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Wills and Probate

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HELD, Order for a new trial for plaintiff child affirmed. Order denying plaintiff parents a new trial reversed. In upholding the order for a new trial for the plaintiff child, the court relied upon *Von Saxe v. Barnett,* 125 Wash. 639, 217 Pac. 62 (1923), and applied the following rules: (a) under six years of age, there is a conclusive presumption that a child is incapable of contributory negligence; (b) six to fourteen, there is a prima facie presumption against contributory negligence; (c) over fourteen, the infant bears the burden of showing lack of capacity. As to the parents' motion for a new trial, the court held that, as a matter of law, in the absence of knowledge of special danger in so doing, parents are not guilty of contributory negligence in permitting their five-year-old children to play outside without constant supervision.

Negligence—Guest Statute—Payment, What Constitutes. In *Woolery v. Shearer,* 153 Wash. Dec. 141, 332 P.2d 236 (1958), the plaintiff sought to recover for injuries sustained by his wife while riding in the defendant's pickup truck. Defendant, half-brother of the injured wife, interposed the host-guest statute. Plaintiff sought to overcome the defense by a showing that his wife was in defendant's truck returning from a meeting where they had discussed with an attorney her appointment as guardian of their mother. Since the guardianship would give the wife access to a bank account and enable her to aid defendant in his business, plaintiff contended that payment had been established and that his wife was not a guest within the meaning of the statute.

The trial court gave judgment for the plaintiff, and on appeal the supreme court reversed, holding that the mere hope of obtaining a benefit, when uncommunicated to the passenger, does not constitute payment within the contemplation of the statute. The unanimous departmental decision indicated no desire to extend construction of the "payment" clause beyond the limits defined in earlier cases. The court found that plaintiff's argument fell short of the test suggested in *Fuller v. Tucker,* 4 Wn.2d 426, 103 P.2d 1086 (1940), that the transportation must be motivated by the expectation of a tangible business benefit. In answer to plaintiff's contention that an agreement regarding the anticipated payment is not necessary, the court properly distinguished *Scholz v. Leuer,* 7 Wn.2d 76, 109 P.2d 294 (1941), as being a case in which "the anticipated payment was received during the course of the transportation."

The case illustrates the consistency of the court in literally interpreting the "payment" exception of the statute and adds to the substantial body of case law supporting this interpretation.

WILLS AND PROBATE

Executors and Administrators—Accountability of Administratrix for Rental Value of Residence. A solution to a troublesome problem which had recurred in the Washington court for over half a century was recently advanced in *In re Kruse's Estate.*[1] The question, abstractly, is whether a surving spouse, who is also administratrix, must account to the estate for the rental value of her occupancy of the family residence when she has no independent claim against the estate and when she is entitled to an award in lieu of homestead of a partial but substantial interest in the residence. The court answered that, as a matter of basic policy, she need not.

[1] 152 Wash. Dec. 290, 324 P.2d 1088 (1958).

Respondent had been married to the decedent for three years before he died intestate in 1956. He left two sons by a former marriage, appellants in the instant case, who contested approval of the final accounting. Respondent was appointed administratrix and proceeded to wind up the estate in reasonably[2] approvable fashion. The court set aside to her, as property in lieu of homestead, an undivided 78.87 per cent interest in the residence.

Appellants' controverted contention was that the court failed to require respondent to account to the estate for the reasonable rental value of the family residence, which she occupied during her term as administratrix. Th court held that the administratrix did not need to account for such rental value, especially since at all times after decedent's death she had a right to have a substantial part of the property set aside to her in lieu of homestead.

Since 1902 the Washington court has been confronted with a form of this problem on several occasions, but the present case marks its initial appearance in such shape that a direct answer was required. Appellants relied upon three cases,[3] which, on first impression, might be thought to support their view. The court considered each of the three and was able to distinguish them on their facts from the instant case. As will be shown, the distinctions derived are not directly in point.

In re Alfstad's Estate[4] held that a sister was accountable as administratrix to the estate for the rental value of business property. The property, a small-town hotel and saloon, was of a different nature from the property in the *Kruse* case, as its purpose was the production of income. Further, the administratrix in *Alfstad* was held accountable for rental value as an offset to a claim she made against the estate for expenditures for improvements to the property. She was not entitled to an award in lieu of homestead. On those grounds the *Alfstad* fact pattern is distinguishable.

As the court in the *Kruse* case recognizes, appellants' contention was not before the court in *In re Foster's Estate,*[5] where a dictum

[2] Appellants contested approval of a five months' extension of family allowance and urged that a final accounting and distribution could have been made earlier. However, since the order was not appealed from at the time made, the court held it could not now be reviewed. The conclusion follows *In re* Schwarzwalter's Estate, 47 Wn.2d 119, 286 P.2d 699 (1955).

[3] *In re* Alfstad's Estate, 27 Wash. 175, 67 Pac. 593 (1902); *In re* Foster's Estate, 139 Wash. 224, 246 Pac. 290 (1926); *In re* Hickman's Estate, 41 Wn.2d 519, 250 P.2d 524 (1952).

[4] 27 Wash. 175, 67 Pac. 593 (1902).

[5] 139 Wash. 224, 246 Pac. 290 (1926).

appeared to the effect that where the decedent owned, in his separate right, an undivided one-half interest in a residence, the administratrix *might* be accountable to contenants to the extent of offsetting any claim she might have against the contenants, and to render an account of rental value to the estate, *if the circumstances justify.*

A further distinguishing factor was found to be present in *In re Hickman's Estate,*[6] where the surviving husband, executor under the wife's will, was held to account for the rental value of the residence which was the wife's separate property and which was devised to a third party. Again the charge for rental value was made to offset a community claim for improvements made to the property during marriage and paid for with community funds. The court chose to limit *Hickman* to its facts and, manifestly, there is a variance between it and the instant case factually.

The court's summary of the distinctions adduced was as follows:

> In the instant case the property is not commercial income property, as discussed in *In re Alfstad's Estate, supra;* it was not owned by decedent as a contenant prior to death, together with other tenants in common, as in *In re Foster's Estate, supra;* it was not separate property of decedent otherwise disposed of by will, as in *In re Hickman's Estate, supra;* it was not subject to a claim for improvements placed thereon, as discussed in all three cases.[7]

Although discovering distinctions between the cases upon which appellants relied and the instant case, the court did not dispose of the crux of appellants' contention, which was simply that respondent lived in a house which was not her property and that she ought to have paid for the use of it. The court's answer was that she ought not to account, but no reason was advanced in support of this conclusion except to point out that the cases upon which appellants relied involved somewhat different facts.

Two avenues to the desired result may be suggested: (1) The award in lieu of homestead could relate back to the death of the intestate, to give the survivor a larger proportional interest than she would otherwise have had under the descent statute. This reasoning is purely fictional and does unnecessary violence to the concept of title.[8] (2)

[6] 41 Wn.2d 519, 250 P.2d 524 (1952).
[7] 152 Wash. Dec. 290, 297, 324 P.2d 1088, 1092 (1958).
[8] Under the descent statute, RCW 11.04.020, separate real property descends at death to the surviving spouse and the children as tenants in common. Where there are two or more children the wife receives by descent an undivided one-third interest.
The award in lieu of homestead realigns the proportionate interests of the tenants in common. To apply a relation-back rationale would be to infer that the realignment

Since the widow could have applied for sufficient family allowance under RCW 11.52.040 to provide rent of this house during the probate period, merely acting as a channel through which money was transferred from one pocket of the estate to another, the case achieves the same result, though in a less technically correct manner.

Quite apart from the logic of the decision, the result, viewed independently, seems desirable,[9] insofar as the widow's ultimate undivided interest in the property is concerned. Possibly she should still remain accountable for the rental value during administration of the portion she does not own. The widow-administratrix apparently acted in good faith, and it was reasonably foreseeable that she would eventually be awarded a substantial interest in the residence. Once the award has been made, she is not accountable to tenants in common for rental value of her own use, their remedy then being partition. Further, as a practical matter the problem under examination seldom arises unless hostility exists between the widow and the heirs.[10] Also, the amounts involved are usually small. Therefore, the nonliability of the surviving spouse will not ordinarily disturb the rights of the heirs to any appreciable degree and accords reasonably with ordinary concepts of justice.

The value of *In re Kruse's Estate* is that it suggests a simplification, acceptable to the supreme court, of what could be a knotty problem when a surviving spouse lives in the family residence during administration. The remaining question is, how large a percentage of interest in the dwelling does the spouse have to have to use it rent-free?

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Probate—Award in Lieu of Homestead. *In re White's Estate,* 152 Wash. Dec. 133, 324 P.2d 262 (1958). *A* owned certain real property before her marriage to *B*. During their marriage, *B* gave *A* a quitclaim deed to the property. The parties separated, and *A* filed a declaration of homestead on her property in full compliance with the procedure outlined in the statutes of the state. *A* then died intestate, and *B* applied for an award in lieu of homestead under the provisions of RCW 11.52.010, which requires as a condition precedent to the granting of such an award that it "appear to the satisfaction of the court that no homestead has been claimed in the manner provided by law. . . ." The lower court denied the petition of *B*, because he

retroactively became superimposed upon the statute, thus denying to it any effectiveness at all.

[9] Authority in other jurisdictions is sparse but consistent. A widow-administratrix was not required to account where she and her husband had together bought income property during their marriage. Foley v. Engstrom, 247 Iowa 774, 74 N.W.2d 673 (1956). But she was required to account for profits when she continued to operate decedent's liquor store after his death. *In re* Ridosh's Estate, 5 A.D.2d 67, 169 N.Y.S.2d 54 (1957).

[10] Note 9, *supra.*

was unable to convince the court that the homestead claim previously filed by the deceased wife was invalid. The decision was affirmed by the supreme court.

B's chances in this litigation might have been better if he had based his claim on RCW 11.52.020 rather than RCW 11.52.010, even though some factual and statutory construction problems might have existed under the RCW 11.52.020 approach. Under RCW 11.52.020, the court may, if a homestead *has been selected* during the life time of the deceased spouse, award such homestead to the surviving spouse. By proceeding under RCW 11.52.010, appellant faced the necessity of showing that no valid homestead had been selected by his wife.

WORKMEN'S COMPENSATION

Horseplay—Course of Employment. The question of a workman's right to compensation for an injury sustained during a "horseplay" or "skylarking" incident was presentd to the Washington Court for the first time in *Tilly v. Department of Labor and Indus.*[1] Tilly, en route to the men's lavatory, "did some act or made some remark" to a female co-employee, and escaped into the lavatory when she began chasing him, armed with a wet paper towel. When he later emerged to return to his work station, she renewed the pursuit. Tilly's efforts to regain the sanctity of the men's room were frustrated by the intervention of a male employee, who held him while his face was washed by his pursuer. After a brief friendly scuffle, Tilly was released, and the two men laughingly returned to the lavatory. While attempting to drink, Tilly lost consciousness and died the following morning from a dissecting aneurysm.[2] In affirming a judgment awarding Mrs. Tilly a widow's pension, the court held that Tilly was, as a matter of law, in the course of his employment at the time of his injury.

Although the *Tilly* case is one of first impression in Washington, so-called "horseplay" incidents in workmen's compensation cases have frequently been analyzed by courts in other states and by many text writers.[3] The non-participating victim of horseplay is generally permitted recovery,[4] whereas the treatment to be given the participating

[1] 152 Wash. Dec. 111, 324 P.2d 432 (1958).

[2] This condition apparently resulted from a reduction of the normal amount of oxygen in the blood. The appellants, in their brief, conceded that the medical testimony was in conflict as to the causal relation between the face washing incident and the death. The court held this to be a concession that the jury was enttiled to find Tilly's death to be caused by a compensable injury as defined in RCW 51.08.100. See Porter v. Department of Labor and Indus., 51 Wn.2d 634, 320 P.2d 1099 (1958). For a discussion of what constitutes an injury under the act, see Windust v. Department of Labor and Indus., 152 Wash. Dec. 1, 323 P.2d 241 (1958); Comment, 33 CALIF. L. REV. 458 (1945).

[3] 1 LARSON, WORKMEN'S COMPENSATION § 23 (1952); 6 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 1614 (Perm. ed.); Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 ILL. L. REV. 311 (1946).

[4] Leonbruno v. Champlain Silk Mills, 229 N.Y. 170, 128 N.E. 711 (1920); Swift & Co. v. Forbus, 201 Okla. 516, 207 P.2d 251 (1949); Hollingsworth v. Auto Specialties Mfg. Co., 352 Mich. 255, 89 N.W. 2d 431 (1958).