Supreme Court No. 98189-2
Court of Appeals No. 51576-8-II

SUPREME COURT OF THE STATE OF WASHINGTON

In re Estate of

GERALD W. IRWIN

BARBARA A. KELLEY,
Petitioner,

v.

BARBARA IRWIN,
Respondent.

PETITION FOR REVIEW

By:

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1. IDENTITY OF THE PETITIONER

Petitioner Barbara Kelley ("Kelley") asks this Court to review the decision of the Court of Appeals referred to in Section 2.

2. COURT OF APPEALS DECISION

Thurston County Superior Court ruled, on equitable grounds, that RCW 11.12.070 should be interpreted so that as between devised life estate holders and fee simple owners, the former should pay debt on property secured by a mortgage, when the Will at issue is silent on the issue. Division 2 of the Court of Appeals, on October 22, 2019, affirmed, without oral argument, providing alternative reasoning, in *In re Estate of Irwin*, 10 Wn. App. 2d 924, 450 P.3d 663 (2019). Reconsideration was denied on January 22, 2020.

3. ISSUES PRESENTED

3.1. As a matter of substantial public importance under RAP 13(b)(4), whether RCW 11.12.070 should be interpreted so that as between specifically devised life estate holders and specifically devised fee simple owners, the latter should pay principal debt on property secured by a mortgage? Yes.

3.2. Whether, under RAP 13(b)(1), RAP 13(b)(2), RAP 13(b)(4) the ambiguity in RCW 11.12.070, as to who pays mortgage debt when property is specifically devised to life estate holders and specifically devised to fee simple owners, should be resolved by following the common law? Yes.

3.3. Whether, under RAP 13(b)(1), RAP 13(b)(2), and RAP 13(b)(4) the ambiguity in RCW 11.12.070, as to who pays mortgage debt when property is specifically devised to life estate holders and specifically

devised to fee simple owners, should be resolved by analyzing legislative history? Yes.

3.4. Whether, under RAP 13(b)(1), RAP 13(b)(2), and RAP 13(b)(4) the published decision erred in interpreting precedent by creating (or mistakenly recognizing common) law unique to Washington State and requiring life estate holders to pay principal debt on property secured by a mortgage, rather than specifically devised fee simple owners, when a Will is silent on the issue? Yes.

3.5. Whether, under RAP 13(b)(1), RAP 13(b)(2), RAP 13(b)(4) the published decision erred by not following precedent requiring the Will at issue be construed as a whole? Yes.

4. STATEMENT OF THE CASE

4.1. Decedent ("Mr. Irwin") died owning real property subject to a mortgage. In his Will, he named Kelley as his personal representative, to serve without bond and with nonintervention powers. (CP at 1).

4.2. Mr. Irwin made a bequest, which granted Kelley a life tenancy only requiring that she pay the taxes and insurance on the property:

> I give a life estate in the property located at 5109 58th Avenue, Olympia, Washington to BARBARA A. KELLEY provided she pays the taxes and insurance on the property.

(CP at 3).

4.3. The only other beneficiaries of the estate, per the Will, were Respondents ("Mr. Irwin Jr.") and ("Ms. Irwin"), who each take fifty-percent of all remaining interests in the estate. (CP at 3).

4.4. Kelley was appointed personal representative by the trial court. (CP at 33). Subsequently, Ms. Irwin filed a petition to remove Kelley

as personal representative. (CP at 6-7). Relevant to this appeal, Ms. Irwin claimed that, under RCW 11.12.070, Kelley was personally required to pay the monthly mortgage payment on the real property. (CP at 10).

4.5. Kelley responded that as a life tenant, she was not personally required to pay the monthly mortgage payment on the real property; rather, the remaindermen devisees that owned the property in fee simple had the responsibility to pay the mortgage. (CP at 16-17, 27-31, 47-51; RP (October 12, 2017) at 7-15; RP (February 9, 2018) at 21-29, 31-33). Kelley pointed out that Mr. Irwin's intent, as stated in the Will, was that she should only pay the taxes and insurance on the property. (CP at 16-17, 27-31, 47-51; RP (October 12, 2017) at 7-15; RP (February 9, 2018) at 21-29, 31-33).

4.6. The trial court ruled in favor of Ms. Irwin. (CP at 33-35, 56-57). The commissioner reasoned that "the will does not explain who should pay the mortgage" and that it was "fair that Kelley pay the mortgage for only the portion of time which she enjoys the benefits of the life tenancy." (CP at 35).

4.7. Kelley argued on appeal that statutory interpretation, legislative history, and the common law all mandated that she should not pay the property's principal debt secured by the mortgage. The Irwins responded that the common law was modified, and that Kelley should pay all of the mortgage payments.

4.8. The Court of Appeals, in its published decision, without oral argument, affirmed on alternative grounds and held that there is a unique Washington common law requiring the life tenants to pay all principal debt payments, secured by a mortgage, as well as all carrying costs, such as mortgage interest, taxes, and all expenses to maintain the property. Reconsideration was denied.

4.9. No other court in this nation as far as undersigned counsel can tell has ever made the same holding. Every state's caselaw mentioning this issue sides with Kelley, as do citations in treatises and hornbooks. The published decision stands apart from any decision in the entire nation.

5. WHY REVIEW SHOULD BE ACCEPTED

5.1. As a Matter of Substantial Public Importance, Review Should be Accepted Because RCW 11.12.070 Should Be Interpreted So that Remaindermen Pay the Principal Debt on Property Secured by a Mortgage Over Life Tenants When Such Property is Specifically Devised to Both.

The facts of this case are typical of many elderly fixed income couples' estate planning. This Court should grant review because the issue at hand will adversely affect thousands of Wills already executed in this state. Attorneys and residents not aware of the decision will continue to be adversely affected. The published decision has the potential to adversely affect every property owner in this state desiring, at the time of their passing, to provide for their significant other as well as their children. Elderly

residents on fixed incomes are the most likely to be harmed. Thus, this case presents an issue of substantial public importance.

An illustrative example is warranted. In this example, near exactly the same as the facts at hand, a couple meets later in life. They are elderly with biological, adopted, or stepchildren from different significant others. For many reasons—whether it be financial, maintaining retirement benefits, or countless others—they do not get married, or maybe they do and the property at issue remains separate property for whatever reason. The couple lives together in the property. For love, convenience, to pay bills, and/or to consolidate their assets and generate/preserve preciously rare income later in life, one person moves in with the other. The person moving into the property with the other sells his or her other home.

The residence in which they then both live in together typically has some debt secured by a mortgage, but such debt is paid down and there is substantial equity in the home. The couple wishes to provide for each other after passing, but also desires to provide for their children from previous relationship(s). The children may not connect with the new significant other as there is no blood/biological relationship and/or because they see a threat to "their" inheritance.

When meeting with an estate planning attorney, the titled owner of the home, after consultation, decides to devise the residence to his or her

children in fee simple, but reserves for his or her surviving partner a life estate. *This is a common, near perfect, inexpensive, equitable solution that fairly balances the interests and needs of the surviving significant other and that of the decedent's children*.

The estate planning attorney utilizes the common devise of "I give Blackacre to 'A' in fee simple, reserving a life estate in the life of 'B'." This allows the surviving significant other to continue living in their home and maintain the status quo for the remaindermen, paying typically de minimis upkeep, living expenses, and the interest[1] on any mortgage debt. It also creates a situation where the decedent's children will eventually take possession of the home. But for the time being, the surviving significant other is free from interference from such children that he or she may not get along with, during his or her life. He or she can preserve liquid resources to live off in retirement without paying for the purchase price of the home.

This is why the common law—in every state in this nation—has always provided *life tenants merely maintain the status quo and preserve the property*, while the *remaindermen pay for and accumulate equity in the property*, when a Will does not say otherwise. This prevents the (typically) older surviving significant other from being burdened by the debt used to

[1] Because of amortization schedules front ending mortgage interest payments, interest payments on mortgage debt are typically lower and lower as the payment period nears completion.

purchase the property, as he or she is only required to pay upkeep, living expenses, taxes, and any interest on the mortgage. The (typically) younger children who are fee simple owners gain equity in the property as debt is paid off and benefit from the value of property typically increasing over time via market, and (anti-sprawl) regulatory, influences.

In sum, while these children must pay the principal debt on the property, secured by the mortgage, such children eventually obtain all of the equity in the property for a substantial discount. Thus, the children's inheritance is preserved while the surviving significant other's gift of possession of the home, free of principal mortgage debt is effectuated.

But the Court of Appeals decision disregards these bedrock principles regarding freehold estates, disregards universal common law, confuses estate planning attorneys, confuses the public at large, impacts thousands of already executed Wills drafted to take into account the common law, and in doing so substantially harms the public interest, especially the elderly often on fixed incomes. In its interpretation of a clearly ambiguous statute, and of a unique Will that mistakenly did not name the specifically devised remaindermen, the decision turns the common law known to attorneys and the public at large on its head by mandating life estate holders pay all debt on property secured by a mortgage. It is an extraordinary holding that is harmful to the public interest.

Undersigned counsel can find no case in this entire nation, or any treatise citing to caselaw, where the common law has ever required a life tenant to pay the principal mortgage debt if the Will did not direct so. Public policy reasons support this Court granting review.

5.2. The Published Decision Fails to Acknowledge that RCW 11.12.070 is Ambiguous, Fails to Clearly Modify the Common Law Universal to All States in this Nation, and Fails to Apply Such Common Law. This Court Should Accept Review.

Property interests are commonly, and metaphorically, described as a "bundle of sticks." Some properties have more interests, *i.e.*, "sticks," than others, and that number may change over time as property is devised from one person or entity to another. However, one stick—the fee simple ownership interest—is the most important interest, *i.e.*, "stick," of all. *Bartlett v. Bartlett*, 183 Wash. 278, 282, 48 P.2d 560, 562 (1935) (holding a fee simple estate is the highest estate known to the law, being an absolute one). The fee simple interest always exists, and it is always the first interest to pass to the new owner when all the interests of a property are devised. 31 C.J.S Estates § 11 ("The fee never stands in abeyance; it must always rest in someone.") (citing *e.g.*, *McTamney v. McTamney*, 138 N.J. Eq. 28, 31, 46 A.2d 444, 446 (1946)). These fee simple concepts are bedrock principles.

Another bedrock, never changing, principle with respect to freehold estates, is that a life estate is an interest in property "whose duration is

limited to the life of the party holding it, or some other person." 31 C.J.S. Estates § 35. Importantly, "There can be no life estate in property without a remainder" fee simple interest. 31 C.J.S. Estates § 35 (citing *e.g.*, *Benson v. Greenville Nat'l Exchange Bank*, 253 S.W.2d 918, 922 (1952)).

Thus, creating a life estate properly involves some variation of the following language, specifically naming the fee simple remaindermen and specifically naming the life tenant.

> "I give Blackacre to 'A' in fee simple, reserving a life estate in the life of 'B'."

Under the common law, universal to all states in this nation, a life tenant is not required to pay the principle debt on real property secured by a mortgage. *See e.g.*, *Draper v. Sewell*, 263 Ala. 250, 253, 82 So. 2d 303, 306 (1955) (holding life estate holder has no obligation to pay the principle debt of a mortgage); *Tyler v. Bier*, 88 Ore. 430, 434, 172 P. 112, 113 (1918); *Currier v. Teske*, 93 Neb. 7, 13, 139 N.W. 622, 624 (1913).

Furthermore, when statutes are a "derogation of the common law," they "must be strictly construed and no intent to change that law will be found, unless it appears with clarity." *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285, 1288 (1980); *Cooper v. Runnels*, 48 Wn.2d 108, 112, 291 P.2d 657, 659 (1955).

Last, RCW 11.12.070 states the following in pertinent part:

> When any real or personal property subject to a mortgage is specifically devised, the devisee shall take such property so devised subject to such mortgage unless the will provides that such mortgage be otherwise paid.

Here, under the example quoted above, "A" is specifically devised the fee simple interest in "Blackacre," and "B" is specifically devised a life estate. Both interest holders are specific devisees. Under RCW 11.12.070 which specific devisee is mandated to pay the debt secured by the mortgage? The obvious answer is that RCW 11.12.070 is ambiguous.

The published opinion states that "Kelley does not provide any convincing authority for her claim that a party receiving a life estate cannot be considered a devisee simply because she is not a fee simple owner of the property." (Published Opinion at 5). But Kelley did not advance the argument quoted above. She did not claim that she was not a "devisee." Kelley's argument was—when construing the substance, not form, of the Will—that *both she and the Irwins were specific devisees*, and that RCW 11.12.070 is plainly ambiguous as to which specific devisee "is responsible for the mortgage. . . ." (*e.g.*, Reply Brief at 13). Given that RCW 11.12.070 does not clearly modify the common law that remaindermen pay debt secured by a mortgage—the common law should prevail in this case. Public policy reasons and the fact the published decision is contrary to precedent support this Court granting review.

5.3. The Published Decision Does Not Analyze Legislative History, Contrary to Precedent, When a Statute is Ambiguous. This Court Should Accept Review.

The "primary duty" of a court interpreting a statute "is to ascertain and give effect to the intent and purpose of the Legislature." *Harmon v. DSHS*, 134 Wn.2d 523, 530, 951 P.2d 770, 773 (1998). Courts use "legislative history" as well as "other statutes" when "statutory language is ambiguous" in "order to discern legislative intent." *Id.*

Here, the statute is clearly ambiguous as to the issue at hand. Yet the published decision astonishingly cast aside considering legislative history of RCW 11.12.070 *at all*, succinctly stating "Kelley also relies on *In re Cloninger's Estate*, 8 Wn.2d 348, 112 P.2d 139 (1941), but that court addressed statutory language not at issue here." (Published Opinion at 6). Apparently, the Court of Appeals found the legislative history—of the very statute at issue—not relevant. This Court should accept review because when a statute changes, and an ambiguity is created, case precedent makes it paramount to decern the legislative purpose.

In the case of RCW 11.12.070, no caselaw in Washington exists where it was argued, let alone held, that any version of RCW 11.12.070 required life tenant devisees pay mortgages. Notably, however, just before the current 1955 version of RCW 11.12.070 was enacted, this Court decided *Cloninger*, a case all about fee simple devisees and nothing to do with life

estates. There, the decedent's Will devised real property to his daughter in fee simple. The rest of the estate went to his wife. The real property was encumbered by a mortgage. The daughter argued that the estate's personal assets and residue must pay the mortgage. The wife argued that the daughter took the property subject to the mortgage. The court concluded that the 1860 to 1954 version of the statute was a derogation of the common law because it was not clear that the common law rule, *i.e.*, fee simple devisees not being required to pay mortgages, was or was not modified. *Cloninger*, 8 Wn.2d at 350-351. The words "previously executed" muddied the statute enough so that any change in the common law could not be clearly found.

This Court's holding in *Cloninger* stands for the rule of law that unless RCW 11.12.070 clearly expresses the intent to modify the common law, the common law prevails. More precisely, the most recent 1955 change to RCW 11.12.070 had a single purpose. The legislature intended to modify the common law rule upheld in *Cloninger*, which presumed fee simple devisees took property free of mortgages, in favor of a modern trend[2]

[2] "The common-law rule has been modified, however, in a number of states -- some statutes going so far as to establish a converse rule: That, in the absence of an expression of intention by the testator to the contrary, *it will be presumed that he intended the [fee simple] devisee to take the property subject to the encumbrance*." *Cloninger*, 8 Wn.2d at 350 (emphasis added). *Cloninger* is clearly relevant to this case at hand, and RCW 11.12.070, because it recognized a modern trend that fee simple devisees take devised property subject to encumbrances, such as mortgages. That modern trend was clearly codified by the legislature in the current version of RCW 11.12.070; the legislature's intent and purpose was to make fee simple devisees pay mortgages, so as to supersede *Cloninger* by statute. Nothing suggests that the intent was to make life tenants do so.

occurring at the time that presumed the opposite. *See id.* at 350.

The statutory change fixed the inequity of making beneficiaries pay mortgages on property when (a) such property was not actually devised to them in fee simple, and when (b), as a result, such beneficiaries would never be entitled to any of the equity in the property. Reading RCW 11.12.070, reading this Court's decision in *Cloninger*, and recognizing their obvious close temporal proximity, as well as the modern trend at the time, makes this plain. There was no intention or purpose expressed in the statute, or in *Cloninger*, towards changing the common law rule that life tenants do not pay principal balances on mortgages.

A new law, or legislative history, meant to eviscerate testamentary gifts of possession, *i.e.*, mandating life tenants pay principal debts on real property secured by mortgages, and upending bedrock principles regarding freehold estates and life tenancies, would have made mention of such radical purposes. The fact that no appellate case nor any legislative history on RCW 11.12.070—for the past 150 years—mentions life tenant devisees at all, let alone being mandated to pay mortgages under the statute, is illuminating.

Perhaps the most important point being that it would be a strained consequence to believe that the legislature intended to fix one inequitable result, *i.e.*, beneficiaries paying for property in which they would never have

any claim of equity—just to create the nearly identical inequitable result of the same sort—*i.e.*, making life tenants pay for property in which they too would never have any equity.

This Court should accept review so that the paramount function of determining legislative purpose, *e.g.*, through analyzing legislative history, is not so lightly disregarded in the future, as it was in this case.

5.4. Washington State Has No Unique Common Law as to Life Tenants and Mortgage Payments and this Court Should Accept Review to Correct the Published Decision's Erroneous Statement of Law Otherwise.

Pursuant to RCW 4.04.010, "The common law, so far as it is not inconsistent with the . . . laws . . . of the state of Washington . . . shall be the rule of decision in all the courts of this state." This Court recognized the common law at issue in this case in *In re Brooks' Estate*, 44 Wn.2d 96, 98, 265 P.2d 833 (1954) (holding life tenants pay *"current expenses such as taxes, repairs, and other upkeep. . . .*") (quoting *Richardson v. McCloskey*, 276 S.W. 680, 685 (Tex. Com. App. 1925)). Division 1 further recognized the same common law in *In re Estate of Campbell*, 87 Wn. App. 506, 513, 942 P.2d 1008 (1997) (stating "[carrying] costs of maintaining life estate property" can be charged to the life tenant).

The question of whether "current expenses such as taxes, repairs, and other upkeep" paid by life tenants includes payments on principal

mortgage balances is easily answered by reading the cases that *Brooks' Estate* cites. For example, the Texas case *Richardson* (cited *Brooks' Estate*) explicitly cited four cases, from three states, that all follow the rule that life tenants do not pay principal balance on debt secured by a mortgage. *Richardson*, 276 S.W. at 685 (citing cases from states all following the (only) common law rule that life tenants do not pay the principal balance on mortgages). Furthermore, Texas law provides that life tenants do not pay the principal balance on any "existing encumbrance":

> A life tenant is charged with the duty of protecting the interest of remaindermen from forfeiture by reason of any act or omission on his part and to preserve the estate in which he holds a life tenancy. In *Brokaw v. Richardson*, 255 S.W. 685, 688 (Tex.Civ.App.-Ft. Worth 1923, no writ history), the court stated that in pursuance of this obligation ***a life tenant is required to pay the interest on existing encumbrances***. We think this is correct. Therefore, we hold that appellant is liable for payment of the interest on the indebtedness. ***The payments made toward the retirement of any principal would, of course, inure to the benefit of the remaindermen and would not be the obligation of the life tenant***.

Hill v. Hill, 623 S.W.2d 779, 780 (1981) (emphasis added). Thus, how *Richardson*, or in turn *Brooks' Estate*, can be interpreted as holding life tenants pay principal amounts owed on mortgages is not a supportable proposition.

Moreover, Texas law allows life tenants to "compel the remaindermen to contribute their proportion of the [e]ncumberance paid."

Bryson v. Connecticut General Life Ins. Co., 211 S.W.2d 304, 309 (1948). Clearly, a mortgage is an encumbrance, and the contribution that *Bryson* refers to is when a life tenant is forced to prevent foreclosure—*i.e.*, losing his or her (gifted) place to live—by paying the principal debt on the mortgage for which the remaindermen are duty bound to pay. *See id.*

Here, nevertheless, the published opinion cites as *unique* Washington State common law, "As a general rule, unless the will expressly provides otherwise, 'one who takes a life estate in the property of a decedent elects to take as a whole with the benefits of the income and profits, and under the corresponding burdens of the current expenses such as taxes, repairs, and other upkeep, viewing the estate as a whole.'" (internal punctuation altered) (citing *Brooks' Estate*, 44 Wn.2d at 98 (quoting *Richardson*, 276 S.W. 680, 685 (Tex. Com. App. 1925)). The published decision also cited *Campbell*, 87 Wn. App. at 513. Finally, the published decision reasoned that "it would be a 'strained consequence' for the residual devisees to have to pay the mortgage on their own testamentary gift where they do not yet have possessory interest in the property, *particularly in light of the principles articulated* in *Brooks' Estate* and *Estate of Campbell*." (emphasis added).

Because the published decision failed to note the dispositive distinction between "carrying charges" or maintenance costs/expenses or

"upkeep" versus capital contributions, and debt incurred, toward the *purchase* of property, this Court should grant review. The published decision is contrary to this Court's decision in *Brooks' Estate*. The specific error is that the published decision transforms *Brooks' Estate's* correct—and common among all states—statement of law that life tenants pay carrying costs such as "*corresponding burdens of the current expenses such as taxes, repairs, and other upkeep*" into an incorrect statement of law that *Brooks' Estate*, itself, in no way states nor stands for: "A life tenant accepts all of the benefits and burdens of the property and those with a remaining interest cannot be made responsible. . . ."[3] (Published Decision at 6). The published decision reads words into, or more precisely out of, *Brooks' Estate*'s holding and its pedigree. Those words read out of the decision were "*corresponding burdens of the current expenses such as taxes, repairs, and other upkeep*." The published decision erred in not recognizing that *Brooks' Estate* merely spoke of carrying costs, echoing what other state courts have held for 150-plus years.

As to *Campbell*, it is hard to see how that case stands for any proposition other than that life tenants pay "carrying" costs, unless the Will provides otherwise. *See Campbell*, 87 Wn. App. at 513. Since carrying costs

[3] Another error is the breadth of the decision. The common law placed equitable financial limits on any and all amounts/obligations paid by a life tenant because life tenants merely preserve, not pay for, the property. The published decision eviscerates that common law.

include interest charges on encumbrances such as mortgages, *Campbell*, read in the context of *Brooks' Estate*, 44 Wn.2d at 98 and its pedigree, supports Kelley's position. In fact, *Campbell* is in accord with every state in this nation's common law on life estates.

Finally, the published decision cites RCW 64.12.020, 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE § 1.27, at 53 (2d ed. 2004), and *McDowell v. Beckham*, 72 Wash. 224, 232, 130 P. 350 (1913). But neither RCW 64.12.020 nor *McDowell* state that a life tenant not paying the principal debt secured by mortgage is actionable waste. Moreover, while William B. Stoebuck and John W. Weaver do make a passing reference that a life tenant commits waste by not paying "mortgage debt"—*the reference is uncited to any caselaw or secondary authority* and fails to illuminate whether the authors are speaking about mortgage interest debt or principal debt. The authority the authors do cite all supports Kelley's position on appeal.[4]

In sum, this Court's decision *Brooks' Estate* is based on Texas law that supports Kelley's position on appeal. The published decision is directly

[4] Appendix A to C are selections from treatises by, or cited by, Washington Practice Series. They provide numerous citations to other states, all stating the common law is that life tenants only pay the interest accumulating on mortgage debts. Surely, if it was "common" for the "law" in Washington State to make life tenants pay principle debt amounts secured by mortgages—there would be at least one case that says so. Washington Practice Series fails to cite any such case and as such is not persuasive authority.

averse to this Court's decision. Moreover, *Campbell* focuses on that particular decedent's intent, and whether carrying costs such as taxes—not capital contributions towards the purchase of property—were intended to be paid by a life tenant pursuant to the language of a particular Will. Last, Washington Practice Series provides no citation to any authority contrary to the common law or Kelley's position on appeal.[5] This Court should accept review to correct the published decision's erroneous interpretation of Supreme Court precedent directly on point.

5.5. The Published Decision Fails to Follow Precedent Mandating that Wills are Construed as a Whole.

Wills must be construed as a whole. *In re Estate of Magee*, 75 Wn.2d 826, 829, 454 P.2d 402, 404 (1969). Here, the published opinion states that "Kelley contends that the Irwins, as residuary fee simple devisees, should be liable for the mortgage." (Published Decision at 3). But Kelley's argument has never been that "residuary" beneficiaries should pay the mortgage. Rather, Kelley's argument is that the Will must be construed as a whole, and that its form not be raised above its substance. Properly construed, the Irwins—as to the real property at issue—are specific devisees by operation of law.

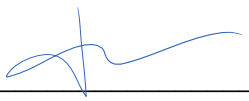
[5] The published decision also holds that Kelley, as Decedent's long-time partner, "ignores the principle that [Decedent] is presumed to have known the law at the time he executed his will." The published decision then cites RCW 11.12.070, which is plainly ambiguous on this issue and contradicts the common law that Decedent "presumed" was the law.

Stated simply, ***before Kelley is specifically devised anything***—the law, and bedrock principles regarding freehold estates, mandate the Irwins' fee simple interest be specifically devised first. *See* 31 C.J.S Estates § 11 (stating "The fee never stands in abeyance; it must always rest in someone") (citing *e.g.*, *McTamney*, 138 N.J. Eq. at 31; *Shufeldt v. Shufeldt*, 130 Wash. 253, 262, 227 P. 6, 9 (1924) (holding "If, when the will goes into effect, there is no contingency . . . as to the person entitled to the remainder . . . then the remainder is vested."). The unartfully, and uniquely, drafted Will merely and mistakenly placed the remainder fee simple specific devise in the residue section of the Will.

6. CONCLUSION

Pursuant to RAP 13.4, Kelley respectfully requests this Court grant review, and reverse the published decision in part. Kelley requests that Irwins pay the principal mortgage balance due, as required under the common law, and that she only be required to pay the interest on the mortgage. She further requests that the decision be reversed so that she be awarded attorney fees and costs on appeal.

Respectfully submitted this 20th day of February, 2020,



Drew Mazzeo WSBA No. 46506

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on February 20, 2020, I caused to be served:

- Petition for Review

On:

Mindie Wacker, WSBA No. 40010
Martin Burns, WSBA No. 98117
Attorneys for Barbara Irwin and Gerald Irwin Jr.
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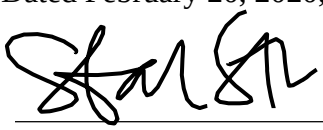
Via email and electronic service by the Court of Appeals.

Dated February 20, 2020, at Olympia, Washington.



Stacia Smith

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APPENDIX “A”

("voluntary" or "commissive" waste) and an affirmative duty, to some extent, to take steps to prevent waste ("permissive" waste). The examples above sufficiently illustrate commissive waste; no more will be said about that. As to permissive waste by a leasehold tenant, it is clear that a tenant has the duty to take measures to prevent the action of forces that will cause serious, lasting injury to the premises. Classic examples are the tenant's duty to replace or board up broken windows or to patch holes in a roof, if entry of the elements would cause serious damage. This duty is in addition to any tenant's repair covenant and, indeed, is the tenant's only repair duty in the absence of such a covenant.[25] Life tenants have similar duties to prevent waste, limited to the rents, issues, and profits they receive from the land or, if they personally occupy it, to the land's fair rental value. Their duty not to permit waste also includes a duty to pay taxes, assessments, and mortgage debt payments, subject to the limitation just stated.[26] While, as noted, there does not seem to be explicit Washington case law on permissive waste, it would be surprising if the rules stated in this paragraph were not in force. For one thing, three of the statutes cited above mention permissive waste.[27]

Washington also has incomplete authority on the extent to which a tenant, life tenant, guardian, or co-tenant is liable for serious and permanent damage done by third persons. At old common law, a party who himself could be liable for waste was liable for acts of waste done even by trespassers without his knowledge, on the theory he had an action over against them. Today, however, the general rule is that he is liable only if he negligently failed to prevent the third person's doing the damage.[28] One decision in Washington, from the court of appeals, holds that a tenant was liable for acts of waste committed by a third person, but the court is at pains to point out that the tenant had actual knowledge the harm was being done over a period of time.[29] The suggestion is strong that in this case the court of appeals would not have held the tenant liable unless he had had some involvement with the person who did the actual damage.

Persons who create a present and future estate may, by appropriate language in the creating instrument, lessen the tenant's or life tenant's duties not to commit or permit waste. If the parties to a lease agree that the tenant may, or perhaps is even required to, build or tear down structures, cut timber, remove minerals, etc., then of course none of the permitted acts will be waste.[30] If the grantor or devisor of a life estate

25. *See* W. Stoebuck & D. Whitman, Law of Property § 6.22 (3d ed. 2000).

26. Restatement of Property §§ 130, 139 (1936); W. Stoebuck & D. Whitman, Law of Property § 4.3 (3d ed. 2000).

27. RCWA 59.12.030(5); RCWA 59.18.130(5); RCWA 64.12.020.

28. Restatement of Property § 146 (1936); W. Stoebuck & D. Whitman, Law of Property § 4.1 (3d ed. 2000).

29. Dorsey v. Speelman, 1 Wn.App. 85, 459 P.2d 416 (1969).

30. Burns v. Dufresne, 67 Wash. 158, 121 P. 46 (1912) (permitted acts not waste if done reasonably).

mortgagee's permission, are an undue restraint on alienation.[10] However, these decisions are largely nullified by the Federal Garn–St. Germain Depository Institutions Act of 1982.[11]

Research References:

C.J.S. Perpetuities §§ 52, 55–77.
West's Key No. Digests, Perpetuities ⇐6–7.

§ 1.27 Waste

However "waste" may be used in popular terminology, in its technical and original sense, the word means damage to land done or allowed by one who owns a present estate that is subject to a future estate. The offense is against the owner of the future estate. Since the Statute of Westminster in 1285, and now by RCWA 59.12.020 in Washington, joint tenants and tenants in common may also be liable for waste to their cotenants.[1] The Washington statute also makes guardians and subtenants liable for waste to their wards and head landlords, respectively.[2] We will define in more detail those acts that constitute waste, but in general it is serious and more or less permanent harm done to the land or to objects affixed to it, such as growing timber or buildings. Waste may also consist of a life tenant's failing to pay taxes, assessments, or mortgage debts, so that title is jeopardized. The gist of it seems to be that the harm is serious and permanent enough to cause substantial loss to the plaintiff's future estate.[3]

Washington's statutes do not define waste, but there are a number of appellate decisions on the subject, most of which deal with questions of definition.[4] By far most of the cases are landlord-tenant cases.[5] It is

10. Bellingham First Fed. Sav. & Loan Ass'n v. Garrison, 87 Wn.2d 437, 553 P.2d 1090 (1976). *See also* Miller v. Pacific First Fed. Sav. & Loan Ass'n, 86 Wn.2d 401, 545 P.2d 546 (1976); Terry v. Born, 24 Wn.App. 652, 604 P.2d 504 (1979). *Cf.* Magney v. Lincoln Mut. Sav. Bank, 34 Wn.App. 45, 659 P.2d 537 (1983). *But compare Terry v. Born* with Morris v. Woodside, 101 Wn.2d 812, 682 P.2d 905 (1984).

11. 12 U.S.C. § 1701j. *See also* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982); Perry v. Island Sav. & Loan Ass'n, 101 Wn.2d 795, 684 P.2d 1281 (1984).

§ 1.27

1. Stat. of Westminster, 13 Edw. I, c. 22 (1285); RCWA 64.12.020. English decisions limited the actions under the Statute of Westminster to cases in which waste was committed by co-tenants in fee simple absolute. W. Stoebuck & D. Whitman, Law of Property § 5.8 (3d ed. 2000). Whether a similar limitation exists under the Washington statute is not known.

2. RCWA 64.12.020. Seattle–First Nat'l Bank v. Brommers, 89 Wn.2d 190, 570 P.2d 1035 (1977), is a case in which a guardian was held liable for statutory treble damages to her ward for cutting timber without court authorization.

3. The statements in this section about general American law are drawn, usually without further attribution, from Restatement of Property § 139 (1936); 5 American Law of Property §§ 20.1–20.23 (A. J. Casner ed. 1952); L. Simes, Future Interests § 46 (2d ed. 1966); and W. Stoebuck & D. Whitman, Law of Property §§ 4.1–4.5, 5.8 (3d ed. 2000).

4. Some leading cases on these questions are Seattle-First Nat'l Bank v. Brommers, 89 Wn.2d 190, 570 P.2d 1035 (1977);

APPENDIX “B”

capable of a reasonable use by the owners of the future interests, should they become entitled to possession, and if the owners of the future interests object to the changes proposed by the life tenant, it would seem that their objection should be deemed "reasonable" even if the value of the realty would not be decreased—or would even be increased—by the proposed changes.

It should be noted that the *Melms* court said, by way of dictum, that, where a landlord "rents his premises for a short time," after fitting them for certain uses, "he is entitled to receive them back at the end of the term still fitted for those uses; and he may well say that he does not choose to have a different property returned to him from that which he leased, even if, upon the taking of testimony, it might be found of greater value by reason of the change."[28] In fact, the rules as to what constitutes waste on the part of tenants for years (and periodic tenants) are somewhat more restrictive than those applicable to life tenants. In general, "the tenant is entitled to make changes in the physical condition of the property which are reasonably necessary in order for the tenant to use the leased property in a manner that is reasonable under all the circumstances"; but, "except to the extent the parties to a lease validly agree otherwise, there is a breach of the tenant's obligation if he * * * does not, when requested by the landlord, restore, where restoration is possible, the leased property to its former condition * * *."[29] The duties of the tenant for years (or periodic tenant) will be considered in more detail post in Chapter 6.

Use of land by a tenant (whether for life or for years) in a manner expressly authorized by the instrument creating the successive estates in the land obviously cannot constitute waste. Express provisions as to the permissible uses of the premises are, of course, very common in a lease creating a term of years.[30] Such provisions are much less common in an instrument creating—usually gratuitously—a life estate. But the latter may provide that the life tenant shall hold "without impeachment of waste." Such a provision has, from the earliest times in both England and the United States, been construed as protecting a tenant for life from any "legal" liability for waste.[31] But, as we shall see, courts of equity have sometimes provided a remedy for "unconscionable" conduct that injures the reversioner or remainderman even though the life tenant holds "without impeachment for waste."[32]

§ 4.3 Permissive Waste

Absent provisions to the contrary in the instrument creating the life estate, a life tenant is subject to a limited duty to make repairs on the

28. Supra note 5, 104 Wis. at 12, 79 N.W. at 740.

29. Rest.Prop.2d § 12.2(1), (3). As to the time within which leased property must be restored or the annexation removed, see id. § 12.3.

30. See post Chapter 6.

31. Rest.Prop. § 141 and Comments thereto.

32. See Rest.Prop. § 141, Comment (a) and Illust. 4; Section 4.5 infra.

property[1] and to pay all or part of certain carrying charges such as property taxes, mortgage interest, and special assessments for public improvements.[2] Failure to make the required repairs constitutes "permissive waste," and failure to pay carrying charges is also frequently termed "permissive waste."[3] But all such affirmative duties are subject to the important limitation that the life tenant is under no duty to expend more than the income that can be generated from the land or, if the life tenant personally occupies the land, the rental value thereof, in order to discharge such duties.[4] However, the surplus income or rental value from prior years must be applied to needed current repairs and carrying charges, and surplus current income or rental value must be applied to make up any accrued deficits in making repairs or paying carrying charges.[5]

No satisfactory general definition of the life tenant's common law duty to make repairs can be found in the decided cases, which simply illustrate typical fact patterns. The cases, however, do make it clear that the life tenant need not rebuild a structure that was completely dilapidated when he or she became entitled to possession or to make general repairs needed at that time;[6] need not rebuild a structure destroyed by fire, storm, or other casualty for which the life tenant was not responsible,[7] and need not eliminate the results of ordinary wear and tear unless repairs are necessary to prevent further deterioration.[8] But a life tenant has a duty to repaint when exterior surfaces will otherwise be exposed to serious deterioration[9] and to keep roofs in repair,[10] or—more generally, to preserve land and structures in a reasonable state of repair.[11]

§ 4.3

1. E.g., Stevens v. Citizens & Southern National Bank, 233 Ga. 612, 212 S.E.2d 792 (1975); Clark v. Childs, 253 Ga. 493, 321 S.E.2d 727 (1984). However, the instrument creating the life estate may shift these responsibilities entirely to the remainder holders; see In re Estate of Campbell, 87 Wash.App. 506, 942 P.2d 1008 (Wash.App. 1997).

2. E.g., Hausmann v. Hausmann, 231 Ill.App.3d 361, 172 Ill.Dec. 937, 596 N.E.2d 216 (Ill.App.1992) (taxes); Sherrill v. Board of Equalization, 224 Tenn. 201, 452 S.W.2d 857 (1970) (taxes); Goodspeed v. Skinner, 9 Kan.App.2d 557, 682 P.2d 686 (1984) (taxes); Garrett v. Snowden, 226 Ala. 30, 145 So. 493, 87 A.L.R. 216 (1933) (mortgage interest); Beliveau v. Beliveau, 217 Minn. 235, 14 N.W.2d 360 (1944) (same); Morrow v. Person, 195 Tenn. 370, 259 S.W.2d 665 (1953) (assessment apportioned in ratio of value of life estate to value of future estate).

3. "The tendency is to treat failure to carry out these obligations in the same manner as failure to repair, and the cases are consequently discussed together." 5 Am.L.Prop. § 20.12 at p. 100.

4. E.g., In re Stout's Estate, 151 Or. 411, 50 P.2d 768, 101 A.L.R. 672 (1936) (repairs); Nation v. Green, 188 Ind. 697, 123 N.E. 163 (1919) (taxes).

5. Ibid.

6. E.g., Savings Investment & Trust Co. v. Little, 135 N.J.Eq. 546, 39 A.2d 392 (1944).

7. E.g., Savings Investment & Trust Co. v. Little, supra note 6; In re Stout's Estate, supra note 1.

8. E.g., Keesecker v. Bird, 200 W.Va. 667, 490 S.E.2d 754 (W.Va.1997).

9. E.g., Woolston v. Pullen, 88 N.J.Eq. 35, 102 A. 461 (1917). Compare Staropoli v. Staropoli, 180 A.D.2d 727, 580 N.Y.S.2d 369 (N.Y.App.Div.1992) (failure to paint exterior of house is not waste where no structural damage results) with Zauner v. Brewer, 220 Conn. 176, 596 A.2d 388 (Conn.1991) (failure to paint and make ordinary repairs is waste).

10. Ibid.

11. Rest.Prop. 139. The older authorities all state that "the tenant must keep the premises windtight and water tight,"

APPENDIX “C”

to find an intent to benefit the remainderman as well as the life tenant.[37]

§ 1697. Duties of Life Tenant and Rights of Owner of Indefeasibly Vested Remainder or Reversion as to Mortgages

Of course, the life tenant will owe a duty to the remainderman or reversioner with respect to a mortgage encumbrance only if it is a lien on the reversion or remainder. This situation may arise where the mortgage was given prior to the creation of the life estate and remainder or reversion; or it may arise by virtue of the joint action of life tenant and remainderman or reversioner in giving the mortgage. In the latter case the duties may be regulated by an agreement entered into as a part of the joint action, but, in the absence of such an agreement, the principles here declared would control.

The life tenant is under a duty to pay the interest accruing during the period of his life estate.[38] As in the case of current taxes, this duty is limited by the rents and profits which the life

37. In re Cameron's Estate, 122 N. W. 564, 158 Mich. 174 (1909).

Welsh v. London Assur. Corp., 25 A. 142, 151 Pa. 607, 31 Am.St.Rep. 786 (1892).

38. Murphy v. May, 8 So.2d 442, 243 Ala. 94 (1942).

Barker v. Barker, 31 So.2d 357, 249 Ala. 322 (1947).

Abney v. Abney, 62 So. 64, 182 Ala. 213 (1913).

Kelley v. Acker, 228 S.W.2d 49, 216 Ark. 867 (1950).

De Prisco v. Rykaczewski, 158 A. 144, 18 Del.Ch. 252 (1932).

Oldham v. Noble, 66 N.E.2d 614, 117 Ind.App. 68 (1946).

Holzhauser v. Iowa State Tax Commission, 62 N.W.2d 229, 245 Iowa 525 (1953) (dictum).

In re Estate of Myers, 12 N.W.2d 211, 234 Iowa 502, 150 A.L.R. 254 (1944).

Todd's Ex'r v. First Nat. Bank, 190 S.W. 468, 173 Ky. 60 (1917).

Wheeler v. Addison, 54 Md. 41 (1880).

Welbon v. Welbon, 67 N.W. 338, 109 Mich. 356 (1896).

Stroh v. O'Hearn, 142 N.W. 865, 176 Mich. 164 (1913).

Bowen v. Brogan, 77 N.W. 942, 119 Mich. 218, 75 Am.St.Rep. 387 (1899).

In re Lee, 213 N.W. 736, 171 Minn. 182 (1927).

In re Daily's Estate, 159 P.2d 327, 117 Mont. 194 (1945).

Bartels v. Seefus, 273 N.W. 485, 132 Neb. 841 (1937).

Reeves v. Huckins, 117 A. 263, 80 N. H. 348 (1922).

Ivory v. Klein, 35 A. 346, 54 N.J.Eq. 379 (1896), affirmed 41 A. 1115, 55 N.J.Eq. 823 (1897).

Sweeney v. Schoneberger, 186 N.Y.S. 707, 111 Misc. 718 (1919).

Pfaff v. Kehrer, 200 N.Y.S. 113 (Sup. 1923).

In re Britz' Estate, 82 N.Y.S.2d 792 (Sur.1948).

tenant receives,[39] but, if the remainderman or reversioner should pay the interest himself, then it would seem that he would have a lien for the full amount on the life estate, whether the rents and profits were sufficient to pay the interest and other carrying charges or not.

If the mortgage falls due during the period of the life estate, the question arises: On whom does the burden of the payment of the principal fall? Courts have generally indicated that life tenant and reversioner or remainderman must each pay his due proportion of this amount.[40] To require them to share the burden

Cogswell v. Cogswell, 2 Edw.Ch. (N.Y.) 231 (1834).

Mosely v. Marshall, 27 Barb. (N.Y.) 42 (1858).

Carter v. Youngs, 42 N.Y.Super.Ct. 418 (1877).

In re Pfohl's Estate, 46 N.Y.S. 1086, 20 Misc. 627 (1897).

In re Very's Estate, 53 N.Y.S. 389, 24 Misc. 139 (1898).

Bonhoff v. Wiehorst, 108 N.Y.S. 437, 57 Misc. 456 (1907).

Miller v. Marriner, 121 S.E. 770, 187 N.C. 449 (1924).

Tyler v. Bier, 172 P. 112, 88 Or. 430 (1918).

Mendenhall v. Jackson, 110 A. 799, 268 Pa. 123 (1920).

Stark v. Byers, 62 A. 371, 213 Pa. 101 (1905).

Estate of Wilson Jewell, 11 Phila. (Pa.) 73 (1875).

Ward's Estate, 3 Pa.Co.Ct.R. 224 (1887).

Bourne v. Maybin, 3 Fed.Cas. p. 1003, No. 1,700 (C.C.Miss.1877).

See Damm v. Damm, 67 N.W. 984, 109 Mich. 619, 63 Am.St.Rep. 601 (1896) (where there was an unencumbered life estate, followed by a life estate in expectancy and a remainder in fee, the latter two estates being subject to a mortgage).

In Stavros v. Bradley, 232 S.W.2d 1004, 313 Ky. 676 (1950), the life tenant satisfied a lien encumbrance. The court held that she was subrogated to the rights of the lienor, but could not collect interest from the remainderman since it was her duty to pay the interest on the encumbrance.

39. See De Prisco v. Rykaczewski, 158 A. 144, 18 Del.Ch. 252 (1932).

Tyler v. Bier, 172 P. 112, 88 Or. 430 (1918).

Miller v. Marriner, 121 S.E. 770, 187 N.C. 449 (1924).

Todd's Ex'r v. First Nat. Bank, 190 S.W. 468, 173 Ky. 60 (1917).

Jones v. Sherrard, 22 N.C. 179, at page 187 (1838).

Compare with cases on duty of life tenant to pay taxes cited in note 6, supra.

40. Murphy v. May, 8 So.2d 442, 243 Ala. 94 (1942).

Abney v. Abney, 62 So. 64, 182 Ala. 213 (1913).

Krause v. Naiman, 167 N.W. 207, 102 Neb. 341 (1918).

Bartels v. Seefus, 273 N.W. 485, 132 Neb. 841 (1937).

Draper v. Clayton, 127 N.W. 369, 87 Neb. 443, 29 L.R.A.,N.S., 153 (1910).

In re Lee, 213 N.W. 736, 171 Minn. 182 (1927).

Garrett v. Snowden, 145 So. 493, 226 Ala. 30, 87 A.L.R. 216 (1933).

would seem to be just. By paying off the mortgage, the value of both life estate and future interest have been increased in proportion to their respective values. Hence it would seem that the due proportion would be based upon the respective values of life estate and remainder or reversion.[41] Certainly, unless payment was not due until after the termination of the life tenant's expectancy and was accelerated at the option of the owner of the future interest, it would be unfair to base the share payable by the life tenant upon the interest which would accrue if the principal were not paid until the death of the life tenant. This might be more or less than the amount by which the life estate is increased in value due to the payment of the mortgage. The cases, however, are not clear as to what a due proportion of the principal is.[42]

Engel v. Swenson, 254 N.W. 2, 191 Minn. 324 (1934).

Detroit & Northern Michigan Building & Loan Ass'n v. Oram, 167 N. W. 50, 200 Mich. 485 (1918).

Whitney v. Salter, 30 N.W. 755, 36 Minn. 103, 1 Am.St.Rep. 656 (1886).

Damm v. Damm, 67 N.W. 984, 109 Mich. 619, 63 Am.St.Rep. 601 (1876).

Todd's Ex'r v. First Nat. Bank, 190 S.W. 468, 173 Ky. 60 (1917).

Coughlin v. Kennedy, 28 A.2d 417, 132 N.J.Eq. 383 (1942).

1 Restatement, Property (1936) § 132.

But see, Kelley v. Acker, 228 S.W.2d 49, 216 Ark. 867 (1950), and the cases cited infra, n. 42.

41. See Draper v. Clayton, 127 N.W. 369, 87 Neb. 443, 29 L.R.A.,N.S., 153 (1910).

In re Lee, 213 N.W. 736, 171 Minn. 182 (1927).

Garrett v. Snowden, 145 So. 493, 226 Ala. 30, 87 A.L.R. 216 (1933).

Engel v. Swenson, 254 N.W. 2, 191 Minn. 324 (1934).

Detroit & Northern Michigan Building & Loan Ass'n v. Oram, 167 N. W. 50, 200 Mich. 485 (1918).

Whitney v. Salter, 30 N.W. 755, 36 Minn. 103, 1 Am.St.Rep. 656 (1886).

Damm v. Damm, 67 N.W. 984, 109 Mich. 619, 63 Am.St.Rep. 601 (1896).

42. In re Daily's Estate, 159 P.2d 327, 332, 117 Mont. 194, 204 (1945), involved payment of a mortgage by a life tenant, and a suit by the life tenant's executrix to recover from the estate of the creator of the interest. The court held that "the present worth of an annuity equal to the interest running during the number of years which constitutes his expected life represents the sum which (the life tenant) is liable to pay as his individual indebtedness; the balance, after subtracting this sum from the mortgage debt actually paid to the mortgagee, is the amount which (the remainderman) is liable to contribute."

See, also, Murphy v. May, 8 So.2d 442, 243 Ala. 94 (1942).

Bartels v. Seefus, 273 N.W. 485, 132 Neb. 841 (1937).

Coughlin v. Kennedy, 28 A.2d 417, 132 N.J.Eq. 383 (1942).

In Snow v. Arnold, 181 So. 7, 132 Fla. 435 (1938), the court apparently allowed the successor to the life tenant to recover the entire amount paid on the principal of a mortgage.

If the life tenant pays the principal in order to protect his interest, he is entitled to reimbursement from the owner of the reversion or remainder, and has a lien on the future interest for the amount which its owner is under a duty to pay.[43]

In general, the remedies of the remainderman or reversioner for the failure of the life tenant to pay interest are the same as in the case of his failure to pay current taxes. Where the life tenant defaults and the mortgage is foreclosed, he cannot become the purchaser and cut off the rights of the remaindermen.[44]

The respective duties of life tenant and remainderman or reversioner may be, and sometimes are, modified by agreement or by the provisions of the instrument creating these interests.[45]

It would seem that the duty of the life tenant should not extend to the payment of interest which accrued prior to the time when

In Boggs v. Boggs, 147 P.2d 116, 63 Cal.App.2d 576 (1944), there is language which would indicate that the entire burden of the mortgage fell upon the remaindermen.

In Morrison v. Launtzhiser, 271 P.2d 301, 176 Kan. 390 (1954), the life tenant was given a lien for the entire amount paid on the principal of the mortgage.

43. Murphy v. May, 8 So.2d 442, 243 Ala. 94 (1942).

Boggs v. Boggs, 147 P.2d 116, 63 Cal. App.2d 576 (1944).

Morrison v. Launtzhiser, 271 P.2d 301, 176 Kan. 390 (1954).

Krause v. Naiman, 167 N.W. 207, 102 Neb. 341 (1918).

Abney v. Abney, 62 So. 64, 182 Ala. 213 (1913).

Draper v. Clayton, 127 N.W. 369, 87 Neb. 443, 29 L.R.A.,N.S., 153 (1910).

Tindall v. Peterson, 98 N.W. 688, 99 N.W. 659, 71 Neb. 160, 8 Ann.Cas. 721 (1904).

Garrett v. Snowden, 145 So. 493, 226 Ala. 30, 87 A.L.R. 216 (1933).

Engel v. Swenson, 254 N.W. 2, 191 Minn. 324 (1934).

Tyler v. Bier, 172 P. 112, 88 Or. 430 (1918).

Collins v. McKenna, 189 N.Y.S. 433, 116 Misc. 72 (1921).

Detroit & Northern Michigan Building and Loan Ass'n v. Oram, 167 N.W. 50, 200 Mich. 485 (1918).

Todd's Ex'r v. First Nat. Bank, 190 S.W. 468, 173 Ky. 60 (1917).

Coughlin v. Kennedy, 28 A.2d 417, 132 N.J.Eq. 383 (1942), appears to deny the life tenant a right to foreclose after paying the mortgage, but concedes that he has a lien.

In Ward v. Chambless, 189 So. 890, 238 Ala. 165 (1939), the life tenant acquired the mortgage and then transferred it to another who later foreclosed. The court held that even if the remainderman had a right to redeem it had been lost by long delay.

44. See Souders v. Kitchens, 124 S.W.2d 1137, 344 Mo. 18 (1938).

45. Coppens v. Coppens, 70 N.E.2d 54, 395 Ill. 326 (1946).

Morrison v. Launtzhiser, 271 P.2d 301, 176 Kan. 390 (1954) (recognized that the will might create a duty on the life tenant to pay the princi-

his life estate came into existence or became possessory.[46] But, if accrued interest remains unpaid when the life estate becomes possessory, the life tenant should pay any interest thereafter accruing on that unpaid amount.[47]

§ 1698. Rights and Duties of Life Tenant and Owner of Indefeasibly Vested Remainder or Reversion as to Special Improvement Tax

A special improvement tax represents an addition to capital in much the same way as the satisfaction of a mortgage. And in the same way this addition to capital also benefits the life tenant. Hence, with some exceptions,[48] it is usually held that the burden of such a tax is shared by life tenant and remainderman or reversioner.[49] There is, however, an additional element not present in the case of the payment of a mortgage debt. The increase in value of the land due to the payment of the mortgage is permanent. But the special improvement may not last forever, and therefore may not increase the value of the future interest in the proportion which its value bears to the life estate. Some courts have, however, ignored that aspect of the situation and have held that the life tenant pays interest to the owner of the future interest on the total amount to be assessed for the improvement, and that this interest payment continues during his life; the owner of the future interest paying the entire assessment.[50] Other courts have divided the burden in the proportion which the value

pal of a mortgage, but construed as creating no such duty).

Johnston v. Dickerson, 127 S.W.2d 64, 233 Mo.App. 762 (1939).

Fuller v. Devolld, 128 S.W. 1011, 144 Mo.App. 93 (1910).

46. Jones v. Sherrard, 22 N.C. 179 (1838).

Ruscombe v. Hare, 6 Dow 1 (1818).

And see Damm v. Damm, 67 N.W. 984, 109 Mich. 619, 63 Am.St.Rep. 601 (1896).

Contra:

Penryhn v. Hughes, 5 Ves. 99 (1799).

47. Jones v. Sherrard, 22 N.C. 179 (1838).

Ruscombe v. Hare, 6 Dow 1 (1818).

48. Thomas v. Thomas' Guardian, 51 S.W.2d 949, 244 Ky. 724 (1932).

Vaughn v. Metcalf, 118 S.W.2d 727, 274 Ky. 379 (1938) (dictum).

49. In re Anderton's Estate, 174 P. 2d 212, 67 Idaho 160 (1946).

See other cases cited infra this section.

50. Holzhauser v. Iowa State Tax Commission, 62 N.W.2d 229, 245 Iowa 525 (1953) (dictum).

Plympton v. Boston Dispensary, 106 Mass. 544 (1871).

Chamberlin v. Gleason, 57 N.E. 487, 163 N.Y. 214 (1900).

Stilwell v. Doughty, 2 Bradf.Sur.(N.Y.) 311 (1853).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Estate of: GERALD IRWIN SR., Deceased. BARBARA A. KELLEY, Appellant, v. BARBARA IRWIN, Respondent.	No. 51576-8-II ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION IN PART AND DENYING APPELLANT'S MOTION FOR RECONSIDERATION

The respondent and appellant have each filed a motion for reconsideration of the published opinion filed on October 22, 2019. After review, it is hereby

ORDERED that appellant's motion for reconsideration is denied. It is further

ORDERED that respondent's motion for reconsideration is granted in part, and we amend the filed opinion as follows:

On page 8, lines 17 through 21, the following text is removed:

> III. ATTORNEY FEES
>
> Both Kelley and Irwin request attorney fees on appeal under RAP 18.1 and RCW 11.96A.150. Both parties ask that we either award them attorney fees for work their attorneys performed below or remand for the trial court to award attorney fees, even though they apparently did not request attorney fees before the trial court.

On page 8, line 17, the following text is inserted:

> III. ATTORNEY FEES
>
> Both Kelley and Irwin request attorney fees on appeal under RAP 18.1 and RCW 11.96A.150. Both parties ask that we either award them attorney fees for work their attorneys performed below or remand for the

trial court to award attorney fees, even though they put nothing in this record to establish that they requested attorney fees before the trial court.

On page 9, lines 1 through 8, the following text is removed:

> While we have discretion under RCW 11.96A.150 to award attorney fees to any party, we decline to grant attorney fees for work done in the trial court to award fees where neither party sought fees below. Nor do we grant attorney fees on appeal.

On page 9, lines 1 through 8, the following text is inserted:

> While we have discretion under RCW 11.96A.150 to award attorney fees to any party, we decline to grant attorney fees for work done in the trial court at this stage, nor do we grant attorney fees on appeal. Instead, we remand to the trial court to decide whether to grant attorney fees for work performed at the trial court.

On page 9, lines 7 through 8, the following text is removed:

> We decline to impose attorney fees.

On page 9, lines 7 through 8, the following text is inserted:

> We decline to impose attorney fees and remand to the trial court.

IT IS SO ORDERED.

Jjs: Glasgow, Melnick, Sutton

Glasgow, J.

We concur:

Melnick, P.J.

Sutton, J.

Filed
Washington State
Court of Appeals
Division Two

October 22, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Estate of:	No. 51576-8-II
GERALD IRWIN SR.,	PUBLISHED OPINION
Deceased.	

GLASGOW, J. — In his will, Gerald Irwin Sr. left Barbara Kelley a life estate in real property that was still encumbered by a mortgage. He left the residue of his estate to his two children, divided evenly between them. The trial court ruled that Kelley was responsible for paying the mortgage during her life estate.

Kelley appeals, arguing that she is not "the devisee" and so is not responsible for the mortgage under RCW 11.12.070, that Irwin Sr. did not intend for her to pay more than the taxes and insurance on the real property, and that under common law principles, life tenants are generally not liable for mortgages on property in which they receive a life estate. Irwin Sr.'s children argue that the invited error doctrine prohibits Kelley from appealing the trial court's order.

We hold that the invited error doctrine does not apply to this case. We also hold that Kelley is responsible for paying the mortgage during her life estate, and we affirm the trial court.

FACTS

Irwin Sr. executed his will on November 16, 2016. He named Kelley as personal representative of his estate. In the will he also granted Kelley a life estate in real property "provided she pays the taxes and insurance on the property." Clerk's Papers (CP) at 3. Irwin Sr. devised the residue of his estate evenly between his two children, Gerald Irwin Jr. and Barbara Irwin. The will was silent on the mortgage that still encumbered the property at the time of Irwin Sr.'s death.

Irwin Sr. died in January 2017. Relevant to this appeal, the Irwins argued that Kelley, as the life tenant, was personally responsible for the mortgage. The trial court agreed with the Irwins in its letter ruling, ordering Kelley to personally make monthly payments on the mortgage during her life tenancy. The parties then jointly presented a stipulated order memorializing the court's letter ruling.

Kelley appeals.

ANALYSIS

I. INVITED ERROR

As an initial matter, Barbara Irwin[1] argues that Kelley invited the error she now complains about because she stipulated to entry of the trial court's order following its letter ruling. Irwin asks us to invoke judicial estoppel and reject Kelley's appeal. We disagree and decline Irwin's request.

The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). But as Kelley points out, she did not stipulate to the merits of the trial court's order, but simply affirmed that the final order accurately reflected and formalized the court's letter ruling. The invited error

[1] Only Barbara Irwin is a party to this appeal.

doctrine does not apply in this case because Kelley did not stipulate to the merits of the court's ruling.

II. IRWIN SR.'S WILL

Kelley argues the trial court erred in ruling that she is responsible for paying the mortgage on the property. Kelley contends that the Irwins, as residuary fee simple devisees, should be liable for the mortgage. We disagree.

A. Standard of Review and Principles of Will Interpretation

We review a trial court's interpretation of a will de novo, with the goal of ascertaining the testator's intent. *In re Estate of Burks*, 124 Wn. App. 327, 331, 100 P.3d 328 (2004); RCW 11.12.230. If possible, this intent must be determined from the four corners of the will. *Id*. "'[T]he intention which controls is that which is positive and direct, not that which is merely negative or inferential.'" *In re Estate of Campbell*, 87 Wn. App. 506, 511, 942 P.2d 1008 (1997) (quoting *In re Douglas' Estate*, 65 Wn.2d 495, 499, 398 P.2d 7 (1965)).

The testator is presumed to have known the law at the time of execution of his will. *In the Matter of Estate of Mell*, 105 Wn.2d 518, 524, 716 P.2d 836 (1986). The testator is also presumed to be familiar with the "'surrounding circumstances'" that could affect the will's construction. *In re Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994) (quoting *In re Estate of Bergau*, 103 Wn.2d 431, 436, 693 P.2d 703 (1985)).

As a general rule, unless the will expressly provides otherwise, "'one who takes a life estate in the property of a decedent elects to take as a whole with the benefits of the income and profits, and under the corresponding burdens of the current expenses such as taxes, repairs, and other upkeep, viewing the estate as a whole.'" *In re Brooks' Estate*, 44 Wn.2d 96, 98, 265 P.2d 833 (1954) (quoting *Richardson v. McCloskey*, 276 S.W. 680, 685 (Tex. Com. App. 1925)); *see also*

Estate of Campbell, 87 Wn. App. at 513 (costs of maintaining a life estate may be charged to remainderman "where a will explicitly so provides."). A devisee who accepts the benefits of a life estate must assume the burden or expense of the repairs, and a life tenant who voluntarily makes permanent improvements, for example, cannot apportion the cost between themselves and the residual devisees. *Id.*

B. Under RCW 11.12.070, Kelley Is Responsible for Paying the Mortgage Payments as the Devisee

In addition to case law establishing that the holder of a life estate is generally responsible for the costs of maintaining the property during the life estate, RCW 11.12.070 provides that "[w]hen any real or personal property subject to a mortgage is specifically devised, the devisee shall take such property so devised subject to such mortgage unless the will provides that such mortgage be otherwise paid." We agree with the trial court that under this statute, Kelley is the devisee, and because Irwin Sr.'s will did not explicitly provide for the payment of the mortgage, Kelley is responsible for paying the mortgage during her life estate.

The term "devisee" is not defined in the statute. *Black's Law Dictionary* 548 (10th ed. 2014) defines "devisee" as "[a] recipient of property by will." *Black*'s defines the separate term "residuary devisee" as "[t]he person named in a will to receive the testator's remaining property after the other devises are distributed." Thus there does not appear to be any limitation on the term "devisee" that would make it inapplicable to life tenants.

Further, RCW 11.12.070 applies to property that is "specifically devised." The will granted Kelley a life estate as a "specific bequest." CP at 3. In contrast, the remaining fee simple interest goes to the Irwins as part of the overall residual estate that is divided evenly between them. This distinction also supports the conclusion that Kelley is the devisee and is responsible for paying the mortgage during her life estate under RCW 11.12.070.

Kelley advances several arguments as to why she, as the life tenant, should not be considered the devisee under RCW 11.12.070. All fail.

Kelley first argues that her life estate cannot exist at all without a remainder—in this case the Irwins' fee simple interest—and so upon Irwin Sr.'s death, the Irwins' interest vested *before* Kelley's. Therefore, she contends, the Irwins should be considered "the devisee" for the purposes of RCW 11.12.070. She also cites to *Shufeldt v. Shufeldt*, 130 Wash. 253, 262, 227 P. 6 (1924), which explained that where there is no contingency as to the person entitled to the remainder, the remainder vests when the will goes into effect.

Kelley focuses on the Irwins' property interest while ignoring her own. As a life tenant, Kelley is the first person entitled to possessory interest in the property even if she does not hold a fee simple interest in the property. Kelley does not provide any convincing authority for her claim that a party receiving a life estate cannot be considered a devisee simply because she is not a fee simple owner of the property. There is nothing in the language of RCW 11.12.070 or in the dictionary definition of "devisee" that suggests such a limitation. A "recipient" of property would include a person, such as a life tenant, who receives only a possessory interest in the property. BLACK'S LAW DICTIONARY 1461 (10th ed. 2014).

Kelley also argues that requiring her to pay the mortgage on her own testamentary gift, the life estate, is a "strained consequence" that should be avoided in interpreting RCW 11.12.070. Br. of Appellant at 14-15; *Wright v. Engum*, 124 Wn.2d 343, 351, 878 P.2d 1198 (1994). But a devisee is entitled to avoid a burden, including a payment obligation, by rejecting the bequest. *Higgenbotham v. Topel*, 9 Wn. App. 254, 256-57, 511 P.2d 1365 (1973). In addition, one could just as easily argue that it would be a "strained consequence" for the residual devisees to have to pay the mortgage on their own testamentary gift where they do not yet have possessory interest in

the property, particularly in light of the principles articulated in *Brooks' Estate* and *Estate of Campbell*. A life tenant accepts all of the benefits and burdens of the property and those with a remaining interest cannot be made responsible for the costs of maintaining life estate property absent an explicit provision in the will. *Brooks' Estate*, 44 Wn.2d at 98; *Estate of Campbell*, 87 Wn. App. at 513-14. The Irwins will be burdened with mortgage and maintenance costs upon termination of the life estate when they take possession of the property.

Finally, Kelley argues that RCW 11.12.070 is a derogation of this common law and should be strictly construed, citing *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980) and RCW 4.04.010. Kelley would strictly construe "devisee" to exclude life tenants. *Brooks' Estate* says the opposite, however, holding that a life tenant takes the life estate along with all the benefits and burdens of the property, viewing the estate as a whole, unless otherwise provided in the will. 44 Wn.2d at 98. *Brooks' Estate* was decided the year before RCW 11.12.070 was adopted and remains consistent with the plain language of the statute obligating the devisee to assume responsibility for any mortgage absent contrary language in the will. Kelley also relies on *In re Cloninger's Estate*, 8 Wn.2d 348, 112 P.2d 139 (1941), but that court addressed statutory language not at issue here. *Id.* at 349-51; REM. REV. STAT. § 1401 (1860).

Kelley also contends that under the common law, life tenant devisees should "have no obligation to pay the principal debt secured by a mortgage because it would be inequitable to make someone pay for property in which he or she is not accumulating equity." Reply Br. of Appellant at 15. This proposition has held sway in other states, which have adopted the rule that unless the creator of the life estate has otherwise provided, the life tenant must pay interest on the mortgage but is under no obligation to pay off the principal of an encumbrance on the property. 31 C.J.S. ESTATES § 58; *see also* 51 AM. JUR. 2d, Life Tenants and Remaindermen § 294; *Draper v. Sewell*,

263 Ala. 250, 253, 82 So. 2d 303 (1955); *Tyler v. Bier*, 88 Or. 430, 434, 172 P. 112 (1918); *Currier v. Teske*, 93 Neb. 7, 13, 139 N.W. 622 (1913). Under this rule, a life tenant who does pay off the principal generally is entitled to contribution from the residual fee simple owners. 31 C.J.S. ESTATES § 58.

However, Kelley does not direct us toward any source suggesting that Washington courts subscribe to this principle. Rather under Washington law, life tenants accept a life estate with all the corresponding burdens associated with the property, viewing the estate as a whole. *Brooks' Estate*, 44 Wn.2d at 98. And in Washington, the duty of a life tenant not to permit waste includes a duty to pay mortgage debt payments. 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE § 1.27, at 53 (2d ed. 2004); *see also* RCW 64.12.020; *McDowell v. Beckham*, 72 Wash. 224, 232, 130 P. 350 (1913). Thus, Kelley's arguments fail to change our reading of RCW 11.12.070.

For these reasons, we agree with the trial court that Kelley is "the devisee" under RCW 11.12.070, and so takes her life estate subject to the mortgage. If Kelley does not wish to undertake this burden, she can reject the bequest.

C. Washington Courts Will Not Draw Negative Inferences from the Will

Alternatively, Kelley contends that Irwin Sr.'s will provided that his children must pay the mortgage. Kelley relies on language in the will that provided that Kelley receives a life estate "provided she pays the taxes and insurance on the property." CP at 3. Kelley argues that Irwin Sr.'s intent was clear: Kelley must pay taxes and insurance, and nothing else. However, Kelley ignores the principle that Irwin Sr. is presumed to have known the law at the time he executed his will. *Estate of Mell*, 105 Wn.2d at 524.

In *Estate of Campbell*, the court rejected the type of negative inference that Kelley asks us to draw here. 87 Wn. App. at 513-14. In that case, the testator's will gave his wife a life estate that included "undisturbed possession of the house and land . . . *so long as she wishes to live there.*" *Id.* at 508. Campbell's children were entitled to the remainder. *Id.* They argued that the language in the will indicated an intent to terminate the life estate if Campbell's wife vacated the property. *Id.* at 510. But under the law, absent a contrary statement in the will, a holder of a life estate was entitled to sublease and collect rents during the pendency of the life estate even if she did not live on the property. *Id.* at 511. The court declined to infer from the will's language that Campbell's wife's life estate would terminate should she move from the property, explaining that the intention that controls "'is that which is positive and direct, not that which is merely negative or inferential.'" *See id.* at 511-12 (quoting *Douglas' Estate*, 65 Wn.2d at 499). Absent a clear statement to the contrary, existing law controls.

Here, Kelley asks us to infer that Irwin did not intend for her to pay the mortgage because he said that her life estate was conditioned on her paying taxes and insurance on the property. But like in *Estate of Campbell*, Kelley is asking us to draw a negative inference. We follow the reasoning in *Estate of Campbell* and decline to do so.

III. ATTORNEY FEES

Both Kelley and Irwin request attorney fees on appeal under RAP 18.1 and RCW 11.96A.150. Both parties ask that we either award them attorney fees for work their attorneys performed below or remand for the trial court to award attorney fees, even though they apparently did not request attorney fees before the trial court.

While we have discretion under RCW 11.96A.150 to award fees to any party, we decline to grant attorney fees for work done in the trial court or remand for the trial court to award fees where neither party sought fees below. Nor do we grant attorney fees on appeal.

CONCLUSION

Under RCW 11.12.070, Kelley is a specific devisee and is therefore responsible for paying the mortgage during her life estate. Irwin Sr.'s will did not expressly provide otherwise. And Washington common law supports, rather than undermines, this conclusion. We affirm. We decline to impose attorney fees.

Glasgow, J.

We concur:

Melnick, P.J.

Sutton, J.

LIFETIME LEGAL, PLLC

February 20, 2020 - 5:49 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51576-8
Appellate Court Case Title:	In re the Estate of: Gerald R. Irwin
Superior Court Case Number:	17-4-00132-0

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