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Probate

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be brought into the court room and that which cannot, merely because the latter cannot be included in the record on an appeal. Much other evidence is not included in the record such as demeanor of witnesses, physical demonstrations, etc. Where the parties are given an opportunity to be present and a proper method of showing the material facts to be observed is employed in the way of a safeguard to a fair trial, there would seem little justification for a rule as limiting as that announced by the *Elston* case. A revaluation of the *Elston* rule by the supreme court of the extent to which a view may be used in support of the trial court's findings seems to be needed. Relaxation of the strict rule would be helpful to counsel especially in cases involving subject matter which is difficult to describe adequately by testimony, and also to the trial judge who may be confused by the supposedly descriptive testimony of a witness. It is submitted that the court should adopt a rule whereby a trial judge may utilize what he has seen upon his view as additional evidence in the case. In the two cases reported, the court seems to be moving in this direction.

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Timeliness of Affidavit of Prejudice—Rulings Involving Discretion—Granting Permission for Out of State Attorney to Become Associated with an Attorney of Record. *In re William's Estate*, 48 Wn.2d 313, 293 P.2d 392 (1956), involved an application for a writ of prohibition to restrain the trial judge from presiding over a will contest in disregard of an affidavit of prejudice. Prior to the filing of the affidavit of prejudice, the trial judge had granted an oral application allowing an out-of-state attorney to become associated with the relator for the trial of the cause. *Held:* RCW 4.12.050 requires that the affidavit of prejudice be filed and brought to the attention of the trial judge "before the judge presiding has made any order or ruling involving discretion." The granting of the oral application was a ruling involving discretion within the meaning of RCW 4.12.050, and as such the affidavit of prejudice was not filed timely under the statute even though the ruling did not go to the merits of the case. The court also said that it was immaterial that under Rule 22, Revised Rules for Admission to Practice, 34A Wn.2d, May 1955, Supp. p. 36 (now Rule 7, Rules for Admission to Practice, 47 Wn.2d p. xxvi (1956)), the judge was required to give his reasons for refusal or that the application is usually granted as a matter of comity and courtesy, since this would only have a bearing upon whether there was an abuse of discretion in rejecting the application.

PROBATE

Parties Entitled to Appointment as Administrators—Grounds for Disqualification. The Washington Court recently handed down two decisions which appear to alter the existing principles relating to the qualification and disqualification of parties entitled to be appointed as

administrators. *In re McGill's Estate*[1] held that inexperience in business affairs was not a sufficient reason to deprive a surviving spouse of the priority right to administer her husband's estate as provided by RCW 11.28.120.[2] In the case of *In re Odman's Estate*[3] the court held that a serious physical handicap and a factual basis for the existence of a controversy between the surviving spouse and the estate were not sufficient grounds to deprive her of the right to administer the community portion of the estate pursuant to RCW 11.28.030.[4]

There does not appear to be any sound reason for taking issue with the results reached by the court in either of these cases.[5] However, the broad legal principle set forth by the court as the basis for the decisions represents a substantial change in fundamental policy. In reaching its decision in the *Odman* case the court stated,

> . . . in *In re McGill's Estate* we indicated that the right of the surviving spouse is absolute except when (1) such surviving spouse is disqualified on one of the statutory grounds, or (2) it is evident that he or she would do irreparable harm to the estate if appointed.[6]

In *In re McGill's Estate* the court stated that RCW 11.36.010[7] prescribes the grounds for disqualifying an administrator, implying that these grounds were exclusive.

Three Washington statutes directly deal with the right to be ap-

[1] 149 Wash. Dec. 233, 299 P.2d 847 (1956). The court upheld the appointment of the decedent's wife as administratrix over the objection raised by other heirs that she lacked the necessary qualifications because of her inexperience in the extensive business matters that were involved. The court pointed out that the survivor need not manage the business enterprises personally and that none of the statutory grounds for disqualification applied.

[2] RCW 11.28.120. "Persons entitled to letters. Administration of the estate of the person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order: (1) The surviving husband or wife . . . "

[3] 149 Wash. Dec. 583, 304 P.2d 1044 (1956). The court upheld the appointment of the decedent's wife as administratrix of the community portion of the estate over the objection raised by the executor that the confinement to a wheel chair, a pronounced speech impediment and the existence of a factual basis for a dispute over the nature of the deceased's property as community or separate were grounds for disqualification at the discretion of the trial court.

[4] RCW 11.28.030. "Community property—Who entitled to letters. A surviving spouse shall be entitled to administer upon the community property, notwithstanding any provisions of the will to the contrary, if the court find such spouse to be otherwise qualified . . . "

[5] In connection with physical handicaps as grounds for disqualification see: *In re* Holland's Estate, 139 N.Y.S.2d 63, Sur. 1955. Robinson v. Robinson, 178 Md. 623, 16 A.2d 854 (1940); Mobley v. Mobley, 149 Md. 401, 131 Atl. 770 (1926); 158 A.L.R. 296 (1945).

[6] 149 Wash. Dec. at 585, 304 P2d at 1045 (1956).

[7] RCW 11.36.010. "Parties disqualified. The following persons are not qualified to act as executors or administrators: Corporations, nonresidents of this state, minors, persons of unsound mind, or who have been convicted of any felony or a misdemeanor involving moral turpitude. . . ."

pointed administrator or executor of an estate. The decision in the *McGill* case is based on RCW 11.28.120 which deals with administrators of intestate estates. RCW 11.28.010[8] deals with letters to executors, while *In re Odman* is based on RCW 11.28.030 which provides for the administration of the community estate by the surviving spouse. It should be noted that no clear distinction has ever been drawn in Washington on the basis of the language of these statutes. RCW 11.28.010 and RCW 11.28.120 are phrased in the generally recognized mandatory or absolute language of "shall be granted."[9] This language would seem to lead to the conclusion that persons eligible under these two statutes have an absolute right, except as qualified by RCW 11.36.010, the disqualification statute. RCW 11.28.030, the community property statute, presents a different situation however. This statute begins in absolute terms but contains the qualifying clause, "if the court finds such spouse to be otherwise qualified." This latter provision would seem to grant the court discretion, for the purpose of insuring the proper administration of the community estate, in judging the qualifications of a surviving spouse to serve as administrator.

While a distinction can be drawn on the basis of the different language of the statutes it does not appear that the court has even considered it in so far as the qualifications of *administrators* are concerned. This uniform treatment is demonstrated in the two cases under consideration, the *McGill* case, dealing with a survivor's right under the intestate statute, being cited as the controlling authority for *In re Odman*, concerning the surviving spouse's right under the community property statute. A distinction has developed in the case of *executors*, however, the court taking the position that it is decidedly limited in its discretion to disqualify executors.

An examination of earlier Washington decisions in this area indicates that the court was previously disposed to exercise a rather wide discretion in passing upon the qualifications of parties applying for appointment as administrators. The cases dealing with the qualifications of executors, on the other hand, have limited the court's power of disqualification almost to a point where the statutory right has become absolute except as qualified by the statutory grounds for disqualifica-

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[8] RCW 11.28.010. "Letters to executors—Refusal to serve—Disqualification. After probate of any will, letters testamentary shall be granted to the persons therein appointed executors . . ."

[9] See 39 WORDS AND PHRASES 122, Shall—In Statutes As Permissive Or Mandatory.

tion. The previous decisions can be divided into three groups based on the particular state involved.

In re Robinson's Estate[10] and *State ex rel Lauridsen v. Superior Court*[11] are representative of the position regarding the court's discretionary power to set aside the appointment of an executor nominated by the testator in his will. The court in the *Robinson* case refused to name as co-executor a petitioner who had attempted to suppress the will, stating that while great respect would be given to the nomination of the testator, the court is not bound or concluded by it. In the *Lauridsen* case the court took a more positive position in upholding the right of executors, stating,

> . . . in the absence of fraud connected with the will or the estate, and in absence of any statutory disqualification, the right of the testator to appoint an executor of his will may not be superseded by the court by appointing an administrator in his place.[12]

These decisions appear to establish the principle that in the absence of some element of fraud the right of an executor to administer the estate is absolute so long as none of the statutory grounds for disqualification are applicable.

The cases dealing with the qualifications of persons seeking appointment as administrators under the intestate statute have set forth principles which appear to give the court greater discretion than is afforded where executors are involved. Beginning with *In re Langill's Estate*[13] the court has consistently taken the position that the right to appointment as administrator is not absolute nor are the statutory grounds for disqualifying persons entitled to serve exclusive. The previous cases have generally taken the position that while great weight is to be accorded the statutory preferences the court may exercise its discretion in judging the qualifications of parties seeking appointment as administrators.[14] In *In re Stotts' Estate*[15] the court stated:

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[10] 149 Wash. 307, 270 Pac. 1020 (1928).

[11] 179 Wash. 198, 37 P.2d 209 (1934). The court upheld the rights of executors to administer the estate by revoking letters of administration which had previously been issued when the executors had unavoidably delayed appearing.

[12] 179 Wash. at 207, 37 P.2d at 212 (1934).

[13] 117 Wash. 268, 201 Pac. 28 (1921). The child of the deceased, applying pursuant to RCW 11.28.120, was denied appointment as administrator because of a prior misappropriation of the estate. None of the statutory grounds for disqualification were applicable.

[14] State *ex rel.* Cowley v. Superior Court, 158 Wash. 546, 291 Pac. 481 (1930); *In re* Thomas' Estate, 167 Wash. 127, 8 P.2d 963 (1932); *In re* St. Martin's Estate, 175 Wash. 285, 27 P.2d 326 (1933); *In re* Covington's Estate, 177 Wash. 668, 33 P.2d 87 (1934), *In re* Leith's Estate, 42 Wn.2d 223, 254 P.2d 490 (1953).

> The relation is such that he who serves as administrator should be one who can act impartially, and in those jurisdictions such as this where the court is not bound by mandatory statutory provisions on the subject of preference right of appointment, nor by enumerated causes of disqualification to act, no one should be appointed who is hostile to the observance of and respect for the rule that the purpose of administration is to both collect and preserve the estate and impartially assist in passing it to those beneficially interested according to the priority of their rights.[16]

This position seems far removed from that taken in the *Odman* and *McGill* decisions.

Only one prior case appears to have dealt specifically with the power of the court to evaluate the qualifications of a person applying for appointment as administrator under the community property statute. The court in the case of *In re Bredl's Estate*[17] said that the preference rights given by the statute were valuable but not absolute. The principle set forth was that the statutory right is not so definite that it requires the appointment of one who has demonstrated a dishonesty of purpose or one who portrays a gross unfitness in other respects to administer the trust.

Prior to *In re McGill* and *In re Odman* it appeared that Washington had departed from the majority rule to the effect that the statutory grounds of disqualification are exclusive, at least in the cases of administrators. Persons applying under the intestate and community property statutes have been denied appointment on the grounds of fraud, misappropriation of the estate, hostility to creditors and where bitterness and ill feeling existed between persons equally entitled to serve.[18] It appeared firmly established that the statutory rights were not absolute and that the courts should exercise discretion in determining whether an applicant was qualified for appointment as administrator. The principles adopted in *In re McGill* and *In re Odman* now place Washington, for all practical purposes, with the majority of the jurisdictions which have held that the statutory grounds for disqualification are exclusive.[19]

[16] 133 Wash. 100, 233 Pac. 280 (1925). The court denied the petition for appointment of the guardian of two minor grandchildren of the deceased and appointed instead a disinterested party because the petitioner had demonstrated hostility towards claims of creditors.

[16] 133 Wash. at 104, 233 Pac. at 282 (1925).

[17] 117 Wash. 372, 201 Pac. 280 (1921). The court denied appointment of the husband of the deceased who was applying under RCW 11.28.030 where he had previously concealed facts concerning the existence of a will.

[18] See note 14 *supra*.

[19] 21 AM. JUR., *Executors and Administrators* § 82 (1939); 33 C.J.S., *Executors*

If the court elects in the future to stand on the proposition that the statutory right to serve as an administrator or executor is absolute except as qualified by the disqualification statute, or where it is evident that irreparable harm would be done to the estate, Washington law appears to be in an anomalous position. RCW 11.28.250,[20] providing for the revocation of letters, states that when the court has reason to believe that an administrator or executor is incompetent to act, or for any other cause or reason which appears necessary, it shall have the authority to revoke such letters.[21] It seems incongruous that the court apparently is empowered with a much wider discretion to remove administrators or executors than it has to deny their original appointment. Consistency would appear to require that the court have the authority to exercise the same sound discretion in weighing the qualifications before appointment that is exercises in removing administrators after appointment. As indicated previously, the decisions prior to *McGill* and *Odman* provide established authority for such a position, at least in the case of administrators.

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Executors and Administrators—Venue. *Schluneger vs. Seattle-First National Bank*, 48 Wn.2d 188, 292 P.2d 203 (1956) presented the question whether an action on a rejected claim in probate may be maintained against a corporate executor in the county wherein it transacts business, but other than the county in which it was appointed executor.

Defendant bank was appointed executor by the Superior Court of Whitman County. Plaintiffs served a creditor's claim upon the defendant and filed it with the clerk of the Superior Court within the statutory period. The claim was rejected by the defendant. In accordance with RCW 11.40.060 (Suit on Rejected Claim) plaintiffs commenced an action on the rejected claim in Spokane County wherein the defendant transacted business. The defendant appeared specially, challenging the jurisdiction of the Spokane Superior Court. The Spokane court refused to dismiss but transferred the action to Whitman County. The defendant again made a special appearance and demurred upon the ground that the action had not been commenced within the statutory period.

In reversing a dismissal of the plaintiffs' action the Supreme Court ruled that under RCW 11.16.070 a distinction exists between probate matters and a civil action to establish a rejected claim as a charge against an estate. A civil action is not part of the probate proceedings and is governed by the same venue rules like any other civil

and Administrators § 34 (1942).

[20] RCW 11.28.250. "Revocation of letters—Causes. Whenever the court has reason to believe that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his charge, or has committed, or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such executor or administrator, or for any other cause or reason which to the court appears necessary, it shall have power and authority, after citation and hearing to revoke such letters . . . "

[21] *In re* Clawson's Estate, 3 Wn.2d 509, 101 P.2d 968 (1940).

action. Once a rejected claim is established in the proper court, it then becomes subject to the rules of estate administration. Following Rule of Pleading, Practice and Procedure 1, 34A Wn.2d 68, the action (against the corporate defendant) was properly commenced in Spokane County wherein the corporate executor "transacts business."

Heirs and Next of Kin—Stepchildren. In the case of *In re Smith's Estate,* 149 Wash. Dec. 217, 299 P.2d 550 (1956) the supreme court affirmed the trial court's decision that stepchildren cannot take as "issue" or "children" under the Washington statute of descent. The statute, RCW 11.04.020, provides in so far as here relevent: "If the decedent leaves no husband or wife the estate goes in equal shares to his children, and to the issue of any deceased child by right of representation" . . . "the words 'issue,' 'child' and 'children' whenever used in this section shall be construed to include lawfully adopted children." RCW 11.04.100 prohibits distinctions between kindred of the whole blood and of the half blood who are entitled to inherit under the statutes of descent and distribution. As between a stepchild and stepparent there is no blood relationship, but only the relationship of affinity which is the relationship one spouse has to blood relatives of the other spouse. Here there was no showing that the decedent adopted plaintiffs and since there was no blood relationship between decedent and plaintiffs, they cannot inherit as heirs at law.

Unsuccessful Bidders at Realty Sale—Right to Appeal. *In re Scholes' Estate,* 149 Wash. Dec. 319, 301 P.2d 172 (1956) held that the unsuccessful bidder at a probate sale was not an "interested party" entitled to appeal to the supreme court. Plaintiffs put in a bid for the real estate, then withdrew it and entered a new bid. Before learning of the new bid, the administratrix had accepted a bid which was for ten dollars less than plaintiffs' final bid. Not knowing of plaintiffs' new bid, a return of sale on the lower bid was made by the administratix. Plaintiffs appealed from an order confirming an amended return of sale to the lower bidder. In affirming, the court first held that it was within the discretion of the trial court to approve the lower price when the difference was only ten dollars. As a second independent ground for the decision, the court held that the appellant was not an "interested" party. In support of this the court cited the case of *Terry v. Clothier,* 1 Wash. 475, 25 Pac. 673 (1890). The case held that unsuccessful bidders are not interested parties and have no right to object to a confirmation of sale. Under RCW 11.16.040 the plaintiffs were not interested parties as their only concern was to purchase property from the estate. An "interested" party is one such as a personal representative, who represents the estate, or an heir, legatee, devisee or creditor who can claim a right to receive something from the estate. The statute does not give the plaintiffs, situated as they are, the right to appeal.

REAL PROPERTY

Conveyance of After-Acquired Title by Quitclaim Deed; Effect of Habendum Clause. The court, in *Brenner v. Brenner Oyster Co.*[1] held the presence of an habendum clause in a quitclaim deed does not show an intention to convey after-acquired title within the provisions of RCW 64.04.070. In so holding, the court expressly overruled *West Seattle Land and Improvement Co. v. Novelty Mill Co.,*[2] and *Bradley*

[1] 48 Wn.2d 264, 292 P.2d 1052 (1956).
[2] 31 Wash. 435, 72 Pac. 69 (1903).