70248-3

No. 70248-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Estate of HOMER R. HOUSE (Deceased)

LINDA McMURTRAY AND LARRY PIZZALATO,
Appellants,

v.

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

and

JANET CORNELL, as PERSONAL REPRESENTATIVE OF THE ESTATE OF HOMER R. HOUSE
Respondents.

BRIEF OF RESPONDENT JANET CORNELL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HOMER R. HOUSE

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I. INTRODUCTION AND SUMMARY

In 1924 Homer V. House sold, for one dollar, his interest in Colorado property while reserving rights to oil and gas royalties from the property. He died in 1974, poor enough in his later years that his son, Homer R. House, helped to support his parents until his own children were born. To his family's knowledge Homer V. House owned nothing of value when he died. Supp. CP ___, ___.[1]

In 2004 Homer R. House passed away, thirty years after his father. He had no knowledge of his father's retained royalty rights in Colorado. CP 607; II RP 155:12-156:1. It was not until 2011 that any of the parties to this appeal learned of these royalty rights, more than seven years after Homer R. House had passed away and more than five years after they all had waived any interest in Homer R. House's Estate and in any trusts he had created with his second wife, Vera House. CP 73-75.

The trusts in which they waived any interest had been created twenty years earlier, in 1991, when Homer R. House and his second wife, Vera House, established the House Family Trust. At that time, both Homer R. House and Vera House had executed identical wills. Supp.

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[1] Supplemental clerk's papers were designated on December 31, 2013. The title of the document has been included for the court's convenience pending numbering of the additional clerk's papers. Supp. CP ___, ___ (*March 20, 2013 Declaration of Janet House Cornell at ¶ 1; March 20, 2013 Declaration of Judy Thees at ¶ 3*).

CP ___, ___.[2] Following her husband's death in February 2004, Vera House neither filed his will or opened probate for his estate. Not until December 2012 was a will offered for probate and Homer R. House's daughter, Janet ("Jeanie") Cornell, appointed to serve as Personal Representative of her father's estate.

After Homer R. House's death Vera House proceeded to distribute the known assets held in the House Family Trust to two trusts that came into existence upon Homer R. House's death, a Survivor's Trust and a Decedent's Trust. She first funded the Survivor's Trust, and then rapidly emptied and terminated that trust. In November 2004, she executed quit claim deeds for two houses in Bellevue, first, as Trustee of the Family Trust to herself as Trustee of the Survivor's Trust, followed immediately by quit claim deeds transferring the properties from herself, as Trustee of the Survivor's Trust to each of her children, Linda McMurtray and Larry Pizzalato. CP 133-151. On February 28, 2005, Vera House executed a new will, revoking her 1991 Will that poured her assets back into the House Family Trust and instead leaving everything to McMurtray and Pizzalato. CP 162-169. That same day, she terminated the Survivor's Trust. CP 170; CP 606-608.

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[2] Supp. CP ___, ___ (*Dec. 30, 2011 Declaration of Larry Pizzalato Re Authenticity and Validity of Lost Will, ¶ 4(b); Dec. 30, 2011 Declaration of Linda McMurtray Re Authenticity and Validity of Lost Will, ¶ 4(c)*).

In addition to those houses, valued at $795,000, Vera House distributed to herself, as part of the distributions to the Survivor's Trust, approximately $550,000, 29.73% of House Family Trust brokerage accounts with Merrill Lynch and Morgan Stanley.[3] At that time, Vera House's counsel suggested also terminating the Decedent's Trust, with $100,000 going to Vera House who was, by the terms of the Decedent's Trust, not entitled to anything from that trust. Her two children and the four House children, Jeanie Cornell, Robert House, Susan Terhaar and Judith Thees (the "House Children") would then share equally in the remaining brokerage account assets, worth approximately $1,307,000. Supp. CP ___.[4]

In October 2005, Vera House, individually and as trustee, and all the parties to this appeal terminated the Decedent's Trust. As part of that termination, all parties agreed to release "all claims, demands, actions or causes of actions, known or unknown" in the Family Trust and the Estate of Homer R. House. CP 182-189; CP 608 (Findings of Fact "FOF" 1, 37, 39).

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[3] The brokerage account assets distributed to the Survivor's Trust were the subject of litigation in 2007. On March 10, 2005, weeks after she had terminated the Survivor's Trust, Vera House opened a new Morgan Stanley account titled in the name of the Survivor's Trust. Morgan Stanley interpleaded the assets following Vera House's death; those assets were awarded to McMurtray and Pizzalato. CP 196-203; CP 218-220.

[4] Supp. CP ___ (*Trial Exhibit 87, March 29, 2005 letter from Tousley Brain Stephens to parties*).

Six years later, with the 2011 discovery of the royalty interest, a probate was opened in Colorado for the estate of Homer V. House as the first step in the distribution of the that intererst. CP 605 (FOF 11, 13.) The only asset in that intestate estate is Homer V. House's 5% non-participating perpetual royalty interest traced back to what he retained in the 1924 real estate transaction, where for "One Dollar and other valuable consideration," he sold real property in Weld County, Colorado, but reserved

> . . . one sixteenth part of all oil or gas, or both, produced and saved from said premises, except such amount as shall be necessary for use for drilling operations on said land.

CP 69. These royalty rights[5] were unknown to Homer R. House twenty years earlier in 1974 when his father died, unknown in 1991 when Homer R. House executed his last will, unknown in 1991 when he and Vera House executed the House Family Trust, unknown in 2004 when Homer R. House died, unknown in 2005 when his federal estate tax return was filed, unknown in 2004 and 2005 when Vera House distributed assets from the Family Trust to the Survivor's Trust and then terminated that trust, and unknown in 2005 when Vera House and the parties to this appeal executed the Trust Termination Agreement and terminated the Decedent's Trust.

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[5] *See Keller Cattle Co. v. Allison*, 55 P.3d 257 (Colo. App. 2002) (discussion of nonparticipating royalty interests).

CP 605-607, (FOF 3, 11, 21, 26 , 27, 29-32); CP 52-55; CP 96-123; CP 131; CP 133-151; CP 182-189.

Similarly, the royalty rights were unknown to Vera House when she executed her last will in 2005, unknown at the time of her death in June 2007, never identified as an asset in her estate by Linda McMurtray and Larry Pizzalato, who served as personal representatives of their mother's estate, never identified in any inventory of her assets or in the probate of her will and never distributed as part of the probate of her estate which was closed in September 2008. CP 606-607 (FOF 15-19, 30, 31, 34.)

Given this history, the trial court appropriately exercised its equitable authority under RCW 11.96A to determine the distribution of these royalty rights, based on extensive findings of fact and conclusions of law. Of the forty-two findings of fact, only five are contested on appeal, and only one of those five was objected to by Linda McMurtray and Larry Pizzalato before the trial court. Those findings provide a sound foundation for the court's legal determination that it should exercise its equitable power to distribute this previously unknown asset amongst Homer R. House's four children. The trial court's decision and its ruling should be affirmed. The trial court also appropriately awarded fees to the

Estate, to be paid by Linda McMurtray and Larry Pizzalato, and that decision should be affirmed on appeal.

II. RESTATEMENT OF ISSUES ON APPEAL

A. Did the trial court correctly determine as a matter of law that McMurtray and Pizzalato had waived any interest in the disputed asset?

B. Did the trial court correctly determine as a matter of law that the royalty rights, an asset unknown to Vera House, as trustee of the Family Trust, was not distributed following Homer R. House's death to either the Survivor's Trust or the Decedent's Trust?

C. Did the trial court appropriately exercise its equitable authority to determine the distribution of an asset unknown to decedent during his lifetime and unknown to the trustee during the duration of the House Family Trust?

D. Should the trial court's equitable disposition of a reservation of an interest in "all oil or gas, or both, produced and saved from said premises, except such amount as shall be necessary for . . . drilling operations on said land" be affirmed?

E. Should the trial court's allocation of fees for this litigation to the Estate against McMurtray and Pizzalato be affirmed as an appropriate equitable allocation by the trial court after hearing pre-trial

motions, conducting trial, and considering all the facts and circumstances presented?

III. ARGUMENT

A. In 2005, McMurtray and Pizzalato Waived All Claims, Known and Unknown, in the House Family Trust and in the Homer R. House Estate.

The Colorado asset at issue falls squarely within the contemplated "unknown" claims all parties waived by entering into the 2005 Trust Termination Agreement. The trial court correctly held that in signing that 2005 Trust Termination Agreement, Vera House, McMurtray, Pizzalato and the House Children each waived any claim to assets in any trust created under the 1991 Trust Agreement as well as to any asset in the Estate of Homer R. House. CP 611-612 (Conclusions of Law ("COL") 11, 15, 17). Paragraph 6 of the 2005 Trust Termination Agreement explicitly provides that each party shall

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

CP 184.

McMurtray and Pizzalato concede the Survivor's Trust was terminated before the 2005 Trust Termination Agreement was signed. They concede the Decedent's Trust was then terminated by that 2005 agreement. They concede the royalty rights were unknown until 2011. Yet notably in their opening brief, McMurtray and Pizzalato gloss over the existence of the 2005 Trust Termination Agreement and its application to the unknown royalty rights. McMurtray and Pizzalato's attempt to dance around the Termination Agreement is contrary to the law and was properly rejected by the trial court.

Indeed, in prior litigation, they argued for the enforcement of the 2005 Trust Termination Agreement against the House Children when there was a dispute over the disposition of a brokerage account. It would be inequitable to now permit them to take a contrary position for their benefit.[6] CP 210-211; CP 215-216. *In re Phillips' Estate,* 46 Wn.2d 1,

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[6] In the 2007 case involving the same parties and a dispute over the distribution of the brokerage account created by Vera House in the name of the Survivor's Trust after she had terminated that trust, Vera's Children described the Termination Agreement as all-encompassing to preclude the House Children from laying claim to the account. *See* CP 208-211; 215-216. They used the Termination Agreement as a sword to argue an alternative ground for ruling that they, not the House Children, were entitled to the disputed brokerage account. 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.

Judicial estoppel should bar Vera's Children's contrary position here. The primary purposes behind the doctrine of judicial estoppel are: "preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289, 294-95 (2012). Washington courts are guided by three factors in assessing whether to apply the doctrine: "(1) whether the party's later position is clearly inconsistent with its earlier

13, 278 P.2d 627 (1955) (settlement that was to resolve "all differences arising out of the administration of the said estates" held to be a global release of claims, absent fraud in the inducement of the agreement).

The general rule applying to the 2005 Trust Termination Agreement is that a broad release covers all matters "as may fairly be said to be within the contemplation of the parties when it was given, subject to provisos stated in the release, and no others." *Bakamus v. Albert*, 1 Wn.2d 241, 249, 95 P.2d 767, 770 (1939). But if "under the circumstances of the particular case . . . a demand falls fairly within the terms of the release it is discharged thereby, whether or not it was contemplated by the parties, and whether or not they were aware of its existence." *Id.* at 249-50 (citation

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position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or the second court was misled, and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party." *Id.* (quotation marks omitted).

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," *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 908-09, 28 P.3d 832, 835 (2001), other courts take a broader view of the doctrine and hesitate to adopt this requirement. Instead, these courts find that the purpose of the doctrine is to prevent a litigant from "playing fast and loose" with the courts. *See* Wright & Miller, 18B Fed. Prac. & Proc. Juris. § 4477 (2d ed.). A better approach then is to adopt the Third Circuit's reasoning, which permits the use of judicial estoppel against a party even when there is not a direct benefit from asserting the inconsistent position in prior litigation. *See Ryan Operations G.P.v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 359–61 (3d Cir. 1996) ("Whether the party sought to be estopped benefitted from its earlier position or was motivated to seek such a benefit may be relevant insofar as it evidences an intent to play fast and loose with the courts. It is not, however, an independent requirement for application of the doctrine of judicial estoppel."); *see also In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) ("Because the doctrine is intended to protect the judicial system, *rather than the litigants,* detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary."). Further, judicial estoppel should apply "even when the facts are clear and only legal positions have changed, so long as the underlying facts are constant." *See* Wright & Miller, 18B Fed. Prac. & Proc. Juris. § 4477 (2d ed.).

omitted). For example, a separation agreement releasing each party and his or her heirs "from all causes of action, claims, rights or demands whatsoever, at law or in equity, which either of the parties ever had or now has against the other, known or unknown . . ." that constitutes a mutual waiver of any right "to assert a statutory share or distributive share in the estate of the other" was held to be a valid waiver of rights to a pension fund that still designated the party as a beneficiary. *In re Estate of Gardner*, 103 Wn. App. 557, 563, 13 P.3d 655, 656 (2000) (resolving the issue of property distribution under ERISA, but holding that the ex-wife waived her rights to the decedent's pension proceeds by signing the release incorporated in the dissolution decree).

Releases covering "known or unknown" causes of action, claims, rights or demands, are construed broadly to cover all future related claims, including those of which the party bears the risk of uncertainty or mistake. For example, in settling personal injury matters, signing a release of all claims "known and unknown, suspected and unsuspected" constitutes a "final and complete settlement" and binds the injured from pursuing damages where he knew at the time that he was not fully recovered. *Hoggatt v. Jorgensen*, 43 Wn. App. 782, 786-87, 719 P.2d 602, 604-05 (1986) (citation omitted); *see also Planich v. Progressive Am. Ins. Co.*, 134 Wn. App. 543, 142 P.3d 173 (2006) (release "from any and all claims,

causes of actions, demands, rights, damages, [and] costs" . . . could not be clearer . . .); *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 189, 840 P.2d 851, 857 (1992) (holding that a release of "any and all claims . . . of any kind or nature whatsoever . . . known or unknown . . . clearly constitute a release of all claims," and also noting that the settling party signed the release without reserving any claims); *accord Bennett v. Shinoda Floral, Inc.*, 108 Wn.2d 386, 395-96, 739 P.2d 648, 653 (1987) (holding that release of "known and unknown" claims bars subsequent suit claiming damages on prior known injuries). The "law favors the private settlement of disputes and gives releases great weight in order to support the finality of such settlements." *Id.* at 395.

Accordingly, as the trial court here correctly concluded, the 2005 Trust Termination Agreement, by its broad release, bars any claim of Vera House, her children, and the House children to the previously unknown Colorado asset. CP 611 (COL 6, 11). The release contemplated "rights or interests" "arising out of or in any way connected with the Family Trust, the Decedent's Trust, the Estate of Homer R. House," regardless of whether "known or unknown." CP 184. The release comprised a global resolution that the parties would not exhume the Family Trust in any manner, through any trust or the Estate of Homer R. House. The parties benefitted from the termination—Vera receiving $100,000 she had no

right to receive from the Decedent's Trust and the other parties receiving $204,038 prior to Vera's death—and now are bound by what they agreed to in return—to "terminate the Trust entirely" and forego any claims against the House Family Trust or Homer R. House's estate. CP 182-189; CP 191–194; CP 608 (FOF 38).

B. There Was No Distribution of the Royalty Interest, an Asset Unknown to Vera House, as Trustee of the Family Trust, to Either the Survivor's Trust or the Decedent's Trust

McMurtray and Pizzalato downplay the significant and undisputed fact that the asset in dispute was *unknown* to either Homer R. or Vera House during their lifetimes, and continued to be unknown to Vera House following Homer R. House's death in 2004, during her administration of the trusts, through the termination of trusts in 2004 and 2005, and then unknown to them during their administration of Vera House's estate. This unknown asset was not distributed through probate or by act of a trustee. CP 607 (FOF 31). The trial court correctly found that "there is no . . . transfer of it because nobody knew about it." II RP 203:12-13, CP 607 (FOF 32).

The federal estate tax return for Homer R. House's estate identified the real property Vera House quit claimed to the Survivor's Trust. Supp. CP ___.[7] It identified $1,765,804 in stocks and bonds. It identified

[7] Supp. CP ___ (Ex. 94, Form 706, Schedule A).

another $60,128 in other miscellaneous assets and $150,362 in annuities. Supp. CP ___.[8] The federal estate tax return, submitted under penalty of perjury as a complete identification of any assets in which Homer R. House had an interest when he died, makes no mention of the royalty rights or any property in Colorado.

1. It Was the Known Set of Assets that Vera House, as the Surviving Spouse, Allocated Between the Survivor's Trust and the Decedent's Trust

A trustee cannot exercise her discretionary power over an asset that is unknown to her. She cannot assess the value of a not-yet-discovered asset, cannot take inventory of it, and cannot account for it for tax purposes. She has no bases for distributing an asset unknown to her.

If Vera House had known about the royalty rights and failed to identify them or distribute them, it would have been an abuse of her discretion. A trustee who has been conferred with discretionary power over the distribution of trust assets abuses her discretion by failing to use judgment or by making an arbitrary decision. Restatement (Second) of Trusts § 187 (1959). The Restatement provides six factors to consider in determining where there is an abuse of discretion in "exercising or failing to exercise a power." *Id.*, cmt. d. The court will not interfere with a trustee's exercise of discretion so long there *is* an exercise of judgment.

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[8] Supp. CP ___ (Ex. 94, Form 706, Schedules C, F, I).

Id., cmt. e ("the court will not interfere unless the trustee in . . . failing to exercise the power . . . fails to use his judgment, or acts beyond the bounds of a reasonable judgment"); *Waits v. Hamlin*, 55 Wn. App. 193, 200-01, 776 P.2d 1003, 1008 (1989) (reversing summary dismissal of suit in finding material issue of fact on whether trustee abused her discretion in managing the trust); *see also* Bogert et al., The Law of Trusts and Trustees § 560 (Rev. 2d ed.). A trustee fails to use judgment if she is "without knowledge of or inquiry into the relevant circumstances and merely as a result of his arbitrary decision or whim exercises or fails to exercise a power" or "because of a mistaken view as to the extent of his powers or duties, whether the mistake is one of law or fact." Restatement (Second) of Trusts § 187, cmt. h. *See also* Restatement (Third) of Trusts § 50 cmt. b (2003); Restatement (Third) of Trusts § 87 (2007).

The Family Trust conferred on Vera House discretionary authority to divide the assets between the Survivor's Trust and the Decedent's Trust. She did exercise discretion over the two houses in Bellevue, Washington, when she executed quit claim deeds, and transferred the properties from the Family Trust to the Survivor's Trust. CP 607-608 (FOF 34). She also exercised discretion over assets held in brokerage accounts by dividing the assets between the Survivor's Trust and the Decedent's Trust. CP 613-614 (COL 33). Vera House did *not* take any affirmative action however,

let alone acknowledge, the royalty interest. McMurtray and Pizzalato admit this much: that neither Homer R. House nor Vera House "formally" transferred the Colorado asset out of the Family Trust during their lives. Appellants' Br. at 35. Despite this, they continue to argue that the royalty interest *must* have been allocated to the Survivor's Trust. Neither law or logic support the conclusion.

The trustee's failure to consider the Colorado asset in funding the Decedent and Survivor Trusts is akin to a failure to make adequate inquiry or investigation into discretionary distributions from the trust. *See Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 305, 869 P.2d 404, 411 (1994) (holding that trustee did not properly exercise discretion over trust assets where it made little inquiry or investigation into one beneficiary's finances before increasing monthly payments). Here, Vera House's judgment with respect to the Colorado asset was not simply inadequate; it was altogether absent.

Another fatal flaw in McMurtray and Pizzalato's continued assertion that the royalty rights went unknown, by default, into the Survivor's Trust is their failure to note the Family Trust provisions for the valuation of assets as between the Survivor's Trust and the Decedent's Trust. As trustee, while Vera House had the discretion to distribute assets between the Survivor's Trust and the Decedent's Trust, she was required

to value the assets before doing so. The Family Trust called for funding the Decedent's Trust with "the lesser of the equivalent Estate Tax Exemption in effect during the year of the death of the Decedent . . . or one-half (1/2) of the Trust Estate." CP 102. The estate tax exemption was $1,500,000 in 2004 when Homer House died. CP 606 (FOF 25). Since just over $1,300,000 was distributed into each trust, Vera House could have maintained that equal distribution as between the two trusts, and allocated the royalty rights to either trust. Only if all the Family Trust assets had exceeded $3,000,000 would the "excess"—that is, assets worth more than $1,500,000 – been available to fund the Survivor's Trust. Even had there been such an excess—and there was not—as trustee, Vera House was still required to determine which assets went into each of the trusts. McMurtray and Pizzalato continue to ignore these provisions of the House Family Trust.

With the available information on the value of the known assets, the allocation of real property and a percentage of stocks to the Survivor's Trust and the balance to the Decedent's Trust, and in the absence of any other inventory of assets as to the probate and non-probate assets in Homer R. House's estate, the trial court correctly reached the only conclusion that can be reached. Vera House did not make any

discretionary decision to place the royalty interests in either the Survivor's Trust or the Decedent's Trust. CP 606, 607 (FOF 19, 27, 29).

2. As a Matter of Law, There Are No Alternative Legal Bases for Distributing the Royalty Interests Under the House Family Trust or by Intestacy

McMurtray and Pizzalato failed to convince the trial court that intestacy or the Distribution Trust, found in Article VII of the House Family Trust, mandated distribution of the royalty interests. They offer no legal authority for those positions on appeal, and their arguments should be rejected on that basis alone. *See, e.g.*, *Foster v. Gilliam*, 165 Wn. App. 33, 56, 268 P.3d 945, 956-57 (2011), *review denied*, 173 Wn.2d 1032, 277 P.3d 668 (2012); RAP 10.3(a)(6).

McMurtray and Pizzalato conceded at trial that they had no interest to the disputed asset under the laws of intestacy. II RP 172:14-17. Their contention instead was that Vera House would have received assets if Homer R. House had died intestate, and they would then have received those assets from her. However, the contention that intestacy governs the disposition of Homer R. House's assets is a distraction as no one contended that Homer R. House died intestate.[9] McMurtray and Pizzalato themselves offered his Will for probate and sought to be appointed to

[9] The argument that Colorado's more favorable law on the intestate share for a surviving spouse was not argued to the trial court and is simply wrong under RCW 11.96A.020 and 11.96A.040(1)(a). Washington has jurisdiction for the probate of Homer R. House's estate.

administer his estate under that Will. Supp. CP ____.[10] When Janet Cornell was appointed as Personal Representative of her father's estate, she was appointed as the named successor under father's Will, not as the administrator of an intestate estate. Supp. CP ___.[11]

The next contention that the royalty interests "remain" in the Family Trust, and must now be split between the Decedent's Trust and the Survivor's Trust, is not supported by any legal authority. It is also contrary to the terms of the Family Trust. If there had been any assets in the Survivor's Trust or the Decedent's Trust when Vera House died, those assets would have passed to a "Distribution Trust" used first to pay "all legal debts . . . and all expenses of the last illness, funeral and burial as well as all estate, inheritance, succession or other death taxes . . ." CP 106. When Vera House died in 2007, McMurtray and Pizzalato probated her estate under her will and never asserted there were any assets to be distributed under the Family Trust, since there were none. Surely if there were assets still left in the Family Trust, and those assets had been a source to pay expenses, they would have come forward with this argument; they did not. They did not make that argument then because it had no merit; they knew then and argued in the 2007 litigation that the

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[10] Supp. CP ___ (*Verified Petition for Probate of Lost Will and Letters of Administration with Will Annexed*).
[11] Supp. CP ___ (*Order Admitting Lost Will to Probate, Granting Nonintervention Powers*).

Trust Termination Agreement extinguished any claim through the House Family Trust.[12] Despite their prior position that the Trust Termination Agreement barred any claim through the Family Trust, McMurtray and Pizzalato make a final effort to now resuscitate the House Family Trust, claiming they are merely "enforcing" the Trust Termination Agreement. That argument is made without support of any legal authority, was properly rejected by the trial court and that decision should be affirmed. It fails by a simple reading of the all-encompassing terms of the 2005 Trust Termination Agreement and is frivolous.

3. As a Matter of Law, the 2012 Probate of Homer R. House's Will Governs the Disposition of the Royalty Interest

McMurtray and Pizzalato concede the trial court was correct in its finding that neither Homer House nor Vera House transferred the royalty interest to the trust during their lifetimes. CP 607 (FOF 30); Appellants' Br.at 34-35. Similarly they concede the trial court was correct in its finding that Vera House, as trustee after Homer R. House died, never transferred the royalty interest out of any trust. They then cite to RCW 11.04.250 as the basis for their claim that title to the royalty interest passed the moment Homer R. House died, but fail to provide the complete statutory provisions. RCW 11.04.250 provides,

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[12] If an asset passed through the Distribution Trust, it would go in equal 1/6th shares, not 50% to McMurtray and Pizzalato and 12.5% to each of the four House Children. CP 106.

> When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, his or her title shall vest immediately in his or her heirs or devisees, subject to his or her debts, family allowance, expenses of administration, and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent: PROVIDED, That no person shall be deemed a devisee until the will has been probated. The title and right to possession of such lands, tenements, or hereditaments so vested in such heirs or devisees, together with the rents, issues, and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees, excepting only the personal representative when appointed, and persons lawfully claiming under such personal representative; and any one or more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interests in any such lands, tenements, or hereditaments and the rents, issues, and profits thereof, whether letters testamentary or of administration be granted or not, from any person except the personal representative and those lawfully claiming under such personal representative.

This is consistent with RCW 11.48.020 which provides,

> Every personal representative shall, after having qualified, by giving bond as hereinbefore provided, have a right to the immediate possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the court, to the heirs or devisees, and shall keep in tenantable repair all houses, buildings and fixtures thereon, which are under his or her control.

McMurtray and Pizzalato fail to recognize that when Homer R. House died, leaving a will, that Washington law clearly states that the personal representative has legal authority over the assets. They cite no authority for the proposition that the royalty interest instead transferred in 2004 *sub silento* upon Homer R. House's death, through a will not then admitted to probate, to the Family Trust and from there out to the Survivor's Trust. Appellants' Br. at 34-35. To the contrary, the statute provides that an asset does not pass to "heirs" or "devisees" until the will is probated. And McMurtray and Pizzalato are not "devisees" who take under Homer R. House's Will. Probate is ongoing and title thus currently resides with Janet Cornell as the Personal Representative under the Will. RCW 11.04.250; CP 611-612 (COL 9-20). The determination of devisees

occurred in 2013 when the trial court determined how distribution should take place. CP 605 (FOF 6).[13] Its decision should be affirmed.

C. The Court Has Equitable Authority to Distribute an Unknown Asset that Was Unaccounted for by Testamentary Distribution or by the Discretionary Family Trust Distributions

The Trust and Estate Dispute Resolution Act (TEDRA) grants the court "full and ample power and authority" to settle all matters relating to estates and trusts. RCW 11.96A.020. McMurtray and Pizzalato appropriately concede that a legal basis exists for the exercise of equitable discretion under TEDRA. *E.g.*, *In re Estate of Black,* 153 Wn.2d 152, 161, 102 P.3d 796 (2004); *In re Estate of Bowers,* 132 Wn. App. 334, 339-40, 131 P.3d 916 (2006); *see In re Riddell*, 138 Wn. App. 485, 157 P.3d 888 (2007).

The trial court's exercise of equitable authority will be affirmed where the relief granted is "based upon tenable grounds or tenable reasons." *Harman v. Dep't of Labor Indus.*, 111 Wn. App. 920, 928, 47 P.3d 169, 173 (2002); *In re Marriage of Larson and Calhoun*, 313 P.3d 1228 (Wash. Ct. App. 2013). To reverse the trial court's exercise of its equitable authority, there must have been an abuse of discretion. *See, e.g.*, *Rabey v. Dep't of Labor & Indus. of State of Wash.*, 101 Wn. App. 390,

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[13] The intestate takers in 2013 would be Homer R. House's four surviving children. Under Homer R. House's Will calling for intestate succession as a fall-back, McMurtray and Pizzalato have no claim. CP 54; CP 613 (COL 27).

397, 3 P.3d 217, 220 (2000) (concluding that trial court did not abuse it discretion by exercising its equitable power to avoid an unjust outcome; "An appellate court reviews the authority of a trial court to fashion [equitable] remedies for an abuse of discretion."); *Sac Downtown Ltd. P'ship v. Kahn*, 123 Wn.2d 197, 205, 867 P.2d 605, 610 (1994) ("On equitable matters, a court has broad discretion, which will be disturbed on appeal only if the trial court abused its discretion.").

There is no clear legal answer to when an interest in this previously unknown royalty interest vested. *See* II RP 205:8-10. Specifically, there is no controlling law on how to trace back an unknown asset particularly in light of the intervening 2005 Trust Termination Agreement that extinguished all parties' claims to the asset. Where rights are not "defined and established by existing legal principles" and there is no "directly applicable rule of law," a court in equity that exercises its equitable powers does not ignore "controlling law" or "settled principles." Appellants' Br. at 26-27 (citations omitted).

The Colorado asset was not identified until 2011. During the interim period when operative instruments and discretionary actions could have disposed of the asset (had it been known), the parties executed the Trust Termination Agreement which cut off any present-day claims to the disputed asset. As such, neither Homer R. House's Will nor the Family

Trust govern the later-discovered Colorado asset, and the court is left to exercise its equitable authority over distribution of the asset. The trial court below properly engaged in a balance of equities to arrive at its decision of distributing the Colorado asset to the House Children.

The cases McMurtray and Pizzalato cite—to support the point that appellate courts reverse trial courts that disregard statutory directives—are inapposite. In *Noble v. A & R Envtl. Servs., LLC*, 140 Wn. App. 29, 164 P.3d 519 (2007), the issue before the court related to distribution of corporate assets in light of directly applicable statutory authority governing the winding up of an LLC. The court there correctly remanded for entry of findings supporting the trial court's distribution in order to determine whether it complied with statutory requirements. *Town Concrete Pipe of Wash., Inc. v. Redford*, 43 Wn. App. 493, 717 P.2d 1384 (1986) is similarly distinguishable, if not supportive of respondent here. The court there was confronted with issues relating to mechanics' liens statutes and whether the enactment of the statutes precluded the respondent from receiving damages as unjust enrichment. The appellate court affirmed the continued availability of equitable relief, in addition to the statutory options, reversing and remanding only because of a lack of findings to support the equitable relief granted. *Id.* at 498-99.

Further, through its broad grant of equitable powers, TEDRA clearly authorizes a trial court to resolve disputes in probate based on equitable factors. The court below properly exercised its equitable discretion given the nature and timing of the discovery of the disputed property.

D. Appellate Review of Findings of Fact and Conclusions of Law

The trial court did not err in entering the findings of fact and conclusions of law supporting its distribution of the Colorado asset to the House Children.

1. McMurtray and Pizzalato's Failure to Object to Findings of Fact Before the Trial Court Waives Their Objections on Appeal

As trial counsel noted to the court, when asked if he had any objections to the proposed findings of fact and conclusions of law,

> "I do, Your Honor. I have—we have some—in large part they're fine. . . . We do have some minor what we think are things . . . that need to be corrected . . ."

II RP 244:18-24. Trial counsel's objections were then limited to Findings of Fact No. 26, 40, and 41. III RP 244:18-24; 254:7-9;[14] 266:24. On appeal, objections are now made to Findings No. 19, 26, 27, 32 and 36.

[14] Finding of Fact 42, to which an objection was made, was amended, consistent with trial counsel's objection. III RP 270:6-12.

McMurtray and Pizzalato's failure to object to four of these five findings of fact as proposed ends review, as they failed to preserve these issues for appellate review. RAP 2.5(a); *see State v. O'Hara,* 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "The purpose behind this rule is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *State v. Lindsey*, 311 P.3d 61, 69 (Wash. Ct. App. 2013) (refusing to address argument on erroneous instruction because appellant failed to object to instruction at trial). Further, "[a] party may waive its right to challenge a ruling on appeal by failing to object below or by engaging in conduct that invites the ruling." *Magana v. Hyundai Motor Am.,* 123 Wn. App. 306, 314, 94 P.3d 987 (2004).

2. McMurtray and Pizzalato's Failure to Properly Make an Offer of Proof and Offer Exhibits Waives Their Objections on Appeal

The trial court heard summary judgment motions in this matter on February 8, 2013, only a month prior to trial. CP 490. When trial started on a Monday morning, the court asked how long the parties needed to present their case. The parties identified the many exhibits to which there was no objection. I RP 19:17-26:24. The court then asked who the witnesses would be and how long trial would take. I RP 27:11-16; 29:12-13. The Personal Representative and the House Children informed the

court that trial should be done in a day. I RP 29:14-15; 31:16-17. McMurtray and Pizzalato contended it was "going to take quite a bit more time," two days for their witnesses and another day to call the House parties as witnesses. I RP 31:19-33:9. The suggestion was made that McMurtray and Pizzalato make an offer of proof about that testimony and counsel agreed. I RP 37:9-38:9. The following day, the court and parties discussed the offer of proof which was submitted that morning. The court explicitly ruled that the offer of proof did not mean that the offer was admitted as testimony and explicitly permitted objections to be made during closing argument to the contents of the offer of proof. II RP 119:2-122:25. McMurtray and Pizzalato had no objection to that procedure, did not call any witnesses, did not offer any of the objected to exhibits into evidence, and with that the trial court determined that the factual case was closed. II RP 123:8-10. During closing argument, their counsel referred to the specific evidence in the offer of proof and exhibits, objections were made and the court made rulings on the specific evidence offered from the offer of proof. II RP 156:7-162:1.

When the hearing resumed a day later, the court inquired as to whether there was a need to return to the offer of proof and objections, McMurtray and Pizzalato's counsel stated, "I think it's unnecessary in light of the Court's ruling." III RP 214:12-13. However to clarify the

record, counsel then noted objections and the court made rulings on the offer of proof, paragraph by paragraph. As the court noted, if the witnesses had testified, consistent with the offer of proof, objections as noted by other counsel would have been sustained.

Now on appeal, McMurtray and Pizzalato contend the court abused its discretion by engaging in "wholesale, after-the-fact tailoring of what evidence is deemed to have been considered . . ." The court asked counsel for offers of proof, articulated that objections were not waived but would be considered to the extent the content of the offer was relied upon in closing, and McMurtray and Pizzalato's counsel agreed to this process. Similarly, counsel agreed when court resumed session to the process of going through the offer of proof line by line. There is no authority offered on appeal to support the contention that this was an abuse of discretion and there was none. The invited error doctrine bars McMurtray and Pizzalato from "setting up an error at trial and then complaining of it on appeal." *Hymas v. UAP Distribution, Inc.*, 167 Wn. App. 136, 148, 272 P.3d 889, 895, *review denied*, 175 Wn.2d 1006, 284 P.3d 742 (2012); *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321, 328 (2009) ("The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial"); *State v. Clark*, 170 Wn. App. 166, 194, 283 P.3d 1116, 1130

(2012), *review denied*, 176 Wn.2d 1028, 301 P.3d 1048 (2013) (applying invited error doctrine to bar party from challenging jury instruction for first time on appeal when he agreed to it at trial); *see also Magana,* 123 Wn. App. at 314 ("A party may waive its right to challenge a ruling on appeal by failing to object below or by engaging in conduct that invites the ruling."). The objection on appeal to the trial court's handling of the offer of proof is without merit.

3. The Findings of Fact Are Supported by the Record

Findings of fact will be affirmed where there is a "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *In re Estate of Langeland,* 312 P.3d 657, 659 (Wash. Ct. App. 2013); *In re Estate of Haviland*, 162 Wn. App. 548, 561, 255 P.3d 854, 866 (2011); citing *Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wn.2d 873, 879, 73 P.3d 369 (2003); *accord In re Wash. Builders Benefit Trust*, 173 Wn. App. 34, 65, 293 P.3d 1206, 1222-23, *review denied*, 177 Wn.2d 1018, 304 P.3d 114 (2013). Unchallenged findings of fact are verities on appeal. *Id.*

McMurtray and Pizzalato now contend that the trial court erred in entering various findings, each of which is a finding of negative proof—in other words, findings on what was absent from the evidence presented to the trial court. They fail to identify any evidence to dispute the underlying

issue or any contrary evidence.[15] If there is evidence to support the trial court's findings, the reviewing court will not substitute its judgment for the trial court's decisions. *In re Estate of Lint,* 135 Wn.2d 518, 957 P.2d 755 (1998). The challenges here fail to meet the mandate that McMurtray and Pizzalato present not only argument, but citations to the record to support their argument that the trial court's findings were in error. RAP 10.3; *In re Estate of Lint,* 135 Wn.2d at 532; *Karlberg v. Otten*, 167 Wn. App. 522, 525, n.1, 280 P.3d 1123 (2012). The record here clearly supports the findings that there was no evidence on these matters, and McMurtray and Pizzalato's challenges to these findings should be rejected.

4. Specific Findings

The trial court considered an objection to Finding of Fact 26, which states specifically, "There is no document from Vera House, as the surviving spouse, that identifies a division of assets between the Survivor's Trust and the Decedent's Trust." The trial court considered an exhibit proffered to contradict the proposed finding and rejected the argument. As the trial court agreed, normally a trustee would provide

[15] Finding of Fact No. 19 held that there was no inventory of assets in the Vera House estate. Finding of Fact No. 27 held there was no trustee's book of accounts that identified the allocation of assets between trusts. Finding of Fact No. 32 held that there was no transfer of assets from Homer V. House's estate to the Homer R. House and Vera House Family Estate. Finding of Fact No. 36 held that there was no evidence that Vera House executed any documents to transfer the Colorado asset.

beneficiaries with an actual inventory of assets and itemize those assets, and the exhibit merely referred to categories of assets and approximate values. There is evidence to support Finding of Fact No. 26. III RP 254:3; 251:2-254:4.

McMurtray and Pizzalato failed to object to Finding of Fact 32 and therefore failed to preserve any claimed error for appellate review. Nevertheless, the finding that the Colorado asset was not transferred out of Homer V.'s Estate is supported by other findings, not challenged on appeal, including the fact that the asset was not listed on the federal estate tax return, there were no documents conveying the property, and neither Homer R. or Vera House knew of the asset. CP 607 (FOF 29-31). The challenge on appeal to this Finding of Fact is frivolous.

Further evidence on record supports the finding that Vera did not distribute the Colorado asset from the Family Trust because she did not exercise discretion over the Colorado asset in funding the Decedent's Trust and Survivor's Trust. The Colorado asset was never mentioned or accounted for. *See, e.g.*, Supp. CP ___ (Ex. 94); CP 339; Supp. CP ___ (Ex. 87); CP 607 (FOF 29). Additional assets could have been distributed into the Decedent's Trust.[16] McMurtray and Pizzalato's persistent effort

[16] McMurtray and Pizzalato conceded the Decedent's Trust could have been funded with up to $1,500,000 and that is was only funded with approximately $1,350,000 in assets.

to catapult the royalty interest into the Survivor's Trust was correctly rejected by the trial court and that decision should be affirmed on appeal.

5. The Conclusions of Law Are Supported by Findings of Fact and Consistent with the Law

The trial court's conclusions of law are reviewed de novo, but involve a determination of whether the findings of fact support the conclusions of law. *In re Wash. Builders Benefit Trust*, 173 Wn. App. at 65, citing *City of Tacoma v. State,* 117 Wn.2d 348, 361, 816 P.2d 7 (1991); *Casterline v. Roberts*, 168 Wn. App. 376, 381, 284 P.3d 743 (2012). With only a single finding of fact challenged before the trial court, there was a strong foundation for the trial court's conclusions of law. And as with the findings of fact, there was no objection before the trial court to nine of the fourteen conclusions of law now objected to and one of the now-objected to conclusions of law was revised to reflect trial counsel's concern, leaving only four conclusions of law objected to at trial and now on appeal. III RP 270:14-286:15.

a. Conclusions of Law Approved at Trial but Objected to on Appeal

Before the trial court, McMurtray and Pizzalato objected to Conclusion of Law 11 only to the extent it did not apply to the House Children. III RP 271:5-12. The handwritten interlineations reflect the requested change, with counsel noting, "That's fine. That's what we were

asking for." III RP 272:13-14. As a matter of law, and as discussed above, the effect of the 2005 Trust Termination Agreement is to bar subsequent claims to both known and unknown property. It is undisputed that no one was aware of these royalty rights, yet McMurtray and Pizzalato fail to address the impact of their release and waiver of any interest in Homer R. House's estate upon execution of the Trust Termination Agreement. CP 605-609 (FOF 11, 21, 29, 31, 32, 39, 40, 41.) The objection to this Conclusion of Law on appeal is frivolous.

On appeal, McMurtray and Pizzalato object to Conclusions of Law 15 and 17, neither of which were objected to at trial. These two conclusions reiterate what is set forth in Conclusion of Law 11—the identity of parties who waived claims under the 2005 Trust Termination Agreement. Any objection to these Conclusions of Law on appeal are frivolous. *See, e.g.*, *Lee v. Kennard*, 176 Wn. App. 678, 310 P.3d 845, 853 (2013).

At trial, McMurtray and Pizzalato agreed that as to Conclusion of Law 30, "The Court made statements that are in line somewhat with what's in there," III RP 279:21-22, and only questioned whether this should be a finding of fact or a conclusion of law; after a discussion with the court counsel concurred with the conclusion. III RP 279:24-282:5. Any objection to this Conclusion of Law is frivolous.

The same is true for the Conclusion of Law 31, a statement as to the amount of Homer R. House's taxable estate. After a discussion amongst the court and counsel, the finding remained unchanged, and is consistent with estate tax return. III RP 282:13-283:17. The objection to this Conclusion of Law is frivolous.

b. Conclusions of Law Not Objected to at Trial, Objected to on Appeal but Without Any Assignment of Error

McMurtray and Pizzalato set out a laundry list of objections to other Conclusions of Law entered by the trial court to which no objection was made at trial: Conclusions of Law No.19, 20, 23, 24, 28, and 35. They fail to state assignments of error to all of these conclusions with the exception of Conclusions of Law 22 and 29. Their failure to object at trial or to assign error on appeal precludes consideration of the issues set forth in these findings undercuts the merit of their belated objection. RAP 2.5(a); *see O'Hara,* 167 Wn.2d at 98; *Lindsey*, 311 P.3d at 69.

Conclusion of Law 19 states that title to the Colorado property vested in Ms. Cornell, as personal representative. As the trial court found, this is consistent with RCW 11.04.250 that provides, while title in real estate vests at death in "heirs or devisees", "no person shall be deemed a devisee until the will has been probated." III RP 248:1-9. It is also consistent with Conclusion of Law 18, to which no objection was made at

trial or on appeal. CP 612 (COL 18). Conclusion of Law 24 states again that title to the property and its income rests with the personal representative of Homer V. House's estate, to which no objection was made at trial. III RP 276:4-7; 277:17-19. The objections to Conclusions of Law 19 and 24 are frivolous.

Trial counsel had a suggested change to Conclusion of Law 20, but after a discussion with the trial court stated, "Actually Your Honor. I'll go ahead and withdraw that one." III RP 274:19-275:17. The objection to Conclusion of Law 20 is frivolous.

Conclusion of Law 23, to which no objection was made at trial, is the court's determination that it would be equitable to distribute the disputed asset to the four House children. III RP 276:4-7, 277:17-19. The failure to object at trial or to articulate a basis for an assignment of error on appeal precludes consideration of this issue. RAP 2.5(a); *see O'Hara,* 167 Wn.2d at 98; *Lindsey*, 311 P.3d at 69.

As the Findings of Fact note, the asset in question here was a House family asset, passing from Homer V. House to his son as separate property. From the assets in the House Family Trust, McMurtray and Pizzalato received approximately four times as much than Homer R. House's children. In 2004 McMurtray received $375,000 in real property and Pizzalato received $420,000 in real property; in 2008 each received

another $389,453 from a brokerage account. They also received in equal shares all of their mother's assets following her death in 2007. CP 606, 609 (FOF 15, 16, 42.) The objections to Conclusion of Law 23 is frivolous.

The objection to Conclusion of Law 35, to which no objection was made at trial, is equally frivolous. McMurtray and Pizzalato state, ". . . $65,000 plus any future revenues" are what is at stake in this litigation. The court found that even with a distribution of the royalty interests to Homer R. House's children, McMurtray and Pizzalato would receive substantially more of the assets accumulated by Homer and Vera House. For good reason, no objection was made to Conclusion of Law 35 at trial. III RP 276:4-7, 277:17-19. The failure to object at trial or to articulate a basis for an assignment of error on appeal precludes consideration of this issue. This Conclusion is consistent with Findings of Fact No. 28, 34 and 42. The objection to Conclusion of Law 35 is frivolous.

c. Conclusions of Law Objected to at Trial, Objected to on Appeal but Without Any Assignment of Error

At trial, McMurtray and Pizzalato objected to Conclusion of Law 34 which states, "Both Vera and Homer House recognized the appropriateness of an equal distribution of assets." CP 614. While an objection was made at trial, there is no articulated assignment of error. III

RP 283:20-285:3. Given the provisions in the Family Trust, this Conclusion of Law is well supported.[17] All the Assets in the trust, declared to be community property, were split equally between two trusts when the first spouse died. The surviving spouse then had control over her "survivor's share", and the deceased spouse's share would be held intact, to be split equally between all six children when the surviving spouse passed away. CP 102, 106.

d. Conclusions of Law Not Objected to at Trial but Objected to on Appeal, and for Which Assignment of Error is Made

McMurtray and Pizzalato articulate, on appeal, assignments of error to Conclusions of Law 22 and 29. Neither was objected to at trial. III RP 276:6-277:20; 279:15-19 (ending discussion of Conclusion 20, correcting a typographical error in Conclusion 21, and moving to Conclusion 27; then to Conclusion 30.) Conclusion of Law 22 is consistent with RCW 11.96A.020 that grants the Court authority to act equitably in "all matters concerning . . . estates", and "to proceed with such administration and settlement in any manner and way that to the

[17] When the first spouse died, the trust assets were to be divided into two shares, a Decedent's Trust and a Survivor's Trust. The Decedent's Trust was to receive the lesser of $1,500,000, the estate tax exempt amount when Homer R. House died, or 50% of the Trust. No distributions were to be made from that trust to Vera House. Following her death, the six children were to receive equal shares. 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.

court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court." RCW 11.96A.030(2) defines "matter" in the probate setting to include ". . . any issue, question or dispute involving: (a) The determination of any . . . devisees . . . heirs . . . interested in an estate . . . or with respect to any other asset or property interest passing at death . . ."

Conclusion of Law 29 determined that "there are substantial equitable considerations that weigh in favor of distributing the disputed asset to the House children," is consistent with the court's detailed findings of fact. The royalty interests derived from Homer V. House, the grandfather Homer R. House's children knew and with whom they had a family relationship. McMurtray and Pizzalato never knew Homer V. House and were never adopted by Homer R. House. Homer and Vera House made provisions to place "her house" into the Decedent's Trust should she survive her husband, and then to allow her children to purchase the house from the trust after both Homer and Vera House passed away. CP 102, 106 (*Article IV.A; Article VII.A*). The result of distributions after Homer R. House passed away, the Trust Termination Agreement, and the 1998 litigation over the Morgan Stanley account resulted in Pizzalato receiving directly from the trust more than $1 million and McMurtray receiving over $968,000 while each of the House Children received

$204,038. Taking the disputed asset, unknown to anyone when all of the estate planning was done and distributions made, and dividing it in four shares between Homer R. House's children, is clearly equitable. The asset being divided, which had generated approximately $65,000 in royalty income by the time of trial, places a House heritage asset with the House descendants, and makes a very modest increase in their share of the total estate.

E. Attorney Fees Were Properly Awarded to the Estate

An attorney fee award is reviewed in two parts: the initial determination of whether there is legal basis to award attorney fees is reviewed de novo, and the discretionary award and reasonableness of it are reviewed for an abuse of discretion. *See Kitsap Bank v. Denley*, 312 P.3d 711, 721-22 (Wash. Ct. App. 2013); *In re Wash. Builders Benefit Trust*, 173 Wn. App. at 84-85. It is undisputed that the court had the legal authority under RCW 11.96A.150 to award fees "from any party" "in such amount and in such manner as the court determines to be equitable."

The trial court's award of fees will be upheld absent an abuse of discretion, that is its decision will be affirmed unless it is "manifestly unreasonable or based on untenable grounds or reasons." *Id.*, citing *In re Estate of Black,* 153 Wn.2d at 160. Given the near "limitless sets of factual circumstances that might arise in a probate proceeding, the

legislature wisely left the matter of fees to the trial court, directing only that the award be made as justice may require." *In re Estate of Black*, 116 Wn. App. 476, 489, 66 P.3d 670, 677 (2003), *aff'd on other grounds,* 153 Wn.2d 152, 102 P.3d 796 (2004) (quotation marks omitted). As the courts have held, "Washington favors the protection of estates through the award of attorney fees under RCW 11.96.140 [predecessor to RCW 11.96A.150]." *Laue v. Estate of Elder*, 106 Wn. App. 699, 712, 25 P.3d 1032 (2001), citing *In re Estate of Kerr,* 134 Wn.2d 328, 949 P.2d 810 (1998).

1. The Fee Award Is Authorized by Law

At the beginning of trial, as McMurtray and Pizzalato's counsel offered more than 100 exhibits and told the court trial he was going to call witnesses for three days of testimony, the court noted the "modest distribution" in dispute and its authority under TEDRA to assess attorney fees. I RP 32:2-34:4. The trial court was correct in noting its broad discretion to award attorney fees in a trust dispute as RCW 11.96A.150 provides. *See also In re Estate of Frank,* 146 Wn. App. 309, 327, 189 P.3d 834 (2008). McMurtray and Pizzalato do not dispute that TEDRA provides the basis for an award of attorney's fees; they only contend that the trial court's award was improper under the circumstances of this case. CP 855 (FOF 3).

2. The Fee Award Is Supported by Equity, by the Court's Findings of Fact and Its Conclusions of Law

Here, the trial court twice entered findings of fact and conclusions of law supporting its award of fees, after an initial round of briefing and in denying the substantive portion of a motion for reconsideration. CP 854-857; CP 927-931. In support of its award, the court properly considered that the Estate prevailed in its position. CP 857 (COL 12). Significantly the trial court also concluded that McMurtray and Pizzalato's "vigorous pursuit of their claims" necessitated the time spent by the personal representative to respond. *Id.* (COL 11). Where "litigation was necessitated" by a party's actions, the court may direct him to "personally pay" attorney's fees to other parties. *In re Estate of Jones*, 152 Wn.2d 1, 20-21, 93 P.3d 147, 157 (2004); *In re Estate of Fitzgerald*, 172 Wn. App. 437, 453-54, 294 P.3d 720 (2012), *review denied*, 177 Wn.2d 1014, 302 P.3d 181 (2013). Such is the case here where a large portion of the litigation was necessitated by McMurtray and Pizzalato's conduct. Before there were any court proceedings, McMurtray and Pizzalato's counsel unilaterally notified the Colorado representative of PDC Energy that 100% of the asset belonged to them. CP 642. This was followed by their first pleadings, where McMurtray and Pizzalato sought to be appointed as personal representatives (even though not named in the will they offered

for probate). Simultaneously they filed a petition seeking 100% of the disputed asset along with an award of fees in their favor. This forced Ms. Cornell, who was named as the successor personal representative in her father's Will, to both file pleadings to have herself appointed and to file a response on the merits of McMurtray and Pizzalato's petition claiming 100% of the disputed asset. CP 8-19; CP 20-29; CP 30-33. Only after those pleadings did McMurtray and Pizzalato agree to Ms. Cornell's appointment as Personal Representative. CP 643.

Mediation was unsuccessful. An opening settlement offer was for McMurtray and Pizzalato to receive 100% of the asset while agreeing to forego their own fees (which were on a contingent basis in any event). In mediation, the best offer they made was to keep 83.33% and give 16.6% of the asset to the four House children. On the eve of trial, the offer nudged up, with McMurtray and Pizzalato keeping 75% of the disputed asset and offering to give the four House children the remaining 25% and $7,500 for legal fees.[18] CP 643.

Against the individual parties, McMurtray and Pizzalato served discovery requests and requests for admission. In their responses to discovery, McMurtray and Pizzalato failed to produce documents that were later offered as trial exhibits and admitted they had 3,000 pages of

[18] McMurtray and Pizzalato had a contingent fee arrangement with their lawyer: 25% of the net recovery, up to $50,000. Despite not prevailing, he was paid $12,500. CP 851.

documents from prior litigation that they had not produced. CP 644. They served notices to attend trial on each of the four individual parties yet failed to call any of them or make an offer of proof as to any testimony from the four House Children. At trial, they proposed 121 trial exhibits including 32 pleadings in the case and multiple sets of discovery requests. Another 29 exhibits were never offered or admitted in evidence, but each of the exhibits required review and effort to prepare for trial. CP 644.

The court's exercise of equitable discretion also reasonably considered the fact that unless McMurtray and Pizzalato bore the cost of the Estate's necessary actions in resolving in this matter (much of which they necessitated), the House Children would end up bearing the full cost of such through their reduced distribution from the Estate. CP 857 (COL 13), CP 929 (COL 11, 13). Even in losing their fight over what the trial court described as a "modest" amount in dispute, McMurtray and Pizzalato were able to force litigation costs that exceeded the value of the asset in dispute. An award of fees so as not to deplete the assets was appropriate. *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 345, 183 P.3d 317 (2008).

3. The Personal Representative Necessarily Presented Her Position Regarding Distribution of the Colorado Asset

McMurtray and Pizzalato contend that as personal representative Ms. Cornell should not be awarded fees because she should not have taken a position on this dispute or been a party in its resolution. A personal representative of an estate is charged with the duty of settling the estate, including nonprobate assets, "as rapidly and as quickly as possible." RCW 11.48.010. She has the authority to pursue claims and to settle claims. RCW 11.48.130. Her duties include the obligation "to present his position in a probate matter where there is a dispute as to distribution." *Estate of Kvande v. Olsen*, 74 Wn. App. 65, 71-72, 871 P.2d 669, 672-73 (1994) (holding that personal representative can seek guidance from court as to proposed distribution). She is a "party" under TEDRA and appropriately presented evidence to the court regarding the distribution issues. RCW 11.96A.030(5)(c). The trial court's decisions to permit the personal representative to appear as a party and participate in the proceedings was consistent with RCW 11.96A and should be affirmed on appeal.[19]

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[19] *See CP 518 - 520,* Order Denying Motion for Summary Judgment, denying McMurtray and Pizzalato's motion to strike the Estate's pleadings; *CP 554 - 555,* Order Denying Counterclaimant's Motion to Bifurcate the Trial of the Probate and Counterclaim Petitions.

Courts have recognized that a decedent may select the personal representative of his choice, and that person may serve in a fiduciary capacity while also being an individual beneficiary of the estate. "A decedent has the right to designate who will administer an estate and is not inhibited by an actual or potential conflict of interest, but can designate someone to act in circumstances that will involve the conflict relationship, and that is within the right of the decedent." *In re Vance's Estate*, 11 Wn. App. 375, 382, 522 P.2d 1172, 1176 (1974) (challenge to personal representative's appeal of the IRS determination of stock value rejected even when result of appeal would be personally beneficial to personal representative and result in reduction in amount for distribution to other heirs).

Despite this statutory and case law, and the rejection of their position by the trial court, McMurtray and Pizzalato continue to argue that the personal representative cannot "take sides" in a dispute. In taking this position, they fail to inform the court that they filed a *Petition to Probate Lost Will,* seeking to have themselves appointed as co-personal representatives and simultaneously filed a TEDRA petition to have the

court order that they were "the true owners" of the disputed property and sought an award of fees. Supp. CP ___;[20] CP 1-7.

Estate of Kvande v. Olsen supports the personal representative's actions here. In *Kvande*, *supra*, the personal representative took the position that the residuary estate should be distributed to the decedent's intestate heirs and sought the court's approval. 74 Wn. App. at 71-72. On appeal on the merits—arguing that the entire estate should have been distributed to himself only to the exclusion of the other intestate heirs—and fee award, Olsen contended that the personal representative could not take sides. The court rejected this position and distinguished *Thompson v. Weimer*, 1 Wn.2d 145, 150, 95 P.2d 772, 775 (1939), relied upon by McMurtray and Pizzalato. Both *Thompson v. Weimer* and *In re Cannon's Estate*, 18 Wash. 101, 105-06, 50 P. 1021, 1022 (1897) also long predate RCW 11.96A.150 which explicitly grants the court authority to award fees from any party to any party, consistent with the statutory and case law that approves a personal representative taking action to present a disputed distribution to the court.

The personal representative's filing of a petition in this matter to ask the court to direct her distribution of the previously-undisposed-of Colorado asset was both appropriate and necessary. *See* RCW 11.48.010.

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[20] Supp. CP ___, (*Verified Petition for Probate of Lost Will and Letters of Administration with Will Annexed; Petition for Declaration of Rights Under TEDRA*).

IV. FEES ON APPEAL

The Estate also requests attorney fees on appeal, as authorized by RCW 11.96A.150 and RAP 18.1. *Laue v. Estate of Elder*, 106 Wn. App. 699, 713, 25 P.3d 1032, 1039 (2001); *see also In re Estate of Haviland*, 162 Wn. App. at 569 (granting respondent's request for fees on appeal to be paid by appellant).

V. CONCLUSION

Based on thorough factual findings, the trial court correctly concluded that there is no clear answer on how an asset, unknown during the lifetimes of the decedent and all subsequent appointed trustees, should be distributed. Particularly in light of a termination agreement signed by all parties that waived all claims, known and unknown, the trial court properly exercised its equitable discretion to distribute the disputed asset to the House Children. The trial court also properly exercised its discretion when awarding attorney's fees against McMurtray and Pizzalato.

This Court should affirm the trial court's ruling.

DATED: December 31, 2013 **PERKINS COIE LLP**

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CERTIFICATE OF SERVICE

I certify that on December 31, 2013, I caused the foregoing document to be served on the following parties via the method described below:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: December 31, 2013.

Christine F. Zea, Legal Secretary