Supreme Court No. 91546-6

SUPREME COURT
OF THE STATE OF WASHINGTON

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No. 70248-3-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

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Estate of: HOMER R. HOUSE (Deceased),

*Respondent.*

LINDA MCMURTRAY and LARRY PIZZALATO,

*Petitioners.*

v.

JANET CORNELL, ROBERT HOUSE, SUSAN TERHAAR and JUDITH THEES,

*Respondents.*

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# PETITION FOR REVIEW

**Corrected**

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## I. IDENTITY OF PETITIONERS

Petitioners Linda McMurtray and Larry Pizzalato ask the Court to grant review of all issues in the unpublished Court of Appeals decision ("Decision" or "Slip Op.") described in Section II.

## II. COURT OF APPEALS DECISION

Division I affirmed the trial court's resolution of a dispute between two sets of step-siblings over newly-discovered real property interests (mineral rights) in Colorado which passed to the decedent Homer Ray House ("Ray House") on his father's death in 1974, unbeknownst to Ray House. The mineral rights came to light in 2011, after the deaths of Ray House in 2004 and of his wife Vera House in 2007. The disputing parties are the adult children of Ray House ("Ray's Children"), Vera's adult children ("Vera's Children" or "Petitioners"), and Janet Cornell, Ray House's oldest child, as the Personal Representative of Ray's Estate ("PR").

Division I rejected Petitioners' appeal based on how legal title was held and when it vested, and instead affirmed the trial court's award of the Colorado mineral rights to Ray's Children "under equity" and affirmed the trial court's order requiring Vera's Children to pay the fees of both Ray's Children and virtually all the fees of the PR, *see* Slip Op. pp. 1-2, 22-23; the PR's fees were over three times the amount awarded to Ray's Children ($113,986 and $36,303; App. C, p. 4) for a bench trial with less than a half-day of live testimony. The Decision also ordered Vera's Children to pay the

appeal fees of the PR and Ray's Children, except for fees as to the PR's motion to strike, which was denied. Slip Op. pp. 22-23. The Commissioner's award reduced the PR's fee request by $11,000, but still awarded appellate fees and costs in a two-to-one ratio: $42,283.70 to the PR; $19,422.75 to Ray's Children. App. C-4. The PR moved to modify the reduction and, in responding, Petitioners made a cross-motion to modify, arguing the reduction was too small.

A copy of the Decision is App. A. A timely motion for reconsideration was denied by order of January 30. App. B. Motions to modify the January 23, 2015, award of fees and costs (App. C), are pending before the panel.

## III. ISSUES PRESENTED FOR REVIEW

1. May a trial court sitting in probate distribute real property interests pursuant to "equity" in express disregard of an available remedy at law via legal title and the deceased's testamentary plan, which remedy at law gives effect to the decedent's detailed testamentary plan?

2. May the probate court settle a dispute over newly-discovered real property interests in disregard of and contrary to the deceased's Will and estate planning documents that includes coordinated trusts and wills with his wife, or is the trial court required to give effect to estate planning instruments under settled law, including *Estate of Bergau, Estate of Evans,*[1] and RCW 11.12.230?[2]

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[1] *In re Estate of Bergau,* 103 Wn.2d 431, 693 P.2d 703 (1985); *In re Estate of Evans*, 181 Wn.App. 436, 326 P.3d 755 (2014).

[2] RCW 11.12.230 states: "All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them." The statute dates to

*(Footnote continued next page)*

3. If the trial court is required to follow the applicable Colorado law of distribution and the decedent's testamentary documents, did Division I err in affirming the trial court's resort to equity to award the disputed real property interests contrary to the law and those testamentary documents?

4. Did Division I err in affirming the trial court's determination of title to real property interests in Colorado under "equity" rather than Colorado law, contrary to settled law recently re-stated by Division III in *OneWest Bank, FSB v. Erickson*?[3]

5. Did Division I err in construing a 2005 release between Vera's Children and Ray's Children to preclude Vera's Children from asserting their vested legal title to the newly-discovered property held in trust in Ray's Estate because: 1) the release explicitly provides for a release of only the signatories' claims as to "each other," did not transfer legal title to the property or release any claims against Ray's Estate, and did not satisfy the requirements of Ch. 11.86 RCW to disclaim an interest in an estate; or 2) if the release precludes Vera's Children from asserting their claim of legal title in the probate of Ray's Estate, does it also preclude Ray's Children from asserting their claim for an equitable distribution from Ray's Estate?

6. Did the trial court and Division I err in awarding the Personal Representative fees that were three times (at trial) and two times (on appeal) the fees awarded to Ray's Children for the PR's leadership in prosecuting Ray's Children's claim against Vera's Children, where such fees were far beyond the known value of the Estate, incurred by breaching the PR's fiduciary duties, and Ray's Children were fully capable of prosecuting their own claim at no cost to Ray's Estate?

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early Territorial days, 1860. See statutory history in West's RCWA 11.12.230: [1965 c 145 § 11.12.230. Prior: 1917 c 156 § 45; RRS § 1415; prior: Code 1881 § 1338; 1863 p 210 § 75; 1860 p 172 § 42.]

[3] *OneWest Bank, FSB v. Erickson*, __Wn. App.__, 337 P.3d 1101 (2014), *petition for review pending* (No. 91283-1).

## IV. STATEMENT OF THE CASE

### A. Background.

This case began more than seven years after the death of Ray House when certain real property interests in Colorado (mineral rights) were disclosed in 2011. The property at issue is Ray House's share of oil and gas deposits in Colorado inherited from his father Homer Virgil House ("Virgil House") in 1974, and owned by Ray House until his death in 2004. The mineral rights' existence was unknown to any of the parties until the parties received letters from an energy company in Colorado in June 2011 stating Virgil House owned a 1/16th share of the oil and gas deposits and it was seeking to determine his heirs in order to distribute the profits from its wells. The profits as of June 2011 amounted to approximately $60,000. The current value of the oil and gas deposits is unknown to Petitioners or the courts.

The Petitioners filed the underlying probate petition on December 30, 2011 and the related TEDRA petition on January 3, 2012. OB, pp. 16-17. Ray House's daughter Janet Cornell filed a competing probate petition on January 9, 2012. *Id.* By the parties' agreement, Ms. Cornell was appointed Personal Representative of Ray's Estate and Ray House's Will was admitted to probate on January 30, 2012. *Id.* The deadline to contest the Will expired on May 30, 2012 without any contest being filed.

## B. Homer Ray House's Will And Estate Plan.

Ray House executed a straightforward Will on February 21, 1991. CP 290-293, App. D. Article III provides for the disposition of his estate and states in its entirety:

> All property both real and personal which I own at the time of my death is to be transferred to the Trustee of the HOMER R. HOUSE and VERA J. HOUSE FAMILY TRUST under agreement dated the 21st day of February, 1991, to be held, managed and disposed of in accordance with the provisions of said Trust.

CP 291. App. D-2. The Will thus expressly incorporates the family trust and makes it part of Ray House's testamentary intent. Article VI provides for failed gifts and reads in full, CP 292, App. D-3:

> Should any of the bequests, gifts or devises in Article III fail due to circumstances that cannot be reconciled with the terms herein or my express wishes, I give, devise and bequeath such, in the alternative, to my residuary restate.
>
> I direct that my residuary estate pass in accordance with the laws of intestate succession.

Under Ray House's 1991 Will and testamentary plan, the unknown mineral rights were disposed of in one of two possible ways. They either were transferred into the family trust per Article III of his Will by Vera as trustee, or they went to Vera by intestate succession as part of his residuary estate in Article VI. Either way, the mineral rights vested as a matter of law on his death in 2004 with Vera, directly through intestate succession, or indirectly through the

trusts. In no event did they vest with the House Children on Ray House's death in 2004 or on Vera's death in 2007.

### C. Nature Of The Dispute And Trial Court Rulings.

The dispute below was between recognition of legal title that vested on death of the holder under Colorado and Washington law (asserted by Vera's Children) versus the equitable claims by Ray's Children based on circumstances arising years after Ray House executed his Will and years after his death, and pursued by one of them while purportedly acting as the PR of the Estate at a cost far exceeding the value of the known profits as of June, 2011.[4]

The trial court eschewed application of the law or the Will, ruling: "The court has the equitable authority to make a distribution of the asset in dispute in this litigation, regardless of how legal title may have been held," CP 612, then proceeded to award the mineral rights under "equity"[5] rather than under applicable law and the Will.

The Decision holds the trial court "did not abuse its discretion in awarding to Homer Ray's Children ownership of the mineral

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[4] Since the initial disclosure of some $60,000 in assets, the PR has not been willing to state what the additional income or profits accruing to the Estate have been. The nature of the mineral rights is that they continue to produce income. The only certain thing is that the amount of the asset has increased since 2011. Given the ferocity with which the PR and her siblings have fought this case, it must be assumed that the annual income and expected duration are very large indeed, or the PR breached her duty by wasting all the Estate assets in the litigation that could have been financed by Ray's Children on their own.

[5] "Even if title to the Colorado property interest vested in Vera, there are substantial equitable considerations that weigh in favor of distributing the disputed property to the House children." CP 613.

rights that are in dispute" (Slip Op. p. 2) and that it had full authority to distribute the Colorado real property interests under equity, "regardless of how legal title may have been held." *See* Slip Op., p. 12 (quoting Appellants' argument it was rejecting). The full analysis at pp. 12-18 affirms the trial court's "distribution" of the mineral rights to Ray's Children, a distribution via equity that directly affects—determines–the legal title to the Colorado real property rights, contrary to Colorado's immediate vesting principles.

Finally, Petitioners objected to the PR's leading this litigation between the two sets of step-siblings both before trial and as part of the fee applications. *See* OB 9, 42-49 & fn. 20; RB 25-28.

## V. REASONS WHY REVIEW SHOULD BE ACCEPTED

### A. Summary

The Decision conflicts with decisions of this Court and other decisions of the Court of Appeals that trial courts in probate are not to exercise their equitable authority when legal remedies are available; that Washington courts' first and primary duty is to give effect to the expressed intent of the testator in accord with his Will and referenced documents; that Washington trial courts have no authority to determine under equity title to real property interests in other states; and that the probate court should not reward a personal representative with a large fee award when violating her fiduciary duties by taking sides and leading the litigation of a dispute between two groups of claimants where each group can present their cases,

and the PR's conduct of the litigation consumes her stated value of the Estate by a factor of two in the trial court alone.

Respondents may argue that as an unpublished decision it only binds the parties and is not important. This Court is well aware unpublished decisions are reviewed and relied on for guidance by practitioners in each practice area, including probate. It is also aware trial courts turn to unpublished decisions for guidance, whether they are binding or not.[6] It thus is important to the current state of the law and practice that review be granted under RAP 13.4(b)(4), to assure the probate bar that wills and associated estate planning documents will, in fact, be honored, not eviscerated by latter day "equitable concerns" that only ***frustrate*** the testator's intent, rather than fulfill it.

### B. Review Should Be Granted Per RAP 13.4(b)(1), (2), & (4) Because It is Contrary to This Court's Decisions For the Court of Appeals And The Trial Court To Rule, In Effect, That "It Is OK To Throw Out Or Disregard Vested Legal Title Per The Testator's Distribution Plan In Order To 'Do Equity.'"

It is a fundamental tenant of probate law in Washington dating to the 1860's that the probate court is to give effect to a

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[6] *See, e.g., Oltman v. Holland Am. Line USA,* 163 Wn.2d 236, 248-49, 178 P.3d 981, *cert. dismissed,* 129 S. Ct. 24 (2008) (trial judges not barred from considering analyses of other trial judges); *State v. Arreola,* 176 Wn.2d 284, 296-97 & fn. 1, 290 P.3d 983 (2012), citing unpublished decisions to show that, in practice, the lower courts were following the directives of Supreme Court decisions as to pretextual traffic stops.

testator's declared intent in distributing property which comes into an estate. RCW 11.12.230; *Estate of Bergau,* 103 Wn.2d 431, 693 P.2d 703 (1985); *In re Estate of Evans*, 181 Wn.App. 436, 326 P.3d 755 (2014). It is no exaggeration to say the entire purpose of the probate code and proceedings is to insure to the extent humanly possible that an estate plan made in advance by the deceased is in fact put into effect so that his or her detailed plans are not frustrated. *Id.* Reliance is placed on this principle by Washington citizens every day to order their affairs and provide for their families.

Ray House thought he had done just that. He executed a coordinated set of estate planning documents with his wife Vera which demonstrate their intent to take care of each other (primarily for the survivor), avoid federal estate taxes to the extent possible, avoid the costs of probate and, presumably, preclude disputes. *See* CP 295-323, 579, Family Trust (containing a survivor's trust, decedent's trust, distribution trust and provisions for "support and maintenance"); CP 291-93, Ray House's Will. *See* OB, pp. 11-12 and record cites therein.

Petitioners have consistently asserted that the documents and the applicable law of descent of real property interests (Colorado law) gave a complete answer to the distribution of the newly-found mineral rights. That analysis takes into account the vesting of the mineral rights in Ray House in 1974 on his father's death, and then begins on the date of Ray House's death in 2004 and is analyzed

***going forward in time*** from that date in 2004 to see where the mineral rights go under his testamentary plan and the applicable law; the analysis does not begin in 2011 with the discovery of the mineral rights and then look backward, as the PR and Ray's Children assert, because the property vested immediately on Ray's death under both Washington and Colorado law. *See* OB 30-39; RB, pp. 2; 17-19.

Further, Petitioners asserted that by operation of Colorado law, the mineral rights vested immediately in Ray House on the death of his father, whether he knew it or not; and similarly, they vested immediately under his estate plan when he died in 2004, whether he and Vera knew it or not, then passed pursuant to his testamentary plan, ultimately vesting in Vera before the 2005 release of claims between just the individual parties was signed; and passed to Petitioners in 2007 pursuant to her will. *Id.*

**C. Review Should Be Granted per RAP 13.4(b)(1), (2), & (4) Because The Washington Court's "Equitable Award" of Ownership of the Colorado Mineral Rights In Disregard Of How Legal Title Was Transferred And Held Under Colorado Law Conflicts With Washington Law Precluding Courts From Determining Title of Real Property Interests In A Foreign State, Including the Recent *Erickson* Decision From Division III.**

**1. The Decision conflicts with settled law by letting "equity" determine real property interests in a foreign state in disregard of that state's law.**

The Decision holds the trial court "did not abuse its discretion in awarding to Homer Ray's Children ownership of the mineral

rights that are in dispute" (Slip Op. p. 2) and that it had full authority to distribute the Colorado real property interests under equity, "regardless of how legal title may have been held." *See* Slip Op., p. 12 (quoting Petitioners' argument it was rejecting). The full analysis at pp. 12-18 of the decision thus affirms the trial court's "distribution" of the mineral rights to the House Children, a distribution via equity that directly affects—determines–the legal title to the Colorado real property rights, contrary to Colorado's immediate vesting principles.[7] Since the trial court had no authority to do so under settled law, the Decision affirming the trial court warrants review under RAP 13.4(b)(1), (2), & (4).

The principle that trial courts lack authority to determine title to out of state real property interests was most recently restated by Division III in *OneWest Bank, FSB v. Erickson*, __Wn. App.__, 337 P.3d 1101 (2014), *petition for review pending* (No. 91283-1) ("*Erickson*"), provided to Division I on reconsideration. In *Erickson* Division III relied on long-settled law (many of which were cited in Petitioners' merits briefs below, *e.g.*, OB 30-31; RB 6-7) in rejecting the orders from an Idaho court purportedly encumbering real property in Spokane. Its explanation of the underlying principles is equally applicable here and documents some of the decisions of this

[7] Petitioners pointed out below the alternatives for distribution that existed under law, some of which the Estate even admitted existed, such that there was no proper basis to invoke equity. *See* RB, pp. 11 – 15.

Court and the Court of Appeals that the panel's Decision is in conflict with.

> ¶ 42 Even if Idaho law authorized the Idaho courts to approve a mortgage on property in Washington State, we would rule to the contrary, because we are not bound by a foreign state's order concerning property here. *See Olympia Mining & Milling Co. v. Kerns*, 64 Wash. 545, 551, 117 P. 260 (1911) (collecting hoary rhetoric). Even if Bill McKee was a resident of Idaho at the time of the encumbrance, we would conclude that the Idaho order authorizing the mortgage is invalid. **Historically the laws of the place, where such real property lies, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities, which should accompany them**. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 424 (1834). Thus, the local forum is the ultimate arbiter of a party litigant's interest in land, or more properly immovables, within its jurisdiction. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS ch, 8 (1971); ROBERT A. LEFLAR, THE LAW OF CONFLICT OF LAWS § 22 (1959); Herbert F. Goodrich, *Two States and Real Estate*, 89 U. Pa. L.Rev. 417 (1941).
>
> ¶ 43 **Based on these ancient principles, a court of one state has no jurisdiction over the real estate in a second state.** *1111 *Brown v. Brown*, 46 Wn.2d 370, 372, 281 P.2d 850 (1955). It is a fundamental maxim of international jurisprudence that every state or nation possesses an exclusive sovereignty and jurisdiction within its own territory. *Brown*, 46 Wn.2d at 372, 281 P.2d 850. **The rule is well established that the courts of one state cannot directly affect the legal title to land situated in another state**. *Brown*, 46 Wn.2d at 372, 281 P.2d 850.
>
> ¶ 44 Legions of cases, olden and modern, hold that a court of one state cannot administer or affect title to real property sited in another state. Therefore, the home state of the property need not enforce decrees entered by a foreign state concerning the

> home state's real estate. Decrees of one state affecting interests in land of another state are not accorded full faith and credit under the United States Constitution. *Fall v. Eastin*, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65 (1909).
>
> . . .
>
> ¶ 51 Finally, we return home to *Sparkman & McLean Income Fund v. Wald*, 10 Wn.App. 765, 772, 520 P.2d 173 (1974), which extends the prohibition of one state's authority to real property in another state to the handling of mortgages. . . . .
>
> > The trial court's attempt to directly affect the title to Oregon real property by extinguishing the Oregon mortgages was, however, of no force or effect. **Courts of one state cannot directly affect the title to real property beyond that state's territorial limits.**
>
> 10 Wn.App. at 772, 520 P.2d 173.

*Erickson,*___ Wn. App. ___, 337 P.3d at 1110-13 (emphasis added).

An "equitable" distribution in disregard of legal title cannot be lawfully made as to the succession of real property interests arising in another state. *See Erickson.* A probate court cannot avoid this fundamental rule and sidestep the foreign state's real property laws of succession and transfer simply by waving the magic wand of equity, as the *Erickson* decision and the cases it relies on show.[8] To

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[8] *See In re Bruhns' Estate,* 58 Mont. 526, 193 P. 1115, 1116 (1920), as quoted in *Erickson,* 337 P.3d at 1112, ¶ 50 (emphasis added):

> [A] California resident, who owned land in Montana died intestate. Heirs of the decedent argued that the Montana court should apply California law, to the detriment of the widow, when distributing the Montana land. The court disagreed and wrote:
>
> > We do not deem it necessary to cite authorities to the effect that jurisdiction of the courts in Montana in probate matters pertaining to real estate is confined solely to property situated in this state, and that **any order or decree affecting realty in another state would be a nullity. Likewise the California probate courts may**

*(Footnote continued next page)*

the extent this is not already the law of Washington per an appellate decision in a probate case, review should be granted to affirm that application in probate and resolve the conflict between these cases.

### 2. The erroneous construction of the Release to invoke equity cannot justify deviation from following the law of immediate vesting and the Will.

The Decision misapprehended the distinction between "claims" given up in the Release and vested rights which were acquired by operation of law. A person's rights in real property interests that vest immediately on the death of the decedent are separate and distinct from a "claim" against an estate. Petitioners' rights vested as a matter of law under both Colorado and Washington law and were not dependent on probate.

An estate only holds property in trusteeship during the probate of the estate for the benefit of the heirs and devisees. *In re Estate of Henderson*, 46 Wn.2d 401, 403, 281 P.2d 857 (1955) ("We construe RCW 11.04.250 [cf. Rem.Rev.Stat. § 1366] to mean that real property and the right to receive the income therefrom vest in the devisee as of the date of the death of the decedent, subject only to the trusteeship of the executor during the probate of the estate"); RCW 11.04.250 (title to real property vests immediately in the heir or devises). Because the real property rights vest immediately as a

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**make no binding orders pertaining to real property in this state**.

matter of law, a probate proceeding can only recognize who has the foreign real property rights under the applicable foreign law. It cannot choose who gets them via its local law of equity where, as here, the foreign law and the deceased's Will provide for distribution. *See* OB, pp. 26-32; RB, pp. 6-7, 11-13.

Since under both Colorado and Washington law the recipient's rights vested immediately on death, there was no "release" of a claim because there was no "claim" against either Ray House's estate nor against Vera House's estate. Nor could there be under the immediate vesting rule. *See, e.g.,* Reply Brief p. 11; *In re Schmidt's Estate,* 134 Wash. 525, 527, 236 Pac. 274 (1925); *Estate of Henderson, supra*; RCW 11.04.250. There could only be a recognition of to whom those real property rights passed on the death of the holder of those rights.

The Decision also misapprehended the Release itself. By agreeing to not assert claims against ***one another***, the signatories effectively agreed to let the transfer of real property interests play out by operation of law – not by "equity." Review should be granted to clarify that a release of claims between individual parties that does not meet the requirements of a disclaimer to the right to inherit from the decedent's estate under RCW 11.86.031 and 11.86.051 cannot "release" a person's ***vested right*** to his or her property interests.[9]

[9] The Release was contained as a part of the Trust Termination Agreement that was designed, after Ray House's death but while Vera was still alive, to put

*(Footnote continued next page)*

The core of the Decision is that because Vera and the real disputants herein – Vera's Children and Ray's Children -- signed the Release after Ray House's death, Petitioners cannot now make a "claim" on the real property interest that is being addressed in Ray House's Estate. But the Release was signed ***after*** the mineral rights property interests had vested in Vera, even though that occurred before Ray House's Estate was probated, so the Release could not negate her rights in the vested real property interest.[10] [11]

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to rest disputes that has arisen between Ray's Children and Vera. *See* Opening Brief, pp. 11-14. In exchange for the early distribution of the assets, the parties agreed to

> mutually release and discharge **each other** from any and all claims, demands, actions or cause of action known or unknown, that any of them may have or hereafter may acquire, arising out of or in any way connected with the Family Trust, the Decedent's Trust, the Estate of Homer R. House, or their respective rights or interests thereunder. Upon execution of this Agreement, the sole remaining right of the parties **as regards each other** shall be the right to enforce the performance of this Agreement.

CP 183 (emphasis added). The emphasized language reinforces that the terms of the Release apply equally to the House Children as to Petitioners, and they too are barred from any claims on the mineral rights if that is how the Release is applied.

[10] Page eight of the Decision demonstrates the misapprehension of how the immediate vesting principle applies. The first paragraph states: "Significantly, the Estate of Homer R[ay] House was the gateway through which the mineral rights in dispute passed." This is only partly correct, since, as noted *supra*, 1) the Estate only serves as a trustee during the probate for the benefit of the devisees and heirs and 2) the mineral rights vested immediately as a matter of law on Ray House's death. Ray House's estate documents simply pointed the direction for where his property went, as described *supra*: to his surviving spouse, Vera by one vehicle or another

The conclusion to that paragraph at Slip Op. p. 8 also seems to rely on (or point to) an irrelevant fact in the second sentence: "This is because these rights passed by way of intestate succession from his father [Virgil House]." Slip Op., p. 8. That point does not follow from the first sentence, that Ray House's estate

*(Footnote continued next page)*

Application of the long-settled principles of the immediate vesting of real property interests to the facts herein requires recognition that the mineral rights interests vested in Vera House immediately on the death of her husband Ray House in 2004; and thence immediately vested in her heirs on her death in 2007. *See* Opening Brief, pp. 30-31. Those real property rights were not a "claim" that Vera House held against Ray House's estate which could be asserted or waived or "released" by signing the general release of her claims to his estate after those property interests had already vested in her. They were rights which had to be recognized as they devolved under the law.

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was the "gateway" through which the rights passed. Nor does it lead to the conclusion of waiver in the next two sentences of the first paragraph on Slip Op., p. 8. Rather, it illustrates Petitioners' point about the distinction between a vested property right versus a "claim" against the estate.

[11] Similarly, paragraph three on Slip. Op. p. 10 illustrates Petitioners' point on the distinction between the vested right and a claim: "If they had a claim to an interest in that property in 2004 by way of Colorado law, they waived the right to claim such an interest when they executed the release in 2005." This demonstrates again that the Decision failed to apprehend the distinction of an estate "claim" as opposed to vested property right/ownership which vested immediately on the death of the holder of the right. *See also* Slip Op., p. 14 ("This might be true had they not released any claims to the disputed property.").

D. **Review Should Be Granted Per RAP 13.4(b)(1) & (4) To Confirm: The Personal Representative's Fiduciary Duties Not To Waste The Estate And To Be Impartial; That A PR May Not Consume All Of An Estate's Assets By Taking The Lead To Her Personal Benefit In A Dispute Between Two Groups Of Claimants Where Each Can Bear The Litigation Expenses; And That A PR Will Not Be Rewarded For Incurring Exorbitant Fees To The Estate For Work She Should Have Done For Herself Such That The PR Should Be Personally Charged For The Estate's Fees Beyond A Nominal Amount Required To Monitor The Litigation.**

Review should be granted under RAP 13.4(b)(4) (as well as conflicting with established law) to address the PR's breach of her fiduciary duties to the Estate to not waste assets and to be neutral.[12] By taking the lead in the litigation of claims between two groups of disputants and incurring fees of many multiples of the 2011 value of the Estate when both sets of parties were fully capable of litigating their asserted interests at no cost to the Estate, the PR's use of all the Estate assets is not justified under RCW 11.48.010 alone. Division I accepted without analysis Respondents' argument that *In re Estate of Kvande v. Olsen*, 74 Wn. App. 65, 871 P.2d 669, *rev. den.*, 124

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[12] RCW 11.48.010 (PR's duty is to settle the estate "without sacrifice" to it); *In re Estate of Larson,* 103 Wn.2d 517, 521, 694 P.2d 1051 (1985). *Accord,* Wa. State Bar Ass'n, WASHINGTON PROBATE DESKBOOK, (2005), Chapter 10, "Fiduciary Duties", §10.2(1) as to the personal representative; §10.4 as to "Core Fiduciary Duties," which include the duties of loyalty, good faith, and impartiality. A fiduciary "may not put herself in a position in which the fiduciary's interests may conflict with those of the beneficiaries" and "cannot otherwise profit from its position as a fiduciary," citing *Tucker v. Brown,* 20 Wn. 2d 740, 768, 150 P.2d 604 (1944).

Wn.2d 1021 (1994), controls and permits the PR to take sides and waste the Estate's assets (Slip Op., pp. 21), even though that conflicts with the statute because it is undisputed the PR directed the litigation to promote her personal interests and those of her siblings, and even though Petitioner pointed out *Kvande* involved different circumstances. *See* RB, pp. 25-27.

Under the facts here with the PR's admission that litigation was necessary to distribute the mineral rights (with which the Decision agreed, Slip Op. p. 22), and with the PR furthering her direct, personal interest to the ***exclusion*** of Petitioners, it is *In re Estate of Howerton,* 65 Wn.2d 868, 400 P.2d 85 (1965), that controls for the reasons stated in the Reply Brief. Review should be granted because the Decision conflicts with *Howerton* (which it chose not to address) which controls over the Court of Appeals decision in *Kvande*.

Finally, the Decision shows the Bench and Bar need guidance to confirm that a personally-interested PR must stand aside or refrain from using estate assets to pursue her own claim when, as here, that claim can be prosecuted by the real parties in interest without depleting the Estate.

## VI. CONCLUSION

Petitioners ask the Court to grant review of the Decision and address all the issues raised by them in the appeal and in this Petition, and schedule argument at the earliest opportunity.

Dated this 3rd day of March, 2015.

**CARNEY BADLEY SPELLMAN, P.S.**

By _____
Gregory M. Miller, WSBA 14459

*Attorneys for Petitioners*
*Linda McMurtray and Larry Pizzalato*

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 3rd day of March, 2015.

Cathy A. Norgaard, Legal Assistant

## APPENDICES

# APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| In re the Estate of<br><br>HOMER R. HOUSE,<br><br>Deceased.<br><br>LINDA McMURTRAY and LARRY PIZZALATO,<br><br>Appellants,<br><br>v.<br><br>JANET CORNELL; ROBERT HOUSE; SUSAN TERHAAR; and JUDITH THEES,<br><br>Respondents. | No. 70248-3-I<br><br>DIVISION ONE<br><br>UNPUBLISHED<br><br>FILED: December 22, 2014 |

Cox, J. — "A release is a contract and its construction is governed by contract principles subject to judicial interpretation in light of the language used."[1] Courts generally uphold the validity of releases.[2] Here, Vera J. House, along with Linda McMurtray and Larry Pizzalato (collectively "Vera's Children"), and

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[1] Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 187, 840 P.2d 851 (1992).

[2] Id. at 186-87; see also Metro. Life Ins. Co. v. Ritz, 70 Wn.2d 317, 318, 422 P.2d 780 (1967) (concluding that regardless of the intent of the parties signing the release, an unconditional general release of "all claims" included all claims as a matter of law).

Janet Cornell, Robert House, Susan Terhaar and Judith Thees (collectively "Homer Ray's Children"), signed a Trust Termination Agreement in 2005.[3] By its express terms, all parties to that agreement mutually agreed to "release and discharge each other from any and all claims, demands, actions or cause[s] of action, known or unknown, that any of them may have or hereafter may acquire, arising out of or in any way connected with the Family Trust, the Decedent's Trust, the Estate of Homer R. House, or their respective rights or interests thereunder."[4] We hold that the claims that Vera's Children assert in this proceeding fall within the terms of this release and are therefore barred. We also hold that the trial court did not abuse its discretion in awarding to Homer Ray's Children ownership of the mineral rights that are in dispute. Finally, the court did not abuse its discretion in awarding attorney fees in favor of the Estate of Homer R. House and Homer Ray's Children against Vera's Children. We affirm.

This TEDRA proceeding arises from competing claims to ownership of oil and gas mineral rights in real property located in the state of Colorado. In 1924, Homer Virgil House, the then owner of the property, conveyed it to another, reserving in himself ownership in an interest in the net income from oil and gas mineral rights in the property. Homer Virgil[5] died in 1974. He was survived by his six children, including his son Homer Ray House. The record establishes that

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[3] Clerk's Papers at 184-88.

[4] Id. at 183.

[5] This opinion uses his first and middle names to distinguish him from his son.

none of the parties to this proceeding knew of the interest in the mineral rights until 2011.

Homer Ray had four children. Homer Ray's second wife, Vera, had two children. Homer Ray never adopted Vera's Children.

In 1991, Homer Ray and Vera created the Homer R. House and Vera J. House Family Trust.[6] They were the trustors and co-trustees of this family trust. The trust agreement provided that upon the death of either trustor, the surviving spouse, as trustee, would divide the trust into a Survivor's Trust and a Decedent's Trust.[7]

Homer Ray died testate in 2004. He was survived by Vera, Homer Ray's Children, and Vera's Children. Vera did not file Homer Ray's will or open probate for his estate. It is undisputed that she distributed known assets from the Family Trust into a Survivor's Trust and a Decedent's Trust.

In 2005, Vera terminated the Survivor's Trust and appointed all the assets in that trust to herself.

Later that year, Vera, Homer Ray's Children, and Vera's Children, executed the Trust Termination Agreement.[8] By its express terms, the agreement terminated the Decedent's Trust. Moreover, Vera, Homer Ray's Children, and Vera's Children, mutually released and discharged each other from "any and all claims . . . known or unknown, that any of them may have or

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[6] Clerk's Papers at 295.

[7] Id. at 301.

[8] Id. at 181-89.

hereafter may acquire, arising out of . . . the Family Trust, the Decedent's Trust, the Estate of Homer R. House, or their respective rights or interests thereunder."[9]

In 2007, Vera House died testate. Under her will, Vera's Children were equal beneficiaries of her estate.

In 2011, after the parties learned that Homer Virgil had reserved an interest to mineral rights in the Colorado property, the personal representative of Homer Virgil's estate released Homer Ray's one-sixth share of net income from the reserved oil and gas rights to the personal representative of Homer Ray's estate. The value of these rights is approximately $65,000 in current income plus an undetermined amount of possible future income.

In January 2012, Vera's Children commenced this TEDRA proceeding, claiming that the mineral rights passed to them. Janet Cornell, as personal representative of the Estate of Homer R. House, responded to the petition, and later, petitioned for distribution of the mineral rights interest and proposed distribution solely to Homer Ray's Children.

Vera's Children moved for summary judgment, asserting that they were entitled to the mineral rights as a matter of law. In opposing this motion, Cornell took the position that the release in the Trust Termination Agreement barred the claim of Vera's Children and she again urged distribution of the mineral rights to Homer Ray's Children. The court denied this motion, and the case proceeded to trial.

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[9] Id. at 183.

At the close of the bench trial, the court determined that the Trust Termination Agreement barred the claims of Vera's Children. The court then exercised its equitable discretion and awarded the interest in the mineral rights to Homer Ray's Children. It also ordered Vera's Children to pay attorney fees and costs to the Estate and to Homer Ray's Children. The court substantially denied the motion for reconsideration of Vera's Children regarding the award of attorney fees.

Vera's Children appeal.

**TRUST TERMINATION AGREEMENT**

The Estate and Homer Ray's Children both argue that Vera's Children released any and all claims to the mineral rights that are at issue in this case. We hold that the Trust Termination Agreement that the parties signed in 2005 did exactly that. Assertions to the contrary are not well-taken.

"A release is a contract and its construction is governed by contract principles subject to judicial interpretation in light of the language used."[10]

"'The touchstone of contract interpretation is the parties' intent.'"[11] "We follow 'the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used.'"[12]

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[10] Nationwide, 120 Wn.2d at 187.

[11] In re Estate of Bernard, 182 Wn. App. 692, 697, 704, 332 P.3d 480 (2014) (internal quotation marks omitted) (quoting Realm, Inc. v. City of Olympia, 168 Wn. App. 1, 4-5, 277 P.3d 679, review denied, 175 Wn.2d 1015 (2012)).

[12] Id. (quoting Realm, 168 Wn. App. at 5).

This court reviews legal conclusions de novo.[13]

Here, the trial court concluded that Vera's Children waived any claim to assets in the Estate of Homer Ray and to any assets in any trust created under the 1991 Family Trust as a result of the 2005 Trust Termination Agreement:

> The parties to the Trust Termination Agreement waived "any and all claims, demands, actions or cause of action known or unknown, that any of them may have or hereafter may acquire, arising out of or in any way connected with the Family Trust, the Decedent's Trust, the Estate of Homer R. House, or their respective rights or interests thereunder."[14]

This conclusion is supported by the language of the agreement, which is the objective manifestation of the parties' intent. Specifically, the agreement states in relevant part that Vera, "as Trustee, Trustor and individually as Vera J. House," as well as Homer Ray's Children and Vera's Children did:

> release and discharge each other from ***any and all claims***, demands, actions or cause[s] of action, ***known or unknown***, that any of them ***may have or hereafter may acquire***, ***arising out of*** or ***in any way connected with*** the ***Family Trust, the Decedent's Trust, the Estate of Homer R. House, or their respective rights or interests thereunder*** . . . . [T]he ***sole*** remaining right of the parties as regards each other shall be the right to enforce the performance of this Agreement.[15]

This plain language bars "***any and all claims***" that are "***known or unknown***."[16] There can be no serious debate over the very broad scope of this

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[13] In re Pers. Restraint of Cross, 180 Wn.2d 664, 681, 327 P.3d 660 (2014).

[14] Clerk's Papers at 608.

[15] Id. at 183 (emphasis added).

[16] Id. (emphasis added).

language. The release applies to any "claim," whether "known or unknown," to the subject matter that is defined in the language that follows this text. The record establishes that at the time of execution of this agreement in 2005, none of the parties to it knew of the mineral rights that first became known to them in 2011. But that lack of knowledge is irrelevant in view of the fact that the plain text of the release applies to either "known or unknown" claims. Thus, this agreement applies to the claims asserted here to the extent they fall within the subject matter that is defined in the text that follows this broad language.

The subject matter released includes any claims that the parties to the agreement "may have or hereafter may acquire."[17] The plain meaning of this text is that it includes then existing claims as well as those that the parties might acquire in the future. Thus, claims they held as of 2005 were released. Likewise, any claims they acquired after 2005 were also released.

The next important text is "arising out of." This term is also very broad in scope.[18] Equally broad in scope is the term that follows—"in any way connected with." Applied here, these terms pertain to specific objects: "[T]he Family Trust, the Decedent's Trust, the Estate of Homer R. House, or their respective rights or interests thereunder."[19]

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[17] Id.

[18] See Toll Bridge Auth. v. Aetna Ins. Co., 54 Wn. App. 400, 404, 773 P.2d 906 (1989).

[19] Clerk's Papers at 183.

Significantly, the Estate of Homer R. House was the gateway through which the mineral rights in dispute passed. This is because these rights passed by way of intestate succession from his father. Accordingly, by signing the release in this document, Vera's Children waived any claim "arising out of or in any way connected with" the Estate of Homer R. House.[20] In sum, they waived any claim to the mineral rights that passed through it.

Likewise, and for similar reasons, they also waived any claim to the mineral rights that passed through the Family Trust. This trust was the conduit through which these rights passed from the Estate of Homer R. House.

For these reasons, Vera's Children are barred from asserting the claims they make here.

Notably, the last sentence of the paragraph states: "[T]he ***sole*** remaining right of the parties as regards each other shall be the right to enforce the performance of this Agreement."[21] It neither carves out of the broad scope of the preceding language in the release any exception to that broad language nor does it expand the scope of the rights reserved to the parties. In short, the only right retained by Vera's Children was to "enforce the performance of this Agreement."[22] Seeking to enforce claims they expressly released in 2005 does not fall within the sole right they retained.

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[20] Id.

[21] Id. (emphasis added).

[22] Id.

We also note that Vera, "as Trustee, Trustor and individually as Vera J. House" also released the claims we have discussed.[23] Even if Vera's Children were able to show that they are not bound by the plain terms of their express waiver under this agreement, they have failed to explain why Vera would not be bound. Because their arguments necessarily are based on taking through her, failing to show why Vera would not be bound by her express waiver under this agreement is fatal to their claims.

In sum, Vera's Children released any claim to this then unknown asset in 2005 by executing the Trust Termination Agreement. Their claims to this asset are barred.

The Estate relies on the doctrine of judicial estoppel to argue that the claims of Vera's Children are barred. Because we resolve this dispute based on the release in the Trust Termination Agreement, we need not address this argument.

Vera's Children assert that the date of vesting of the mineral rights, under Colorado law, was Homer Ray's death in 2004. This was the year prior to their execution of the Trust Termination Agreement in 2005. Thus, they argue that the release has no impact and does not preclude their claim because "they did not release the right to property in which they already held a vested ownership interest."[24]

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[23] Id.

[24] Consolidated Reply Brief at 17-18 (emphasis omitted).

The plain language of the agreement refutes this argument. The release contains no language akin to that quoted in the immediately preceding paragraph.

In considering this argument, we assume, without deciding, that a conflict exists between Washington law and Colorado law whether the rights to the mineral rights in the Colorado property vested at the time of the 2004 death of Homer Ray. We further assume, without deciding, that the correct choice of law for purposes of this conflict is the law of Colorado.[25] We conclude that the application of Colorado law on vesting at the time of the decedent's death does not evade the unequivocal release of any claims, known or unknown, by Vera's Children in the 2005 Trust Termination Agreement, as we have discussed.[26]

If they had a claim to an interest in that property in 2004 by way of Colorado law, they waived the right to claim such an interest when they executed the release in 2005. The language in the agreement is quite specific: they released any claim, whether "known or unknown," that they then "may have or hereafter may acquire."[27] If, on the other hand, they acquired such an interest after 2005, they also released it by virtue of the 2005 agreement by virtue of the language we just quoted. There is no other reasonable interpretation of this provision.

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[25] See Werner v. Werner, 84 Wn.2d 360, 366-67, 526 P.2d 370 (1974).

[26] COLO. REV. STAT. ANN. § 15-12-101.

[27] Clerk's Papers at 183.

We again note that Vera's Children could only take by way of Vera. But Vera also released any claim to property in the 2005 Trust Termination Agreement. Vera's Children leave unexplained how they could take through her under these circumstances even if they somehow escaped their express release in the Trust Termination Agreement.

Vera's Children argue that this asset "defaulted" to the Survivor's Trust. Implicit in this is the argument that the release does not bar Vera's Children's claim, because the Survivor's Trust is outside the scope of the release. Assuming, without deciding, that the mineral rights defaulted to the Survivor's Trust, this claim still fails for the reasons we previously explained in this opinion. The very broad language that the release applied to any claims "arising out of or in any way connected" with the Family Trust and the Estate of Homer R. House defeats this claim.[28]

Because we conclude that the release bars this claim regardless of its location, the precise location of the asset is not material to our conclusion. Thus, we need not address Vera's Children's assignments of error to the challenged findings of fact and conclusions of law relating to the trial court's resolution of this issue.

Vera's Children as well as all other parties to the agreement released any claim to the mineral rights by virtue of the Trust Termination Agreement. Thus, the relevant question is whether the court abused its discretion by distributing this

[28] Clerk's Papers at 183.

previously unknown asset on the basis of equitable principles. We address that question in the next portions of this opinion.

## EQUITABLE AUTHORITY

Vera's Children argue that the court erred when it concluded that it had equitable authority to make a distribution "'regardless of how legal title may have been held.'"[29] We hold that the court did not abuse its discretion by applying equitable principles to the distribution of the mineral rights asset.

Under TEDRA, courts have "full and ample power and authority" to administer and settle, among other things, "[a]ll matters concerning the estates and assets of . . . deceased persons" and "[a]ll trusts and trust matters."[30] And the court "has full power and authority" to proceed with administration and settlement of matters "***in any manner and way that the court seems right and proper***, all to the end that the matters be expeditiously administered and settled by the court."[31] "Matter" includes any dispute involving "[t]he determination of . . . devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death."[32] These statutes support the broad view of the superior court's authority, under TEDRA, to apply equity to distribution of the asset.

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[29] Opening Brief of Appellants (quoting Clerk's Papers at 612).

[30] RCW 11.96A.020(1)(a), (b).

[31] RCW 11.96A.020(2) (emphasis added).

[32] RCW 11.96A.030(2)(a).

Vera's Children argue that "the trial court may not ignore controlling law in order to do what it considers 'equity'" and that "trial courts do not have unlimited authority" to exercise their equitable powers.[33] In support of this, they cite a secondary source, which states: "[W]here rights are defined and established by existing legal principles, they may not be changed or unsettled in equity."[34] But as just discussed, Vera's Children released any claims to the disputed property and thus have no legal right on which to base this argument. And TEDRA provides the court with equitable authority to resolve this dispute. Vera's Children fail to convincingly argue what other legal principles override the court's exercise of its equitable authority in this case.

Vera's Children rely on Noble v. A & R Environmental Services LLC for the proposition that "[c]ourts will not give relief on equitable grounds in contravention of a statutory requirement."[35] And they rely on Town Concrete Pipe of Washington Inc. v. Redford for the proposition that "'[w]hile equity will not suffer a wrong without a remedy, equity follows law and cannot provide a remedy where legislation expressly denies it.'"[36] But both of these cases are distinguishable. Further, neither case involved a dispute brought under TEDRA. And the

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[33] Opening Brief of Appellants at 26 (citation omitted).

[34] 27A AM. JUR. 2D Equity § 83 (2013).

[35] Opening Brief of Appellants at 28 (quoting Noble v. A & R Envtl. Servs., LLC, 140 Wn. App. 29, 37-38, 164 P.3d 519 (2007)).

[36] Id. (quoting Town Concrete Pipe of Wash., Inc. v. Redford, 43 Wn. App. 493, 498, 717 P.2d 1384 (1986)).

language in TEDRA that we previously cited in this opinion supports the exercise of equitable authority in this proceeding.

Vera's Children argue that "[b]ecause statutes and case law determine passage of interest in land, the trial court's equitable jurisdiction should not have been invoked or exercised."[37] In particular, they argue that legal title flowed to them as a matter of law because: (1) Real property interests transfer automatically, and Homer Ray had an interest in the mineral rights on his father's death; (2) The interest was transferred to the trust through Homer Ray's will when he died in 2004; (3) The interest defaulted to the Survivor's Trust and then to Vera when she revoked the Survivor's Trust; and (4) The rights passed to Vera's Children upon Vera's death in 2007 through her will.[38]

This might be true had they not released any claims to the disputed property. But having done so, they have no right to argue on the basis of any claimed interest in the property in Colorado.

Vera's Children argue, in the alternative, that if the mineral rights failed to pass to the Survivor's Trust and then to Vera, they either (1) remained in the Family Trust to pass according to the Trust Agreement; or (2) passed through intestate succession.[39] But again, Vera's Children do not persuasively argue why, under either of these scenarios, the release would not bar their claim to an

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[37] Id. at 39.

[38] See id. at 30-37.

[39] Id. at 37-38.

asset that remained in the Family Trust or in Homer Ray's estate. Thus, these alternative arguments are also not persuasive.

Finally, Vera's Children argue that if the release applies, the Estate would be left with an asset that no party could lay claim to and "the trial court should have resorted to the legal dictates of intestate succession over invoking equity to distribute the asset as the trial court saw fit."[40] But Vera's Children provide no authority to support this argument. We reject it.

**DISTRIBUTION TO HOMER RAY'S CHILDREN**

Vera's Children argue that the trial court abused its discretion when it awarded the mineral rights to Homer Ray's Children. We disagree.

This court reviews a trial judge's exercise of equitable authority for abuse of discretion.[41] A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.[42] "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard."[43]

The trial court concluded that it "would be equitable for [Homer Ray's Children] to receive equal shares of the Colorado property in dispute and any

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[40] Consolidated Reply Brief at 19.

[41] Harman v. Dep't of Labor & Indus., 111 Wn. App. 920, 928, 47 P.3d 169, review denied, 147 Wn.2d 1025 (2002).

[42] In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

[43] Id. at 47.

income from that property."[44] It also concluded that "there are substantial equitable considerations that weigh in favor of distributing the disputed property to [Homer Ray's Children]."[45]

The court relied on several equitable factors. For example, the court stated that the disputed assets were originally owned by Homer Virgil, the grandfather of Homer Ray's Children. The court noted that Homer Ray's Children knew their grandfather and that Vera's Children did not have the same relationship with Homer Virgil. Additionally, the court stated that descendants have a natural attachment to family property. And the court concluded that it "would not be economically inequitable to distribute the disputed property to [Homer Ray's Children]" because it would "still leave [Vera's Children] with substantially more of the assets accumulated by Homer R[ay] and Vera."[46] After considering these factors, the court properly exercised its discretion.

Vera's Children argue that the court "did not comprehend—or refused to accept—that Vera had the legal right to put the assets into the Survivor's Trust, revoke that trust, and pass those assets to her children . . . ."[47] And they argue that the Family Trust did not require equal distribution. But even if this were true, they fail to explain how the court abused its discretion when it considered the above factors. The question is whether the court's decision was within the range

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[44] Clerk's Papers at 612.

[45] Id. at 613.

[46] Id. at 614.

[47] Opening Brief of Appellants at 39.

of reasonable choices that it was entitled to make, not whether Vera's Children agreed with that choice.[48]

Vera's Children argue that "[t]he trial court's abuse of its discretion to reach a personally desired result is also apparent in specific aspects of its findings and conclusions and earlier rulings."[49] Specifically, they argue that findings of fact 19, 26 and 27 were not supported by substantial evidence. In general, these findings state that there is no inventory of assets, no document identifying a division of assets, and no "trustee's books of account" that identifies the allocation of assets between the Survivor's Trust and the Decedent's Trust.[50] But again, Vera's Children fail to explain how these findings are material to this issue, or how this shows an abuse of discretion. Accordingly, we do not address this argument any further.

Finally, Vera's Children also argue that the trial court erred in not considering their offer of proof, when the trial court ultimately decided the case. They argue that "[t]he 'un-considered' evidence went directly to the family relationships, was relevant, and should have been considered."[51]

We do not read the record in the manner argued. A fair reading of this record is that the trial court admitted the written offer of proof, subject to

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[48] See Littlefield, 133 Wn.2d at 47.

[49] Opening Brief of Appellants at 40.

[50] Clerk's Papers at 606-07.

[51] Opening Brief of Appellants at 41.

relevancy and other objections to be made at a later time. Two days later, the court considered and ruled on objections to each of the parts of the written offer of proof that it earlier admitted. Assuming, without deciding, that the court abused its discretion in excluding portions of the written offer of proof, such error was harmless. The evidence in this offer of proof was largely cumulative to other evidence that was before the court. For example, the offer of proof illustrated that the parties were embroiled in legal disputes and that the family relationships were strained. This was well known to the court when it made its oral ruling in this case. For these reasons, we reject this claim of error.

**ATTORNEY FEES**

Vera's Children argue that the court abused its discretion when it ordered them to pay attorney fees to Homer Ray's Children and to the Estate. We disagree.

*At Trial*

Under RCW 11.96A.150(1), a court may award fees "[f]rom any party" "in such amount and in such manner as the court determines to be equitable." The court may consider "any and all factors that it deems to be relevant and appropriate . . . ."[52]

[52] RCW 11.96A.150(1)(c).

Where litigation was necessitated by a party's actions, the court may direct him to personally pay attorney fees to other parties.[53] A court may also award fees in order to prevent depletion of the assets.[54]

This court reviews an award of attorney fees for abuse of discretion.[55] A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons.[56]

Here, the trial court awarded fees to the Estate and to Homer Ray's Children, in the amounts of $113,986 and $36,303 respectively.[57] In making these awards, the court considered several factors.

The court considered the fact that the Estate prevailed in this matter and that the court did not adopt Vera's Children's legal positions.[58] It also noted that the time required to address the issues presented was commensurate with Vera's Children's "vigorous pursuit of their claims."[59] Further, the court stated that it "would be inequitable for [the parties that will share in the Estate] to bear

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[53] Estate of Jones, 152 Wn.2d 1, 20-21, 93 P.3d 147 (2004).

[54] In re Irrevocable Trust of McKean, 144 Wn. App. 333, 345, 183 P.3d 317 (2008).

[55] Estate of Ehlers, 80 Wn. App. 751, 764, 911 P.2d 1017 (1996).

[56] Littlefield, 133 Wn.2d at 46-47.

[57] Clerk's Papers at 930, 861.

[58] Id. at 857.

[59] Id.

[the] costs without an allocation of fees and costs to [Vera's Children]."[60] These were appropriate factors to consider. The court properly exercised its discretion.

Vera's Children argue that RCW 11.96A.150 is not a prevailing party statute. This is true. But it is also true that courts are not precluded from considering this as a factor. And both the Estate and Homer Ray's Children were the prevailing parties.

Vera's Children also argue that the award is not authorized by statute because it "included the unstated basis of punishing [Vera's Children]."[61] They point out that the Estate conceded that it would have incurred up to $12,500 in fees to deal with probate, and the trial court concluded that this would be an "'equitable cap on the total probate and litigation fees to be allocated to [Homer Ray's Children]."'[62] They then point out that the trial court only reduced the fees awarded to the Estate by $6,000 and argue that the "only fair implication" of this is that the trial court was punishing Vera's Children.[63]

This argument has no reasonable basis in this record, particularly in view of the court's reduction in the original amount requested after having certain facts called to its attention. As we read this record, the court determined that reasonable fees and costs for an uncontested probate and ancillary probate

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[60] Id.

[61] Opening Brief of Appellants at 42.

[62] Id. at 43 (quoting Clerk's Papers at 930).

[63] Id.

would have been $6,000.[64] The court deducted that amount from the revised total of fees and costs after certain facts were called to its attention. That is the net awarded.[65] The claim that punishment was involved is baseless.

Next, Vera's Children argue that the personal representative improperly took sides and breached her fiduciary duty. We disagree.

They primarily rely on In re Cannon's Estate and Thompson v. Weimer for the proposition that the personal representative cannot take sides between potential distributes and cannot urge the claims of one against another.[66] But these cases do not support the proposition that the Estate must not take a position with respect to claims made against the estate just because it is consistent with that taken by others involved in the same litigation.

The Estate points to Estate of Kvande v. Olsen, which expressly stated that "a personal representative is obliged to present his position in a probate matter where there is a dispute as to distribution."[67] This is the rule that controls here.

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[64] Clerk's Papers at 928.

[65] Id. at 930.

[66] Opening Brief of Appellants at 46 (citing In re Cannon's Estate, 18 Wn. 101, 105, 50 P. 1021 (1897); Thompson v. Weimer, 1 Wn.2d 145, 150, 95 P.2d 772 (1939)).

[67] 74 Wn. App. 65, 72, 871 P.2d 669, review denied, 124 Wn.2d 1021 (1994).

*On Appeal*

The Estate and Homer Ray's Children request attorney fees on appeal. They rely on RCW 11.96A.150. For substantially the same reasons identified by the trial court, we conclude they are also entitled to fees on appeal. We also note that regardless of how one resolved the threshold question—the effect of the release in the Trust Termination Agreement—there was still a need to resolve the question of how to distribute the rights to the mineral rights. In this case, a trial was required and this appeal followed. Given the current value of the assets, it would be inequitable to impose the costs of litigation on appeal on either the Estate or Homer Ray's Children. This burden properly falls on Vera's Children, not Homer Ray's Children or the Estate.

**MOTION TO STRIKE**

The Estate moves to strike portions of the Opening Brief "that refer to exhibits never offered or admitted at trial" and that refer to a declaration submitted post-trial.[68] We deny the motion and deny any award of fees relating to this motion.

RAP 9.6 provides that parties should designate clerk's papers and exhibits that they want the trial court clerk to transmit to the appellate court. An appellate court may strike references to materials that are not on the record at appeal.[69] But "a motion to strike is typically not necessary to point out evidence and issues

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[68] Motion to Strike Portions of Appellants' Opening Brief at 1-5, Ex. A.

[69] See, e.g., State ex rel. Wash. State Convention & Trade Ctr. v. Allerdice, 101 Wn. App. 25, 35, 1 P.3d 595 (2000).

a litigant believes this court should not consider."[70] "So long as there is an opportunity . . . to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials—not a separate motion to strike."[71]

These principles apply here. Accordingly, we need not address this issue further.

We affirm the judgment and the orders, and we grant the Estate's and Homer Ray's Children's request for fees on appeal, subject to their compliance with RAP 18.1 and the limitations we discussed regarding the motion to strike. We deny the Estate's motion to strike.

COX, J.

WE CONCUR:

Schindler, J.

Leach, J.

[70] Engstrom v. Goodman, 166 Wn. App. 905, 909 n.2, 271 P.3d 959, review denied, 175 Wn.2d 1004, 285 P.3d 884 (2012).

[71] Id.

# APPENDIX B

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

| | |
|---|---|
| In re the Estate of<br><br>HOMER R. HOUSE,<br><br>Deceased.<br><br>LINDA McMURTRAY and LARRY PIZZALATO,<br><br>Appellants,<br><br>v.<br><br>JANET CORNELL; ROBERT HOUSE; SUSAN TERHAAR; and JUDITH THEES,<br><br>Respondents. | No. 70248-3-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Appellants, Linda McMurtray and Larry Pizzalato, have moved for reconsideration of the opinion filed in this case on December 22, 2014. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 30th day of January 2015.

For the Court:

Cox, J.

Judge

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JAN 30 PM 2:51

# APPENDIX C

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

| | |
|---|---|
| In re the Estate of<br><br>HOMER R. HOUSE,<br><br>Deceased.<br><br>LINDA MCMURTRAY and LARRY PIZZALATO,<br><br>Appellants,<br><br>v.<br><br>JANET CORNELL; ROBERT HOUSE; SUSAN TERHAAR; and JUDITH THEES,<br><br>Respondents. | No. 70248-3-I<br><br>COMMISSIONER'S CORRECTED RULING AWARDING ATTORNEY FEES AND COSTS |

This ruling corrects my January 21, 2015 ruling that awarded attorney fees and costs to the Estate of Homer R. House ("Estate") and respondents Janet Cornell, Robert House, Susan Terhaar, and Judith Thees (collectively "Homer Ray's Children"). Before the ruling, appellants Linda McMurtray and Larry Pizzalato (collectively "Vera's Children") had filed a timely consolidated objection to the requested fees, expenses, and costs, and the Estate and Homer Ray's Children had each filed a reply. The objection and the replies were not brought to my attention at the time of the January 21 ruling. I have reviewed the objection and the replies and correct my January 21 ruling as follows.

This is a TEDRA case. This Court issued an unpublished opinion

affirming the trial court's decisions. In the opinion, this Court awarded attorney fees on appeal under RCW 11.96A.150 to the Estate and to Homer Ray's Children subject to compliance with RAP 18.1. This Court denied any fees relating to the Estate's motion to strike.

The Estate filed a declaration of counsel for attorney fees and a cost bill. The Estate requests attorney fees of $50,736.50, expenses of $2,676.49, and RAP 14.3 costs of $139.96, in the total amount of $53,552.95. In her declaration, the Estate's counsel states that she did not include any time or fees for the work done regarding the motion to strike. Homer Ray's Children also filed a declaration of counsel for attorney fees on appeal, requesting attorney fees of $19,390 and expenses of $32.75 in the total amount of $19,422.75.

Vera's Children filed a consolidated objection to the Estate's and Home Ray's Children's requests for fees and expenses. Vera's children do not object to the Estate's requested costs of $139.96.

Vera's Children argue that litigation expenses beyond those allowed under RAP 14.3 should be excluded. Although the costs allowed under RAP 14.3 are limited, RCW 11.96A.150 allows "costs, including reasonable attorneys' fees[.]"[1] The TEDRA statute contains a broad language authorizing an award of costs, including reasonable attorney fees "in such amount and in such manner as the court determines to be equitable," considering "any and all factors that it deems to be relevant and appropriate[.]"[2] In light of the TEDRA statute, I decline to reduce the requested expenses.

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[1] RCW 11.96A.150(1).
[2] RCW 11.96A.150(1).

Vera's Children argue that the Estate's computer research costs ($2,285.24) are excessive and should be denied or reduced by at least 75-80%. Computer research expenses are considered to be "an aspect of attorney fees, so long as the expenses are reasonably incurred."[3] Vera's Children argue that the issues on appeal were already researched and litigated in the trial court and that the high hourly billing rates for the Estate's attorneys ranging from $370 to $530 should incorporate their experience and other incidents of overhead, including access to a law library. Vera's Children also argue that the attorney fees of $50,736.50 for the Estate and $19,390 for Homer Ray's Children are excessive and duplicative and should be reduced by 15-20%.

The Estate counters that the legal research expenses were reasonable in light of the increased number of authorities cited in appellants' brief. The Estate seeks additional fees incurred in filing a reply ($1,887). Homer Ray's Children also defend their attorney fee request, arguing that Vera's Children individually served Homer Ray's Children, forcing them to retain separate counsel.

In my January 21 ruling, I found the requested fees and expenses reasonable. However, after reviewing Vera's Children's objection (not available at the time of my January 21 ruling) and further reviewing the opinion, I conclude that a 15% reduction in the Estate's requested fees ($50,736.50 x 0.75 = $38,052) is appropriate. I base this conclusion in part on the Estate's counsel's high hourly rates and the fact that the issues on appeal were vigorously litigated at the trial court level, where the trial court awarded fees to the Estate and

[3] Absher Constr. Co. v. Kent Sch. Dist. No. 415, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995).

Homer Ray's children in the amounts of $113,986 and $36,303 respectively. I reject Vera's Children's request for further reduction and allow the Estate's request for additional fees of $1,887 with a 15% reduction ($1,415.25).

Therefore, it is

ORDERED that the January 21, 2015 ruling awarding attorney fees and costs shall be corrected as follows:

The attorney fees of $39,467.25 ($38,052 + $1,415.25), expenses of $2,676.49, and costs of $139.96, in the total amount of $42,283.70 are awarded to the Estate. Appellants Vera's Children shall pay the total amount.

The attorney fees of $19,390 and expenses of $32.75 in the total amount of $19,422.75 are awarded to respondents Homer Ray's Children. Appellants Vera's Children shall pay the total amount.

Done this 23rd day of January, 2015.

Court Commissioner

# APPENDIX D

# LAST WILL AND TESTAMENT

# OF

# HOMER R. HOUSE

**KNOW ALL PERSONS BY THESE PRESENTS:**

That, I, **HOMER R. HOUSE**, of the County of Island, State of Washington, being of sound and disposing mind and memory, and not acting under duress, menace, fraud or the undue influence of any person whomsoever, do make, publish and declare this my **LAST WILL AND TESTAMENT**, hereby revoking all Wills and any codicils thereto at any time heretofore made by me.

## ARTICLE I

## *IDENTIFICATION OF FAMILY*

I declare that at the time of the execution of this **LAST WILL AND TESTAMENT** I have a wife, **VERA J. HOUSE**. We have no children. I have four children by a prior marriage whom my wife has not legally adopted: **JANET CORNELL, SUSAN TERHAAR, JUDITH THEES** and **ROBERT HOUSE**. My wife has two children by a prior marriage whom I have not legally adopted: **LARRY J. PIZZALATO** and **LINDA MCMURTRY**. I have no other children.

## ARTICLE II

## PAYMENT OF DEBTS

I hereby direct and order that all just debts for which proper claims are filed against my estate, and the expenses of my last illness and funeral, be paid by my Executor as soon after my death as is practicable and before any division or distribution of property. Any and all property passing under this Will shall pass subject to all encumbrances.

Homer R House

**HOMER R. HOUSE**
Testator

## ARTICLE III

### *DISPOSITION OF ESTATE*

All property both real and personal which I own at the time of my death is to be transferred to the Trustee of the HOMER R. HOUSE and *VERA J. HOUSE FAMILY TRUST* under Agreement dated the 21st day of February, 1991, to be held, managed and disposed of in accordance with the provisions of said Trust.

## ARTICLE IV

### NOMINATION OF EXECUTOR

I hereby nominate and appoint my wife, VERA J. HOUSE, the Executor of this, my LAST WILL AND TESTAMENT, to act without bond and without intervention of any court as hereinafter provided. In the event that the aforementioned Executor is for any reason unable or unwilling to act in such capacity, I hereby nominate and appoint JANET CORNELL, to act as Executor without bond and without intervention of any court as hereinafter provided. In the event that JANET CORNELL is for any reason unable or unwilling to act in such capacity, I hereby nominate and appoint SUSAN TERHAAR, to act as Executor without bond and without intervention of any court as hereinafter provided. In the event that SUSAN TERHAAR is for any reason unable or unwilling to act in such capacity, I hereby nominate and appoint JUDITH THEES, to act as Executor without bond and without intervention of any court as hereinafter provided. In the event that JUDITH THEES is for any reason unable or unwilling to act in such capacity, I hereby nominate and appoint ROBERT HOUSE, to act as Executor without bond and without intervention of any court as hereinafter provided.

## ARTICLE V

### NONINTERVENTION CLAUSE

I further direct that my Executor act without the intervention of any court, except as may be required in the case of nonintervention wills. My Executor shall have full power: to sell, lease, exchange, convey and encumber, without notice or confirmation, any assets of my estate, real or personal, at such prices and terms as may seem just to him; to mortgage or pledge any estate property; to invest and reinvest any assets of my estate; to advance funds and borrow money, secured or unsecured, from any source; and to select any part of the estate in satisfaction of any partition or distribution thereunder, in kind, in money or both. Such powers may be exercised whether or not necessary for the administration of my estate.

Homer R House

HOMER R. HOUSE
Testator

## ARTICLE VI

## RESIDUARY ESTATE

Should any of the bequests, gifts or devises in Article III fail due to circumstances that cannot be reconciled with the terms herein or my express wishes, I give, devise and bequeath such, in the alternative, to my residuary estate.

I direct that my residuary estate shall pass in accordance with the laws of intestate succession.

IN TESTIMONY WHEREOF, I hereunto set my hand and publish and declare this as my LAST WILL AND TESTAMENT on this 21st day of February, 1991.

Homer R. House

HOMER R. HOUSE
Testator

## DECLARATION OF WITNESSES

THE FOREGOING INSTRUMENT, consisting of four (4) pages, including this, was on the *21st day of February, 1991, signed and published by the said* HOMER R. HOUSE, *and by him* declared to be his LAST WILL AND TESTAMENT in the presence of us, and each of us, who at his request and in his presence and the presence of each other, have hereunto subscribed our names as witnesses.

We declare that the testator, HOMER R. HOUSE, is personally known to us, and that at the time he signed this LAST WILL AND TESTAMENT, the testator appeared to be of sound mind and under no duress, fraud, or undue influence.

We further declare that we are not related to the testator by blood, marriage, or adoption, and to the best of our knowledge, we are not entitled to any part of his estate upon his death, under this LAST WILL AND TESTAMENT or by operation of law.

THOMAS J. BROTHERS, residing at Lynnwood, Washington.

LORI A. SMITH, residing at Bothell, Washington.

*State of Washington* }
} ss
County of Snohomish }

ACKNOWLEDGMENT

I, LISA A. JONES, *Notary Public in and for the State of Washington, do hereby certify that on* this 21st day of February, 1991, personally appeared before me HOMER R. HOUSE to me known to be the individual described herein and who executed the above LAST WILL AND TESTAMENT and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Also appeared before me THOMAS J. BROTHERS and LORI A. SMITH, witnesses to the signing of the LAST WILL AND TESTAMENT who have each acknowledged that they witnessed the signing of the LAST WILL AND TESTAMENT by HOMER R. HOUSE and that he did the same as his free and voluntary act.

GIVEN UNDER MY HAND AND OFFICIAL SEAL this 21st day of February, 1991.

LISA A. JONES

Notary Public in and for the State of Washington, residing at Everett, Washington.
*Commission expires September 14th, 1993.*