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Christopher M. Eisold, *Statute in the Abyss: The Implications of Insanity on Wisconsin's Slayer Statute*, 91 Marq. L. Rev. 875 (2008).
Available at: <http://scholarship.law.marquette.edu/mulr/vol91/iss3/7>

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STATUTE IN THE ABYSS: THE IMPLICATIONS OF INSANITY ON WISCONSIN'S SLAYER STATUTE

I. INTRODUCTION

The maxim that one cannot benefit from his or her crime permeates both our judicial system and our society as a whole.¹ A central function of the state is to prevent crime through deterrent mechanisms, such as increasing the costs and decreasing the benefits of committing crime.² By eliminating such benefits or reducing them in relation to a crime's costs, the state makes the crime more costly to commit and the rational criminal will have less incentive to commit the offense.³ It is for this precise reason that many states, including Wisconsin, have enacted "slayer statutes."⁴

Wisconsin's slayer statute is similar to those of other states,⁵ directing that when an individual intentionally and unlawfully kills another, that killer is not entitled to a share of the victim's estate, either by way of will or intestacy.⁶ In the most basic homicide case, this definition is sufficient to provide desirable results. However, as illustrated by an Indiana case, questions as to undefined terms, such as "intent" and "unlawful," can make this section particularly difficult to

1. See Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 490 (1986); see also *Steinbarth v. Johannes*, 144 Wis. 2d 159, 166, 423 N.W.2d 540, 542 (1988).

2. Madeline H. Morris, *Universal Jurisdiction in a Divided World*, 35 NEW ENG. L. REV. 337, 358 (2001).

3. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985). When evaluating whether to commit a crime, the potential offender must make an evaluation. See *id.* at 1195-96. He or she must weigh potential benefits of the offense with the costs. See *id.* When the benefits exceed the costs, the offender will commit the crime. See *id.* at 1196. By enacting section 854.14, the state prevents criminals from benefiting from their crimes and attempts to lower the potential benefits of committing a particular crime. See generally WIS. STAT. § 854.14 (2005-2006). Thus, crime is less attractive and fewer crimes will pass the above evaluation, resulting in the reduction of the occurrence of a particular crime. See Posner, *supra*, at 1196.

4. See WIS. STAT. § 854.14.

5. See, e.g., FLA. STAT. § 732.802(1) (2005) ("[A] person who unlawfully and intentionally kills . . . [a] decedent is not entitled to any benefits under the will or under the Florida Probate Code.").

6. § 854.14(2).

apply and future results difficult to predict, in certain situations.⁷ This uncertainty is increased by a lack of case law and legislative history on the section.

An example of the problem occurs when considering the statute in the context of a killer found not guilty by reason of insanity in criminal court. Can one who lacks the mental capacity to conform her behavior to the law commit an intentional and unlawful act in killing another? Such a case recently arose in Wisconsin,⁸ emphasizing the ambiguity of Wisconsin's slayer statute in this particular framework.⁹

This Comment analyzes Wisconsin's slayer statute in the context of a recent local homicide and the probate matter that followed. Part II provides the factual background of the highly publicized Van Lare incident and the court proceedings that followed. Part III discusses relevant precedent and examples from other jurisdictions. Part IV considers the approach the Wisconsin court system is likely to take on the matter based on relevant law and public policy. Part V evaluates a variety of steps the Wisconsin legislature could take to achieve the most favorable outcome. Finally, Part VI offers a conclusion to an issue of law that is just developing.

II. FACTS OF *VAN LARE*

On the surface, Todd Van Lare seemed like any normal family man. He was married with two kids, two step-children, a typical job, and good social relationships.¹⁰ But beneath the surface, Van Lare convinced himself that his neighbors and co-workers were plotting to kill him.¹¹ These delusions drove him to distrust almost everyone and to kill his wife in an exercise of what he believed to be self-defense.¹² On the morning of November 1, 2004, just a few hours before he was to be taken to a mental treatment facility, Van Lare killed his wife while she

7. Compare *Turner v. Estate of Turner*, 454 N.E.2d 1247 (Ind. Ct. App. 1983) (holding that an insane killer did not have the requisite intent and, therefore, could collect on the decedents' estates), with IND. CODE § 29-1-2-12.1 (1988) (declaring the Indiana legislature's intent that insane killers not collect on their victims' estates).

8. See David Doege, *Killer Committed to Mental Hospital*, MILWAUKEE J. SENTINEL, Aug. 30, 2005, at 1B.

9. See § 854.14.

10. David Doege, *Cry for Help Turns Futile, Fatal*, MILWAUKEE J. SENTINEL, Aug. 23, 2005, at 1A.

11. *Id.*

12. *Id.*

was sleeping.¹³ He was found several hours later barricaded in the basement with two of his children.¹⁴

Several months before the incident, Van Lare began suffering from paranoid delusions.¹⁵ These delusions forced him to quit his job, as he suspected several of his co-workers were plotting against him.¹⁶ As his condition worsened, Van Lare suspected more and more people were out to get him, and at the time he killed his wife, he trusted only his parents and his sister.¹⁷

The delusions took over Van Lare's life to such an extent that his family frantically sought to find him treatment.¹⁸ They visited several psychiatric facilities, each of which provided differing opinions on both his condition and the most effective treatment.¹⁹ Among all these variances were just two constants: (1) Van Lare's refusal to submit to treatment at any of the facilities²⁰ and (2) the psychiatrists' beliefs that Van Lare did not pose a serious threat of harm to anyone or himself.²¹ Van Lare viewed the hospitals with the same level of suspicion he viewed everything else in his life and was reluctant to trust any of them.²²

When Van Lare finally found a facility he was comfortable with, his family was ecstatic; he was finally going to get the treatment he needed.²³ Unfortunately, that treatment did not come soon enough. On the morning of the day he was to begin treatment, he was arrested for the murder of his wife.²⁴

At the criminal trial, four expert psychologists convinced the court that Van Lare was not mentally fit, and thus should not be held responsible for his actions.²⁵ The court found that Van Lare *intentionally* killed his wife but was not guilty by reason of mental

13. See Doege, *supra* note 8.

14. David Doege, *Defendant Will Fight Exam Results*, MILWAUKEE J. SENTINEL, Dec. 7, 2004, at 5B.

15. See Doege, *supra* note 10.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. See Doege, *supra* note 14.

25. Letter to the Court, *In re Estate of Van Lare*, No. 2004PR119 (Waukesha County Cir. Ct. Aug. 5, 2005); see Doege, *supra* note 8.

disease or defect.²⁶ Van Lare was committed to a mental institution for inpatient mental treatment with the potential for conditional release beginning six months later.²⁷

Soon after this criminal verdict, Van Lare made a claim against his wife's estate.²⁸ In seeking to collect his statutory share of his deceased wife's intestate estate,²⁹ Van Lare argued that because he was found not guilty by reason of insanity, he could not have intentionally killed his wife, and that Wisconsin Statutes section 854.14 was inapplicable.³⁰ As a result, Van Lare believed he was entitled to his share of her estate as her husband.³¹ The estate asserted that Wisconsin's slayer statute was applicable, supporting its argument by the finding of the criminal court that Van Lare intended to kill his wife, though he was not guilty by reason of insanity.³² Both parties noted the uncertain state of Wisconsin law with respect to the implications of insanity on the Wisconsin slayer statute.³³

III. APPLICABLE LAW

A. *The Wisconsin Slayer Statute*

Wisconsin Statutes section 854.14 governs the process when a decedent is killed by a potential beneficiary.³⁴ In those instances, the killer is prohibited from receiving property transferred by way of

26. Order of Commitment, *In re Estate of Van Lare*, No. 2004PR119 (Waukesha County Cir. Ct. Aug. 29, 2005); see David Doege, *Man Who Killed Wife Found Criminally Insane*, MILWAUKEE J. SENTINEL, Aug. 9, 2005, at 3B.

27. *Id.*

28. Response Brief in Opposition to the Petitioner's Proposed Order to Determine the Succession of Decedent's Assets, *In re Estate of Van Lare*, No. 2004PR119 (Waukesha County Cir. Ct. June 1, 2006) [hereinafter Brief in Opposition].

29. Van Lare sought all marital property as surviving spouse, the proceeds of a life insurance policy on his wife's life as named beneficiary, and one-half of her individual property as natural heir. Brief in Opposition, *supra* note 28, at 6–8; see WIS. STAT. § 852.01(a)(2) (2005–2006).

30. Brief in Opposition, *supra* note 28, at 6–8; see § 854.14(2).

31. See § 852.01.

32. Brief in Support of Petition for an Order Determining the Succession of Assets at 5, *In re Estate of Van Lare*, No. 2004PR119 (Waukesha County Cir. Ct. April 18, 2006) [hereinafter Brief in Support].

33. See Brief in Support, *supra* note 32, at 6; Brief in Opposition, *supra* note 28, at 4, 8; see also § 852.01.

34. See § 845.14.

inheritance, devise or bequest, or through intestate succession.³⁵ The killer is effectively treated as disclaiming any benefit resulting from the death.³⁶

In order for the statute to take effect, the killing must be “unlawful and intentional.”³⁷ There are three methods by which a killing may be considered unlawful and intentional.³⁸ First, any “final judgment establishing criminal accountability for the unlawful and intentional killing of the decedent conclusively” meets this requirement.³⁹ Second, “[a] final adjudication of delinquency on the basis of an unlawful and intentional killing of the decedent” establishes intent and unlawfulness.⁴⁰ Third, “[i]n the absence of a [prior] judgment . . . , the court, upon the petition of an interested person, shall determine whether, based on the preponderance of the evidence, the killing of the decedent was unlawful and intentional.”⁴¹ Absent from the statute is any definition of the terms “intentional” or “unlawful.”⁴²

B. Relevant Wisconsin Case Law

The general doctrine that an individual should not be permitted to profit from one’s own illegal acts dates back to principles of equity in the early common law.⁴³ This principle was officially ingrained into Wisconsin law in 1927 in the case of *Estate of Wilkins*.⁴⁴ Similar holdings have continued in Wisconsin throughout the twentieth century in areas such as joint tenancy,⁴⁵ insurance,⁴⁶ and marital property rights,⁴⁷ with the

35. *Id.*

36. § 854.14(3).

37. § 854.14(2).

38. § 854.14(5)(a)–(c).

39. § 854.14(5)(a).

40. § 854.14(5)(b).

41. § 854.14(5)(c).

42. *See* § 854.14(5).

43. *See In re Estate of Wilkins*, 192 Wis. 111, 119, 211 N.W. 652, 655 (1927), *overruled on other grounds by In re Wilson’s Will*, 5 Wis. 2d 178, 92 N.W.2d 282 (1958).

44. *Id.* at 119, 211 N.W. at 655.

45. *In re Estate of King*, 261 Wis. 266, 52 N.W.2d 885 (1952). In *In re Estate of King*, a man killed his wife shortly before committing suicide. *Id.* at 271, 52 N.W.2d at 887. The administrator of the man’s estate asked the court to grant the entire joint property to the estate. *Id.* at 269, 52 N.W.2d at 887. The court issued a ruling based on the equitable principle that one cannot benefit from his crime, granting the entire parcel to the wife’s estate. *Id.* at 273–74, 52 N.W.2d at 888–89. This decision was overruled in part in *In re Estate of Hackl*, when the court rejected the idea that the entire property is transferred to the victim’s estate. 231 Wis. 2d 43, 604 N.W.2d 579 (1999). However, the decision was upheld in

court in each case reaching the conclusion that the killer should not benefit from the commission of a crime.⁴⁸ However, the issue of insanity as a challenge to the intent requirement of this doctrine and statute has not been decided in Wisconsin.

C. Wisconsin Legislative History

While Wisconsin case law has adhered to the principle that one cannot benefit from one's own act of homicide for many years, the doctrine was encoded in Wisconsin's statutes only a few decades ago. The foundation of the present day slayer statute dates back to 1981, when the Wisconsin legislature codified the common law principle that an individual may not benefit from one's crime by amending several existing statutory sections.⁴⁹ These amendments directed that an individual could not receive property from persons whom the individual intentionally and feloniously killed.⁵⁰ Included within these

In re Estate of King to the extent that the killer is not entitled to survivorship rights in the victim's portion of the property. *Id.* at 49–50, 604 N.W.2d at 583. Thus, the joint tenancy is essentially severed in favor of a tenancy in common-like relationship. *Id.* at 49, 604 N.W.2d at 583–84. The Wisconsin legislature codified such result several years before the *Hackl* decision. See WIS. STAT. § 700.17(2)(b) (1993–1994).

46. See, e.g., *In re Estate of Wilkins*, 192 Wis. at 121, 211 N.W. at 656 (referencing numerous cases cited by the parties in which a murderer was not permitted to collect on an insurance policy issued to her victim because of the murder).

47. *Hackl*, 231 Wis. 2d 43, 604 N.W.2d 579. *Hackl* killed his wife while the two were going through a divorce. *Id.* at 52, 604 N.W.2d at 584. The circuit court imposed a constructive trust on a one-half interest in *Hackl's* pension. *Id.* at 44–45, 604 N.W.2d at 580–81. *Hackl* appealed, claiming that his wife's interest in his pension terminated upon her death. *Id.* at 45, 604 N.W.2d at 581. The court of appeals affirmed the circuit court decision on the principle that a murderer should not be allowed to benefit from his crime. *Id.* at 45, 604 N.W.2d at 581.

48. See *id.* at 57, 604 N.W.2d at 586; *King*, 261 Wis. at 274, 52 N.W.2d at 889; *Wilkins*, 192 Wis. at 121, 211 N.W. at 656.

49. 1981 Wis. Sess. Laws 1065–66; see WIS. STAT. § 632.485 (1983–1984) (preventing one who intentionally and feloniously kills a person from collecting on a life insurance policy for that victim); WIS. STAT. § 700.17(2)(b) (1983–1984) (severing joint tenancy and survivorship rights when one joint tenant intentionally and feloniously kills another joint tenant); WIS. STAT. § 852.01(2m) (1983–1984) (preventing an heir from collecting on the estate of a decedent whom the heir has killed intentionally and feloniously); WIS. STAT. § 853.11(3m) (1983–1984) (preventing a beneficiary who intentionally and feloniously kills a decedent from collecting on her estate, unless the decedent's wishes would be best carried out in doing so); WIS. STAT. § 895.43 (1983–1984) (preventing a beneficiary of a contractual arrangement who kills the principal obligee from receiving any benefit from the arrangement); WIS. STAT. § 895.435 (1983–1984) (preventing a beneficiary who intentionally and feloniously kills an individual from receiving any benefit payable as a result of the death).

50. See WIS. STAT. § 632.485 (1983–1984); WIS. STAT. § 700.17(2)(b) (1983–1984); WIS.

amendments was the creation of section 852.01(2m), the section from which the present day slayer statute derives.⁵¹ This section, which was incorporated into Wisconsin's general intestate succession section, forbade intestate succession to one who intentionally and feloniously killed the decedent.

In 1997, these amendments were repealed and replaced by a reference to the newly created section 854.14.⁵² The language of the applicable portions of the new section was very similar to that of its predecessor (section 852.01(2m)), with two significant changes.⁵³ The first was a change in the term "felonious"⁵⁴ to "unlawful."⁵⁵ The second was a change in the burden of proof of one challenging the ability of the potential killer to collect from "clear and convincing evidence"⁵⁶ to a "preponderance of the evidence."⁵⁷

D. Slayer Statutes in Other Jurisdictions

While there has not been consideration of insanity with respect to the slayer statute in Wisconsin, sixteen states with similar slayer statutes have considered the issue.⁵⁸ Courts in these jurisdictions have interpreted language very similar to the Wisconsin statute in many different ways.⁵⁹ The resulting applications are scattered. Some states conclusively determine whether sanity is required for application of the slayer statute.⁶⁰ Others merely set a standard of intent and determine on

STAT. § 852.01(2m) (1983–1984); WIS. STAT. § 853.11(3m) (1983–1984); WIS. STAT. § 895.43 (1983–1984); WIS. STAT. § 895.435 (1983–1984).

51. See *Hackl*, 231 Wis. 2d at 50 n.4, 604 N.W.2d at 583 n.4.

52. 1997 Wis. Sess. Laws 1428, 1440.

53. Compare WIS. STAT. § 854.14 (1999–2000), with WIS. STAT. § 852.01(2m) (1983–1984).

54. See WIS. STAT. § 852.01(2m) (1983–1984).

55. See WIS. STAT. § 854.14 (1999–2000).

56. See WIS. STAT. § 852.01(2m) (1983–1984).

57. See WIS. STAT. § 854.14 (1999–2000).

58. See Stephen J. Karina, Note, *Ford v. Ford: A Maryland Slayer's Statute Is Long Overdue*, 46 MD. L. REV. 501, 503 n.20 (1987).

59. Compare *Turner v. Estate of Turner*, 454 N.E.2d 1247, 1252 (Ind. Ct. App. 1983) (holding that an insane killer is permitted to collect on his victims' estates), with *United States v. Kwasniewski*, 91 F. Supp. 847, 854 (E.D. Mich. 1950) (holding that an insane killer is not permitted to collect on his victim's estate).

60. See IND. CODE § 29-1-2-12.1 (1988) (determining that a killer found guilty but mentally ill may not enjoy the proceeds of her victim's death); see also *De Zotell v. Mut. Life Ins. Co.*, 245 N.W. 58 (S.D. 1932) (holding that South Dakota's slayer statute only applies to sane killers).

a case-by-case basis whether a particular killer meets that intent standard.⁶¹

Perhaps the most interesting state reaction to the impact of insanity on a slayer statute occurred in Indiana in *Turner v. Estate of Turner*.⁶² In *Turner*, a young man shot and killed his parents.⁶³ The criminal court found that he was guilty of the murders but not responsible by reason of insanity.⁶⁴ Soon after, the probate issue arose as to whether Turner could collect on the estates of his parents.⁶⁵ Interpreting a statute very similar to Wisconsin's current statute,⁶⁶ the Indiana Court of Appeals permitted Turner to collect.⁶⁷ The statute required that the killing be "intentional," and because he was insane at the time of the murder, he did not satisfy this requirement.⁶⁸

Less than two years after the Indiana Court of Appeals issued its ruling, the Indiana legislature amended the language of the statute, excluding killers found not guilty by reason of insanity from collecting on decedents' estates.⁶⁹ In doing so, Indiana has grouped those who kill out of insanity along with all other killers who are not able to benefit from committing a crime.⁷⁰

Agreeing with the conclusion of the Indiana legislature, the Ohio legislature created a statute with language similar to Indiana's amended statute.⁷¹ The statute requires that persons found not guilty by reason of insanity should not benefit from the death, regardless of the criminal acquittal.⁷² All money, property, and insurance proceeds are to be distributed as if the insane killer predeceased the decedent.⁷³ Thus, like Indiana, Ohio has not given the insane individual any special treatment

61. See, e.g., *Anderson v. Grasberg*, 78 N.W.2d 450, 461 (Minn. 1956).

62. 454 N.E.2d 1247 (Ind. Ct. App. 1983).

63. *Id.* at 1248.

64. *Id.*

65. *Id.* at 1248-49.

66. Compare IND. CODE § 29-1-2-12 (1982), with WIS. STAT. § 854.14 (2005-2006). The statutes are similar in that they both require any killing to be both intentional and unlawful in order to prevent the killer from collecting from the victim's estate.

67. *Turner*, 454 N.E.2d at 1252.

68. *Id.*; see IND. CODE § 29-1-2-12 (1982).

69. Karina, *supra* note 58, at 510 n.64; see IND. CODE § 29-1-2-12.1 (1988).

70. See § 29-1-2-12.1.

71. See OHIO REV. CODE ANN. § 2105.19 (LexisNexis 2007).

72. See *id.*

73. *Id.*

to receive benefits from a crime.⁷⁴

Similar in method, South Dakota has taken a clear stand on the applicability of slayer statutes to insane killers. However, South Dakota has taken the opposite position from Indiana and Ohio, applying its slayer statute only to sane killers.⁷⁵ In *De Zotell v. Mutual Life Insurance Co.*, the beneficiary of a man's life insurance policy sought to collect on the policy despite having killed the insured.⁷⁶ The court indicated that the beneficiary, who was not insane, could not collect, because a "sane, felonious killer cannot recover insurance money on the life of his victim."⁷⁷ An individual found insane at criminal trial does not fall within the South Dakota slayer statute.⁷⁸

In less direct fashion, several states have not explicitly determined whether an insane individual can collect; rather, they have clarified the "intent" requirement of their slayer statutes. Still, those states differ on the requisite level of "intent."⁷⁹ Many states, such as New Jersey, have simply adopted the criminal intent standard.⁸⁰ In these states, a defendant found to act with the requisite intent in criminal court falls within the reach of the slayer statute and is denied benefit from the decedent's death. For example, in *In re Estate of Artz*, a young man was charged and convicted of killing his mother.⁸¹ However, he was acquitted on the basis of insanity.⁸² Upon determining whether he could participate in the proceeds of his mother's estate, a New Jersey court found that the criminal intent standard controlled the determination under the slayer statute, and because the man was found insane, he could not form criminal intent and was permitted to participate in the estate distribution.⁸³

A similar standard is used in Maryland. In *Ford v. Ford*,⁸⁴ a woman

74. *See id.*

75. *De Zotell v. Mut. Life Ins. Co.*, 245 N.W. 58, 65 (S.D. 1932) (holding that South Dakota's slayer statute applies only to sane killers).

76. *Id.* at 58-59.

77. *Id.* at 59 (emphasis added).

78. *See id.* at 65.

79. William M. McGovern, Jr., *Homicide and Succession to Property*, 68 MICH. L. REV. 65, 93-94 (1969).

80. *See, e.g., In re Estate of Artz v. Artz*, 487 A.2d 1294 (N.J. Super. Ct. App. Div. 1985).

81. *Id.* at 1295.

82. *Id.*

83. *Id.*

84. 512 A.2d 389 (Md. 1986).

stabbed her mother several times, resulting in the mother's death.⁸⁵ At the criminal trial, she was found not responsible by reason of insanity.⁸⁶ The mother's will was admitted to probate, and the court ruled that the killer, Ford, had forfeited her right to the devised property naming another beneficiary.⁸⁷ The appeals court reversed, holding that because she was criminally insane at the time of the offense, Ford was incapable of forming the requisite intent required for murder and was not barred from inheriting.⁸⁸ Ford was allowed to collect her share of her mother's estate despite causing her mother's death.⁸⁹ Several additional states addressing insanity and slayer statutes,⁹⁰ as well as the Restatement of Restitution,⁹¹ have adopted the same standard as New Jersey and Maryland and allow insane killers to collect.⁹²

On the other hand, Minnesota makes it easier for the insane killer to collect on the estate of the decedent.⁹³ Minnesota case law holds that one can be considered insane for purposes of collection on an estate even if she was considered sane at criminal trial.⁹⁴ In *Anderson v. Grasberg*, a man who killed his wife was permitted to collect life insurance proceeds despite a finding at the criminal trial that he could distinguish between right and wrong at the time of the murder—the standard under which criminal insanity was judged in Minnesota at the time.⁹⁵ The probate court concluded that the killer was suffering a mental disease and that the statute preventing collection did not apply to such individuals.⁹⁶ Therefore, while considered sane under the commonly used insanity test at criminal trial, he was permitted to collect the insurance proceeds.⁹⁷

Other states use a definition of intent that makes it more difficult for

85. *Id.* at 390.

86. *Id.* at 393.

87. *Id.* at 390.

88. *Id.* at 399.

89. *Id.*

90. *See, e.g., In re Estates of Ladd*, 153 Cal. Rptr. 888 (Ct. App. 1979) (declaring California's position that insane persons are not of sound mind and, therefore, cannot act intentionally for purposes of the slayer statute).

91. *See* RESTATEMENT OF RESTITUTION § 187 (1936).

92. *Ford*, 512 A.2d at 400–04.

93. *See* McGovern, *supra* note 79, at 93.

94. *See* *Anderson v. Grasberg*, 78 N.W.2d 450 (Minn. 1956).

95. *Id.* at 461.

96. *Id.*

97. *See id.*

the insane killer to elude the disqualifying effects of the slayer statute.⁹⁸ In *United States v. Kwasniewski*,⁹⁹ a man killed his wife and tried to collect, as a contingent beneficiary, military benefits she was collecting as the beneficiary of her son who had passed away years prior.¹⁰⁰ In the criminal case, the husband was found not guilty by reason of temporary insanity.¹⁰¹ However, the civil court handling the probate issue was reluctant to consider this finding of insanity conclusive in permitting him to receive the benefits.¹⁰² The civil court agreed that Kwasniewski was temporarily insane at the time of his wife's death, but that he did intend to kill his wife, despite his temporary rage.¹⁰³ Therefore, the intent requirement for the slayer statute was met, and the husband was prevented from collecting the benefits he would have otherwise received upon her death.¹⁰⁴ This result is similar to the updated Indiana statute, where an individual may not have the criminal intent to warrant punishment but is nevertheless denied receipt of benefits from the event.¹⁰⁵

Finally, thirty-four states, including Wisconsin, have not identified the intent required, leaving courts in these states to navigate an unclear path.¹⁰⁶

IV. HOW SHOULD *VAN LARE* BE DECIDED?

A. *Interpreting Section 854.14*

Under section 854.14, there are three ways in which Van Lare would fall within the slayer statute and fail to collect on his wife's estate.¹⁰⁷ The

98. See McGovern, *supra* note 79, at 93–94.

99. 91 F. Supp. 847 (E.D. Mich. 1950).

100. *Id.* at 848–49.

101. *Id.* at 850. The husband correctly suspected his wife of cheating on him and, upon catching her with another man, shot and killed her. *Id.*

102. *Id.* at 854.

103. *Id.* at 852–53.

104. See *id.*

105. See IND. CODE § 29-1-2-12 (1982).

106. See *Ford v. Ford*, 512 A.2d 389, 400–04 (Md. 1986).

107. See WIS. STAT. § 854.14(5) (2005–2006). First, any “final judgment establishing criminal accountability for the unlawful and intentional killing of the decedent conclusively” meets this requirement. *Id.* Second, “[a] final adjudication of delinquency on the basis of an unlawful and intentional killing of the decedent” establishes intent and unlawfulness. *Id.* Third, “[i]n the absence of a judgment . . . or . . . adjudication, . . . [a] court, upon the petition of an interested person, shall determine whether, based upon the preponderance of the

first method, a final adjudication assigning criminal liability, does not apply in this case as Van Lare was not held legally accountable in his criminal trial.¹⁰⁸ The second possibility, an adjudication of delinquency, does not apply either, as he was not found delinquent in his criminal proceeding (nor could he have, as he was not a minor).¹⁰⁹ Therefore, if Van Lare is going to be refused his marital share of his wife's intestate estate, it will have to be under the third option: a court determination by a preponderance of the evidence that his killing was unlawful and intentional.¹¹⁰ Unfortunately, this is where section 854.14 ends, providing no further assistance in determining what is unlawful and intentional.¹¹¹

This lack of assistance is not overly concerning with respect to unlawfulness, as it seems obvious that the homicide was unlawful. The fact that the criminal court found Van Lare guilty of first-degree intentional homicide indicates the unlawfulness of his actions.¹¹² He simply was held not responsible due to his mental state.¹¹³

The interesting question lies in whether the act was intentional, specifically whether the finding of insanity conclusively establishes Van Lare's lack of intent. As previously noted, this question depends on the applicable legal standard of intent and whether this standard is met in spite of insanity. Unfortunately, the legislature has not provided an intent standard by which to judge the actions of the killer. Instead, general discretion is left to the court to determine whether the killing was intentional, with vague instructions, such as "preponderance of the evidence"¹¹⁴ and "clear and convincing evidence."¹¹⁵ Such standards are commonly used by courts in determining findings of fact or the application of those facts to the settled law, but in this situation, there is essentially a question as to the correct legal standard against which those facts are to be evaluated.

Allowing such discretion in essentially determining the law is dangerous for several reasons. Most obviously, the lack of a legal

evidence, the killing of the decedent was unlawful and intentional." *Id.*

108. See § 854.14(5)(a).

109. See § 854.14(5)(b).

110. See § 854.14(5)(c).

111. See *id.*

112. Doege, *supra* note 26.

113. Doege, *supra* note 26.

114. See § 854.14(5)(c).

115. See WIS. STAT. § 852.01(2m) (1983-1984).

standard leaves the issue to the determination of a particular judge, lending itself to an arbitrary result. The final result seems to rest on the subjective view of the trial court. This brings to the surface another danger: the fact that this arbitrary result may be followed as precedent, effectively setting a standard that may have not been intended by the legislature.

Absent further legislative indication of "intent," the *Van Lare* court will have to determine the requirement of intent in section 854.14. As noted above, states addressing the issue have chosen among one of three standards: (1) criminal intent; (2) a standard more stringent than criminal intent, meaning that meeting the criminal intent standard would not be sufficient; and (3) a standard less stringent than criminal intent.¹¹⁶ While it is unknown which standard was intended by the Wisconsin legislature, some reasonable inferences can be made.

A review of the legislative history indicates two material changes in the language of the statute in its evolution over the past two decades. The first is a change from the word "felonious" to the word "unlawful" in describing a criterion of disallowance.¹¹⁷ The second is a change in the burden of proof of the party opposing collection by the insane killer from "clear and convincing evidence" to a mere "preponderance of the evidence."¹¹⁸ These changes suggest intent by the legislature to lower the requirements for individuals to come within the section, resulting in the inclusion of a greater number of individuals within the bounds of the slayer statute. Whether this inclusion extends to insane slayers is still unclear, but there is an indication of a broader inclusion of those who are denied the benefits of slaying.

In identifying these changes, it reasonably can be inferred that the legislature did not intend a standard more stringent than the criminal intent standard. Legislative historical evidence aside, this standard also defies the logical application of the maxim that one cannot benefit from one's crime, as it may result in instances where a killer is found guilty at criminal trial, yet is also allowed to collect benefits from the death.¹¹⁹ This would occur when the killer meets the criminal requirement of intent, yet fails to meet the stricter level of intent as required by the

116. See *supra* Part III.D.

117. Compare WIS. STAT. § 852.01(2m) (1983–1984), with WIS. STAT. § 854.14(5) (2005–2006).

118. Compare WIS. STAT. § 852.01(2m) (1983–1984), with WIS. STAT. § 854.14(5) (2005–2006).

119. See, e.g., *Anderson v. Grasberg*, 78 N.W.2d 450 (Minn. 1956).

statute.

Remaining, then, is the criminal level of intent and the standard that denies benefit at some level below the criminal level of intent. Of the few states that have considered this issue, several have determined that the appropriate level of intent for the slayer statute is the criminal level.¹²⁰ These states hold that a conviction or acquittal in the criminal trial is dispositive of whether an individual can benefit from the death.¹²¹ Criminal intent is defined in Wisconsin in section 939.23.¹²² It defines “intentionally” as “a purpose to do the thing . . . or is aware that his or her conduct is practically certain to cause [a particular] result.”¹²³ Under this standard, it is likely that an insane individual would not have intended the particular act and, therefore, would not fall under the restrictions of section 854.14. If this were the case, Van Lare probably would be able to collect on his wife’s estate. Though the court found that he was guilty of first-degree intentional homicide, Van Lare was considered not responsible due to his mental condition. Because he could not recognize the consequences of his actions, he could not have had a purpose to cause them.

However, various states have determined the intent standard to be below the criminal level of intent.¹²⁴ These states hold that acquittal is not dispositive as to whether an individual can profit from the insane killing.¹²⁵ Thus, even though Van Lare was found not guilty by reason of insanity, he may still be prevented from collecting under this standard.

This standard is a logical one, as probate disputes are civil, not criminal, matters. At a criminal trial where the constitutionally protected rights of the defendant are at risk, courts generally err on the side of caution,¹²⁶ enforcing tougher standards on the prosecution and preferring to let a criminal go free than to convict an innocent person.¹²⁷

120. See, e.g., *Ford v. Ford*, 512 A.2d 389, 400–04 (Md. 1986); *In re Estate of Artz*, 487 A.2d 1294, 1296 (N.J. Super. Ct. App. Div. 1985).

121. See *Artz*, 487 A.2d at 1296.

122. See WIS. STAT. § 939.23 (2005–2006).

123. *Id.*

124. See, e.g., *United States v. Kwasniewski*, 91 F. Supp. 847, 853 (E.D. Mich. 1950) (applying Michigan law).

125. See *id.*

126. Sandra M. Ko, Comment, *Why Do They Continue to Get the Worst of Both Worlds? The Case for Providing Louisiana’s Juveniles with the Right to a Jury in Delinquency Adjudications*, 12 AM. U. J. GENDER SOC. POL’Y & L. 161, 169 (2004).

127. Bryan A. Liang, *Shortcuts to “Truth”: The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 255 (1998).

These same rights are not at risk in a civil matter. Furthermore, at a criminal trial, one private party competes with the state, which is in a better position to bear the cost of an incorrect decision than the individual defendant.¹²⁸ In a civil suit, two private parties compete for the same interest. If the insane killer is permitted to collect on the estate, another private party is prevented from collecting that portion. Therefore, it would not be unreasonable for a lower burden of proof to be sufficient to sustain a verdict against a party in a civil case when such standard would not be sufficient to sustain an unfavorable verdict against that party in a criminal case. The fact that these suits are civil in nature may lead the court to be less preferential to the insane killer than it might be in a criminal trial.

To choose between these two standards, and even to completely disregard the third standard as a possibility, would be pure speculation. The legislature has given little indication of its "intent" standard, and both of the remaining standards are conceivable options. Therefore, consideration of the policy reasons behind permitting an insane killer to collect on the benefits of the victim's death may be persuasive in deciding the issue.

B. Policy Implications

A variety of public policies may play a role in determining whether to permit an insane killer to collect. For example, one of the purposes of law is to remove incentives for violating the law.¹²⁹ However, if someone is truly insane and kills out of this insanity, denying that person access to benefits from the death will serve no beneficial deterrent function.¹³⁰ An individual killing out of insanity does not rationally consider the effects his or her action will have or what benefits, if any, will result from the killing.¹³¹ This is the precise reason why such a person is not charged criminally for the crime—the punishment will not deter any behavior and will have no rehabilitative benefit.¹³² Similarly,

128. See *Addington v. Texas*, 441 U.S. 418, 423–24 (1979).

129. See, e.g., *City of Brentwood v. Cent. Valley Reg'l Water Quality Control Bd.*, 20 Cal. Rptr. 3d 322, 336 (Ct. App. 2004) (noting that a basic purpose of law is to discourage individuals from offending).

130. See Peter Arenella, *Reflections on Current Proposals to Abolish or Reform the Insanity Defense*, 8 AM. J.L. & MED. 271, 273 (1982) (noting that deterrence of the insane is highly unlikely).

131. See *id.*

132. See *id.*

denying insane individuals the benefit of profiting from the incident will not deter other insane individuals from killing. Therefore, not allowing the insane killer to collect on the victim's estate will have no effect on the killer's choice to kill, and ineffective law is pointless law.¹³³

Yet there are many policy reasons for limiting the recovery by insane killers as well. For example, the purpose of posthumous transfers is satisfying the intent of the decedent.¹³⁴ It seems reasonable to assume that the victim of a homicide would not intend his or her killer to receive a portion of his or her estate.¹³⁵ Certainly a decedent would not contemplate his or her own slaying at the hands of an insane beneficiary and, therefore, would not draft a will provision for such a situation.

Also, precautions are frequently used to prevent the direct transfer of significant amounts of money to persons who lack the mental capacity to manage it. Those who are incapable of handling large amounts of money may receive it in trust, with the trustee authorized to use it for the benefit of the beneficiary. Therefore, there may be a general interest in limiting the amount insane killers receive, if permitted at all in this situation.

Another factor may be the increasing skepticism toward the insanity defense.¹³⁶ Justice requires that those responsible for breaking the law be punished for what they have done, yet the insanity defense leaves crimes without criminals to hold accountable, seeming to undermine justice and accountability. Skepticism is increased by the fact that well-paid experts try to convince courts and juries that those who seemingly commit heinous crimes should not be held accountable because of mental imperfections.¹³⁷ The common person may have trouble believing in these alleged defects, something one has likely never experienced.¹³⁸

133. See William H. Rodgers, Jr., *Where Environmental Law and Biology Meet: Of Pandas' Thumbs, Statutory Sleepers, and Effective Law*, 65 U. COLO. L. REV. 25, 28 (1993) (speaking of the low to non-existent functional value of ineffective law).

134. Andrew L. Noble, *Intestate Succession for Stepchildren in Pennsylvania: A Proposal for Reform*, 64 U. PITT. L. REV. 835, 835 (2003).

135. Interestingly, this brings up issues of euthanasia. While it will not be discussed here, there are situations in which a decedent may have wanted an individual to kill her and that her intent would be to include that individual in the sharing of the estate.

136. Scott Leigh Sherman, Note, *Guilty but Mentally Ill: A Retreat from the Insanity Defense*, 7 AM. J.L. & MED. 237, 237 (1981).

137. See *id.*

138. *Id.* at 237-38.

C. Probable Solution

Based on the statutory language, treatment in other jurisdictions, and policy considerations, a probate court in Wisconsin would likely find the insane killer to be outside the parameters of the slayer statute and permit collection of benefits from the killing. The majority rule from other jurisdictions indicates that the criminal standard is the appropriate one to apply, and Van Lare would not fall within this standard, as he was acquitted at a criminal trial. Further, denying Van Lare access to his wife's estate will not influence his future conduct nor deter other insane persons from acting out of their own insanity. While it may not be preferable to pass large estates to the mentally unstable, doing so would be consistent with the belief that people can be rehabilitated and successfully assimilated back into society.

As hopefully demonstrated, the process engaged in above is far from exact and represents nothing more than one individual's interpretation of an unclear area of law. Nevertheless, it is similar to the process that will inevitably occur in Wisconsin courtrooms absent further legislative action.

V. LEGISLATIVE ACTION

This case is almost identical to the *Turner* case from Indiana. The statutes read almost identically.¹³⁹ The factual scenarios are very similar.¹⁴⁰ The results at criminal trial are very similar.¹⁴¹ Considering the above analysis, it seems that the results from Wisconsin's probate court could be very similar, as well.

The distinguishing feature of these two cases lies in the action taken by the Indiana legislature following the trial result.¹⁴² The state of Indiana made a policy decision that it was not appropriate for someone adjudicated insane to collect on the estate of the decedent.¹⁴³ It determined that mental condition aside, permitting anyone to collect on the estate of someone they killed went against the maxim that one cannot benefit from the commission of a crime.¹⁴⁴ A modification was

139. Compare IND. CODE § 29-1-2-12 (1982), with WIS. STAT. § 854.14 (2005–2006).

140. Compare *Turner v. Estate of Turner*, 454 N.E.2d 1247, 1248–49 (Ind. Ct. App. 1983), with *supra* Part II.

141. Compare *Turner*, 454 N.E.2d at 1249, with *Doege*, *supra* note 26.

142. See IND. CODE § 29-1-2-12.1 (1988).

143. See *id.*

144. See *id.*

made to the statute, preventing those who kill out of insanity from collecting on the estate of the decedent.¹⁴⁵ This was a strong stand in response to a murky area of law.

The Wisconsin legislature is in the position to take a similar, though not necessarily the same, stand to clarify this area of the law. The legislature can do one of two things. First, it could take similar action to that of Indiana, directly codifying whether an insane killer can collect on the decedent's estate. This would certainly be the most preferable option, leaving little room for error and providing for the clearest results.

The second action the legislature could take is to simply define the critical terms it uses in the section. When decisions are to be based on the meaning of specific terms, such as "unlawful" and "intentional," such terms should be clearly defined as to their scope. This allows courts to rationally and uniformly decide the issue. It may also save the legislature from having to completely overturn what it considers incorrect judicially determined doctrine, as seen in Indiana (although better late than never).

VI. CONCLUSION

Not surprisingly, the *Van Lare* probate issue was settled during the publication of this Comment.¹⁴⁶ While it is impossible to assert that legal uncertainty was the sole cause for the settlement, briefs from both parties indicated the lack of both precedent and clarity on the impact of insanity on the Wisconsin slayer statute.¹⁴⁷ Although settlement and closure may be best for all those involved, it would be unfortunate if the decision to do so rested primarily on the vagueness of the law.

Absent any modification from the legislature, it seems reasonable that strict application of section 854.14 results in the insane killer collecting on the decedent's estate, as none of the three methods by which "unlawful and intentional" killing is determined are present here. However, the confusion is far from over. The only way to prevent an arbitrary solution to this issue is for the Wisconsin legislature to provide courts with guidance. Failure to do so will result in arbitrary application of an uncertain law, leaving the issue in the hands of a randomly

145. *See id.*

146. *See* Post-Mediation Agreement, *In re* Estate of Van Lare, No. 2004PR119 (Waukesha County Cir. Ct. Nov. 29, 2006).

147. *See* Brief in Support, *supra* note 32, at 6; Brief in Opposition, *supra* note 28, at 4, 8.

selected judge. For the sake of the parties involved and the sanctity of the law, a standard needs to be set, whatever it may be.

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