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No. 70248-3-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

Estate of: HOMER R. HOUSE (Deceased),

Respondent.

LINDA MCMURTRAY and LARRY PIZZALATO,

Appellants.

v.

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

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(The Honorable Richard A. Eadie)

CONSOLIDATED REPLY BRIEF

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I. INTRODUCTION & GENERAL REPLY.

As they did below, Respondents[1] obfuscate the issues in an attempt to convince the Court that either the entire appeal must be dismissed on procedural grounds, or the trial court rightly opted to toss legal principles to the side in favor of what it deemed equitable. Their approach of citing to rules, statutes, facts and cases out of context – and failing to address arguments raised by Appellants Linda McMurtray and Larry Pizzalato[2] – is perhaps understandable given that, considering the relevant information in the proper context, Respondents simply do not prevail on the substance. Neither do they prevail on procedure.

In short, as detailed *infra*, Respondents have failed to undercut the substantive arguments of the Opening Brief, including: ***first***, that the trial court erred by imposing its view of "equity" -- despite the fact that law could (and does) provide proper resolution of how the mineral rights interests are distributed, despite the fact that it conflicted with the expressed intent of Homer Ray House in his comprehensive estate planning documents, and despite the fact the trial court refused to take into account all the facts and

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[1] This is a consolidated Reply to the Response Brief of Janet Cornell, as personal representative of the estate of Homer R. House (referred to herein as the "Estate" and "Estate's Response"), and to the Response Brief of Janet Cornell, Robert House, Susan Terhaar and Judith Thees (referred to herein as the "House Children" and "House Children Response"). Together, the Estate and the House Children are referred to as "Respondents."

[2] Appellants are referred to as "Linda and Larry" or "Vera's Children" herein.

circumstances, as is required when making an equitable ruling; and, ***second,*** that the trial court erred in its fee award by punishing Linda and Larry for the fact and conduct of the litigation, despite Respondents' assertions in the trial court there was no clear answer to how the mineral rights should be distributed making judicial resolution necessary, and despite the fact that the House Children, and their sibling Janet as Personal Representative directing the Estate's strategy, refused to make any offers of settlement other than demand that Linda and Larry relinquish their claim ***and*** pay all of the Estate's fees, which had already exceeded the Estate's funds, showing the irresolvable conflict of the personal representative.[3]

A key legal error is Respondents' claim the disposition of the mineral rights interest is determined by looking ***backward*** in time ("tracing back") from the probate of Homer Ray's estate, critical to their arguments to get the trial court to invoke equity. It is an issue of law. As discussed *infra* in § II. D. 2., the correct analysis begins on the date of Homer Ray's death in 2004, then looks ***forward***, pursuant to the settled law that the rights to real property interests vest in a beneficiary on the holder's death. Once the analysis is made from that starting point, it is clear that law provides the answer, not equity.

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[3] There was never any settlement posture of the Estate or the House Children other than to "pound sand and pay our fees because we get it all," hardly one designed to resolve a dispute. *See* CP 731-33 (Linda's declaration describing the conduct of the litigation and lack of genuine settlement discussions); CP 777-79 and referenced exhibits at CP 782-811 (trial counsel's declaration describing same with letters and emails between counsel).

II. REPLY ARGUMENT.

A. General Reply as to the Estate's Procedural Arguments, Which Fail.

The Estate spends a substantial portion of its Response arguing that Linda and Larry have waived their rights to challenge certain Findings of Fact and Conclusions of Law on appeal because they allegedly did not properly object ***below***. For example, the Estate argues that Linda and Larry waived review as to Findings of Fact 19, 27, 32 and 36 because their trial counsel did not comment on those Findings during the presentation of Findings of Fact and Conclusions of Law. *See* Estate's Response, pp. 25-26. Likewise, the Estate claims that Linda and Larry cannot challenge Conclusion of Law 30 because their trial counsel, at presentation before the trial court, admitted that the wording of the Conclusion of Law matched the court's oral ruling. *Id.* at 33. The Estate's arguments show that, surprisingly, it fails to understand basic trial and appellate procedure.

The Estate's effort to create a non-existent issue is based on the Estate confusing how error is preserved in jury trials (by requiring exceptions to proposed instructions) with the post-oral decision exercise of determining whether the prevailing party's draft of findings and conclusions accurately set forth the oral ones made by the trial court, or if they deviate from the oral ruling. The Estate's confusion is illustrated by its reliance on two cases dealing with waiver of issues on appeal due to the failure to object to jury instructions, cases which are inapposite here. *See* Estate's Response,

pp. 26, 34, 35 (citing *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009); *State v. Lindsey*, 177 Wn. App. 233, 311 P.3d 61 (2013)). The losing party in no way gives up his right to challenge the trial court's adverse ruling simply because he signs off on written findings of fact and conclusions of law as an accurate reflection of the trial court's adverse ruling. The only thing "agreed to" is that this reflects the trial court's final ruling, which then is fully subject to appeal.

Linda and Larry are appealing the Findings of Fact and Conclusions of Law by which the trial court took Respondents' position over their position. Linda and Larry are entitled to challenge the trial court's choice of Respondents' position over theirs. The Opening Brief makes very clear just what is being challenged on appeal, as shown by the two response briefs engaging in the substantive arguments. Thus, under the text of RAP 10.3(g) that provides for review of error "clearly disclosed in the associated issue pertaining thereto," and RAP 1.2(a)'s command that the rules will be "liberally interpreted to promote justice and facilitate the decision of cases on the merits," and the strong institutional and historical preferences for deciding cases on the merits,[4] any defects

[4] *See, e.g., State v. Olson*, 126 Wn.2d 315, 321-24, 893 P.2d 629 (1995) (absent "compelling reasons" not to do so, the appellate court "should normally" overlook "technical flaws" in compliance with the RAPs and reach the merits," citing RAP 1.2(a)); *Eller v. East Spokane Motors,* 159 Wn. App. 180, 188, 244 P.3d 447 (2010) (overlooking technical noncompliance with the rules because it did not impede reaching the merits); *Lewis v. Estate of Lewis,* 45 Wn. App. 387, 389, 725 P.2d 644 (1986) (reaching merits

(Footnote continued on next page.)

that may exist should not be a barrier to the Court reaching the merits here. This is especially important in an intra-family dispute such as this where a definitive ruling on the merits is the most likely way to end the long-running conflict. Further, as Linda and Larry's arguments as to the Findings and Conclusions being appealed have merit, none of these objections on appeal are frivolous. *See* Estate's Response, pp. 31, 33-36.[5]

As for Linda and Larry's supposed failure to object to certain conclusions of law, "RAP 10.3(g) does not require a party to assign error to a conclusion of law." *State v. Alvarez*, 74 Wn. App. 250, 255, 872 P.2d 1123 (1994).

Regardless of whether Larry and Linda made any objection to proposed findings and conclusions ***below***, the Court of Appeals should consider the merits of the errors of law raised on appeal because "[a] trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it." *Optimer Intern., Inc. v. RP Bellevue, LLC*, 151 Wn. App. 954, 962, 214 P.3d 954 (2009) (quoting *State v. Quismundo*, 164 Wn.2d 499,

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where appellant failed to assign error to finding because the claimed error was "clearly disclosed" in her brief). *Accord,* Wa. State Bar Ass'n, APPELLATE PRACTICE DESKBOOK, (3rd ed. 2005, 2011 revision), §5.3 ("Interpretation of the Rules to Facilitate Decisionmaking on the Merits") and § 5.4 ("the Basic Goal of Appellate Review: Deciding Cases on the Merits and Not on Procedural Grounds") (discussing the purpose of the rules and the practice of the appellate courts to reach the merits of appeals).

[5] Moreover, the Estate fails to cite or argue any of the well-developed law on frivolous appeals. Its claim that the appeal, or any parts of the appeal, is "frivolous" is wrong.

505-06, 192 P.3d 342 (2008)).[6] All the merits of Linda and Larry's arguments should be addressed. *Id. Accord*, RAP 1.2(a).

B. The Asset at Issue is a Real Property Interest, and Therefore Colorado Law Determines Its Distribution.

The Estate mistakes Linda and Larry's assertion that Colorado law applies in this case as a challenge to the trial court's jurisdiction. Linda and Larry do not contest the trial court's jurisdiction over Homer Ray's probate proceeding. But the fact that the Washington trial court has jurisdiction over Homer Ray's probate has no bearing on which state's laws will be applied where the asset at issue is a real property asset located in another state, which uniformly is the law of the state in which it is located. *Werner v. Werner*, 84 Wn.2d 360, 367, 526 P.2d 370 (1974) (quoting J. Story, COMMENTARIES ON THE CONFLICT OF LAWS, § 424 (1834)) ("Historically 'the laws of the place, where such property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities, which should accompany them.'"); *Rustad v. Rustad*, 61 Wn.2d 176, 178, 377 P.2d

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[6] Further, "RAP 2.5(a) is permissive in nature and does not automatically preclude [the appellate court] from reviewing an issue not raised below." *Optimer Intern., Inc.*, 151 Wn. App. at 962 n.6 (quoting *In re Marriage of Wendy M.*, 92 Wn. App. 430, 434, 962 P.2d 130 (1998)); *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005) (by using the term "may," RAP 2.5(a) allowing appellate court to refuse to review any claim of error not raised in trial court is written in discretionary, rather than mandatory, terms). But this is not necessary here since Linda and Larry ***did*** raise the issues below and ***did*** properly preserve them. To the extent this Court believes Linda and Larry raised any new issues ***on appeal***, those issues should be addressed to properly resolve the case. *See Estrada v. McNulty*, 98 Wn. App. 717, 720-23, 988 P.2d 492 (1999), discussed *infra.*

414 (1963) ("All the authorities in England and America * * * recognize the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate."). Despite their assertions to the contrary, neither the Estate nor the House Children present authority to dispute this principle.

Below, the Estate admitted that Homer Virgil House died intestate, owning "an interest in mineral rights for property in Colorado." CP 11. The Estate also referred to the interest as a "non-participating perpetual royalty interest." CP 34. Though the Estate refers to the Colorado asset as a "royalty interest" in its Response, and the House Children refer to the Colorado asset as an "interest in mineral rights" in their Response, neither party denies that the Colorado asset is a real property interest. Nor can they.

Ms. Cornell testified at trial that she expected "a real property interest" (Homer Virgil's interest) would be transferred into Homer Ray's estate. I RP 64:5-9. Likewise, the House Children's counsel agreed that the case dealt with a real property interest. I RP 100:19-101:7. Regardless of whether the asset is characterized as a reservation of perpetual royalty rights or mineral rights, it is a real property interest. *See* C.R.S. § 38-30-107.5 (1991) (reservation of royalty interest in minerals or geothermal resources, whether perpetual or limited, creates real property interest); *Keller Cattle Co. v. Allison*, 55 P.3d 257, 263 (Colo. App. 2002) (explaining that

C.R.S. § 38-30-107.5 simply explained the state of law in Colorado rather than changed it).

Given these principles, Washington law applies to the court's interpretation of governing documents (e.g., whether Homer Ray intended to benefit Vera primarily, whether the will is valid, what the Trust provided, and the impact of the Trust Termination Agreement), but Colorado law – the law of the state where the real property is located – applies for purposes of determining ownership of the property (when and in whom title vests).

C. Controlling Law Does Not Support Respondents' Claims that They are Entitled to the Asset.

Respondents' argument that the trial court properly invoked its equitable authority hinges entirely on the assertion that the mineral rights interest could not and did not vest in any party until the asset was probated, at which time (in 2012) the Trust Termination Agreement had been executed and Vera had already passed away. *See* Estate's Response, pp. 21-22; House Children's Response, pp. 9-10. Under Respondents' flawed view, title does not vest in a party (heir or devisee) until the property has been probated and, because Vera passed away before the probate proceedings, Linda and Larry cannot now take directly through Homer Ray's will (as they are not named) or through intestate succession, as they are not Homer Ray's children and Vera was not a surviving spouse at

the time of probate. The trial court's position, and Respondents' support for it, are questions of law, which are reviewed *de novo*.[7]

Respondents' stance is contrary to the controlling law set out in the Opening Brief. The law in both Colorado and Washington is the same: property interests vest in the recipient immediately on the death of the decedent. *See* Opening Brief, p. 31, and the Colorado cases and the Washington law cited therein. Yet the Estate nevertheless claims that Linda and Larry "cite no authority" to show that the royalty interest "transferred" immediately on Homer Ray's death. *See* Estate's Response, p. 21. It seems the Estate chose to pretend page 31 of the Opening Brief did not exist and hope the Court would not see the Colorado and Washington law therein that provides title vests immediately in heirs and devisees, even if probate has yet to take place, and even if the heirs and devisees have yet to be determined. The issue is the immediate ***vesting*** of the right in the property, not evidence of the transfer, which may occur after the probate and recording of deeds. Respondents' position is contrary to law and, if accepted, would upset and complicate basic probate principles of succession and administration.

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[7] The appellate court will "review questions of law de novo." *Bennett v. Computer Task Grp., Inc.*, 112 Wn. App. 102, 106 & fn 5, 47 P.3d 594, 595 (2002), citing *ITT Rayonier, Inc. v. Dalman*, 67 Wn. App. 504, 507, 837 P.2d 647 (1992) for the proposition that "where the parties do not dispute the material facts and the only issues are questions of law, our review is de novo." *Accord, Estrada v. McNulty, supra*, 98 Wn. App. at 721-23 (engaging in *de novo* review to determine the correct statute to determine and govern the operative beneficiary designation for a state pension).

The Estate's only response to this clear provision of the statutes and case law is that title must not pass immediately because the personal representative has legal authority over and the right to possession of the property at issue. *See* Estate's Response, pp. 19-22.[8] But Linda and Larry have never taken the position that a personal representative lacks authority over real property while it is in probate; that point begs the question. Even assuming the Washington statutes cited by the Estate are controlling, they, like the Colorado statutes, are plain that the legal interest transfers immediately upon death. *See* RCW 11.04.250; Opening Brief, p. 31, fn.14. The personal representative's ability to control the property for probate purposes does not conflict with that principle. It is telling that Respondents have been unable to cite to any legal authority holding otherwise. As at trial, the Estate's arguments do not rebut this principle; instead, they go to whether the interest conveyed was a perfected interest, with the rights to exercise the benefits of ownership, such as possession of the property.

The purpose of the section in RCW 11.04.250 identified by the Estate is simply to confirm the unremarkable and normal principle that is the point of a probate proceeding that, in order for Linda and Larry (or the House children, for that matter) to have full

[8] The House Children do not directly address Linda and Larry's authority stating that property interests vest immediately, but in arguing that the Trust Termination Agreement bars any claim for the asset, they presumably believe probate is necessary prior to vesting.

entitlement to the property, probate must occur. "The power of an executor to manage and control the real property of the estate is not necessarily inconsistent with and does not necessarily override the power and the right of a devisee to encumber or convey his interest in the real property of the estate." *Kerns v. Pickett*, 49 Wn.2d 770, 773, 306 P.2d 1112 (1957) (citations omitted).

The proviso that "no person shall be deemed a devisee until the will has been probated" does not add an additional requirement of passing the asset through probate before title vests in the heir or devisee:

> Prior to the proviso, the statute says that, upon death, the title shall vest "immediately," "instantly." This is the substantive portion of the law, intended, manifestly, to change the rule announced in some of our earlier cases, such as *Balch v. Smith*, 4 Wash. 497, 30 P. 648. It deals with the title – the thing that is transmissible and inheritable. It vests immediately.

In re Schmidt's Estate, 134 Wash. 525, 527, 236 P. 274 (1925).

Probate thus only provides *proof* of that vesting: "That is, the probating of the will is not necessary for the passing of the title or providing a devisee, but as proof of that kind provided for by the statute as to who shall be deemed to be the person in whom title was vested immediately upon the death of the testator." *Id.* at 528. The proviso was only intended to provide proof of vesting, not to interfere with the fact of vesting. *Id.*

As explained in the Opening Brief at page 31, Colorado law provides the same thing. Respondents fail to address the Washington and Colorado case law and statutes set out in the Opening Brief. Likewise, the trial court failed to understand the import of the controlling law even though it was cited to repeatedly. *See* CP 270-71, 454-55, 482-83, 511-12, 567-69. As an issue of law, this Court's review is *de novo* to ensure application of the correct rule of law. *See Estrada v. McNulty,* 98 Wn. App. 717, 720-23, 988 P.2d 492 (1999) (the question of "what law controls the most recent" beneficiary designation for a public retirement pension plan would be addressed on appeal where the potentially applicable statutes were before the trial court and it was an issue of law). *Accord, Optimer Intern.* and *State v. Quismundo, supra* (the court's obligation is to follow the law even if it was not cited by the parties).

Given that the mineral rights interest passes immediately upon death, it is possible to trace title to the asset without dismissing legal principles entirely and relying on equity to reach a result. The trial court was presented with different options for how the asset could pass, all of them governed by legal principles. No matter which option the trial court determined was appropriate, none provided it with the capability to bypass the law and make its decision as a matter of equity. *See, e.g., Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006) (because an equitable remedy is an extraordinary form of relief, the "court will grant

equitable relief only when there is a showing that a party is entitled to a remedy ***and the remedy at law is inadequate***") (emphasis added).

First, if the trial court determined that the mineral rights interest passed into the Family Trust, the assets either passed to the Survivor's Trust by the terms of the Trust Agreement[9] or the assets were never distributed and remain in the Trust. As explained on pages 35 to 36 of the Opening Brief, if the asset passed to the Survivor's Trust, it then passed to Vera once the Survivor's Trust was terminated, and then passed to Linda and Larry upon her death according to her will.

If the asset did not pass to the Survivor's Trust, as the Estate claims, it remains in the Family Trust. Then, by the original terms of the trust, the asset would be split equally between the Survivor's Trust (which portion would pass to Linda and Larry through Vera's will) and the Decedent's Trust (which portion would be distributed according to the Trust Termination Agreement to Linda, Larry and the House Children). CP 301. If passing the remaining asset from the Family Trust through the Survivor's Trust and the Decedent's Trust is impracticable or impossible because each of those trusts has been terminated, the Trust Agreement provisions still govern by

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[9] The Trust Agreement provided that any assets not specifically allocated to the Decedent's Trust passed to the Survivor's Trust. CP 301. *See* Opening Brief, pp. 11-12; 32-36.

requiring distribution through a so-called Distribution Trust. CP 305. Those provisions state that upon the death of both trustors, all remaining trust assets will be gathered into a Distribution Trust and distributed pro rata to the beneficiaries. *Id.* The Trust Termination Agreement terminated the Decedent's Trust but did not operate to terminate any Distribution Trust. *See* CP 182 ("Pursuant to and in consideration of the terms of this Agreement, the Decedent's Trust shall be terminated."). At pages 18 and 19 of its Response, the Estate admits that this was a legal alternative for the trial court, noting that if any asset remained it would go to the Distribution Trust and, in that case, the asset would be split pro rata between Vera's children and the House children.

Finally, if the conditions of distribution provided by the original trust terms are not workable, then the transfer would be a failed gift. The trial court should then have reverted back to Homer Ray's will which provided that a failed gift should pass by intestate succession. CP 292. Under intestate succession, Colorado law in effect in 2004 provided that Vera would receive the first $100,000 and one-half the balance of the intestate estate, with the rest to the House Children. C.R.S. § 15-11-102(4) (1995). Because the asset vests at the time of death, intestate succession must be determined as of the date of death. Vera's interest passes to her children.

The Estate admits that intestate succession as a fallback under the will was a viable alternative for the trial court to make a legal

determination of distribution when it contends, without support, that Washington law controls intestate succession and argues that the House Children would be the beneficiaries. *See* Estate's Response, pp. 17 fn.9, 22 fn.13.[10] Even if the Estate is correct that Washington law controls an intestate analysis, Linda and Larry would take Vera's inheritance of "[a]ll of the decedent's share of the net community estate" and "[o]ne-half of the net separate estate" of Homer Ray under Washington's intestate statute. *See* RCW 11.04.015. The Estate's sole argument against this is that Linda and Larry cannot take anything under intestate succession because Vera is no longer alive for them to take under her interest. Accepting the Estate's argument would require ignoring long-settled law stating that the interest vests at the time of Homer Ray's death in 2004 – not at the time of probate – when Vera was the surviving spouse.

Ultimately, under any of these options – the terms of the House Family Trust, Homer Ray's will, or intestate succession – there was a proper ***legal*** basis for determining the distribution of the mineral rights interest. The trial court's resort to equity was improper and must be reversed.

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[10] The Estate's citation to RCW 11.96A.020 and RCW 11.96A.040(1)(a), which only state that the court has expansive jurisdiction in probate, is irrelevant to the choice of law that the trial court should apply. Even if Linda and Larry failed to properly cite to Colorado's intestate succession statute below, they did argue that intestate succession was the alternative legal device for distribution of the asset if it failed to pass through the Trust, and that they would take under intestate succession through Vera's interest as the surviving spouse at the time of Homer Ray's death in 2004. *See, e.g.*, CP 573.

D. The Release in the Trust Termination Agreement Does Not Preclude Appellants from Claiming or Receiving the Asset.

1. Judicial estoppel is not applicable.

The Estate argues that Linda and Larry should be judicially estopped from claiming an interest in the asset, but then it ***admits*** that Washington law requires that a party's prior inconsistent position actually benefit the party or have been accepted by the court for estoppel to apply.[11] *See* Estate's Response, pp. 8-9, fn.6 ("While ***the majority rule in Washington is that judicial estoppel applies only if a 'litigant's prior inconsistent position benefited the litigant or was accepted by the court***,' ... other courts [outside Washington] take a broader view of the doctrine and hesitate to adopt this requirement.") (emphasis added).

The Estate also concedes that Linda and Larry were not benefited by their prior position, as the prior tribunal explicitly refused to consider the impact of the Trust Termination Agreement. *See* Estate's Response, p. 8, fn.6 ("While the prior tribunal found in their favor on other grounds, Vera's Children now change positions to their benefit and are trying to avoid the effect of the Termination Agreement."); CP 217-19 ("The court does not reach the issue

[11] Washington cases continue to reiterate this holding. *See, e.g., Johnson v. Si–Cor Inc.*, 107 Wn. App. 902, 908-09, 28 P.3d 832 (2001); *DeVeny v. Hadaller*, 139 Wn. App. 605, 621-22, 161 P.3d 1059 (2007); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 230-31, 108 P.3d 147 (2005); *City of Spokane v. Marr*, 129 Wn. App. 890, 893, 120 P.3d 652 (2005); *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 103-04, 220 P.3d 229 (2009) (citing, e.g., *New Hampshire v. Maine*, 532 U.S. 742, 755, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)).

whether Homer House's Children ... have released by contract any claim to the account with Morgan Stanley held in the name of the Survivor's Trust (the 'MS Funds') or any other Trust property").[12] Judicial estoppel does not apply here.

2. The release does not preclude a party from demonstrating that it is the rightful owner to an asset the title for which vested immediately upon death of the decedent, long before the release or the Trust Termination Agreement were executed.

The trial court held that the Trust Termination Agreement operated as a waiver by Linda, Larry and Vera of any claim to assets in the House estate or under the trust, and that "there are good arguments that [the Agreement] would bar any claim" of Vera, Linda, Larry and the House Children to the mineral rights interest. CP 626 [COL 11]. Respondents rely heavily on the release as precluding Linda and Larry from asserting an interest in the asset. Estate's Response, pp. 8-12; House Children Response, pp. 9-10.

Linda and Larry agree that both sides released the right to claim against each other for any trust asset that was not owned at the time the Trust Termination Agreement was executed. However,

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[12] In that litigation, the House Children claimed an interest in the MS Funds because the account with Morgan Stanley was in the name of the Survivor's Trust. However, the evidence showed that Vera, as trustee, had distributed the MS Funds to herself and terminated the Survivor's Trust in accordance with the trust provisions. Weeks later, on her own behalf, not as trustee, she opened a new account in the name of the Survivor's Trust and deposited the funds. Though the account was named for the Survivor's Trust, it no longer existed and Vera was entitled to those funds personally. After her death, the funds passed to her children. Thus, the release did not play a role in the determination of the court.

they did not release the right to property in which they already held a vested ownership interest. As has been stated, real property interests vest in the heir or devisee at the instant of death of the decedent. Opening Brief, p. 31 and cases cited therein; RCW 11.04.250; *In re Wiltermood's Estate*, 78 Wn.2d 238, 240-41, 472 P.2d 536 (1970) (RCW 11.04.250 vests heirs with legal interests upon the death of decedent); *In re Patrick's Estate*, 195 Wash. 105, 108, 79 P.2d 969 (1938) (interpreting analogous provision under prior statute, Rem. Rev. Stat. § 1368).

Once again, the issue comes back to Respondents' refusal to accept long-settled law that the real property interest vested at Homer Ray's death. *See* Estate's Response, p. 23 ("There is no clear legal answer to when an interest in this previously unknown royalty interest vested."). The Estate's argument that "there is no controlling law on how to ***trace back*** an unknown asset particularly in light of the intervening 2005 Trust Termination Agreement" highlights Respondents' and the trial court's analytical error. *Id.* (emphasis added). The law is that disposition of the real property interest should be traced from the moment of Homer Ray's death ***looking forward***, rather than tracing back from the probate proceedings. Because the date of vesting was the date of Homer Ray's death in 2004 as a matter of law under *both* Colorado *and* Washington law, the determination of ownership (regardless of which parties are found to be the rightful owner) relates back to that

date, before the release was executed. Therefore, the later release has no impact.

3. Even if the release applies, Linda and Larry hold an interest in the asset.

Both sides have accepted that, if the release applies, it applies to the House Children as well as Linda and Larry. *See* Estate's Response, p. 7. The parties have also agreed that the release does not function as a disclaimer that prevents intestate takers from inheriting their share. *See* I RP 138:22-25; I RP 171:20-23; I RP 193:9-15.

If the release applied, the Estate would be left with an asset that no party could lay claim to.[13] In such a scenario, 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. Intestate succession requires that the asset be split between the House Children and Linda and Larry. The Estate argues otherwise by asserting that a party's right and interest in property passing by bequest passes only when probate is accomplished. In its view, the property cannot "pass" until probate was opened to determine ownership, and because this occurred after Vera's death, she could not have an interest in it. Estate's Response, pp. 21-22 fn.13.

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[13] Arguably, the asset would then escheat to the State of Colorado, an outcome that presumably none of the parties would favor.

This view is mistaken, as explained *supra*, because the interest in ***real*** property interests passes at the moment the decedent dies by vesting at that time. At the time of Homer Ray's death, Vera was still alive. If intestate succession is the appropriate vehicle for transferring the asset, Vera was a surviving spouse entitled to the first $100,000 of the asset under C.R.S. § 15-11-102(4), or one-half of the asset under RCW 11.04.015(1)(b) (the surviving spouse receives "[o]ne-half of the net separate estate if the intestate is survived by issue"). The trial court erred by accepting Respondents' argument that the release applied, and further by deciding on its own distribution plan rather than following the applicable law.

E. Respondents Misconstrue the Concepts of "Fairness" and "Equity" as They Apply in this Case.

As they did below, Respondents attempt to convince this court to accept their misconceived notions of equity and fairness. They focus on arguing that Linda and Larry received the majority of Homer Ray and Vera's assets because, in their mistaken view, equity and fairness are only achieved if each of the six children receives the same amount from the total overall estate. *See, e.g.,* House Children's Response, pp. 6-7 ("As a result of Vera's actions after Homer died, instead of an equal 16.5% interest distributed to all six children, Vera's children … received about 30% each, and the House Siblings each received about 10%."). Their view, along with the trial court's decision, ignores two important points: 1) equity and

fairness do not necessitate an equal distribution to each beneficiary, particularly where the terms of the trust provide otherwise; and 2) the trustors' intent controls and there is ***no evidence*** that Homer Ray and Vera intended each of the six children to receive equal distributions.

Had Homer Ray and Vera intended the result Respondents argue for, they could have specified it in their comprehensive set of estate planning documents. The fact there is ***no*** such intent expressed is a glaring omission that can only mean they did ***not*** intend for all six of Vera's and Homer Ray's collective children to receive equal shares of the ultimate distribution. The trial court's decision to invoke equity in order to more nearly achieve that goal is therefore not supported by ***any*** evidence that such a distribution scheme is consistent with Homer Ray's testamentary intent. If anything, it is ***contrary*** to Homer Ray's expressed intent and the trial court's ruling should be reversed for that reason alone.

The trial court misunderstood what was "fair" because it mistakenly believed Linda and Larry were not entitled to the assets they received. In the Estate's Response, it conveniently glosses over Linda and Larry's point that the terms of the Trust Agreement permitted Vera to put half the trust property in the Survivor's Trust, terminate that trust, distribute all those assets to herself and then pass all those assets to her children. This cannot be inequitable if it is what the trustors' intended, as both Vera and Homer Ray must have

intended by agreeing to such language in the Trust Agreement. The Estate recognized (and gave voice to the House Children's frustration) that the Trust provisions explicitly allowed for an unequal distribution:

> The Survivor's Trust was to receive the remaining 50% of the Trust assets when Homer R. House died. Those assets were to be available to support the survivor during her lifetime, and could be distributed outside of trust during her lifetime or under her Will. ***Absent those provisions, the balance of the Survivor's Trust would have been distributed in equal shares to the six children.***

Estate's Response, p. 37 fn. 17 (emphasis added). Nothing in Homer Ray's will or the Trust Agreement indicates an intent that the total assets were to be split equally among the collective six children, or that Vera abused her powers as trustee. Though Vera's proper exercise of the Trust terms leading to an unequal distribution may have bothered the House Children (and apparently the trial court), it was not unfair or inequitable based on what the trustors, Homer Ray and Vera, intended. This is hardly the first case where a child is unhappy with how the parent provided for distributing the parent's estate, but that child's unhappiness is no basis for equity to override the parent's distribution plan.

Respondents also make much of the fact that Vera and Appellants all received something through the Trust Termination Agreement. *See* Estate's Response, p. 3 (noting that Vera received $100,000 by agreement, even though she was not entitled to

anything from the Decedent's Trust by the terms of the trust); House Children Response, p. 5 (same). The fact that *the House Children agreed* to pay Vera $100,000 out of the Decedent's Trust as consideration to get their share of the remaining funds in that trust immediately instead of waiting until Vera's death is strong evidence that the payment was not contrary to fairness; if it was, presumably the House Children would not have agreed to it.

Even if the trial court was correct that the prior unequal distributions of trust assets were not "fair," and the court appropriately invoked equitable principles to determine the mineral rights interest distribution (which Linda and Larry contend was *not* appropriate), it erred by failing to look at the entire picture to determine the trustors' intent and what the equities actually were. The court focused on the fact that Linda and Larry received more than the House Children but refused to consider evidence that Homer Ray and Vera's relationship with the House Children deteriorated over their final years, which explained *why* the distributions were unequal. It therefore artificially limited its determination of what was "equitable" or "fair" to a mathematical calculation and nothing more.

It was an abuse of discretion for the court to decide on the distribution as between the House Children and Vera's children based on the equities, but then exclude or refuse to consider and take into account the equitable circumstances presented by one side.

"[W]hen equity jurisdiction attaches, it extends to the entire controversy and whatever relief the facts warrant will be granted." *Eichorn v. Lunn*, 63 Wn. App. 73, 80, 816 P.2d 1226 (1991). In cases where equity is invoked, courts engage in a careful balancing of ***all*** the facts and circumstances. *See, e.g.*, *Cowley & Strickland v. Foster*, 143 Wash. 302, 306-07, 255 P. 129 (1927) (specific performance, governed by the principles of equity, "is controlled by a just and fair consideration of all the facts and circumstances of each particular case"); *In re Marriage of Marshall*, 86 Wn. App. 878, 881, 940 P.2d 283 (1997) (to do "equity" in imposing equitable lien in dissolution proceeding, court "must take into account all relevant circumstances"); *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989) (in marriage dissolution, distribution need not be equal to be fair; "[t]he key to an equitable distribution of property is not mathematical preciseness, but fairness" which is determined "by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules"). Appellate courts have deferred to the trial court's judgment "in tailoring a decree which ***balances both parties' interests*** and reaches an equitable solution." *Eichorn*, 63 Wn. App. at 80 (emphasis added). The trial court's blatant refusal to consider all the relevant facts and to balance both parties' interests in the exercise of its equitable jurisdiction was an abuse of discretion warranting reversal.

F. The Personal Representative Breached Her Fiduciary Duties As Personal Representative By Acting Solely in the House Children's Favor – and Thus in Her Own Personal Interest – Making Her, or All the House Children, Responsible for the Estate's Attorney Fees.

The Opening Brief at pages 46 to 49 set out the settled obligation of the Personal Representative ("PR") to act fairly and impartially in administering an estate because the PR stands in a fiduciary relationship to the heirs and potential beneficiaries, citing among other decisions, *In re Estate of Larson,* 103 Wn.2d 517, 521, 694 P.2d 1051 (1985).[14] The Respondents have no genuine rebuttal that speaks to the circumstances of this case.

As argued in the Opening Brief and discussed *infra,* the PR's actions here to actively pursue the interests of herself and her siblings over the interests of Linda and Larry when also 1) claiming there was "no bright line" rule for how the mineral rights should be distributed and 2) taking a legal position contrary to the settled law of the immediate vesting of property interests, could only constitute a breach the PR's fiduciary duty to act impartially. This is particularly true when combined with the PR's extremely expensive conduct of the litigation by the Estate. *See* fn. 17 and 18, *infra.*

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[14] These principles have not changed. *See e.g.,* Wa. State Bar Ass'n, WASHINGTON PROBATE DESKBOOK, (2005), Chapter 10, "Fiduciary Duties", especially §10.2(1) as to the personal representative and §10.4 as to "Core Fiduciary Duties," which include the duties of loyalty, good faith, and impartiality. Thus, 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).

Those actions did not serve the Estate in determining the correct distribution of the mineral rights. The Estate could have, and should have, taken an inexpensive back seat while letting the House Children assert their claim to the mineral rights against Linda and Larry, preserving Estate assets while letting the genuine disputants each pay for themselves. Instead, at the direction of the PR, the Estate aggressively pursued the matter on behalf of the PR and the other House Children and, thus, claimed at the June 2012 mediation only six months after the case had been started that the Estate had incurred fees of about $70,000, already beyond the then-current size of the Estate. *See* CP 732, ¶18, quoted *infra.* This conduct is not proper under any Washington authority.

The Estate's Response relies phrases taken in isolation from *In re Estate of Kvande v. Olsen*, 74 Wn. App. 65, 871 P.2d 669, *rev. den.,* 124 Wn.2d 1021 (1994), to support its argument that the PR was allowed to take sides and use the Estate to promote her personal interests and those of her siblings in this long-running intra-family dispute. But on careful reading, *Kvande* is distinguished. In affirming the intestate succession determined by the trial court, Division I dismissed the appellant's argument the personal representative could not take sides in that controversy because, in that unusual case, the personal representative stood to benefit "in equal proportion" to the appellant, in contrast to this case in which the PR seeks to benefit to the ***exclusion*** of Linda and Larry.

Further, the authorities relied on in *Kvande* support Linda and Larry's position that the PR acted improperly. Of particular note is *In re Estate of Howerton,* 65 Wn.2d 868, 400 P.2d 85 (1965), which also involved a contest between the deceased's children from a prior marriage and the last wife of their deceased father. In *Howerton,* the PR was one of the decedent's three children from the prior marriage who were contesting the shares they would get, as opposed to their father's second wife, and appealed the trial court's interpretation of the will. The Supreme Court held that the PR was "not a proper party to this appeal" and that she and her siblings should bear all the costs of the appeal. *Id.* at 870.[15] The same should apply to the PR and House Children here.

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[15] Not surprisingly, the Estate's Response fails to cite *In re Estate of Morris,* 89 Wn. App. 431, 949 P.2d 401 (1998), a decision which affirmed the denial of a requested fee award to a personal representative because the personal representative's defense of the heirs' lawsuit did not result in substantial benefit to the estate. And although the Estate's Response at page 40 cites the Division III decision in *In re the Estate of Black*, 116 Wn. App. 476, 66 P.3d 670 (2003), *aff'd on other grounds,* 153 Wn.2d 152, 102 P.3d 796 (2004), for the generic point that fee awards are to be made as justice requires, it fails to discuss the result of the appeal. That was to ***vacate*** the award of fees to one party and denial to the other since the dispute resolved rights to the estate assets, and resolution benefited the estate, so that fees should have been awarded either to ***both*** parties or to ***neither***:

> The estate benefits when all competing interests of all potential beneficiaries are resolved, regardless of the outcome. [Citation omitted.]
>
> The court should have either awarded both Mr. Burns and Ms. Black their fees from the estate, or awarded neither their fees.
>
> . . . .
>
> . . . The orders awarding Mr. Burns's fees and denying Mr. Black's fees are reversed.

Estate of Black, 116 Wn. App. at 491-92.

G. Respondents' Attorney Fees Arguments Do Not Save the Awards From Being Reversed for Abuse of Discretion.

Linda and Larry do not dispute that the trial court has authority under RCW 11.96A.150 to award fees "as the court determines to be equitable." However, that does not give the trial judge free rein to do whatever "justice" he or she wants. *Coggle v. Snow,* 56 Wn. App. 499, 505-07, 784 P.2d 554 (1990). *See* Opening Brief, pp. 25-26 & fn. 10. Case law shows that the trial court's determination of an "equitable" amount here was an abuse of discretion. While the "prevailing party" may be *a* consideration, as the Opening Brief pointed out at page 45, the statute is not a "prevailing party" statute and it is error to treat it so, absent bad faith. In this case, the trial court failed to consider all the relevant information in reaching its decision as to what was equitable and entered an order clearly intended to punish Linda and Larry for the litigation, even though the Estate and the House Children all contended there was no obvious answer to how the real property interest should be distributed, thus acknowledging that the litigation was necessary. Under these circumstances, it is inherently ***inequitable*** to make Linda and Larry bear virtually the entire cost of all the parties.

The court also failed to take into consideration that the case presented novel or unique legal issues, at least as presented by Respondents. *See, e.g., In re Estate of Stover*, ___ Wn. App. ___, 315 P.3d 579, 585 (2013); *In re Guardianship of Lamb*, 173 Wn.2d

173, 198, 265 P.3d 876 (2011) (court may "consider any relevant factor, including whether a case presents novel or unique issues"); *In re Estate of D'Agosto*, 134 Wn. App. 390, 402, 139 P.3d 1125 (2006) (fees unwarranted because case involved "novel issues of statutory construction"); *Bale v. Allison*, 173 Wn. App. 435, 461, 294 P.3d 789 (2013) (fees unwarranted because case involved "unique issue").

Respondents argue that an award of fees to the Estate is appropriate to prevent depletion of the Estate's assets where the litigation does not benefit the Estate. *See* Estate's Response, p. 43; House Children's Response, p. 16-17. But, as Linda and Larry noted at page 48 of their Opening Brief, the Estate benefitted from the litigation in determining distribution of the asset. *See In re Estate of Black*, 153 Wn.2d 152, 174, 102 P.3d 796 (2004). Linda and Larry pointed out that the Estate had admitted as much in its Response to the Motion for Reconsideration below. *See* Opening Brief, p. 48; CP 887. Given that all parties admitted that the litigation was both necessary and benefitted the Estate, and that this was pointed out to the trial court, the court below abused its discretion in failing to consider this point.[16]

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[16] Further, the litigation has not necessarily depleted the entire value of the Estate, which is undetermined. The Estate consists of a real property mineral rights interest which provides an income stream of unknown duration and value. While about $65,000 had been paid out as of the time of trial, the Estate is not limited to that historic amount. Appellants are not aware of any certain value being placed on the asset.

The House Children also argue that the Court should affirm the trial court's award of payment by Linda and Larry of 100% of the Estate's attorney fees because otherwise, "no portion of any attorneys' fees allocated to the Estate would be borne by the Appellants." House Children Response, p. 17. While the House Children – especially Ms. Cornell who was also the PR – should have considered this point when deciding to have the Estate take a very expensive lead in the litigation against Linda and Larry, it is not a valid reason for allocating 100% of the fees to them.

Respondents argue that the fee awards to both the Estate and the House Children were proper because Linda and Larry were allegedly overly litigious. *See* House Children Response, p. 14; Estate's Response, p.41. According to Respondents' arguments, simply engaging in litigation to protect one's interests equates with being overly litigious. A party is allowed to engage in the normal practices of litigation. Awarding all of the fees incurred in the suit against the losing party, absent bad faith, will have the unwanted effect of chilling legitimate claims. *See In re Estate of Kessler*, 95 Wn. App. 358, 370, 977 P.2d 591 (1999).

More to the point, the Estate's Response tries to reverse the approaches of the parties by projecting the strategy of the PR and the House Children on Linda and Larry. While it complains at page 40 that "mediation was unsuccessful" as though it was because Linda and Larry did not negotiate, in fact it was the PR and the House

Children who refused to ever make any offer to settle other than by "offering" complete victory for themselves. It was the PR who took sides in the litigation and made only a single attempt at "settlement" during mediation, in which she demanded that Linda and Larry pay 100% of her fees, which had already exceeded the approximately $65,000 estate, without ever a proposal under which Linda and Larry would receive any of the benefits. *See* CP 731-33 (Linda's declaration describing the course of the litigation and the lack of a genuine settlement offer from the Estate);[17] CP 777-79, 782-811 (Linda and Larry's trial counsel's description of the lack of settlement discussions and contemporaneous documents). The Estate, directed by the PR, kept demanding that Linda and Larry bid against themselves and relinquish their claim, even though the Estate asserted in its Petition for distribution on September 12, 2012, that "***[t]here is no bright line legal answer to direct the distribution of these mineral rights . . .*** " CP 43. This meant that litigation was required to resolve the matter since both the Estate and the House

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[17] For example, *see* CP 732, ¶18:

> 18. Larry and I attended mediation in this action with Homer's children on June 11, 2012. Homer's children were represented by Deborah Phillips, who also represented the personal representative and [the] estate. At mediation, the personal representative and her siblings (Homer's children) demanded that Larry and I pay all of the estate's attorney's fees, which amounted to approximately $70,000 at that time.

The record reflects that the House Children did not retain separate counsel who appeared in the matter on their behalf until August 29, 2012, nearly three months after the June mediation and over $70,000 had allegedly been incurred by the Estate, when Ms. Bertram appeared on their behalf. CP 1047.

Children while represented by the Estate's counsel in June at the failed mediation, had taken the hard position that they would insist the House Children got all the asset, even though the Estate later declared in court "there is no bright line answer to direct distribution" of the asset.

Finally, the trial court should have taken into consideration that the PR did not act impartially in carrying out that role. The PR's litigation strategy against Linda and Larry created unnecessary, duplicative briefing when the House Children finally got independent counsel, thereby dramatically increasing the cost of the litigation which had by the June mediation apparently already consumed the then-current value of the asset.[18] Had the PR acted impartially, mediation may have been successful, and at least the litigation costs would have been drastically reduced. Linda and

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[18] Indeed, the conduct of the PR in choosing the most expensive counsel possible for the Estate, then pursuing a scorched-earth litigation strategy with her "give up and pay our fees" as the only "settlement" offer based on arguments founded on ignoring the fundamental and universal probate principle of the immediate vesting in the beneficiary of real property interests on death of the owner, illustrates a strategy of: if the PR and her siblings cannot get the asset, then all possible value will be burned up in the litigation so the rightful claimant cannot get it. This is not unlike the conclusion to the *Jarndyce* case that is the centerpiece of Dickens' BLEAK HOUSE (1853). *See* quote from the final chapter at http://en.wikipedia.org/wiki/Jarndyce_v_Jarndyce:

> "Mr. Kenge," said Allan, appearing enlightened all in a moment. "Excuse me, our time presses. Do I understand that the whole estate is found to have been absorbed in costs?"
> "Hem! I believe so," returned Mr. Kenge. "Mr. Vholes, what do *you* say?"
> "I believe so," said Mr. Vholes.
> "And that thus the suit lapses and melts away?"
> "Probably," returned Mr. Kenge. "Mr. Vholes?"
> "Probably," said Mr. Vholes.

Larry should not be punished for the PR's breach of her fiduciary duty to act impartially and conserve the Estate's assets by her scorched-earth strategy by being required to pay the exorbitant fees awarded to the Estate. Nor should the PR be rewarded for breaching her fiduciary duty by failing to act impartially. Rather, the PR, or the PR and her siblings, should bear the costs of the litigation to the Estate given that the PR chose the counsel and directed litigation strategy. *Estate of Howerton, supra,* 65 Wn. 2d at 870.

III. CONCLUSION.

For the reasons set out *supra* and in the Opening Brief, Appellants Linda McMurtray and Larry Pizzalato respectfully request the Court reverse and vacate the trial court's orders, both the fee awards and the merits decision that they have no interest in the Colorado mineral rights Homer Ray House received from his father in 1974, and which they contend were passed by operation of law on his death in 2004 to his wife Vera by his estate planning documents.

If the Court agrees that the undisputed facts and applicable law mean the mineral rights interest has wholly succeeded to Linda and Larry, they request that this Court make that determination as a matter of law, as in *Estrada v. McNulty*; or to direct the trial court to enter an order to that effect on remand. Alternatively, if this Court determines the mineral rights interest only partly succeeded to Linda and Larry by intestate succession or other mechanism, they similarly request the Court make that determination as a matter of law, or to

remand for a re-determination of rights to the property pursuant to the law as set out by this Court.

Both awards of fees and costs should be vacated and the trial court instructed to enter an order that only Linda and Larry's own fees for prosecuting the assertion of their claims be borne by Linda and Larry, and that the House Children, and/or the personal representative, bear their own and the Estate's fees incurred in pressing the House Children's position. Linda and Larry also request the Court direct that they be responsible for, at most, only their own fees on appeal and any remand.

DATED this 10th day of March, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By _____
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WASHINGTON STATE COURT OF APPEALS, DIVISION I

Estate of: HOMER R. HOUSE (Deceased), Respondent. LINDA MCMURTRAY, et al., Appellants, v. JANET CORNELL, et al. Respondents.	No. 702483-I CERTIFICATE OF SERVICE

I declare under penalty of perjury that I caused true and correct copies of the *Consolidated Reply Brief* and this *Certificate of Service* to be filed, and served upon counsel of record today as follows:

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DATED this 10th day of March, 2014.

Catherine A. Norgaard