

FILED
COURT OF APPEALS
DIVISION II

No 49410-8-II

2017 JAN 6 AM 11:29

STATE OF WASHINGTON

COURT OF APPEALS BY AP
DIVISION II DEPUTY
OF THE STATE OF WASHINGTON

IN RE THE MATTER OF THE ESTATE OF DARLENE
SNIDER, Deceased.

KENNETH CROGG and DENNIS CROGG,

Appellants,

LAWRENCE BRADLEY "BRAD" MILLIGAN,

Respondent.

APPEAL FROM SUPERIOR COURT OF CLARK COUNTY
HONORABLE SUZAN CLARK
CLARK COUNTY CAUSE NO. 14-4-00808-3

AMENDED BRIEF OF APPELLANT

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P/m: 1/4/17

I. ASSIGNMENT OF ERRORS

A. ASSIGNMENT OF ERROR

1. The trial court erred in granting Lawrence Bradley “Brad” Milligan’s motion to compel compliance with Nonjudicial Binding Settlement Agreement.

2. The trial court erred by not granting an award of attorneys fees to Kenneth Crogg and Dennis Crogg.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1.1 Did the trial court err as a matter of law by not enforcing the Nonjudicial Binding Settlement Agreement entered into by the parties pursuant to RCW 11.96A.220?

1.2 Did the trial court err in entering an Order Re: Compliance with Settlement Agreement on April 22, 2016 authorizing an additional appraisal contrary to the terms of the Nonjudicial Binding Settlement Agreement entered into by the parties on January 21, 2016?

1.3 Should the court confirm the award of the property in question located at 1000 SE 101st Avenue to Kenneth Crogg and Dennis Crogg with no further options by Lawrence Bradley Milligan to purchase the same.

II. STATEMENT OF CASE

A. Procedural History of the Case

2.1 Darlene B. Snider died a resident of Clark County on April 11, 2014. She was survived by her spouse, Lawrence Bradley Milligan (hereinafter referred to as Milligan), and her three (3) children from her first marriage: Laura Schumacher (hereinafter referred to as Laura), Kenneth Crogg and Dennis Crogg (hereinafter collectively referred to as Crogg).

2.2 On December 23, 2014, the parties entered into an Agreed Order appointing Perry EauClaire (hereinafter referred to as Perry), a professional fiduciary, as the Administrator of the Decedent's intestate estate. Perry filed a Verified Inventory with the Court which includes appraised value for three (3) real properties and the Decedent's jewelry. The Decedent also had two financial accounts. No creditor claims have been filed against the estate.

2.3 On October 12, 2015, Milligan filed a Petition for Determination of Property Interest under Washington's Trust and Estate Dispute Resolution Act (TEDRA) claiming an equitable lien against the marital home. Crogg objected to the claim. The parties

thereafter agreed to mediation as provided for under TEDRA to resolve all of their disputes including the fair and equitable distribution of the Decedent's estate.

2.4 On January 21, 2016, all of the parties and their attorneys executed a Nonjudicial Binding Settlement Agreement (hereinafter referred to as Agreement) resolving all property issues.

2.5 On April 13, 2016, Milligan filed a motion with the court to compel compliance with the Agreement requesting an additional appraisal which was not provided for in the Agreement.

2.6 On April 22, 2016, Judge Suzan Clark of the Clark County Superior Court entered an Order Re: Compliance with Settlement Agreement granting Milligan's motion instructing the Personal Representative of the Estate to obtain an additional appraisal.

2.7 On June 21, 2016, Crogg filed a Motion for Relief from Order entered April 22, 2016 and for enforcement of the Agreement executed by all parties hereto on January 21, 2016.

2.8 On August 5, 2016, Judge Suzan Clark of the Clark County Superior Court entered an Order Denying Motion for Relief from Order entered April 22, 2016 and confirming her prior order. And, in the August 5, 2016 Order, the Court found the

Agreement required the Crogg's to "attain an appraisal" and that the appraisal obtained after the agreement was entered is so far out of the ball park that it is not reliable.

In that same order the court found no evidence that the Croggs perpetrated any fraud in obtaining the appraisal. At the time of preparing this brief, none of the parties to this action have been able to find another appraiser to do the additional appraisal of the property as ordered by the court.

B. STATEMENT OF FACTS

The matter before the Court of Appeals concerns the enforcement of a Nonjudicial Binding Settlement Agreement entered into by all the parties concerned. (CP 1).

The appraisal of the real property in question as required by the Agreement was completed by Jeffrey Yohe setting the value of the subject property at \$460,000.00. (CP 12).

Upon receipt of the appraisal by Milligan, he objected to the value so stated and through counsel filed a motion to compel compliance with the Agreement claiming it was a breach of good faith in complying with the terms of the Agreement as the

appraisal was three times the prior appraisal and was not submitted in good faith. (CP 48).

On June 21, 2016 Crogg, through their counsel, filed a Motion for Relief from Order entered April 22, 2016 along with their memorandum of like date. (CP 38 & CP 30).

On August 5, 2016 the Clark County Superior Court entered an Order denying the Croggs' Motion for Relief (CP 42).

III. ARGUMENT

A. STANDARD OF REVIEW

An appellate court reviews questions of law de novo. *Sunnyside Valley Integration Dist. v. Dickie*, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable or on untenable grounds. *State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

B. THE TRIAL COURT ERRED AS A MATTER OF LAW BY NOT ENFORCING THE NONJUDICIAL BINDING SETTLEMENT AGREEMENT ENTERED INTO BY THE PARTIES PURSUANT TO RCW 11.96A.220.

As stated above, The Trust and Estate Dispute Resolution Act (hereinafter referred to as “TEDRA”) is controlling over matters related to a trust or an estate in the State of Washington. A written settlement agreement under TEDRA is deemed to be binding and conclusive unless the party contesting it can show that *the stipulation* was a product of fraud or that the attorney overreached his authority. *Washington Asphalt Co. v. Harold Kaeser Co.*, 51 Wn.2d 89, 316 P.2d 126, 69 A.L.R.2d 752 (1957); *Cook v. Vennigerholz*, 44 Wn.2d 612, 269 P.2d 824 (1954). Also See *Kelly v. Belcher*, 155 W. Va. 757, 187 S.E.2d 617, 626 (1972); *Robinson v. Hiles*, 119 Cal. App.2d 666, 260 P.2d 194, 196 (1953).

In *Kelly v. Belcher*, the plaintiff was successful in having a nonjudicial binding settlement agreement terminated on the basis of attorney overreach. In that case, plaintiff was an innocent bystander in a shooting incident that left him a quadriplegic. The record shows that the attorney for the plaintiff, on the day of trial, reached a settlement agreement with the defendant for the amount of \$50,000.00 to be paid to plaintiff. A nonjudicial settlement

agreement was entered that day. However, the plaintiff argued that he was neither consulted before the settlement agreement was entered nor was he certain who was the actual defendant. On appeal, and after careful consideration of all the evidence, the court agreed with the plaintiff and vacated the judgment. There have been no such findings in this case whatsoever.

Here, as indicated by the signature of all the parties, the Agreement is not the product of attorney overreach and all of the parties to the agreement were represented by competent legal counsel. Indeed there is no contention that is even remotely the case.

As for fraud, Milligan may argue that his perceived breach of good faith by Crogg in complying with terms of agreement should persuade the court to find the Agreement is voidable. However, nothing in Milligan's Motion to Compel Compliance suggests fraud. Subsection III of Milligan's Motion to Compel Compliance alleges *Breach of Good Faith* (emphasis added) with the appraisal and NOT a fraudulent motive. Besides the fact that their allegations for breach of good faith are simply based on a higher appraised value than Milligan wanted to pay, the court should not even entertain fraud as a basis to vacate or add additional terms to the original judicially binding Agreement.

Because both prongs for which Milligan could find relief from the binding Agreement are clearly without merit, it is incumbent upon the court to find that the Agreement, entered January 21, 2016, is binding, cannot be revised except for fraud in its inducement or attorney overreach and has the full effect of law.

In addition the most current case of *Cruz v. Chavez*, 186 Wn. App. 913 (2015) held that an essential element to the valid formation of a binding settlement agreement (contract) is mutual assent objectively manifested by the parties, voluntarily and knowingly and that the presumption is that a person who has signed an agreement objectively manifested that assent.

Also, the fairly current case of *Dan's Trucking v. Kerr Contractors*, 184 Wn. App. 133 (2014) which dealt with an arbitration agreement is relevant to this Nonjudicial Binding Settlement Agreement and the court reiterated the long standing position of our courts that there is a strong public policy favoring the finality of arbitration and agreements reached in arbitration.

The Declaration of Jeffrey K. Yohe, who is a duly licensed and certified real estate appraiser, sets forth the reasons why the appraisal done for the estate was incorrect in its assumptions, although the burden is not on the Croggs

to show this as there is no evidence of wrongdoing on their part or that of the appraiser that they hired in good faith as required by the Non Judicial Binding Settlement Agreement.

The bottom line is that the Croggs judiciously performed the requirements of the Non Judicial *Binding* Settlement Agreement and Milligan failed to do so or provide any evidence to the contrary and the terms of the agreement must be enforced by this court or the provisions of the TEDRA statutes will be meaningless as well as any agreement that is purported to be binding which is contrary to the law in the State of Washington until a higher court rules otherwise.

C. DID THE TRIAL COURT ERR BY NOT GRANTING AN AWARD OF ATTORNEYS FEES TO CROGG AS ALLOWED BY RCW 11.96A.150

RCW 11.96A.150 provides:

- (1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid

in such amount and in such manner as the court determines to be equitable.

The touchstone of an award of attorney fees from the estate is whether the litigation resulted in a substantial benefit to the estate. *In re Estate of Black*, 116 Wn. App. 476 (2003) (citing *Estate of Niehenke*, 117 Wn.2d 631, 648, 818 P.2d 1324, 1333 (1991)). Indeed, the Washington Supreme Court in *Niehenke* went as far as to hold recent Washington cases suggest that it is inappropriate to assess fees against an estate when the litigation could result in no substantial benefit to the estate. Where there was no benefit to the estate as a whole and only particular beneficiaries benefited by successful litigation, fees were denied. See e.g., *In re Ehlers*, 80 Wn. App. 751, 911 P.2d 1017 (1996) (court noted that even if beneficiaries had succeeded, which they did not, they would not have been entitled to fees because their action would have only benefited them).

Here, it is clear from the pleadings and the facts that Milligan was not acting in a way to benefit the decedent's estate, but to simply enlarge his portion of his inheritance. Because this response was necessary to correct a potential

injustice, Crogg should not be responsible for responding this Milligan's superfluous Motion and the ultimate Order which was entered. Milligan was aware the Non Judicial *Binding* Settlement Agreement was binding, but still went ahead with his own Motion to Compel. In the interest of justice and for future judicial efficiency attorney's fees should be imposed to dissuade future inappropriate actions.

IV. REQUEST FOR ATTORNEYS FEES

Crogg request that the appellate court award them their attorneys fees and costs incurred during this appeal of the trial courts Orders pursuant to RCW 11.96A.150 and RAP 18.1.

V. CONCLUSION

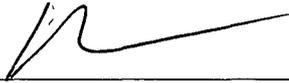
In conclusion, Plaintiff requests that the appellate court:

- 5.1 Vacate the trial court's April 22, 2016 Order re:
Compliance with Settlement Agreement.
- 5.2 Vacate the trial court's August 5, 2016 Order
Denying Motion From (sic) Relief From Order Entered April 22,
2016 and Confirming Prior Order and remand for entry of an Order

granting the requested relief without modification or requirement for additional appraisals.

5.3 That the trial court be ordered to award Crogg their requested attorneys fees incurred in the lower courts proceeding pursuant to RCW 11.96A.150.

RESPECTFULLY SUBMITTED this 4th day of January, 2017.



RONALD W. GREENEN, WSB #6334
of Attorneys for Appellant

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

I hereby certify that on January 4, 2017 I served the foregoing AMENDED BRIEF OF APPELLANT by delivering via Vancouver Legal Courier Service to:

Chris L. Babich
Senescu & Babich, PLLC
Attorneys at Law
1409 Franklin Street, Suite 207
Vancouver, WA 98660

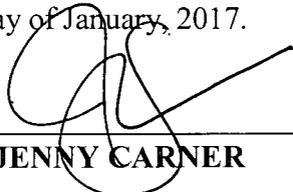
by serving a copy thereof certified by me as such, contained in a sealed envelope, to said offices at their regular address as noted above.

I further certify that on January 4, 2017 I served the foregoing AMENDED BRIEF OF APPELLANT by regular US Mail to:

Kristina S. DeVore
Attorney at Law
201 NE Park Plaza Dr. Suite 290
Vancouver, WA 98684

by serving a copy thereof certified by me as such, contained in a sealed envelope, to said offices at their regular address as noted above.

Dated this 4th day of January, 2017.



JENNY CARNER