No. 303314

COURT OF APPEALS DIVISION III

OF THE STATE OF WASHINGTON

In the Matter of the Estate of

WENDELL K. MILES, Deceased

APPELLANT'S REPLY BRIEF AND RESPONSIVE MEMORANDUM TO CROSS-APPELLANT'S OPENING BRIEF

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APPELLANT'S REPLY

A. Reply To Respondent's Statement Of The Case:

1. Previous Statement Incorporated By Reference

Appellant refers to the Statement of the Case as set forth in Appellant's Opening Brief on Pages 4 through 12 for a complete discussion of the facts underlying this appeal.

2. CVAS Itself Argued For The Implementation Of "Cy Pres"

Conspicuously omitted from CVAS's Statement of the Case is the fact that CVAS, the Respondent here, itself urged the utilization of the *Cy Pres* doctrine to distribute Mr. Miles' gift. (CP 70)

CVAS presented the following argument to the trial court in its brief for the distribution hearing:

> The doctrine [cy pres] applies in situations where a testator has evidenced a dominant intent to devote his property to some charitable use but the circumstances are such that it becomes impossible to follow the particular method he directs, and the courts then sanction its use in some other way which will, as nearly as may be, approximate his general intent. See Duncan v. Higgins, 129 Conn. 136, 26 A.2d 849. Ordinarily where an organization to which a charitable gift or devise is made is incapable of taking it, the question whether its payment to another organization will be permitted is determined upon the basis of the applicability of the *cy pres* doctrine or doctrine of approximation; and that doctrine will be applied only where the court finds in the terms of the will, *read in the light of surrounding circumstances*, a general intent to devote the property to a charitable use, to which the intent that it go to the particular organization named is secondary.
> (Emphasis added) Id.

(CP 70)

3. ***The Estate Advocated Sharing The Gift By Way Of An Umbrella Group.***

Also omitted from CVAS's statement of the Case are details about the Estate's first Petition for Distribution filed in Superior Court. Until the time it filed an Amended Petition for Distribution, the Estate intended to have the Estate assets distributed by implementing an "umbrella group". (CP 19-20, 37, 54-58). Referring to the real property under discussion here, the Estate executrix acknowledged that

> this Personal Representative shall apply to the court for a determination as to the distribution of the proceeds from the sale because various legal theories can be advanced which will result in the ultimate distribution of this asset to multiple entities or persons. (Emphasis Added)

(CP 20)

The idea of the umbrella organization was the subject matter of extensive correspondence by e*mail from one Lennox Ryland, sister-in-law of the Personal Representative Rita Garrison. Ms. Ryland went so far in her mailingS to Ms. Tasker as to propose bylaws for an organization she called the Stevens County Animal Welfare Alliance (CP 37, 54-55), including a mission statement for said proposed organization. (CP 54-58) Ms. Ryland envisioned starting the new year with the first formal meeting of the Stevens County Animal Welfare Alliance, proposing that it be a 501(c)(3) non-profit organization. (CP 55). Ms. Ryland addressed her

correspondence to all concerned persons and organizations, to wit, Dog Patch and other agencies that had an active interest in and commitment to promoting the welfare of animals in the Colville area. (CP 56) The Estate's Personal Representative Rita Garrison in her affidavit in support of the Interim Report asked for a hearing to determine the "ultimate recipients" of the real property, acknowledging the uncertainty of the identity of Mr. Miles' devisee. (CP 28)

B. Reply To Substantive Arguments Of Response Memorandum

1. Cy Pres Should Be Implemented To Distribute The Testator's Gift.

The *Cy Pres* doctrine should be applied in this case and the property distributed to the organizations fitting the Testator's testamentary intent.

As noted above, this was the position taken by CVAS at the distribution hearing. CVAS's position changed only after the gift was given to it entirely by the Superior Court. Yet CVAS devotes a section of its memo to an argument that *Cy Pres* is not required nor authorized here. (Respondent/Cross Appellant's Brief at Page 20.)

The record reflects that in its Memorandum in Opposition to Estate's Amended Interim Report filed April 29, 2011, CVAS articulately

and correctly agreed that the Doctrine applies in situations where a testator has evidenced a dominant intent to devote its property to some charitable use but circumstances are such that it becomes impossible to follow the particular method directed by the grantor. The court in that instance, should sanction the gift's use in some other way which will as nearly as may be possible approximate his general intent. (CP 70)

This is the argument of CVAS. This is the position it had taken all along during the negotiations regarding the umbrella group. Ms. Tasker and Dog Patch reiterate and concur in CVAS's own argument regarding the applicability of *Cy Pres* here in support of her position. That is, in light of the surrounding circumstances, the court should accede to the general intent to devote the property to a charitable use to which the intent that it go to the particular organization named is secondary. As stated by CVAS, the circumstances surrounding the testator's will clearly demonstrate that he loved animals and that he wanted his property to be devised to animal humane organizations in the Colville area. (CP 70)

2. CVAS Appears To Promote A* Cy Pres *Disposition Even Now.

CVAS' memorandum as it proceeds from Page 15 to Page 21 amounts to a discussion of how a gift would be fairly shared between CVAS and Dog Patch rather than arguing that CVAS is more correctly entitled to the entire gift. The organization argues its relatively greater

participation in animal rescue efforts (Response Brief, Page 17); the greater number of animal rescues it accomplishes versus that of Dog Patch (Response Brief, Page 18); that CVAS shelters and adopts while Ms. Tasker's Dog Patch focuses on other issues such as adoption, placement and education (Response Brief, Page 19); and that Ms. Tasker's involvement in business other than attending to dogs and animals makes her less worthy. (Response Brief, Page 19-20).

Ms. Tasker disputes the favorable comparison CVAS gives itself over Dog Patch in many of these areas. Even assuming CVAS's comparison to be correct, however, this argument speaks only to the way the gift should be shared between the two competing entities, not to say that CVAS is solely entitled to it. The brief of CVAS should more properly be viewed as its position in either the TEDRA process or by the court in the *Cy Pres* distribution of the gift.

3. Application Of Cy Pres *Avoids A Gift Lapse.*

CVAS goes on to argue that *Cy Pres* only applies where it is evident a Testator does not intend to gift to a specific person or entity, but instead to a specific class of beneficiaries. (Respondent/Cross-Appellant's Brief, Page 23). Assuming for a moment that there is no description here that clarifies which organization should receive the property – neither CVAS or Dog Patch – Respondent's argument would have it that the gift

should not pass to animal rights organizations, but instead go to the residuary. But this clearly would be contradictory to the intent of Mr. Miles' testamentary scheme. Such an outcome would bring about the gift lapse that CVAS agrees should not occur. (CVAS Response Brief, Page 20)

A better rule mentioned but underplayed by CVAS is found in the case it cites from Connecticut. *Cy Pres* applies in situations where a testator has evidenced a dominant intent to devote the property to some charitable use but the circumstances are such that it becomes impossible to follow the particular method he directs. *Duncan v. Higgins*, 129 Conn 136.

Therefore, rather than saying the gift fails because it does not go to a class of beneficiaries, this court should apply *Cy Pres* in this instance where a specific beneficiary is not known but the purpose and intent of the gift is known. This approach would follow the initial lead of the Estate when it recommended and invited participation of animal rights organizations to share in the gift by way of the Stevens County Animal Welfare Alliance, the umbrella organization that never materialized. (CP 55).

4. No Basis For The Court To Infer That Miles Knew About CVAS.

Respondent argues on Page 16 of its memorandum that Mr. Miles

knew of Dog Patch Group's defunct status. No such evidence exists. To the contrary, Ms. Tasker's Private Operating Foundation, Dog Patch Humane, was the only organization in existence in Colville advertising in the yellow pages under "Humane Societies" at the time Mr. Miles made his devise. (CP 52) That Ms. Tasker said "the name Wendell Miles was not familiar to her" is not dispositive of whether Mr. Miles knew her or was familiar with Dog Patch. (Respondent/Cross-Appellant's Brief at 16.) Indeed, the Colville area was awash in circulars, phone book ads, and other advertisements that listed Ms. Tasker's organization as "Dog Patch Humane". (CP 40-53) Ms. Tasker's organization was the only one of the contenders here to which Mr. Miles made a cash donation. (CP 141) Ms. Tasker recalls encountering Miles in town. She knew him, even if not by name. He visited Dog Patch. (CP 38) The Respondent, on the other hand, can not claim that Mr. Miles ever visited or knew anything about Colville Valley Animal Sanctuary. There is no basis by which the court could "reasonably infer that Mr. Miles knew of CVAS." (Finding of Fact 'K') A challenge to sufficiency of the evidence admits the truth of opposing evidence and inferences. *Bott v. Rockwell Intern*, 80 Wn.App. 326, 332 (1996). But even viewing the evidence in a light most favorable to CVAS, the finding is based on nothing more than speculation.

5. There Is No Evidence That Mr. Miles Knew Of Any Animal Rights Organization In The Area Except For Dog Patch Humane.

Dog Patch has always used the word "Humane" as part of its title. See 1998 Colville Statesman Examiner Ad (CP 40); August 13, 1997 Statesman Examiner News Article (CP 42); Interview Former Stevens County Prosecutor Jerry Wetle (CP 44); North Columbia Monthly Ad (CP 48).

When Mr. Miles wrote his will, Dog Patch had already been known locally as Dog Patch Humane or the "Colville Humane Society" and a shorter version "Dog Patch". Dog Patch has often been referred to as "Colville Humane" and people who call Ms. Tasker at Dog Patch leave messages for Colville Humane. (CP 35) If Mr. Miles knew any Colville area animal rights organization as a Humane Society, it would be Dog Patch.

6. Appellant Has Challenged Adverse Findings And Conclusions.

Findings that are not challenged on appeal are verities. *State v. Harris*, 167 Wn App 340 (2012); *In Re Estate of Haviland*, 162 Wn App 548 (2011). The inverse proposition is that challenged findings are not accepted as verities on appeal. Appellant contended in the opening memorandum and continues to contend here that the Findings of Fact used by the court to reach its Conclusions of Law that flow from them are not

supported by substantial evidence in the record and therefore subject to this court's scrutiny on appeal. *Bott*, *supra* at 690.

a. No Prior Opportunity To Challenge Findings Was Given To Appellant At Trial Level.

There was no notice filed by the Superior Court Judge of proposed Findings and Facts and Conclusions of Law or of a hearing on their entry. Those Findings of Facts and Conclusions of Law were drafted personally by Judge Nielson and he filed them without hearing on presentment. (CP 243-50) There was never an opportunity for Ms. Tasker to object to the Findings or Conclusions.

The errors noted by Ms. Tasker and Dog Patch in the opening memorandum summarized the essence of error alleged. But it is all the adverse aspects of the full findings noted under Part A of Appellant's brief that are challenged here on review. The Appellant considers the references she made to the court's findings and conclusions to address all paragraphs of the Findings mentioned in the Opening Memorandum, the first and only opportunity she had to cite assignments of error.

7. Respondent Provides No Further Evidence To Show That Mr. Miles Knew CVAS.

There is no substantial evidence that supports a conclusion that Mr. Miles knew CVAS. Indeed, from Ms. Rose's Declaration the court

learned that she regretted that she never knew Mr. Miles. (CP 384) Yet the Respondent asks this court to speculate on that point. At Page 15 of Respondent's Reply, CVAS contends that

> the court could reasonably infer that Mr. Miles knew of CVAS. (CP 384, Respondent's Brief at 15.) (Emphasis Added)

That Mr. Miles knew CVAS is a crucial finding of the court under paragraph 'K' to give the property to CVAS, and one not supported by substantial evidence. This court should not accept the invitation by the Respondent to speculate on the issue of whether or not Mr. Miles knew of CVAS.

8. No Proof Shows That Miles Was Exposed To Any Of CVAS's Promotional Materials.

There is no evidence that supports a finding that Mr. Miles knew CVAS, directly or indirectly, or that he had any awareness of it by any of its alleged dba's. Therefore the court's Findings in paragraph "H" that Colville Valley Animal Sanctuary has cards, thank you notes, promotional brochures, t-shirts, sweat shirts and parade banners that have "humane society" written on them are not supported by substantial evidence, and therefore not supportive of a conclusion that Mr. Miles knew CVAS. It can't be said that Miles knew anything about any of those promotional

items or CVAS.

The Court's Finding 'H' that Miles knew CVAS by its real name or by any other names is not supported by the record.

9. Tasker All Along Proposed To Share The Gift With Other Suitable Contenders.

Ms. Tasker all along expressed interest in sharing the gift among animal rights groups. CVAS in its Respondent/Cross-Appellant's Brief at Page 14 et. seq. emphasizes Ms. Tasker's statement that she said "it could equally be said that Mr. Miles' intent was to give this property to Dog Patch" as though it has revealed a smoking gun in Ms. Tasker's comment.

To the contrary, Ms. Tasker from the very start of this Probate proceeding, following the lead of the Estate, agreed the gift should be shared even though she believed it was intended for Dog Patch. She went on to add in her Affidavit filed April 8, 2011 that she has

> never been covetous about the distribution of the proceeds of the sale of the particular item of real property which was targeted for 'Colville human society' to all charitable animal organizations in Colville.

(CP 25)

It is therefore no revelation or any concession whatsoever that Ms. Tasker stated it could equally be said that Mr. Miles' intent was to give his property to Dog Patch. Rather, in her statement Ms. Tasker only pointed

out how imprecise the description of the beneficiary was. She is on record from the start as saying that she would agree to the sharing of the gift equally with Colville Valley Animal Sanctuary or other animal rights groups who had a bonafide right to share it.

10. Much of CVAS's Brief Is Consistent With Ms. Tasker's Position

The responsive memorandum from page 21 to the end centers upon the fact that no organization in Stevens County is known as the "Colville human society". On this point, Ms. Tasker agrees with CVAS. This argument too militates in favor of a *Cy Pres* resolution. Furthermore, none of the facts of record provide the court with any substantial evidence to show that the group intended by Mr. Miles was Colville Valley Animal Sanctuary and not Dog Patch Humane. Neither name is the same as the actual words "Colville human society". If indeed Mr. Miles had looked at the brochures or other promotional material CVAS had used, he could very easily have copied that name down and use the precise name in his will. It is just as easy for Ms. Tasker and Dog Patch to say that Mr. Miles mistakenly wrote down "Colville human society" when he meant Dog Patch Humane, as it is for CVAS to say Miles meant the gift for itself.

This detail underscores the point is that in any instance where there is an ambiguity such as this, the testamentary intent of the Testator as gleaned from the four corners of the will should be implemented. *Matter*

Of Estate of Wendl, 37 Wn. App. 894, 897, 684 P.2d 1320 (1984). It is evident from Mr. Miles' will that his intention was to give to charitable animal rights organizations. These organizations did not necessarily have to be, as the Respondent contends, organizations that house and shelter animals. Mr. Miles gifted to PETA. Yet PETA does not shelter animals. PETA is largely an advocacy group that keeps no animals. Ms. Tasker's Dog Patch on the other hand is a shelter organization, although somewhat reduced in volume in recent years. Her focus is on education and adoption and neutering. She has a big presence in the community as evidenced by the affidavits in her support. The accurate picture of Dog Patch and its function in the community is not from adversary CVAS attack allegations, but from the numerous declarations from members of the bar and local business people whom she has helped. (CP 033-34, 117-20, 121-123, 124, 238-240, 241-42) While she does not disregard CVAS's substantial presence in the community, the court should not disregard the very substantial presence she has and the difference she has made in the welfare of animals over the years and in the year during which Mr. Miles would have made his will.

This is precisely where implementation of the *Cy Pres* doctrine fits. The splitting-up of the gift should be based upon the outcome of a fair fact-finding proceeding under either TEDRA or by the court wherein

the given organization's percentage of contribution to the Stevens County animal cause can be fully and fairly divided. What is incorrect about the court's ruling is that despite the fact that there is no specific organization as stated in the Miles' will – following the literal terms of the will is not possible – *Cy Pres* was not invoked. The court in effect flipped a coin in deciding the recipient should be CVAS.

None of the authority cited by the Respondent should militate to a different conclusion. CVAS reaches back 130 years to a New Jersey case for support of the proposition that the court should let the description of the beneficiary intended prevail over the name used. Assuming that rule applies, there is no description of the recipient of the gift here that gets the court to a conclusion that CVAS was the devisee intended. The identity of the recipient has not been proved as CVAS would have this court accept in applying the authority it cites. It would be a different case if some other indicia in Mr. Miles' will or even parol evidence led to such a firm conclusion. But there is no such evidence that clearly describes the recipient so that the court can know its identity. If the will is silent and parol evidence is unhelpful, then the court is just speculating about identity.

11. <u>Dog Patch Group Never Lost Its Non-Exempt Status</u>.

The Response Brief argues that Ms. Tasker and Dog Patch allowed

its non-profit status to lapse. The argument goes on to say that Ms. Tasker only began filing tax returns after she became aware of the bequest in Miles' will. (Respondent/Cross Appellant's Brief, Page 19)

Reference to Ms. Tasker's Affidavit of April 28th refutes the argument and clarifies the point:

> After designating Dog Patch a 501(c) (3) private operating foundation, the IRS made an error in its computer and mis-categorized Dog Patch. The result was they did not provide proper paperwork to Dog Patch for some years. In May 2010 Dog Patch contacted the IRS Foundation Center inquiring how Dog Patch should comply with the new regulations that had been publicized. It was at that time the IRS error was discovered by the IRS. The IRS instructed Dog Patch how to provide records on which the IRS could re-instate Dog Patch and overcome the error. Dog Patch provided the 990PF's requested and in Nov. 2010 received a letter from the IRS removing delinquencies caused by the IRS error and reinstating Dog Patch as a Private Operating Foundation. (See Exhibit #26). See also, Declaration of Dave Raines, CPA.

(CP 143, 112-116)

Dog Patch was at all times material to the case, and presently is, in existence.

12. Ambiguity Exists As To Which Organization The Testator Intended To Designate.

Finding of Fact "J" says in part that there is ambiguity as to which organization the Testator intended to designate. Appellant agrees with this part of that finding. Appellant disagrees that Testator knew the name of

the organizations and this point is manifest in his failed attempt to correctly name the object of his gift in his will.

Respondent, however, makes an issue out of the way that Ms. Tasker challenged Finding of Fact "I". As set forth above, all adverse findings are challenged here, where there was no hearing on presentment. In that Finding the court said that Mr. Miles had a clear intent to leave property to charitable organizations that protect and care for animals. Gifts to Dr. Bacon, Rita Garrison, Debbie Odeon, and Mr. Randy Hurt certainly are not gifts for animals. Moreover, the gift to PETA is a gift to an organization that champions animal issues and does not engage in direct animal care. That distinction comes into play here because Dog Patch's focus in its recent years is on adoption and education as well as person-to-person placement of animals as opposed to kenneling. Much of Ms. Tasker's housing of animals was precluded by the protracted lawsuit against her. (CP 117-18, 121-23) Ms. Tasker's organization Dog Patch is largely a dog facility but does care for some felines. (CP 35-36) However, Mr. Miles' obituary itself was taken with his picture of his dog, perhaps demonstrating his concern for dogs over other species.

To the extent that Ms. Tasker's organization fits within the description of organizations that cared for animals, Appellant agrees with that Finding "I". To the extent the finding says Mr. Miles' interest lay

only with organizations that sheltered animals, no substantial evidence supports it.

13. Tasker And Dog Patch Both Appeared In The Estate Action And Appealed The Court's Ruling.

The Respondent moved to dismiss this appeal based upon its argument that Dog Patch never appealed the court's decision. (Respondent/Cross-Appellant's Brief, Page 5) It raised a standing argument saying that Ms. Tasker's private operating foundation Dog Patch did not appear in the proceedings. CVAS's position was fully briefed and argued. The argument was rejected by the commissioner and CVAS appealed to the full panel of this Court. CVAS briefed the standing issue a second time. The panel affirmed Commissioner Wasson's decision.

The time for CVAS to petition the Supreme Court for review of this aspect of the decision has come and gone. The standing issue is a thing decided. Even if the argument is again considered by this court, it should be disregarded for reasons set forth in Ms. Tasker's two responsive memos on the subject.

We are left with the substantive issue of whether the court should have applied the *Cy Pres* doctrine. Appellant's answer to that inquiry is in the affirmative as argued herein and previously briefed.

14. When Mr. Miles Visited The Dog Patch Facility Is Irrelevant To His Interest In It.

a. CVAS Speculates On The Date Miles' Visited Dog Patch.

In its memorandum, CVAS concedes or at least doesn't disagree that Mr. Miles visited Dog Patch. (Respondent's/Cross-Appellant's Brief, Page 8) Appellant accepts that concession.

However, CVAS also argues in that section of its memorandum that the visit Mr. Miles made to the Dog Patch facility is somehow stale because in its view it occurred too long ago. (Respondent/Cross-Appellant's Brief, Page 8.)

As noted above, Ms. Tasker's phone book advertisements under the heading "Humane Societies" existed through 2010, the same year Mr. Miles wrote his will. (CP 7) No other facility advertized under that category. The only other organization advertising as a "humane society" at the relevant times advertized in Republic, Washington, a town in neighboring Ferry County to the west of Stevens. (CP 36, 52, 129, 156)

The allegations that the visit to Dog Patch was between 1991 to 1999 when it was highlighted in the news is speculation on the part of CVAS. The facility remained renown and many people have visited it even after those turbulent years of litigation. But irrespective of when

Miles' visit may have taken place, Dog Patch was in existence at the time Mr. Miles wrote his will. (CP 126, 129). That Mr. Miles visited Dog Patch and knew Ms. Tasker is known. When Mr. Miles visited the facility is not known. But even if early on in the history of Dog Patch, the timing of the visit is unimportant. The statement that Mr. Miles' visit to Dog Patch was years ago is speculation and even if true, irrelevant to Mr. Miles' interest in Dog Patch.

b. While Scaled Down, Dog Patch Is A Viable Animal Rights Organization.

The Court did not have substantial evidence to make its finding that Mr. Miles knew Dog Patch had scaled down its operation. (Finding of Fact 'K') Nothing in the record supports such a statement.

15. Dog Patch Group Is Viable And Active.

Among other things, the responsive memorandum contends Dog Patch Group is not in operation. This it does suggesting that Ms. Tasker did not file tax returns for 2005/2006. (Respondent/Cross-Appellant's Brief, Page 9) This personal swipe against Ms. Tasker suggests Dog Patch committed tax fraud.

The court's finding "J" is that the charitable animal organizations in the Colville vicinity that responded in the estate proceeding are "in existence". CVAS did not challenge that finding. There is no counter-

appeal of the Distribution Order that challenges any of the court's findings for that matter. That Dog Patch is in existence and a viable, active organization is further supported by the Affidavits of Attorneys Craig Smith, Lewis Wilson and Carol Hemmingway, among others, who have availed themselves of the services of Dog Patch. (CP 117-20, 238-40, 241-42)

Even though Ms. Tasker and Dog Patch envision an equitable sharing, the fact that Mr. Miles gave a donation to Dog Patch Humane and the companion fact that no evidence exists that he knew anything about Colville Valley Animal Sanctuary would therefore lead to a conclusion that his intent would have been to remember the one organization – Dog Patch Humane – in his will when he referred to the Colville Humane Society. The Court's Finding K to the contrary is without substantial evidence to support it.

Having replied to Respondent's Responsive Memorandum, Ms. Tasker in behalf of Dog Patch now submits its

RESPONSIVE MEMORANDUM TO CROSS-APPEAL

I. Introduction:

At issue here is the sum of $1,100 awarded Ms. Tasker in attorney's fees for having to respond to legal pleadings filed by Nancy Rose for CVAS, a corporation. It is not disputed that Ms. Rose is not a lawyer. (CP 825)

II. Counter-Statement Of Facts Pertaining To Cross-Appeal:

In the Statement of Facts set forth by CVAS in its Cross-Appeal, CVAS suggests it was ambushed by Ms. Tasker at a time their group was without an attorney, thus forcing Ms. Rose to act as an attorney for CVAS. (Response Brief at Page 4).

Ms. Tasker submits that the timing of her attorney's letter as mentioned on Page 4 of Cross-Appellant's Brief was coincidental with CVAS's Notice of Discharge of Counsel. Ms. Tasker had no control over the internal affairs of CVAS. Whether or not CVAS dismissed its attorney Tom Webster who prevailed for CVAS at the disbursement hearing was none of her business. Neither did she have any control over the time limit in which she had to make her decision to appeal the court's decision, the subject of another CVAS accusation. Her window of opportunity to propose a settlement short of appeal was only so wide – thirty days to be precise.

CVAS shows no logical connection between the resignation of Mr. Webster and Ms. Tasker's decision to appeal the Court's ruling. As mentioned in Cross-Appellant's facts, the withdrawal by Mr. Webster was at first contested by CVAS. (Respondent's/Cross-Appellant's Memo, Page 4) although it later doubled-back and dismissed Mr. Webster itself. Ms. Tasker could not keep up with CVAS's internal oscillations never mind time her moves in sync with its. (CP 837) The following chronology may be helpful:

- August 29, 2011, Final Hearing on Distribution.
- September 2, 2011, Mr. Webster, attorney for CVAS filed his Notice of Intent to Withdraw effective September 12th unless a written objection to withdrawal was served upon Mr. Webster. (CP 671-672).
- September 12, 2011, Ms. Rose in behalf of CVAS files that objection. (CP 673-75).
- On September 9, 2011 Lisa Gallagher seeks other counsel in Western Washington. (CP 682)
- On September 20, 2011, the Superior Court handed down its ruling on the distribution issue.
- On September 22, 2011 CVAS's Own Notice of Discharge of Counsel. (CP 837-39)

➢ On September 23, 2011 settlement proposal letter from Appellant's counsel to CVAS's attorney. (CP 740-41)

➢ September 29th Nancy Rose files the Motion to Reopen the Record on behalf of CVAS. (CP 731-36)

Mr. Webster's Notice of Intent to Withdraw apparently came as a result of criticisms by Lisa Gallagher, an associate of CVAS, about the way Mr. Webster was handling the representation of CVAS. (CP 679-681) This criticism was odd considering that under Mr. Webster's representation CVAS fully prevailed on the distribution issue and was awarded the property in question in this appeal.

Whether CVAS would prevail on its objection to Mr. Webster's withdrawal or whether CVAS had it in mind all along to hire another attorney immediately was something Ms. Tasker in behalf of Dog Patch could not have known at the time the settlement proposal letter was sent by her attorney.

The letter proposing settlement from Ms. Tasker's attorney was merely that. (See Appellant's Brief, Page 4) It was an invitation to negotiate a property split without appeal as CVAS had all along intended for Mr. Miles' gift. (CP 267-68). It was in every respect a proposal for settlement. (CP 740-41.) It did not contain threatening words. The initiative was consistent with Judge Nielson's cautionary remarks early on

that the parties should economize in the legal efforts put forth to maximize the value of the charitable gift to its recipients, an opportunity now come and gone.

Finally, regarding the facts of the Cross-appeal, Ms. Tasker is the sole director and the incorporator of Dog Patch Group, Inc. It is a non-profit, Private Operating Foundation (POF) and Ms. Tasker is its only officer and director. (CP 426) CVAS is a non-profit corporation with board of directors and elected officers of which Ms. Rose is its president. In its tax returns the name of its organization is Colville Pet Refuge dba Colville Valley Animal Sanctuary.[1]

The pleadings submitted by Ms. Rose were objected to in part by Ms. Tasker for Dog Patch Humane resulting in a ruling wherein Judge Nielson did strike portions of some affidavits Rose prepared for others. Lisa Gallagher, not a licensed attorney, prepared the majority of the work on the case including all of the briefing and declarations filed on behalf of CVAS. (CP 678-79) Despite Lisa Gallagher's preparation of all the pleadings, the organization, as early as September 9th – only one week after Webster's withdrawal and before any hearing was set on CVAS's

[1] Regarding CVAS's query that Ms. Tasker should object to Ms. Rose's conduct in acting as attorney for CVAS when Tasker herself performed an attorney's role in filing her lis pendens, Ms. Tasker would point out the very different nature of her Dog Patch Foundation from a regular corporation. As stated by CVAS's accountant witness Dog Patch was an alter-ego of Ms. Tasker. (CP 426)

objection to the withdrawal – spoke to counsel in Western Washington for the purpose of hiring a substitute for Mr. Webster. (CP 682) Ms. Rose filed pleadings for CVAS on September 29, 2011, some four weeks after Mr. Webster's Notice To Withdraw.

III. Argument and Discussion

1. Attorney's Fees Were Justified In Amount And Appropriate.

An award of attorney's fees as sanctions is a matter within the sound discretionof the court which should not be disturbed on appeal absent an abuse of discretion. *Marina Condominium Homeowner's Ass'n v. Stratford*, 161 Wn. App. 249, 259, (2011) citing *Magana v. Hyundai Motor America*, 167 Wn. 2d 570, 582 (2009).

Regarding attorney's fees awarded to Ms. Tasker, the record documents the time spent by Ms. Tasker's attorney in responding to the frivolous pleadings of the Sanctuary in moving to reopen the record. The bulk of the declarations in the file used by the court at the distribution hearing – fourteen of twenty-one – were submitted by CVAS. The Sanctuary prevailed and had the real property awarded to it exclusively, notwithstanding CVAS's own readiness to share the gift equitably among other contenders before it learned of the court's ruling. (CP 267-76) CVAS then created a dispute with its own attorney who advocated for

them to a successful conclusion so as to be without counsel when the court's ruling on distribution ultimately came in on September 20, 2011. To a large extent it has only itself to blame for being without an attorney at that crucial juncture in the proceeding.

Therefore, to the extent that it is undisputed that Mr. Rose is not a licensed attorney and that she filed the Motion to Reopen the Record by herself for a corporation, and that the Motion to Reopen was frivolous in that CVAS had fully prevailed at hearing, CR 11 sanctions were properly imposed.

2. No "Threat" Justified Ms. Rose's Acting As CVAS's Attorney.

The cross-appeal part of CVAS's brief says in defense of Ms. Rose's appearing for the corporation that she had to re-open the record because Ms. Tasker was threatening to appeal. (Cross Appellant's Brief at Page 4). To defend Ms. Rose's actions, CVAS fabricates an emergency that never existed to justify her unlawful practice of law. The "emergency" CVAS says existed is that the distribution hearing record was not sufficiently complete because no testimony was taken and more affidavits were needed. (Cross-appeal brief, Page 4). With this faulty premise, Ms. Rose bootstraps her way into an argument of urgency to justify her conduct.

To the contrary there was no need to reopen the record as the Cross-appellant urges was the case because CVAS had fully prevailed having all of Mr. Miles' real estate awarded to it. The decision to have the August 29, 2011 Distribution hearing conducted upon declarations and not testimony was made on advice of CVAS's own counsel. At the hearing, CVAS had available to it Ms. Tasker's answers to CVAS's interrogatories, and of the twenty-one declarations the court reviewed, fourteen were submitted by CVAS, making the bulk of the extensive evidence reviewed before the court that of CVAS.[2] CVAS dwells on the fact that the court conducted the hearing without testimony and that it did not have a chance "to put on a good deal of its case. . . which resulted in an incomplete record to support the trial court's judgment on appeal." (Respondent/Cross Appellant's Brief, Page 4; CP 731-36) Yet the question unanswered is why CVAS would offer fourteen affidavits if it didn't expect the hearing to be conducted on affidavits all along.

Furthermore, the letter that the Sanctuary says is directed to it threatening an appeal was actually a letter to Mr. Webster. (CP 740) Mr. Webster was still attorney of record when the letter was written to him. At the time the letter was written, it wasn't clear that Mr. Webster would

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[2] Ms. Tasker never proffered discovery and therefore used no answers to interrogatories from CVAS at the hearing.

actually be off the case for CVAS. Therefore, all of the argument to the effect that the letter was in the nature of an ambush when CVAS was stranded without counsel is based on erroneous assumption. The letter was written to Webster while still counsel to CVAS. (CP 740-41)

3. CVAS Had Five Months Notice Of Hearing On Distribution.

The August 29th hearing was held after nearly five months of filing of the Estate's first Interim Report on April 5, 2011. (CP 17-24) The court at the first noted hearing of April 26, 2011 pushed the hearing out until May 3, 2011, and then at that May 3rd hearing until August 29, 2011. (CP 286-88) With nearly five months of time to prepare for the hearing after the first notice of hearing on intent to distribute filed by the Estate, CVAS cannot argue in good faith that it didn't have a chance to put on its case.

No prejudice befell CVAS in the way the hearing was conducted. CVAS had ample time to prepare itself for the hearing. Ms. Rose had no urgent need to file a Motion to Reopen by herself for a corporation.

4. No Good Faith Explanation By Ms. Rose Excuses Unauthorized Practice Of Law.

CVAS had one Lisa Gallagher, a lawyer not licensed to practice in Washington, preparing all of its pleadings. (CP 678-79) Someone evaluating Ms. Gallagher's admission to that effect could interpret it to

mean that she prepared pleadings for the present attorney of record as well. It is not credible that Ms. Gallagher could not have enlisted the services of local counsel instead of fabricating an emergency and reaching all the way across to the other side of the State to have an attorney appear for CVAS for its Motion to Reconsider. CVAS intentionally violated the rules and had Ms. Rose file pleadings for it knowing fully well that this was violative of the rules regarding unauthorized practice of law. (CP 744)

The motion was not necessary or urgent in the first place to justify Rose's unauthorized practice. Even if the motion had merit, CVAS could have found an attorney on a more local level who could approve Gallagher's pleadings so it could file it properly.

5. Rose's Position Relative To CVAS Is Distinct From That Of Ms. Tasker Relative To Dog Patch Humane.

CVAS is a bonafide non-profit corporation with a board of directors and officers elected. There is no exception to the rule that a non-lawyer may not represent a corporation applicable to CVAS.

Ms. Tasker on the other hand falls within the narrow exception to that rule due her under *Willapa Trading Co. Inc. v. Muscanto Inc.*, 45 Wn App 779 (1986).

In *Willapa*, Division One of this court said that a non-lawyer could appear on behalf of himself and a corporation which he was the president, director and sole stockholder. The *Willapa* ruling was limited in scope, but Ms. Tasker fits within the narrow categorization of individuals who may appear for her corporation. She is the only person associated with and responsible for her private operating foundation. (CP 129, 170) Her entity is distinct from other business entities. (CP 170) Her special status would place her clearly within the limited exception the *Willapa* court found applies to certain individuals in representing their organizations. This is not the case with Ms. Rose who is one of numerous individuals responsible for running Colville Valley Animal Sanctuary.

6. Ms. Tasker Accepted The Sanctions The Court Imposed Upon Her For Filing The Lis Pendens

Ms. Tasker did not appeal the court's order imposing sanctions for her representation of Dog Patch when she filed a *lis pendens*. She accepts the penalty imposed. So should Ms. Rose accept that her conduct in filing pleadings for a corporation is far more egregious than that of Ms. Tasker and pay her sanctions.

7. The Motion To Reopen The Record By CVAS Was Frivolous.

Judge Nielson ordered sanctions against Ms. Rose for her conduct in representing a corporation. In his ruling, however, he did not go so far

as to say that the reason for the sanction was based upon frivolous motion by Ms. Rose. Rather, the sanctions were based strictly upon her unauthorized practicing of law in the filing of the pleadings. (CP 824-826)

Nevertheless, the pleadings were frivolous as argued by Ms. Tasker and Dog Patch in opposition to that Motion to Reopen. As mentioned elsewhere, CVAS fully prevailed at the distribution hearing and there was no need for CVAS to reopen the record. It had ample time to prepare for the hearing and had submitted fourteen affidavits in its behalf with the help of its attorney.

CR 59 in its preliminary language reads as follows:

> CR 59 New Trial, Reconsideration, and Amendment of Judgments
>
> a) Grounds for New Trial or Reconsideration
>
> On the motion of the party aggrieved. . . any decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting substantial rights of the parties. (Emphasis Added.)

The focus of the above language should be on "party aggrieved". It is incorrect that CVAS should call itself a party aggrieved if it fully prevailed by taking all the property in contention. If not a party aggrieved, CVAS is not eligible for relief under CR 59 in the first place.

Secondly, the rule talks about a motion which should be granted when any of the enumerated causes materially affect the substantial rights of the parties. As to the words "materially affecting", the fact is that CVAS did prevail. More to the point, however, is that none of the enumerated rights under that section apply to CVAS. There was no irregularity in the proceedings. The agreement to have the matter heard by affidavit was based upon agreement of the parties with the approval of the court. That agreement was with the consent by CVAS's then attorney.

None of the other reasons justifying motion for new trial apply. Certainly substantial justice was done, so the catch all basis to vacate a ruling is not tripped. This inapplicability of the rule is yet another basis for Ms. Tasker and Dog Patch to object to the motion brought by the non-attorney to reopen the record, i.e., because it was in bad faith.

8. After The Fact Attempts To Cure The Error Does Not Undue Harm To Ms. Tasker.

The rules should mean what they say. The fact that CVAS hired an attorney afterward does not undo the damage to Ms. Tasker by Ms. Rose's conduct. As Judge Nielson pointed out in his ruling on the issue the day sanctions were awarded, it would not be fair to Ms. Tasker, who enlisted the services of counsel and spent the time and money in pointing out Roses's unauthorized practice, for the court to decide the issue

differently based on an after-the-fact, rear guard effort by CVAS to hire a lawyer. Our Supreme Court expressed the sentiment of the court on CR 11 issues in *Roberson v. Perez*, 123 Wn App 320, 339 (2004) where CR 11 sanctions were upheld. There the court recognized that the prejudice that befell the aggrieved party there required imposition of the more serious of two sanctions under consideration. In the instant case, the only applicable sanction is a monetary one to redress Ms. Tasker's out-of-pocket losses. It takes monetary sanctions to address the improper conduct by CVAS that cost Ms. Tasker a monetary loss. Put another way, Ms. Tasker would have to refrain entirely from objecting to Ms. Rose's wrongful conduct if she can't rely on the court to compensate her for pointing out the violation. It is not fair to force Ms. Tasker to pay for Ms. Rose's error. The court imposes the least severe sanction to ensure the wrong doer does not profit from the wrong. *Fisons* at 337. Here that sanction was the one imposed by the trial court. That ruling should stand.

There was never any indication by the Sanctuary that it would be getting an attorney to cover the legal work Ms. Rose did while CVAS was actively looking for such services. The suggestion by CVAS that there be some less burdensome sanction for a *pro se* party filing a pleading does not address the irreversible costs that Ms. Tasker expended in responding to the motion.

Accepting the Judge's ruling that the basis for the denial of the Motion to Reopen the Record was for unauthorized practice and nothing more, the ruling still allowed sanctions for pleadings that were improperly filed. This would have been all of the pleadings with the exception of those filed on behalf of CVAS by Mr. Karp and the Declaration of Lisa Gallagher. To a large extent then the response by Ms. Tasker had to be made because the record created by a non-attorney required correction; parts of the declarations were stricken at Ms. Tasker's request.

Monetary sanctions are within the discretion of the court and are reviewed for abuse of discretion. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 399 (1993). The Imposition of Sanctions Against Rose Was Appropriate And Within The Sound Discretion of the Court.

9. Attorney Fees Inapplicable.

CVAS's perfunctory request for attorney's fees on appeal should be disregarded. No applicable law grants it the right to recover fees or appeal. The financial situation of Ms. Tasker and Dog Patch is as dire or more so than is that of CVAS. The Appellant's appeal here is meritorious and not frivolous.

No fees can in good faith be requested by Appellant, thus none are requested. Neither should CVAS ask for or be awarded attorney's fees. *In Re Marriage of Ochsner*, 47 Wn. App. 520 (1987).

CONCLUSION

Re: Appeal:

For the reasons set forth this court should reverse the ruling of the Superior Court on the Petition for Distribution and have the matter remanded for distribution of the real property of Wendell Miles under either TEDRA or pursuant to hearing before the Superior Court.

No attorney's fees should be granted to Respondent in this good faith, appropriate appeal.

Re: Cross-Appeal:

As CVAS fully prevailed at the distribution hearing, there was no need to file the CR 59 motion that Ms. Rose used as an excuse to practice law in behalf of the Sanctuary. The attorney's fees were verified and ordered in the discretion of the court.

The court's ruling regarding the position of sanctions against Nancy Rose for unauthorized practice of law should be affirmed.

Respectfully submitted this 10 day of December, 2012.

ROBERT A. SIMEONE, WSBA #12125
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10TH day of December, 2012, I caused to be served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF AND RESPONSIVE MEMORANDUM TO CROSS-APPELLANT'S OPENING BRIEF by the method indicated below, and addressed to the following:

GARY G. WEBER ATTORNEY AT LAW PO BOX 383 COLVILLE WA 99114	[x] Regular Mail [ ] Certified Mail [ ] Hand Delivered [ ] Facsimile
ADAM P. KARP ATTORNEY AT LAW 114 W MAGNOLIA ST STE 425 BELLINGHAM WA 98225	[x] Regular Mail [ ] Certified Mail [ ] Hand Delivered [ ] Facsimile

BRENDA KELLER, Legal Assistant to
ROBERT A. SIMEONE, WSBA #12125