

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

**IN THE MATTER OF THE** )  
**ESTATE OF BERNARD A. WEST,** )  
 )  
**Deceased.** )  
\_\_\_\_\_ )

**SX-98-PB-055**

**MEMORANDUM OF LAW**

**THIS MATTER** came before the Court on a Motion to Strike Response to Nephews' Memorandum (hereafter "Motion to Strike") filed by the Richard W. West and David W. West (hereafter "the Wests") on November 30, 2009. The Wests are asking this Court to strike a pleading from the record of the proceedings of the above-captioned probate. The pleading was filed on November 24, 2009, by the Antioch College Continuation Corporation (hereafter "ACCC"). The Wests object that the November 24<sup>th</sup> pleading exceeded the local rules governing motion practice as outlined by LRCi: 7.1(a). The Wests aver that ACCC already responded to the Wests' motion, and that the Wests' reply pleading of November 9, 2009 should have ended the exchange. The Wests seek for this Court to issue sanctions, pursuant to LRCi: 7.1 (a), for the expenses and costs incurred by the Wests for filing their here-considered Motion to Strike, including attorney's fees. This Court grants the Wests' motion for the reasons given hereafter, and also orders sanctions, in accordance with the Wests' request, pursuant to the above-cited authority of the LRCi.

On December 16, 2009, the ACCC filed their opposition to the Wests' Motion to Strike in which they lay out three alternative findings for this Court, that would avoid the result of this Court striking from the record the arguments contained in ACCC's November 24, 2009, Motion to Strike Response to Nephews.

**MEMORANDUM OPINION**

Page 2

ACCC first argues that there was no violation of LRCi: 7.1 (a). ACCC argues that the first filing in this exchange, by the Wests, was improperly titled "Petition to Declare Legacies Lapsed." (hereafter "Petition"). ACCC avers that the Wests' Petition is "more akin to a complaint that raises a claim" than as "a 'motion' as contemplated by LRCi: 7.1(a)." Consequently, ACCC seeks to persuade this Court that ACCC's subsequently filed "Opposition to Motion to Deem Charitable Bequest Lapsed," (hereafter "Opposition to Motion") should be deemed the first filing in the exchange. Thus, ACCC's Opposition to Motion becomes the initiating "motion" of the "Motion, Response and Reply" protocol outlined in LRCi: 7.1(a).

This Court agrees with ACCC that the Wests' Petition was improperly and ambiguously titled "Petition to Declare Legacies Lapsed," where in fact it ought to have been titled "Motion to Declare Legacies Lapsed." However, in ACCC's own Opposition to Motion, filed on October 28, 2009, counsel for ACCC deemed the Wests' initial "petition" to be a "motion." ACCC's Opposition to Motion contains a footnote at the bottom of the first page that explicitly informs this Court and opposing counsel that "ACCC will respond to the Wests' request as if it were a motion to the Court." Subsequently, on November 9, 2009, the Wests continue the ACCC's convention by filing a "reply," namely, "Reply to Opposition to Motion to Deem Charitable Bequest" (hereafter "Reply"). This Court finds that the Wests' initial error was thus cured by the ACCC's footnote, and that both sides were on notice that they were proceeding in an exchange before this Court that falls within the scope of LRCi: 7.1 (a). As a result, this Court agrees with the Wests, and finds that by the time the ACCC filed its November 24, 2009, "Response to Nephews' Memorandum," this Court had already been presented with a motion, a response, and a reply from the parties. Consequently, by entering its November 24<sup>th</sup> pleading without leave of this Court, ACCC was in violation of LRCi: 7.1 (a), and are thus subject to sanctions under the rule.

ACCC alternatively argues that if this Court finds, as it has done, that ACCC violated LRCi: 7.1 (a), then ACCC moves this Court to strike the Wests' "General Charitable Intent" argument contained in their Reply. ACCC objects to the "General Charitable Intent" argument on the grounds that it is an argument that is being raised for the first time in a reply pleading, and that considering such arguments is something that courts generally disfavor doing (citing: *Embroidery Worker's Pension Fund v. Ryan, Beck & Co.*, 869 F. Supp. 278, 281 (D.N. J. 1994); *McLendon v. Continental Can Co.*, 908 F. 2<sup>nd</sup> 1171, 1183 (3<sup>rd</sup> Cir. 1990).

Both of the above-cited cases, which ACCC provided to this Court for guidance, refer to the practice of filing briefs in appellate proceedings. In *Embroidery Workers*, 869 F. Supp at 281, a party who had moved to dismiss on grounds of Subject Matter Jurisdiction, in a reply brief to a supplemental brief, seeks to impugn one litigant's standing on the basis of his not meeting the requirements of representative capacity as required by Federal Rule of Civil Procedure 23.1. In *McLendon v. Continental Can Co.*, 908 F. 2<sup>nd</sup> at 1183, the court declines to consider an issue raised in an appellant's reply brief that had been rejected by the court being appealed from, but not referenced in the notice of appeal. This Court appreciates the wisdom of preventing novel theories or arguments of law from being raised in appellate reply briefs; for after so many opportunities to be heard, the principal of fairness is strong in limiting this variety of litigation gambit.

This Court does not see in the instant case the same need for strict applicability of the above-outlined principal as it would in the context of filing appellate briefs. However, even if the analogy were more persuasive, in light of the facts of this case, this Court demurs from concluding that inclusion of the "General Charitable Intent" argument in the Wests' Reply constitutes an attempt by the Wests to raise a new argument in a reply pleading.

The Wests' initial filing asked the Court to deem as lapsed the two residual bequests found under Clause Sixth of the Last Will and Testament of decedent, Bernard A. West. ACCC's filing

**MEMORANDUM OPINION**

Page 4

in response rejected the Wests' premise that the bequest to Antioch had lapsed, but then offered in the alternative the proposition that the equitable doctrine of *cy pres* should be applied, and that the residuary estate of Bernard A. West should be distributed to ACCC according to this doctrine. ACCC offers three and a half pages of legal analysis with many citations in support of the application of *cy pres* in the instant case. The Wests, in their reply, have their first opportunity to respond to the applicability of *cy pres* and to offer their reasoning to this Court why the doctrine should not be applied. This Court does not see how any of the reasons the Wests would offer to the narrow purpose of defending against the application of *cy pres* could be characterized by the ACCC as raising the type of new arguments that courts will waive from reply motions.

The "general charitable intent" argument that was objected to by ACCC refers to assertions by the Wests that the application of *cy pres* to a bequest is contingent upon a finding of the bequest's "general charitable intent," whereas a specific bequest would not be subject to the doctrine. Before undertaking to evaluate the authority provided in support of the claims raised by either party regarding the validity of the will bequest or the applicability of the equitable doctrine of *cy pres*, this Court does not agree that the Wests' analysis needs to be stricken from the record, in no small part because ACCC already had the opportunity to, and did, liberally brief the Court on its views on the applicability of the equitable doctrine in its Opposition to Motion.

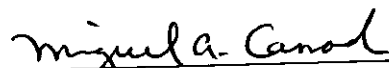
Likewise, because the ACCC already briefed the Court regarding the applicability of *cy pres* in the instant matter; because the doctrine of *cy pres* is largely left to the discretion of the Court<sup>1</sup>; but primarily because the language of LRCi 7.1(a) clearly prohibits parties from making further reply or response except "by leave of Court obtained before filing"; this Court also declines to grant ACCC's motion for leave *nunc pro tunc* to file their response to this Court.

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<sup>1</sup> Restatement (Third) of Trusts § 67

Finally, this Court will issue sanctions, pursuant to LRCi: 7.1 (a), for the expenses and costs incurred by the Wests for filing their here-considered Motion to Strike, including attorney's fees. This Court again looks to the authority of LRCi 7.1(a), which states "counsel will be sanctioned for violation of this limitation." Because the Court finds that the Wests requests for legal fees are reasonable given the circumstances, it sees no need to explore the question as to whether the language of LRCi 7.1(a) has been interpreted as discretionary, and will apply sanctions as though there were no discretion for it to do otherwise. An appropriate Order of even date follows.

**DATED** this 9 day of July, 2010.

  
Miguel A. Camacho, Magistrate of the  
Superior Court of the Virgin Islands

**ATTEST:**  
VENETIA H. VELAZQUEZ, ESQ.  
Clerk of the Court

By:   
Court Clerk Supervisor

Dated: 7/12/2010