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Court of Appeals No. 58932-6-I

SUPREME COURT  
OF THE STATE OF WASHINGTON

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IN RE THE ESTATE OF PAMELA L. KISSINGER,  
LEONARD HOSS, Personal Representative,  
Respondent,

JOSHUA HOGUE,  
Appellant

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ANSWER TO PETITION FOR REVIEW  
CROSS-PETITION FOR REVIEW

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**A. IDENTITY OF RESPONDENT/CROSS PETITIONER**

Leonard Hoss, personal Representative of the Estate of Pamela Kissinger, Deceased and Respondent in the Court of Appeals asks this Court to deny Appellant's Petition for Review of the issues raised therein, and to grant review of the Court of Appeals decision terminating review designated in Part B of this Answer as to the new issues raised herein.

**B. COURT OF APPEALS DECISION**

Respondent/Cross-Petitioner (hereinafter Respondent) seeks review of the Court of Appeals Decision filed on December 3, 2007 and attached hereto as Appendix A and of the order denying motions for reconsideration filed on January 17, 2008 and attached hereto as Appendix B.

**C. ISSUES PRESENTED FOR REVIEW**

1. In defining the term "willful" as used in RCW 11.84.010, is the Court bound by the Legislature's express definition of this term in RCW 9A.08.010(4) and made applicable throughout the RCW by RCW 9A.04.090?

2. Since, as held by the Court of Appeals, the issue of whether a killing was willful for purposes of the slayer statute is one of fact, is this issue conclusively determined in Respondent's favor, eliminating the need for remand, by the trial court findings (which must be taken as verities on appeal) that:

4. In killing Pamela Kissinger, Joshua Hogue intentionally, knowingly and willfully killed a human being.

6. Notwithstanding his mental illness, Hogue subjectively knew he was killing a human being when he stabbed Pamela Kissinger, and he did so with premeditated intent. ?

**D. STATUTORY FRAMEWORK**

Like most states, Washington has enacted a “Slayer statute” to prevent a person who commits a homicide from inheriting or receiving any monetary benefit arising from the death of the decedent. RCW 11.84.020 sets out the Washington law on this issue:

No slayer shall in any way acquire any new property or receive any benefit as a result of the death of the decedent, but such property shall pass as provided in the sections following.

RCW 11.84.010 provides the definitions necessary to interpret this statute.

**11.84.010 Definitions.**

As used in this chapter:

- (1) “Slayer” shall mean any person who participates, either as a principal or an accessory before the fact, in the willful and unlawful killing of any other person.
- (2) “Decedent” shall mean any person whose life is so taken...
- (3) “Property” shall include any real and personal property and any right or interest therein.

In this case there is no question that Joshua Hogue participated as a principal in the killing of his mother Pamela Kissinger. Thus, the question as to whether he is barred from participating in the proceeds of the wrongful death and survival actions prosecuted as a result of his mother's death turns on whether her killing was "willful and unlawful" as defined by RCW 11.84.010.

**E. PROCEDURAL POSTURE OF CASE**

On June 23, 1999 Pamela Kissinger and her son James Zachary Kissinger were killed by Ms. Kissinger's eldest son Joshua Hoge. CP143. At the time of the killing, Joshua, who has a long history of chronic mental illness, was off his medication and actively psychotic. CP 143. Joshua was charged with two counts of first degree murder as well as one count of first degree of assault for assaulting another occupant of the house, under King County Cause No. 99-1-05527-2 SEA. On January 13, 2000 Joshua was found not guilty by reason of insanity of all of the criminal charges against him, and he was committed to Western State Hospital, where he remains. CP15-23.

Leonard Hoss is the Personal Representative of the estate of his sister, Pamela Kissinger. As a result of Ms. Kissinger's death, both wrongful death and surviving personal injury actions existed, which actions have been settled, subject to further order of the Court. The

settlement funds have been deposited in the Registry of the Superior Court in an interest-bearing account. The beneficiaries of the wrongful death and survival actions are determined by RCW 4.20.020, .046, and .060. Under these statutes, the only potential beneficiaries of these claims are Ms. Kissinger's remaining children, Joshua Hoge and Justin Hoge.

Leonard Hoss petitioned the court pursuant to RCW 11.96A.090 for a determination of the statutory beneficiary(ies) of these wrongful death and survival actions, so that arrangements can be made to disburse the settlement funds upon approval of the Court. Petitioner asked the Court for a determination that Joshua Hogue is prohibited from sharing in the settlement of the lawsuit arising from the death of his mother, who he killed, by operation of Washington's slayer statute, RCW 11.84.010ff. CP 70-81.

A hearing was held on this matter in the Superior Court with the facts presented on the basis of the stipulated admission of documentary evidence. CP 1-69, 94-134. Included in this evidence were extensive psychiatric evaluations conducted at the request of both the prosecutor and defense attorney in the criminal case as well as numerous police reports describing Joshua's statements and conduct immediately after and in the days following the killings. Also included was the criminal Trial Court's order finding Defendant not Guilty by Reason of Insanity. CP15.

After consideration of this evidence and hearing evidence, the trial court issued Findings of Fact and Conclusions of Law and an Order determining that Joshua Hogue was barred by RCW 11.84.020 from participating in the proceeds of the wrongful death action arising out of the death of Pamela Kissinger. CP 142-144, Appendix C.

Joshua Hogue appealed from this order. In his appeal, he did not assign error with regard to five of the seven findings of fact. App.Br. ii. In his appellate brief, he presented neither a factual basis nor any argument as to why the two findings of fact to which he assigned error were not supported by substantial evidence, and in fact there was an abundance of evidence to support these findings. See Resp. Br. 4-9.

**F. ARGUMENT WHY REVIEW OF ISSUES RAISED BY APPELLANT SHOULD BE DENIED**

**1. The question of whether a crime committed while legally insane is nonetheless unlawful has been definitively answered by this Court in *State v. Box*, 109 Wash.2d 320, 745 P.2d 23 (1987). No reason is given by Appellant to reconsider this decision.**

The Court of Appeals herein held that, “As a matter of law, a homicide is an unlawful act unless it is excusable or justifiable. The criminal code defines what defenses make a homicide lawful and insanity is not one of them.” This resort to legislative definition of the nature of the crimes of homicide to determine which may be lawful under the criminal code is correct, and has been expressly approved by this Court. The

legislature has expressly declared what killings are lawful. Thus, under RCW 9A.32.010, “homicide is the killing of a human being by the act... of another... and is either (1) murder, (2) homicide by abuse, (3) manslaughter, (4) excusable homicide, or (5) justifiable homicide.” Thus, with a few narrow and expressly stated and defined exceptions, all killing of a human being by another is “unlawful” under Washington law. See also RCW 9A.16.020 (use of force – when lawful), 9A.16.030 (homicide – when excusable) and 9A.16.050 (homicide – by other person – when justifiable). Our criminal code itself defines what defenses make a homicide “lawful”. Insanity is not one of them.

Appellant makes the bald assertion that, “A person who has been found not guilty due to self defense is in the same position as a person found not guilty by reason of insanity.” Pet. Rev. at 8. He argues that an insanity acquittal somehow renders the killing lawful. It is practically breathtaking that Appellant can urge these views, unsupported by any authority, and fail to even mention *State v. Box*, supra. This case not only holds directly to the contrary of Appellant’s position, but explains at length the legal difference between self defense and insanity.

The question in *Box* was whether the allocation of the burden of proof of insanity to the defendant by a preponderance was constitutional. The defendant argued that, since sanity was necessary to

proving the *mens rea* necessary to make an act criminal, it was an element of the offense which must be proved by the prosecution beyond a reasonable doubt.

The court reaffirmed its earlier holding in *State v. McDonald*, 89 Wn.2d 256, 571 P. 2d 930 (1977) that sanity is not an element of a criminal offense. *Id.* at 328. The court then went on to compare insanity as a defense with self defense. Because of the statute cited above concerning justification, self defense has been held to negate the *mens rea* of First Degree Murder, because self defense is defined as a lawful act. RCW 9A.16.020(3); *Box*, *supra*, at 329. Likewise, the court noted that self defense negates *mens rea* of crimes requiring “knowledge” as defined above.

The court then went on to distinguish that situation from the insanity defense:

By contrast, committing an act under an insane impulse **does not make that act lawful**. Rather, if a claim of insanity is raised, once the elements of murder are proved, the defendant’s inability to distinguish right from wrong is examined in an attempt to determine his or her culpability for the murder.

*Box*, *supra*, at 329 (Emphasis added.). It is hard to imagine a more direct refutation of Appellant’s position

The court then went on to hold that the defense of insanity does not negate the element of premeditation any more than it does intent, stating

The defendant cites no case law for his contention that an insane person cannot premeditate an act. We do not believe that legal insanity precludes thinking beforehand about an act, even though such thoughts may be confused or irrational.

Id. at 330.

It is thus plain that Appellant is absolutely wrong in his statement that a person found not guilty by reason of insanity cannot be seen to have acted unlawfully. This Court has twice held the exact opposite. In Washington, unlike in California and other states that hold that insanity negates the mens rea of a crime, it is clear that insane persons are capable of acting “unlawfully.” See, In Re: Estates of Ladd, 91 Cal. App. 3d, 219, 153 Cal. Rptr. 888 (1979).

It may be true that Hogue was confused by his mental illness as to whom he was killing or even why. However, there is simply no evidence in the record to indicate that he did not subjectively believe he was killing human beings and that he did so in an intentional and premeditated fashion. The trial court’s Finding of Fact to that effect is supported by

substantial evidence. The killing of Pamela Kissinger was certainly unlawful.

**2. Appellant's equal protection argument raises no significant constitutional questions.**

Appellant's argument with regard to equal protection is raised for the first time in this Petition for Review, and should not be considered *Potter v. Washington State Patrol*, 161 Wash.2d 335, 166 P.3d 684 (2007); *Washington Osteopathic Medical Ass'n v. King County Medical Service*, 78 Wash.2d 577, 478 P.2d 228 (1970).

Even if the merits are reached, again this question has already been answered by this Court in *Box, supra*. While insanity does not negate any element of the criminal offense, self defense does. *Box, supra*, at 328-30. Thus there is a very good reason to treat persons found not guilty on the basis of self defense different than insanity acquittees. Furthermore, an acquittal on the basis of self defense does not itself make the slayer's statute inapplicable. The person asserting the statute could still prove the absence of self defense as a matter of fact, and prevail in obtaining the application of the statute. *Cook v. Gisler*, 20 Wash.App. 677, 683, 582 P.2d 550 (1978); *Leavy, Taber, Schultz & Bergdahl v. Metropolitan Life Ins. Co.*, 20 Wash.App. 503, 507, 581 P.2d 167 (1978).

**G. ARGUMENT WHY REVIEW SHOULD BE GRANTED TO CONSIDER WHETHER THE HOMICIDE HERE WAS A “WILLFUL” KILLING UNDER THE SLAYER STATUTE**

1. The Court of Appeals decision conflicts with the legislature’s own definition of “willful”, and raises an issue of substantial public importance which must be decided by this Court in light of the Court’s earlier holding in *New York Life Insurance v. Jones*, 86 Wash.2d 44, 47, 541 P.2d 989 (1975).

The Court of Appeals expressly relied on this Court’s holding in *New York Life Insurance v. Jones* for its definition of “willfully” as “intentionally and designedly”. This opinion was entered before the passage of the 1976 criminal code, which provided a statutory definition for the term “willful”. The legislature’s definition of this term governs this situation, as is clear under Washington jurisprudence of statutory construction.

When the legislature defines a statutory term by further specific legislation, courts are bound to follow that definition. *State v. Watson*, 146 Wn.2d. 947, 954, 51 p.3d 66 (2002). This Court itself recognized this in *New York Life v. Jones, supra*. Thus, the Court began its discussion as follows. “Words of a statute not particularly defined are to be given their ordinary, everyday meaning. If the legislature uses a term well known to the common law, it is presumed that the legislature intended it to mean

what it was understood to mean at common law.” *Id.* at 47. (Emphasis added.)

Thus the Court recognized that it was only the fact that the term “willful” was not given a statutory meaning that allowed resort to common law definitions. At common law the term willful had different and shifting meanings, both in a civil and criminal context. In addition to *State v. Russell*, 73 Wash.2d 903, 442 P.2d 988 (1968); and *State v. Spino*, 61 Wash.2d 246, 377 P.2d 868 (1963), cited by the Supreme Court in *NY Life v. Jones*, see also, *Adkisson v. City of Seattle*, 42 Wash.2d 676, 258 P.2d 461 (1953), *Stevens v. Murphy*, 69 Wash.2d 939, 421 P.2d 668 (1966); and *State v. James*, 36 Wash.2d 882, 221 P.2d 482 (1950) .

In 1976 the Legislature completely re-drafted the criminal code. Included in the code for the first time were statutory definitions of criminal mental states. RCW 9A.08.010. At this time the legislature clearly expressed its intention that these definitions be used whenever discussing criminal offenses, thus eliminating the proliferation of multiple definitions of culpable mental states:

**9A.04.090. Application of General Provisions of the Code.** The provisions of Chapter 9A.04 through 9A.28 RCW of this Title are applicable to offenses defined by this Title **or another statute**, unless this Title or such other Title **specifically provides otherwise**. (Emphasis added.)

Included in these definitions was for the first time a statutory definition of “willfulness” in RCW 9A.08.010 (4):

**(4) Requirement of Willfulness Satisfied by Acting Knowingly.** A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

Knowledge is further defined in the criminal code:

**KNOWLEDGE.** A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in same situation to believe that facts exist which facts are described by a statute defining an offense

RCW 9A.08.010(1)(b).

Nothing in the “Slayer Statutes” specifically provides another definition of “willful”. Thus the definition given in RCW 9A.08.040 (4) applies, by the clear language of the statutes. While this definition is different than the one chosen by this Court in *NY Life v. Jones*, the Court there itself recognized that its choice at that time was solely permitted by

the fact that the legislature had not provided a definition, and that under that circumstance the legislature is presumed to mean the common law definition.

This emphasizes the key point. It is the meaning given to statutory terms by the legislature that governs. “A court's ‘fundamental objective in construing a statute is to ascertain and carry out the legislature's intent.’” *Qwest Corp. v. City of Bellevue*, 161 Wash.2d 353, 166 P.3d 667 (2007). If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself. *Berger v. Sonneland*, 144 Wash.2d 91, 26 P.3d 257 (2001). It should be remembered in this regard that the legislature has declared that RCW Ch.11.84 “shall be construed broadly to effect the policy of this state that no person shall be allowed to profit by his own wrong, wherever committed.” RCW 11.84.900

Also supporting petitioner's position herein is *City of Spokane v. White*, 102 Wash.App.955, 10 P.3d 1095 (2000), *rev.den.* 143 Wn.2d 1011, 21 P.3d 291 (2001). There the court undertook in the context of an assault prosecution, the analysis of the difference between intent and willful under Washington law. As defined in RCW 9A.08.040 (4), the court found that willfully equates with knowingly. Knowingly is a less serious form of mental culpability than intent. *State v. Thomas*, 98 Wash. App. 422, 425, 989 P.2d 612 (1999).

This Court's adoption of a common law definition of willful in *NY Life v. Jones* was appropriate only because there was no statutory definition before 1976. Afterward, under the cases cited above, the courts are bound to the definition chosen by the Legislature.

Division 3 of the Court of Appeals followed that rule in deciding *Leavy, Taber, Schultz and Bergdahl v. Metropolitan Life Ins. Co.* 20 Wn. App.503, 581 P.2d 167 (1978) after the enactment of Title 9A. In that case, a wife killed her husband. Although she was charged with second degree murder, she was convicted of manslaughter. The court noted that a killing by manslaughter is certainly unlawful, but nonetheless considered the question of whether it was "willful" as defined by the statute. The court pointedly noted that, unlike nearly all of the statutes considered in other jurisdictions, "the word 'intent' is not used in the Slayers Act". *Id* at 506. The court held that there was nothing about the nature of manslaughter that precluded a death by manslaughter from being willful in the sense of the statute. The court's holding that an unintentional killing can still be willful, rendering the killer a "slayer" in the sense meant by the Slayer Statutes, is the correct result under the clear statutory definitions.

The trial Court concluded that the killing of Pamela Kissinger was willful by utilizing the definition established by the Legislature in RCW 9A.08.010 (4), as required by the mandate of RCW 9A.04.090. CP 143.

The reversal of this Conclusion of Law by the Court of Appeals herein was solely based on this Court's holding in *New York Life Ins. v. Jones, supra*. This Court should accept review and recognize the legislatively mandated definition of willful, which in effect overrules this Court's holding in *Jones*. Only this Court can make this decision, and it is appropriate that it do so.

3. **The killing herein was "willful", under any definition.**

The Court of Appeals ordered this matter remanded to the trial court for a determination as a matter of fact as to whether Joshua Hogue acted "intentionally and designedly" when he killed his mother Pamela Kissinger. However, the trial Court has already made these factual determinations in findings of fact that are amply supported by the evidence. The Court of Appeals opinion never mentions the trial Court's Findings of Fact or their implications for the determination of this appeal.

In support of their respective positions, the parties hereto stipulated to the admission of various documentary evidence. CP 15-69, 95-134. From this documentary evidence, the trial court entered seven Findings of Fact. Five of these Findings of Fact were unchallenged by the Appellant herein, and are taken as verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Appendix C, Findings of Fact 1-3,5,7.

The Appellant herein did assign error to the trial court's Findings of Fact Nos. 4 and 6, which read as follows:

4. In killing Pamela Kissinger, Joshua Hogue intentionally, knowingly and willfully killed a human being.

6. Notwithstanding his mental illness, Hogue subjectively knew he was killing a human being when he stabbed Pamela Kissinger, and did so with premeditated intent.

CP 143.

However, with regard to Finding of Fact No. 4, Appellant's Brief and Argument were directed solely to the supposedly conclusive effect of the finding of criminal insanity itself on the question of whether Joshua Hogue acted willfully and unlawfully when he killed his mother Pamela Kissinger. No factual analysis was undertaken. Likewise, other than the naked statement in Appellant's Assignment of Error No. 3, Appellant makes no argument and refers to nowhere in the record to support the assertion of error by the trial court in Finding No. 6 that Joshua Hogue subjectively knew he was killing a human being when he stabbed Pamela Kissinger, and that he did so with premeditated intent.

It is incumbent on counsel to present the Court with argument as to why specific findings of the trial court are not supported by the evidence, and to cite to the record to support that argument. *Matter of*

*Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). Where no such argument and citation to the record are made, the findings will be treated as verities, as are unchallenged findings. *In Re: Inland Foundry Company, Inc. v. Dept. of Labor and Industries*, 106 Wn.App. 333, 340, 24 P.3d 424 (2001).

While Finding of Fact number 4 may be a mixed finding of Law and Fact, Appellant here has made no argument and no citations to the record indicating why the Court's Finding of Fact No. 6 is in error. Accordingly, that finding should be accepted by this Court as a verity on appeal. For purposes of this appeal, the Court should accept as true that Hogue knew he was killing a human being when killing Pamela Kissinger, and did so with premeditated intent.

However, even if this Court should consider Appellant's challenge to Finding of Fact No. 6, it is clear that there are no grounds for asserting error with that finding. In an estate case, the Appellate Court reviews Findings of Fact for substantial evidence in support thereof. *In Re: Estate of Kessler*, 95 Wn.App. 358, 369, 977 P.2d 591 (1999). Where there is conflicting evidence, the reviewing court need only determine whether the evidence most favorable to the responding party supports the challenged findings. Id.

In this case, the evidence is overwhelming if not completely uniform in support of the Court's Finding of Fact No. 6. In the Order finding Joshua Hogue not guilty by reason of insanity, Mr. Hogue, who was then competent to stand trial, stipulated that he committed the acts with which he was charged, including Aggravated Murder in the First Degree for causing the death of Pamela Kissinger "with premeditated intent to cause the death of another person." CP. 16. Mr. Hogue personally signed this stipulation. CP. 17. Based on that stipulation the Court found that he committed the acts constituting Aggravated Murder in the First Degree with respect to Pamela Kissinger by stabbing her "intentionally and with premeditation." CP 18-19. In Finding of Fact No. 5 the criminal court found that the defendant killed Pamela and James Kissinger "in the manner described in the preceding finding." CP 19.

When questioned by Detective Jon M. Mattsen within hours of the killing, Hogue indicated that the people in the house died by a butcher knife. When asked who he stabbed first, he indicated that it was Zach. He then stated that he stabbed Pam who was his mom. He indicated that he did so because, "she was trying to warn Walt." He told the detective that he stabbed his mother in the back. CP 12.

Commission of a crime with premeditated intent satisfies the most stringent standard of proof of *mens rea* available under Washington

law. Whatever standard is used to define “willful”, a killing that is committed “intentionally, knowingly and willfully” by a person who “subjectively knew he was killing a human being”, and was accomplished “with premeditated intent” would have to satisfy the standard of willfulness.

There thus is no reason to remand this matter to the trial Court for another hearing. The fact-finding hearing contemplated by this Court has already occurred. Although the Court’s findings were based on documentary evidence, this was at the choice of the parties. Both stipulated to the admissibility of certain evidence and that the Court could base its findings thereon. Since the Court’s findings are amply supported by the evidence, and in turn by necessity support a finding of “willfulness”, there simply is no reason to grant appellant “another bite of the apple”.

Where a judgment or order is correct, it will not be reversed merely because the trial court gave the wrong reason for its rendition. *Ertman v. City of Olympia*, 95 Wash.2d 105, 108, 621 P.2d 724 (1980). Here it is plain that the killing of Pamela Kissinger was “willful” under any reasonable definition. This Court should accept review and remand this matter to the Trial Court for entry of judgment in accordance with the trial court’s order.

## CONCLUSION

This proceeding was brought to determine under the clear language of the legislature, whether a person such as Mr. Hogue should obtain money from a wrongful death suit brought on account of the death of the people he killed. While the state has determined it is inappropriate to punish Mr. Hogue for this killing, that does not necessarily mean that he should be enriched by it. This matter is a simple one of defining statutory language. This task is made even simpler by the fact that the legislature has provided the necessary definitions. The trial court correctly determined that the killing of Pamela Kissinger by Joshua Hogue was willful and unlawful. Under the mandatory language of RCW 11.84.020, Hogue is properly disqualified from recovering from the proceeds of the wrongful death claim arising out of her death.

Dated this 21st day of March, 2008.

Respectfully submitted:



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Mark Leemon  
Attorney for Plaintiff

## APPENDIX A

Estate of **Kissinger v. Hoge**  
Wash.App. Div. 1, 2007.

Court of Appeals of Washington, Division 1.  
In re the ESTATE OF Pamela L. **KISSINGER**;  
Leonard Hoss, Personal Representative, Respondent,  
v.  
Joshua **HOG**E, Appellant.  
**No. 58932-6-I.**

Dec. 3, 2007.

**Background:** The Superior Court, King County, Dean S. Lum, J., held that slayer statute prohibited son from sharing in proceeds of wrongful death settlement arising from death of his mother, who he killed. Son appealed.

**Holdings:** The Court of Appeals, Grosse, J., held that:

(1) homicide was unlawful under slayer statute, but  
(2) homicide was willful under slayer statute only if it was committed "intentionally and designedly," not if it met definition of "willfulness" under criminal code.

Remanded.

West Headnotes

**[1] Descent and Distribution 124 ↪51**

124 Descent and Distribution

124II Persons Entitled and Their Respective Shares

124II(A) Heirs and Next of Kin

124k49 Disqualification to Take

124k51 k. Causing or Procuring Death of Intestate. Most Cited Cases

A slayer found not guilty by reason of insanity does not, ipso facto, act in a non-willful manner for purpose of determining whether slayer may inherit from victim. West's RCWA 9A.04.090, 9A.08.010(4), 11.84.020.

**[2] Descent and Distribution 124 ↪51**

124 Descent and Distribution

124II Persons Entitled and Their Respective Shares

124II(A) Heirs and Next of Kin

124k49 Disqualification to Take

124k51 k. Causing or Procuring Death of Intestate. Most Cited Cases

A criminal conviction is not a sine qua non to application of the slayer's act, since the slayer statute is not penal. West's RCW 11.84.020.

**[3] Homicide 203 ↪750**

203 Homicide

203VI Excusable or Justifiable Homicide

203VI(A) In General

203k750 k. In General. Most Cited Cases

A homicide is an unlawful act unless it is excusable or justifiable. West's RCWA 9A.08.010.

**[4] Descent and Distribution 124 ↪51**

124 Descent and Distribution

124II Persons Entitled and Their Respective Shares

124II(A) Heirs and Next of Kin

124k49 Disqualification to Take

124k51 k. Causing or Procuring Death of Intestate. Most Cited Cases

Homicide of mother by son was "unlawful," as would support his disqualification from sharing in wrongful death settlement under slayer statute, even though son was found not guilty by reason of insanity. West's RCW 11.84.020.

**[5] Descent and Distribution 124 ↪51**

124 Descent and Distribution

124II Persons Entitled and Their Respective Shares

124II(A) Heirs and Next of Kin

124k49 Disqualification to Take

124k51 k. Causing or Procuring Death of Intestate. Most Cited Cases

Homicide is "willful" under slayer statute, as would support disqualifying killer from sharing in wrongful death settlement, if homicide is committed

“intentionally and designedly,” not if homicide meets definition of willfulness set forth in the criminal code. West's RCWA 9A.08.010(4), 11.84.020.

**\*\*956** Jean Ann O'loughlin, Attorney at Law, Tacoma, WA, for Appellant.

Mark Leemon, Leemon & Royer PLLC, Seattle, WA, for Respondent.

**\*\*957** GROSSE, J.

[1]\*77 ¶ 1 Our state's slayer statute has been interpreted to not prevent a non willful slayer from inheriting. However, a slayer found not guilty by reason of insanity does not, ipso facto, act in a non-willful manner. Under the slayer statute a slayer must act with intent and design. In contrast, the insanity defense encompasses acts in which the slayer can intentionally kill without necessarily understanding the consequences and the traditional test of being unable to perceive the nature and quality of the act committed. The trial court must determine whether the delusions suffered by Joshua Hoge are such that he did not designedly and intentionally kill his mother and stepbrother. Here, the trial court determined that Hoge acted willfully using the modern criminal code's definition of willful, which requires nothing \*78 more than knowledge. Hence, we must remand to the trial court to apply the appropriate legal standard to the facts.

### FACTS

¶ 2 On June 23, 1999, Pamela Kissinger and her son, James Zachary Kissinger, were killed by Kissinger's eldest son, Joshua Hoge. Hoge was charged with two counts of first degree murder and one count of first degree assault (for assaulting another occupant of the house). On January 13, 2000, Hoge was found not guilty by reason of insanity. He was committed to Western State Hospital where he remains.

¶ 3 Hoge has a long history of serious mental illness. He has been in and out of mental institutions since he was a teenager and has been diagnosed with chronic paranoid Schizophrenia. Hoge has also been diagnosed with Capgras syndrome, a psychotic illness in which a person believes certain people in his life are imposters. The Capgras syndrome was the possible motivating factor in his killing of his mother and half brother.

¶ 4 The stipulated facts included a portion of the

psychiatric evaluation by Dr. Gregory Leong, the State appointed expert in the murder case. The evaluation noted that paranoid themes dominated Hoge's delusions and this paranoia included a longstanding misidentification delusion that his mother had “been replaced by a physically identical ... individual. This delusionally held Capgras object is viewed ... with a combination of hostility and fear.”

¶ 5 The trial court here concluded as a matter of law that Hoge killed Kissinger willfully under the modern criminal code definition of that term.<sup>FN1</sup> The trial court further concluded that the killing was unlawful as it was a homicide and neither justifiable nor excusable. Based on those conclusions, the trial court held the slayer statute prohibited \*79 Hoge from sharing in the proceeds of the settlement of the wrongful death claim arising from the death of Kissinger. Hoge appeals alleging that the killing was neither unlawful nor willful.

FN1.RCW 9A.04.090 and 9A.08.010(4).

### ANALYSIS

¶ 6 Washington's slayer statute is designed to prevent a slayer who commits a homicide from acquiring any property or receiving any benefit resulting from the death of the decedent.<sup>FN2</sup> A slayer is defined as “any person who participates, either as a principal or an accessory before the fact, in the *willful and unlawful* killing of any other person.”<sup>FN3</sup> In such cases, the slayer is deemed to predecease the decedent and is thus ineligible to share in the proceeds of the decedent's estate.

FN2.RCW 11:84.020.

FN3.RCW 11.84.010.

[2] ¶ 7 By its terms, the statute requires proof that the slaying was both willful and unlawful. Hoge argues that the determination of not guilty by reason of insanity completely absolves him of any criminal liability. That may be true, but “[a] criminal conviction is not a sine qua non to application of the slayer's act.”<sup>FN4</sup> The slayer statute is not penal. It is to be construed broadly to effect \*\*958 the state's policy that no person shall be allowed to profit by his own wrong-doing.<sup>FN5</sup>

FN4. *Leavy, Taber, Schultz & Bergdahl v. Metropolitan Life Ins. Co.*, 20 Wash.App. 503, 507, 581 P.2d 167 (1978).

FN5. RCW 11.84.900.

[3][4] ¶ 8 As a matter of law, a homicide is an unlawful act unless it is excusable or justifiable.<sup>FN6</sup> The criminal code defines what defenses make a homicide lawful and insanity is not one of them.<sup>FN7</sup> Thus, the killing of Kissinger is unlawful for purposes of the slayer statute.

FN6. *Cook v. Gisler*, 20 Wash.App. 677, 683, 582 P.2d 550 (1978).

FN7. RCW 9A.32.010 ("Homicide is the killing of a human being by the act ... and is either (1) murder, (2) homicide by abuse, (3) manslaughter, (4) excusable homicide, or (5) justifiable homicide.").

[5]\*80 ¶ 9 Hoge argues that his act cannot be deemed willful because he could not form the requisite intent. In *New York Life Insurance v. Jones*,<sup>FN8</sup> the Supreme Court defined willfully for purposes of the slayer statute to mean "intentionally and designedly." The court stated:

FN8. 86 Wash.2d 44, 47, 541 P.2d 989 (1975).

Willfully means intentionally and designedly. *State v. Russell*, 73 Wash.2d 903, 442 P.2d 988 (1968); *State v. Spino*, 61 Wash.2d 246, 377 P.2d 868 (1963); *Webster's Third New International Dictionary* 2617 (1968). See 45 *Words and Phrases* 313-28 (perm. ed.1970). The authorities collected there show that this meaning attaches to the word, whether it is used in civil or criminal statutes.<sup>FN9</sup>

FN9. *Jones*, 86 Wash.2d at 47, 541 P.2d 989.

The court held that a plea of guilty to second degree felony murder is sustainable without proof that the killing was intentional. Therefore, a plea of guilty to such a charge did not admit that the killing was willful. However, in holding summary judgment

inappropriate, the court noted that the secondary beneficiaries were still entitled to show that the slayer intended to kill the person she had assaulted. In making such a showing, the beneficiaries would be "aided by the presumption that a person is presumed to have intended the usual and ordinary consequences of his acts."<sup>FN10</sup> The *Jones* court has established a mens rea requirement for the slayer statute. The question then is to what extent Hoge's "insanity" interfered or prevented him from forming the intent to kill. On this limited record we simply cannot tell.

FN10. *Jones*, 86 Wash.2d at 48, 541 P.2d 989. We note the apparent inconsistency between this later dicta and the court's holding.

¶ 10 Here, the trial court applied the definition of willfulness set forth in the modern criminal code rather than the standard enunciated by the Supreme Court in *Jones*. The criminal code defines willfulness:

Requirement of Willfulness Satisfied by Acting Knowingly. A requirement that an offense be committed willfully is satisfied if \*81 a person acts knowingly-with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.<sup>FN11</sup>

FN11. RCW 9A.08.010(4).

Knowledge is further defined in the criminal code: KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in same situation to believe that facts exist which facts are described by a statute defining an offense.<sup>FN12</sup>

FN12. RCW 9A.08.010(1)(b).

¶ 11 Under the modern criminal code, one who acts willfully may in fact have acted with less mens rea than one who acts with design and intent. As the law of this state, the Supreme Court's definition of

willfully in *Jones* is the applicable standard. We are then left with the question of the degree to which Hoge's delusion prevented him from forming the intent to kill. This factual determination is best left to the trial court and further psychiatric evidence. Therefore, we \*\*959 remand for further proceedings in accordance with this decision.

WE CONCUR: DWYER and ELLINGTON, JJ.  
Wash.App. Div. 1, 2007.  
Estate of Kissinger v. Hoge  
142 Wash.App. 76, 173 P.3d 956

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## APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

IN RE THE ESTATE OF PAMELA L. )  
KISSINGER; LEONARD HOSS, )  
Personal Representative, )

No. 58932-6-1

Respondent, )

ORDER DENYING MOTIONS  
FOR RECONSIDERATION

v. )

JOSHUA HOGE, )

Appellant. )

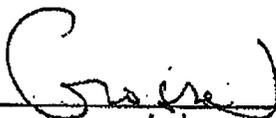
The appellant and respondent have filed motions for reconsideration herein. The court has taken the motions under consideration and has determined that both should be denied.

Now, therefore, it is hereby

ORDERED that the motions for reconsideration are denied.

Done this 17<sup>th</sup> day of January, 2008.

FOR THE COURT:

  
\_\_\_\_\_  
Judge

FILED  
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STATE OF WASHINGTON  
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## APPENDIX C

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IN THE SUPERIOR COURT OF KING COUNTY  
FOR THE STATE OF WASHINGTON

IN RE THE ESTATE OF:

PAMELA L. KISSINGER,  
  
DECEASED.

No. 00-4-01632-5 SEA

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER ON PETITION  
FOR DETERMINATION OF  
STATUTORY BENEFICIARY(IES)

THIS MATTER having come before the undersigned judge of the above-entitled Court on motion by Leonard Hoss as Personal Representative of the Estate of Pamela Kissinger, deceased, for a determination of the beneficiary or beneficiaries of the proceeds of the wrongful death claim filed herein, Leonard Hoss appearing through his attorney Mark Leemon, and Joshua Hoge appearing by and through his attorney Jean O'Laughlin, and it appearing that proper notice of this proceeding having been served on Justin Hoge and Joshua Hoge, sole potential beneficiaries of the Estate of Pamela Kissinger, and the Court having before it the Petition of Hoss along with supporting documents, the response on behalf of Joshua Hoge, the reply of Hoss, the stipulation of counsel as to the facts applicable to the determination of this matter, and the records and files herein, and being further fully advised; now, therefore, the Court does hereby enter the following:

ORDER DETERMINING STATUTORY  
BENEFICIARY(IES) --1

Leemon  
+ Royer  
LLC

2505 Second Avenue, Suite 610, Seattle, WA 98121  
Phone 206 269-1100 Fax 206 269-

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**FINDINGS OF FACT**

1. On June 23, 1999, Joshua F. Hoge (Hoge), DOB 10/30/70 killed the deceased Pamela Kissinger, his natural mother, by stabbing her in the back with a butcher knife.
2. At approximately the same time and the same place and just prior to the stabbing of Pamela Kissinger, Hoge killed James Zachary Kissinger, his half brother, by stabbing him numerous times with a butcher knife.
3. At approximately the same time and the same place and shortly after the stabbing of Pamela Kissinger he attempted to kill Walter Williams by striking him in the head with an axe.
4. In killing Pamela Kissinger, Joshua Hoge intentionally, knowingly and wilfully killed a human being.
5. Hoge was psychotic and delusional at the time he killed Pamela Kissinger.
6. Notwithstanding his mental illness, Hoge subjectively knew he was killing a human being when he stabbed Pamela Kissinger, and did so with premeditated intent.
7. Hoge did not act in reasonable self defense in killing Pamela Kissinger.

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**CONCLUSIONS OF LAW**

1. In accordance with RCW 9A.04.090 and 9A.08.010 (4) Hoge killed Pamela Kissinger willfully as described in RCW 11.84.010(1).
2. The killing of Pamela Kissinger by Hoge, having been committed with premeditated intent, was neither justifiable homicide nor excusable homicide, but constituted aggravated murder in the first degree and was unlawful.

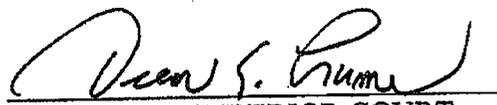
- 1 3. The insanity of Hoge at the time he killed Pamela Kissinger does not negate the *mens*  
2 *rea* necessary to make that killing unlawful. *State v. McDonald*, 89 Wn.2d 256, 571  
3 P.2d (1977). overruled on other grounds, *State v. Sommerville*, 111 Wn.2d 524, 760  
4 P.2d 932 (1988); *State v. Box*, 109 Wash.2d 320, 745 P.2d 23 (1987).  
5  
6 4. Joshua Hoge willfully and unlawfully killed Pamela Kissinger, the deceased sister of  
7 the Personal Representative herein, and is a slayer within the meaning of RCW  
8 11.84.010(1).

9 BASED ON the above Findings of fact and Conclusions of Law, the court hereby enters the  
10 following:

11 **ORDER**

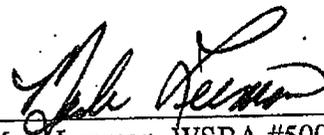
12 IT IS HEREBY ORDERED that the provisions of RCW 11.84.020 apply to  
13 prohibit Joshua Hoge from participating in the proceeds of the settlement of the  
14 wrongful death claim arising from the death of the decedent Pamela Kissinger.  
15

16  
17 DONE IN OPEN COURT this 11 day of September, 2006.

18  
19   
20 JUDGE of the SUPERIOR COURT

21 Presented by:  
22 Leemon + Royer, PLLC

Copy Received, Notice of Presentation  
Waived:

23  
24   
25 Mark Leemon, WSBA #5005  
26 Attorney for Leonard Hoss

27   
28 Jean O'Laughlin, WSBA #14756  
29 Attorney for Joshua Hoge  
30 e-mail  
authorization  
9/11/06

ORDER DETERMINING STATUTORY  
BENEFICIARY(IES) - 3

Leemon  
+ Royer  
PLLC

2505 Second Avenue, Suite 600  
Phone 206 269-1100 Fax:

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## APPENDIX D

WEST'S REVISED CODE OF WASHINGTON ANNOTATED  
TITLE 9A. WASHINGTON CRIMINAL CODE  
CHAPTER 9A.04. PRELIMINARY ARTICLE

**→9A.04.090. Application of general provisions of the code**

The provisions of chapters 9A.04 through 9A.28 RCW of this title are applicable to offenses defined by this title or another statute, unless this title or such other statute specifically provides otherwise.

Current through Chapter 5 of the 2008 Regular Session

WEST'S REVISED CODE OF WASHINGTON ANNOTATED  
TITLE 9A. WASHINGTON CRIMINAL CODE  
CHAPTER 9A.08. PRINCIPLES OF LIABILITY

→9A.08.010. **General requirements of culpability**

(1) Kinds of Culpability Defined.

(a) INTENT. A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

...

(2) Substitutes for Criminal Negligence, Recklessness, and Knowledge. When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

...

(4) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

WEST'S REVISED CODE OF WASHINGTON ANNOTATED  
TITLE 9A. WASHINGTON CRIMINAL CODE  
CHAPTER 9A.32. HOMICIDE

**→9A.32.010. Homicide defined**

Homicide is the killing of a human being by the act, procurement, or omission of another, death occurring at any time, and is either (1) murder, (2) homicide by abuse, (3) manslaughter, (4) excusable homicide, or (5) justifiable homicide.

Current through Chapter 5 of the 2008 Regular Session

WEST'S REVISED CODE OF WASHINGTON ANNOTATED  
TITLE 9A. WASHINGTON CRIMINAL CODE  
CHAPTER 9A.16. DEFENSES

**→9A.16.020. Use of force--When lawful**

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

- (1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer's direction;
- (2) Whenever necessarily used by a person arresting one who has committed a felony and delivering him or her to a public officer competent to receive him or her into custody;
- (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary;
- (4) Whenever reasonably used by a person to detain someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person, so long as such detention is reasonable in duration and manner to investigate the reason for the detained person's presence on the premises, and so long as the premises in question did not reasonably appear to be intended to be open to members of the public;
- (5) Whenever used by a carrier of passengers or the carrier's authorized agent or servant, or other person assisting them at their request in expelling from a carriage, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force used is not more than is necessary to expel the offender with reasonable regard to the offender's personal safety;
- (6) Whenever used by any person to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing an act dangerous to any person, or in enforcing necessary restraint for the protection or restoration to health of the person, during such period only as is necessary to obtain legal authority for the restraint or custody of the person.

**→9A.16.030. Homicide--When excusable**

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

**→9A.16.050. Homicide--By other person--When justifiable**

Homicide is also justifiable when committed either:

(1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or

(2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is.