

No. 70248-3-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

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Estate of: HOMER R. HOUSE (Deceased),

*Respondent.*

LINDA MCMURTRAY and LARRY PIZZALATO,

*Appellants.*

v.

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

*Respondents.*

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

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OPENING BRIEF OF APPELLANTS

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Gregory M. Miller, WSBA No. 14459  
Jacqueline K. Unger, WSBA No. 44190  
Attorneys for Appellants

CARNEY BADLEY SPELLMAN, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104-7010  
(206) 622-8020

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## I. INTRODUCTION & SUMMARY

The trial court sitting in probate may not ignore controlling law governing the descent of property, nor the express provisions of the testator's will, simply because "it wants to do equity" based on its view of the competing claimants. The trial court here ignored the settled law of both Colorado and Washington that, as a matter of law, real property interests vest immediately on the death of the decedent and there is no need for a formal deed or documentary proof of transfer of title for that vesting to occur; the property interest transfers as a matter of law. A formal deed or title transfer document thus merely recognizes what has already occurred as a matter of law. The court also ignored the express provision of the decedent Homer Ray House's will that "[a]ll property . . . which I own" at the time of his death passed to his family trust, CP 291, and so to Vera his second wife of 32 years, not to his four adult children from his first marriage. But here the trial court chose to disregard applicable law for "equity" to award the Colorado mineral rights to the decedent's four children in an attempt to equalize distributions from the trust which were never required to be equal in the first place. Since the court ignored the law, the rulings must be vacated.

The trial court's findings and conclusions demonstrate its legal errors in failing to trace correctly the path of the mineral rights that originated with Homer Virgil House, the late father of the decedent herein. Those rights passed to and vested by the settled

Colorado law of intestate succession in his son Homer Ray House immediately on Homer Virgil's death in 1974. Then, when Homer Ray died in 2004, they immediately passed to and vested in Homer Ray's family trust pursuant to his will and settled law as "property he owned," even if he was not aware of them. They ultimately passed to Homer Ray's wife Vera under terms of the trust and, on her death, to her children Linda and Larry, the appellants herein.

The trial court's erroneous assumption of equitable authority is starkly embodied in Conclusion of Law ("COL") 29, which provides: "Even if title to the Colorado property interest vested in Vera, there are substantial equitable considerations that weigh in favor of distributing the disputed property to the House children." CP 613. In plain English, the trial court said: "I can do whatever I want with the disputed mineral rights, whatever the law may require." This is not counsel's overstated paraphrase done for heightened effect – it is, unfortunately, accurate. The trial court's erroneous, naked assertion of unrestrained equitable superpowers, its belief it may act as a "knight errant" answerable only to itself, is in COL 22: "The court has the equitable authority to make a distribution of the asset in dispute in this litigation, regardless of how legal title may have been held." CP 612. The consequences of this approach are huge: there is no law; only the given judge's view of the matter on that day.

The trial court's legal errors in its analysis are set out in detail *infra*. Two examples of its erroneous reasoning which establish reversible error for abuse of discretion since both are contrary to settled law of both Colorado and Washington, are COL 19 that "[t]itle to the Colorado property [interest] vests in Janet Cornell, as the personal representative of the Estate of Homer R[ay] House," and COL 20, that "it is difficult to determine clearly when [Homer Ray's interest in the Colorado mineral rights] was identified and when it passed to Homer R[ay] House." *See* CP 612.

Finally, the trial court's decision is in conflict with Homer Ray's stated intent as to the disposition of his property in the express terms of his will. His will provides that "[a]ll property both real and personal which I own at the time of my death is to be transferred to the Trustee" of the family trust he had established with his wife of 32 years, Vera, and was to be managed in accordance with the terms of that trust. CP 291. The will named all his own children and made no specific bequests to any of them or to anyone else. Rather, the will provided that "all property . . . which I own" goes to the family trust and nowhere else. It was both error and an abuse of discretion for the trial court to countermand Homer Ray's clearly stated intent and distribute the mineral rights contrary to his express wishes in the will, and contrary to the immediate vesting at death of title to real property under settled law.

This case is best understood by keeping in mind the continued disputes between the two sets of step-siblings, including the prior litigation surrounding the care of Homer Ray House in his last years on Whidbey Island and the litigation between the two sets of offspring following his death. *See* CP 578-584, offer of proof.

## **II. ASSIGNMENTS OF ERROR & ISSUES ON APPEAL**

### **A. Assignments of Error.<sup>1</sup>**

1. The trial court erred in dismissing the claim of Appellants to the mineral rights inherited by Homer Ray House from his father Homer Virgil House and which later passed by his will to Homer Ray's spouse, Vera House, via their family trust; and thence from her to Appellants.

2. The trial court erred in determining the Colorado mineral rights were in a residuary estate of Homer Ray House, since by his will all his property, real and personal, was transferred to the family trust and, from there, devolved to Homer Ray's wife, Vera since they were not specified as being placed in the Decedent's Trust. Alternatively, if the mineral rights passed by Homer Ray's residuary estate, the trial court erred by failing to follow the applicable law of intestate succession to distribute the proper share to his surviving spouse, Vera.

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<sup>1</sup> Appellants comply with RAP 10.4(c) by attaching a copy of the findings of fact and conclusions of law as appendices A, B, and C, as to the merits and attorney's fees.

3. The trial court erred in entering findings of fact to the extent they include legal conclusions specifying the transfer of the mineral rights following the deaths of Homer Virgil House, and Homer Ray House, and Vera House to the extent they differ from Colorado and Washington law, both of which provide for immediate vesting in the recipient on the death of the decedent.

4. The trial court erred in entering “Findings of Fact” on the merits, Nos. 19, 26, 27, 32, 36 (App. A-5 & A-6; CP 606-09).

5. The trial court erred in entering merits “Conclusions of Law” including findings contained therein, Nos. 11, 15, 17, 19, 20, 22, 23, 24, 28, 29, 30, 31, 34, 35 (App. A-8 to A-11; CP 611-14).

6. The trial court erred in entering COL 22 by concluding that it had equitable authority that allowed it to ignore settled law on the passage of property interests on the death of the property holder “and make a distribution of the asset in dispute in this litigation, regardless of how legal title may have been held.” COL 22, CP 612.

7. The trial court erred in “not considering” ¶¶ 21-31, 33, 35-39, 45, 51, 57, 58, 60 of Appellants’ offer of proof which were not stricken nor deemed inadmissible, when the trial court ultimately decided the case on alleged equitable interests of the parties.

8. The trial court erred in entering COL 29 by concluding that it had equitable authority that allowed it to ignore long-standing law on the passage of property interests on the death of the property

holder and to distribute “the disputed property to the House children” . . . [e]ven if title to the Colorado property interest vested in Vera.” COL 29, CP 613.

9. The trial court erred in allocating the amount of the Estate’s fees that Appellants should pay and the amounts to be borne by the individual Respondents and by the Estate, and in ruling that the fees of the Respondent House children be paid by Appellants.

10. The trial court erred in entering the “Findings of Fact and Conclusions of Law related to the initial attorney fee award to the Estate: Nos. 5, 6, 10, 11, 13, 14 (App. B-3 to B-4, CP 856-857); and as related to the amended fee award to the Estate: Nos. 4, 6, 8, 9, 11, 12, 13, 14, 15, 16 (App. C-2 to C-4, CP 953-955).

11. The trial court erred in entering the fee award in favor of the Individual Respondents, including the inadequate, unnumbered findings set forth therein: App. B-7 to B-8, CP 860-62.

## **B. Issues on Appeal.**

1. Does the probate court have the power to ignore or disregard both the controlling law on the descent of property and the vesting of title to real property, and the express language in the deceased’s will, and instead distribute disputed property interests according to its own view of “equity”?

2. Homer Virgil House died intestate in California in 1974 and possessed certain Colorado mineral rights (an interest in Colorado

real property) which, as a matter of law, were divided at his death equally between his six children. Both Colorado and Washington law provide that, as a matter of law, real property vests immediately in the heir or devisee on the date of death of a decedent. Given this legal requirement, did a one-sixth share of Homer Virgil House's Colorado mineral rights devolve to and vest in his son, Homer Ray House, in 1974 on Homer Virgil's intestate death in California; and thence as a matter of law to Homer Ray's and his wife Vera's family trust pursuant to Homer Ray's will on his death in Washington in 2004 where Homer Ray had not made any transfer of those rights between their receipt in 1974 and his death in 2004?

3. Homer Ray House's will states his clear intent that "All property both real and personal which I own at the time of my death is to be transferred to the Trustee of the HOMER R. HOUSE and VERA J. HOUSE FAMILY TRUST . . . to be held, managed and disposed of in accordance with the provisions of said Trust." CP 291. Under both Colorado and Washington law, at the time of his death in 2004, Homer Ray House owned the Colorado mineral rights which had devolved to and vested in him by intestate succession immediately on his father's death in 1974. Did the trial court err by failing to give effect to the express terms of Homer Ray's will and his clearly-stated intent that all of his property go to the family trust, and thus to Vera his wife of 32 years who cared for him in his old age, rather than be

considered a residuary estate interest (or upon their discovery, newly added interests to his estate) that would pass by intestate succession to his four surviving children, who were known to him, named in the will, and were not given any specific bequests?

4. Does the superior court sitting in probate have the authority to disregard the requirements for the succession of property by operation of law in order to do what it considers to be “the right thing” in determining which set of children of the deceased Homer Ray House and Vera House succeed to the mineral rights interests that Homer Ray passed to his wife Vera on his death via the family trust?

5. Homer Ray House’s will contains a limited clause for any residuary estate that passes through intestate succession which is only created if any of his gifts or devises “fail due to circumstances that cannot be reconciled with the terms herein or my express wishes . . .” CP 292. Did the trial court err by distributing property owned by Homer Ray at the time of his death as part of a residuary estate by intestate succession rather than pursuant to the express terms of the will which transferred the property to his Family Trust; or, if they did pass by intestate succession, did it err by failing to distribute the appropriate share to Vera as his surviving spouse?

6. The Estate and the Personal Representative took the position in their very first substantive pleading filed by the Personal Representative in her Petition for Distribution, and throughout the

litigation, that “[t]here is no bright line legal answer to direct distribution of the [Colorado mineral rights].” CP 43. Under these circumstances where there is an admitted bona fide dispute requiring court intervention and no contention of a frivolous action, did the trial court abuse its authority in awarding fees solely against the Appellants and thereby charge only them for the entire cost of litigation necessary to resolve ownership of the disputed asset?

7. The personal representative prosecuted the case on behalf of one set of claimants of which the personal representative is a member in a matter which she argued there is no clear answer as to the rights of the claimants to the property. Did the trial court abuse its discretion in charging all attorney’s fees against Appellants even though they had the superior claim at law?

8. Where the personal representative takes the side of one set of claimants (of which the personal representative is a member) in the admittedly bona fide and necessary dispute over entitlement to the estate asset, and pursues those claims for her personal group of claimants in the name of the Estate rather than allow the sets of claimants to prosecute and defend the claims at their own cost, is it an abuse of discretion to charge any portion of the Estate’s or personal representative’s fees for prosecuting those self-interested claims against the losing party, rather than require the personal representative personally or the Estate to bear those fees?

### III. STATEMENT OF THE CASE<sup>2</sup>

#### A. Substantive History.

##### 1. The interest in the mineral rights at issue in this appeal was reserved by Homer Virgil House in 1924.

On June 4, 1924, Homer Virgil House executed a warranty deed conveying a piece of Colorado property to several other parties but reserving to himself, his heirs and assigns certain mineral rights in the land: “the equal one-sixteenth part of all oil or gas, produced or saved from said premises, except such amount as shall be necessary for use for drilling operations on said land.” CP 285.

At some point over the years, Homer Virgil and/or his family lost track of this real property interest. Homer Virgil died intestate in California on July 1, 1974, without having transferred or conveyed legal title to the oil and gas deposits. CP 370-371; Ex. 41, p. 5; CP 605. Homer Virgil was survived by his six children: Inez Benner, Eunice Belcourt, Helen Gibbs, Earle House, Homer Ray House and Myrna Latschaw. CP 287. Under Colorado’s intestacy laws, each of his six children inherited one-sixth of his interest. However, because the family lost track of the mineral rights interests, none of his children were aware of their inheritance of them when Homer Virgil died.

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<sup>2</sup> The three volumes of transcripts for March 25, 26, and 28, 2013, are paginated consecutively and will be cited as I RP \_\_; II RP \_\_, or III RP \_\_.

## **2. Background of Homer Ray House and the House Family Trust, formed in Washington in 1991.**

This appeal follows one of Homer Virgil's six children – Homer Ray House (“Homer Ray”), born April 21, 1919. CP 56. He had four children during his first marriage: Janet Cornell, Susan Terhaar, Judith Thees and Robert House (“House children”). CP 290. Homer Ray and his first wife divorced and in 1972, when 53, Homer Ray married Vera House, who had two adult children of her own when they married: Linda McMurtray and Larry Pizzalato, the Appellants (“Vera’s children”).<sup>3</sup> *Id.*; CP 578.

In 1991, after nearly twenty years of marriage and when he was 72 years old, Homer Ray and Vera established the Homer R. House and Vera J. House Family Trust (“Family Trust”). CP 295-323; CP 540, 579. Homer Ray and Vera were the trustors and co-trustees, and they initially transferred one hundred dollars plus “all of the tangible personal property of which they are possessed” to the trust. CP 296. The Trust Agreement allowed for the transfer of additional assets “at any time by the Trustors or by any person or persons, by inter vivos or testamentary transfer.” *Id.*

On the death of either trustor, the Trust Agreement called for the division of the Family Trust into a Decedent’s Trust and a Survivor’s Trust. The trustee (the surviving spouse) was to direct into the Decedent’s Trust “an amount equal to the lesser of the

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<sup>3</sup> None of the adult stepchildren were adopted by either stepparent.

Estate Tax Exemption in effect during the year of the death of the Decedent...or one-half (1/2) of the Trust Estate.” CP 301. By default the rest of the trust assets were allocated to the Survivor’s Trust. *Id.*

The surviving spouse, as the remaining trustor, was given a general power of appointment to distribute the principal and income of the Survivor’s Trust, and to revoke or terminate the Survivor’s Trust at any time. CP 300, 303.

**3. After Homer Ray died in 2004, his Will directed all his assets to the Family Trust and the Trust assets were distributed to a Decedent’s Trust and a Survivor’s Trust. In 2005 the Survivor’s Trust was revoked and the Decedent’s Trust was terminated and distributed.**

Homer Ray and Vera’s relationship with the House children soured over the years. *See* CP 579-81; 730 ¶7. In 2000, the House children sued to have Homer Ray declared incompetent in an attempt to take over the trust.<sup>4</sup> They were unsuccessful. The House children tried again, unsuccessfully, to take over the trust in 2004 when, as their father lay dying, they attempted to have Vera declared incompetent and gain control over the trust. CP 275-276 (Verified response and Opposition to Petition for Distribution, pp. 13-14).

Homer Ray died testate on February 14, 2004, without taking any action during his lifetime with respect to the mineral rights interest he acquired from his father by inheritance. CP 56. Article

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<sup>4</sup> *See* Exs. 109-114, docket and pleadings for *In re the Guardianship of Homer Ray House*, Island County Superior Court No. 00-4-00210-8, filed October 20, 2000.

III of his will, governing the disposition of his estate, provided simply that “[a]ll property both real and personal which I own at the time of my death is to be transferred to the Trustee of the HOMER R. HOUSE and VERA J. HOUSE FAMILY TRUST under Agreement dated the 21st day of February, 1991, to be held, managed and disposed of in accordance with the provisions of said Trust.” CP 291, App. D. This pour-over language directed that any – “all” – assets he owned which were not transferred to the Family Trust during his lifetime (such as his interest in the mineral rights) pass upon his death to the Family Trust as beneficiary under his will. Article VI of the will provides that any bequest, gift, or devise which failed to pass according to the terms of Article III “due to circumstances that cannot be reconciled with the terms herein or my express wishes” would alternatively be bequeathed to his residuary estate and pass by intestate succession. CP 292.

Upon Homer Ray’s death, Vera took steps to assess and manage the trust assets. Per the Trust Agreement, the Family Trust was split into the Decedent’s Trust and the Survivor’s Trust. In accord with the Trust Agreement, transferred approximately \$1.3 million in stocks and bonds into the Decedent’s Trust and \$800,000 in real property and \$500,000 in stocks and bonds into the Survivor’s Trust, for a relatively equal split. *See* Exs. 87 (Vera’s

lawyer's March 29, 2005 letter, App. E.), 94 (estate tax return); II RP 135:20-136:2 (Estate attorney's statement of figures); CP 582.<sup>5</sup>

In February 2005, Vera decided to exercise her general power of appointment to revoke the Survivor's Trust and appoint all of the Survivor's Trust assets to herself. Ex. 99; CP 130, 582-83. Eight months later, in October 2005, Vera, as trustee, and each trust beneficiary (all the individual parties herein, the House children and Vera's children), executed the Trust Termination Agreement designed to resolve any dispute over the House children's inheritance from their father, CP 583; Ex 101, just as outlined by Vera's attorney six months earlier in Ex. 87. The Termination Agreement acknowledged the funding of the Decedent's Trust with specific assets that did not include the Colorado property and terminated the trust by the early distribution of all those assets, with \$100,000 to Vera as consideration for the early distribution, and the balance, \$1,224,228, distributed pro rata (\$204,038) to each beneficiary (the six children). Ex. 101; CP 190-93, 608 (FOF 38). In exchange for the early distribution of the assets, the parties agreed to

mutually release and discharge each other from any and all claims, demands, actions or cause of action known or unknown, that any of them may have or hereafter may acquire, arising out of or in any way connected with the Family Trust, the Decedent's Trust, the Estate of Homer R. House, or their respective rights or interests thereunder.

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<sup>5</sup> The federal estate tax exemption in 2004 was \$1.5 million. FOF 25 (CP 606).

Ex. 101; CP 327.

**4. Vera dies and leaves her assets to only her children.**

On June 18, 2007, Vera died testate. CP 179. Her will, admitted to probate on June 27, 2007, devised all of her property (including those assets from the Survivor's Trust which she had distributed to herself in accordance with the Trust Agreement) to her two children, Appellants Larry Pizzalato and Linda McMurtray, in equal shares. CP 161-168. The deadline to contest the will expired without challenge and the probate closed on September 10, 2008.

**5. An extra bank account is found and litigation commences in 2008.**

In 2008, a Morgan Stanley brokerage account was found in the name of the Survivor's Trust, and litigation resulted over the disposition of that account. CP 195-252. In 2005 when she was 85 years old, about a month after revoking the Survivor's Trust, Vera nevertheless opened the brokerage account in the name of the Survivor's Trust with the assets she had previously appointed to herself; upon learning of it, the House children laid claim to it. Ex.86. In that brokerage account litigation, Judge Trickey ultimately held that Vera had validly revoked the trust in February 2005, and therefore the Survivor's Trust assets had passed to her individually such that her estate was then the sole owner of the funds and the House children had no right to it. CP 342-43. The trial court did not

rule on whether the House children had released any claim to the Morgan Stanley account or any other Trust property by signing the Trust Termination Agreement. CP 343.

#### **6. The Mineral Rights Interest Resurfaces.**

In 2011, Donna Keistler, a “consulting landman” in Colorado, was searching for Homer Virgil’s heirs as PDC Energy was operating wells on the property in which Homer Virgil reserved his interest, and there were net profits from those wells. CP 492, I RP 52:1-14, Ex. 29. Approximately \$390,000 has been generated to date, divided between Homer Virgil’s six children, which puts \$65,000 plus any future revenues at stake in this litigation.

In 2011, Homer Virgil’s will was entered into probate in Colorado and Myrna Latschaw, one of Homer Virgil’s daughters and a sister of Homer Ray, was appointed executor of her father’s estate in Colorado. In 2012, Ms. Latschaw released Homer Ray’s one-sixth interest in those funds to Janet Cornell, the personal representative of Homer Ray’s estate. I RP 56:12-57:4. The funds currently sit in a bank account in Austin, Texas, where Ms. Cornell lives. I RP 57:5-6.

#### **B. Procedural History.**

After learning of the mineral rights interest and with no action take by the House children, Vera’s children filed in King County Superior Court to admit a lost will of Homer Ray and also filed a TEDRA petition in January 2012 asserting that the mineral rights

interest passed to them through the Family Trust and through Vera's will. CP 1-7. The court appointed Janet Cornell as Personal Representative, as agreed by the parties. *See* CP 477, 731-32 ¶ 16; Ex. 11. In March 2012, Ms. Cornell commenced probate in Colorado for the Homer Ray estate as to the mineral rights, naming herself as the domiciliary foreign personal representative. CP 62.

On September 12, 2012, Ms. Cornell petitioned the trial court for distribution of the assets of Homer Ray's estate (consisting solely of the mineral rights funds) to the four House children. CP 34-44. Ms. Cornell's argument in the petition for distribution and throughout the proceedings<sup>6</sup> was that the court should exercise its equitable discretion and distribute the funds to the House children in an attempt to equalize the distribution of House assets between all six children – despite the fact nothing in Homer Ray's will or in the Trust Agreement shows such a distribution was the Trustors' intent.

On January 10, 2013, Vera's children filed a motion for summary judgment, asserting they were entitled to the mineral rights interest as a matter of law. CP 471-87. The motion was denied and the case proceeded to trial. CP 518-21.

Trial was over two days, March 25 and 26, 2013, consisting of admitted documents and the brief testimony of the personal representative on the 25<sup>th</sup>. The factual record closed after the filing

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<sup>6</sup> *See, e.g.*, CP 36, 42, 504; 1 RP 70:23 – 70:1.

on the morning of the 26<sup>th</sup> of Vera’s children’s offer of proof of their testimony, with objections reserved to argument, and both the Estate and the House children waiving cross-examination or calling any other witnesses. II RP 119-123:6. After closing arguments, the court gave its oral decision. II RP 202-07. The next hearing two days later on March 28<sup>th</sup> was spent going over the Estate’s and the House children’s objections to the offer of proof testimony and the trial court’s rulings as to what of their offered testimony it “considered in any decision I made,” so that they were not “relevant in that sense”, but nevertheless were not stricken as irrelevant. III RP 217:14 – 24. *See* III RP 214-242:13.<sup>7</sup>

At trial the Estate’s counsel did not take a neutral stance. Instead, in her opening statement Estate Counsel strongly argued the case for the House children, asserting the determination of title

is a question of the Court’s equitable authority, looking to the laws of intestacy, looking to the decedent’s intent to the extent you can determine that intent from his estate planning documents. Where the ultimate disposition of assets remained in any of the trusts ... they would all have been rejoined in a single trust and distributed six ways. Under

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<sup>7</sup> The trial court’s asserted basis for not “considering” the proffered testimony was clearly erroneous. For example, it agreed that it “did not consider” ¶ 45 that Vera had consolidated all of stock and bond assets into a single account on the basis asserted by the House children that the underlying documents to support that statement had been objected to and not admitted. III RP 224:21- 225:5. In fact, the documents in question which included Exs. 87 and 94, *had not* been objected to, but were admitted on March 25. I RP 24-25; CP 596-98 (court’s exhibit list).

intestacy, I think that they would go to his children.<sup>8</sup> Or I think another important factor is to look at the total amount of assets in this estate, which were approximately \$2.7 million when Homer died, and to look where those assets have been distributed.

I RP 71:22-72:9. Estate Counsel recognized there were different ways for the court to make a legal determination (through trust transfer or intestacy), but ultimately persuaded the court to focus on whether the distribution was “equitable,” implicitly defining equity as whether each beneficiary received equal amounts – even though “equal distribution” is not necessarily synonymous with equitable.

As in the briefing leading up to trial, Vera’s children argued that the asset passed to them because title to real property vests in heirs or devisees immediately upon death of the decedent and so ultimately passed to them after Vera’s death. I RP 76:17-77:13. When the court brought up the possibility of the asset remaining in the Family Trust because it was not known and arguably not distributed to either the Survivor’s Trust or Decedent’s Trust, Appellants pointed out that the law still trumped the court’s exercise of equitable authority and the court would have to determine the decedent’s and trustors’ intents to determine distribution. I RP 82:23-88:9.

The trial court did not understand that the amounts were split relatively equally between the Survivor’s and Decedent’s Trusts,

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<sup>8</sup> As explained *infra*, controlling intestacy laws would actually split the property between the parties.

instead thinking the division was in Vera's children's favor since she gave her children real property (the two Bellevue homes) from the Survivor's Trust before revoking the trust and appointing the assets to herself, and therefore decided the House children should hold on to the House-derived real property interests. But the Survivor's Trust was not given the two Bellevue homes *in addition to* one-half of the remaining estate; the Bellevue homes counted toward the Survivor's Trust's one-half interest in the Family Trust estate. This was pointed out to the court. The court was then confused how Vera's children could receive more than the House children, if the trusts were to be split 50-50. Appellants again pointed out that Vera had invoked her right to revoke the Survivor's Trust and pass everything to them, yet they were also entitled to distribution from the Decedent's Trust as two of its six beneficiaries.<sup>9</sup>

The Court: ...[T]hey recognized the family connection that Vera had with those two houses and distributed them to their children before[,] then they took something that was more – closer to a 50-50 distribution...

Mr. McMurtray: No. No, Your Honor.

...

Mr. McMurtray: There was a 50-50 including the real estate. The real estate that went to Vera's children, that was –

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<sup>9</sup> Of course, had Vera died first, it is likely the House children would have received more than 50% of the overall Family Trust estate. Homer Ray would have been entitled to pass his 50% share through the Survivor's Trust to his own children, and each of the four House children would have also been able to claim a one-sixth share of the Decedent's Trust. CP 105-06. Respondents' dissatisfaction with the way events played out is no basis for straying from the terms of the Trust Agreement, to which Vera and Homer Ray both agreed.

it was 50-50 between the decedent's and survivor's trust. 1.3 went into the survivor's. That was the real estate and 500,000 in stock. Into the other side you had 1.3 also, 1.3 all in stock. It was an exact 50-50 division.

The Court: Okay. Just a minute. We had 2.7 million. And Homer's children ended up with 800,000, correct?

...

The Court: ... Then how do you say that's a 50-50 distribution?

...

Mr. McMurtray: Vera did what she was allowed to do with one half of the trust.

The Court: Oh, sure. She was allowed to do that.

Mr. McMurtray: Yeah.

The Court: No questions about that.

Mr. McMurtray: And she revoked – and that's why – the only reason that's an ultimately unequal division is because Vera did what she did was allowed to do and revoked that half.

The Court: Oh, sure. She – she had the power to do that under the trust.

...

The Court: I haven't heard anybody say otherwise.

...

Mr. McMurtray: Now, what we saw is the decedent's trust then got divided among all six children only. And the survivor's trust –

The Court: Right.

Mr. McMurtray: -- went just to Vera's side.

The Court: Right. Right.

Mr. McMurtray: Okay? That's where the unequal division comes in.

The Court: Right. Understood.

II RP 179:24-182:10.

Despite the trial court's assurances, there was an apparent lack of understanding, since it then stated soon thereafter:

I still don't wonder though that Vera in her own mind – I know that there may be other views about this, but I don't one [sic] wonder that – or help but wonder that Vera in her own mind saw that *the [Bellevue] houses* that she had had meaningfulness, in a way, to her children and *should go to her children* and that maybe *the rest* that they accumulated during their many years together *should be equally divided* between one side of the family and the other, *because that's what she did*.

II RP 196:14-22 (emphasis added). Vera's children once again pointed out that the estate was split between the two trusts equally, with the two Bellevue properties accounting for the majority of the Survivor's Trust. II RP 196:23-197:13.

The court ultimately found that “[b]ecause no one knew about the [Colorado mineral] property rights, they were not transferred out of the Estate of Homer V[irgil] House or distributed from the Family Trust to any other trust.” CP 607 (FOF 32); II RP 203:12-13. The court stated “[w]hile Homer Ray] House had some interest in the disputed property following the death of his father, it is difficult to determine clearly when that interest was identified and when it passed to Homer R[ay] House.” CP 612 (COL 20). Then, despite Appellants' repeated explanations that title vests immediately upon death, and that the transfer of Vera's houses into the Survivor's Trust did not alter the equal split between the trusts, and despite a lack of evidence that the Trustors' primary intent was an overall equal distribution to each of the six children, the court found that “the ultimate, I think, bottom line financially is that – is that out of

the \$2.7 million estate, \$800,000 went to the House family... [Homer and Vera] both recognized and both acknowledged the appropriateness of an equal division, the appropriateness of the . . . other spouse's children having a fair distribution of the property." II RP 206:23-207:6.

Because the court found that the interest could no longer pass through the trust (which had terminated in 2005) and the House children had not received as much from the trust as Vera's children, it distributed the interest to the House children because it believed it had "the equitable authority to make a distribution of the asset in dispute in this litigation, regardless of how legal title may have been held." CP 612 (COL 22).

**C. Attorney's Fees Award.**

The trial court initially awarded the Estate and the House children 100% of the fees and costs they incurred in the proceeding. CP 857, 861. It awarded \$125,623.00 in fees and costs to the Estate and \$36,303.52 to the House children. *Id.*

On Vera's children's motion for reconsideration, the Estate acknowledged that the amount of fees awarded to it was "based on hourly rates above the amounts presented in the supporting declarations," conceded a reduction of \$11,636.25 was necessary, CP 895, and the trial court reduced the award accordingly. CP 930. Although the Estate also conceded it would have incurred up to

\$12,500 in fees to deal with probate matters regardless of the litigation, CP 895, and the trial court inexplicably found this warranted an “equitable cap on the total probate and litigation fees to be allocated to the House siblings” of \$7,500 to \$12,500, the court only reduced the fees awarded to the Estate and charged against Vera’s children by an additional \$6,000 for an uncontested probate. CP 930. This resulted in a total net award of fees and costs to the Estate of \$113,986.75, all of which was charged against Appellants, Vera’s children Larry and Linda. CP 930.

Larry and Linda appealed both the substantive decision and the later fee awards, and Linda superseded the judgment so this appeal could proceed. CP 965-66.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

Challenged findings of fact are reviewed for substantial supporting evidence. *Estate of Bussler*, 160 Wn. App. 449, 460, 247 P.3d 821 (2011), citing *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Findings of fact may be affirmed only if they are supported by substantial evidence. *Id.*; accord, *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *United Pacific Ins. Co. v. Lundstrom*, 77 Wn.2d 157, 459 P.2d 930 (1969). “Evidence is substantial if it is sufficient to persuade a rational, fair-minded person of the factual

finding.” *Bussler*, 160 Wn. App. at 460, citing *Wenatchee Sportsmen Ass’n*, 141 Wn.2d at 176.

Where the findings are supported by substantial evidence (or are unchallenged), the appellate court then reviews whether the trial court’s findings of fact support the conclusions of law and the judgment. *See City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991).

The appellate court also reviews discretionary decisions for an abuse of discretion, which applies to attorney fee awards. A trial court abuses its discretion when its decision is manifestly unreasonable; or is exercised or based on untenable grounds or reasons concerning the purposes of the trial court’s discretion; or for no reason, since then there is no exercise of discretion. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993) (reversing for abuse of discretion). *Accord, Coggle v. Snow*, 56 Wn. App. 499, 505-07, 784 P.2d 554 (1990) (vacating discretionary decision). The review of discretionary decisions employs a three-part analytical test:

A court’s decision is manifestly unreasonable if it is **[1]** outside the range of acceptable choices, given the facts and the applicable legal standard; **[2]** it is based on untenable grounds if the factual findings are unsupported by the record; **[or 3]** it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (emphasized numbers added) (reversing because the test was not met). “A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Washington State Physicians Insurance Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (footnotes omitted) (reversing trial court). The result is that the abuse of discretion standard is both substantive and well established: discretionary rulings must be grounded in **both** the correct legal rules **and** the actual facts, or they are an abuse of discretion. The trial court decisions must be founded on principle, reason, and the facts. *See Coggle v. Snow*, 56 Wn. App. at 505-07.

**B. The Trial Court May Not Ignore Controlling Law in Order to Do What It Considers “Equity” and Must Be Reversed Where, As Here, It Ignores Controlling Law.**

It is well settled that trial courts do not have unlimited authority to exercise their powers,<sup>10</sup> including their equitable powers:

[C]ourts of equity may not depart from precedent and assume an unregulated power of administering abstract justice or act

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<sup>10</sup> The trial judge is not an untethered “knight errant” who may do whatever “justice” in a case he or she deems fit, but rather always is tied to the applicable legal rules and facts of the case. *See Coggle v. Snow*, 56 Wn. App. 499, 504-07 (1990), quoting and discussing Justice Benjamin Cardozo’s famous reflection on the nature of judicial discretion in *THE NATURE OF THE JUDICIAL PROCESS* (1921). This makes sense because completely unbridled discretion means, as a practical matter, there are no rules, no accountability, and no predictability for clients and their counsel. This applies equally to equitable situations as to “ordinary” discretionary situations at law.

merely upon their own concept of what is right or wrong in a particular case. Thus, where rights are defined and established by existing legal principles, they may not be changed or unsettled in equity. A court of equity, accordingly, will not give relief in contravention of a statutory requirement or in contravention of a directly applicable rule of law, regardless of its view of the equities. Equity courts cannot disregard, or in effect repeal, statutory and constitutional requirements and provisions.

27A AM. JUR. 2D EQUITY § 83 (2013). *Accord* 30A C.J.S. EQUITY § 128 (2013.) (“While equity has the power to pierce rigid statutory rules to prevent injustice, where substantial justice can be accomplished by following the law, and the parties’ actions are clearly governed by rules of law, equity follows the law.”).<sup>11</sup>

Washington law is consistent and the appellate courts reverse trial courts that stray from these settled principles, illustrated recently in *Noble v. A & R Environmental Services, LLC*, 140 Wn. App. 29, 164 P.3d 519 (2007). In *Noble*, a member of an LLC who alleged he was also a creditor of the LLC filed an appeal of an order distributing the LLC assets equally based on its findings that the parties intended to be equal members and had contributed equal amounts (ignoring the actual value of the contributions), in disregard

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<sup>11</sup> *Accord Thompson v. Chase Manhattan Mortg. Corp.*, 90 S.W.3d 194, 204 (Mo. Ct. App. 2002) (“Equity follows the law” such that “no maxim of equity may be invoked to destroy an existing legal right . . . nor can an equity court create rights that do not exist.”); *Guy Dean's Lake Shore Marina, Inc. v. Ramey*, 518 N.W.2d 129, 133 (Neb. 1994) (“In dealing with legal rights, a court of equity adopts and follows the rules of law in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law.”).

of LLC statutes requiring distribution first to creditors (including members) and then to members in proportion to their actual contributions. Division III *reversed* because the trial court had failed to follow the applicable statutes. The Court agreed with the appellant's claim that the trial court could not disregard statutory directives based on equitable principles: "Courts will not give relief on equitable grounds in contravention of a statutory requirement." *Id.* at 37-38, citing *Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 699, 790 P.2d 149 (1990).

Similarly, in *Town Concrete Pipe of Washington, Inc. v. Redford*, 43 Wn. App. 493, 498, 717 P.2d 1384 (1986), Judge Ringold *reversed* the trial court, explaining that, "While equity will not suffer a wrong without a remedy, equity follows law and cannot provide a remedy where legislation expressly denies it."

Thus, while probate courts are courts "of equity and general jurisdiction," see *In re Estate of Drinkwater*, 22 Wn. App. 26, 29, 587 P.2d 606 (1978), their ability to exercise their equitable powers is limited by controlling law when it dictates a certain result. In probate proceedings, then, the trial court must follow the directions of the will or, in the absence of a valid will, default to the statutory intestate laws. See RCW 11.12.230 ("All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator,

in all matters brought before them.”); RCW 11.04.015 (providing laws of intestate succession); *Griffiths v. State*, 28 Wn.2d 493, 500, 183 P.2d 821 (1947) (“The right of the legislature to regulate, grant or withhold the privilege of receiving property of decedent's estates is plenary.”). Colorado law is consistent.<sup>12</sup> Other appellate courts in the context of estate administration also have rejected equitable arguments based on the principle that controlling law must be followed.<sup>13</sup>

Reversal is required here because the trial court openly refused to follow controlling law in the guise of doing equity, as expressly stated in COL 22, where it stated it had the “equitable authority” to distribute the asset “regardless of how legal title may

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<sup>12</sup> See C.R.S. § 15-11-101(1) (“Any part of a decedent’s estate not effectively disposed of by will or otherwise passes by intestate succession to the decedent’s heirs as prescribed in this code, except as modified by the decedent’s will.”); C.R.S. § 15-10-103 (“Unless displaced by the particular provisions of this [Colorado probate] code, the principles of law and equity supplement its provisions.”); *Lunsford v. Western States Life Ins.*, 908 P.2d 79, 84 (Colo. 1995) (“Where the language of a statute is clear on its face, we must apply it as written. . . . Furthermore, when the legislature speaks with exactitude, we must construe the statute to mean that the inclusion or specification of a particular set of conditions necessarily excludes others.”).

<sup>13</sup> See, e.g., *Huff v. Metz*, 676 So.2d 264, 266 (Miss. 1996) (fact that upholding validity of *inter vivos* deed, creating joint tenancy with right of survivorship in homestead that was also majority of grantor’s property, resulted in unequal division of property between grantor’s children could not be basis for making equitable division of property under grantor’s will; surviving joint tenant’s ownership rights in property could not be disregarded based on equitable considerations); *Williams v. Harrington*, 460 So.2d 533 (Fla. Ct. App. 1984) (surviving spouse’s elective share may not be equitably adjusted to compensate the spouse for income tax paid on distributions of stock and cash that surviving spouse requested and received, even though the estate retained the income; the legislature could have included a provision authorizing that sort of tax adjustment to elective share, but chose not to, though it did make provisions for other types of tax consequences relative to elective shares).

have been held.” CP 612. COL 29 was similarly explicit by stating that, “Even if title to the Colorado property interest vested in Vera, there are substantial equitable considerations that weigh in favor of distributing the disputed property to the House children.” CP 613. These legal declarations are in direct conflict with the authorities cited *supra*, both the settled law around the country and controlling Washington law. The trial court’s March 30 order must be vacated.

**C. Legal Title to The Colorado Real Property Interests Flowed to Appellants, Vera’s Children, as a Matter of Law under Both Colorado and Washington Law.**

**1. Real property interests transfer automatically; therefore, Homer Ray had an interest in the mineral rights as of the date of his father’s death in 1974 when he died intestate and the interest was split between Homer Virgil’s children.**

Because the real property interest at issue is located in Colorado, Colorado law applies to determine how the property succeeds on the death of the holder of the interest. *See 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 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.”). Colorado law provides that title to property vests in heirs or devisees immediately upon the decedent’s death:

Upon a person’s death, that person’s real and personal property devolves to that person's devisees by will or, in the absence of a valid will, to that person’s heirs. § 15–12–101, C.R.S.2007. **The legal title to estate property vests in the heirs or devisees upon the death of the decedent.** *Collins v. Scott*, 943 P.2d 20, 22 (Colo.App.1996).

*Pierce v. Francis*, 194 P.3d 505, 510 (Colo. App. 2008) (emphasis added). *Accord Gray v. Gray*, 100 P.2d 150, 151 (Colo. 1940) (“**It is elementary that title to real property vests in the heirs on the death of an intestate owner**, and the district court was without authority in this proceeding to enter any decree affecting it, since the owner, as such, was not made a party to the action.”) (bold added); *Hanson v. Dilley*, 418 P.2d 38, 41 (Colo. 1966) (“The fact that there was no determination of heirship in estate proceedings does not deprive the plaintiff of the full right of inheritance to which she was entitled under the law.”).<sup>14</sup>

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<sup>14</sup> In Washington, RCW 11.04.250 provides the same. Under that statute, “[w]hen a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein... his or her title shall vest immediately in his or her heirs or devisees...” *Accord, In re Estate of Schmidt*, 134 Wash. 525, 528, 236 P. 274 (1925) (probating a will is not necessary to pass title). *See Estate of Bond v. C.I.R.*, 104 T.C. 652, 665 (U.S. Tax Ct. 1995) (“Whether the will has been probated does not affect whether in fact the title was vested. The fact that the will has not been probated merely means that this final proof is not present until the probate, and other proof might be necessary. This interpretation of the statute [RCW 11.04.250] is in accordance with prior holdings of the Supreme Court of Washington that title to real property vests immediately in the heirs or devisee upon the death of the person from whom they inherit.”).

Contrary to the trial court’s “finding” that “it is difficult to determine clearly ... when [the interest] passed to Homer R[ay]. House,”<sup>15</sup> the applicable law plainly controls and states the mineral interest automatically and immediately vested in Homer Ray upon his father’s death. The court erred in ignoring relevant Colorado law and thereby abused its discretion.

**2. Though Homer Ray and Vera did not explicitly transfer the land interest to the trust, it was transferred to the trust through Homer Ray’s Will when he died in 2004.**

**a. Homer Ray’s Will covered all assets, both known and unknown.**

Under Washington statutes, specifically RCW 11.12.230, the intent of the testator controls and must be followed. The statute provides that “All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them.” Our courts apply this principle. For instance, in *In re Price’s Estate*, 75 Wn.2d 884, 454 P.2d 411 (1969), the court concluded that children of the testator’s deceased son could not inherit their father’s

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<sup>15</sup> Findings or conclusions which are incorrectly designated are treated as what they actually are by the appellate courts. *E.g.*, *State v. Evans*, 80 Wn. App. 806, 820 n. 35, 911 P.2d 1344 (1996); *Valentine v. Dep’t of Licensing*, 77 Wn. App. 838, 846, 894 P.2d 1352 (1995). Similarly, where a “finding” or “conclusion” contains both elements, the portion that is a finding is reviewed as such, and the portion that applies the law is reviewed *de novo*. *Robel v. Roundup Corp.*, 103 Wn. App. 75, 85, 10 P.3d 1104 (2000), *aff’d in part, rev’d in part on other grounds*, 148 Wn.2d 35, 59 P.3d 611 (2002). In this case the date of vesting is determined as a matter of law by the date of death of the person holding the real property interest so the review is *de novo* for whether the correct law was applied, and it was not.

share of the estate because the testator's intent was to leave the estate to *surviving* children. The court held:

in construing a will, [the court] is faced with the situation as it existed when the will was drawn, and must consider all the surrounding circumstances, the objects sought to be obtained, and endeavor to determine what was in the testator's mind when he made the bequests, and the court must not make a new will for him, or warp his language in order to obtain a result which the court might feel to be just.

*In re Estate of Price*, 75 Wn.2d at 886. Similarly, in *In re Williamson's Estate*, 38 Wn.2d 259, 263, 229 P.2d 312 (1951), the court held there is no room for construction if, as here, the will is clear and unambiguous; that meaning must be given full effect.

Homer Ray's Will demonstrates that he intended for all of his assets, even any real property interest of which he was unaware, to go into the Family Trust because he intended all his assets to be provided for Vera should he die before her, as occurred here. Vera testified by declaration in 2001 in the guardianship action that Homer Ray and Vera created the Family Trust for management of all of their assets in one place, with the primary intent that their needs be met during their lifetimes; the purpose was not to ensure an equal distribution of the assets to their children. Ex. 113, p. 4.<sup>16</sup>

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<sup>16</sup> Vera there testified: "The trust is expressly to provide solely for the needs of Homer and myself during our lifetimes. The children are the residual beneficiaries upon our deaths, but are not beneficiaries of the trust during our lifetimes."

Homer Ray listed each of his children in his will. Yet he did not make a specific bequest to any of them. Nor did he specify any bequest to his lineal heirs. This was a likely source of unhappiness among the House children, and perhaps a result of their resentment of his long-term wife, Vera, who was not their mother.

**b. Under both Colorado and Washington law, the real property interest vests on death of the holder of the interest and is not dependent on probate.**

Respondents' primary argument is that Homer Ray did not transfer and/or could not transfer the mineral interest into the Family Trust because it was unknown to him. However, as shown *supra*, Homer Ray's Will specified that **all** of his property was transferred into the Trust upon his death. His Will necessarily reflected his intent: everything he then had went into the Family Trust. As demonstrated *supra*, under Colorado law, Homer Ray's one-sixth interest in the mineral rights property vested immediately upon his father's death in 1974 such that it necessarily was included as his property which transferred into the Family Trust at his death.

Respondents argued below that the title could not pass until Homer Virgil's probate was opened in Colorado in 2011, at which time the Family Trust no longer existed. But since Colorado law provides that the property right vested immediately in Homer Ray on his father Homer Virgil's death regardless of the status of probate proceedings; thus, it follows that the property vested in the Trust

under the terms of the Will immediately upon Homer Ray's testate death in 2004 regardless of when his or his father's estate was probated. Because Washington law essentially mirrors Colorado's on the immediate vesting principle, the result would be the same if Washington law was applicable.

**3. Homer Ray's real property interest in the Colorado mineral rights defaulted to the Survivor's Trust, all of which was distributed to Vera when she revoked the Survivor's Trust.**

After their transfer into the Family Trust, the terms of the Trust Agreement controlled the mineral rights disposition. As neither Homer Ray nor Vera were aware of the asset, they did not formally transfer it out of the Family Trust during their lives. However, the Trust Agreement dictate the result because of its default provision.

According to the Trust Agreement, upon the death of one of the trustors, the Family Trust split into a Decedent's Trust and a Survivor's Trust. Vera, as trustee, was to fund the Decedent's Trust with the lesser of one-half of the Family Trust assets or the estate tax exemption. CP 301. Once Vera did this (which she did by distributing her Bellevue homes and approximately 30% of the brokerage accounts to the Survivor's Trust while placing the remaining 70% of the brokerage accounts to the Decedent's Trust), she had no need to take any further action with respect to any remaining assets, as the default provision controlled: "All of the rest

and residue of the assets of the Trust Estate shall be allocated to the SURVIVOR'S TRUST." CP 301.

After Vera, as trustee, exercised her general power of appointment and revoked the Survivor's Trust on February 28, 2005, all the assets in that trust, including the mineral interest rights, passed to Vera personally. CP 130. As a matter of law, Vera then held title to that real property interest in mineral rights, even though there was no documentary evidence of the interest passing to her.

**4. The Colorado mineral rights passed to Vera's children upon Vera's death in 2007 through her will.**

Under Vera's will, all her property was left in equal amounts to her two children. CP 161-68. Because the devise passed immediately upon death, Larry and Linda became owners of the property immediately upon their mother's death. There is no dispute that Vera's will was enforceable, and her estate was properly probated and closed in 2008.

**5. In the alternative, if the mineral rights somehow failed to pass to the Survivor's Trust and then to Vera personally, they either (1) remained in the Family Trust to pass according to the Trust Agreement; or (2) they passed through intestate succession, making the trial court's resort to equity improper.**

**a. If the mineral rights were transferred into the trust, but somehow failed to be distributed to any party before the trust's termination, they remain in the Family Trust.**

If the mineral rights were not distributed to the Decedent's Trust or Survivor's Trust, then they remained in the Family Trust. Should this Court make this determination, the trial court's resort to "equity" was still improper and it should then direct the trial court to follow the Trust Agreement which requires Family Trust property be split between the Decedent's Trust and the Survivor's Trust equally. Under this analysis, half of the interest would go through the Survivor's Trust to Vera, then to her children, Appellants. The other half would be split pro rata between the six House children and Vera's children, according to the Decedent's Trust Termination Agreement.

The "release" in the Trust Termination Agreement does not prevent the Decedent's Trust beneficiaries from claiming their share of the mineral rights. The Agreement provides that "[u]pon 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 327. By seeking a share of the remainder of

the Trust estate, Appellants are merely enforcing the Agreement within the terms of the “release.”

**6. If the interest was never validly transferred into the Family Trust, Homer Ray’s will requires it pass to his residuary beneficiaries through intestate succession.**

If the mineral rights interest could not pass into the Trust estate through Homer Ray’s will, the will and settled probate law would still control because it is clear that the mineral interest was Homer Ray’s property at his death and the will directed that any failed devises or bequests pass to his residuary through intestate succession. CP 292. Again, because this is a real property interest, Colorado’s laws on intestate succession control. Because a devise vests immediately upon death, the distribution must be considered as of the date of Homer Ray’s death in 2004, when Vera was still alive and was his surviving spouse. Colorado’s laws in effect in 2004<sup>17</sup> provided that “If one or more of the decedent’s surviving descendants are not descendants of the decedent’s surviving spouse, and all of such surviving descendants who are children of the decedent are adults, then the surviving spouse receives the first one hundred thousand dollars, plus one-half of any balance of the intestate estate.” C.R.S. § 15-11-102(4) (1995).

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<sup>17</sup> Colorado’s intestate succession statute was revised, effective July 1, 2010, to provide the surviving spouse in the same situation with the first \$150,000 plus one-half of the balance of the intestate estate. C.R.S. § 15-11-102(4).

Thus, the value of the mineral rights interest (currently about \$65,000) and any future profits up to \$100,000 would go to Vera's estate, and then to her children, Appellants. After that, the House children would collectively receive half of any profits coming in, with the other half to Vera's children.

**D. Because Statutes and Case Law Determine Passage of Interest in Land, The Trial Court's Equitable Jurisdiction Should Not Have Been Invoked or Exercised.**

The trial court accepted the Estate's and the House childrens' joint argument that the overall trust distribution was unfair because it was not "equal" as between all six children and therefore applied "equity". But the trial court simply did not comprehend – or refused to accept – that Vera had the legal right to put the assets into the Survivor's Trust, revoke that trust, and pass those assets to her children, and that Homer Ray's will and the Family Trust show he knew she had this right when he sent "all" his property to the Family Trust and executed both documents at the same time as part of his overall estate plan. The Family Trust did not require "equal" distribution. Vera and Homer Ray must have contemplated that whomever was the surviving spouse could revoke the trust and give the Survivor's Trust assets to the surviving spouse's children since the Trust Agreement expressly reserved that power to the surviving spouse.

The Trust Agreement explicitly called for an unequal distribution between the Survivor's the Decedent's Trusts if the trust estate exceeded the estate tax exemption. If Homer Ray and Vera had intended a precisely equal distribution of their overall assets among the six children, they easily could have provided for it.

Whatever may have been the perceived "equities" or "injustices" as between the two sets of step-children the trial court felt it should remedy, as set out in Section B, *supra*, the court simply had no authority to ignore applicable and controlling law and testator documents to achieve a result it thought was "right." That is, indeed, the definition of a disregard for the law that is an abuse of discretion.

The trial court's abuse of its discretion to reach a personally desired result is also apparent in specific aspects of its findings and conclusions and earlier rulings. For example, there was no evidence admitted that would support the merits FOF 19 and 27 related to the allegedly non-existent inventory of assets and the "trustee's books of accounts". No one testified on those matters one way or another; the findings are not supported by the evidence. Similarly, the trial court erred in FOF 26 that there was "no document from Vera House" identifying the division of Family Trust assets, when the division she made is plainly stated in her lawyer's – her agent's – letter of March 29, 2005, in Ex. 87, App. E hereto, particularly when combined with the Termination Agreement executed by all parties, CP 325-332.

Finally, the abuse of discretion is seen in the trial court's after-the-fact "un-consideration" of Vera's children's offer of proof of what they would testify to, made the morning of March 28 after the trial court had already rendered its decision, discussed *supra* in Section II.B and footnote 7. The wholesale, after-the-fact tailoring of what evidence is deemed to have been considered, days after the decision is made, is novel to say the least. As explained *supra*, the basis for "not considering" ¶ 45 (that Vera consolidated the bookerage accounts) was because the House children said the supporting documents – among others, Ex. 87, her lawyer's March 29, 2005 letter – had been objected to and were not admitted. III RP 224:21-25. But that was flatly incorrect; it was admitted on the first day of trial, I RP 24-25; CP 598, and states on page two Vera had "consolidated" her accounts. *See* App. D-2 herein. Similarly, ¶¶ 21-31, 33, 35-39, 57, 59, and 60 were "not considered" largely because they supposedly did not play a role in the court's ultimate decision – which is inexplicable since they go to the closeness of Homer Ray with his children – or lack thereof – and the ultimate decision was based on "equities" and the supposed need to maintain "family connections." *See* II RP 205:18-25 (oral decision discussing same).

The "un-considered" evidence went directly to the family relationships, was relevant, and should have been considered.

**E. The Attorney Fee Award Must Be Vacated Because the Trial Court Erred in Awarding Attorney’s Fees and Costs.**

- 1. The fee award must be vacated because the award rewarded the personal representative for incorrectly taking sides between potential beneficiaries in the dispute and because the award apparently included the unstated basis of punishing Appellants, Vera’s children, which is not a basis for awarding fees under the statute.**

Throughout the litigation, the personal representative caused the Estate to file pleadings, motions, and briefs asserting that the trial court should distribute the Colorado mineral rights only to the House children, even while admitting that there was “no bright line legal answer to direct distribution of the [Colorado mineral rights].” CP 43. Nevertheless, after ruling for the Estate and the House children and against Vera House’s children on the merits, the trial court granted the Estate’s and the House children’s motions awarding them **100%** of the fees and costs they incurred in the **entire** proceeding. CP 857, 861, App. B. The court thus awarded \$125,623.00 in fees and costs to the Estate and \$36,303.52 to the House children. *Id.*

On Vera’s children’s motion for reconsideration, the Estate acknowledged that the amount of fees awarded to it was “based on hourly rates above the amounts presented in the supporting declarations,” conceding that a reduction of \$11,636.25 was necessary. CP 895. This makes plain the trial court had not engaged

in a careful review of the fee applications when making its ruling, but simply gave the Estate what it requested. But, based on the Estate's change of position, the trial court then reduced the award accordingly, CP 930, though still granting the Estate all it requested.

The Estate also conceded that it would have incurred up to \$12,500 in fees to deal with probate matters regardless of the litigation. CP 895. But although the trial court found that this warranted an "equitable cap on the total probate and litigation fees to be allocated to the House siblings" of \$7,500 to \$12,500, the trial court nevertheless **only** reduced the fees awarded to the Estate by just an additional \$6,000, without stating any rationale for the amount of the reduction. CP 930, App. C. The only fair implication for awarding fees **beyond** what the Estate requested is that the trial court was punishing Vera's children for some unstated – and therefore an extra-legal – reason. The dual reductions resulted in a total net award of fees and costs to the Estate from Vera's children of \$113,986.75. CP 930.

Nothing in the statute permitting an award of fees authorizes a trial court to punish claimant who proceed in good faith on their claim, particularly where the personal representative and the Estate have formally taken the position that "there is no bright line legal answer" that directs distribution of the disputed property, making litigation necessary in the absence of agreement on whether and how

to divide it. Since there is no positive basis for such an award under the statute, it must be deemed unauthorized by the statute, and thus unlawful. Such an award becomes even more unlawful in the context here where, in fact, there ***is a bright-line legal answer to distribution of the disputed property*** which vested in successive recipients as a matter of law, but this bright-line answer to the descent of the property following Homer Virgil's, and then Homer Ray's deaths, was ignored by the trial court. Based on these circumstances and under the legal principles detailed in section 3 *infra*, the fee award must be vacated as not authorized by statute.

**2. The awards of fees and costs should be vacated, and the issue should be remanded because the trial court erred in its distribution of assets.**

First and foremost, because the trial court erred in its distribution of assets and the judgment must be reversed, the court's award of fees and costs to the Estate and the House children should also be vacated and the issue of fees and costs remanded to the trial court for determination in light of the changed result and this Court's remand instructions. Appellants contend all parties should bear their own fees for the entire litigation, and the PR should bear the costs incurred by the Estate in prosecuting the House children's claim, as discussed *infra*.

**3. Whether or not the judgment is affirmed, the trial court erred in charging the Estate's and the House children's attorney's fees and costs against Vera's children.**

TEDRA's general provision for fees and costs is not a "prevailing party" statute. RCW 11.96A.150; *see In re Estate of Burmeister*, 70 Wn. App. 532, 540, 854 P.2d 653 (1993) (discussing predecessor statute), *rev'd on other grounds*, 124 Wn.2d 282, 877 P.2d 195 (1994). Instead, the determination of whether any party should be awarded or required to pay fees and costs is governed by principles of justice and equity. *Id.* Where a dispute "[1] involves all the beneficiaries, [2] affects the rights of all beneficiaries, and [3] an award against the estate would not harm any uninvolved beneficiaries," absent a finding of bad faith, the trial court abuses its discretion in favoring one party with an award of fees and costs. *In re Estate of Black*, 153 Wn.2d 152, 174, 102 P.3d 796 (2004).<sup>18</sup>

To sustain an award fees and costs under the statute on the basis that one party is the "prevailing party," absent bad faith, is inequitable and "would be to do a great wrong and tend to discourage the assertion of legitimate claims." *In re Estate of Kessler*, 95 Wn. App. 358, 370, 977 P.2d 591 (1999). In interpreting

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<sup>18</sup> The Supreme Court recently commented that "Any court on appeal may, in its discretion, order reasonable attorney fees to be awarded to any party in such amount and in such manner as the court determines to be equitable. RCW 11.96A.150." *In re Estate of Becker*, 177 Wn.2d 242, 249, 298 P.3d 720 (2013). Appellants are not requesting fees on appeal, but leave it to this Court to determine if any fee award to them under *Becker* is appropriate for the appeal considering the mistakes made by the trial court at the behest of the Estate and the House children, *e.g.*, I RP 101:13-19.

and applying RCW 11.96A.150 and its predecessor, our appellate courts have refused to award fees and costs to the “prevailing party” in a bona fide dispute. *See, e.g., In re Estate of Burks*, 124 Wn. App. 327, 333, 100 P.3d 328 (2004) (declining to award fees and costs on appeal where the dispute involved “difficult questions”); *Mearns v. Scharbach*, 103 Wn. App. 498, 514-15, 12 P.3d 1048 (2000) (same).

For its part, an estate, through the personal representative, stands in a fiduciary relationship to those beneficially interested in the estate, and the fiduciary duties of the attorney employed by the personal representative run not only to the personal representative but also to the heirs. *In re Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985). Critically, the personal representative is not supposed to “take sides” in a dispute between potential distributees as she did here, for in doing so “[s]he might resist the rightful claimant at the expense of the estate, to which [s]he might ultimately be found entitled.” *In re Cannon’s Estate*, 18 Wash. 101, 105, 50 P. 1021 (1897). In such a dispute, the parties’ claims “do not impair the estate, but relate only as to who is entitled to the same.” *Id.*

The personal representative thus is bound to represent the estate’s interests impartially and, unlike what occurred in this case below, “cannot be heard to urge the claims of one against another or others.” *Thompson v. Weimer*, 1 Wn.2d 145, 150, 95 P.2d 772 (1939). Unless presented with a claim that would materially

diminish the assets of the estate available for distribution, the personal representative's proper role "extends no further than to see that all available evidence is fully and truthfully presented to the superior court at the hearing on the petition for distribution of the estate," *In re Maher's Estate*, 195 Wash. 126, 131, 79 P.2d 984 (1938),<sup>19</sup> precisely what was not done by the personal representative here. Generally, an award of fees and costs to an estate is warranted only where the asserted claim would materially diminish the estate's assets available for distribution, *e.g.*, *In re Cannon's Estate*, 18 Wash. at 105-06; or where the personal representative's standing or authority is directly challenged, *e.g.*, *In re Estate of Kerr*, 134 Wn.2d 328, 344, 949 P.2d 810 (1998), neither of which applies here.

Given an estate's proper role as impartial caretaker of the estate, where the parties have made competing claims to assets in an estate based on reasonable and good faith arguments in support of their respective positions, and all potential beneficiaries were involved, in such circumstances the trial court does not abuse its discretion in charging all parties' fees and costs against the estate. See *Estate of Black*, 153 Wn.2d at 174; see also *In re Estate of Watlack*, 88 Wn. App. 603, 612-13, 945 P.2d 1154 (1997); *Burmeister*, 70 Wn. App. at 539-40. This recognizes the substantial

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<sup>19</sup> Consistent with this rule, a personal representative has no right to appeal from a decree of distribution except in connection with matters of direct concern to the estate or the personal representative's own liability. *Thompson*, 1 Wn.2d at 150; *In re Maher's Estate*, 195 Wash. at 131.

benefit to an estate from establishing which alleged beneficiaries are entitled to the disputed assets. *Estate of Black*, 153 Wn.2d at 174.

The dispute here involved all the potential distributees. There is no suggestion that Vera's children acted in bad faith. Indeed, the Estate admitted in its initial pleading that there was "no bright line legal answer to direct distribution of the [Colorado mineral rights]." CP 43. Furthermore, the Estate benefited from the litigation because it is establishing the distribution of mineral rights; the Estate acknowledged, "There was a benefit to the Estate to have this dispute resolved[.]" CP 887. Nevertheless, the Estate, appearing through a personal representative, *who was herself interested in the distribution of the disputed asset*, was **not** impartial in the dispute. Instead, the Estate "took sides" in the dispute and aggressively asserted itself in support of the House children's claim, conducting and directing the litigation to such an extent that the House children typically just joined in the Estate's pleadings.<sup>20</sup>

In these circumstances, where the self-interested personal representative caused the Estate to dramatically exceed its proper role and increase the cost of litigation by engaging one of the most expensive firms in Seattle, where there was an admitted bona fide dispute, where there is no suggestion of bad faith by Vera's children,

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<sup>20</sup> As confirmation of the Estate's desire to prosecute the case, it alone opposed Vera's children's motion to bifurcate the TEDRA from the probate action (CP 535-37) which was brought to keep the Estate from unnecessary expense, *see* CP 514-17 (motion) and 551-53 (reply), and which was denied. CP 554-55.

and where the litigation benefited the Estate, it was inequitable and an abuse of discretion to impose upon Vera's children virtually the entire cost of resolving the dispute. It was inequitable and an abuse of discretion to award the Estate any of the attorney's fees and costs it incurred in the litigation, much less to award the Estate 100% of its fees and costs, exclusive of \$6,000 for probate administration.

In addition, it was inequitable and an abuse of discretion to order Vera's children to pay 100% of the House children's fees and costs. Moreover, it is reversible error to fail to make sufficient findings and conclusion on a fee award to permit appellate review, *Mahler v. Szucs*, 135 Wn.2d 398, 434–35, 957 P.2d 632, 966 P.2d 305 (1998), as is the case here. *See* CP 861, the trial court's handwritten conclusory statement which lacks the required specificity to be considered adequate findings under *Mahler*. This alone requires vacation of the fee award in favor of the House children.

Both awards of fees and costs should be vacated and the trial court instructed that the fees for prosecuting the assertion of their claims be borne by the claimants, and that the House children and/or the personal representative bear the Estate's fees incurred in pressing the House children's position.

## V. CONCLUSION

Appellants Linda McMurtray and Larry Pizzalato respectfully ask this Court to vacate the fee award and orders and judgment holding that they have no interest in the Colorado mineral rights Homer Ray House received from his father in 1974, and which Homer Ray bequeathed in his Will to his beloved wife of 32 years on his death in 2004 via the Family Trust they jointly established with great care and forethought. Because the undisputed facts and applicable law mean the mineral rights have succeeded to Appellants, they respectfully request the trial court be directed to enter an order to that effect on remand, and that no fees be assessed against Appellants on behalf of the Estate or anyone else for appeal or the trial.

Alternatively, if the mineral rights are deemed to have only partly succeeded to Appellants by intestate succession, they request the matter be remanded for a re-determination of rights to the property under the law set out by this Court, with all parties to bear their own fees in the trial court.

DATED this 28<sup>th</sup> day of October, 2013.

CARNEY BADLEY SPELLMAN, P.S.

By:   
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Gregory M. Miller, WSBA No. 14459  
Jacqueline K. Unger, WSBA No. 44190  
Attorneys for Appellants

WASHINGTON STATE COURT OF APPEALS, DIVISION I

Estate of:  
HOME R. HOUSE (Deceased),  
Respondent.  
LINDA MCMURTRAY and  
LARRY PIZZALATO,  
Appellants,  
v.  
JANET CORNELL, ROBERT  
HOUSE, SUSAN TERHAAR and  
JUDITH THEES,  
Respondents.

NO. 70248-3-I

CERTIFICATE OF SERVICE

I declare under penalty of perjury that I caused copies of Appellants' *OPENING BRIEF, APPENDICES A-E*, and this Certificate of Service to be served upon counsel of record on October 28, 2013, as follows:

Deborah J. Phillips, Esq. 1201 - 3rd Avenue, Ste. 4900 Seattle, WA 98101-3099 Phone: 206-359-8000 Fax: 206-359-9000 Email: <a href="mailto:djphillips@perkinscoie.com">djphillips@perkinscoie.com</a> <i>[counsel for PR]</i>	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> email <input type="checkbox"/> Other
Karen R. Bertram 705 2nd Avenue, Ste. 800 Seattle, WA 98104 Phone: (206) 382-4414 Fax: (206) 382-4412 Email: <a href="mailto:kbertram@khbblaw.com">kbertram@khbblaw.com</a> <i>[Counsel for beneficiaries - Cornell, R. House, Terhaar, Thees]</i>	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> email <input type="checkbox"/> Other

DATED this 28 day of October, 2013.

  
Catherine A. Norgaard, Legal Assistant

**APPENDICES**

**APPENDIX A:** Findings of Fact, Conclusions of Law  
(March 28, 2013)(CP 604-616)..... A-1 to A-13

**APPENDIX B:** Findings of Fact, Conclusions of Law; Order  
Granting Motion for Award of Attorneys’ Fees and Costs  
(May 30, 2013)(CP 854-861).....B-1 to B-8

**APPENDIX C:** Amended Findings of Fact, Conclusions of Law  
(June 28, 2013); Judgment (July 19, 2013); Judgment Summary  
(July 19, 2013)(CP 952-961) .....C-1 to C-10

**APPENDIX D:** Last Will and Testament of Homer R. House  
(February 21, 1991)(CP 290-293)..... D-1 to D-4

**APPENDIX E:** Letter from Romney Brain to Trust Beneficiaries dated  
March 29, 2005 (Trial Ex. 87) .....E-1 to E-3

# APPENDIX A

**FILED**  
KING COUNTY WASHINGTON

MAR 28 2013

SUPERIOR COURT, CLERK  
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THE HONORABLE RICHARD EADIE  
Hearing Date: March 25, 2013  
Hearing Time: 9:00 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

In re the Estate of:

HOMER R. HOUSE,

Deceased.

No. 11-4-07189-5 SEA

~~PROPOSED~~ FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This matter came before the Court on March 25, 2013. The Court, having considered the evidence, the records and files herein and the presentation of counsel, hereby enters the following FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER:

**FINDINGS OF FACT**

**Homer R. House Will and Probate**

1. Homer R. House died February 14, 2004.
2. Homer R. House was survived by his wife, Vera House, and his children, Janet Cornell, Robert House, Susan Terhaar and Judy Thees. Vera House's two children, Larry Pizzalato and Linda McMurtray were never adopted by Homer H. House.

~~PROPOSED~~ FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 1

87055-0001/LEGAL25987880.1

Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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3. Homer R. House executed a Will dated February 21, 1991.

4. The Will named Vera House as Personal Representative but she did not file the original will or open a probate after the death of Homer R. House.

5. In 2012, no original of the Will could be located, and the Court determined that a copy of the Will was properly admitted as a lost Will.

6. The last Will of Homer R. House was admitted to probate in the above-entitled cause number on January 30, 2012.

7. Janet Cornell was named as the successor Personal Representative in the Will, and was appointed to serve on January 30, 2012.

8. On or about March 13, 2012, Janet Cornell opened an ancillary probate in Colorado following her appointment in the state of Washington.

**Homer V. House Probate**

9. Homer V. House was the father of Homer R. House.

10. Homer V. House died in 1974.

11. Probate of the Homer V. House Estate was opened in Colorado on or about November 23, 2011 after the Homer V. House surviving family members learned of the interest in the Colorado property that is the subject of this litigation.

12. Homer V. House owned property in Colorado that he sold in 1924, but in which he retained an interest in oil and gas rights as set forth in the title document for that property.

13. Myrna Latschaw, one of Homer V. House's children and a sister of Homer R. House, was appointed to serve as Personal Representative of her father's Estate.

14. The only distributions from the Homer V. House Estate to the Homer R. House Estate have been a 1/6 share of net income from the retained oil and gas rights.

**[PROPOSED] FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 2**

87055-0001/LEGAL25987880.1

**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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**Vera House**

15. Vera House died June 18, 2007.

16. Vera House executed a will on February 28, 2005 under which her two children were equal beneficiaries of all her estate.

17. Linda McMurtray and Larry Pizzalato, her children, were appointed as co-personal representatives of her Estate in King County Cause No. 07-4-03466-5.

18. That Estate was closed by order of the court on September 10, 2008.

19. There is no inventory of assets or information as to the probate or non-probate assets in the Vera House Estate.

**Trusts under Homer R. House Estate Planning Documents**

20. The February 19, 1991 Trust Agreement executed by Homer R. House and Vera House created a Family Trust.

21. The Form 706 estate tax return identified the known assets in the Homer R. House estate as of February 24, 2004.

22. The 1991 Trust Agreement provided that the surviving spouse, as Trustee, shall divide the Trust into a Survivor's Trust and a Decedent's Trust.

23. Vera House had the discretion under the Trust Agreement, Article X, Section L, to allocate assets between the Survivor's Trust and the Decedent's Trust.

24. The Decedent's Trust was to include an amount equal to the lesser of the Estate Tax Exemption in effect during the year Homer R. House died or one-half of the Trust Estate.

25. The estate tax exemption amount in 2004 was \$1,500,000.

26. 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.

**[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW - 3**

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**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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27. There is no document identified as the "trustee's books of account", as provided for in the Trust Agreement, that identifies the allocation of assets as between the Survivor's Trust and the Decedent's Trust.

28. There are documents, including the Form 706 Estate Tax Return, that identify two parcels of real property in Bellevue, Washington that were owned by the Family Trust, quit claimed from that trust to the Survivor's Trust, and then quit claimed by Vera House, as trustee of the Survivor's Trust to her son and to her daughter.

29. The Form 706 Estate Tax Return lists on Schedules B, C, F, and I, other assets of Homer R. House as of the date of his death. The Colorado property or any interest in that property is not listed on the Form 706.

30. There are no documents conveying an interest in that property or the mineral rights in that property from Homer R. House to the Family Trust prior to his death.

31. Neither Homer R. House or Vera House had any knowledge of the Colorado property rights.

32. Because no one knew about the property rights, they were not transferred out of the Estate of Homer V. House or distributed from the Family Trust to any other trust.

**Termination of Survivor's Trust**

33. The 1991 Trust Agreement gave Vera House a general power of appointment over assets in the Survivor's Trust.

34. On November 17, 2004, Vera House executed quit claim deeds conveying two houses in Bellevue, Washington from herself, as sole trustee of the House Family Trust, to herself, as sole trustee of the Vera J. House Survivor's Trust. On that same date, one of the houses was then conveyed by Vera House, as sole trustee of the Vera J. House Survivor's

~~PROPOSED~~ FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 4

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Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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Trust to Larry J. Pizzalato, Trustee of his own living trust, and the other house was conveyed to Linda McMurtray.

35. On February 28, 2005, Vera House executed a General Power of Appointment and Revocation of Trust, appointing all the assets in the Survivor's Trust to herself.

36. There is no evidence that Vera House executed any deeds or documents transferring the Colorado property to or from the House Family Trust, to the Survivor's Trust, or from the Survivor's Trust to herself.

**Termination of Decedent's Trust**

37. In or around October 2005, Vera House, Larry Pizzalato, Linda McMurtray, Janet Cornell, Robert House, Susan Terhaar and Judy Thees signed a Trust Termination Agreement. The assets distributed under that Trust Termination Agreement consisted of assets in an account with Morgan Stanley.

38. The value of the assets distributed under the Trust Termination agreement was \$1,324,228 (\$100,000 to Vera House and \$204,038 to each of Vera House's two children and Homer R. House's four children.).

**Trust Termination Agreement**

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

40. The parties to this litigation, in their individual capacities, were all parties in King County Cause No. 07-2-37835-9. Pizzalato and McMurtray contended in that

~~PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW - 5

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Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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litigation that the Trust Termination Agreement precluded the House children from making claims to certain assets. In their pleadings, they contended, "This release language unequivocally released and barred any claim asserted by Homers' Children here, which arises solely of the Family Trust comprised of the assets in both the Survivor's Trust and Decedent's Trust. . . . [T]his release by Homer's Children relating to the Family Trust necessarily included a release of any claims relating to the Survivor's Trust. Homer's Children's claims should therefore also be dismissed on this independent ground. . . ."

41. In other pleadings in that litigation, Pizzalato and McMurtry contended that the Trust Termination Agreement released "any and all claims, demands, actions or cause of action, known or unknown, that any of them have or hereafter may acquire arising out of or in any way connected with the Family Trust. . . . 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." They contended that the release applied to the Survivor's Trust as well.

**Distribution of Assets**

42. From the information presented, the following individuals received approximately the amounts set forth below following the death of Homer R. House and Vera J. House:

- Larry Pizzalato: Real property located at 9822 NE 18th St., Bellevue WA, appraised for \$420,000 as of March 17, 2004; \$204,038 from Morgan Stanley under 2005 Trust Termination Agreement; \$389,543 from Morgan Stanley account in 2008
- Linda McMurtray: Real property located at 9852 Bellevue, WA, appraised for \$375,000 as of March 17, 2004; \$204,038 from Morgan Stanley under 2005 Trust Termination Agreement;

**[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW - 6**

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**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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\$389,543 from Morgan Stanley account in 2008

Janet Cornell: \$204,038 from Morgan Stanley under 2005 Trust Termination Agreement

Robert House: \$204,038 from Morgan Stanley under 2005 Trust Termination Agreement

Susan Terhaar:: \$204,038 from Morgan Stanley under 2005 Trust Termination Agreement

Judy Thees:: \$204,038 from Morgan Stanley under 2005 Trust Termination Agreement

Vera House: Real property located at 9822 NE 18th St., Bellevue WA, appraised for \$420,000 as of March 17, 2004; Real property located at 9852 Bellevue, WA, appraised for \$375,000 as of March 17, 2004; \$100,000 from Morgan Stanley under 2005 Trust Termination Agreement; funds distributed to her children in 2008 following her death.

*received prior to death, real property transferred as noted above*

*RE*  
*of*  
*AKS*  
*BM*

**CONCLUSIONS OF LAW**

1. This Court has jurisdiction pursuant to RCW 11.96A as Homer R. House died in King County, Washington.
2. Venue is proper in King County pursuant to RCW 11.96A.050.
3. The Colorado property in dispute in this matter was unknown to Homer R. House and Vera J. House during their lifetimes.
4. Title to the Colorado property was not transferred by deed during the lifetime of Homer R. House or Vera J. House.
5. Title to the Colorado property was not transferred by deed by Vera House, as the trustee of the Family Trust, the Decedent's Trust or the Survivor's Trust following the death of Homer R. House.

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW - 7

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**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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6. The Colorado property in dispute in this matter was unknown to the parties when they executed the 2005 Trust Termination Agreement.

7. The Colorado property was unknown to the parties until 2011.

8. RCW 11.02.005(6) provides that "heirs" are those who take by intestate succession.

9. McMurtray and Pizzalato are not heirs of Homer V. House as provided under RCW 11.04.015.

10. McMurtray and Pizzalato are not " devisees " as they were not named beneficiaries under the Will of Homer R. House.

11. In the 2005 Trust Termination Agreement, Vera House, Linda McMurtray and Larry Pizzalato waived any claim to assets in the Estate of Homer R. House and to any assets in any trust created under his 1991 Trust Agreement. The Trust Termination Agreement has very broad terms, and there are good arguments that it would bar any claim of Vera House, Linda McMurtray and/or Larry Pizzalato <sup>and the House children</sup> to the property in dispute. (RE)

12. Vera House would have been an heir of Homer R. House as provided under RCW 11.04.105, if Homer R. House had died intestate, but he did not.

13. Vera House <sup>and the House children were</sup> was not a " devisee " as <sup>they were</sup> she was not named as a beneficiary <sup>as</sup> under (RE) the Will of Homer R. House.

14. Homer R. House's Will provided that any property, both real and personal, that he owned at the time of his death passed to the House Family Trust created in 1991.

15. In the 2005 Trust Termination Agreement Vera House waived any claim to assets in the Estate of Homer R. House and to any assets in any trust created under his 1991 Trust Agreement.

**[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW - 8**

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Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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16. Homer R. House's children would have been heirs as provided under RCW 11.04.105, if Homer R. House had died intestate, but he did not.

17. In the 2005 Trust Termination Agreement the four House children waived any claim to assets in the Estate of Homer R. House and to any assets in any trust created under his 1991 Trust Agreement.

18. RCW 11.24.250 provides that title vests in "heirs or devisees", adversely to others except the personal representative.

19. Title to the Colorado property vests in Janet Cornell, as the personal representative of the Estate of Homer R. House.

20. While Homer R. House had some interest in the disputed property following the death of his father, it is difficult to determine clearly when that interest was identified and when it passed to Homer R. House.

21. The property in dispute remained under the management and control of others after 1924 <sup>and until 1974 (RE)</sup> ~~when Homer V. House died~~ <sup>WIFE'S</sup> during the lifetimes of Homer R. House and after his death in 2004.

22. This court has the equitable authority to make a distribution of the asset in dispute in this litigation, regardless of how legal title may have been held.

23. It would be equitable for the four children of Homer R. House to receive equal shares of the Colorado property in dispute and any income from that property.

24. Until distribution of the property from the Estate of Homer R. House to his four children, Janet Cornell, as Personal Representative of the Estate of Homer H. House, holds the interest in the disputed property and any income from that property.

~~PROPOSED~~ FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 9

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Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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25. The property was originally owned by Homer V. House, the grandfather of the four children and Homer V. House had no will so the laws of intestacy govern the distribution from his estate to his six children.

26. The House children knew their grandfather Homer V. House and had a family relationship with him. Vera's children did not have that same relationship with Homer V. House.

27. The property would have been separate property of Homer R. House, as it was received by inheritance.

28. Vera House distributed real property from the House Family Trust to her children.

29. Even if title to the Colorado property interest vested in Vera, there are substantial equitable considerations that weigh in favor of distributing the disputed property to the House children.

30. Individuals<sup>AE</sup> have a natural attachment to family property and a fundamental interest in preserving such property within the family. Therefore, it is normal and natural to distribute property owned by one spouse ~~distributed~~<sup>FE</sup> to that spouse's children.

31. The value of Homer R. House's taxable estate when he died in was approximately of \$2.7 million.

32. The value of the assets in the Decedent's Trust, as set forth on the Form 706 Estate Tax Return, was \$1,307,966.

33. From the assets owned by the Family Trust, Larry Pizzalato received a house appraised for \$420,000 as of the date of Homer R. House's death, \$204,038 under the Trust Termination Agreement in 2005, and \$389,543 from the disputed Morgan Stanley account in 2008. Linda McMurtray received a house appraised for \$375,000 as of the date of Homer

**[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW - 10**

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**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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R. House's death in 2004, \$204,038 under the Trust Termination Agreement in 2005, and \$389,543 from the disputed Morgan Stanley account in 2008. Each of Homer R. Houses' children received \$204,038 under the Trust Termination Agreement in 2005. From the trust assets valued at approximately \$2.7 million at the time of Homer R. House's death in 2004, the House children combined have received approximately \$800,000.

34. Both Vera and Homer House recognized the appropriateness of an equal distribution of assets.

35. A distribution of House family property to the House children would still leave Vera Houses' children with substantially more of the assets accumulated by Homer R. and Vera House. It would not be economically inequitable to distribute the disputed property to the House children.

**ORDER**

1. Janet Cornell, as the Personal Representative of the Estate of Homer R. House, is the proper party to receive the Colorado property and all income and other rights in that property.

2. Janet Cornell, Susan Terhaar, Judith Thees and Robert House are entitled to receive from the Homer R. House Estate equal 25% shares in the Colorado property and all income and other rights to that property when Ms. Cornell, as Personal Representative, distributes the assets in the Estate of Homer R. House.

3. Larry Pizzalato and Linda McMurtry are not beneficiaries of the Estate of Homer R. House, have no claim to any assets in his Estate, and waived any and all claims, known or unknown, in his Estate, the House Family Trust dated February 21, 1991, the Decedent's Trust and the Survivor's Trust under the 2005 Trust Termination Agreement.

~~PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW – 11

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Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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4. Larry Pizzalato and Linda McMurtray are no longer "interested parties" in the administration of the Homer R. House Estate and no notice is required to them in the administration of this Estate.

DONE IN OPEN COURT THIS 28<sup>th</sup> day of March, 2013.

Richard D Eadie  
THE HONORABLE RICHARD A. EADIE

Presented by:

Deborah J. Phillips  
Deborah J. Phillips, WSBA No. 8540  
DJPhillips@perkinscoie.com  
Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000  
*Attorneys for Janet Cornell, Personal Representative of the Estate of Homer R. House*

Karen R. Bertram  
Karen R. Bertram, WSBA No. 22051  
kbertram@khbbblaw.com  
Kutscher Hereford Bertram Burkart PLLC  
705 Second Avenue, Suite 800  
Seattle, WA 98104-1711  
Telephone: 206.382.4414  
Facsimile: 206.382.4412  
*Attorneys for Janet Cornell, Susan Terhaar, Judy Thees and Robert House, Beneficiaries of the Estate of Homer R. House*

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW - 12

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Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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Brandon McMurtray, WSBA No. 41455  
[brandon\\_mcmurtray@hotmail.com](mailto:brandon_mcmurtray@hotmail.com)  
PO Box 641  
Bellevue, WA 98009  
Telephone: 626.644.7144  
*Attorney for Linda McMurtray and Larry Pizzalato*

[PROPOSED] FINDINGS OF FACT AND  
CONCLUSIONS OF LAW – 13

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Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

# APPENDIX B

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13 MAY 30 AM 10:36  
KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA.

The Honorable Richard Eadie  
Date of Hearing: May 10, 2013  
Time of Hearing: 9:00 am  
Without oral argument

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

Estate of:  
HOMER R. HOUSE,  
  
Deceased.  
  
LINDA MCMURTRAY and LARRY  
PIZZALATO,  
  
Counterclaimants,  
  
v.  
  
JANET CORNELL, ROBERT HOUSE,  
SUSAN TERHAAR and JUDITH THEES,  
  
Counterclaim Defendants.

No. 11-4-07189-5 SEA  
~~PROPOSED~~ FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER AWARDING FEES

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER AWARDING FEES - 1

79635-0100/LEGAL26676336.1

Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

1 THIS MATTER came before the Court on March 25, 2013 for a trial hearing. The  
2 Court entered Findings of Fact, Conclusions of Law and an Order on March 28, 2013,  
3 directing the Personal Representative to distribute the disputed asset in this Estate in equal  
4 shares to the four children of Homer R. House. In the *Petition for Distribution* filed by the  
5 Personal Representative, she sought an award of fees under RCW 11.96A.250. The Court  
6 has considered all the pleadings in this matter and hereby enters the following *Findings of*  
7 *Fact, Conclusions of Law and Order Awarding Fees.*

#### 17 FINDINGS OF FACT

##### 19 Legal Basis Presented for Fee Request

- 20 1. The Estate seeks an award of fees and costs under RCW 11.96A.
- 21 2. The fee declaration submitted and the attached invoices provide information  
22 addressing the factors in RPC 1.5. These include (a) the time and labor required, the novelty  
23 and difficulty of the questions involved, and the skill requisite to perform the legal services  
24 properly; (b) the likelihood if apparent to the client that the acceptance of a particular  
25 employment will preclude other employment by the lawyer; (c) the fee customarily charged  
26 in the locality for similar legal services; (d) the amount involved and the results obtained; (e)  
27 the time limitations imposed by the client or the circumstances; (f) the nature and length the  
28 professional relationship; (g) the experience, reputation and ability of the lawyer performing  
29 the services and (h) the terms of the fee arrangement.
- 30 3. McMurtray and Pizzalato sought an award of fees and costs in their initial  
31 *Petition*, and do not dispute that RCW 11.96A.150 permits an award of fees in this matter.  
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FINDINGS OF FACT; CONCLUSIONS OF  
LAW AND ORDER AWARDING FEES - 2

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Perkins Cole LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

1 **Factual Basis Presented for Fee Request**

2 4. The hours spent, the timekeepers who worked on this matter for the Personal  
3 Representative, the hourly rates and the experience and qualifications of the timekeepers are  
4 set forth in the declaration submitted by counsel.  
5  
6  
7

8 **CONCLUSIONS OF LAW**

9  
10 5. RCW 11.96A.150 set forth the applicable standard for an award of costs,  
11 including reasonable attorneys' fees (hereafter "costs") in this matter. That is an equitable  
12 standard which permits the court to consider any relevant factors. *In re Estate of Black*, 153  
13 Wn. 2d 152, 173 (2004); *In re Estate of Jones*, 152 Wn. 2d 1 (2004).  
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18 6. This Court has the authority under RCW 11.96A to grant equitable relief and  
19 to award costs as provided in RCW 11.96A.150.  
20

21 7. The hourly rate for the timekeepers submitted is reasonable, based upon their  
22 respective experience and expertise.  
23

24 8. The fees customarily charged by lawyers with the experience of Ms. Phillips  
25 and the other Perkins Coie attorneys is commensurate with lawyers with similar experience.  
26

27 The  
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29 9. The work required for this matter precluded counsel from undertaking other  
30 work for other clients.  
31

32 10. The Estate prevailed in this matter in its position. *McMurtray and Pizzalato's*  
33 motion for summary judgment was opposed by the Estate, and denied by the Court. Their  
34 legal positions were not adopted by the Court after trial. The Estate's position that an  
35 equitable distribution should be made was adopted by the Court, and was consistent with the  
36 Estate's position in its *Petition for Distribution*.  
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FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER AWARDDING FEES - 3

79635-0100/LEGAL26676336.1

Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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11. The time required addressing the issues presented in this matter, from Ms. Cornell's initial pleadings to be appointed as Personal Representative, to oppose the position of McMurtray and Pizzalato's that they were entitled to 100% of the Estate's assets, through mediation, summary judgment, trial and other contested hearings, was commensurate with the circumstances presented by McMurtray and Pizzalato's vigorous pursuit of their claims.

12. While RCW 11.96A.150 does not apply a "prevailing party" standard to a request for costs, the fact that the party requesting costs was successful is an appropriate factor to be considered.

13. The Court's ruling was that McMurtray and Pizzalato's would not share in distribution of the Estate's assets. Without an award of fees from those two parties, the parties that will now share in the Estate will bear the full cost of resolving this claim. It would be inequitable for those parties alone to bear those costs without an allocation of fees and costs to McMurtray and Pizzalato who claimed to be entitled to 100% of these assets.

14. For all of these reasons, it is equitable for the Court to make an award of fees to the Estate.

**ORDER**

1. The Estate is awarded fees and costs in the amount of \$125,623<sup>00</sup> to be paid by McMurtray and Pizzalato, 50% to be paid by each of those parties.

2. The fees shall be paid within <sup>30</sup>~~10 (ten)~~ days of entry of this Order.

DONE IN OPEN COURT this 30 day of May, 2013.

Richard D Eadie  
The Honorable Richard Eadie

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER AWARDING FEES -- 4

Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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Presented by:

s/ Deborah J. Phillips  
Deborah J. Phillips, WSBA No. 8540  
DJPhillips@perkinscoie.com  
Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000  
*Attorneys for Janet Cornell, Personal Representative  
of the Estate of Homer R. House*

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER AWARDING FEES -- 5

79635-0100/LEGAL26676336.1

Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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**CERTIFICATE OF SERVICE**

I certify that on April 9, 2013, I caused the foregoing document to be served on the following parties via the method described below:

*Via Email*

Brandon McMurtray  
PO Box 641  
Bellevue, WA 98009  
Email: brandon\_mcmurtray@hotmail.com

*Via Email*

Karen R. Bertram  
Kutscher Hereford Bertram Burkart PLLC  
705 Second Avenue, Suite 800  
Seattle, WA 98104-1711  
Email: kbertram@khbblaw.com

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

DATED: April 9, 2013.

s/ Christine F. Zea  
Christine F. Zea, Legal Secretary

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER AWARDED FEES - 6

79635-0100/LEGAL26676336.1

Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

FILED  
13 MAY 30 AM 10:37  
KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA.

HONORABLE RICHARD EADIE  
Hearing Date: May 10, 2013  
*Without Oral Argument*

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In the Matter of the Estate

of

**HOMER R. HOUSE,**

Deceased.

LINDA MCMURTRAY and LARRY  
PIZZALATO,

Counterclaimants,

v.

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

Counterclaim Defendants.

No. 11-4-07189-5 SEA

(RS)

**[PROPOSED] ORDER GRANTING  
COUNTERCLAIM DEFENDANTS'  
MOTION FOR AWARD OF  
ATTORNEYS' FEES AND COSTS**

THIS MATTER having come this day before this Court on the Counterclaim Defendants' Motion for Award of Attorneys' Fees and Costs, the Court having reviewed the pleadings and submissions of the parties and the records and files herein, and being otherwise fully advised in the premises, it is hereby

ORDERED ADJUDGED AND DECREED that the Counterclaim Defendants are entitled to recover reasonable attorneys' fees and costs incurred in defending this matter;

ORDER GRANTING COUNTERCLAIM DEFENDANTS'  
MOTION FOR AWARD OF ATTORNEYS' FEES AND  
COSTS - Page 1

KUTSCHER HEREFORD  
BERTRAM BURKART PLLC  
705 Second Avenue, Hoge Building, Suite 800  
Seattle, Washington 98104  
Tel: (206) 382-4414 Fax: (206) 382-4412  
www.khbblaw.com

1 IT IS FURTHER ORDERED that the amount of the attorneys' fees and costs  
2 presented by the Counterclaim Defendants is reasonable and that the Counterclaim  
3 Defendants are awarded their reasonable attorneys' fees and costs pursuant to RCW  
4 11.96A.150, in the amount of \$36,303.52.

5 IT IS FURTHER ORDERED that Counterclaimants Linda McMurtray and Larry  
6 Pizzalato shall pay the Counterclaim Defendants' attorneys' fees and costs in the amount of  
7 \$36,303.52 within 10 (ten) days of the entry of this Order.

8 DONE IN OPEN COURT this 30 day of May, 2013.

9  
10 Richard D. Eadie  
11 Honorable Richard Eadie

12 Presented By:

13 KUTSCHER HEREFORD  
14 BERTRAM BURKART PLLC

15 By: Karen R. Bertram, WSBA #22051  
16 *Attorneys for Counterclaim Defendants*  
17 *Janet Cornell, Susan Terhaar, Judy Thees*  
18 *and Robert House, Beneficiaries of the*  
19 *Estate of Homer R. House*

the court finds that the hourly  
rates are reasonable for  
litigation of the nature  
involved in this case. The  
hours devoted to this case  
by lawyers for counter claim  
Defendants are reasonable.  
The fee petition submitted  
supports these hours and  
costs and the petition sets  
forth the services provided in a  
clear and easily understood  
manner.

(BE)

# APPENDIX C

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**FILED**  
KING COUNTY, WASHINGTON  
JUN 28 2013  
SUPERIOR COURT CLERK  
BY ANDREW T. HAVIS DEPUTY

The Honorable Richard Eadie  
Without Oral Argument

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

Estate of:

HOMER R. HOUSE,

Deceased.

No. 11-4-07189-5 SEA

AMENDED ~~PROPOSED~~ FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND  
ORDER

LINDA MCMURTRAY and LARRY  
PIZZALATO,

Counterclaimants,

v.

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

Counterclaim Defendants

AMENDED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER - 1

79635-0100/LEGAL27119144.1

Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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THIS MATTER came before the Court on Counterclaimant's Motion for Reconsideration of Order Dated May 30, 2012 Awarding Fees and Costs to the Estate. The Court has considered all the pleadings in this matter and hereby enters the following Findings of Fact, Conclusions of Law and Order. *\* and agrees with the analysis contained therein.*

**FINDINGS OF FACT**

1. The Counterclaimants did not submit any new evidence regarding the Estate's fees.
2. Information about the Counterclaimants' fees and costs is new evidence, as it was submitted at the Court's request, after the Estate and the House beneficiaries replies were submitted on the initial fee motions.
3. Counterclaimants paid their attorney \$12,500 for the probate and litigation work performed on their behalf.
4. Counterclaimants have not provided the court with legal authority addressing the basis to support the motion for reconsideration under CR 59.
5. Counterclaimants asserted their claim to 100% of the royalty interest in this matter before filing their December 2012 filing to open probate and to have the royalty interest awarded 100% to them.
6. The time entries included in Counterclaimants Exhibits 1 are not for probate work as contended by Counterclaimants.
7. The reasonable cost for an uncontested probate would have been between \$2,500 - \$5,000 with up to \$1,000 for the ancillary probate.

AMENDED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER - 2

79635-0100/LEGAL27119144.1

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1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000



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14. It would be equitable for the six parties who claimed an interest in the royalty interest to share, in equal amounts, the reasonable cost of probate in this Estate.

15. The Counterclaimants offered \$7,500 just before trial for the Estate's fees and their total fees for the probate and litigation were \$12,500. That range of fees would be an equitable cap on the total probate and litigation fees to be allocated to the House siblings.

16. The Court finds that the basis for its prior award of fees, except as modified in this Order, was equitable and should remain in effect.

**ORDER**

1. The total fees incurred by the Estate of \$113,986.75 shall be paid by Pizzalato and McMurtray, with a deduction of \$~~6000~~<sup>RE</sup> for the reasonable costs of probate.

2. The fees previously ordered by the Court were to be paid by June 30, 2013, 30 days from entry of the Court's Order. The fees, as modified by this Order, shall be paid within 10 (ten) days of entry of this Order.

DONE IN OPEN COURT this 28<sup>th</sup> day of June, 2013.

Richard D. Eadie  
The Honorable Richard Eadie

Presented by:

s/ Deborah J. Phillips  
Deborah J. Phillips, WSBA No. 8540  
DJPhillips@perkinscoie.com  
Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000  
*Attorneys for Janet Cornell, Personal Representative  
of the Estate of Homer R. House*

AMENDED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER - 4

79635-0100/LEGAL27119144.1

Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

**CERTIFICATE OF SERVICE**

I certify that on June 26, 2013, I caused the foregoing document to be served on the following parties via the method described below:

*Via Email*

*Via Email*

Brandon McMurtray  
PO Box 641  
Bellevue, WA 98009  
Email: brandon\_mcmurtray@hotmail.com

Karen R. Bertram  
Kutscher Hereford Bertram Burkart PLLC  
705 Second Avenue, Suite 800  
Seattle, WA 98104-1711  
Email: kbertram@khbblaw.com

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

DATED: June 26, 2013.

s/ Christine F. Zea  
Christine F. Zea, Legal Secretary

AMENDED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER -- 5

79635-0100/LEGAL27119144.1

Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF KING

Estate of:

HOMER R. HOUSE,

Deceased.

LINDA MCMURTRAY *et al.*,

Counterclaimants,

v.

JANET CORNELL *et al.*,

Counterclaim Defendants,

Case No. 11-4-07189-5 SEA

JUDGMENT

(Clerk's Action Required)

JUDGMENT SUMMARY

- 1. Judgment Creditor: Janet Cornell, Personal Representative of the Estate of Homer R. House
- 2. Judgment Debtor: Linda McMurtray

JUDGMENT

- 1 -

Brandon McMurtray (Bar No. 41455)  
P.O. Box 641  
Bellevue, WA 98009  
(626) 644-7144



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2. The Estate of Homer R. House is awarded judgment against Larry Pizzalato in the amount of \$53,993.38 for a total judgment amount of \$53,993.38.

3. The principal judgment amount shall bear interest at the rate of 12% per annum accruing as of July 10, 2013, unless the full amount shall be paid before such date.

DATED this 19<sup>th</sup> day of July, 2013.

*Richard A. Badie*  
\_\_\_\_\_  
THE HONORABLE RICHARD A. BADIE

Presented by:

/s/ Brandon McMurtray  
Brandon N. McMurtray (No.41455)  
Attorney for Counterclaimants  
Linda McMurtray and Larry Pizzalato

JUDGMENT

- 3 -

Brandon McMurtray (Bar No. 41455)  
P.O. Box 641  
Bellevue, WA 98009  
(626) 644-7144

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2013 JUL 22 AM 11:37

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

HONORBLE RICHARD EADIE  
Hearing Date: July 17, 2013  
*Without Oral Argument*

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In the Matter of the Estate

of

**HOMER R. HOUSE,**

Deceased.

**LINDA MCMURTRAY and LARRY  
PIZZALATO,**

Counterclaimants,

v.

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

Counterclaim Defendants.

No. 11-4-07189-5 SEA

**JUDGMENT SUMMARY**

Judgment Creditors:	Janet Cornell, Susan Terhaar, Judith Thees and Robert House
Judgment Creditors' Attorney:	Karen R. Bertram
Judgment Debtors:	Linda McMurtray and Larry Pizzalato
Judgment Debtor's Attorney:	Brandon N. McMurtray
Principal Judgment Amount:	\$36,303.52
Interest on Judgment from June 10, 2013- July 17, 2013 at \$11.94 per day:	\$ 322.38
Total:	\$36,625.90

JUDGMENT SUMMARY -- Page 1

KUTSCHER HEREFORD  
BERTRAM BURKART PLLC  
705 Second Avenue, Hoge Building,  
Suite 800  
Seattle, Washington 98104  
Tel: (206) 382-4414 Fax: (206)  
382-4410

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The Principal Judgment shall bear interest at the rate of 12% per annum, or \$11.94 per diem, from this date forward. The Clerk shall enter this Judgment Summary in the execution docket without delay.

DATED this 19<sup>th</sup> day of July, 2013

Richard D. Eddie  
Judge/Commissioner

Presented by:

KUTSCHER HEREFORD  
BERTRAM BURKART PLLC

By: Karen R. Bertram, WSBA # 22051  
Attorneys for Judgment Creditors  
705 Second Avenue, Suite 800  
Seattle, WA 98104  
206-382-4414

# APPENDIX D

**LAST WILL AND TESTAMENT**

**OF**

**HOMER R. HOUSE**

**KNOW ALL PERSONS BY THESE PRESENTS:**

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

**ARTICLE I**

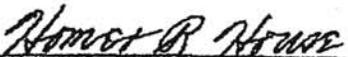
**IDENTIFICATION OF FAMILY**

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

**ARTICLE II**

**PAYMENT OF DEBTS**

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

  
**HOMER R. HOUSE**  
Testator

ARTICLE III

DISPOSITION OF ESTATE

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

ARTICLE IV

NOMINATION OF EXECUTOR

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

ARTICLE V

NONINTERVENTION CLAUSE

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

  
HOMER R. HOUSE  
Testator

**ARTICLE VI**  
**RESIDUARY ESTATE**

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

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

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

  
**HOMER R. HOUSE**  
Testator

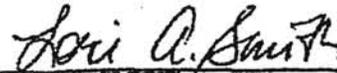
**DECLARATION OF WITNESSES**

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

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

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

  
THOMAS J. BROTHERS, residing at Lynnwood, Washington.

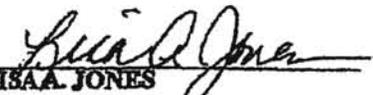
  
LORIA A. SMITH, residing at Bothell, Washington.

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

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

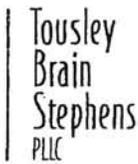
Also appeared before me THOMAS J. BROTHERS and LORIA A. SMITH, witnesses to the signing of the LAST WILL AND TESTAMENT who have each acknowledged that they witnessed the signing of the LAST WILL AND TESTAMENT by HOMER R. HOUSE and that he did the same as his free and voluntary act.

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

  
LISAA. JONES

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

# APPENDIX E



Attorneys and Counselors

700 Fifth Avenue, Suite 5600  
Seattle, Washington 98104-5056  
Telephone (206) 682-5600  
Facsimile (206) 682-2992

ROMNEY R. BRAIN  
rbrain@tousley.com

OUR FILE NO:  
H-1971-003.L1A

March 29, 2005

Jeanie Cornell  
2605 239th Avenue S.E.  
Issaquah, WA 98029

Susan Terhaar  
12778 Wilson Street  
Leavenworth, WA 98826

Judith Thees  
5112 172nd Street S.W.  
Lynnwood, WA 98037

Robert House  
1907 18th Avenue South  
Seattle, WA 98114

Larry Pizzalato  
P.O. Box 1700  
Mercer Island, WA 98040

Linda McMurtray  
LM Rentals, LLC  
P.O. Box 641  
Bellevue, WA 98009-0641

Re: Trust of Vera J. House

Beneficiaries:

We have finally reached the point where the various matters related to the Estate of Homer House and the Homer House and Vera House Family Trust have been completed. The biggest challenge, and by far the most time consuming aspect of this process, has been completing the consolidation and then allocation of the two investment accounts between the Survivor's Trust and Decedent's Trust created under the House Family Trust. For information and reference purposes I am enclosing copies of the House Family Trust and Homer's Estate Tax Return.

As of the date of Homer's death, the combined total value of the Estate (Homer and Vera) was approximately \$2,770,000, or approximately \$1,385,000 each. After reducing Homer's share by the amount of direct bequests to Vera, the gross amount going from Homer's share to the

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Decedent's Trust based upon date of death values, was approximately \$1,307,000. (Note that the actual amounts distributed to the Decedent's Trust and the Survivor's Trust have been (a) reduced by the amount of administration expenses; and (b) increased by the amount of appreciation in the brokerage accounts since the date of Homer's death - approximately \$135,000).

Prior to dividing the entire Estate into two shares to be held in the Decedent's Trust and the Survivor's Trust, Vera elected to take as part of her share the two rental homes at a total appraised value of \$795,000 (Homer's and Vera's one-half (1/2) interest being \$397,500 each). As a result, when it came time to allocate the combined brokerage account (as noted, the original two accounts with Merrill Lynch and Morgan Stanley were consolidated into a single account with Morgan Stanley), an adjustment was made for the early distribution to Vera, such that the combined brokerage account was allocated 70.27% to the Decedent's Trust, and 29.73% to the Survivor's Trust. The resulting gross amount of the combined brokerage account allocated to the Decedent's Trust as of March 10, 2005 totaled approximately \$1,350,000. Attached with this letter is a summary of the brokerage account allocation prepared by Wilbur Wolf at Morgan Stanley.

One of the difficulties that we have been dealing with throughout this process is that the House Family Trust was very poorly drafted to begin with. As you may or may not be aware, the provisions of the Decedent's Trust provide for no distributions until Vera's death. The effect of this is that Vera will receive none of the income out of the Decedent's Trust, as would typically be the case, and the Beneficiaries will not receive their interest in the Trust in any form until Vera's death. In our discussions, we have discussed ways of potentially dealing with this anomaly in order to have the Trust function more as it was intended to function and should function in a more typically drafted estate plan. One way to handle this would be to terminate the Trust entirely. In consideration for Vera agreeing to the termination, Vera would receive a small distribution from the Trust, representative of the income that would normally have been paid to her out of this kind of a trust (we propose \$100,000), and the Beneficiaries would receive their respective interest in the balance of the Trust (approximately \$1,250,000) immediately. Termination of the Trust could only be accomplished with the agreement of the Trustee and all Beneficiaries, so this course of action would require unanimous approval.

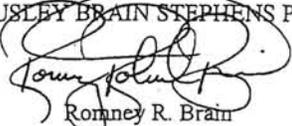
Given the situation with the Decedent's Trust, I would initially just ask each Beneficiary to indicate, without necessarily any final commitment, whether they would be interested in looking into and pursuing a possible termination of the Decedent's Trust, along the foregoing lines. Please advise, and if there is unanimous interest, I will put together a formal proposal to be submitted to Vera and all of the Beneficiaries.

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Please let me know if you have any questions regarding the above information.

Very truly yours,

TOUSLEY BRAIN STEPHENS PLLC



Romney R. Brain

RRB/odb  
Enclosures  
cc: Vera House (*w/out enclosures*)

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