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No. 51576-8-II

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.

REPLY BRIEF OF APPELLANT

By:

Drew Mazzeo
Bauer Pitman Snyder Huff Lifetime Legal, PLLC
1235 4th Ave E #200
Olympia, WA 98506
(360) 754-1976
dpm@lifetime.legal

Attorney for Appellant

TABLE OF CONTENTS

1. INTRODUCTION 1

2. RELEVANT REPLY FACTS 3

3. REPLY ARGUMENT 4

3.1. The Irwins’ Invited Error Argument is Without Merit 4

3.2. The Irwins’ Judicial Estoppel Argument is Without Merit..... 6

3.3. Mr. Irwin’s Will is Not Silent on What was Required of Ms. Kelley to Preserve Her Life Tenancy; She was Explicitly Required to Pay the Taxes and Insurance. 7

3.4. The Irwins Fail to Construe the Will as a Whole..... 10

3.5. If Mr. Irwin’s Intent is Not Clear and RCW 11.12.070 is Applicable, then the Fee Simple devisees Pay the Mortgage. 11

3.6. RCW 11.12.070 is a Derogation of the Common Law But the Purpose, Legislative History, and Derogation Had Nothing To Do with Life Tenancies. 14

3.7. Alternatively, RCW 11.12.070 is Not Applicable to this Case, and the Common Law Rule Regarding Life Tenants Not Paying Principal Debts on Real Property Secured By Mortgages Prevails. 18

4. ATTORNEY FEES..... 25

APPENDIX

Legislative History of RCW 11.12.070.....iii

TABLE OF AUTHORITIES

Cases

Anfinson v. FedEx Ground Package Sys., Inc.,
174 Wn.2d 851, 281 P.3d 289 (2012)..... 7

Benson v. Greenville Nat'l Exchange Bank,
253 S.W.2d 918, 922 (1952)..... 13

Currier v. Teske,
93 Neb. 7, 13, 139 N.W. 622, 624 (1913)..... 15

Draper v. Sewell,
263 Ala. 250, 82 So. 2d 303 (1955) 15

Elec. Contr. Ass'n v. Riveland,
138 Wn.2d 9, 978 P.2d 481 (1999)..... 11

Estate of Bunch v. McGraw Residential Ctr.,
174 Wn.2d 425, 275 P.3d 1119 (2012)..... 19, 22

Food Servs. of Am. v. Royal Heights,
69 Wn. App. 784, 850 P.2d 585 (1993) 20

Holmes v. Holmes,
65 Wn.2d 230, 396 P.2d 633 (1964)..... 7, 8, 9

In re Estate of Cloninger,
8 Wn.2d 348, 112 P.2d 139 (1941)..... passim

In re Estate of Mell,
105 Wn.2d 518, 716 P.2d 836 (1986)..... 9

In re Estate of Muller,
197 Wn. App. 477, 389 P.3d 604 (2016) 4

In re Estate of Patton,
6 Wn. App. 464, 494 P.2d 238 (1972) 9, 10

In re Hilborn,
63 Wn. App. 102, 816 P.2d 1247 (1991)..... 20

Matthews v. Elk Pioneer Days,
64 Wn. App. 433, 824 P.2d 541 (1992) 20

Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia,
464 U.S. 30, 104 S. Ct. 304, 78 L. Ed. 2d 29 (1983)..... 24

Payseno v. Kitsap County,
186 Wn. App. 465, , 346 P.3d 784 (2015)..... 11

Potter v. Wash. State Patrol,
165 Wn.2d 67, 196 P.3d 691 (2008)..... 20

Sligar v. Odell,
156 Wn. App. 720, 233 P.3d 914 (2010) 20

| | |
|--|--------|
| <i>State v. Amezola</i> , 2014 Wash. App. LEXIS 2595 | 6 |
| <i>State v. Dalluge</i> , 2015 Wash. App. LEXIS 1502 | 5 |
| <i>State v. Keller</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001)..... | 12 |
| <i>State v. Taylor</i> , 97 Wn.2d 724, 649 P.2d 633 (1982)..... | 12, 13 |
| <i>State v. Wakefield</i> , 130 Wn.2d 464, 925 P.2d 183 (1996)..... | 6 |
| <i>Thompson v. Watkins</i> , 285 N.C. 616, 207 S.E.2d 740 (1974)..... | 14 |
| <i>Tyler v. Bier</i> , 88 Ore. 430, 434, 172 P. 112, 113 (1918)..... | 15 |
| <i>Wichert v. Cardwell</i> , 117 Wash. 2d 148, 812 P.2d 858 (1991)..... | 18, 20 |
| Statutes | |
| RCW 4.04.010 | 20 |
| RCW 11.12.070..... | passim |
| Treatises | |
| C.J.S. Estates § 35..... | 13 |
| Other Authorities | |
| Merriam-Webster Online Dictionary. 2018. (18 Aug. 2018) | 8 |

1. INTRODUCTION

Barbara Irwin (“Ms. Irwin”) and Gerald Irwin Jr. (“Mr. Irwin Jr.”) collectively (the “Irwins”) raise the doctrines of judicial estoppel and invited error in their Response. Barbara Kelley (“Ms. Kelley”) devotes little space in her Reply Brief to these arguments. The doctrines are inapplicable and unsupported by the record. The Irwins appear to believe agreeing to what a commissioner previously ruled on, making a presentation hearing unnecessary, somehow amounts to a stipulation as to the merits. They are wrong and have misrepresented the record, mostly without citation.

As to the Irwins’ arguments on the merits, these also fail. The testator, Gerald W. Irwin (“Mr. Irwin”), intended to grant Ms. Kelley a life tenancy *provided*, i.e., on condition that, she pay the taxes and insurance on the property. No more and no less. To not give effect to the word “provided” in his Will would erroneously ignore the most important word and provision, therein, and would also create an inconsistency in the Will.

Furthermore, when reading Mr. Irwin’s Will as a whole, it is clear that he intended to specifically devise the property in fee simple to the Irwins but reserve a life tenancy for Ms. Kelley. The life tenancy provision just omitted the necessary fee simple remaindermen interests, and misstated them as a part of the residue. The Irwins’ arguments, otherwise, improperly reads the life tenancy provision in isolation to create an issue

with RCW 11.12.070 that, literally, has never occurred since the statute's creation in 1860. Stated another way, their argument regarding reading the Will fails because it advocates for form over substance.

Next, Ms. Kelley argues all parties were specific devisees of the real property because *a life estate cannot exist without specifically devised fee simple remaindermen*. The legislature understood this bedrock principal with respect to freehold estates and life tenancies. When Mr. Irwin's Will is read understanding this, it is clear that the Irwins were specifically devised the real property by operation of law. Therefore, if RCW 11.12.070 applies to this action, the only interpretation of the statute that avoids ambiguity, avoids absurd results, and gives effect to the legislative purpose is to require the remaindermen devisees pay for the mortgage on the property at issue.

Finally, and alternatively, RCW 11.12.070 does not apply to this action at all and the common law prevails. This is because it is clear from the legislative history, intent, and purpose of RCW 11.12.070 that the Irwins' interpretation would be a derogation of the common law as to life tenancies. The legislature did not fix the inequity of mandating that beneficiaries pay for property they have no equity in, a direct reaction to *Estate of Cloninger*, just to mandate the same inequity by making life tenants pay for property they too have no equity in. The Irwins' statutory construction arguments are unpersuasive rebuttals because they

misunderstand the purpose of RCW 11.12.070, which is paramount. They also fail to cite current, and binding, authority clearly upholding the derogation of the common law doctrine.

2. RELEVANT REPLY FACTS

2.1. On September 25, 2017, Ms. Irwin petitioned for an order requiring Ms. Kelley to pay the debt on Mr. Irwin's real property secured by the mortgage. (CP at 6-14). On October 13, 2017, there was a hearing. *Id.* at 32. Ms. Kelley's trial court counsel stated that he would provide the Irwins with an accounting (RP (October 13, 2017) at 18) and that an accurate inventory had been provided to the Irwins. *Id.* at 8. The trial court's commissioner stated she would provide a written opinion later. (CP at 32; RP (October 13, 2017) at 17). On October 16, 2017, the letter opinion was issued. (CP at 33-35).

2.2. On November 1, 2017, a proposed order codifying the commissioner's opinion was prepared and filed with the trial court. *Id.* at 36-39. A presentation hearing was noted for November 3, 2017. *Id.* at 40. However, it was stricken because the parties agreed as to what the commissioner's ruling was and entailed. *Id.* at 40-44. Such order was entered. *Id.* at 41-44.

2.3. On November 16, 2017, Ms. Kelley moved to revise. *Id.* at 46-52. A hearing was set for January 12, 2018 (*Id.* at 46), but later re-noted for

February 9, 2018. (CP at 53; RP (February 9, 2018)). No argument was made regarding any “stipulation” on the merits. (RP (February 9, 2018)). No argument was made regarding estoppel. *Id.* Rather, the merits were argued. *Id.* at 19-34. Ms. Kelley’s trial court counsel stated that the only portion of the commissioner’s ruling he was not moving to revise was regarding “capital and/or permanent improvements.” *Id.* at 20.

2.4. When the Irwins’ counsel was asked about why one trial court commissioner wrote the letter opinion, but another signed the “stipulated” order memorializing the trial court’s ruling, the Irwins’ counsel stated the commissioner “*issued a letter opinion asking us to draft the stipulated order and send it in.*” *Id.* at 19-20 (emphasis added).

3. REPLY ARGUMENT

3.1. The Irwins’ Invited Error Argument is Without Merit.

Under the invited error doctrine, a party may not set up an alleged error and then complain about the error on appeal. *In re Estate of Muller*, 197 Wn. App. 477, 484, 389 P.3d 604, 609 (2016). In *Estate of Muller*, the co-personal representatives asked the trial court to exclude ER 1006 summaries provided by both parties. *Id.* at 484-85. The trial court did so. *Id.* On appeal, the co-personal representatives argued it was error to exclude the summaries. *Id.* This Court rejected such an argument because the trial court did exactly what the co-personal representatives asked of it. *Id.* at 484.

Additionally, arguments inadequately briefed are not considered on appeal. *Hiatt v. Walker Chevrolet Co.*, 120 Wash. 2d 57, 64, 837 P.2d 618, 622 (1992) (citing RAP 12.1(a)).

Here, the Irwins argue that “Ms. Kelley (through counsel) waived the right to oppose the motion at presentment and instead stipulated to the order.” (Brief of Respondent at 2-3). They also argue that “Ms. Kelley is appealing her own order” because she “clearly advised her attorney that she would stipulate to an order in accordance with Commissioner Zinn’s Letter Opinion.” *Id.* at 4. They cite *State v. Dalluge*, 2015 Wash. App. LEXIS 1502. In *Dalluge*, there was an extended dialogue on the record *between the trial court, the prosecutor, and the defendant* regarding waiving certain rights. *Id.* at 1-14. The defendant “personally agreed to the stipulation[, i.e., waiving of rights]. . . .” and *trial court relied on this waiver. Id.* at 18.

This case provides no support for the Irwins. Ms. Kelley did not personally agree to anything, let alone on the record. The record is utterly vacant of any stipulation, as to the merits of this appeal, *with the trial court* or anyone else. What Ms. Kelley’s counsel did do—which happens every day in superior court to avoid argument at a presentation hearing over proposed orders—was *agree to the what the Commissioner previously ruled*. Attorneys commonly enter into these types of “stipulations,” as it prevents wasting parties’ money and promotes judicial economy.

Furthermore, the Irwins’ counsel stated on the record what did occur; the commissioner requested a “stipulated” order stating what the commissioner ruled. (RP (February 9, 2018) at 20).¹

The Irwins also cite *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183, 188 (1996). In *Wakefield*, the court held that the invited error “doctrine [wa]s not applicable to the . . . case.” *Id.* at 475. It held no stipulation occurred. *Id.* This case is irrelevant.

Finally, the Irwins cite *State v. Amezola*, 2014 Wash. App. LEXIS 2595. The first sentence of the opinion states the defendant “agreed to a stipulated facts trial and was found guilty” by the trial court relying on such stipulation. *Id.* at 1. On appeal, the defendant claimed a stipulated fact was not supported by the evidence. *Id.* at 6. The court held the invited error doctrine barred his appeal. *Id.* The decision was warranted and has nothing in common with the case at hand. Ms. Kelley did not stipulate to any facts, nor did her counsel. Accordingly, the Irwins’ argument regarding invited error is (1) inadequately briefed, (2) lacks citation to the record, (3) is not supported by the record, and (4) lacks any merit.

3.2. The Irwins’ Judicial Estoppel Argument is Without Merit.

Judicial estoppel requires clearly inconsistent positions taken in a

¹ To spin the facts—with little to no citation to the record—and argue the invited error doctrine here is distasteful. Ms. Kelley’s trial court counsel did not agree or stipulate that the ruling was correct, and he appropriately moved to revise.

court proceeding that mislead the trial court. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289, 294 (2012).

Here, as stated in Section 3.1, neither Ms. Kelley nor her trial court counsel stipulated to anything other than what the trial court commissioner previously ruled. This made the presentation hearing unnecessary. The Irwins appear to think that attorneys reargue the merits of a decision at a presentation hearing. They do not. They argue over what the trial court previously ruled. Moreover, the record demonstrates no inconsistency and that the trial court was not misled.

3.3. Mr. Irwin’s Will is Not Silent on What was Required of Ms. Kelley to Preserve Her Life Tenancy; She was Explicitly Required to Pay the Taxes and Insurance.

Courts “must give effect to every part of the will unless the clauses are inconsistent and cannot be reconciled.” *Holmes v. Holmes*, 65 Wn.2d 230, 234, 396 P.2d 633, 635 (1964). In *Holmes*, a testator left real property to his wife in his will “to use for her care and maintenance as she finds *necessary*.” *Id.* at 231 (emphasis added). The “balance and residue” was left to the children. *Id.* The wife argued, and trial court ruled, that she could sell the property. *Id.* at 232. The children argued she could not. *Id.* The Supreme Court affirmed the trial court. It reasoned that it “must give effect to every part of the will”—especially the word “*necessary*.” *Id.* at 234. Furthermore, it reasoned that the testator “would naturally intend” his wife to have “free

hand in managing and controlling the estate.” *Id.*

Here, the Irwins argue that “The will is not ambiguous as to the issue of the mortgage or maintenance, it is merely silent.” (Brief of Respondent at 7). They further argue that Mr. Irwin “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.* at 7.

Mr. Irwin’s Will states, “I give a life estate in the property . . . *provided* [Ms. Kelley] pays the taxes and insurance on the property.” (CP at 3) (emphasis added). Ms. Kelley agrees that the Will is not ambiguous. The Will is an affirmative direction that Ms. Kelley preserves a life estate *provided* she pays the taxes and insurance. No more and no less.

To ignore the word “provided” is improper because courts “must give effect to every part of the will unless the clauses are inconsistent and cannot be reconciled.” *See Holmes*, 65 Wn.2d at 234. The word “provided” unambiguously means “on condition that” or “with the understanding.” Merriam-Webster Online Dictionary. 2018. (18 Aug. 2018) available at <https://www.merriam-webster.com/dictionary/provided>. To add more, or *additional*, conditions, understandings, terms, or requirements for Ms. Kelley to preserve her life tenancy—that are not written into the Will—would be blatantly “inconsistent” with the plain language of the Will as well as the intent of Mr. Irwin. *See Holmes*, 65 Wn.2d at 234. It would also be

adding words to the Will that are not there. Instead, the Court must give effect to the word “provided.” *See id.* Additionally, just like in *Holmes*, Mr. Irwin “would naturally intend” his significant other,² Ms. Kelley, to not have to do more than he “provided” to preserve her life estate. *See id.*

Next, the Irwins cite *In re Estate of Patton*, 6 Wn. App. 464, 494 P.2d 238 (1972), but it is also of no help to them. There, the court found that the intent of the testator stating, “all other property” was to be interpreted in the most expansive manner argued amongst the parties. *Id.* at 469. The court *then* held the expansive bequest was contrary to community property law. *Id.* at 477. In the case at hand, Mr. Irwin intending the remaindermen to pay the mortgage, and expenses other than the taxes and insurance, is not contrary to law. It is what Mr. Irwin expressly intended and *provided* in his Will. Consequently, *Estate of Patton* actually supports Ms. Kelley’s arguments. For the same reasons, i.e., the Will is not ambiguous and the Court must give effect to the word “provided,” *In re Estate of Mell*, 105 Wn.2d 518, 524, 716 P.2d 836, 839 (1986) does not help the Irwins.

² The Irwins attempt to raise the Deadman’s Statute for the first time on appeal. (Brief of Respondent at 12, n. 2). If the Court was to look at declarations to help determine the intent of Mr. Irwin, e.g., CP at 16 (stating, “[The Irwins] apparently have asked me to satisfy the mortgage. *I know that is not what [Mr. Irwin] wanted*, nor did he make those provisions in his Will.”) (emphasis added), there is no infirmity to doing so under the Deadman’s Statute, RCW 5.60.030. The Irwins failed to timely object at the contested hearings and waived the statute. *See Estate of Lennon v. Lennon*, 108 Wn. App. 167, 176, 29 P.3d 1258, 1264 (2001).

Finally, the Irwins' citation to *In re Estate of Robinson*, 46 Wn.2d 298, 300, 280 P.2d 676, 677 (1955) and *In re Estate of Brooks*, 44 Wn.2d 96, 99, 265 P.2d 833, 835 (1954) are equally unhelpful to their arguments. No party has ever asserted that Mr. Irwin did not know the property was encumbered by a mortgage. He encumbered it. The Will is not ambiguous as to what Mr. Irwin *provided*; Ms. Kelley is only required to pay the taxes and the insurance to preserve her life tenancy.

3.4. The Irwins Fail to Construe the Will as a Whole.

“In the construction of a will the fundamental rule is that the intent of the testator is paramount and is to be determined from . . . the will when read as a whole.” *In re Estate of Patton*, 6 Wn. App. at 467. Here, no party disputes that the mortgage encumbered the property when the Will was executed. Reading the Will as whole, as the Court must, Mr. Irwin intended to specifically devise fee simple in the real property to the Irwins as well as reserve a life tenancy for Ms. Kelley. These are his only three beneficiaries and there is no debate over who was to be devised what at his passing. However, the Will omitted the required fee simple devisee remaindermen in the “Specific Bequests”³ provision, granting Ms. Kelley a

³ The “Specific Bequests” section would have been more accurately titled “Specific Devises.” The lack of adding the required remaindermen to the life estate provision, as well as the fact that Ms. Kelley’s trial court attorney (from the same law firm as the attorney who drafted Mr. Irwin’s Will) appeared to believe that a life estate is not a devise, rather a personal license or gift (RP October 13, 2017) at 14; RP (February 9, 2018) at 23; CP at

life tenancy. Instead, the intended fee simple specific devisee remaindermen was placed in the residue.

The Irwins erroneously rely on reading the life tenancy provision in isolation. They argue an issue with RCW 11.12.070 that has never before occurred. (*See* Sections 3.5-3.7). Had the provision included the required fee simple remaindermen, it would have been more plain that the Irwins were specifically devised the real property. (*See* Section 3.5). Fortunately, Mr. Irwin’s intent, when reading the Will as whole, is clear. This Court should honor it.

3.5. If Mr. Irwin’s Intent is Not Clear and RCW 11.12.070 is Applicable, then the Fee Simple Devisees Pay the Mortgage.

“The *primary* goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature.” *Elec. Contr. Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481, 486 (1999) (emphasis added). “A statute is ambiguous when it is fairly susceptible to different, reasonable interpretations, either on its face or as applied to particular facts, and must be construed to avoid strained or absurd results.” *Payseno v. Kitsap County*, 186 Wn. App. 465, 471, 346 P.3d 784, 787 (2015) (internal punctuation omitted). Courts will not even interpret unambiguous statutes to “yield

29, 48-49)), demonstrates that this appeal is mostly the result of an unintended omission. Perhaps RCW 11.96A.125 addresses this type of scrivener’s or legal error as Mr. Irwin’s intent was clear. (*See* Section 3.3).

unlikely, strange or absurd consequences.” *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030, 1035-1036 (2001). This is especially true when the strange or absurd result “undermines its sole purpose.” *State v. Taylor*, 97 Wn.2d 724, 730, 649 P.2d 633, 636 (1982).

Here, the Irwins argue that RCW 11.12.070 should be interpreted so that a life tenant pays debt on real property secured by a mortgage. (Brief of Respondent at 10). They argue the statute is unambiguous (*id.* at 20), and that the possibility of remaindermen being foreclosed on property they do not live in would be an absurd result. *Id.* at 15. They are incorrect.

The legislative intent of the current version (1955) of RCW 11.12.070 was to address the inequity of beneficiaries paying for property they could never have equity in—not to create the same inequity for life tenants. (*See* Section 3.6). The “sole purpose” was to require those specifically devised property in fee simple to pay for the mortgage when the Will did not provide otherwise. *See id.* Neither the intent nor the purpose was to create ambiguity. *See id.* But that is exactly what the Irwins request this Court hold.

Following the Irwins’ interpretation, when RCW 11.12.070 is applied to typical wills devising life estates, the statute would be ambiguous on whether a fee simple devisee remaindermen or a life tenant was responsible for the mortgage payment. For example, a typical life estate

devise (stating the required remaindermen) reads: I give Blackacre to “A” in fee simple, reserving a life estate in the life of “B.” Both the remainderman and the life tenant are clearly specific devisees. But who is responsible for the mortgage under RCW 11.12.070? Answer: the statute is ambiguous.⁴

Having determined that the Irwins’ interpretation creates ambiguity in RCW 11.12.070, the proper outcome in this case is that RCW 11.12.070 be interpreted to further its purpose, as stated above. The “specifically devised” language could not have been chosen to apply to life tenancies because that would create ambiguity, and because *the legislature knew* that a fundamental principle regarding freehold estates is that life tenancies require specifically devised fee simple remaindermen. *See* C.J.S. Estates § 35 (stating “There can be no life estate in property without a remainder.” 31) (citing e.g., *Benson v. Greenville Nat’l Exchange Bank*, 253 S.W.2d 918, 922 (1952)).

Furthermore, applying the Irwins’ interpretation to RCW 11.12.070 leads to the absurd result of nullifying a testator’s testamentary gift of possession by mandating the life tenant pay for such possession. (*See* Amended Brief of Appellant at 14-19; *see also* Sections 3.6-3.7). This is

⁴ Even if this Court found that the statute was not ambiguous, judicial construction is necessary because the Irwins’ interpretation undermines the statute’s sole purpose. *See State v. Taylor*, 97 Wn.2d at 730; (Section 3.6).

especially true since their interpretation is based on a Will omitting required remaindermen, not legislative intent or purpose. (See Sections 3.4, 3.6-3.7).

Finally, remaindermen being foreclosed upon for not paying the mortgage, and receiving the remaining equity in the home after foreclosure, is exactly what the common law provides. *Thompson v. Watkins*, 285 N.C. 616, 621, 207 S.E.2d 740, 744 (1974) (holding “In respect to a prior mortgage . . . the life tenant’s only duty to the remainderman is to pay the interest. He is under no obligation to pay any part of the principal.”). If it is a modern day fair result for the common law, it cannot be an absurd result.

Accordingly, if RCW 11.12.070 is applied to this case to effectuate its purpose, the omitted language granting the specific devise of the fee simple interest to the Irwins (as remaindermen) would fairly be supplied by operation of law. This is the only interpretation that avoids absurd results and advances the purpose of the RCW 11.12.070. Once this occurs, under the statute, the Irwins are responsible for the mortgage.

3.6. RCW 11.12.070 is a Derogation of the Common Law but the Purpose, Legislative History, and Derogation Had Nothing To Do with Life Tenancies.

Prior to 1860, RCW 11.12.070 did not exist. At that time, the common law provided two important, independent, rules of law. First as to fee simple devisees, “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.” *In re Estate of Cloninger*, 8 Wn.2d 348, 349, 112 P.2d 139, 140 (1941). Second, as to life tenant devisees, the common law then and now still provides that such beneficiaries 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. *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 principal 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 1860, the legislature passed RCW 11.12.070. From 1860 to 1954, the statute read:

A charge or incumbrance 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 of incumbrance.

(Appendix A). No appellate cases exist where it was argued that any version of RCW 11.12.070 requires life tenant devisees pay mortgages. Before the 1955 statute was enacted, however, a dispute arose in *Estate of Cloninger* regarding a fee simple devisee. There, the decedent’s Will devised real property to his daughter. 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. *Estate of 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. The case 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.

In 1955, the legislature added the following, in pertinent part, to RCW 11.12.070:

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, no legislative history or caselaw regarding RCW 11.12.070 mentions life tenancies and mortgages because the common law rule that a life tenant does not pay the principal debt on real property secured by a mortgage was not intended to be modified. (*See* Appendix A). Rather, the 1955 addition to the 1860 version of RCW 11.12.070 had a single purpose.

Beneficiaries “specifically devised” property in fee simple were mandated to pay debt secured by a mortgage when a Will did not provide otherwise.

The legislature intended to modify the common law rule upheld in *Estate of Cloninger*, which presumed fee simple devisees took property free of mortgages, in favor of a modern trend⁵ occurring at the time that presumed the opposite. *See Estate of Cloninger*, 8 Wn.2d 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 *Estate of Cloninger*, and recognizing the obvious close temporal proximity of the 1955 statute and the Supreme Court case makes this plain. There was no intention or purpose expressed in the statute towards changing the common law regarding life tenancies at all. A new law meant to eviscerate testamentary gifts of possession, i.e., mandating life tenants pay debts on real property secured by mortgages, and upending bedrock principles regarding freehold estates

⁵“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 devisee to take the property subject to the encumbrance.” *Estate of Cloninger*, 8 Wn.2d at 350. Notably, undersigned counsel can find no case suggesting this then modern trend had anything to do with common law rules regarding life estate and payment of debts secured by a mortgage.

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 since its creation in 1860—mentions life tenant devisees being mandated to pay mortgages under the statute is illuminating.

Perhaps the most important point being that it would be absurd to believe that the legislature intended to fix one inequitable result, i.e., beneficiaries paying for property they would never have any claim of equity in—just to create the nearly identical inequitable result—i.e., making life tenants pay for property they too would never have any equity in.

3.7. Alternatively, RCW 11.12.070 is Not Applicable to this Case, and the Common Law Rule Regarding Life Tenants Not Paying Principal Debts on Real Property Secured By Mortgages Prevails.

The Irwins agree that “the common law related to this case has been modified by statute” but argue that “it is not the law that statutes in derogation of the common law should be ignored.” (Brief of Respondent at 16-20). They further argue that this “court should interpret and apply [RCW 11.12.070] . . . in a liberal manner. . . .” and not “strictly.” (Brief of Respondent at 20). The premise of their arguments is that the purpose of the statute was to apply to life tenancies. *See id.* They devote much of their brief on the topic to block quoted dicta from a 1991 case, *Wichert v. Cardwell*, 117 Wash. 2d 148, 812 P.2d 858 (1991), regarding whether statutes in

derogation of the common law should be strictly or liberally construed. (Brief of Respondent at 16-20).

What the Irwins fail to understand is that it does not matter what level of scrutiny is placed on the statute. Under any standard of construction, their interpretation of RCW 11.12.070 erroneously presumes the legislature intended to modify the common law rule that life tenants do not pay principal debts on real property secured by a mortgage. (*See* Section 3.6). The legislature intended no such thing and no legislative history or purpose demonstrates otherwise. *See id.* It is absurd to believe the legislature fixed one inequity just to create another of the same sort. (*See* Sections 3.5-3.6). Therefore, any level of scrutiny applied to their interpretation of RCW 11.12.070 leads to the same result that the common law applies in favor of Ms. Kelley. *See Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432, 275 P.3d 1119, 1123 (2012) (holding “Neither a liberal construction nor a strict construction may be employed to defeat the intent of the legislature”).

Furthermore, the Irwins failed to inform this Court that the block quoted dicta in their Response—was exactly that—block quoted dicta.⁶

⁶ *Wichert* expressly stated, (1) “Defendants . . . argue that the statute must be strictly construed because it is in derogation of common law,” (2) “Arguably the rule of liberal construction applies to the present statute . . . but the matter [wa]s not briefed and we express no opinion thereon,” (3) the “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

Wichert expressly held that it was not deciding the intricacies of the derogation of the common law doctrine:

It is apparent that much more analysis is needed to craft a proper and meaningful principle of construction when a statute purports to change an identified common law rule. . . . Another case, with thorough briefing and analysis should cause a complete review and resolution.

Wichert, 117 Wn.2d at 156. Since *Wichert*, many cases, including the Supreme Court, have cited *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980), the case *Wichert* criticized, as good law on the topic of common law derogations and applying strict scrutiny.⁷ The most recent Supreme Court case appears to hold statutes in derogation of the common law “should be given a fair reading, one that is neither strict nor liberal, to effectuate the legislature’s intent.” *Estate of Bunch*, 174 Wn.2d at 433.

Regardless, to decide the issue at hand, it is clear that the derogation of the common law doctrine has not been overturned expressly nor *sub silentio*. In applying the doctrine, what can easily be said⁸ is that factors

times,” (4) “It is apparent that much more analysis is needed to craft a proper and meaningful principle of construction when a statute purports to change an identified common law rule,” and (5) “Another case, with thorough briefing and analysis should cause a complete review and resolution” of what level of scrutiny to apply when statutes are derogations of the common law. *Wichert*, 117 Wn.2d at 154-56.

⁷ See e.g., *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691, 695 (2008); *Sligar v. Odell*, 156 Wn. App. 720, 727, 233 P.3d 914, 918 (2010); *Food Servs. of Am. v. Royal Heights*, 69 Wn. App. 784, 787-788, 850 P.2d 585, 587 (1993); *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 437, 824 P.2d 541, 543 (1992); *In re Hilborn*, 63 Wn. App. 102, 104-105, 816 P.2d 1247, 1247 (1991).

⁸ Based on a thorough examination of the doctrine in more cases than necessary to cite. If requested, undersigned counsel can provide supplemental briefing.

include (1) determining the applicable common law, (2) whether the legislature intended to change the applicable common law, (3) the legislative history, intent, purpose, and applicable changes to the statute, and related statutes, over time, (4) whether the statutory language is ambiguous on its face or as applied, (5) whether there are public policy, or other reasons, to liberally or strictly interpret the statute to effectuate its purpose, (6) how previous authority has interpreted the statute or applicable prior versions thereof, and (7) whether argued interpretations of the statute would lead to absurd or strained results.

Here, all of these factors favor Ms. Kelley. RCW 11.12.070 is a derogation of the common law, and it is inapplicable to this case. First, possible applicable common law rules are (a) the rule that an estate's personal assets and residue pay debt on real property secured by a mortgage, and (b) the rule that life tenants do not pay principal debts on real property secured by a mortgage. (*See* Section 3.6).

Second, the legislature reacted to, and modified, the common law rule, affirmed in *Estate of Cloninger*, that an estate's personal assets and residue paid mortgages on real property when such property was devised in fee simple. (*See* Section 3.6). The legislature did not intend for RCW 11.12.070 to mandate life tenants pay mortgages over fee simple devisees—in contradiction of the common law. (*See* Section 3.5-3.6).

Third, the legislative history, purpose, intent, and applicable changes of the statute over time all unmistakably demonstrate that the legislature meant to mandate fee simple devisees pay mortgages on real property. (*See* Sections 3.5-3.6). On the other hand, nothing in the legislative history supports the argument that the legislature meant to change the common law rule that life tenants do not pay principal debts secured by mortgages. (*See* Section 3.6). Nor did it intend to change the fundamental principle that life estates require fee simple remaindermen. (*See* Section 3.5-3.6).

Fourth, RCW 11.12.070 is ambiguous as to which devisee should pay the debt secured by a mortgage when real property is devised in fee simple, reserving a life estate for another. (*See* Section 3.5). This is especially true applied to the facts of this, or any similar, case. (*See* Sections 3.5-3.6; Amended Brief of Appellant at 19-23).

Fifth, sound public policy of effectuating a testator's intent in granting a life tenancy would dictate that RCW 11.12.070 be interpreted either (a) fairly, or liberally, to have the fee simple devisee(s) pay the debt on the real property secured by the mortgage to promote the statute's purpose (*see e.g., Estate of Bunch*, 174 Wn.2d at 433), or (b) strictly to prevent the statute from taking away a life tenant's testamentary gift of possession of the property in contradiction of the common law and

inequitably mandating life tenants pay down debt but gain no equity. (*See* Section 3.6; Amended Brief of Appellant at 10 -19).

An illustrative example here is warranted because the facts of this case are typical of elderly couples' estate planning and thus this Court has a public policy interest to consider. The couple is elderly with children from different significant others. They meet when older and for many reasons do not get married but live romantically in every other way as if they were. One moves in with the other and the residence has a mortgage, but it is paid down and there is substantial equity in the home. The couple wishes to provide for each other after passing, but also want to provide for their children from previous relationships. The children may not connect with the new significant other as there is no blood relationship and because they see a threat to "their" inheritance. Devising the home to the children but reserving a life estate to the surviving partner is a near perfect, inexpensive, solution. The surviving significant other has a place to live, largely free of interference from children he or she may not get along with, until death and can preserve liquid resources in retirement. The children must pay the mortgage, but the devise means they eventually obtain all of the equity in the property for a substantial discount. Thus, the children's inheritance is preserved.

Sixth, prior caselaw, i.e., *Estate of Cloninger*, has already

interpreted a prior version of this statute as a derogation of the common law and provides sound authority to strictly interpret RCW 11.12.070 in favor of Ms. Kelley. It does not appear with “clarity” that the legislature meant to gut testamentary gifts of possession and make life tenants pay for property they have no equity in. (*See* Section 3.6). This Court requiring Ms. Kelley to pay the mortgage would violate RCW 4.04.010. Moreover, it would be disregarding the “well-established principle of statutory construction that the common law. . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.” *See Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35-36, 104 S. Ct. 304, 78 L. Ed. 2d 29 (1983).

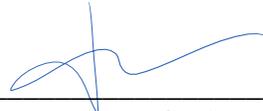
Seventh, the Irwins’ interpretation of RCW 11.12.070 would lead to the absurd result of nullifying a testator’s intended testamentary gift of possession of the property by making a life tenant pay for that possession. (*See* Sections 3.3-3.4; Amended Brief of Appellant at 10-19). It would also absurdly interpret a statute based on a life tenancy provision omitting the remaindermen, against the intent of the statute and testator. (*See* Section 3.5-3.6). Finally, it is absurd to believe that the legislature fixed the inequity of mandating beneficiaries pay for property they had no equity in—just to mandate life tenants pay for property they too have no equity in. (*See* Sections 3.5-3.6; Amended Brief of Appellant at 10-19).

Accordingly, if this Court does not agree with Ms. Kelley's previous arguments, the common law should prevail in this case. Under this fair reading of the statute, RCW 11.12.070's purpose has nothing to do with life tenancies. The Irwins' interpretation would modify the long-standing common law rule that life tenants do not pay principal debts on real property for which they have no equity in. This is a result the legislature never intended when passing RCW 11.12.070, and which would be a derogation of the common law, absurd, and contrary to sound public policy.

4. ATTORNEY FEES

The Irwins make ancillary and erroneous arguments, irrelevant to this appeal, that Ms. Kelley is mismanaging the estate, that she has not provided them an inventory and/or accounting, and that she is commingling estate funds. (Brief of Respondent at 21). The reality is that Ms. Kelley has done none of these things, she is paying the mortgage personally because the trial court ruling has not been stayed, and she is patiently waiting for a just result on appeal that corrects the trial court's ruling.

Respectfully submitted this 23rd day of August, 2018,



Drew Mazzeo WSBA No. 46506
Attorney for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on August 23, 2018, I caused to be served:

1. Reply Brief of Appellant

On:

Mindie Wacker, WSBA No. 40010
Martin Burns, WSBA No. 98117
Attorneys for Barbara Irwin and Gerald Irwin Jr.
Burns Law, PLLC
524 Tacoma Ave. South
Tacoma, WA 98502

Via email and electronic service by the Court of Appeals

Dated August 23, 2018, at Olympia, Washington.



Stacia Smith

APPENDIX "A"

Legislative History of RCW 11.12.070.....iii

ty, of sound mind, may, by last will, devise all his estate, real and personal. This section shall not be construed as depriving a widow of her dower, nor a husband of his interest as tenant by the courtesy.

SEC. 19. A married woman may, by will, dispose of any real estate held in her own right, subject to any rights which her husband may have as tenant by courtesy.

SEC. 20. Every will shall be in writing, signed by the testator or by some other person under his direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator.

SEC. 21. Every person who shall sign the testator's name to any will by his direction, shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request.

SEC. 22. No will in writing, except in cases hereinafter mentioned, nor any part thereof, shall be revoked except by a subsequent will in writing, or by burning, canceling, tearing, or obliterating the same, by the testator, or in his presence, or by his consent and direction.

SEC. 23. If, after making any will, the testator shall marry, and the wife shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for her by marriage contract, or unless she shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation, shall be received.

SEC. 24. A will made by an unmarried woman shall be deemed revoked by her subsequent marriage.

SEC. 25. A bond, covenant, or agreement, made for a valuable consideration by a testator, to convey any property, devised or bequeathed in any last will, previously made, shall not be deemed a revocation of such previous devise or bequest, either in law or equity; but such property shall [pass] by the deviser or bequest, subject to the same remedies on such bond, covenant, or agreement, for specific performance, or otherwise against devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.

SEC. 26. A charge or incumbrance 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 or incumbrance.

SEC. 27. If any person make his last will and die, leaving a child or children, or descendants of such child or children, in case of their

by marriage settlement, or unless she be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received.

SEC. 1323. A bond, covenant or agreement made for a valuable consideration by a testator to convey any property, devised or bequeathed in any last will previously made, shall not be deemed a revocation of such previous devise or bequest, but such property shall pass by the devise or bequest, subject to the same remedies on such bond, covenant or agreement, for specific performance or otherwise, against devisees or legatees, as might be had by law against the heirs of the testator or his next of kin, if the same had descended to him.

SEC. 1324. A charge or incumbrance 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 or incumbrance.

SEC. 1325. If any person make his last will and die, leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making of such will, or the death of the testator, every such testator so far as he shall regard such child or children or their descendants, not provided for, shall be deemed to die intestate, and such child or children or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them and all the other heirs, devisees and legatees shall refund their proportional part.

SEC. 1326. If such child or children, or their descendants, shall have an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they shall take nothing by virtue of the provisions of the preceding sections.

SEC. 1327. When any estate shall be devised to any child, grandchild or other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator.

SEC. 1328. If, after making any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such second will shall not revive the first will unless it appears by the terms of such revocation that it was his intention to revive and give effect to the first will, or unless he shall duly republish his first will.

SEC. 1329. No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, unless the same be proved by two witnesses, who were present at the making thereof, and it be proven that the testator, at the time of pronouncing the same, did bid some person present to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness, and at the dwelling house of the deceased, or where he had been residing for the space of ten days or more, except where such person was taken sick from home and died before his return. Nothing herein con-

1917 VERSION

Interest on
devises.

SEC. 26. No interest shall be allowed or calculated on any devise contained in any will unless such will expressly provide for such interest.

Testator's
signature by
subscribing
witness.

SEC. 27. Every person who shall sign the testator's or testatrix's name to any will by his or her direction shall subscribe his own name as a witness to such will and state that he subscribed the testator's name at his request.

Revocation,
how effected.

SEC. 28. No will in writing, except in cases herein-after mentioned, nor any part thereof, shall be revoked except by a subsequent will in writing, or by burning, canceling, tearing, or obliterating the same, by the testator or testatrix, or in his or her presence, by his or her consent or direction.

Subsequent
marriage of
testator.

SEC. 29. If, after making any will, the testator shall marry and the wife, or husband, shall be living at the time of the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such survivor by marriage settlement, or unless such survivor be provided for in the will or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received. A divorce, subsequent to the making of a will, shall revoke the will as to the divorced spouse.

Divorce.

Agreements
to convey
property
not to effect
revocation
of will.

SEC. 30. A bond, covenant, or agreement made for a valuable consideration by a testator to convey any property, devised or bequeathed in any last will previously made, shall not be deemed a revocation of such previous devise or bequest, but such property shall pass by the devise or bequest, subject to the same remedies on such bond, covenant, or agreement, for specific performance or otherwise, against devisees or legatees, as might be had by law against the heirs of the testator or his next of kin, if the same had descended to him.

Charges or
encum-
brances not
to effect
revocation.

~~SEC. 31.~~ 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

~~1955~~ VERSION
1955

erence to original wills presented to the court for probate.

Amendment.

~~Sec. 2.~~ Section 31, chapter 156, Laws of 1917 and RCW 11.12.070 are each amended to read as follows:

Mortgaged property.

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.

Charge or encumbrance.

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 or encumbrance.

Amendment.

SEC. 3. Section 55, chapter 156, Laws of 1917 and RCW 11.28.070 are each amended to read as follows:

Administrators with the will annexed.

Administrators with the will annexed shall have the same authority as the executor named in the will would have had, and their acts shall be as effectual for every purpose: *Provided*, That they shall not lease, mortgage, pledge, exchange, sell or convey any real or personal property of the estate except under order of the court and pursuant to procedure under existing laws pertaining to the administration of estates in cases of intestacy, unless the powers expressed in the will are directory and not discretionary.

Limitation.

Amendment.

SEC. 4. Section 92, chapter 156, Laws of 1917 (heretofore divided and codified as RCW 11.68.010, 11.68.020 and 11.68.030) is amended as set forth in sections 5, 6 and 7 of this act.

In section 1, beginning on page 1, line 30 of the original bill, being page 2, line 10 of the printed bill, strike all of the paragraph down to and including the semi-colon (;) following the words "as hereinafter provided" on line 2, page 2 of the original bill, being page 2, line 13 of the printed bill, and insert in lieu thereof the following:
 "Catch brand" means a mark or brand used by a person as an identifying mark upon forest products and booming equipment previously owned by another;
 "Brand" means an identifying mark upon forest products or booming equipment which shall first be registered as hereinafter provided."

ROBERT BERNETHE, Chairman,
 HORACE W. BOZARTE, Vice Chairman.

We concur in this report: Robert C. Bailey, Morrill F. Folsom, Earl G. Griffith, Mrs. Vincent F. Jones, Douglas G. Kirk, Tom Martin, Clyde J. Miller, Ole H. Olson, James T. Ovenell, Max Wedekind, John K. Yearout.

The bill was read the second time by sections.

On motion of Mr. Bernethy, the committee amendments were adopted.

House Bill No. 224 was passed to Committee on Rules and Order for third reading and ordered engrossed.

House Bill No. 271, by Representatives Clark (Newman H.) and Neill (Marshall A.):

Amending the probate procedure statute.

MR. SPEAKER:

House of Representatives,
 Olympia, Wash., February 3, 1955.

We, a majority of your Judiciary Committee, to whom was referred House Bill No. 271, amending the probate procedure statute, have had the same under consideration, and we respectfully report the same back to the House with the recommendation that it do pass with the following amendments:

In section 16, page 8, line 17 of the original bill, being page 8, line 13 of the printed bill, after the period (.) following the words "clerk of the court" add the following paragraph: "Within twenty days after his appointment, the executor or administrator of the estate of a decedent shall cause written notice of his said appointment, and of the pendency of said probate proceedings, to be mailed to each heir and distributee of said estate whose name and address is known to him, proof of which shall be made by affidavit and filed in the cause."

In section 18, page 10, line 16 of the original bill, being page 10, line 6 of the printed bill, after the words "account for" and before the words "days after" strike the word "thirty" and insert in lieu thereof the word "sixty"

FRED A. DORE, Chairman,
 RALEH PURVIS, Vice Chairman.

We concur in this report: Newman H. Clark, John L. Cooney, H. B. Hanna, Elmer E. Johnston, Mark Litchman, Jr., Harold J. Petrie, Lincoln E. Shropshire, William A. Weitzman.

The bill was read the second time by sections.

On motion of Mr. Dore, the committee amendments were adopted.

House Bill No. 271 was passed to Committee on Rules and Order for third reading and ordered engrossed.

House Bill No. 288, by Representatives Timm, Donohue and Dore (by legislative council request):

Prohibiting unauthorized persons from communicating with convicts.

The bill was read the second time by sections and passed to Committee on Rules and Order for third reading.

House Bill No. 332, by Representatives Swayze and Siler:

Prohibiting the malicious poisoning of domestic animals and birds.

The bill was read the second time by sections.

On motion of Mr. Petrie, House Bill No. 332 was ordered placed at the foot of the reading calendar.

SPEAKER'S PRIVILEGE

The Speaker recognized in the gallery of the House students from the Ridgefield Junior High School and asked them to stand and be recognized. (Applause.)

House Bill No. 360, by Representative Clark (Newman H.):

Excluding corporations organized under federal or state laws from the definition of alien as related to the alien land law.

The bill was read the second time by sections and passed to Committee on Rules and Order for third reading.

House Bill No. 447, by Representatives Griffith and Rosenberg:

Setting forth the method of holding special elections in hospital districts.

The bill was read the second time by sections and passed to Committee on Rules and Order for third reading.

House Bill No. 212, by Representatives Huhta, Arnason and Savage:

Increasing the minimum salary of teachers to \$3600.00.

The bill was read the second time by sections.

On motion of Mr. Timm, the following amendments were adopted:

In section 1, line 8 of the original bill, being line 3 of the printed bill, after the words "with a" and before the word "teacher" insert the words "full-time"

In section 1, line 8 of the original bill, being line 3 of the printed bill, after the word "teacher" and before the words "to teach" insert the following: "having a college degree or its equivalent in training"

House Bill No. 212 was passed to Committee on Rules and Order for third reading and ordered engrossed.

House Bill No. 368, by Representatives Gordon and Hansen (Julia Butler):

Prescribing the rate of speed of motor vehicles operating near grade crossings.

On motion of Mrs. Hansen (Julia Butler), House Bill No. 368 was re-referred to Committee on Highways.

House Joint Resolution No. 1, by Representative Purvis:

Calling a constitutional convention for the purpose of revising or amending the Constitution of the state of Washington.

On motion of Mr. Purvis, House Joint Resolution No. 1 was re-referred to Committee on Constitution, Elections and Apportionment.

House Bill No. 332, by Representatives Swayze and Siler:

Prohibiting the malicious poisoning of domestic animals and birds.

The bill was read the second time by sections.

On motion of Mrs. Swayze, the following amendment was adopted:

In section 1, line 11 of the original bill, being line 5 of the printed bill, after the word "for" strike the word and punctuation "man,"

House Bill No. 332 was passed to Committee on Rules and Order for third reading and ordered engrossed.

THIRD READING OF BILLS

House Bill No. 76, by Representatives Dore and Clark (Newman H.):

Providing that powers of appointment may be released by written instrument.

On motion of Mr. Sandison, the rules were suspended, the second reading considered the third, and House Bill No. 76 was placed on final passage.

ONLY STATEMENT FROM 1955 on B.M.

SENATE AMENDMENTS TO HOUSE BILL

Senate Chamber,
 Olympia, Wash., March 7, 1955.

MR. SPEAKER:

The Senate has passed: Engrossed House Bill No. 271, with the following amendments:

Amend the bill by striking all of Sec. 4, Sec. 5 and Sec. 6, beginning on line 23 of page 2 and ending on line 27, page 3 of the engrossed bill, same being Sec. 4, Sec. 5 and Sec. 6, beginning on line 33, page 2 and ending on line 34, page 3 of the printed bill and renumber the remaining sections consecutively.

Amend the title, line 9 of the engrossed bill, same being line 8 of the title of the printed bill by striking the following: "; and adding new sections to chapter 112B RCW", and the same is herewith transmitted. HERBERT H. SIELER, Secretary.

On motion of Mr. Neill (Marshall A.), the House concurred in the Senate amendments to Engrossed House Bill No. 271.

The Speaker stated the question before the House to be the final passage of Engrossed House Bill No. 271, as amended by the Senate.

The Clerk called the roll on the final passage of Engrossed House Bill No. 271, as amended by the Senate, and the bill passed the House by the following vote: Yeas, 89; nays, 0; absent or not voting, 10.

Those voting yea were: Representatives Adams, Anderson, Arnason, Bailey, Ball, Beierlein, Bernethy, Bozarth, Byrne, Carmichael, Carty, Chytil, Clark (Cecil C.), Clark (Newman H.), Comfort, Connor, Cooney, Donohue, Dore, Edwards, Eldridge, Elway, Farrar, Fisher, Folsom, Frayn, Gallagher, Gordon, Griffith, Hanna, Hansen (Julia Butler), Hanson (Herb), Harris, Heckendorn, Henry, Hess, Holliday, Huhta, Hurley, Johnston, Jones (Mrs. Vincent F.), King, Kirk, Kupka, Litchman, Loney, Lorimer, Lybecker, Mardesich, Martin, Mast, May, McBeath, McDermott, McFadden, Miller (Clyde J.), Miller (Floyd C.), Mundy, Munro, Munsey, Neal (Mel T.), Neill (Marshall A.), Oakes, Olsen (Ray), Olson (Ole H.), Ovenell, Pence, Petrie, Rasmussen, Ridgway, Rosenberg, Ruoff, Sandison, Savage, Sawyer, Shropshire, Siler, Smith, Stocker, Strom, Swayze, Testu, Timm, Wang, Wedekind, Weitzman, Wintler, Young, Mr. Speaker—89.

Those absent or not voting were: Representatives Brown, Canfield, Hallauer, Hawley, Hyppa, Jones (Arthur D.), McCutcheon, Purvis, Robison, Yearout—10.

Engrossed House Bill No. 271, as amended by the Senate, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

SENATE AMENDMENT TO HOUSE BILL

Senate Chamber,
 Olympia, Wash., March 7, 1955.

MR. SPEAKER:

The Senate has passed: House Bill No. 373, with the following amendment:

Amend Section 1, subsection (1), line 7, page 1 of the original bill, same being Section 1, subsection (1), line 2, page 1 of the printed bill, after the word "means" strike the balance of subsection (1) and insert in lieu thereof the following: "any common carrier by rail, doing business in or operating within the state, and any subsidiary thereof.", and the same is herewith transmitted. HERBERT H. SIELER, Secretary.

On motion of Mr. Wedekind, the House concurred in the Senate amendment to House Bill No. 373.

The Speaker stated the question before the House to be the final passage of House Bill No. 373, as amended by the Senate.

The Clerk called the roll on the final passage of House Bill No. 373, as amended by the Senate, and the bill passed the House by the following vote: Yeas, 89; nays, 0; absent or not voting, 10.

Those voting yea were: Representatives Adams, Anderson, Arnason, Bailey, Ball, Beierlein, Bernethy, Bozarth, Byrne, Carmichael, Carty, Chytil, Clark (Cecil C.), Clark (Newman H.), Comfort, Connor, Cooney, Donohue, Dore, Edwards, Eldridge, Elway, Farrar, Fisher, Folsom, Frayn, Gallagher, Gordon, Griffith, Hanna, Hansen (Julia Butler), Hanson (Herb), Harris, Hawley, Heckendorn, Henry, Hess, Huhta, Hurley, Hyppa, Johnston, Jones (Arthur D.), Jones (Mrs. Vincent F.), King, Kirk, Kupka, Litchman, Loney, Lorimer, Lybecker, Mardesich, Martin, Mast, May, McBeath, McDermott, McFadden, Miller (Clyde J.), Mundy, Munro, Munsey, Neal (Mel T.), Neill (Marshall A.), Oakes, Olsen (Ray), Olson (Ole H.), Ovenell, Purvis, Rasmussen, Ridgway, Rosenberg, Sandison, Savage, Sawyer, Shropshire, Siler, Smith, Stocker, Strom, Swayze, Testu, Timm, Wang, Wedekind, Weitzman, Wintler, Yearout, Young, Mr. Speaker—89.

Those absent or not voting were: Representatives Brown, Canfield, Hallauer, Holliday, McCutcheon, Miller (Floyd C.), Pence, Petrie, Robison, Ruoff—10.

House Bill No. 373, as amended by the Senate, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

SENATE AMENDMENTS TO HOUSE BILL

Senate Chamber,
 Olympia, Wash., March 7, 1955.

MR. SPEAKER:

The Senate has passed: House Bill No. 405, with the following amendments:

Amend Section 1, following line 17, page 2 of the original bill, same being Section 1, line 24, page 2 of the printed bill, by inserting a new section to be known as Sec. 2, to read as follows:

"Sec. 2. All sales under the provisions of this chapter shall be made to the highest or best bidder pursuant to a call for bids published at least fifteen days prior to the date fixed for the sale thereof in one issue of a legal weekly newspaper printed and published in Whitman County."

Renumber the former Sec. 2 to read "Sec. 3.", and the same is herewith transmitted. HERBERT H. SIELER, Secretary.

On motion of Mr. Neill (Marshall A.), the House concurred in the Senate amendments to House Bill No. 405.

The Speaker stated the question before the House to be the final passage of House Bill No. 405, as amended by the Senate.

The Clerk called the roll on the final passage of House Bill No. 405, as amended by the Senate, and the bill passed the House by the following vote: Yeas, 89; nays, 0; absent or not voting, 10.

Those voting yea were: Representatives Adams, Anderson, Arnason, Bailey, Ball, Beierlein, Bernethy, Bozarth, Byrne, Carmichael, Carty, Chytil, Clark (Cecil C.), Clark (Newman H.), Comfort, Connor, Cooney, Donohue, Dore, Edwards, Eldridge, Elway, Farrar, Fisher, Folsom, Frayn, Gallagher, Gordon, Griffith, Hallauer, Hanna, Hansen (Julia Butler), Hanson (Herb), Harris, Hawley, Heckendorn, Henry, Holliday, Hurley, Hyppa, Johnston, Jones (Mrs. Vincent F.), Kirk, Kupka, Litchman, Loney, Lorimer, Lybecker, Mardesich,

Those absent or not voting were: Senators Dixon, Flanagan, Gallagher, Ganders, Gissberg, Ivy, Jackson, Keefe, Nordquist, Nunamaker, Pearson, Rogers, Sears, Winberg—14.

House Bill No. 405, as amended, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

Engrossed House Bill No. 113, by Representatives Clark (Newman H.) and Martin:

Relating to banks and banking and bank deposits.

Engrossed House Bill No. 113 was read the second time by sections.

On motion of Senator Ryder, the rules were suspended, the second reading considered the third, and Engrossed House bill No. 113 was placed on final passage.

The Secretary called the roll on the final passage of Engrossed House Bill No. 113, and the bill passed the Senate by the following vote: Yeas, 32; nays, 0; absent or not voting, 14.

Those voting yea were: Senators Andrews, Bargreen, Barlow, Clark, Copeland, Cowen, Dahl, Goodloe, Greive, Hall, Hoff, Hofmeister, Knoblauch, Lennart, Lindsay, Luvera, McMullen, Pearson, Peterson, Raugust, Rosellini, Roup, Ryder, Sears, Shannon, Sutherland, Todd, Wall, Washington, Wilson, Zahn, Zednick—32.

Those absent or not voting were: Senators Dixon, Flanagan, Gallagher, Ganders, Gissberg, Happy, Ivy, Jackson, Keefe, Nordquist, Nunamaker, Riley, Rogers, Winberg—14.

Engrossed House Bill No. 113, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

House Bill No. 115, by Representatives Clark (Newman H.) and Martin:
Relating to banks and group plan life insurance for officers and employees.
House Bill No. 115 was read the second time by sections.

On motion of Senator Ryder, the following amendments were adopted:

Amend Section 1, line 6, page 1 of the original bill, same being Section 1, line 1, page 1 of the printed bill, after the word and figure "Section 1.", strike the remainder of the sentence and insert in lieu thereof the following: "Section 30.12.200, chapter 33, Laws of 1955 and RCW 30.12.200 are each amended to read as follows:"

Amend the title, line 2 of the original bill, same being line 2 of the title of the printed bill, by striking everything after the word "employees" and inserting in lieu thereof the following: "; and amending section 30.12.200, chapter 33, Laws of 1955 and RCW 30.12.200."

On motion of Senator Ryder, the rules were suspended, the second reading considered the third, and House Bill No. 115, as amended, was placed on final passage.

The Secretary called the roll on the final passage of House Bill No. 115, as amended, and the bill passed the Senate by the following vote: Yeas, 36; nays, 0; absent or not voting, 10.

Those voting yea were: Senators Andrews, Bargreen, Barlow, Clark, Copeland, Dahl, Dixon, Ganders, Gissberg, Goodloe, Greive, Hall, Happy, Hoff, Hofmeister, Ivy, Knoblauch, Lennart, Luvera, McMullen, Pearson, Peterson,

Raugust, Riley, Rosellini, Roup, Ryder, Sears, Shannon, Sutherland, Todd, Wall, Washington, Wilson, Zahn, Zednick—36.

Those absent or not voting were: Senators Cowen, Flanagan, Gallagher, Jackson, Keefe, Lindsay, Nordquist, Nunamaker, Rogers, Winberg—10.

House Bill No. 115, as amended, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

Engrossed House Bill No. 271:

Senate Chamber,
Olympia, Wash., March 1, 1955.

Mr. PRESIDENT:

We, your Committee on Judiciary, to whom was referred Engrossed House Bill No. 271, relating to probate law and procedure, have had the same under consideration, and we respectfully report the same back to the Senate with the recommendation that it do pass with the following amendment:

Amend the bill by striking all of Sec. 4, Sec. 5 and Sec. 6 beginning on line 23 of page 2 and ending on line 27, page 3 of the original bill, same being Sec. 4, Sec. 5 and Sec. 6 beginning on line 33, page 2 and ending on line 34, page 3 of the printed bill, and renumber the remaining sections to read Sec. 4 through Sec. 15.

WILLIAM C. GOODLOE, Chairman.

We concur in this report: Dale M. Nordquist, Neil J. Hoff, M. J. Gallagher, Eugene D. Ivy, Nat W. Washington, Patrick D. Sutherland, R. R. Bob Greive.

Engrossed House Bill No. 271 was read the second time by sections.

On motion of Senator Goodloe, the committee amendment was adopted.

On motion of Senator Goodloe, the rules were suspended, the second reading considered the third, and Engrossed House Bill No. 271, as amended, was placed on final passage.

On motion of Senator Goodloe, the rules were suspended and Engrossed House Bill No. 271 was returned to second reading for the purpose of further amendment.

On motion of Senator Goodloe, the following amendment to the title was adopted:

Amend the title, line 9 of the engrossed bill, same being line 8 of the title of the printed bill by striking the following: "; and adding new sections to chapter 11.28 RCW"

On motion of Senator Goodloe, the rules were suspended, the second reading considered the third, and Engrossed House Bill No. 271, as amended, was placed on final passage.

The Secretary called the roll on the final passage of Engrossed House Bill No. 271, as amended, and the bill passed the Senate by the following vote: Yeas, 33; nays, 0; absent or not voting, 13.

Those voting yea were: Senators Andrews, Bargreen, Barlow, Clark, Copeland, Cowen, Dahl, Dixon, Ganders, Gissberg, Goodloe, Greive, Hall, Happy, Hoff, Hofmeister, Knoblauch, Lennart, Luvera, McMullen, Pearson, Peterson, Riley, Rosellini, Roup, Ryder, Shannon, Todd, Wall, Washington, Wilson, Zahn, Zednick—33.

Those absent or not voting were: Senators Flanagan, Gallagher, Ivy, Jackson, Keefe, Lindsay, Nordquist, Nunamaker, Raugust, Rogers, Sears, Sutherland, Winberg—13.

Engrossed House Bill No. 271, as amended, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

House Bill No. 245:

The Secretary read:

REPORTS OF STANDING COMMITTEES

Senate Chamber,
Olympia, Wash., February 25, 1955

MR. PRESIDENT:

We, your Committee on Agriculture, Livestock, Reclamation and Irrigation, to whom was referred House Bill No. 245, relating to poultry disease diagnostic laboratories, and making an appropriation therefor, have had the same under consideration, and we respectfully report the same back to the Senate with the recommendation that it be referred to the Committee on Ways and Means. *LLOYD J. ANDREWS, Chairman*

We concur in this report: E. J. Flanagan, W. A. Gissberg, Howard Roup, Tom Hall, Louis E. Hofmeister, Reuben A. Knoblauch, Ernest W. Lennart, George D. Zahn.

Senate Chamber,
Olympia, Wash., February 28, 1955

MR. PRESIDENT:

We, a majority of your Committee on Ways and Means, to whom was referred House Bill No. 245, have had the same under consideration, and we respectfully report the same back to the Senate with the recommendation that it do pass.

ASA V. CLARK, Chairman

We concur in this report: Dale M. Nordquist, Ed. F. Riley, Eugene D. Ivy, E. J. Flanagan, Andrew Winberg, Howard Bargreen, Tom Hall, Ernest W. Lennart, Lloyd J. Andrews, Henry J. Copeland, Howard Roup, M. J. Gallagher, Francis Pearson, Reuben A. Knoblauch, Carlton I. Sears.

Senate Chamber,
Olympia, Wash., February 28, 1955

MR. PRESIDENT:

We, a minority of your Committee on Ways and Means, to whom was referred House Bill No. 245, have had the same under consideration, and we respectfully report the same back to the Senate with the recommendation that it do not pass.

....., Chairman

We concur in this report: James Keefe, John N. Ryder, W. D. Shannon.

On motion of Senator Hall, the rules were suspended, and House Bill No. 245 was considered without going into the Committee of the Whole.

House Bill No. 245 was read the second time by sections.

On motion of Senator Andrews, House Bill No. 245 was advanced to third reading.

On motion of Senator Andrews, the rules were suspended and the second reading of House Bill No. 245 considered the third.

The Secretary called the roll on the final passage of House Bill No. 245 and the bill passed the Senate by the following vote: Yeas, 32; nays, 2; absent or not voting, 12.

Those voting yea were: Senators Andrews, Bargreen, Barlow, Clark, Copeland, Cowen, Dahl, Dixon, Ganders, Gissberg, Greive, Hall, Happy, Hoff, Hofmeister, Knoblauch, Lennart, Luvera, McMullen, Pearson, Peterson, Rosellini, Roup, Ryder, Sears, Shannon, Todd, Wall, Washington, Wilson, Zahn, Zednick—32.

Those voting nay were: Senators Goodloe, Riley—2.

Those absent or not voting were: Senators Flanagan, Gallagher, Ivy, Jackson, Keefe, Lindsay, Nordquist, Nunamaker, Raugust, Rogers, Sutherland, Winberg—12.

House Bill No. 245, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

Engrossed House Bill No. 41, by Representatives Smith, Gallagher and Olson:

Changing delinquency period for payment of state taxes.

Engrossed House Bill No. 41 was read the second time by sections.

On motion of Senator Rosellini, Engrossed House Bill No. 41 was advanced to third reading.

On motion of Senator Rosellini, the rules were suspended and the second reading of Engrossed House Bill No. 41 considered the third.

The Secretary called the roll on the final passage of Engrossed House Bill No. 41, and the bill passed the Senate by the following vote: Yeas, 32; nays, 0; absent or not voting, 14.

Those voting yea were: Senators Andrews, Bargreen, Barlow, Clark, Copeland, Dahl, Dixon, Goodloe, Greive, Hall, Happy, Hoff, Hofmeister, Knoblauch, Lennart, Luvera, McMullen, Pearson, Peterson, Riley, Rosellini, Roup, Ryder, Sears, Shannon, Sutherland, Todd, Wall, Washington, Wilson, Zahn, Zednick—32.

Those absent or not voting were: Senators Cowen, Flanagan, Gallagher, Ganders, Gissberg, Ivy, Jackson, Keefe, Lindsay, Nordquist, Nunamaker, Raugust, Rogers, Winberg—14.

Engrossed House Bill No. 41, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

House Bill No. 546:

On motion of Senator Hoff, House Bill No. 546 held its place at the foot of today's calendar.

House Bill No. 373:

The Secretary read:

REPORT OF STANDING COMMITTEE

Senate Chamber,
Olympia, Wash., February 23, 1955.

MR. PRESIDENT:

We, your Committee on Labor and Industrial Insurance, to whom was referred House Bill No. 373, relating to costs of records and medical examinations required of employees and applicants for employment, have had the same under consideration, and we respectfully report the same back to the Senate with the recommendation that it do pass with the following amendment:

Amend Section 1, subsection (1), line 7, page 1 of the original bill, same being Section 1, subsection (1), line 2, page 1 of the printed bill, after the word "means" strike the balance of subsection (1) and insert in lieu thereof the following: "any common carrier by rail, doing business in or operating within the state, and any subsidiary thereof."

We concur in this report: R. C. Barlow, Lloyd J. Andrews, Andrew Winberg, Theodore Wilson, H. N. Jackson, Gerald G. Dixon, John N. Todd, Patrick D. Sutherland.

House Bill No. 373 was read the second time by sections.

On motion of Senator Dixon, the committee amendment was adopted.

1965 VERSION

Probate law and procedure. Wills. Agreement to convey does not revoke.

valuable consideration by a testator to convey any property, devised or bequeathed in any last will previously made, shall not be deemed a revocation of such previous devise or bequest, but such property shall pass by the devise or bequest, subject to the same remedies on such bond, covenant, or agreement, for specific performance or otherwise, against devisees or legatees, as might be had by law against the heirs of the testator or his next of kin, if the same had descended to him.

Devise or bequeathal of property subject to encumbrance.

SEC. 11.12.070 *Devise or Bequeathal of Property Subject to Encumbrance.* 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 or encumbrance.

No revival of will by revocation of later one.

SEC. 11.12.080 *No Revival of Will by Revocation of Later One.* If, after making any will, the testator shall duly make and execute a second will, the destruction, cancellation, or revocation of such second will shall not revive the first will.

Intestacy as to pretermitted children.

SEC. 11.12.090 *Intestacy as to Pretermitted Children.* If any person make his last will and die leaving a child or children or descendants of such child or children not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, as to such

child or children not named or provided for, shall be deemed to die intestate, and such child or children or their descendants shall be entitled to such proportion of the estate of the testator, real and personal as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part.

SEC. 11.12.110 *Death of Devisee or Legatee Before Testator.* When any estate shall be devised or bequeathed to any child, grandchild, or other relative of the testator, and such devisee or legatee shall die before the testator, having lineal descendants who survive the testator, such descendants shall take the estate, real and personal, as such devisee or legatee would have done in the case he had survived the testator; if such descendants are all in the same degree of kinship to the predeceased devisee or legatee they shall take equally, or, if of unequal degree, then those of more remote degree shall take by representation with respect to such predeceased devisee or legatee. A spouse is not a relative under the provisions of this section.

SEC. 11.12.120 *Lapsed Legacy or Devise—Procedure and Proof.* Whenever any person having died leaving a will which has been admitted to probate shall by said will have given, devised or bequeathed unto any person, a legacy or a devise upon the condition that said person survive him, and not otherwise, such legacy or devise shall lapse and fall into the residue of said estate to be distributed according to the residuary clause, if there be one, of said will and if there be none then according to the laws of descent, unless said legatee or devisee, as the case may be, or his heirs, personal representative, or someone in behalf of such legatee or devisee, shall appear before the court which is administering said estate within six years from and after the date th

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