongful death action is distinctly separate from the Probate Code and, though the father had the right and ability to act as the personal representative, a probate action should not determine such an appointment.[105]

Since the court determined the appointment of a personal representative to pursue a wrongful death action is a decision that should be made independent of the Probate Code, the court suggested criteria and guidelines for courts to follow.[106] Oddly, directly after proclaiming the Probate Code as not controlling, the court suggested using the Probate Code's priority list, particularly when a party contests the appointment.[107] The court stated this list reflects legislative policy in prioritizing significant relationships and is useful in considering a personal representative's suitability.[108] The court suggested the district court should also consider the petitioner's financial and physical ability, geographic location, intentions, stake in the outcome, and family dynamics.[109] Acknowledging the lack of guidance contained in the Wrongful Death Act, the court warned against appointing a personal representative on solely a first-come, first-served basis and suggested notice, or the lack thereof, to other potential personal representatives provides an additional consideration in determining who the court will ultimately appoint.[110]

Dissent

Justice Hill dissented, joined by Justice Golden.[111] He contended the legislature always intended the Probate Code to control the personal representative appointment in a wrongful death action.[112] He utilized legislative history in arguing the majority's reasoning disregarded the clear intent of the Wrongful Death Act and left the appointment of the personal representative in a wrongful

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[104] *Id.* at 880.

[105] *Id.*

[106] *Id.* at 880–81.

[107] *Id.* at 881.

[108] *Id.*

[109] *Id.*

[110] *Id.* ("The only test of who is appointed as personal representative, despite the lack of guidance within the wrongful death act, cannot simply be who first gets to the courthouse. There is some hint in the record that just such a race occurred in this case.").

[111] *Id.* at 882 (Hill, J., dissenting).

[112] *Id.* at 882.

death action up to the broad and general discretion of the district court.[113] This essentially removed the reasonable and widely-accepted priority list and notice requirements specified in the Probate Code.[114] He stated no reason supports the proposition the father should have priority over the wife in a wrongful death claim.[115] Further, he acknowledged the wife clearly holds "statutory entitlement" and no extenuating circumstances exist that would otherwise disqualify her appointment.[116] Justice Hill concluded by stating the probate court should control a personal representative's appointment.[117] Furthermore, instead of remanding the case to the lower court and ordering the dismissal of the entire probate action, the Wyoming Supreme Court should have ordered the court to appoint the wife as the personal representative in the wrongful death action.[118]

ANALYSIS

The Wyoming Supreme Court's decision in *Johnson* overruled well-established Wyoming case law, leaving practitioners guessing as to how Wyoming courts will appoint personal representatives in future wrongful death actions.[119] The court recognized that appointment cannot rest solely on who petitions the courthouse first and suggested the lower court, on remand, should consider the Probate Code's provisions.[120] However, by divorcing the Probate Code from the appointment process it traditionally controlled, the Wyoming Supreme Court opened up the term "personal representative" to expansive interpretation, thereby allowing appointments to stand based solely on a court's broad discretion.[121]

This case note argues the obvious meaning of "personal representative" refers to the representative of a decedent's estate and Wyoming's Probate Code provides the most complete and definite structure among the state's statutes for interpreting the term.[122] Historically, the legislature and the Wyoming Supreme Court supported the relationship between the statutes by specifically limiting

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[113] *Id.* at 882–83 (discussing the legislative histories of the wrongful death and probate statutes, out of which the legislature appears to have unintentionally created the debate addressed in this case).

[114] *Id.*

[115] *Id.* at 883.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *See id.* at 882–83 (stating the majority opinion removes the priority generally given to a spouse which does nothing but "perpetuate irrational 'complexities' and . . . create new 'ambiguities' where none exist").

[120] *Id.* at 881 (majority opinion).

[121] *See infra* notes 148–57 and accompanying text (discussing the history of Wyoming case law and the Wrongful Death Act in relation to the Probate Code).

[122] *See infra* notes 127–39 and accompanying text.

particular Probate Code provisions from applying to wrongful death actions.[123] Wyoming case law also demonstrates courts and practitioners have long agreed the probate court controls appointment.[124] This case note argues the *Johnson* court—in divorcing the Probate Code from the wrongful death statute's personal representative requirement—resurrected legal issues the Probate Code and case law had previously put to rest.[125] Lastly, a comparison of the *Johnson* court's decision to other states' wrongful death statutes and decisions demonstrates the anomaly created in Wyoming law by opening the appointment of the decedent's personal representative to a court's broad discretion.[126]

Plain Meaning

When interpreting the legislature's intent behind the Act, the court incorrectly emphasized the separate purposes served by the Civil and Probate Codes.[127] Instead, Wyoming's well-established rules of statutory interpretation grant the plain and ordinary meaning of words the greatest deference when attempting to follow legislative intent concerning a term or phrase in a statute.[128] The plain and ordinary meaning of the term "personal representative" refers to the executor, administrator, or other court-appointed individual representing the decedent's estate.[129] Considering other sections of the Wyoming code, in which the personal

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[123] *See infra* notes 140–47 and accompanying text.

[124] *See infra* notes 148–57 and accompanying text.

[125] *See infra* notes 158–64 and accompanying text. *See generally* Jordan Wilder Connors, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 688 (2008) ("[S]tare decisis . . . reduces the amount of research and analysis required in cases analogous to cases the Court has ruled on before.").

[126] *See infra* notes 165–71 and accompanying text.

[127] *Compare In re* Estate of Johnson, 231 P.3d 873, 878 (Wyo. 2010) ("Of primary significance is that the separate purposes of the two statutes are entirely distinct."), *with* Halliburton Energy Servs., Inc. v. Gunter, 167 P.3d 645, 649 n.3 (Wyo. 2007) ("[We realize] there is a difference between probate estates and wrongful death estates, and that the statutes governing the latter are in the Civil Code rather than the probate code, but we believe the probate code statute is instructive in determining the intent of the Civil Code statute.").

[128] *See* Horse Creek Conservation Dist. v. State *ex rel.* Wyo. Att'y Gen., 221 P.3d 306, 312 (Wyo. 2009) ("[The court's] paramount consideration is the legislature's intent as reflected in the plain and ordinary meaning of the words used in the statute."); RME Petrol. Co. v. Wyo. Dep't of Revenue, 150 P.3d 673, 683 (Wyo. 2007) (stating if reasonable persons agree on the meaning with consistency and predictability, it is considered clear and unambiguous and the plain language meaning holds); Debora A. Person, *Legislative Histories and the Practice of Statutory Interpretation in Wyoming*, 10 WYO. L. REV. 559, 566 (2010) (explaining how numerous Wyoming Supreme Court decisions show the court should apply the plain and ordinary meaning of a term).

[129] *See* Willis v. Pan Am. Ref. Corp., 26 F. Supp. 990, 993 (D. Md. 1939) (citing Briggs v. Walker, 171 U.S. 466 (1898) ("In giving the right of action to the personal representative without further description [in the Federal Employers' Liability Act], Congress evidently intended to confer the right upon the lawfully and properly appointed executor or administrator of the decedent.")); UNIF. PROBATE CODE § 1-201 (amended 2008) ("'Personal representative' includes executor, administrator, successor personal representative, special administrator, and persons who perform

representative refers to the administrator, executor, or other estate representative, the legislature was mindful of this plain meaning.[130] The concise statutory language used here and, more importantly, the lack of subsequent changes despite numerous opportunities demonstrate the legislature understood and accepted the plain meaning of the term as referring to the Probate Code.[131]

The legislature's careful use of the definite article "the" in the Act further supports the interpretation that the personal representative refers to a pre-existing representative of the decedent.[132] At the time the Wyoming legislature created the Act, the complaint typically had to show the plaintiff was the appointed representative of the estate.[133] However, the *Johnson* majority considered opening a probate court action in the absence of an estate "absurd," even though other courts and legal writers easily accept such a situation and recognize the Act's language requires the representative's appointment before filing a wrongful death action.[134] The legislature could have easily changed the language to use an

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substantially the same function under the law governing their status."); 31 AM. JUR. 2D *Executors and Administrators* § 7 (2010) ("The commonly accepted definition of 'personal representative' includes an executor or administrator, and the Uniform Probate Code uses this term almost exclusively, instead of 'executor' and 'administrator.'" (footnote omitted)); BLACK'S LAW DICTIONARY 1416–17 (9th ed. 2009) ("[A personal representative is a] person who manages the legal affairs of another because of incapacity or death, such as the executor of an estate."); TIFFANY, *supra* note 16, at 237 ("Where the statute requires the action to be brought in the name of the personal representative, the complaint must allege the appointment of the plaintiff as executor or administrator.").

[130] *See* Pagel v. Franscell, 57 P.3d 1226, 1230 (Wyo. 2002) (quoting Wyo. Cmty. Coll. Comm'n v. Casper Cmty. Coll. Dist., 31 P.3d 1242, 1249 (Wyo. 2001)); Person, *supra* note 128, at 567 ("Statutes are construed as a whole with the ordinary and obvious meaning applied to the words as they are arranged in paragraphs, sentences, clauses, and phrases."); *supra* notes 37–42 and accompanying text (citing other Wyoming statutes that use the term "personal representative").

[131] *See supra* notes 13–36 and accompanying text (discussing the evolution of wrongful death in Wyoming).

[132] WYO. STAT. ANN. § 1-38-102 (2010); Melissa C. King, *Are Kerps Alive in Essence? The Viability of Executive Incentive Bonus Plans After 11 U.S.C. § 503(C)(1)*, 82 ST. JOHN'S L. REV. 1509, 1526 (2008) ("[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes." (quoting Am. Bus. Ass'n v. Slater, 231 F.3d 1, 4–5 (D.C. Cir. 2000))).

[133] *See* TIFFANY, *supra* note 16, at 237 ("[F]ailure to amend the [wrongful death] complaint so as to show that the . . . plaintiff was administrator of the estate of the deceased was a fatal defect."); Person, *supra* note 128, at 567 (stating a court must interpret a statute's words as they were understood at the time the statute was created).

[134] *In re* Estate of Johnson, 231 P.3d 873, 880 (Wyo. 2010); *see* Carrick v. Cent. Gen. Hosp., 414 N.E.2d 632, 636 n.2 (N.Y. 1980) ("It is well established that the existence of a qualified administrator is essential to the maintenance of the action and that the statutory right to recover for wrongful death does not even arise until an administrator has been named through the issuance of letters of administration."); Murg v. Barnsdall Nursing Home, 123 P.3d 21, 25 (Okla. 2005) (holding it appropriate to reopen a probate estate and appoint a new individual as personal representative for the purpose of bringing a wrongful death action when the previous personal representative for the estate refused to pursue the action); Richardson v. Kennedy, 475 S.E.2d 418, 426 (W. Va. 1996) (stating if the decedent's estate is closed prior to bringing a wrongful death action, the court should reopen it and appoint the petitioner as representative to pursue the action);

indefinite article such as "a" personal representative or added specific appointment criteria if it intended for the appointment of multiple representatives within the action or separate from estate matters.[135] Instead, retaining "the" in the Act limits the meaning and interpretation of "personal representative," preventing multiple petitions for appointment.[136]

Legislative Actions

In deciding Larry Johnson's father should not have petitioned the probate court for appointment, the Wyoming Supreme Court gave too much consideration to the placement of the wrongful death statutes outside the Probate Code.[137] The majority misinterpreted the statutes' placement in the Code as legislative intent to separate the two actions, when it resulted simply from the legislature's desire to clarify and update the overall Wyoming Code.[138] The legislature clearly intended to limit its involvement at that time to housekeeping matters, not "to eliminate or affect in any way causes of action for wrongful death."[139]

The *Johnson* majority also misinterpreted legislative changes to the wrongful death statutory language as indications of an intent to dissociate the Probate Code from wrongful death actions entirely.[140] The court admitted that in its 1963 *Bircher*

COOLEY, *supra* note 14, at 95 ("[A]n administrator may by appointed for the purpose of bringing [a wrongful death action] though there be no estate."); Fowler Vincent Harper, Comment, *Jurisdiction to Appoint an Administrator to Sue for Wrongful Death*, 6 IND. L.J. 506, 510 (1930) ("The [Indiana] statute recognizes the validity of administration when there is no estate except the claim for wrongful death.").

[135] *See* BP Am. Prod. Co. v. Madsen, 53 P.3d 1088, 1091 (Wyo. 2002) (citing Application of Hotel St. George Corp., 207 N.Y.S.2d 529, 531 (1960)) ("In a statute, 'a' usually means 'any.'"); King, *supra* note 132, at 1526 (quoting *Am. Bus. Ass'n*, 231 F.3d at 4–5 (stating the use of 'the' connotes a limitation while 'a' or 'an' is more general).

[136] WYO. STAT. ANN. § 1-38-102; *see BP Am. Prod. Co.*, 53 P.3d at 1092 (citing Brooks v. Zabka, 450 P.2d 653, 655 (Colo. 1969) (en banc)) ("[I]n construing statutes, the definite article 'the' is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'").

[137] *See Johnson*, 231 P.3d at 880 (concluding the personal representative appointment in a wrongful death action has "nothing to do with the appointment of an executor or administrator under the probate code"); *supra* notes 13–36 and accompanying text (explaining the placement of the Wrongful Death Act in the Wyoming Code).

[138] *Compare Johnson*, 231 P.3d at 878 ("Of primary significance is that the separate purposes of the two statutes are entirely distinct."), *with* Wetering v. Eisele, 682 P.2d 1055, 1060 (Wyo. 1984) ("[W]e know that at one time these [wrongful death] provisions were included in the probate code, and although subsequently renumbered the legislation which accomplished the renumbering did not manifest any purpose to eliminate these provisions from the probate code.").

[139] 1982 Wyo. Sess. Laws 93–94; *see supra* notes 21–36 and accompanying text (discussing the period of legislative changes in the 1970s and 1980s).

[140] *See* 2 EDGAR B. KINKEAD, THE LAW OF PLEADING 834 (1985) ("The right to sue [for wrongful death], being purely statutory and in derogation of the common law, must be strictly construed [and] extended only to the personal representative.").

holding, the court expressly connected the Wrongful Death Act to the intestacy statutes as "a viable construction of the statutes as they stood at that time."[141] Since *Bircher*, the legislature replaced the Act's reference to the Probate Code, which distributed the proceeds from a wrongful death action, with a provision allowing nearly anyone the opportunity to recover damages.[142] Additionally, since 1963 it enacted provisions protecting the proceeds from a wrongful death action from creditors of the decedent's estate.[143] The *Johnson* court inferred from these changes that the association to the Probate Code no longer existed and specifically overruled *Bircher*.[144]

The Wyoming Supreme Court erroneously interpreted these modifications as a directive from the legislature to divorce the entire Probate Code from applying to the Wrongful Death Act.[145] Instead, limiting specific Probate Code provisions from applying to wrongful death actions illustrates the legislature recognized an established relationship between them.[146] By distinguishing the decedent's heirs from the wrongful death action beneficiaries and protecting the proceeds from estate creditors, the legislature demonstrated it could have isolated the wrongful death statutes from the Probate Code entirely, but instead it retained the language requiring the personal representative to bring an action.[147]

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[141] *Johnson*, 231 P.3d at 879 (referring to the 1963 wrongful death statute that required the award from a wrongful death action to be distributed per the Probate Code).

[142] WYO. STAT. ANN § 1-38-102(c) (2010) ("The court . . . may award such damages . . . as shall be deemed fair and just."); *see supra* notes 21–23 and accompanying text (discussing changes made to the damages provision of Wyoming's wrongful death statutes).

[143] *See* WYO. STAT. ANN. § 1-38-102 ("[N]o 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."); 1973 Wyo. Sess. Laws 149 (modifying the distribution of proceeds from a wrongful death action judgment and adding a section protecting such proceeds from the decedent's creditors).

[144] *Johnson*, 231 P.3d at 879 ("[I]t is now clear that a wrongful death action is not to be processed under the probate code."); *see* 21 C.J.S. *Courts* § 202 (2010) ("A court should be reluctant to overrule its interpretation of statutory language after the legislature has reenacted or amended the statute without modifying or expressing disagreement with the construed language.").

[145] *See* Ashley v. Read Constr. Co., 195 F. Supp. 727, 728–29 (D. Wyo. 1961) (exempting the in-state requirement of the probate code from applying to wrongful death actions without limiting other provisions); SPEISER ET AL., *supra* note 16, § 11:31 (explaining the majority of states allow personal representatives appointed outside the wrongful death action's jurisdiction to maintain the action, where generally a representative lacks authority outside the jurisdiction of appointment); *supra* note 24 and accompanying text (noting the legislature retained the personal representative requirement); *infra* notes 146–47 and accompanying text.

[146] *See* Wetering v. Eisele, 682 P.2d 1055, 1061 (Wyo. 1984) ("When the legislature adopts a statute it is presumed to have done so with full knowledge of the existing state of law with reference to the subject matter of the statute."); *supra* notes 127–36 and accompanying text (noting the legislature retained the personal representative requirement while cognizant of existing case law).

[147] *See* 1973 Wyo. Sess. Laws 149 (deleting the language identifying specific beneficiaries of a wrongful death action and adding a section protecting such proceeds from the decedent's creditors); *Wetering*, 682 P.2d at 1061 (concluding the legislature, in amending the Wrongful Death

Wyoming Case Law

In the years between *Bircher* and *Johnson*, the Wyoming Supreme Court decided cases the *Johnson* majority overlooked, and these cases reinforced the connection of personal representative in the Wrongful Death Act to the Probate Code.[148] Because the Act as applied in Wyoming always existed outside of the Probate Code, case law provides a more accurate source of legislative intent than the majority's reliance on the Act's placement.[149] Wyoming courts and practitioners have long interpreted the term "personal representative" to mean the administrator or executor of the decedent's estate, and the lack of congressional modifications following these cases demonstrates the legislature's acquiescence to this interpretation.[150] While the Act does not reference the Probate Code and vice versa, the Wyoming Supreme Court has traditionally applied the Probate Code's definitions and provisions in deciding wrongful death issues.[151] Notably, practitioners in Wyoming previously considered a probate court appointment of the personal representative not only appropriate but required.[152]

Act in 1973, must have assumed the probate code's provisions for intestate descent would apply); *supra* notes 142–43 and accompanying text (outlining the legislature's previous amendments to the wrongful death statutes).

[148] *See* Corkill v. Knowles, 955 P.2d 438, 443 (Wyo. 1998); DeHerrera v. Herrera, 565 P.2d 479, 482 (Wyo. 1977); Jordan v. Delta Drilling Co., 541 P.2d 39, 42 (Wyo. 1975), *overruled by Wetering*, 682 P.2d 1055, *as recognized in Johnson*, 231 P.3d at 879; Coliseum Motor Co. v. Hester, 3 P.2d 105, 108 (Wyo. 1931); 21 C.J.S. *Courts* § 202 (2010) (describing how overruling a decision also overrules holdings based on that overruled decision); Connors, *supra* note 125, at 682 ("The Supreme Court considers stare decisis—the obligation to adhere to past opinions—to be 'indispensable' to the 'rule of law.'"); *supra* notes 54–66 and accompanying text (discussing relevant cases decided between 1963 and 2010).

[149] *See* 1979 Wyo. Sess. Laws 257, 311 (moving the Wrongful Death Act to the Probate Code); 1981 Wyo. Sess. Laws 237 (repealing the Wrongful Death Act from the Probate Code). There is an absence of wrongful death cases between 1979 and 1981 when the Act was within the probate code and the legislature is assumed to be aware of the case law when modifying statutes. *See Wetering*, 682 P.2d at 1061 (stating the legislature is presumed to know existing case law when enacting a related statute); *supra* notes 43–66 and accompanying text (discussing the history of case law).

[150] *See Corkill*, 955 P.2d at 443 ("The statute requires every wrongful death action to be brought by and in the name of the decedent's personal representative, *i.e.*, the executor or administrator of the decedent's estate."); Bircher v. Foster, 378 P.2d 901, 902 (Wyo. 1963) ("[T]he 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. We see no reason why these views should now be altered."), *overruled by Johnson*, 231 P.3d at 879; 21 C.J.S. *Courts* § 202 (2010) ("While a court has the power to overrule precedent, it should do so only for the most compelling reasons.").

[151] Lawson, *supra* note 2, at 411 (stating the Wyoming Supreme Court has often used the Probate Code for definitions and provisions in applying the Wrongful Death Act).

[152] *See, e.g.*, *Corkill*, 955 P.2d at 440 ("Knowles is the decedent's father and the qualified personal representative of the decedent's estate."); *Jordan*, 541 P.2d at 41 ("[P]laintiff-appellant was appointed, qualified and is the acting administratrix of the estate . . . and as his personal representative, brought this action for his wrongful death."); *Coliseum Motor Co.*, 3 P.2d at 105 (Wyo. 1931) ("This action was brought by . . . [the] administratrix of the estate.").

In disregarding the Probate Code's well-defined provision for determining a personal representative and merely suggesting it may provide guidance, the majority turned once predictable outcomes into open questions, thus subjecting practitioners to a court's unpredictable discretion.[153] Previously in Wyoming, a court not sitting in probate lacked authority to appoint a personal representative for the purpose of bringing a wrongful death action.[154] In *Butler v. Halstead* the court expressly held certain provisions of Wyoming's Probate Code control aspects of a wrongful death action.[155] Justice Hill's dissent in *Johnson* appropriately addressed the long history of holdings in Wyoming, stating the court has always interpreted the wrongful death statute to rely on the Probate Code in appointing a personal representative.[156] By overruling the court's prior decisions, the *Johnson* majority created vagueness, uncertainty, and varying interpretations, which run contrary to the court's own rules of statutory construction.[157]

Challenges and Contention

Isolating the wrongful death statutes from the Probate Code potentially creates additional judicial proceedings and conflicts between individuals supposedly representing the same interests.[158] In appointing a representative without using objective criteria, a court's decision will be more susceptible to challenges by other

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[153] *See* Payne v. Tennesee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); Alpine Lumber Co. v. Capital W. Nat'l Bank, 231 P.3d 869, 873 (Wyo. 2010) (stating that courts should avoid overturning established case law interpreting a statute as it essentially changes the statute, which is the province of the legislature, not the judiciary); Connors, *supra* note 125, at 688 ("Stare decisis fosters the related aims of predictability, notice, perceived legitimacy, and fairness, because it provides that like cases will be treated alike.").

[154] *See, e.g.*, *Corkill*, 955 P.2d at 443 (Wyo. 1998) (equating the wrongful death's personal representative to the executor or administrator of the decedent's estate); *Bircher*, 378 P.2d at 903 ("[T]here is no authority in this State either by statute or decision whereby a district court, unless sitting in probate, would be authorized to appoint a father as the personal representative of a deceased son for the purposes of a death action.").

[155] Butler v. Halstead, 770 P.2d 698, 700 (Wyo. 1989) ("[T]he persons for whose benefit a wrongful death action is brought are all of those persons identified in § 2-4-201 [of the Probate Code].").

[156] *In re* Estate of Johnson, 231 P.3d 873, 882 (Wyo. 2010) (Hill, J., dissenting).

[157] *See* Cook v. State, 841 P.2d 1345, 1353 (Wyo. 1992) (stating courts should follow precedent as it promotes reliability, predictability, consistency, and integrity of the judicial process); *Bircher*, 378 P.2d at 902 (declining to discuss the plaintiff's argument that the Wrongful Death Act's "personal representative" has a broader definition than the Probate Code's, and stating previous opinions already settled the issue); Person, *supra* note 128, at 566; *supra* notes 37–41 and accompanying text (explaining the Probate Code's provisions provide structure to the wrongful death statutes).

[158] *See* SPEISER ET AL., *supra* note 16, § 15:6 (discussing the importance of a court process appointing personal representatives to minimize family disputes and complications as well as provide certainty and promote judicial efficiency); *infra* notes 159–65 and accompanying text.

possible representatives as well as by defendants attempting to defeat the action based on standing.[159] Absent a specific process for appointing a representative to bring a wrongful death action, this decision increases litigation by permitting more challenges to appointments, ultimately to the detriment of those harmed by the wrongful death.[160] In *Johnson*, for example, the father failed to present reasons why he should have priority over the decedent's wife in a wrongful death claim, yet the court remanded the case simply because it was brought as a probate action.[161] The purpose of a wrongful death action is, first and foremost, to benefit the decedent's dependents, for which the Probate Code provides objective criteria for appointment and safeguards their interests.[162] Justices Hill and Golden, in their dissent, appropriately concluded the court should have accepted the probate court as the appropriate venue and remanded the case, ordering the lower court to follow the Probate Code's procedures by appointing the wife as the personal representative.[163] In remanding the case, the *Johnson* majority warned against appointing a personal representative on a first-come, first-served basis, yet it

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[159] *See* Tanner v. King, 157 A.2d 643, 644 (N.H. 1960) (holding the lack of a proper plaintiff as required by the statute precluded the court from maintaining the action); Henkel v. Hood, 156 P.2d 790, 792 (N.M. 1945) ("It is incidental that a 'personal representative' . . . is named to bring suit. It is not because this would fall within his duties as such, but because someone must be named and our Legislature has fixed upon such a person as the one to sue."); David K. Deitrich, *Florida's Wrongful Death Law: Time for a Change*, 18 U. FLA. L. REV. 637, 645 (1966) ("[S]ome sort of priority must be established to determine which beneficiary can sue.").

[160] *See* Connors, *supra* note 125, at 688 ("[S]tare decisis . . . reduces the amount of research and analysis required in cases analogous to cases the Court has ruled on before."); *supra* notes 153–57 and accompanying text. In an article discussing the deficiencies of Florida's statutes addressing wrongful death, the author suggests wrongful death actions should be brought as a single action by the personal representative. Deitrich, *supra* note 159, at 645. The author explains a model act issued by Harvard contained provisions including a priority system among the beneficiaries and allowing secondary beneficiaries to bring an action as long as the primary beneficiary is given notice. *Id.*

[161] *Johnson*, 231 P.3d at 881.

[162] *See id.* at 883 (Hill, J., dissenting) (citing 22A AM. JUR. 2D *Death* § 81 (2003)); WYO. STAT. ANN. §§ 2-4-201 (specifying a priority list of relatives of the deceased entitled to administer), -203 (defining exceptions to those entitled to administer by reason of incompetence), -205 (describing how to petition the court for appointment as administrator), -206 (allowing interested parties to contest and oppose a petition for appointment), 2-7-205 (2010) (requiring notice of administration of estates to the surviving spouse and all heirs at law of the decedent).

[163] *Johnson*, 231 P.3d at 883; *see* Jordan v. Delta Drilling Co., 541 P.2d 39, 42 (Wyo. 1975) ("[T]he administrator or executor [of the estate as appointed under the probate code] must bring the action."), *overruled by* Wetering v. Eisele, 682 P.2d 1055 (Wyo. 1984), *as recognized in Johnson*, 231 P.3d at 879; Bircher v. Foster, 378 P.2d 901, 902–03 (Wyo. 1963) ("[T]here is no authority in this State either by statute or decision whereby a district court, unless sitting in probate, would be authorized to appoint a father as the personal representative of a deceased son for the purposes of a death action."), *overruled by Johnson*, 231 P.3d at 879; *supra* notes 43–66 and accompanying text (discussing relevant Wyoming case law).

effectively sanctioned a race to the courthouse by no longer requiring the Probate Code to control the appointment process in a wrongful death action, failing to hold courts accountable to the decedent's most direct surviving dependents.[164]

Other States' Wrongful Death Statutes and Case Law

The majority's decision in the *Johnson* case is inapposite to other states' case law directly addressing this issue and contradicts the consistent interpretation of similarly-worded statutes created to serve a similar purpose.[165] Most of the country's wrongful death statutes share similar language with Wyoming's, requiring a personal representative to bring the action.[166] Decisions from these jurisdictions are instructive, as courts have consistently interpreted the term "personal representative" to refer to the representative of the decedent's estate.[167] While some states explicitly reference their probate code or estate statutes, in the absence of a definition or appointment criteria, courts and practitioners have traditionally applied the state's probate code to fill in the blanks.[168] Wyoming,

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[164] *Johnson*, 231 P.3d at 881 (majority opinion); *see* Frederick Davis, *Wrongful Death*, 1973 WASH. U. L. Q. 327, 338 (1973). Davis calls the original approach of requiring the personal representative of the deceased to bring a wrongful death action "simple and direct" and question the decision of some jurisdictions to allow alternative plaintiffs:

> It is not altogether clear what policy considerations dictated a departure from the traditional approach. . . . Whatever the reason for the changes, however, they have taken place in a number of jurisdictions, and in every case the [determining who has standing to bring a wrongful death action] which [was] so simply and directly disposed of by the original [approach, has] become more complicated.

Davis, *supra*, at 338.

[165] *See, e.g.*, Bennett v. Nicholas, 250 S.W.3d 673, 675 (Ky. Ct. App. 2007) ("[A] wrongful-death action can only be brought by the estate's lawful representative, either the executor or administrator."); Luckey v. Union Pac. R.R. Co., 219 N.W. 802, 804 (Neb. 1928) ("The administrator of the deceased employee's estate . . . is the 'personal representative.'"); Henkel v. Hood, 156 P.2d 790, 794 (N.M. 1945) (Bickley, J., concurring specially) ("When the Legislature employed the phrase 'personal representative' they meant executor or administrator of the estate of the deceased."); *see supra* notes 67–84 and accompanying text (discussing other states' wrongful death cases).

[166] *See, e.g.*, D.C. CODE § 16-2702 (2010) (specifying a wrongful death action "shall be brought by and in the name of the personal representative of the deceased person"); KY. REV. STAT. ANN. § 411.130 (West 2010) ("[A wrongful death] action shall be prosecuted by the personal representative of the deceased."); NEB. REV. STAT. § 30-810 (2010) ("Every such action . . . shall be brought by and in the name of the person's personal representative."); W. VA. CODE ANN. § 55-7-6 (2010) (using the phrase "such personal representative"); *see supra* notes 67–75 and accompanying text (reviewing other states' statutes with language similar to Wyoming's).

[167] *See* James E. Goldie, Comment, *The Arkansas Wrongful Death Statute*, 35 ARK. L. REV. 294, 294 (1981) ("Generally, the suit is brought in the name of the personal representative of the decedent's estate on behalf of those beneficiaries entitled to damages.").

[168] *See*, *e.g.*, *In re* Estate of Hutman, 705 N.E.2d 1060, 1065 (Ind. Ct. App. 1999) ("[T]he determination of who becomes a special administrator does not rest solely upon who wins the proverbial race to the courthouse. Rather, the person chosen must also be qualified under the

however, is the first state to leave the appointment of the personal representative in a wrongful death action up to the broad discretion of a district court, without providing statutory guidance or benefiting from established case law.[169] The decision in *Johnson* creates a legal anomaly in Wyoming, as Wyoming is now the first state to disassociate the "personal representative" in a wrongful death action from the administrator or executor of the decedent's estate, based solely on a new interpretation of an old statute.[170] Instead, the *Johnson* court should have followed its precedent and the pervasive legal interpretation of these other states in keeping the appointment of a personal representative firmly tethered to the Probate Code's provisions.[171]

CONCLUSION

The Wyoming Supreme Court's holding in *In re Estate of Johnson* contradicts legislative intent and reverses years of case history by divorcing the Probate Code's criteria for appointing personal representatives from wrongful death actions.[172] Wyoming's legislative history and case law demonstrate the Probate Code is meant to complement the Wrongful Death Act, regardless of the Act's location in the Wyoming code.[173] Furthermore, previous decisions provided a clear roadmap upon which practitioners can no longer rely.[174] The *Johnson* court's

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[Probate Code]."); Chavez v. Regents of Univ. of New Mexico, 711 P.2d 883, 886 (N.M. 1985) ("'Personal representative' is not defined by either the Tort Claims Act or the Wrongful Death Act. A statutory definition of the term may be found, however, in the Probate Code.").

[169] *See* Dominguez v. Rogers, 673 P.2d 1338, 1341 (N.M. Ct. App. 1983) ("[New Mexico's wrongful death statute] clearly names a nominal party as the person who must bring the wrongful death action on behalf of all the individual statutory beneficiaries.").

[170] *See In re* Estate of Johnson, 231 P.3d 873, 879–80 (Wyo. 2010) (overruling *Bircher* based on the lack of legislative direction expressly written into the Wrongful Death Act); *supra* notes 43–86 and accompanying text (surveying other jurisdictions' treatment of wrongful death actions and statutes).

[171] *See* IBP, Inc. v. Alvarez, 546 U.S. 21, 32 (2005) ("Considerations of stare decisis are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades."); Dunnegan v. Laramie Cnty. Comm'rs, 852 P.2d 1138, 1140 (Wyo. 1993) (quoting Cook v. State, 841 P.2d 1345, 1353 (Wyo. 1992) (stating courts should depart from precedent to prevent the perpetuation of error and "to vindicate plain, obvious principles of law")); *supra* notes 43–85 and accompanying text (examining other states' wrongful death statutes and cases).

[172] *See supra* notes 13–86 and accompanying text (detailing Wyoming's wrongful death statutes' legislative history and history of related cases).

[173] *See supra* notes 127–47 and accompanying text (contending the court should not use the location of the statutes within the Wyoming Code to infer legislative intent).

[174] *See supra* notes 148–57 and accompanying text (examining previous Wyoming decisions).

decision creates a new class of civil-action personal representatives appointed at the broad discretion of the court—opening the door to unpredictability—where the Probate Code once provided structure.[175]

The Probate Code provides the best process for appointing personal representatives.[176] Without overriding established exceptions, it should continue to control the definition and appointment process of the representative to bring a wrongful death action.[177] The absence of relationship priority and a notice requirement will only lead to increased litigation and legal wrangling.[178] Until the legislature amends the Wrongful Death Act, this decision provides little incentive for a petitioner to inform other potential representatives of his or her actions and even less to prevent petitioners from racing to the courthouse.[179]

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[175] *See supra* notes 158–64 and accompanying text (showing how the probate code's provisions and earlier decisions incorporating them provided structure and predictable outcomes).

[176] *See supra* notes 158–64 and accompanying text.

[177] *See supra* notes 161–64 and accompanying text (using the procedural history of the *Johnson* case as an example of the problem in not applying the probate code when appointing the personal representative in a wrongful death action).

[178] *See supra* notes 153–64 and accompanying text.

[179] *See supra* notes 153–64 and accompanying text.