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DIVISION III
STATE OF WASHINGTON
By _____

No. 303314

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OF THE STATE OF WASHINGTON**

In the Matter of the Estate of

WENDELL K. MILES, Deceased

APPELLANT'S BRIEF

ROBERT A. SIMEONE, WSBA #12125
ATTORNEY FOR APPELLANT
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COLVILLE WA 99114
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A. ASSIGNMENTS OF ERROR

1. The trial court erred by not finding that Testator Wendell Miles, deceased, had visited only Dog Patch Humane among the various animal organizations in the Colville vicinity. (Finding of Fact “E” “I” “J”, CP 141)

2. The court erred in finding that the Testator knew the names of the charitable organizations in Colville that protect and care for animals. (Finding of Fact “J”)

3. The court erred in finding that the Testator knew Dog Patch scaled down its operation since the late 1990’s and that he would have used the name “Dog Patch” in his will if that was his intent. (Finding of Fact “K”)

4. The court erred in finding that the Testator knew of the Refuge Humane Society or Colville Pet Refuge Humane Society. (Finding of Fact “K”)

5. The court erred in finding that it was the Colville Valley Animal Sanctuary (CVAS) that the Testator intended to designate by using the reference “Colville human society” in his will. (Finding of Fact “K”)

6. The court erred in concluding that the *Cy Pres* Doctrine does not apply in this case as the designation in the Testator’s will was as to a specific “Colville human society”. (Conclusion of Law “C”)

7. The court erred in concluding the *Cy Pres* Doctrine does not apply in this case because the reference “Colville human society” was not a description in general terms as to a class of beneficiaries.

(Conclusion of Law “C”)

8. The court erred in concluding that the designation of “Colville human society” is a close approximation of the “The Refuge Humane Society” and the “Colville Pet Refuge Humane Society”.

(Conclusion of Law “E”)

9. The court erred in concluding that the “Refuge Humane Society” and “Colville Pet Refuge Society” were dba’s of the Colville Valley Animal Sanctuary Incorporated in March 2010. (Conclusion of Law “E”)

10. The court erred in ruling that the real property of Mr. Miles’ Estate shall be conveyed to Colville Valley Animal Sanctuary instead of applying *Cy Pres* to remedy the error made in the designation in the will. (CP 249)

11. The court erred in allowing the Declaration of Lisa Gallagher Filed October 18, 2011 to be admitted into evidence. (CP 781-790)

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Wendell Miles’ bequest to “Colville human society” create an ambiguity in his will so as to make unclear the identity of the

recipient of his testamentary gift of real property? (Assignment of Error 1, 2, 3, 4)

2. Did the court incorrectly evaluate available extrinsic evidence in its determination of the testator's intent behind his gift to "Colville human society"? (Assignment of Error 1-5, 9)

3. Does the *Cy Pres* Doctrine require that the gifted property be distributed to organizations closely aligned to the donative intent of the Testator where the particular grantee cannot be ascertained? (Assignment of Error 6, 7)

4. Where literal compliance with the provision in a will becomes impossible due to ambiguity through no fault of the Testator should the court have complied with the testamentary directive as nearly as it practically could be accomplished? (Assignment of Error 6)

5. Should this matter be remanded to the Superior Court for further proceedings to determine the appropriate allocation of the Testator's gift among those charitable organizations that fit within the vision of the Testator's charitable intent? (Assignment of Error 8, 10)

6. Should the court remand this matter to Superior Court for proceedings under the provisions of the Trust And Estate Dispute Resolution Act (TEDRA)? (Assignment of Error 10)

7. Did the court incorrectly allow the admission of a declaration that supported CVAS's Motion to Reopen the Record after the court denied that motion? (Assignment of Error 11)

C. STATEMENT OF THE CASE

Wendell Miles, an animal lover, died on April 22, 2010 leaving behind an estate to be administered in accordance with the terms of a pre-printed will he filled out and executed on March 2, 2010. (CP 5-7) In that will he made a number of specific bequests. Among them were gifts to animal welfare groups, including the ASPCA and PETA. He also gifted certain real property to the "Colville human society", with the lower case "h" and "s" as written in the bequest. (CP 6) His obituary photo pictured him with his dog Maggie. (CP 140).

There is no organization properly known as the "Colville human society". (CP 19-20). If an error in the spelling of the word "humane" occurred in Mr. Miles' writing, and he intended to write the word "humane" when he filled out his pre-printed will when he wrote the word "human", there is no organization with the name "Colville human Society" either. (CP 19-20).

When the Personal Representative of Mr. Miles' estate, one Rita Garrison, determined that no organization with the specific name of "Colville human society" existed, endeavored to bring together all of the potential beneficiaries of the decedent's bequest, they being the local

animal welfare organizations in the Colville area. This mission was organized through Mr. Tom Webster, the attorney who then represented Colville Valley Animal Sanctuary (CVAS). CVAS was one of the animal welfare organizations in Colville that was among the possible recipients of the Testator's gift. The purpose of the proposed meeting among the potential beneficiaries was to arrive at an agreed distribution scheme by way of alternative dispute resolution including a TEDRA mediation under RCW 11.96A et. seq. (CP 31).

To solve the problem arising with the vagueness of the recipient of the gift, an umbrella organization was considered by the Estate and proposed by one Lennox "Maggie" Ryland, a veterinarian and relative of Personal Representative Rita Garrison's sister-in-law. (CP 37, 54-58). This group would be the recipient of the gift, which it would then use to benefit animals. This idea then was transformed into a plan to give the proceeds of sale of the land to all potential recipients. (CP 19-20). The Estate proposed to the court that the Personal Representative would apply to the court for a determination regarding the distribution of proceeds from the sale of the real property in question to multiple entities or persons. (CP 20).

Joyce Tasker, Appellant, runs Dog Patch Humane of Colville. Dog Patch, or Dog Patch Humane, is a charitable organization under the provisions of section 501(c)(3) of the Internal Revenue Code. Dog Patch

operated as a humane rescue organization in Nevada for six years before relocating to Washington in 1992 and doing charitable work for animals since. (CP 129). Ms. Tasker became aware of the proposal for the establishment of the “umbrella organization” for the administration of the charitable gift left to “Colville human society” in Mr. Miles’ Estate through her conversations with the aforementioned Maggie Ryland. (CP 37, 54 - 58). Ms. Tasker was unable to have any direct discussion with regards to the idea of the umbrella organization proposed by Personal Representative Garrison with the Estate’s attorney who refused to speak to her. (CP 26). The idea to create an umbrella organization was replaced by an idea to sell the land and share the proceeds among the various groups.

Although the sharing scheme was proposed by the Estate itself in the Interim Report and Petition for Distribution for Specific Bequests (CP 19-20), the idea ultimately died. For reasons that are not clear, the Estate reversed its course in the idea of sharing the land sale proceeds and went instead to a plan to distribute the property to the residuary, relying on the boiler plate of the pre-printed will that stated

Any bequest listed above in favor of a person or organization not living or in existence at the time of my death shall lapse and the money and/or property so devised shall become a part of my estate residue.

(CP 6)

On April 21, 2011 without any prior notice or warning, the Estate filed the Amended Petition for Distribution requesting the court's permission to distribute the proceeds of the sale of the real property that was targeted for "Colville human society" to the Red Cross, the residual beneficiary named in the Decedent's will. (CP 27)

Because there was no such entity with the name "Colville human society", the Personal Representative concluded that the bequest was made to a non-existent entity and that the gift lapsed. (CP 27). The potential beneficiaries of the gift opposed the Estate's proposal to give the property to the residuary. The dispute led to a contested hearing held August 29, 2011 for the purpose of determining the proper distribution of the Estate. That hearing was conducted upon argument and unsworn declarations and answers to interrogatories.

The court in its written Findings, Conclusions and Rulings found that the Testator had a clear intent to leave the property to charitable organizations that protect and care for animals. (CP 247). At the same time, the court found there was an ambiguity as to which organization the Testator intended to designate, but that the Testator knew the names of the organizations. (CP 247). The court also found that the Testator knew that Dog Patch, the organization run by Ms. Tasker, appellant herein, had scaled down its operations since the late 1990's and that the Testator would have used "Dog Patch" if that was his intent. (CP 247).

Additionally, the court found that the Testator knew of Colville Pet Rescue, another animal rights organization in the area that eventually laid claim to the gift but did not use the name “Colville human society”. Finally, notwithstanding the court’s finding that it was the Testator’s intent to leave his property “to charitable organizations”, (emphasis added) the court found that the Testator knew of the organization known as Colville Valley Animal Sanctuary and it was his intention to designate that group when he used the name “Colville human society” in his will. (CP 248).

Within ten days of that ruling of September 20, 2011, CVAS, which fully prevailed on the distribution issue, filed a Petition to Reopen the Record to include other declarations not submitted in time for the August 29, 2011 hearing. The Petition was opposed by Ms. Tasker on the basis that it was filed *pro se* by Nancy Rose, not an attorney, in behalf of CVAS, a corporation and a legal entity. (CP 752-753). Leading up to Rose’s *pro se* filing of her Motion to Reopen Record were the Notice of Intent to Withdraw as Attorney of Record, filed September 7, 2011 by Mr. Webster, theretofore the attorney for CVAS and Ms. Rose, (CP 671-672); Rose’s objection to Mr. Webster’s intent to Withdraw filed September 12, 2011 (CP 673-675); the Declaration of Lisa Gallagher filed September 13, 2011 criticizing Mr. Webster for allowing the hearing to be conducted by written declarations, and not testimony (CP 682); Motion to Withdraw as

Counsel filed by Mr. Webster September 16, 2011 (CP 671-672); and the Response by Rose for CVAS to Motion to Withdraw, filed September 22, 2011 (CP 673-675). Later that day of September 22, 2011, after objecting to the Notice of Mr. Webster's withdrawal, Ms. Rose on behalf of CVAS reversed her position on the subject and noticed the court of her discharge of Mr. Webster as attorney for CVAS (CP 837).

In addition to objecting to the Petition because Ms. Rose was not an attorney, and therefore ineligible to represent CVAS, Dog Patch sought CR 11 Sanctions on the basis that Colville Animal Sanctuary was not a "party aggrieved" as required by CR 59. She contended that because CVAS had received a result entirely favorable to itself with the court's awarding it all of the Estate real property, it was not entitled to the relief afforded aggrieved parties under CR 59. (CP 751-752).

It had been the position of the Estate that this gift would be subject to administration by the court under the *Cy Pres* Doctrine. Although not specifically stated as such, it was implicit in the April 5th Interim Report by the Estate that the property would be sold and the proceeds distributed to multiple entities or persons per *Cy Pres*. (CP 20, CP 29 - 30). It was not until the resistance by the potential beneficiaries - CVAS, Dog Patch Group, and Pet Rescue - to the idea that expenses incurred by the Estate for sale of property be borne by these groups, that the Estate switched

fields and promoted the idea that the property should go to the residuary beneficiary because the gift failed. (CP 27).

Dog Patch is a private operating foundation under IRS regulations. It was the only facility among the contenders for his gift that Mr. Miles actually visited. (CP 38). At the time Mr. Miles executed his will it had been in business for over twenty-two years as a no-cage facility at a Colville address attending to the needs of thousands of dogs. During the preceding ten years it was a no kill as well as a no-cage facility. (CP 129). In 2010, Dog Patch advertized in the yellow pages of the Colville phone book under the heading "Humane Societies" and had done so for the preceding 18 years. Until 2010 Dog Patch was the only humane society listed in the yellow pages. (CP 84). Another animal rights group advertizes in Republic, a town in neighboring county to the west, under the classification of "Humane Societies" but no others are in Colville. (CP 129). Dog Patch takes daily calls from the public which range from questions on education, cruelty, care, training, strays/abandoned animals; lost and found animals; spay and neutering; owner turn in, nuisance issues, and how to choose a shelter or boarding kennel. It receives from three to ten phone calls per day on these subjects. Dog Patch also receives up to ten inquiries daily over the internet. (CP 126).

Ms. Tasker works between 16 and 18 hours a day with animals for Dog Patch and has done so for more than 20 years without compensation.

She donates a portion of her social security to make sure bills are paid each month. In the past, she donated a lump sum retirement withdrawal to Dog Patch to keep her humane society operational. (CP 128).

Dog Patch has served the public at no charge for all of its humane services. Most of its support is provided for by Joyce Tasker. It uses its own private money and not community dollars to give humane services to pets. (CP 129). No fees have ever been charged for any services the organization provides including spaying, neutering, admissions or adoptions. Ms. Tasker has never taken any compensation for any of the work she does. (CP 129). Dog Patch loans books from its comprehensive library, and both CD's and DVD's to the public for instructional purposes. (CP 130). At the Dog Patch premises, Ms. Tasker conducts presentations from authors on animal behavior; holds clicker training classes; gives presentations on proper nutrition; conducts agility training; hosts Sunday get-togethers for elderly and their pets; and runs obedience training. (CP 130). As opposed to Colville Valley Animal Society which sends hundreds of animals away to Spokane or Seattle to unknown fates and for compensation, Dog Patch limits its intake of animals and provides individualized attention to the ones it accepts while sticking to its necessarily meager budget. (CP 130).

On the day of the hearing held on the CVAS's Motion to Reopen the Record, Ms. Rose submitted a Declaration by one Lisa Gallagher in

support of her organization's position. (CP 122) The same day the court heard Dog Patch's Motion to Strike Pleadings and for Sanctions. While the court ruled to strike Nancy Rose's Motion to Reopen, as she was not an attorney, later on presentment of the Order on that hearing the court ruled that the supportive Declaration of Lisa Gallagher was admissible. This ruling was made despite Dog Patch's argument that Ms. Gallagher's Declaration did nothing but reiterate the material that was disallowed by the court in connection with its ruling striking Nancy Rose's objectionable material. (CP 824-826).

D. ARGUMENT

1. Interpretations Of Wills In General.

RCW 11.12.230 requires that 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 it.

The court should seek to determine the intent and plan of the Testator from the words of the instrument, construed in their natural and obvious sense and to give a Testator's plan effect if it is lawful. The Court must give effect to any lawful intent of the Testator, regardless of the reasonableness of the conditions imposed. *Anderson v. Anderson*, 80 Wn.2d 496, 495 P.2d 1037 (Wash. 1972); *In Re Estate of Campbell*, 87 Wn.App.506, 942 P.2d 1008 (Wash.App. Div. 1 1997). Where a will is

ambiguous there is room for a court to find the intent of a Testator. See *Harrell v. Rutherford*, 40 Wn.2d 171, 241 P.2d 1171 (Wash. 1952). If possible, the intent of the Testator should be ascertained from the language of the will itself unaided by extrinsic facts. See *Vadman v. American Cancer Soc.*, 26 Wn.App. 697, 615 P.2d 500 (Wash.App. Div. 2 1980).

In certain instances, extrinsic evidence is appropriate for the court where there is ambiguity as to a Testator's intent. *In Re Estate of Price*, 73 Wn.App. 745, 871 P.2d 1079 (Wash.App. Div. 1 1994). Then and only then may extrinsic evidence be used and then only as an interpretive aid, not as a tool for rewriting a Testator's will. *Price*, *id.*

2. The Interpretation Of The Will Of Wendell Miles Specifically.

Wendell Miles completed a pre-printed, form will, the variety which would have been purchased from a stationery store. In his specific bequests, Article 3, he gave and devised his real estate to "Colville human society". During the pendency of the Estate proceedings in Superior Court, it was assumed and understood by those who stepped up as potential recipients of the gift that in his writing of the word "human" in the will, he left off the "e" and that his intent as reflected in his will was to write the word "humane". (CP 31, 29-30) The specific bequest contained neither a definite nor indefinite article before the words "Colville human society". Neither was the word "human" capitalized. Both of these grammatical peculiarities raise questions as to whether or not a specific

organization was ear-marked as the beneficiary of Mr. Miles' generosity or whether it was a general reference to humane animal organizations.

3. The Court Must Apply The *Cy Pres* Doctrine To Carry Out The Testator's Charitable Intent.

As set forth in the facts of this case, it had been largely assumed among the potential beneficiaries of Mr. Miles' gift that the real property or its proceeds upon sale would be disbursed among animal rights groups in the Colville area in some equitable way. (CP 31). This is an application of the *Cy Pres* doctrine which appellant endorses here. The Respondent CVAS also supported implementing the doctrine saying it should be applied

And that the property be distributed to the organization(s) that most closely match the Testator's intent. (Emphasis Added)

(CP 70).

This had been the express intent of the Personal Representative early on and was specifically enunciated in the Estate's Interim Report and Petition for Distribution filed April 5, 2011. (CP 19 - 20). It was planned that the Personal Representative would sell the property and then at a later date apply to the court for determination regarding the distribution of the proceeds. (CP 20).

CVAS joined in with this initiative. (CP 70, 72). At a later time for unknown reasons the Estate retreated from its idea to distribute the

money to the potential recipients and went instead to a plan to distribute the property to the residuary American Red Cross. The trial court instead found that the “Colville Valley Animal Sanctuary” was the “Colville human society” and distributed the property to those organizations. This result followed notwithstanding the Court’s finding that there was an ambiguity as to which organization the Testator intended. (CP 247). This action led to the present contest among the parties as to the object of Mr. Miles’ testamentary intent.

4. The Gift To “Colville Humane Society” Does Not Lapse.

In the trial court the residuary beneficiary of the Miles’ Estate, the American Red Cross, contested the gift of Mr. Miles’ land to Colville human society raising the argument that the gift had lapsed in that event the real property would have gone to the American Red Cross.

The American Red Cross has not submitted its Notice of Appeal and is apparently no longer pursuing an interest in the property as a residuary beneficiary.

To the extent that the court agreed that the gift of real property should be carried out as directed by the terms of the will, and not lapse, Dog Patch agrees with the ruling of the court. The gift did not lapse and it should not be relegated to the residuary American Red Cross. Here, where there is clear testamentary intent for a specific devise, it is left to the court to make a determination of the object of the testator’s intent which this

appellant will go on to argue must be accomplished by way of the *Cy Pres* Doctrine.

5. The Devise Creates An Ambiguity Requiring The Use Of Extrinsic Evidence To Determine The Testator's Intent.

While Mr. Miles' will sets forth an incorrect name of the animal rights organization to whom he devises his real property, it is nonetheless apparent from the context of his will that first, he is talking about an animal rights group and that the group is in Colville. These two clear expressions in this regard, notwithstanding the omission of the letter "e" at the end of the word "human", are verified by way of the other charitable gifts he made to animal rights organizations SPCA and PETA. Notably, Mr. Miles included the words "animal rescue" after his gift to the SPCA, and the words "animal protection" after his gift to PETA. In *Old Nat. Bank & Trust Co. of Spokane v. Hughes*, 16 Wn.2d 584, 134 P.2d 63 (Wash. 1943), our Supreme Court considered ambiguities in the context of a trust document. The law as stated in that case should be equally applicable to the testamentary instruments. In *Hughes*, the court said that the testator's intent and purpose must be derived from the terms of the instrument construing all the provisions together. *Hughes* at 587, citing *In Re Peters' Estate*, 101 Wash. 572, 172 P. 870 (Wash. 1918).

Applying that rule to the will under consideration, the provisions militate to a conclusion that the intended objects of Miles' largesse were

animal rights groups. This conclusion derives from putting the gift into the context of the will, specifically the companion gifts to SPCA and PETA. The words “animal rescue” and “animal protection” also lead to a conclusion that it was a gift intended for animal rights organizations.

6. The Cy Pres Doctrine Provides An Alternate Basis Upon Which The Decedent’s Intent To Provide For Homeless Animals In Colville Could Be Given Effect.

a) *Following The Literal Terms Of The Will Is Not Possible.*

There is no organization known as “Colville human society” or even “Colville humane society”. The absence of a beneficiary raises the issue of how the court distributes this gift without knowing the true beneficiary. The *Cy Pres* doctrine provides an alternative basis for giving effect to the decedent’s clear and unambiguous intent to provide for the homeless shelter animals in Colville. CVAS itself, which now reverses its position on the subject, endorsed application of *Cy Pres* through its attorney. (CP 270-273). The *Cy Pres* doctrine has been articulated as follows:

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 court then sanction its use in some other way which will, as nearly as may be, approximate the general intent.

See *Puget Sound Nat. Bank of Tacoma v. Easterday*, 56 Wn.2d 937, 948-49, 350 P.2d 444 (1960), quoting *Duncan v. Higgins*, 129 Conn. 136, 26 A.2d 849, 850 (Conn. 1942).

The words have French origin and are roughly translated to mean “as near as possible”. The doctrine of *Cy Pres* will be applied where a testator’s will, read in light of the surrounding circumstances, reveals that the testator’s principal objective was to benefit a particular charitable purpose or a particular class of charitable objects, and that his desire that the property go to the particular organization named in the will is secondary. *Easterday*, 56 Wn.2d at 949. It is impossible to follow his directive, the name of the grantee being ambiguous. In such a circumstance, the organization named in the will is once again reasonably viewed as a trustee for the actual object of the charitable gift. Viewed in this manner, the only change effectuated by the court in applying *Cy Pres* is to alter the *means* of administering the will. *Easterday*, 56 Wn.2d at 950.

The fact that Mr. Miles loved dogs, evidenced by his obituary photo featuring his picture with his own dog, coupled with the otherwise clear intent of his will to benefit animals, applied to the rule that it is impossible by way of his directive to give his property to the “Colville human society” leads to the application of *Cy Pres* to achieve the Testator’s intent.

b) Public Charity Begins Where Uncertainty In The Recipient Begins.

The *Cy Pres* doctrine represents an example of a longstanding judicial determination that in the case of charitable bequests courts should do everything possible to discern and carry out a testator's intent, even if it is not possible to follow the literal terms of the will. For example, in *In Re Peterson's Estate*, 141 Wn. 619, 252 P. 139 (1927), a decedent's specific bequest to "the poor people of Spokane" was challenged on the basis that it was too indefinite and uncertain to allow the court or the trustee to discern the intended recipients. While recognizing that the intended recipient could not be identified with any certainty, the Washington Supreme Court nonetheless upheld the bequest, observing that

[b]equests for charitable purposes are always upheld if the donor sufficiently shows his intention to create a charity and indicates its general nature and purpose and described in general terms the class of beneficiaries.

141 Wn. at 622. The court went on to quote from several prior decisions in which it had stated,

Unquestionably courts, in the administration of these matters, look with kindness upon legacies and devices made to the use of charity, and rather than allow benevolent intentions to prove abortive, go to the full length of their ability to fulfill them.

* * *

If the devise be for charitable uses, it is immaterial that the objects of the charity are uncertain and indefinite. Indeed, it is said that vagueness is, in some respects, essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins.

Id., quoting *In Re Wilson's Estate*, 111 Wash. 491, 191 P. 615 (1920); *In Re Stewart's Estate*, 26 Wash.32, 67 P. 723 (1902). See also *De La Pole v. Lindley*, 118 Wn. 398, 204 P. 15 (1922).

The very purpose of the doctrine is this: where a testator in his will evidences a general intention to be executed in a prescribed manner, and such intention cannot be executed with the terms of the will, [*cy pres*] will permit a court of equity to execute the intention with as close proximity to the terms of the will as is reasonably possible. *Jewish Guild for the Blind v. First Nat. Bank*, 226 So.2d 414, 416 (Fla.App. 2 Dist. 1969).

This is not an instance where the gift should fail. Rather, this is an instance where there is a misnomer, misdescription, or ambiguity of description. *Estate of Steinman*, 35 Cal.App.2d 95, 102 (1939). It is apparent from the tenor of the will that Mr. Miles' intention was not to benefit one particular organization. Rather, the spirit of his gift was that it benefit animals, probably dogs and cats, in general, contrary to conclusion of Law "C". This gift is similar to that given to the "poor people of Spokane, as was the case in *In Re: Peterson's Estate*, 141 Wn. 619, 621, (1927). Instead of guessing what the Testator meant, the court should approximate the Testator's intent by distributing the gift designed to benefit animals in the Colville area among the small, discrete number of

groups that fall within the scope of his bequest. This is the proper application of *Cy Pres* here.

7. *Cy Pres Must Be Applied In The Instant Case And The Gift Equitably Shared Among The Potential Recipients.*

In the present case, there are three animal welfare organizations in Colville (some with actual shelter facilities and some which provide other valuable services to the homeless animal population, such as adoption services, foster care placements, and low-cost spaying and neutering). For the court to conclude that one organization that does not bear the name of the stated recipient in the will gets the entirety of this gift is incorrect factually and as a matter of law. It would involve very little in the way of fact-finding for the court to determine the extent of the respective contribution of these three groups to animal rights activity. The provisions of TEDRA utilizing mediation are also a way to accomplish this proportioning. This usage of *Cy Pres* could be the best way of effectuating the decedent's intent.

a) The Testator's Clearly Articulated Intent, Admitted By CVAS Going Into The Distribution Hearing, Was To Benefit The Homeless Animal Population In Colville. (CP 44).

That position going into the hearing should not be forgotten now based upon the outcome. The *Cy Pres* doctrine promoted and urged by CVAS should be utilized to distribute this gift in some equitable

proportion to those animal rights groups that asserted an interest in the gift going into the hearing, namely CVAS, Dog Patch and Colville Pet Rescue.

8. The Court's Findings That Testator's Intent To Leave His Property To Organizations That Protect Animals Favors Dog Patch No Less Than CVAS.

In his personally written Findings of Facts, Conclusions of Law and Ruling, presiding Judge Allen Nielson said that the testator had a clear intent to leave property to charitable organizations that protect and care for animals. Ms. Tasker agrees with the court's finding to this effect found in Finding of Fact "I". But the court went on to add in that Finding that Mr. Miles' intention for the gift under discussion "extends to all animals not just dogs". The court's comment in this regard apparently was made to support an exclusion of Dog Patch because, apparently in the court's view, that organization cares only for dogs.

The fact that CVAS and Dog Patch both care for cats and dogs raises the question whether the court's distinction was supported by the facts. Ms. Tasker's lengthy affidavit points out that she cares for and has provisions at her Dog Patch facility for cats as well as dogs, this point made before the court made its ruling. It has a building dedicated specifically for cats and makes colorful fleece blankets for cats and dogs, and has building materials and supplies for cat habitat on hand for people in need. (CP 150-151). The court's apparent attempt to distinguish Dog

Patch by implication from the group Mr. Miles envisioned in his gift because his intention “extends to all animals not just dogs” is without a basis in fact. This finding cannot be supported by substantial evidence in the record.

More importantly, if it was the court’s purpose in its finding to show that Mr. Miles’ intent extended to “all animals not just dogs”, this finding in itself does not lend any support to the court’s ultimate conclusion that the recipient of the gift should be CVAS and not Dog Patch. CVAS is not an organization that takes and cares for “all animals” any more so than does Dog Patch. The bulk of the work at CVAS is directed towards dogs and cats as is that of Dog Patch. Neither organization can be said to be established for protection and care of all animals as would the PETA or SPCA, for that matter. As an aside, however, Dog Patch is an advocacy organization (CP 133). This would make Mr. Miles’ gift to Dog Patch more consistent with his other bequests to PETA and SPCA.

This distinction then in the finding that Mr. Miles had a clear intent to leave property to charitable organizations that protect and care for “all animals”, not just dogs, does not support a conclusion that the language of his gift made CVAS and not Dog Patch the more likely recipient.

9. Substantial Evidence Does Not Support A Finding That “Colville Valley Animal Sanctuary” Is “Colville Human Society”.

The indisputable fact here is that there is no specific beneficiary that can be ascertained from the literal wording of this will. There is no “Colville human society”. The court’s conclusion in paragraph “K” is that the testator “knew Dog Patch had scaled down its operation since the late 1990’s”. (Finding of Fact “K”, CP 247) There is no support for the court to reach this Finding of Fact from the evidence it had before it. (See Declaration of Lew Wilson, CP 120). The facility has operated for twenty-three years running although shifting its focus to placement. (CP 126). Mr. Miles made no such statement to the effect that he knew that Dog Patch had scaled down its operation since the late 1990’s. The evidence showed that it had not. Dog Patch was the only facility that Mr. Miles had actually visited. (CP 38). Ms. Rose of CVAS could not say that Mr. Miles ever visited its facility. (CP 384). Ms. Acorn of Colville Pet Rescue does not have a facility. Ms. Tasker of Dog Patch, however, reports that Mr. Miles gave a cash donation to Dog Patch at the time of his visit there. (CP 141). The court found that Mr. Miles would have used the words “Dog Patch” if that was his intent. But the court then incongruently finds that when Mr. Miles left his gift to “Colville human society” he intended CVAS, an organization with a completely different name. The court’s thinking in this regard as evidenced in the ruling is that Mr. Miles

knew of the “Refuge Humane Society or Colville Pet Refuge Humane Society which was a highly visible organization”. But this finding is based upon no evidence in the record that Mr. Miles even knew of the group. It could equally be said that Mr. Miles’ intent was to gift his property to Dog Patch, which is the only organization that advertised in the yellow pages and advertised under the heading “Humane Societies”. (CP 156).

While Dog Patch was not formally known as the “Colville humane society”, neither was Colville Valley Animal Sanctuary known as a humane society. Indeed, Colville Valley Animal Sanctuary had no affiliation with the national Humane Society whatsoever.

When Findings of Fact and Conclusions of Law are challenged, the court limits its review to determining whether substantial evidence supports the findings and whether those findings in turn support legal conclusions. *Panorama Village Homeowners Ass’n v. Golden Rule Roofing, Inc.*, 102 Wn.App. 422, 10 P.3d 417 (Wash.App. Div. 1 2000). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. *Merriman v. Cokeley*, 168 Wn.2d 627, 230 P.3d 162 (Wash. 2010). Ms. Tasker submits, based upon the evidence, that there is no organization known as “Colville human society” and that the Colville Valley Animal Sanctuary is a name different from Colville human society. Additionally, there is no proof on the record that

Mr. Miles knew of the Refuge Humane Society or Colville Pet Refuge Humane Society. The court's findings in Finding of Fact "K" are unsupported by the record. This court should find there is no substantial evidence to support the trial court's finding that by gifting his real property to the "Colville human society", the testator intended the gift to go to Colville Valley Animal Sanctuary.

By way of the same reasoning, there is no basis for the court to conclude that the Testator would have used the name Dog Patch if that was his intent. His approximation of the name of the organization as closely points to "Dog Patch Humane", the name which Ms. Tasker's organization uses as it does "Colville Valley Animal Sanctuary". Either error leads to a discussion of whether or not the testamentary intent should be given effect via the *Cy Pres* doctrine.

10. The Trial Court's Decision Not To Apply The Equitable Remedy Of Cy Pres Is Reviewed As A Matter Of Law, And Not As An Abuse Of Discretion.

The question of whether *Cy Pres* doctrine should have been applied here is one of law. This consideration is distinct from the issue of whether the way the remedy was fashioned was an abuse of discretion. See *Townsend v. Charles Schalkenbach Home for Boys, Inc.*, 33 W.2d 255 (1949). In this case, based on the fact that there is an ambiguity in the testator's intended beneficiary, this court should rule as a matter of law

that the trial court should apply *Cy Pres*. This conclusion follows due to the fact that Mr. Miles, by his gift, is expressing a general, charitable intent to animal welfare organizations in the Colville area by gifting his land to “Colville human society”. Each of the contending organizations fits this bill. Literally, none of them is the “Colville human society”. The doctrine (*cy pres*) applies in situations where a testator has evidenced 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. *Horton v. Board of Educ. OF Methodist Protestant Church*, 32 W.2d 99 (1948). It is impossible to divine the true object of Mr. Miles’ generosity. Choosing CVAS to be the “Colville human society” is speculation that requires reversal and a directive to apply *Cy Pres*.

11. Washington Trust And Estate Dispute Resolution Act Can Be Utilized To Resolve The Distribution Issue.

Washington has enacted the Trust and Estate Dispute Resolution Act, TEDRA for the purpose of giving the courts a tool to administer and settle all matters concerning assets of estates. In its pleadings before the court CVAS proposed TEDRA. (CP 268). While the proposal was made to the court during oral argument at the hearing on Distribution of August 29, 2011, the court did not utilize the TEDRA option. As title 11.96A is applicable to the circumstances under discussion, the court should have

utilized the benefits available to it through TEDRA. RCW 11.96A.020. An alternative to having this matter returned the Superior Court for consideration of distribution under the *Cy Pres* doctrine, this court could instead refer the issues addressed herein to the court with instructions that the matter be referred to mediation under RCW 11.96A.280. Thereafter if an agreement cannot be reached this matter can go back to Superior Court for judicial resolution. RCW 11.96A.280.

12. The Court Erred In Allowing The Declaration Of Lisa Gallagher In Support Of The Motion Of CVAS To Reopen The Record.

As the facts recite, CVAS moved to reopen the ruling of the court, which was totally favorable to it in awarding the entirety of Mr. Miles' gift to it. Ms. Tasker in behalf of Dog Patch in response moved to strike Nancy Rose's pleadings based on Ms. Rose not being an attorney and asked the court to deny the Motion to Reopen Record. (CP 747-748). Lisa Gallagher is not an attorney either. She filed a Declaration in connection with the Motion to Reopen noted by CVAS. There was some confusion about the court's ruling at that hearing held October 18, 2011. The order drafted in connection with the court's ruling was noted for final presentment on November 15, 2011. In the court's ruling it permitted, however, the admission of the Declaration of Lisa Gallagher even though it struck the pleadings of Nancy Rose filed in connection with her Motion

to Reopen based upon the fact that it was material drafted by a lay person in behalf of CVAS, a corporation.

Ms. Gallagher filed two Declarations, one on October 14, 2011 (CP 774-777) and one on October 18, 2011 (CP 781-790). In the first, she responded to Ms. Tasker's Motion to Strike Pleadings under request for CR 11 sanctions. She complained therein about CVAS's attorney whom they attempted to discharge. Among her criticisms were that Mr. Webster who did a diligent job of prevailing for his clients,

holding the Sanctuary down while Mr. Simeone proceeded to take head shots at it

and that Mr. Simeone and Mr. Webster were "tag teaming" the Sanctuary. (CP 776)

The second Declaration filed October 18, 2011 contained all hearsay and was a reiteration of the material that Nancy Rose would have included in her Motion to Reopen the Record which the court denied. The court, to be consistent in its ruling, the Declaration of Lisa Gallagher which was part and parcel of the Motion disallowed by the court should have been included in the documents that were stricken. Not only was the material in the Declaration of Lisa Gallagher hearsay, it was an indirect way of allowing into evidence that material which the court specifically said would be stricken because it was part of Nancy Rose's Motion to Reopen the Record.

This court reviews trial court decisions on the admission of evidence for abuse of discretion. *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010). We also review the decision of whether a statement is so prejudicial as to require a mistrial for abuse of discretion. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

State v. Perez-Valdez, No. 84003-2 (WASC), October 13, 2011.

The allowance indirectly of evidence the court disallowed directly is an abuse of discretion. Consistent with its ruling to strike the pleadings of Nancy Rose, the court should have stricken the Declarations filed by Lisa Gallagher.

E. CONCLUSION

The court erred by not applying the *Cy Pres* doctrine and distributing the real property of Wendell Miles in an equitable manner among the deserving bona fide animal welfare organizations in the Colville area as was the intention in his will. Dog Patch is honest and is funded almost entirely by its own private money to further its charitable free services to our community for both rich and poor. The accurate picture of Dog Patch is not from adversary CVAS allegations but from the numerous declaration of members of the bar and local business people.

This court should remand to the Superior Court for a fact finding on the correct apportionment of the proceeds from the sale of Mr. Miles' real property among the eligible contender or alternatively to have the case mediated under TEDRA.

Respectfully submitted this 31 day of January, 2012.

A handwritten signature in black ink, appearing to read "R. A. Simeone". The signature is written in a cursive style with a long horizontal flourish extending to the right.

ROBERT A. SIMEONE, WSBA #12125
Attorney for Appellant Joyce Tasker

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31 day of January, 2011,

I caused to be served a true and correct copy of the foregoing

APPELLANT'S BRIEF by the method indicated below, and addressed to

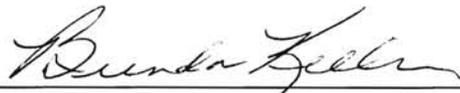
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