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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re Estate of

GERALD W. IRWIN

BARBARA A. KELLEY,
Appellant,

v.

BARBARA IRWIN,
Appellee.

AMENDED BRIEF OF APPELLANT

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1. INTRODUCTION

1.1. A life estate holder, i.e., a life tenant, receives the intended testamentary gift of possession of real property. Under the common law, a life tenant is not required to pay the principle debt on real property secured by a mortgage.[1] Doing so would be akin to requiring her to pay for her testamentary gift, i.e., possession of the property, because if the debt secured by the mortgage is not paid—possession is taken by the bank or creditor holding the debt. In fact, at common law, life tenants can sue remaindermen if they do not pay the mortgage. Since *possession* of real property *is the intended testamentary gift* to a life tenant, requiring a life tenant to pay the mortgage on real property does not reflect a testator's intent and is not equitable nor proper under the law.

This appeal arises from a trial court's order requiring a life tenant to pay the mortgage, e.g., pay for possession of real property, contrary to the testator's intent and contrary to the common law. Possession of the real property for which the life tenant was devised as her sole gift. Thus, it

[1] For simplicity, and because courts do the same, undersigned occasionally continues the common parlance of saying "paying the mortgage," throughout this brief. However, to be clear, "This is incorrect; we do not pay on the *mortgage* but on the note or other *obligation* for which the mortgage is security." 18 Wash. Prac., Real Estate § 17.1 (2d ed). "This reminds us of the fundamental proposition that a mortgage exists only as security in land for the performance of some legally enforceable obligation." 18 Wash. Prac., Real Estate § 17.1 (2d ed).

should appear out of the ordinary, at best, for a trial court to order a life tenant to pay for her gift of possession. This is because a life tenancy grants only a right to possession of property and if that possession required payment, one wonders what exactly was the gift that the testator intended.

The testator, in this case, Gerald W. Irwin ("Mr. Irwin"), left to his significant other/domestic partner, Barbara Kelley ("Ms. Kelley") a life tenancy to his real property. While he knew that the real property had a principle debt secured by a mortgage, his stated intent in the Will was that Ms. Kelley be a life tenant provided she pay the taxes and insurance:

> 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.

Nowhere in the Will does Mr. Irwin state, intend, or require, Ms. Kelley to pay the mortgage, maintenance, or anything else regarding the property.

Appellee, Barbara Irwin ("Ms. Irwin"), and Gerald Irwin Jr. ("Mr. Irwin Jr.") were devised the same real property in fee simple as remaindermen. Therefore, Mr. Irwin's Will can be concisely summed up as stating:

> I give to Ms. Irwin and Irwin Jr. my real property in fee simple, reserving a life estate for Ms. Kelley provided she pay the taxes and insurance on the property.

Dispositive to this appeal, Mr. Irwin's stated intent, as provided in the Will, is clear however one reads it; Ms. Kelley is to receive a life tenancy

"provided she pay the taxes and insurance." No more and no less. There is no other stated intent, other than that Ms. Irwin and Mr. Irwin Jr. are devised fee simple as remaindermen. Because Mr. Irwin's stated intent is paramount and controlling, it was improper for the trial court to infer that Ms. Kelley should pay the mortgage or hold that Mr. Irwin did not state his intent clearly. He did.

1.2. After the Will was admitted to probate, Ms. Irwin and Mr. Irwin Jr. requested the trial court require Ms. Kelley pay for her possession of the property, e.g., the mortgage, based on RCW 11.12.070. Ms. Kelley opposed this request.[2] Unfortunately, the trial court erred in agreeing this was proper. That statute, which the trial court relied upon, provides 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. . . .

RCW 11.12.070. However, RCW 11.12.070 does not address with any clarity, whatsoever, who should pay the mortgage as between fee simple devisees and a life tenant.

Ms. Kelley argues on appeal that if this statute applies, and one

[2] Respecting her partner's intent, Ms. Kelley chose not to pursue a committed intimate relationship claim and just chose to probate the Will.

devisee must pay over another, the devisee with the superior interest, i.e., the fee simple devisees, should pay the debt secured by the mortgage. This is the only interpretation that avoids the strained consequence of making a life tenant pay for her testamentary gift, i.e., possession of the property. Moreover, such interpretation properly allows the fee simple devisees to pay the debt on the real estate; after all, a life tenant's interest cannot exist at all without a remainderman, and a fee simple owner's superior interest benefits from any appreciation in value to the property.

1.3. As an alternative argument, Ms. Kelley argues that if Mr. Irwin's stated intent in the Will, or his intent as a matter of law, is somehow not controlling, the common law controls the specific issue presented in this case and, therefore, RCW 11.12.070 does not apply at all. This is because RCW 11.12.070 is a derogation of the common law that must be strictly construed. Since RCW 11.12.070 does not state with any clarity who pays the mortgage as between a fee simple devisee and a life tenant, the Court must properly turn to the common law to resolve the case. In such a situation, the common law directs that Ms. Kelley does not have to pay the principle debt secured by the mortgage from her personal funds.

2. ASSIGNMENTS OF ERROR

2.1. The trial court erred in ordering Ms. Kelley to personally "pay the mortgage" associated with the real property devised by Mr. Irwin to remaindermen in fee simple, and for which Ms. Kelley was granted a life

tenancy.

2.2. The trial court erred in ordering Ms. Kelley to pay for the ongoing maintenance and expenses on the real property devised by Mr. Irwin to remaindermen in fee simple, and for which Ms. Kelley was granted a life tenancy.

2.3. Ms. Kelley specifically challenges the trial court's findings of fact/conclusions of law (1) that the Will is "silent about the maintenance[, expenses,] or mortgage"; (2) that "[Mr.] Irwin could have provided that maintenance of the estate is paid from the probate estate, or by the remaindermen, but he failed to explicitly do so"; (3) that RCW 11.12.070 applies to this case; and (4) that it is equitable or fair for Ms. Kelley to be required to personally pay the mortgage and expenses associated with the real property. (CP at 34-35; RP (February 9, 2018) at 31-33).

3. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

3.1. Whether Mr. Irwin's intent, as stated in his Will, was for Ms. Kelley to personally pay for anything other than the taxes and insurance on the real property devised to remaindermen in fee simple, and for which Ms. Kelley was granted a life tenancy? (Assignment of Errors 2.1-2.3).

3.2. Arguendo, assuming RCW 11.12.070 applies to this case, whether the trial court erred in ordering Ms. Kelley, as a devisee of a life tenancy to certain real estate, to pay the mortgage over remaindermen who were devised the same real estate in fee simple? (Assignment of Errors 2.1-2.3).

3.3. Whether RCW 11.12.070, as a derogation of the common law, applies and states with such clarity—as to modify the common law—that a life tenant devisee shall pay a mortgage over remaindermen devisees of the same real property? (Assignment of Errors 2.1-2.3).

4. STATEMENT OF THE CASE

4.1. Mr. Irwin passed away owning real property subject to a mortgage. In his Will, he named Ms. 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 Ms. 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 residue of Mr. Irwin's estate, per the Will, was devised fifty percent to Mr. Irwin Jr. and fifty percent to Ms. Irwin. (CP at 3).

4.4. Ms. Kelley was appointed personal representative by the trial court. (CP at 33). Subsequently, Ms. Irwin filed a petition to remove Ms. Kelley as personal representative. (CP at 6-7). Relevant to this appeal, Ms. Irwin claimed that, under RCW 11.12.070, Ms. Kelley was personally required to pay the monthly mortgage payment on the real property. (CP at 10).

4.5. Ms. 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). Ms. 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 [Ms.] Kelley pay the mortgage for only the portion of time which she enjoys the benefits of the life tenancy." (CP at 35). The superior court judge on revision ruled RCW 11.12.070 applied, that Ms. Kelley was "getting a great deal," and that she agreed with the commissioner's reasoning as stated in the commissioner's letter ruling. (RP (February 9, 2018) at 33; CP at 46-51, 56-57).

5. STANDARDS OF REVIEW

The primary duty of a court called upon to interpret a will is to determine the testator's intent at the time he or she executed the will. RCW 11.12.230; McDonald v. Moore, 57 Wn. App. 778, 780, 790 P.2d 213, 215 (1990). Where an "issue is based on the meaning of a statute, it is a question of law and reviewed de novo." State v. Haq, 166 Wn. App. 221, 272, 268 P.3d 997, 1022 (2012).

6. ARGUMENT

6.1. Mr. Irwin's Stated Intent in the Will is Clear that Ms. Kelley is to Receive a Life Tenancy Provided She Pay the Taxes and Insurance. No More and No Less.

"The purpose and duty of the court in construing a will is to give effect to the testator's intent." In re Estate of Campbell, 87 Wn. App. 506,

510, 942 P.2d 1008, 1011, 1997; In re Estate of Robinson, 46 Wn.2d 298, 300, 280 P.2d 676, 677 (1955) (holding "If it is possible to do so, the intent of a testator must be determined without going outside the four corners of the will."). "The 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. at 511. In other words, unless a contrary intent is indicated in the Will, courts hold that the testator meant exactly what he stated in the Will. See id.

In Estate of Campbell, the testator left a Will that gave a surviving spouse a life tenancy in real property, with the option to be bought out by the testator's children. Id. at 508. The children argued that the Will provided that if the surviving spouse moved off the property, then her life tenancy would terminate. Id. at 509. The trial court disagreed and ruled in favor of the surviving spouse. Id. at 508. On appeal, the trial court was affirmed. Id. at 511. The Court of Appeals reasoned that the Will granted a life tenancy as well as a buyout option "in clear and decisive terms." Id. It further reasoned that the children's argument failed because there was not any language in the Will providing that the life tenancy would terminate if surviving spouse moved. Id. at 511-12.

Here, Mr. Irwin's intent is not silent; it is clear. Mr. Irwin granted Ms. Kelley a life tenancy with the only requirements that she personally pay

the taxes and insurance on the property. (CP at 3). No other requirement or intent is expressed, aside from Ms. Irwin and Mr. Irwin Jr. owning the property in fee simple as remaindermen. (CP at 3). Thus, just like in Estate of Campbell, Mr. Irwin's "positive and direct" intention controls the devise, and per the plain language of the Will Ms. Kelley is not responsible for the mortgage. See In re Estate of Campbell, 87 Wn. App. at 511.

To add the requirement that Ms. Kelley pay the mortgage for the remaindermen would require the Court to improperly infer that Mr. Irwin intended she do so—when he stated and intended no such thing per the Will. See id. at 510-11; see also In re Estate of Mell, 105 Wn.2d 518, 525, 716 P.2d 836, 840 (1986) (holding if the testamentary intention can be ascertained from the language of the will, extrinsic evidence concerning the same should not be received); Marriage of Schweitzer, 81 Wn. App. 589, 595, 915 P.2d 575, 579 (1996) (holding "no authority permits the use of extrinsic evidence to delete or contradict written terms that are inconsistent with the extrinsic evidence. Extrinsic evidence 'illuminates what was written, not what was intended to be written.'"); State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196, 199, 2005) (stating "a reviewing court is to rely solely on [plain] language" and "the [drafter] means precisely what [they] say[]" and "Courts may not rewrite or add . . . language").

The commissioner at the trial court reasoned that Estate of

Campbell, and In re Brooks' Estate, supported her ruling because "The Campbell court explained the maintenance of a property subject to a life estate could be placed on remaindermen, but only by express provision." (CP at 34). The error in this reasoning is first that—in the commissioner's opinion—Mr. Irwin did not expressly state what Ms. Kelley was to pay. But he did; the taxes and insurance were to be paid by Ms. Kelley. An inference that Ms. Kelley should pay anything else is what is improper because it would add language and intent to the Will that is not written. See In re Estate of Campbell, 87 Wn. App. at 510-11. It would also contradict Mr. Irwin's written words. Second, the commissioner made the same error regarding the mortgage, stating "the will does not explain who should pay the mortgage." (CP at 35). However, the Will stated exactly what Ms. Kelley was to pay, and the mortgage was not included. Thus, the commissioner's inference that Ms. Kelley should pay the mortgage was improper because Mr. Irwin clearly expressed what Ms. Kelly was to pay to receive her life tenancy. See In re Estate of Campbell, 87 Wn. App. at 510-11. Mr. Irwin's written positive and direct intent was that Ms. Kelley pay the taxes and insurance. Nothing else.

Accordingly, Mr. Irwin's stated intent is dispositive; Ms. Kelley is to receive a life tenancy and she is required to pay the taxes and insurance on the property. No more and no less. The trial court's ruling should be

reversed.

6.2. Under RCW 11.12.070, As Between Fee Simple Devisees and a Life Tenant, the Only Interpretation that Does Not Lead to the Strained Consequence of a Life Tenant Paying for Possession of Real Property—which is Her Testamentary Gift—is that the Fee Simple Devisees Pay the Mortgage.

A fee simple estate is the highest estate known to the law, being an absolute one. Bartlett v. Bartlett, 183 Wash. 278, 282, 48 P.2d 560, 562 (1935). "The fee never stands in abeyance; it must always rest in someone." 31 C.J.S Estates § 11 (citing e.g., McTamney v. McTamney, 138 N.J. Eq. 28, 31, 46 A.2d 444, 446 (1946)). "A 'life estate' is an estate whose duration is limited to the life of the party holding it, or some other person." 31 C.J.S. Estates § 35. "There can be no life estate in property without a remainder." 31 C.J.S. Estates § 35 (citing e.g., Benson v. Greenville Nat'l Exchange Bank, 253 S.W.2d 918, 922 (1952)).

"A remainder is a fee simple interest lacking only present possession." Dean v. Director of Fin., 96 Md. App. 80, 88, 623 A.2d 707, 708 (1993) (citing T. Bergin & P. Haskell, *Preface to Estates in Land and Future Interests*, 25 (2d ed. 1984)). "If, when the will goes into effect, there is no contingency . . . as to the person entitled to the remainder . . . then the remainder is vested." Shufeldt v. Shufeldt, 130 Wash. 253, 262, 227 P. 6, 9 (1924).

A "devisee" is broadly defined as "[a] recipient of property by will."

Black's Law Dictionary, 484 (8th ed. 2004). The Revised Code of Washington Section 11.12.070 provides in pertinent part the following:

> 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. . . .

Courts avoid strained consequences and absurd results when interpreting statutes. Wright v. Engum, 124 Wash.2d 343, 351-52, 878 P.2d 1198 (1994).

Here, the issue is which "devisee" of Mr. Irwin's Will should pay the mortgage, the devisee with ownership in fee simple or the life tenant. To the extent that Mr. Irwin's Will is, arguendo, ambiguous as to who should pay the mortgage, when his Will is read in conjunction with applicable law, his intent can be determined as a matter of law.

Neither Ms. Kelley, nor the remainder fee simple devisees, i.e., Ms. Irwin and Mr. Irwin Jr., had any interest in the property except what was bequeathed to them by Mr. Irwin.[3] All parties obtained their rights to Mr. Irwin's real property as "devisees." See Black's Law Dictionary, 484 (8th ed. 2004); Moore, 57 Wn. App. at 781. Such rights vested when Mr. Irwin passed. See Shufeldt, 130 Wash. at 262. But, importantly, Ms. Kelley's

[3] Again, Ms. Kelley chose to respect her partner's intent and did not pursue a committed intimate relationship claim.

interest is dependent on the fee simple interest because her life estate cannot exist at all without fee simple vesting *first* in Ms. Irwin and Mr. Irwin Jr. See e.g., Benson, 253 S.W.2d at 922.

Thus, under RCW 11.12.070, Mr. Irwin's Will is properly read as immediately vesting a remainder fee simple interest in the real property to Ms. Irwin and Mr. Irwin Jr. See e.g., McTamney, 138 N.J. Eq. at 31 (holding "The fee never stands in abeyance; it must always rest in someone."); Dean, 96 Md. App. at 88. That shared fee simple interest is then subject to a possessory interest, i.e., a life tenancy, for the life of Ms. Kelley.

As between the life tenant and remainder fee simple devisees, the latter should be required to pay the mortgage, under RCW 11.12.070. First, it would be a strained consequence to require the life tenant to pay for her testamentary gift of possession. By definition, a life tenancy is a gift of possession. Since possession will be taken away if the mortgage is not paid, requiring the life tenant to pay the mortgage is akin to nullifying the testator's intent and his entire testamentary gift. Nullifying an entire devise is not the way RCW 11.12.070 is meant to operate nor should it be read that way. Instead, the statute is meant to be a default provision read into a Will, allocating the payment of debt secured by a mortgage, when the intent of the testator cannot be determined. See RCW 11.12.070. Clearly, the intent of a testator, unless expressly stated otherwise in the Will, is for a life tenant

to not pay for her possession of the real property; possession is the only gift intended, unlike a fee simple devise. Second, requiring a life tenant to pay the mortgage is an absurd result because such *life tenancy cannot exist at all without first recognizing that the superior fee simple interest is vested in the remaindermen*. See e.g., McTamney, 138 N.J. Eq. at 31 (holding "The fee never stands in abeyance; it must always rest in someone."); Dean, 96 Md. App. at 88.

An example illustrates the point that interpreting the statute any other way would lead to strained consequences: Had Mr. Irwin's Will stated, "I give to Ms. Irwin and Mr. Irwin Jr. my real property in fee simple, reserving a life estate for Ms. Kelley"—the Will would have more plainly stated who was devised the property in fee simple. Those parties who have superior title, i.e., fee simple, and who benefit from the appreciation in the value of property should pay the mortgage under RCW 11.12.070. It is a strained consequence for a life tenant to pay the mortgage over a fee simple owner. Ms. Kelley should not have to pay for her testamentary gift of possession. The fact that Mr. Irwin's Will states Ms. Kelley's interest first, and then later states Ms. Irwin's and Mr. Irwin Jr.'s interests second, does not change the reality that the latter parties own the property in fee simple and only lack a present possessory interest. See Dean, 96 Md. App. at 88. The superior interest should pay the mortgage.

Stated another way, the order in which devisees are listed in the Will, and the order in which their interests are granted, does not matter; what matters is the effect of the devise given, and in what situations the statute is meant to become the default intent of the testator. In this case, Ms. Irwin and Mr. Irwin Jr. were devised superior title, i.e., fee simple, to the real property. The fee simple interest is superior because the life tenancy cannot exist at all without the fee simple interest, and because the remaindermen have more of the proverbial sticks in the bundle, such as they benefit from all gains in the value of the property. They can also sell the property. As between fee simple owners and a life tenant, as a matter of law and consistent with RCW 11.12.070, it must be that the testator intended that the fee simple owners pay any mortgage, and that life tenant does not. It makes no sense for a testator to give the gift of possession but then require the life tenant, with a lesser interest in the property, pay for that possession.

In summation, Mr. Irwin's intent was to give Ms. Kelley the testamentary gift of possession of the property; he gave her a life tenancy via his Will. The statute at issue, RCW 11.12.070, is meant to aid in determining the testator's (default) intent as to who should pay the mortgage on such property. It is not meant to completely nullify the testator's intent and devise. That would be an absurd result. Moreover, it matters that the lesser interest of a life tenancy is legally dependent on the remaindermen's

fee simple devise; the former cannot even exist without the latter. Thus, in the situation presented in this case, (1) to avoid the strained consequences of Ms. Kelley paying for her testamentary gift—contrary to the testator's known intent of giving the right possession to a life tenant—and (2) to avoid the strained consequence of making the party with the lesser, dependent, interest in the property—pay for the property[4]—the fee simple owners should pay the mortgage under RCW 11.12.070.

6.3. RCW 11.12.070 is a Derogation of the Common Law. It is Strictly Construed and Does Not Address with Clarity the Issue Presented in this Case. Thus, the Common Law Controls and Ms. Kelley Does Not Pay the Principle Debt on the Mortgage.

Washington state applies the common the law when statutory law is inapplicable:

> 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**.

RCW 4.04.010 (emphasis added); Cooper v. Runnels, 48 Wn.2d 108, 112, 291 P.2d 657, 659 (1955). 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,

[4] Again, it is noteworthy that the intent stated in the Will is contrary to requiring Ms. Kelley pay for the debt secured by the mortgage. See Section 6.1. Additionally, the gift of a life tenancy to Ms. Kelley is effectively nullified if she has to pay for her possession of the property, i.e., the mortgage. See Section 6.1.

269, 621 P.2d 1285, 1288 (1980).

At common law, the residue of an estate paid the mortgage on devised real property:

> At common law, in the absence of a contrary intent appearing in the will, a testator was presumed to have intended that a mortgage given to secure an obligation for which he was personally liable, should be satisfied out of his personal estate just the same as any unsecured obligation. The basis for the rule is that the personal assets of the estate are primarily liable for the payment of the debts of the decedent. The rule and its limitation was first laid down in this country by Chancellor Kent, after an exhaustive review of the English cases, in *Cumberland v. Codrington*, 3 Johns. Ch. (N.Y.) 229. The rule has been generally accepted and applied by the courts of this country.

In re Estate of Cloninger, 8 Wn.2d 348, 349, 112 P.2d 139, 140 (1941); see also 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).

In Washington, RCW 11.12.070 provides that devisees should pay the mortgage, but the statute is silent on who should pay it when there is more than one devisee:

> 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. . . .

Without question, RCW 11.12.070 modifies the common law. See In re

Estate of Cloninger, 8 Wn.2d at 350. Therefore, it is strictly construed because it is a derogation. See id. at 352 (holding similar former statute, i.e., Rem. Rev. Stat., § 1401, did not apply to case because of two words, "previously executed").

In Estate of Cloninger the common law was applied—to nearly the same statute, modifying the common law—because it was not clear that the statute was applicable to the facts at hand. Id. This was despite a Missouri court ruling the opposite when faced with an identical statute and similar fact pattern. Id. at 350. Thus, Washington state applies a stringent standard, even greater than other state courts, when statutes are a derogation of the common law; in Washington state any deviation from the common law must clearly resolve the issue at hand, or the statute modifying the common law does not govern the case; the common law does. See id.

Here, the specific issue to decide is which "devisee" of Mr. Irwin's Will should pay the mortgage, the devisee with ownership in fee simple or the life tenant. See RCW 11.12.070; see also (CP at 35) (commissioner stating, "All of the parties here take the real property subject to the mortgage under RCW 11.12.070."). Unfortunately, RCW 11.12.070 does not shed light on, nor answer, this specific question.

Rather, the statute applies to common devises such as, "A owning Blackacre in fee simple absolute conveys to B all of his interest." This is

because following RCW 11.12.070's plain language, "it appears with clarity" that if Blackacre is subject to a mortgage, then B—as owner in fee simple absolute—takes the property devise subject to the debt. See McNeal, 95 Wn.2d at 269; In re Estate of Robinson, 46 Wn.2d at 301. However, in the case at hand, the language of RCW 11.12.070 provides no such "clarity" on the issue of whether a fee simple devisee or a life tenant is responsible for the mortgage—when both are devised interests in the property.

Consequently, the common law governs this case as "it does not appear with clarity" that RCW 11.12.070 provides an answer to the issue presented in this situation. See McNeal, 95 Wn.2d at 269; In re Estate of Cloninger, 8 Wn.2d at 349. Ms. Kelley is, therefore, not responsible for the debt on the property secured by the mortgage.

Finally, and respectfully, the trial court commissioner's reasoning in equity, otherwise, that, "It is fair that Kelley pay the mortgage for only the portion of time in which she enjoys the benefits of the life tenancy," is unpersuasive.

First, it is not fair that a life tenant be required to pay for her testamentary gift of possession; such would be akin to giving someone free possession/rent, but then stating that person just has to pay for possession by making the mortgage payment. That's not much of a gift, and certainly not what Mr. Irwin intended or believed was "fair" for his domestic partner

based on the language of the Will.

Second, the reasoning comes from the commissioner's own equitable determination, not from interpreting the language of the statute. The reasoning improperly ignores the common law entirely (see e.g., RCW 4.04.010), when it is clear RCW 11.12.070 provides no direct answer to the issue in this case. Stated another way, if "equity" was the determining factor in this case, surely more than 200 hundred years of settled common law requiring the fee simple devisee to pay the principal debt secured by the mortgage, and the life tenant paying expenses such as the interest on the mortgage—is the equitable result.[5] See RCW 4.04.010; In re Estate of Cloninger, 8 Wn.2d at 350; Cooper, 48 Wn.2d at 112; McNeal, 95 Wn.2d at 269. After all, the fee simple holder benefits from the increase in the value of the property over time and making a life tenant pay for possession of the property utterly negates the testamentary gift from the testator that was her devise.

For these reasons, interpreting RCW 11.12.070 as the derogation that it is, and strictly construing it so that the common law applies, would be a just and proper result if the Court did not agree with Ms. Kelley's arguments in Section 6.1 and Section 6.2.

[5] Assuming the Testator's stated intent did not control. See Section 6.1.

7. ATTORNEY FEES AND COSTS ON APPEAL

Pursuant to RAP 18.1, Ms. Kelley requests to be awarded attorney fees and expenses on appeal. The Revised Code of Washington Section 11.96A.150 permits any court on an appeal, in its discretion, to order costs, including reasonable attorney's fees, to be awarded to any party from any party to the proceedings. (stating "This section applies to all proceedings governed by this title").

A personal representative can be removed under RCW 11.28.250. Successfully defending a petition for removal of a personal representative, or successfully demonstrating that a personal representative has not violated her duties under RCW 11.28.250, justifies an award of attorney fees. Estate of Kerr, 134 Wn.2d 328, 343, 949 P.2d 810, 817 (1998); In re Estate of Lowe, 191 Wn. App. 216, 240, 361 P.3d 789, 800 (2015); see also RCW 11.68.070 (stating if personal representative's powers are restricted then in "all such cases . . . reasonable attorney's fees may be awarded as the court determines.").

Here, Ms. Kelley should be awarded attorney fees and costs in this appeal. The fees and costs should come from Appellee, Ms. Irwin, as well as Mr. Irwin Jr., personally. Ms. Irwin should pay personally because she opposed the appeal. Both remaindermen should personally pay because both filed declarations requesting the trial court remove Ms. Kelley as

personal representative and to force her to personally make the payments on the debt secured by the mortgage. Moreover, by the time this appeal is decided, less than $55,000.00 will remain of the estate. (See CP at 15). By the remaindermen of the estate paying attorney fees and costs personally, the estate will have enough money to then reimburse Ms. Kelley for the mortgage payments she made during the course of this appeal; otherwise, it is questionable whether the estate will remain solvent.

8. CONCLUSION

In no scenario is it proper for Ms. Kelley to pay the debt secured by the mortgage. First, it is clear that Mr. Irwin's intent was for Ms. Kelley to be granted a life tenancy on the sole condition she pay the taxes and insurance. That was his testamentary gift to his significant other/domestic partner. No more and no less. Interpreting the Will any other way is improper because to do so would require the Court to infer Ms. Kelley must also pay the debt secured by the mortgage—when Mr. Irwin's Will states no such thing. Second, if RCW 11.12.070 does apply to this situation, the only result that is not a strained consequence is that the fee simple owners of the property pay the debt secured by the mortgage. A life tenant should not pay for her possession; her possession was a testamentary gift, and to make her pay for it nullifies that gift and intent of the testator. Moreover, the life tenancy is dependent on the fee simple interest and the superior

interest should pay for the property. Finally, the common law applies to this situation because RCW 11.12.070 does not state with clarity who pays the mortgage as between a fee simple devisee and a life tenant. Under the common law, it is clear Ms. Kelley does not pay the principle debt secured by the mortgage.

Respectfully submitted this 28th day of June, 2018,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on June 28, 2018, I caused to be served:

1. Amended Brief of Appellant

On:

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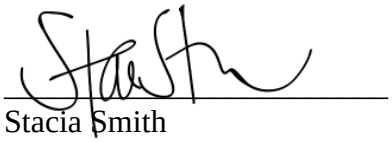
Dated June 28, 2018, at Olympia, Washington.



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