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Appeal No. 51576-8-11
Superior Court No. 17-4-00132-34-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

In re Estate of

GERALD IRWIN

BARBARA KELLY,
Appellant,

v.

BARBARA IRWIN,
Respondent.

RESPONDENT'S RESPONSE BRIEF

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COMES NOW the Respondents, BARBARA IRWIN and GERALD IRWIN JR., (collectively "Irwin") by and through their attorney Mindie Flemins of Burns Law, PLLC, and submit their Response Brief to the Court of Appeals as follows:

I. FACTUAL HISTORY

Gerald Irwin Sr. passed away on January 27, 2017. He requested that Barbara Kelley be appointed as the Personal Representative. On February 24, 2017, Barbara A. Kelley, was appointed the Personal Representative of the Estate of Gerald W. Irwin Sr., to administer his estate pursuant to the Last Will and Testament dated November 16, 2016.

Pursuant to the will, Ms. Kelley was granted a life estate in the property located at 5109 58th Avenue, Olympia, WA. Under the provision of the will, she is to pay the taxes and insurance on the property. A mortgage on the property existed/s at the time Mr. Irwin's death. There is no mention in the will with respect to the payment of the mortgage. Gerry Irwin Jr. and Barbara Irwin (the decedent's children) are named as the only heirs to take all else in equal shares. Without an explicit provision in the will regarding the payment of the mortgage, Ms. Kelley believes that the estate should pay the balance of the mortgage. The heirs, however, believe that Ms. Kelley should pay the monthly payments during her tenure on the property pursuant to RCW 11.12.070 (supra).

Ms. Kelley has been ordered by the court to provide an accounting of the estate. To date she has refused. All funds and personal property should be accounted for in their entirety. And, Ms. Kelley should be using her personal funds to pay her monthly living expenses, which include the monthly mortgage payments, so long as she lives in the residence.

II. PROCEDURAL HISTORY

Around September of 2017, Ms. Kelley informed her attorney that she was ready to close out the estate. CP at 24. No accounting was provided, and no letters to creditors went out. The remaindermen asked for a full accounting of the assets and bank statements. Ms. Kelley refused. Then she demanded that the remaindermen make arrangements to take over the mortgage, and the children petitioned to have Ms. Kelley removed as Personal Representative and ordered to pay the mortgage. CP at 6-14. The motions were heard on October 13, 2017. Commissioner Zinn ordered Ms. Kelley to produce a full accounting, but reserved ruling until she complete further research on the mortgage and maintenance issue. RP at 16-17, 23-3 (October 13, 2017). Commissioner Zinn issued her Letter Opinion on October 16, 2017, whereby she ordered Ms. Kelley to pay the mortgage and maintenance costs during the tenure of the life estate. She directed that an order be drafted pursuant to her direction. An order was proposed and noted for presentment. Ms. Kelley (through counsel) waived the right to oppose

the motion at presentment and instead **stipulated** to the order. CP 41-45. In it, Ms. Kelley was ordered to pay the mortgage, the maintenance, the utilities, to reimburse the estate for all of the money that she taken and comingled, and to produce and accounting with source documents. The order was entered on November 8, 2017. Ms. Kelley then moved for revision of the **stipulated** order. CP at 46. Such motion was heard on February 5, 2018, and denied. CP at 56-57.

III. ARGUMENT

A. Ms. Kelley Invited any Error at the Superior Court Level and Is Estopped From Bringing the Error Before the Court of Appeals

Ms. Kelley stipulated to the Superior Court Order filed November 8, 2017.

> The invited error doctrine would provide another basis for affirming the superior court notwithstanding its acceptance of Mr. Dalluge's stipulation, even if it were error. The doctrine is applicable when a party " 'takes affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal.' " *Hymas v. UAP Distrib., Inc.,* 167 Wn.App. 136, 148,272 P.3d 889 (2012) (quoting *Lavigne v. Chase, Haskell, Hayes & Kalamon, PS,* 112 Wn.App. 677, 681, 50 P.3d 306 (2002)).

State v. Dalluge, 188 Wn. App. 1054 (2015)

> The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Pam,* 101 Wash.2d 507, 511, 680 P.2d 762 (1984). *See also State v. Boyer,* 91 Wash.2d 342, 345, 588 P.2d 1151 (1979) (a defendant cannot propose a jury instruction and then challenge it on appeal).

State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183, 188 (1996)

> Under the invited error doctrine, a party cannot set up an error at trial and then complain of the same error on appeal. *State v. Ellison,* 172 Wn.App. 710, 715, 291 P.3d 921 (2013) (quoting *State v. Pam,* 101 Wn.2d 507, 511, 680 P.2d 762 (1984)), *review denied,* 180 Wn.2d 1014, 327 P.3d 55 (2014).

State v. Amezola, 184 Wn. App. 1020 (2014) UNPUBLISHED GR 14.1

Ms. Kelley is appealing her own order. She has set up her own error.

She must be judicially estopped from deviating from her Stipulated Order.

> Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. [3] Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The purpose of the rule is to protect the integrity of the judicial process. New Hampshire v. Maine, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). In determining whether the doctrine applies, we look at three primary considerations: (1) whether a party's later position is clearly inconsistent with its earlier position, (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled, and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Arkison, 160 Wn.2d at 538-39. These factors are not an exhaustive formula and additional considerations may guide a court's decision. *Id.* at 539. These include:
>
> > (1)The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change.

Markley v. Markley, 31 Wn.2d 605, 614-15, 198 P.2d 486 (1948); *see also* Arkison, 160 Wn.2d at 539. (We review a trial court's decision to apply the equitable doctrine of judicial estoppel for abuse of discretion. Arkison, 160 Wn.2d at 538.)

Ms. Kelley clearly advised her attorney that she would stipulate to an order in accordance with Commissioner Zinn's Letter Opinion. Irwin noted a motion to have oral argument when presenting the order. Ms. Kelley's counsel advised to cancel the hearing as it was unnecessary. The contested order was changed to a stipulated order and all parties (through counsel) signed. Subsequently, Ms. Kelley requested that Judge Mary Sue Wilson revise the stipulated order, but only to the extent that it ordered payment of the mortgage and maintenance. Judge Mary Sue Wilson correctly denied her motion to revise the stipulated order. When asked if she was challenging the additional terms added outside the mortgage or the maintenance, her counsel said no. She has clearly changed her position to one inconsistent with her stipulation. Ms. Kelley must be estopped from now further changing her position to appeal the entire order signed by her counsel at her direction.

B. Ms. Kelley is Attempting to Attribute Intent to the Deceased When No Such Intent is Written Within the Four Corners of the Will and RCW 11.12.070 Controls

1. The Will is Silent on Issues of Mortgage Payments, and Maintenance.

> All courts and others concerned in the execution of last wills shall have due regard to the direction of the will,

> and the true intent and meaning of the testator, in all matters brought before them.

RCW 11.12.230 Intent of testator controlling.

Ms. Kelley argues that Commissioner Zinn and ignored the explicit intent of the Testator. CP 54. Ms. Kelley can only assume the intent of the Testator. As Commissioner Zinn noted, the will "is **silent** about the maintenance or the mortgage." CP 33, 34 (bold added). The Testator did not tell us his intent for the mortgage or the maintenance of the property burdened with the life estate. When a will does not **explicitly** tell us the intent of the Testator, it is not subject to our guesswork.

> Words used in a will are to be understood in their ordinary sense if there is nothing to indicate a contrary intent...The testator's intention is to be determined as of the date of execution of the will. In re Estate of Hamilton, 73 Wash.2d 865, 441 P.2d 768 (1968).

In re Patton's Estate, 6 Wash. App. 464, 468, 494 P.2d 238, 240 (1972)

> The testator is presumed to have known the law at the time of execution of his will. *In re Estate of Patton,* 6 Wash.App. 464, 471, 494 P.2d 238 (1972). The intent must, if possible, be derived from the four corners of the will and the will must be considered in its entirety. *In re Estate of Bergau,* 103 Wash.2d at 435, 693 P.2d 703; *In re Estate of Douglas,* 65 Wash.2d 495, 499, 398 P.2d 7 (1965).

Matter of Estate of Mell, 105 Wash. 2d 518, 524, 716 P.2d 836, 839 (1986)

> If possible to do so, testator's intent must be determined without going outside four corners of will. RCW 11.12.230.

In re Robinson's Estate, 46 Wash. 2d 298, 280 P.2d 676 (1955) ("When he made the bequest to Helen Marie Baker, he knew that she would be required to pay the Fry contract before she could deliver the deed to Krembs…")

The will is not ambiguous as to the issue of mortgage or maintenance, it is merely silent. Mr. Irwin Sr. is presumed to have known the law at the time was his Last Will and Testament was drafted. We can further ascertain this information from the fact that Mr. Irwin Sr. had his attorney draft his will just about month before he passed. He is presumed to have chosen to stay silent on the issues of mortgage payments and maintenance, and presumed to have chosen to allow the law to fill in. Id. **(a testator is presumed to have knowledge of his title to real estate.)**(bold added)

Not only has Ms. Kelley made claim to estate resources to pay the mortgage, she is also performing "maintenance" at the remaindermen's expense. Absent an explicit provision in the will, our State Supreme Court has adopted general principals in the law followed by other states:

> The principle is that **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.
>
> Nor can such tenant [who was also executor] make repairs of a permanent character upon the property at the

> expense of the inheritance. He is bound to make repairs at his own expense. The making of permanent improvements is a voluntary act on his part, which gives no claim on the reversion.
>
> **The general rule is clearly established that compensation for improvements made by a life tenant with full knowledge of his title to the property cannot be recovered from the reversioner or remainderman,** either by way of a money judgment or decree or by the assertion of a lien against the property. Various reasons have been announced for the rule, but the ones usually advanced are that the life tenant should not be permitted to consume the interest of the remainderman by making improvements that the remainderman cannot pay for or that he does not desire, and also that improvements are usually made for the immediate benefit of the life estate and without reference to the wishes of the remainderman.

In re Brooks' Estate, 44 Wn.2d 96, 265 P.2d 833 (1954)(bold added). CP 34.[1]

Ms. Kelley has commissioned and paid forover $5,000 in yard work, maintenance, carpet cleaning, window cleaning, etc. out of estate funds. CP 25, 16. The children have not been consulted about any of this money being spent from their inheritance to clean her residence. The expenses that Ms. Kelley authorized without consulting the remaindermen should be paid from her personal funds; as stated in the Stipulated Order. CP 37. The general maintenance that she orders is for her benefit.

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[1] Other states' opinions are further quoted and explored at CP 11.

2. Where the Will is Silent, RCW 11.12.070 controls.

> **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. The term "mortgage" as used in this section shall not include a pledge of personal property.
>
> A charge or encumbrance upon any real or personal estate for the purpose of securing the payment of money, or the performance of any covenant or agreement, shall not be deemed a revocation of any will relating to the same estate, previously executed. The devises and legacies therein contained shall pass and take effect, subject to such charge.

RCW 11.12.070 (bold added).

> Where "a statute is clear on its face, its meaning [should] be derived from the language of the statute alone." *Kilian v. Atkinson,* 147 Wash.2d 16, 20, 50 P.3d 638 (2002) (citing *State v. Keller,* 143 Wash.2d 267, 276, 19 P.3d 1030 (2001)); *see also BedRoc Ltd. v. United States,* 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004). **"Courts should assume the Legislature means exactly what it says" in a statute and apply it as written.** *Keller,* 143 Wash.2d at 276, 19 P.3d 1030; *see also Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992); *State v. Roggenkamp,* 153 Wash.2d 614, 625, 106 P.3d 196 (2005). Statutory construction cannot be used to read additional words into the statute. *State v. Chester,* 133 Wash.2d 15, 21, 940 P.2d 1374 (1997).

Densley v. Dep't of Ret. Sys., 162 Wn.2d 210, 219, 173 P.3d 885, 889 (2007)(bold added).

The will in this case does not provide a method or designate a party to pay the mortgage remaining on the property. As such, the life estate becomes "subject to" such mortgage. The notion of paying off the mortgage

with assets going to heirs other than the life estate holder would be to effectuate a transfer that is not subject to. RCW 11.12.070 is not ambiguous in the least. Appellant does not argue the statute is unconstitutional. Courts do not question the wisdom of constitutional status, "this court 'cannot question the wisdom of [legislative] policy, and ... must enforce the statute as written." *Duke v. Boyd,* 133 Wash.2d 80, 87–88, 942 P.2d 351 (1997).' State v. Nolan, 98 Wn. App. 75, 82, 988 P.2d 473, 477 (1999) aff'd, 141 Wn.2d 620, 8 P.3d 300 (2000). Appellant wants this court to ignore a binding statute under some notion of fairness. In an attempt to avoid the statute, the Appellant makes several misguided arguments.

Ms. Kelley first argued that she was not a devisee, because she only took a life estate. CP 29. Commissioner Zinn rightly found that Ms. Kelley was a devisee by definition. CP 35. A devisee includes anyone who is given property in a will. Id. Commissioner Zinn cited Black's Law in her Opinion. "Kelley is a devisee of a life estate and the children as residuary devisees after the life estate terminates." Id.

Even in the Campbell case cited by Appellant supra, the court is clear in stating that if the will expresses an instruction in writing, the court will follow it. App. Brief at 11. Mr. Irwin could have directed that the remaindermen pay the expenses, but he did not. He could have directed the estate to pay the mortgage, but he did not.

> **[A] will provision requiring that remaindermen shall pay the expenses of the life estate is not materially different from the statutory provision that devisees of mortgaged property take the property subject to the mortgage, unless the will otherwise provided.**

In re Estate of Campbell, 87 Wn. App. 506, 514, 942 P.2d 1008, 1012–13 (1997) (bold added).

The case law supports that any such instruction in a will must be explicit – not implicit. In citing the Campbell case, Appellant agrees that the "intention which controls is that which is positive and direct, not that which is merely negative or **inferential**." Id at 511, App. Brief at 11 (bold added). To **infer** that the omission of such an instruction is a "positive and direct" statement is a direct contradiction by its own terms. Ms. Kelley has been granted a life estate in real property, and in accepting such, she takes the property subject to its burdens and benefits. The Honorable Mary Sue Wilson pointed out that Ms. Kelly wants the court to "focus on the term in the will which is silent to the mortgage, but the statute says unless the will provides**, the mortgage goes with the devisee.**" RP 27-28, 24-2 (February 9, 2018) (bold added).

Appellant also cites Campbell for the proposition that she should not have to pay maintenance expenses because the will is silent on those as well. She argues that she should only have to pay taxes and insurance because those are directly allocated to her in the will. What Appellant neglects to

admit is that the will does not allocate **any** expenses to the remaindermen at all. Commissioner Zinn rightfully cites the Brooks case, infra, for the legal conclusion that Ms. Kelley is responsible for maintenance costs on the property during the term of the life estate. CP 35.

Moreover, Appellant's footnotes and subtle overtures to herself honoring the intent of the deceased should not be considered as testimony relating to her knowledge of what Mr. Irwin Sr. wished to achieve. Any such testimony is unreliable and self-serving and should be disregarded by the court. [2]

The "deadman's statute" (as it is referred to) is intended to prevent fraud. It is presumed that a person who stands to benefit legally and/or financially from their own testimony will give testimony solely in their own best interest and, because the other party to the statement or transaction is deceased, it is nearly impossible to determine the truth of such testimony. The court should look to the language in the will. Where the will is silent; the court should look to the letter of the law.

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[2] ...That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person... then **a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased,...**

RCW 5.60.030 (bold added)

Commissioner Zinn's Letter Opinion was well-reasoned and focused on the law before her. The stipulated order signed by the parties was drafted accordingly. The request for revision was denied by the Honorable Mary Sue Wilson. CP 57. The Appellant continues to make references to both Commissioner Zinn's Opinion and Judge Mary Sue Wilson's denial as "improper" because they did not **infer** Mr. Irwin's intent. App. Brief at 12. Appellant is missing the point of the very cases that she quotes. "[S]tating 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." State v. Roggenkamp 153 Wn.2d 614, 621,106 P.3d 196, 199 (2005), App. Brief at 12. Commissioner Zinn was clear "the statute controls in the absence of specific language in the will." CP 35.

3. Having Two Devisees Does Not Produce a "Strained Consequence."

Appellant argues that there is a hierarchy of devisees. That is not what the statute says. It says a devisee takes subject to encumbrances, RCW 11.12.070. The Appellant argues that because the fee simple is absolute and the life estate is limited in duration, the life estate should not have to take subject to the mortgage. App. Brief at 14. There is absolutely no legal authority to support that baseless argument. In fact, RCW 11.12.070 states the opposite. Nonetheless, Appellant argues that courts avoid strained consequences. As authority she quotes Wright v. Engum involving a driver

striking a blind pedestrian. App. Brief at 15. There is no relevant correlation to the interpretation of which "devisee" should "take subject to."

Similarly, Appellant argued before the Thurston County Superior Court that requiring her to take subject to the mortgage would produce an "illogical result." She told the court, "That's just a foreign concept…**I couldn't find any authority that would support that**… people…who are asked to live in…generally don't have to pay mortgages." RP at 27, 13-20 (February 9, 2018) (bold added).

Appellant argues that "Clearly the intent of a testator… is for a life tenant to <u>not</u> pay for her possession of the real property…" App. Brief at 16-17 (underline original). However, once again, there is no legal authority to support such and assertion. The only clear knowledge that we have regarding the intent of the testator is that he could have provided for the mortgage but he did not. The lower court did not find any constrained consequences in interpreting and applying the statute.

Appellant argues that "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." App. Brief at 16. That is exactly what the lower court did. The court found that RCW 11.12.070 answers the ultimate question in this case. Who should pay the mortgage?

Answer; the devisee. Which devisee? The court rightfully decided that it should be the responsibility of the devisee in current possession.

The opposite would cause a strained consequence. Hypothetically, if the court required the remaindermen to pay the mortgage while not being able to live in, leverage, or live in the property, and they could not, the property could be foreclosed upon by the mortgage holder.[3] Both the life tenant and the remaindermen would lose both testamentary gifts. The testator's intent would be completely nullified. Worse yet, the life tenant may have a cause of action against the children for the loss of the gift. To place that burden on the only devisees that have absolutely no control over the property would produce an absurd result. If the legislature wanted to the common law rule, it would not have passed a statute and simply let what Appellant argues be the law of the State. However, the fact that they passed the statute is indication that the legislature decided it was time to part ways with the common law.

4. Common Law Prevails as the Law of This State Except as Modified by Statute. RCW 11.12.070 Modified the Common Law.

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[3] This assumes that the remaindermen may be denied an additional mortgage on the property due to the fact that they have their own properties leveraged, and it is not their primary residence.

Appellant argues that the common law applies when statutory law is in applicable. App. Brief at 19. She quotes Cooper (supra) for this premise. The Cooper court quoted the former RCW 1.12.030:[4]

> **The common law** of England, including the English statutes in force at the date of the Declaration of Independence, **continues to be the law of this state except as it is** inconsistent with state and Federal constitutions, or incompatible with the institutions and society of this state, or **modified by statute**. RCW 1.12.030; RCW 4.04.010; In re Hudson, 1942, 13 Wash.2d 673, 684, 126 P.2d 765 and cases cited.

Cooper v. Runnels, 48 Wash. 2d 108, 112, 291 P.2d 657, 659 (1955)(bold added).

Respondent does not disagree with such principal. However, the common law related to this case has been modified by statute. It is not the law that all statutes in derogation of the common law should be ignored. Washington has parted ways with the common law in many areas of law as the practical or political or societal motivations change or make derogation more desirable e.g. Growth Management Act, Shoreline Management Act, local zoning laws, emission controls, etc. all deviate from the common law where the owner of property could determine its highest use without interference.

> SGA's argument that ambiguous zoning ordinances must be construed strictly in favor of the landowner is unpersuasive.

---

[4] Now 4.04.010

> First, SGA itself asserts the language in question is not ambiguous. More importantly, the law does not require strict construction in favor of the landowner. So long as the proposed use is within the scope of the ordinance, a zoning ordinance is construed to effectuate its plain purpose and intent.

Dev. Servs. of Am., Inc. v. City of Seattle, 138 Wash. 2d 107, 117, 979 P.2d 387, 392 (1999)

> The *Beeler* court noted that, by dispensing with the knowledge requirement, the statute was in derogation of common law. The court explained that this interpretation was mandated by the express language of the statute. *Beeler,* at 751–52, 750 P.2d 1282 (citing *McNeal v. Allen,* 95 Wash.2d 265, 269, 621 P.2d 1285 (1980)). No such express language exists in RCW 70.84.040.

Wright v. Engum, 124 Wash. 2d 343, 349, 878 P.2d 1198, 1201 (1994)

Appellant argues that where a statute is a derogation of the common law, it must be "strictly construed and no intent to change the law will be found, unless it appears with clarity." App. Brief at 19.

The court in Wichert v. Cardwell (supra) had a quite a lengthy opinion on the issue of derogation and strict construction.

> Unfortunately the purpose and rationale of a rule of construction that a statute in derogation of the common law generally have not been explored in connection with application of the rule in a particular case. The observation has been made that this rule and other maxims of interpretation "are **merely justifications for decisions arrived at on other grounds, which may or may not be revealed in the opinion."** Patterson, *The Interpretation and Construction of Contracts,* 64 Colum.L.Rev. 833, 852 (1964).

When it is urged that a statute should be strictly construed because it is derogation of the common law a number of issues are apparent. One should start with RCW 4.04.010.

The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state. RCW 4.04.010.

The first step is to ascertain what was "the common law" as contemplated by RCW 4.04.010. *See, e.g., Sayward v. Carlson,* 1 Wash. 29, 40, 23 P. 830 (1890); *Cooper v. Runnels,* 48 Wash.2d 108, 291 P.2d 657 (1955).

Once the court determines what it considers to be "the common law," the next question is whether the statute is in "derogation" thereof. Consideration must be given to **RCW 1.12.010. The provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction.**
***

If we assume, and it is only an assumption, that RCW 4.28.080(14) is in derogation of the common law, what does it mean that it is to be strictly construed? We believe the proper use of strict construction is merely to ascertain whether the statute was in fact intended to change the common law. That is an appropriate inquiry in view of RCW 4.04.010.

Imprecise, or at least nonanalytical, use of the maxim has occurred. Is the statute to be examined critically solely to determine whether the Legislature intended and accomplished a change from the common law, or if that intent to change is found, is the statute itself to be strictly construed merely because it represents a change from the common law? *McNeal v. Allen,* 95 Wash.2d 265, 269, 621 P.2d 1285 (1980) appears to hold that both approaches are applied, *i.e.,* there must be a clear intent to change the common law *and* the statute must be strictly construed.

On the other hand, and clashing with *McNeal,* we have said: **"But where, as here, a statute is plain and unambiguous, it must be construed in conformity to its obvious meaning without regard to the previous state of the common law."** *State ex rel. Madden v. PUD 1,* 83 Wash.2d 219, 222, 517 P.2d 585 (1973).

This whole principle of strict construction of statutes in derogation of the common law "has been the object of a great deal of criticism in modern times." 3 J. Sutherland, *Statutory Construction* § 61.04 (4th ed. 1986). Dean Pound has said that it "has no analytical or philosophical justification." 3 R. Pound, *Jurisprudence* 664 (1959).

The Minnesota court has been quite explicit in its treatment of the rule:

At the outset, **we do not consider ourselves at liberty to apply any rule of "strict construction" to this or any other statute, simply because it happens to be in derogation of common law.** Legislatures intend by such statutes to replace or change rules of the common law. Too much judicial indulgence in "strict construction" of statutes has heretofore disguised "extraconstitutional obstacles to, or hindrances of, legislative purpose." *State ex rel. City of St. Paul v. M[inneapolis], St. P. & S. S. M. Ry. Co.,* 190 Minn. 162, 165, 251 N.W. 275, 277 [1933]. However radical the change, **we do not permit ourselves**, because it is an innovation, so **to limit a statute by construction as to defeat or even hinder its purpose. Our effort is rather to give any statute "a fair construction, with the purpose of its enactment in view, not narrowed or restricted because it is a substitute for the discarded common law."** *Wells–Dickey Trust Co. v. C[hicago], B. & Q. R. Co.,* 159 Minn. 417, 422, 199 N.W. 101, 103 [1924]. It is with that rule, rather than any notion either of duty or right to construe strictly, as a guide, that we attempt interpretation of the ... statute.
Teders v. Rothermel, 205 Minn. 470, 472, 286 N.W. 353 (1939).

Wichert v. Cardwell, 117 Wash. 2d 148, 153–56, 812 P.2d 858, 860–62 (1991)

If the Appellant is merely using the derogation argument to muddy the waters instead of read the clear unambiguous language in the statute, the court should steer clear of going down that rabbit hole. Even if the statute applicable in this case was strictly construed, the results would be the same. RCW 11.12.070 is a plain and unambiguous statute. It clearly deviates from common law, and the court should interpret and apply it as directed in a liberal manner in accordance with RCW 1.12.010.

C. The Irwin Remaindermen Are Entitled to Their Attorney Fees and Costs; and Ms. Kelley Should Be Denied Her Request For Same

> Both trial and appellate courts have broad discretion to award attorney fees in litigation involving trusts and estates. RCW 11.96A. 150(1) provides:
>
> Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings.... In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

In re Estate of Lowe, 191 Wash. App. 216, 238–40, 361 P.3d 789, 800–01 (2015)

Pursuant to RAP 8.1, the remaindermen in this case deserve an award of attorney fees. The court should be aware that over a year and a

half after Mr. Irwin Sr. passed, his children still cannot get closure to his estate. CP at 55. Although they have tried, Ms. Kelley has refused to produce an accounting, turn over the ashes of their beloved father, or allow them to take possession of their inheritance. Id. It is not because this is a complex estate. It is merely because Ms. Kelley does not want to cooperate. She stands in the face of the heirs comingling her funds with the estate and mismanaging the estate. These children cannot even bury their father. The question of who should pay the mortgage has been asked and answered, yet Ms. Kelley keeps using estate funds to pay her own private legal expenses. She has done nothing but deplete the estate for her own gain. There is no benefit to the estate to keep this matter before the court. The children deserve to have the estate refunded for all of the money that she has unjustifiably used from their inheritance to finance her own lifestyle and this argument. This action started because Ms. Kelley did (**and still does**) refuse to supply an accounting of their father's accounts.

IV. CONCLUSION

Ms. Kelley should not get a third bite of the apple after having signed a stipulated order. This has been an expensive yearlong battle between Ms. Kelley and the very estate swore to protect. Had the law been followed, this action would not have depleted the inheritance of the Irwin's.

It is time for Ms. Kelley to start paying her own instead of living off of the children's inheritance.

Ms. Kelley needs to be responsible for her own legal fees to fight with the estate; the same estate in which she has a fiduciary duty to serve. Ms. Kelley is wasting estate funds and causing harm. The court should award the children their attorney fees and costs and remand this matter down to the Superior Court with instructions to award all of their fees and costs from the onset of having to sue her for an accounting of their own money. Ms. Kelley is in contempt of the Superior Court Orders and should be held liable at her own expense.

The Court of Appeals should not overrule the Stipulated Order from the Superior Court, but should affirm it. Ms. Kelley took a life estate subject to the mortgage. In any other scenario, all devisees will lose their gifts. Should she choose to walk away and not take, she can do that too, but not at the children's expense.

RESPECTFULLY SUBMITTED this 25th day of July, 2018.

MINDIE FLEMINS, WSBA No. 40010
Attorney for Respondents

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 25th day of July, 2018, I caused a true and correct copy of Respondent's Response Brief, to be served on the following to:

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DATED this 25th day of July, 2018, at Tacoma, Washington.

BURNS LAW, PLLC

By Shelley Foster
Shelley Foster
Paralegal

BURNS LAW, PLLC

July 25, 2018 - 10:21 AM

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