

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
3/20/2020 4:12 PM  
BY SUSAN L. CARLSON  
CLERK

SUPREME COURT  
STATE OF WASHINGTON  
SUPREME COURT NO. 98189-2  
APPEALS COURT NO. 51576-8-II

---

In re Estate of  
GERALD IRWIN  
BARBARA KELLY,  
Petitioner,  
v.  
BARBARA IRWIN,  
Respondent.

---

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

---

March 20, 2020

Mindie Flemins  
Burns Law, PLLC  
524 Tacoma Ave. S.  
Tacoma, WA 98402  
(253) 507-5586  
Attorneys for *Respondents*

# TABLE OF CONTENTS

	<u>Page</u>
<b>I. REPLY STATEMENT OF THE CASE.....</b>	<b>1</b>
1.1 Factual History.....	1
1.2 Procedural History .....	1
<b>II. ARGUMENT .....</b>	<b>2</b>
2.1 Standard of Review.....	2
2.2 Statute Devising Property with Encumbrances.....	3
2.3 Case Law Requires Explicit Instruction.....	4
2.4 Intent of the Testator is Controlling.....	4
2.5 Courts Should Apply a Statute as Written.....	5
<b>III. ADDITIONAL REQUESTS FOR FEES.....</b>	<b>5</b>
<b>IV. CONCLUSION .....</b>	<b>6</b>
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

*Washington Cases:*

	<u>Page</u>
<u>Densley v. Dep't of Ret. Sys.</u> , 162 Wn.2d 210, 219, 173 P.3d 885, 889 (2007).....	5
<u>In re Estate of Campbell</u> , 87 Wn. App. 506, 514, 942 P.2d 1008, 1012–13 (1997).....	4
<u>In re Seago</u> , 82 Wn.2d 736, 739–40, 513 P.2d 831, 833 (1973).....	3
<u>Merriman v. Cokeley</u> , 168 Wn.2d 627, 631, 230 P.3d 162, 164 (2010)..17303, 901 P.2d 1074 (1995) .....	2

*Statutes:*

RCW 11.12.070 .....	3
RCW 11.12.230 .....	5
RAP 18.1 .....	5, 6

COMES NOW the Respondents, BARBARA IRWIN and GERALD IRWIN JR., (collectively “Irwin”) by and through their attorney Mindie Flemings of Burns Law, PLLC, and submit their Answer to Petition for Review to the Supreme Court as follows:

**I. REPLY STATEMENT OF THE CASE**

I.1 Gerald Irwin Sr. left Barbara Kelley a life estate in real property that was still encumbered by a mortgage. The residue of the estate was divided equally between his two children. After his death, Ms. Kelley continued to use money in the estate to pay the mortgage and make improvements on the home. The funds in the estate account were never disbursed to the heirs, but instead kept for Ms. Kelley’s personal gain.

I.2 Barbara Irwin, Mr. Irwin’s daughter, brought a petition to remove Ms. Kelley as personal representative of her father’s estate. The petition asserted that Ms. Kelley, as a devisee, took the life estate subject to the mortgage payments and continued maintenance on the property pursuant to RCW 11.12.070. Commissioner Zinn agreed, and ordered Ms. Kelley to pay the mortgage and maintenance on the property from her own funds and reimburse the estate. Ms. Kelley requested revision on the issue of the mortgage payment, and revision was denied. Ms. Kelley petitioned the court of appeals. The court of appeals affirmed the trial court. Ms.

Kelley now petition's this Court to rule on whether she should pay any of the underlying principal of the mortgage debt, or whether she should take the life estate subject only to the interest on the mortgage loan.

## II. ARGUMENT

2.1 This particular issue has been heard twice by the trial court, and once (plus revision denied) by the Court of Appeal. Great weight should be given to the courts below.

“An appellate court reviews a trial court's findings of fact for substantial evidence in support of the findings. *In re Marriage of Schweitzer*, 132 Wash.2d 318, 329, 937 P.2d 1062 (1997). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. *Bering v. SHARE*, 106 Wash.2d 212, 220, 721 P.2d 918 (1986). A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. *In re Marriage of Lutz*, 74 Wash.App. 356, 370, 873 P.2d 566 (1994). Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wash.2d 35, 42, 59 P.3d 611 (2002).” *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162, 164 (2010). Appellate tribunals “are not entitled to weigh either the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard. The trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. It is more capable of resolving questions touching upon both weight and credibility than we are. *In re Palmer*, 81

Wash.2d 604, 606, 503 P.2d 464 (1972).” In re Sego, 82 Wn.2d 736, 739–40, 513 P.2d 831, 833 (1973).

2.2 Washington State has a very clear statute pertaining to devise of encumbered property. It may not be what other states have chosen; however, it is not ambiguous.

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.

RCW 11.12.070

RCW 11.12.70 states “[w]hen any real or personal property subject to a mortgage is specifically devised, the devisee shall take such property so devised subject to such mortgage **unless the will provides that such mortgage be otherwise paid....**” 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.

2.3 The case law provides that such instruction (if given) must be explicit – not implicit. “[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).” The statute is clear, and the case law supports, the devisee takes subject to the mortgage unless Mr. Irwin Sr. provided otherwise. He did not. Ms. Kelley has been granted a life estate in such property, and in accepting such, she takes the property subject to its burdens and benefits.

2.4 Mr. Irwin selected the mortgage, he approved the terms of the mortgage, he was aware of the mortgage and its balance at the time he signed his will and at the time he died. The law assumes his knowledge and provides a clear statement as to the encumbrance “unless the will otherwise provided.” Id. For this Court to read words into a will that do not exist would be to negate the testator’s intent.

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.

2.5 This Court has ruled that It should assume the Legislature says what it means; and means what it says.

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).

### III. ADDITIONAL REQUEST FOR FEES

Respondent hereby renews her request for fees and costs.

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

\*\*\*

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing



party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d).

RAP 18.1


Respondent has been the one trying to hold Ms. Kelley accountable to fulfill her duties as Personal Representative and life estate holder. Ms. Kelley has created a very expensive battle while retaining all of the estate funds to pay her mortgage and attorneys. Respondent is entitled to recover her fees and costs. The Court of Appeals has remanded the decision for fees and costs back to the trial court. We request that this Court award Respondent her costs and fees in its Order denying Its reversal; or remand for further award by the trial court.

#### **IV. CONCLUSION**

When a will is clear and unambiguous, it is not the duty of the courts to add language or manufacture the testator's intent. When a statute is clear and unambiguous, it is not the duty of courts to rewrite the language or presume the intent of the Legislature. The Petitioner is asking this Court to do both. This petition for review involves a statute that clearly states the rule that the Legislature has chosen. To reverse the trial

court's finding will have the effect of re-writing the law. There is no erroneous statement of law in this case. The law was applied to the facts by each judicial officer that examined the case. Ms. Kelley has the option of accepting the life estate with all encumbrances, or walking away. The ruling of the trial court should stand.

RESPECTFULLY SUBMITTED this 20th day of March, 2020.

  
\_\_\_\_\_  
MINDIE FLEMINGS, WSBA No. 40010  
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify that on the 20<sup>th</sup> day of March, 2020, I caused a true and correct copy of *Respondent's Answer to Petition for Review*, to be served on the following to:

**Attorney for Petitioner:**

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

- |                                     |                             |
|-------------------------------------|-----------------------------|
| <input type="checkbox"/>            | Legal Messenger             |
| <input type="checkbox"/>            | US Mail                     |
| <input checked="" type="checkbox"/> | Electronic Mail             |
| <input checked="" type="checkbox"/> | E-Service via Supreme Court |
| <input type="checkbox"/>            | Facsimile                   |

DATED this 20<sup>th</sup> day of March, 2020, at Tacoma, Washington.

**BURNS LAW, PLLC**

By: Shelley Foster  
Shelley Foster, Paralegal

**BURNS LAW, PLLC**

**March 20, 2020 - 4:12 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 98189-2  
**Appellate Court Case Title:** In the Matter of the Estate of: Gerald Irwin Sr., Deceased.  
**Superior Court Case Number:** 17-4-00132-0

**The following documents have been uploaded:**

- 981892\_Answer\_Reply\_20200320160926SC365184\_4357.pdf  
This File Contains:  
Answer/Reply - Answer to Petition for Review  
*The Original File Name was Respondents Answer to Petition for Review.pdf*

**A copy of the uploaded files will be sent to:**

- dpm@lifetime.legal
- martin@mburnslaw.com
- mindie@wackerlaw.com
- stacias@lifetime.legal

**Comments:**

---

Sender Name: Shelley Foster - Email: shelly@mburnslaw.com

**Filing on Behalf of:** Mindie Flemins - Email: mindie@mburnslaw.com (Alternate Email: )

Address:  
524 Tacoma Ave S  
Tacoma, WA, 98402  
Phone: (253) 507-5586

**Note: The Filing Id is 20200320160926SC365184**