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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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

JOSHUA HOGUE,
Appellant

BRIEF OF RESPONDENT

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ORIGINAL

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I. SUMMARY OF ARGUMENT

This case presents a straight forward and in many ways simple issue of statutory construction. This issue is whether, **as a matter of law**, Washington's Slayer statutes, RCW Ch. 11.84, do not apply to a person who committed a homicide, solely because he was found not guilty by reason of insanity.¹ This question in turn depends on whether **as a matter of law** a killing committed by a person who is criminally insane can never be "willful" and "unlawful" as defined by the relevant statutes.

The clearly stated legislative language, ordinary rules of statutory construction, and controlling Washington authority clearly support the trial court in its determination that a killing can be willful and unlawful, and that therefore a potential beneficiary who committed such a killing can be disqualified from recovering by application of the Slayer statute, notwithstanding a finding of criminal insanity at the time of the killing. Appellant's arguments to the contrary are largely conclusory and unsupported by relevant authority. Rather, they are based on appeals to supposed policy considerations unsupported by the legislative language and by supposed analogy to case law from other jurisdictions whose

¹ Of course, it may be that a person acquitted by reason of insanity is not a slayer as defined by the pertinent statutes **as a matter of fact**. However, as discussed further below, that issue is not properly before this court in this appeal.

statutory language and insanity jurisprudence is markedly different from Washington's.

It is uncontested that Joshua Hogue was mentally ill when he stabbed his mother and half brother to death. The record is equally clear that the killings were willful and unlawful as defined by Washington law and that he should be barred as a beneficiary of the wrongful death claim brought as a result of his killings.

II. THE SLAYER STATUTE APPLIES TO DISQUALIFY JOSHUA HOGUE AS A BENEFICIARY OF THE WRONGFUL DEATH CLAIM ARISING FROM HIS KILLING OF HIS MOTHER.

A. 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.

B. The facts necessary to this court's determination are those found by the trial court.

In support of their respective positions, the parties hereto stipulated to the admission of various documentary evidence. The Petitioner, the Personal Representative of the Estate (Respondent here) submitted excerpts of the police reports concerning the homicides in question and excerpts from the King County Superior Court file, including the order finding the defendant not guilty by reason of insanity and exhibits thereto, including the Certification for Probable Cause, two forensic mental health reports from Western State Hospital, and an evaluation by Dr. Alan Unis at the University of Washington Medical School. See p. 15-69.

Appellant Joshua Hogue submitted the same excerpts from the Superior Court file. See p. 95-134. From this documentary evidence, the trial court entered seven Findings of Fact. Five of these Findings of Fact are unchallenged by the Appellant herein:

FINDINGS OF FACT

1. On June 23, 1999, Joshua F. Hogue (Hogue), 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, Hogue 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.
5. Hogue was psychotic and delusional at the time he killed Pamela Kissinger.
7. Hogue did not act in reasonable self defense in killing Pamela Kissinger.

CP143.

The trial court's unchallenged Findings of Fact are taken as verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808,

828 P.2d 549 (1992). 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.

Finding of Fact No. 4 is a mixed Finding of Fact and Conclusion of Law. Appellant's Assignment of Error to this Finding of Fact raises the same issues as do Assignments of Error 4 and 5, and Appellant's Designation of Issues pertaining to Assignments of Error. Appellant's Brief and Argument are directed solely to the asserted conclusive effect of the finding of criminal insanity on the question of whether Joshua Hogue acted willfully and unlawfully when he killed his mother Pamela Kissinger.

However, 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 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 site to the record to support that argument. Matter of Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). The court in Lint went on to give the reasons for this rule:

Strict adherence to the aforementioned rule is not merely a technical nicety. Rather, the rule recognizes that in most cases, like the instant, there is more than one version of the facts. If we were to ignore the rule requiring counsel to direct argument to specific Findings of Fact which are assailed, and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

Id. at 532.

Division 3 of this court has expressly followed the Supreme Court's ruling in Lint, holding that, where an appellant has not presented argument to the court why specific Findings of Fact are not supported by the evidence, and has failed to cite to the record in support of that argument, 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).

Appellant here has made no argument and no citations to the record indicating why the Court's Finding of Fact No. 3 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. 3, 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. 3. 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.

In the investigation following the homicides, it appeared that Hogue attacked the third victim, Walter Williams after lying in wait with an ax. During the attack, he indicated clear premeditation, “I’m going to kill you, I told you I’m going to kill you.” CP 9. 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.

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 is supported by substantial evidence and should be accepted by this court.

C. The Task Of This Court Is To Interpret And Apply Specific Statutory Language.

Appellant spends a significant amount of his argument describing Hogue's mental illness in detail, and arguing just how mentally ill a person has to be to be found not guilty by reason of insanity. We can agree that schizophrenia is a disease of the mind over which a person has no control, and that the life of a person with chronic schizophrenia can be a living hell. We could also agree that Mr. Hogue's killing of his mother was at least in part a product of his disease. Washington's insanity defense, the requirements of which Mr. Hogue was found to meet, requires that a defendant be unable to appreciate the nature and quality of his acts or be unable to know right from wrong. However, while all of these factors may be interesting in determining the question of whether Mr. Hogue was "blameworthy" for the killing of his mother, they are nearly entirely irrelevant to the determination of the application of RCW Ch. 11.84 to this case.

The task for this court is merely to determine whether Joshua Hogue was a "slayer" within the meaning of RCW 11.84.020. This term is defined in specific statutory language in RCW 11.84.010(1):

(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.** (*Emphasis added.*)

There is no question that Joshua Hogue participated as a principal in the killing of the decedents herein. This case turns, then, on the interpretation of the statutory language emphasized in the definition above.

The significant terms in this definition are statutory terms of art, and have specific meanings. Whatever the degree of Joshua Hogue's moral blameworthiness for killing his mother and half brother, it is absolutely clear that he meets the statutory definition of a slayer as set out above. Accordingly, under the encompassing language of RCW 11.84.020, he shall not receive any benefit, and certainly not a significant amount of money on account of having killed his mother and half brother.

D. The Killing of Pamela Kissinger was Willful.

As indicated by Appellant, other states have held that a finding of criminal insanity prevents the application of the slayer statute. However, this is because of differences in those states both in the definition of "slayer" and in the meaning and import of a finding of criminal insanity. First, virtually alone among the states, Washington does not require that a killing be "intentional" or "felonious" as do many of the other statutes in

order for the slayer's statute to apply. Rather the requirements under RCW 11.84.010 are that the killing be "willful and unlawful".

There are a few cases in Washington defining the effect of the slayer's statute. While none is precisely on point, several are instructive. Appellant relies on New York Life Insurance Company v. Jones, 86 Wn. 2d 44, 541 P.2d 989 (1975). This case was decided before the enactment of the 1976 criminal code, which for the first time provided statutory definitions of the mental states associated with the various crimes. Thus, while the courts at common law sometimes used intentional and willful as interchangeable mental states, this definitional confusion could not survive the passage of RCW 9A.

Following the enactment of RCW 9A, Division 3 of this Court decided Leavy, Taber, Schultz and Bergdahl v. Metropolitan Life Ins. Co., 20 Wn. App.503, 581 P.2d 167 (1978). 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 although a killing by manslaughter might not be intentional, 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 concluded that willfulness can therefore be present in a conviction for manslaughter as opposed to a purely accidental death, and the trial court was upheld in its denial to the wife of her inheritance rights.

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).

Not only has case law equated willfulness with "knowledge", a mental state specifically defined by RCW 9A.08.010(1)(b), but more importantly, RCW 9A.08.010(4) specifically defines willfulness as it pertains to the commission of an offense.

(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.

Examination of the statute defining knowledge clearly indicates that the killing in the case was willful. Unlike the case with many criminal codes, under Washington law, only a basic knowledge of facts is necessary to allow proof that a defendant acted knowingly. Furthermore, our criminal code even provides for an objective measurement of knowledge which further supports the notion that the killing herein was willful;

9A.08.010. General requirements of culpability

(1) Kinds of Culpability Defined

...

(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 same to believe that facts exist which facts are described by a statute defining an offense.

Here there is no question that Joshua Hogue stabbed his mother to death several times with a knife. There is no question that he knew that he was stabbing a person with a knife. Under those circumstances, there is no

arguing the fact that killing in this case was willful as defined by Washington law.

Appellant argues that this Court should not use the statutory definition of willful found in Title 9A when deciding the meaning of that term in the Slayer's statute. App.Br. at 12. However, this definition is required both by ordinary rules of statutory construction and the Legislature's own direction. When the legislature defines a statutory term by further specific legislation, this court is bound to follow that definition. State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002).

Furthermore, the legislature itself has required by statute, that the definition of willfulness found in RCW 9A.08.010(4) applies to define willfulness as used in the Slayer Statute or any other statutes relating to criminal offenses:

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.)

Nothing in any section of the Slayer Statute specifically provides a different meaning for willfulness. Accordingly, the definition of RCW 9A.08.010(4) governs the situation present here.

There is no question that the homicides at issue herein were done “knowingly” as defined in Washington statutes. Mr. Hogue was plainly aware that he was killing a human being when he killed his mother and when he killed his half brother. The fact that he believed he might be killing other people is absolutely irrelevant with regard to the willfulness of his actions. (See, e.g., State v. Wilson, 125 Wash.2d 212, 883 P.2d 320 (1994), concerning transferred intent.).

Even if Mr. Hogue somehow alleged that he did not “know” that he was killing a human being, he still could be found to have acted knowingly if, “he has information which would lead a reasonable man in the same situation to believe facts exists which facts are described by the statute defining an offense.” RCW 9A.08.010(1)(b)(ii). By establishing an objective standard for knowledge, the legislature has shown its plain intent not to rely solely on the stated subjective mental state of an actor when determining whether a crime was committed “knowingly.” A person may have been found to have acted knowingly even if acting under a mistaken, reasonable subjective belief. State v. Johnson, 119 Wn.2d 167, 829 P.2d 1082 (1992).

A similar analysis conducted by the **Virginia** Supreme Court reached the same conclusion in Johnson v. Insurance Co. of N. Amer., 232 Va. 340, 350 S.E.2d 616, (1986). While that case dealt with an

insurance exclusion, its holding is applicable here. A slayer in that case shot a friend while insane and was found not guilty by reason of insanity. The insurance policy in question had an exclusion for acts “expected or intended” from the standpoint of the insured. The court held that a criminally insane person can nonetheless “intend” a consequence under that ordinary meaning, especially when looked at objectively. The court held that the exclusion would apply to the criminally insane perpetrator except in those cases where a person is so insane that he literally does not know what he is doing.

E. Hogue’s Killings Of His Mother And Half Brother Were Unlawful.

The remaining question then is whether under Washington law a killing done as a result of criminal insanity can be “unlawful” as defined by Washington slayer’s statute. This question was discussed in the case of Cook v. Gisler, 20 Wash. App. 677, 582 P.2d 550 (1978). The court first held that the party urging the operation of the slayer’s statute has the overall burden of persuasion to show that the killing was unlawful. Then the court examined the question of what killings can be lawful by reference to the Washington criminal code. In Cook there was significant evidence to show that the killing was justifiable, and the court held that a

killing, which is justifiable, is not an unlawful killing under the homicide statutes then in effect.

This resort to the nature of the crimes of homicide to determine which may be lawful under the criminal code is determinative herein. 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 98.16.020 (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.

Only excusable and justifiable homicides are not unlawful. The killings herein were neither. Again, pursuant to RCW 9A.04.090, the definitions of the lawful use of force and excusable and justifiable homicide set out in RCW 9A.16.020 through RCW 9A.16.050 apply to determine the meaning of lawfulness included in the slayer statute, since no different definition is given.

Appellant spends significant time discussing the nature of Washington's insanity defense. While this is certainly relevant, our courts' explanation of the operation of this defense supports the Conclusions of Law entered by the Trial Court herein. Several of the states which have ruled that the slayer's statute does not apply to a person acquitted by reason of insanity do so on the basis that killing is not "criminal" or "unlawful" because a finding of insanity negates the *mens rea* necessary to make the act criminal. Such, however, is not the law in Washington.

This was conclusively decided by the Supreme Court case of State v. McDonald, 89 Wn.2d 256, 571 P. 2d 930 (1977). There, the homicide defendant asserted that the presumption of sanity and the requirement in Washington that the defendant prove insanity by a preponderance rather than requiring the prosecution to prove sanity beyond a reasonable doubt is an unconstitutional burden on the defendant. The defendant argued precisely that the sanity of the defendant is necessary to prove a culpable *mens rea*, an element of the offense. The Supreme Court directly rejected this argument stating that, "sanity is not in itself" an element of the offense. Id. at 271. The court, therefore, refused to join those courts that held that the prosecution must prove sanity beyond a reasonable doubt.

McDonald's analysis was reaffirmed by the Supreme Court in State v. Box, 109 Wn. 2d 320, 745 P.2d 23 (1987) the holding of which was entirely misstated by Appellant. The question in Box was not whether the defendant has the burden of proving insanity in a criminal proceeding. This is established by statute in RCW 10.77.030(2). Rather, the issue was whether that allocation of the burden of proof 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 McDonald 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.

As one court recently explained it,

[I]nsanity entitles a defendant to an acquittal, not because it establishes innocence (i.e., State has failed to prove element of criminal intent) but because the State declines to convict or punish one shown to have committed the crime while mentally impaired. ... In other words, the mental state of "insanity" does not go to the elements of the crime but merely the ultimate culpability of the accused.

Gilcrist v. Kincheloe, 589 F.Supp. 291, 294 (E.D. Wash. 1984), *aff'd* 774, F.2d 1193 (9th Cir. 1985).

Box, *supra*, at 329 (Emphasis added.).

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. The Supreme Court has twice held the exact opposite. In Washington, unlike in California, 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 thus appears that under Washington law neither “willfulness” nor “unlawfulness” is affected by a finding of not guilty by reason of insanity. Joshua Hogue in stabbing his mother to death knew he was killing a person and did so with premeditated intent, as found by the trial court. In so acting, he did so willfully and unlawfully, even though his ability to prove by preponderance that he was insane at the time relieves him of being punished in accordance with the criminal law.

III. CASES FROM OTHER JURISDICTIONS ARE NOT PERSUASIVE UNDER WASHINGTON LAW

While it is true as urged by Joshua Hogue’s counsel that numerous other states have passed slayer statutes, practically none of them is identical to the statutory scheme in Washington. The vast majority of slayer statutes include a requirement that the killing must be done “intentionally.” Many of them also add a requirement that the killing be “felonious.” Still others have statutes that explicitly state that a finding of

insanity conclusively determines whether the slayer statute applies. These are obvious differences that lead to different results when the task at hand is statutory construction.

More to the point, in those states that hold a finding of insanity prevents the application of the slayer statute, it is because their courts have held that such a finding either precludes the mental state required by the statute (typically intentional conduct) or relieves the act of killing of its unlawful character. Neither of these principles is true in Washington. Indeed, our Supreme Court has held to the direct contrary. State v. Box, *supra*.

A brief review of the foreign opinions cited by Appellant demonstrates their inapplicability under Washington law. For example, heavy reliance is placed on Ford v. Ford, 307 Md. 105, 512 A 2d 389 (1986). This case does not involve a statute at all, as Maryland does not have one. Rather it is decided on the basis of a common law rule of equity. The rule required that the killing be committed intentionally and feloniously. The court decided that in order for a homicide to be felonious, it must be a felony for which the killer is criminally responsible.

Equally instructive is the court's review of cases in other jurisdictions cited by Appellant in his brief. The Court also reviewed the reasons for the decisions in those other states. This review was in a

paragraph quoted by Appellant. However, the following language was omitted by Appellant and replaced by an ellipse:

It appears that there is unanimity in the result, even though there is no uniformity in the manner of reaching it. For example, some of the courts, especially those jurisdictions which apply the M'Naghten definition of insanity, reason that under that test a person found to be insane is, in fact, acquitted of the criminal charge. Since he is not guilty of the homicide, the rule is not invoked. A popular reason given is that under the definition of insanity applicable, be it M'Naghten's or one predicated upon a mental disease, defect or disorder, a killer within that definition could not entertain the requisite intent to make his act criminal so that the homicide was not intentional or unlawful or felonious. In some of the states in which the slayer's rule speaks in terms of a conviction and the insanity statute permits a verdict of guilty but precludes the imposition of punishment, as does ours, the courts have concluded that since no criminal sentence may be entered on the guilty verdict, there is no judgment in the criminal cause and the killer does not stand "convicted."

Ford v. Ford, *supra*, 512 A.2d at 124. It is immediately apparent that the differing reasons for the results reached by the courts have one thing in common. They are at odds with the Law of Washington as set out above. Under the language of our statutes a killer is precluded from recovering if the killing is willful and unlawful. Our Supreme Court has held that there is nothing about an insanity finding that precludes a finding that the killing

was intentional, much less willful, and that a killing committed while insane is no less unlawful. State, v. Box, *supra*.

A review of cases from other jurisdictions does, however, show relevant similarities in several respects. First, in construing their statutes, the courts pay careful attention to the particular language of the statute itself in trying to determine the legislative intent. Equally significant is the nature of the insanity defense in each jurisdiction and the role this defense plays in the legislative scheme of the individual state.

Examples are found among the very cases cited by Appellant. Thus, in Turner v. Estate of Turner, 454 N.E.2d 1247 (1983), the Indiana Supreme Court focused on the fact that the statute required that a killer be “legally convicted of intentionally causing death”, and held that the statute did not apply because there had been no conviction. In In Re: Vadlamudi’s Estate, 183 N.J. Super. 342, 443 A.2d 1113 (1982), the statute required an intentional killing, and the Court held that as a matter of law, a killing by a person who is legally insane cannot be intentional. In In Re: Eckhardt’s Estate, 184 Misc. 748, 54 N.Y.S.2d 484 (1945) was based on a common law rule of equity, as New York has no statute, and therefore no statutory language to control the court’s decision. In Florida, the statute requires the killing be intentional and unlawful to apply the slayer’s statute. In Congleton v. Sansom, 664 So.2d 276 (Fl. App. 1995), the court held that

a killing committed while insane could be intentional if the actor understand the nature and consequences of the physical act, but that a killing committed while legally insane was not unlawful. The Texas Court in Simon v. Dibble, 380 S.W. 2d 898 (1964) held that under Texas law a criminally insane person is not capable of acting willfully in taking a life.

The rule in Washington must be different than the rule in these other jurisdictions because Washington's statute is different, and its jurisprudence concerning insanity is different. The only state which appears to have the same statutory definition of a slayer is Pennsylvania. There are still no appellate decisions construing this statute in the context of criminal insanity. However, neither the trial court decision cited by Appellant nor any other reported decision states that a finding of criminal insanity is conclusive on the question of the application of the slayer's statute. Rather the insanity acquittal is admissible evidence, though not conclusive, on the question of whether the killing was willful and unlawful. The issue remains one of fact. Ceckovich's Estate, 59 Pa. D.&C.2d 588 (1972); Wellons v. Metropolitan Life Ins. Co., 12 Pa. D.&C.3d (1979). Here the trial court found that the killing was intentional and premeditated, a finding which is amply supported by substantial evidence. Even under the Pennsylvania rule, the trial court herein was clearly correct in ruling that the slayer's statute applies to

prohibit Joshua Hogue from recovering the proceeds of the wrongful death claim arising out of the killing he committed.

IV. THE LEGISLATURE HAS CLEARLY EXPRESSED ITS INTENT WITH REGARD TO THE SLAYER STATUTE.

The language of the Washington slayer's statute is exceptionally broad. Pursuant to RCW 11.84.020, "no slayer shall in anyway acquire any property or receive any benefit as a result of the death of the decedent ..." Thus, the statute apparently applies not only to inheritance but to insurance and even to the situation of joint tenancy. In construing this statute RCW 11.84.900 is a clear statement of the intent of the legislature:

11.84.900. Chapter to be construed broadly. This chapter 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.

If there were any question as to the construction of the language the legislature used in the slayer statute, those questions are answered by RCW 11.84.900. This statute says that this Chapter should be construed broadly to effect the policy of this state that no person "shall be allowed" to profit by his own wrong, wherever committed. The inclusion of the language "shall be allowed" provides a subtle, but meaningful addition to the general purpose behind such statutes, that slayer shall not profit by his own wrong. The focus is not on the intent of the slayer, but rather the

desired effect, that he not “be allowed” to profit, no matter what his intent. The presumption in this legislation is clearly in favor of the enforcement of the slayer statute. Where, as here, the defendant plainly knew that he was killing human beings, acts which are clearly unlawful under Washington law, the legislature’s directive requires interpretation of the slayer statute to exclude Joshua Hogue as a beneficiary of a wrongful death claim arising out of his mother’s death.

The statutory scheme encompassed in Washington’s insanity defense likewise does not require a result contrary to petitioner’s position herein. While it is true that Washington has an insanity defense under very limited circumstances, this cuts in favor of petitioner’s position, not against it. The Washington legislature has determined the fact that a person is mentally ill, seriously mentally ill even, should not stop him from being punished as a criminal. The fact that an act was the “product” of “insanity” while providing an insanity defense in other jurisdictions will not do so in Washington. A seriously insane person who commits a crime which is the product of that insanity may, under many circumstances, be sentenced to prison. Thus, although we may feel sorry for persons who are mentally ill and commit crimes and may even believe that they are not morally blameworthy, Washington law is willing to utilize even the power of imprisonment against such persons who commit crimes. It should not

be surprising, then, that the legislature has not excluded insane killers from the application of the slayer statute. Unless a person acts unknowingly, or unless a killing is excusable or justifiable, such persons are simply not allowed to obtain a benefit from killing someone else.

It may seem anomalous that a person insane enough to avoid criminal punishment for killing another is nonetheless required by statute to be deprived of a recovery to which he would be entitled but for the homicide committed while insane. However, this anomaly is explained in considering that the slayer's statute is not intended as a penalty, but rather a simple prohibition of the receipt of any kind of "benefit" (RCW 11.84.020) by one who willfully and unlawfully kills another whether insane or not. This is especially understandable in light of the clear statement of statutory intent contained in RCW 11.84.900. See generally Armstrong v. Bray, 64 Wash. App. 736, 826 P.2d 706 (1992).²

CONCLUSION

No one is seeking to punish Joshua Hogue. Nor is it the intent of petitioner or was it the task of the trial court to determine whether or not he is "morally blameworthy" for killing his mother and half brother.

² Interestingly, RCW 11.84.900 was amended in 1998 to remove the language "This chapter shall not be considered penal in nature referred to in Armstrong, *supra*. Laws 1998, ch. 292 § 403.

Rather, 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. 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 1 day of May, 2007.

Respectfully submitted:



Mark Leemon
Attorney for Plaintiff

FILED
CLERK OF SUPERIOR COURT
SIMPSON COUNTY
MAY 14 2007
2:00 PM

IN RE THE ESTATE OF:

No. 58932-6-I

CERTIFICATE OF SERVICE

PAMELA L. KISSINGER,
Deceased.

I, Emily Dion-Karp, certify under penalty of perjury under the laws of the State of Washington that, on May 1, 2007, I caused the following document to be served on the person listed below in the manner shown:

RESPONDENT'S BRIEF

VIA LEGAL MESSENGER

Jean O'Laughlin
WSH Legal Services
949 Market Street, Suite 334
Tacoma, WA 98402

DATED this 1st day of May, 2007.



Emily Dion-Karp