

FILED
COURT OF APPEALS
DIVISION II

2017 MAY -1 AM 9:52

No 49410-8-II

STATE OF WASHINGTON

BY AR
DEPUTY

COURT OF APPEALS
DIVISION II
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

REPLY BRIEF OF APPELLANT

RONALD W. GREENEN, WSB#6334
Attorneys for Appellants
GREENEN & GREENEN, PLLC
1104 Main Street, Suite 400
Vancouver, WA 98660
Telephone: (360) 694-1571

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. APPELLANTS’ POSITION 1

 A. Facts of the Case 1

 B. Standard of Review 2

 1. Review by Appellate Court 3

 2. Order on Appeal 3

 3. Broad Authority Under TEDRA to Enforce Agreement 4

 4. The Appellants have failed to provide this Court with an Adequate Record to Review the April 22nd Order 7

 5. The April 22nd Order Was Not a Manifest Abuse of the Trial Court’s Discretion 8

 6. The August 5th Order Was Not a Manifest Abuse of the Trial Court’s Discretion 15

 7. The Croggs’ Interpretation of the Settlement Agreement is Not Reasonable 16

III. ATTORNEY’S FEES 20

 A. Respondent’s Motion for Attorney’s Fees 20

 B. Appellants’ Motion for Attorney’s Fees 21

IV. CONCLUSION 22

TABLE OF AUTHORITIES

TABLE OF CASES

Washington Case Law

16th Street Investors, LLC v. Morrison,
153 Wn.App. 44, 223 P.3d 513 18

Berg v. Hudesman,
115 Wn.2d 657, 801 P.2d 222 (1990) 19

In re Estate of Bernard,
182 Wn.App. 692, 697, 718, 332 P.3d 484, (2014) 15

Broga & Snensen, LLC v. Lamphiear,
165 Wash. 2d 773, 202 P.3d 960 20

State ex rel. Carroll v. Junker,
79 Wn.2d 12, 26, 482 P.2d 775 (1971) 14

Clements v. Olsen,
46 Wn.2d 445, 448, 282 P.2d 266 (1955)17

Condon v. Condon
177 Wn.2d 150, 162, 298 P.3d 86 (2013) 15

Crowley v. Byrne,
71 Wash. 444, 129 P. 113 (1912) 17

In re Estate of Fitzgerald,
172 Wn. App. 437, 448, 294 P.3d 720 (2012) 4

Hearst Commc 'ns, Inc. v. Seattle Times Co.,
154 Wn.2d 493, 504, 115 P.3d 262 (2005) 16

Hollis v. Garwell, Inc.,
137 Wn.2d 683 (Wash. 1999), 974 P.2d 836 20

<i>Hopkins v. Barlin</i> , 31 Wash.2d 260, 196 P.2d 347 (1948)	17
<i>Keystone Land & Dev. Co. v. Xerox Corp.</i> , 152 Wn.2d 171, 176, 94 P.3d 945 (2004)	17, 18
<i>State v. McCormack</i> , 117 Wn.2d 141, 143, 812 P.2d 483 (1991), cert. denied, 502 U.S. 1111 (1992)	3
<i>McFerran v. Heroux</i> , 44 Wash.2d 631, 638, 269 P.2d 815 (1954)	17
<i>Sandeman v Sayres</i> , 50 Wn.2d 539 at 541, 314 P.2d 428	18
<i>Spokane School Dist. No. 81 v. Parzybok</i> , 96 Wn.2d 95, 633 P.2d 1324 1981)	17
<i>Spratt v. Crusander Ins. Co.</i> , 109 Wash. App. 944, 37 P.3d 1269 (2002).....	20
<i>In re Richard C. Swezey Trust of 1990</i> , 051616 WACA, 73209-9-I (2016)	15, 16
<i>Torgerson v. One Lincoln Tower, LLC</i> , 166 Wn.2d 510, 517, 210 P.3d 318 (2009)	17
<i>Viking Bank v. Firgrove Commons 3, LLC</i> , 183 Wn. App. 706, 713, 334 P.3d 116 (2014)	16
 <u>Revised Code of Washington</u>	
RCW 11.92	10
RCW 11.96A	4
RCW 11.96A.010	15

RCW 11.96A.150(1).....	1, 21, 23
RCW 11.96A.220	5, 6, 15
RCW 11.96A.230(1)	6
RCW 11.96A.230(2)	5, 6, 15
RCW 11.96A.240	5
RCW 11.96A.320	3, 5, 6, 14

Civil Rules of Procedure

CR 60	16
CR 60(b)(11)	16

Rules of Appellate Procedure

RAP 18.1	1
----------------	---

Legal Dictionary

<i>Black's Online Legal Dictionary</i> (2 nd Ed) April 2017	18
--	----

I. INTRODUCTION

Appellants, Kenneth Crogg and Dennis Crogg (hereinafter referred to as the “Croggs”) reassert their request that the Appellate Court (a) reverse the trial court’s April 22, 2016 Order Re: Compliance with Settlement Agreement; and (b) reverse the trial court’s August 5, 2016 Order Denying Motion For 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 the requirement for an additional appraisal.

Appellants further request that the Appellate Court deny Respondent’s request for attorney’s fees and costs and award attorney’s fees and costs to Appellants both at the appellate court and trial court levels pursuant to the terms of the Non-Judicial Binding Settlement Agreement, RAP 18.1 and RCW 11.96A.150(1).

II. APPELLANTS’ POSITION

A. Facts of the Case

The issues on appeal in this matter are simple. A dispute arose between the parties as to the distribution of various assets of the Estate of Darlene Snider. A TEDRA action was subsequently filed by the Respondent and the parties participated in mediation. Following

mediation, the parties entered into a Non-Judicial Binding Settlement Agreement resolving all issues surrounding the distribution of the Estate of Darlene Snider. One of those resolved issues was the distribution of the decedent's property located at 1000 SE 101st Ave., Vancouver, Washington. This property was distributed equally to the decedent's three surviving children, KENNETH CROGG, DENNIS CROGG and LAURA SCHUMACHER, with a caveat that BRAD MILLIGAN, the decedent's surviving spouse, would have the option to purchase the property. The terms of the option were as follows:

“Right to Purchase Property: Brad shall have the first option to purchase the real property located at 1000 SE 101st Ave. based upon a current appraised value to be obtained by Ken & Dennis within 60 days of this agreement. Brad shall have 30 days from the date of delivery of the appraisal to finalize and complete the purchase of the property.”

See page 3 of the Nonjudicial Binding Settlement Agreement (CP 1).

The Croggs obtained the new appraisal as required by the Agreement and delivered the appraisal to Respondent. (CP 68 and also CP 12) Because Respondent was not pleased with the results of the appraisal, he did not exercise his option to purchase the property and instead filed a motion to enforce the agreement claiming bad faith on the part of the Croggs in obtaining the appraisal. (CP 48). Upon hearing the matter, the court then modified the terms of the option to purchase and ordered that

another appraisal be obtained by a neutral party. The Respondent would like the Appellate Court to believe that this was a compliance issue under RCW 11.96A.320, but the trial court did not “enforce” the terms of the agreement, the trial court actually modified the terms of the agreement without the legal authority to do so. Had the court enforced the terms of the agreement, this appeal would not be necessary.

B. Standard of Review

1. Review by Appellate Court. Respondent’s question Appellant’s standard of review. There are actually two prongs of review involved in this case. Appellants agree that a proper standard of review in this matter is abuse of discretion, specifically as to the trial court’s modification of the terms contained within the Non-Judicial Binding Settlement Agreement, which is at issue in this case. However, because the terms of the Non-Judicial Binding Settlement Agreement require interpretation under contract law, the decisions made by the trial court in this case are also matters of law and an appellate court reviews questions of law de novo. *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991), cert. denied, 502 U.S. 1111 (1992).

2. Order on Appeal. The Respondent questions which order is on appeal in this matter. Appellant technically appealed the order entered on August 5, 2016. The August 5, 2016 order reaffirmed all of the

terms of the April 22, 2016 order but also included additional findings. (CP 42) By the court's reaffirmation and incorporation of the terms set forth in the April 22, 2016 order within the August 5, 2016 order, and the court making additional findings in the August 5, 2016 order, the contents of both orders are on appeal. (CP 9 and CP 42)

3. Broad Authority Under TEDRA to Enforce Agreement.

In his responsive brief, Respondent states that the court has broad authority in this case under TEDRA (RCW 11.96A), which gives the court full and ample power to administer and settle all estate and trust matters 'all to the end that the matters be expeditiously administered and settled by the court.' Respondent cites *In re Estate of Fitzgerald*, 172 Wn. App. 437, 448, 294 P.3d 720 (2012), wherein the court denied a continuance to conduct discovery in a TEDRA proceeding. This case is clearly distinguished from *Fitzgerald* as matters in the present estate have been all been settled. There are no further trust or estate matters to be resolved in the TEDRA action. The Respondent's option to purchase the parcel of property awarded to Appellants is now an issue between the Appellants and the Respondent only. The Non-Judicial Binding Settlement Agreement (NJBSA) entered into by the parties was a global settlement of all estate issues pending during the TEDRA proceeding. Upon execution of the agreement, all matters concerning the estate were resolved and the

TEDRA proceeding concluded. The court is deemed to have approved the terms of the agreement upon the filing of the agreement with the court.

RCW 11.96A.230(2). Any further court involvement with regards to the agreement is limited only to enforce the provisions therein. RCW

11.96A.320. The provisions of the TEDRA statutes are quite clear as to the procedures concerning NJBSA's and the authority of the court when an agreement has been executed.

A NJBSA is binding and conclusive as to all parties upon execution of the agreement. RCW 11.96A.220. Subject to RCW 11.96A.240, a written agreement shall be binding and conclusive on all persons interested in the estate or trust. RCW 11.96A.220. The only exception to this rule is when a special representative has been a participant in the agreement. Although no special representative is involved in this case, it is important to note that when a special representative is a participant in the agreement under RCW 11.96A.240, the court can only consider whether the special representative has adequately represented and protected the interests of the represented parties. **The court may not consider any other issue.** If the court determines that the interest of the represented parties were not adequately represented the agreement is declared to have no effect. RCW 11.96A.240. [Emphasis Added]. The statute is clear that the court is limited to decide

only the adequate representation and protection of the parties to the agreement and this exception only applies when a special representative participates in the agreement. There are no other exceptions to the rule. The court has no authority to change the terms of the agreement or to add additional terms. In the case at hand, the parties to the agreement were represented by counsel during the mediation and each of them signed the agreement. In fact, the agreement which the parties signed explicitly recites the binding nature of the document as provided in RCW 11.96A.220 (although not required). *See Page 4, Section IV. Agreement, Subsection A of the NJBSA (CP 1).*

In addition, the NJBSA does not have to be filed with the court to be binding and conclusive on the parties. It is effective upon execution and may be filed with the court at any time after execution. RCW 11.96A.230(1). Upon filing of the agreement with the court, the NJBSA is deemed approved by the court and is equivalent to a final court order, which is binding on all persons interested in the estate or trust. RCW 11.96A.230(2). After the agreement has been filed, the only authority the court has is to compel compliance with the provisions of the agreement. RCW 11.96A.320.

4. THE APPELLANTS HAVE FAILED TO PROVIDE THIS COURT WITH AN ADEQUATE RECORD TO REVIEW THE APRIL 22ND ORDER

Respondents assert that Appellants have not provided the Appellate Court with a sufficient record in order to make a determination as to whether the trial court abused its discretion in this matter. The Appellate Court does not need to know how the specific words the trial court used when it rendered its decision and changed the terms of the agreement. The fact that the terms of the agreement were changed at all is the sole issue before the appellate court. A transcript of the trial judge giving her ruling at the motion hearing is not necessary to review this case. In fact, the trial judge's findings within the August 5, 2016 order are quite clear as to what happened at that hearing (CP 42). The Appellants are asking the court to make a determination as to whether the trial court had the authority to change the terms of the agreement regardless of the trial court's reasoning. The trial court's findings in the August 5, 2016 order are sufficient for the Appellate Court to interpret the basis for the entry of the order, specifically on Page 2, Paragraphs 3 and 4, of the order which state:

3. The Court finds that the Non Judicial Binding Settlement Agreement requires the Croggs to "attain an appraisal." The Court finds that the appraisal obtained after the agreement was entered... is so far out of the ball park that it is not reliable." The Court confirms its prior ruling that the only solution is to get a

neutral third appraisal because otherwise the term “appraisal” is a meaningless term in the agreement.

4. The Court finds no evidence that the Croggs perpetuated any fraud in obtaining the appraisal, but finds that Mr. Yohe’s logic in support of the \$460,000.00 appraisal is not persuasive based on the Court’s review of Ms. Moe’s \$150,000.00 appraisal.

(CP 42)

In addition, on page 7 of Respondent’s Responsive Brief, Respondent misleads the court by stating that the Croggs did not file any opposition to Respondent’s Motion to have another appraisal performed on the property and that for all they know the Croggs could have stipulated to Respondent’s request for another appraiser (due to the lack of a transcript). What the Respondent fails to advise the court is that Croggs’s former attorney, Thomas Foley, had withdrawn following the execution of the NJSBA and they were not represented by counsel when the April 22, 2016 order was entered. In addition, the Croggs did not sign or stipulate to the April 22, 2016 order.

5. THE APRIL 22nd ORDER WAS NOT A MANIFEST ABUSE OF THE TRIAL COURT’S DISCRETION.

Respondent’s claim that the trial court did not abuse its discretion when it entered the April 22, 2016 order. The trial court ordered another appraisal in clear violation of the NJBSA. The court found that the January 2016 appraisal procured by the Croggs was “so far out of the ball

park that it is not reliable". The court based its finding on a prior appraisal on the property prepared by Kirsten Moe. (CP 42) Ms. Moe prepared an appraisal of the property dated January 20, 2015, wherein she appraised the property for \$150,000.00. This appraisal was based on 2014 sales. This prior appraisal was not mentioned nor was it incorporated into the NJBSA signed by the parties one year later and has no bearing on the terms of the agreement. In fact, this appraisal was both inaccurate and deficient. Jeffrey K. Yohe, the appraiser who performed the second appraisal dated March 10, 2016 pursuant to the binding agreement, reviewed the prior appraisal performed by Ms. Moe and outlined several areas of deficiency within her appraisal, including but not limited to her failure to make certain cost and time adjustments, use of outdated sales information, utilization of invalid and/or non-comparable sales, and he questioned whether she even inspected those comparables from the street or not. It is Mr. Yohe's opinion that the appraisal practices Ms. Moe utilized and/or did not utilize in this prior appraisal show that she lacked competence in appraising vacant land. *See Declaration of Jeffrey K. Yohe filed June 21, 2016, specifically pages 1 and 2 of his Review of Land Appraisal Completed by Kristen Moe* (CP 12) Also of importance, the Moe appraisal was valued \$109,000 less than the Clark County tax assessment for that year (2015). The tax assessment for the subject

property was \$259,711 for 2015, which is almost twice the value of the prior appraisal done by Ms. Moe. *See Clark County Property Information for Parcel No. 113891000, as attached to Mr. Yohe's Declaration* (CP 12), this tax assessment was the 2015 value used for 2016 property taxes assessed by the Clark County Assessor's office in 2014. The tax assessed value for 2015 taxes was also \$259,700.11. (CP 66.) Ms. Moe's appraisal was \$109,000 less than the assessed value of the property, which also lead Mr. Yohe to question to validity of Ms. Moe's prior appraisal.

An interesting fact that is not included in Mr. Yohe's Declaration is that Ms. Moe has listed the client's name on her appraisal as Perry EauClaire, "Guardian" and not as a personal representative. These are two completely different fiduciary capacities. This leads Appellant to question whether or not Ms. Moe's appraisal was possibly performed using different standards, specifically whether different standards are applied to appraisals when a guardianship is in place (especially given the statutory requirements for the sale of guardianship properties under RCW 11.92) versus appraising a property for sale to a private party.

Nevertheless, the court completely ignored the faults of the first appraisal prepared by Ms. Moe yet found that the appraisal done by Mr. Yohe was "so far out of the ball park that it is not reliable". As stated in his Declaration and attached Review of Ms. Moe's appraisal (Page 2 of

16), Mr. Yohe has never had any contact with the Croggs other than an appraisal he did for one of the Crogg's approximately 10 years prior. The Croggs gave Mr. Yohe no specific instructions nor did they request that he inflate the value of the property in his appraisal. Mr. Crogg only provided Mr. Yohe with the property location information which he needed to identify the property. Mr. Yohe had no bias or personal interest in this matter or with the Croggs. (CP 12).

Regardless of the semantics of the appraisals, the NJBSA was entered into on January 21, 2016, one year after Ms. Moe's appraisal was prepared and for whatever reason, the parties agreed to obtain a more "current" appraisal. The prior appraisal had no bearing on this agreement nor was it mentioned or incorporated within the agreement. As stated in Respondent's Motion to Compel Compliance with the NJBSA filed with the court on April 13, 2016, *Page 2, Paragraph II, Settlement Agreement, Line 12...* As part of the Settlement Agreement, the parties agreed to re-appraise the lots at estate expense so that any purchase would be based on the most current value. Ken and Dennis agreed to have the property re-appraised within 60 days of the date of the settlement agreement and Brad would then have 30 days to finalize a cash sale at the current appraised value. (CP 1)

The appraisal obtained by the Croggs from Jeffrey Yohe dated March 9, 2016 valued the lot at \$460,000.00. The Respondent was not pleased with this appraisal and did not exercise his option to purchase the property and, therefore, forfeited his right to do so. Instead, Respondent filed a Motion to Compel Compliance based on breach of good faith against Ken and Dennis Crogg. (CP 48). In his Motion, Respondent made allegations that because the beneficiaries of the property have a direct financial interest that they submitted an appraisal that was not in good faith. It is highly unlikely that an appraiser would risk his or her reputation or subject himself or herself to such accusations for the purpose of increasing the financial interest of Ken and Dennis Crogg.

The subject property was awarded to Kenneth Crogg, Dennis Crogg and their sister, Linda Schumaker as part of their distributive share of their mother's estate. Respondent is under the assumption that he has a right to purchase the subject property pursuant to the settlement agreement. The Respondent does not have a right to purchase the property; he only has an "option" to purchase the property. If he does not approve of the appraised value obtained by the Croggs then he simply does not have to exercise his option.

Respondent agreed to the terms of the option within the NJBSA and was represented by counsel. Page 6 of the NJBSA, Paragraph M, Filing and Waiver of Notice, Lines 22-26, states:

“Each Party to this Nonjudicial Agreement hereby acknowledges that he or she understands that the Nonjudicial Agreement, when executed by all Parties herein, shall be the equivalent of a Court Order binding on each Party and his or her heirs, personal representatives, successors and assigns, effective upon the date of execution.” (CP 1)

Page 7 of the agreement, Paragraph N, Entire Agreement, Lines 1-7 states:

“This Agreement constitutes the entire agreement between the Parties regarding the matters referenced above and shall be binding on the heirs, successors, assigns, executors, personal representatives and administrators of each of the Parties and all of those who they virtually represent. No other promises or agreements have been made, except as expressly provided herein. The Parties have read the foregoing Agreement and understand it. The terms of this agreement and of release are **contractual** and not a mere recital. [Emphasis added] (CP 1)

The agreement was signed by Mr. Milligan, Mrs. Schumacher, Dennis Crogg and Kenneth Crogg, as well as their respective attorneys and the mediator. Each page of the agreement was initialed by the parties to the agreement as well. Nothing in the agreement states that if Respondent does not like the appraisal that the Croggs obtained that he can simply have another appraisal done before he exercises his option to purchase the property. The terms of the agreement are not ambiguous.

The agreement states in simple terms that the Respondent (Brad) shall have the first option to purchase the real property based upon the current appraised value to be obtained by the Appellants (Ken and Dennis). The terms do not say that Ken and Dennis are to obtain an appraisal to the satisfaction of Brad, nor is there a provision that allows Brad the right to dispute any appraisal obtained by the Croggs.

The appraisal was delivered to Respondent as required under the NJBSA. Because Respondent did not exercise his option within 30 days of the date of delivery of the appraisal his right to purchase the property has ended. The trial court ordering another appraisal at the request of the Respondent is in clear conflict with the terms of the non-judicial binding settlement agreement and an abuse of the court's discretion. Furthermore, the TEDRA statutes are clear that the court's involvement in a NJBSA are limited and in this case, limited only to enforce compliance. RCW 11.96A.320. The trial court did not enforce compliance with the agreement, the court changed the terms of the agreement without any legal authority to do so. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court did abuse its discretion when it ordered another appraisal of the property, which was in direct conflict with the terms of the NJBSA and outside of the court's authority.

Respondent's claim that TEDRA gives the court "plenary power" over the NJBSA agreement is incorrect. It is true that TEDRA provides for judicial and non-judicial resolution to trust and estate disputes and other related matters (RCW 11.96A.010) and that under TEDRA, such matters can be settled by a written agreement signed by all parties. RCW 11.96A.220. If the parties file the written agreement with a court, it becomes the equivalent of a final court order binding all interested parties. RCW 11.96A.230(2). However, when interpreting TEDRA agreements, Washington courts apply the general principles of contract law. *In re Richard C. Sweezey Trust of 1990*, 051616 WACA, 73209-9-I (2016), citing *In re Estate of Bernard*, 182 Wn.App. 692, 697, 718, 332 P.3d 484, (2014) (applying principles of contract interpretation to interpreting TEDRA Agreements); see *Condon v. Condon*, 177 Wn.2d 150, 162, 298 P.3d 86 (2013) (applying principles of contract interpretation to interpreting settlement agreements.).

6. THE AUGUST 5TH ORDER WAS NOT A MANIFEST ABUSE OF THE TRIAL COURT'S DISCRETION.

Appellants offer the same argument set forth above as to the court's authority to modify the terms of the NJBSA and to reaffirm such modification in the August 5, 2016 order. The court had no authority to modify the binding agreement and should have vacated the order of April

22, 2016 under CR 60(b)(11) as set forth in the Crogg's Motion to Vacate the April 22, 2016 Order. CP (38). Respondent is fully aware that the Croggs were not represented by counsel when the April 22, 2016 Order was entered and were essentially acting "pro se" under the assumption that all matters concerning the estate had been resolved under the NJBSA and that they had fulfilled their duties under the agreement.

Respondent further asserts that the CR 60 Motion was not proper before the trial court and that the matter should have been directly appealed. This is essentially a moot argument since this matter is currently on appeal.

7. THE CROGGS' INTERPRETATION OF THE SETTLEMENT AGREEMENT IS NOT REASONABLE.

As stated earlier, the principals of contract law apply to the interpretation of TEDRA agreements. *In re Richard C. Swezey Trust of 1990*, 051616 WACA, 73209-9-I (2016). When interpreting contracts, the court gives words in a contract their ordinary, usual, and popular meaning, unless the contract in its entirety clearly demonstrates a contrary intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). The contract is viewed as a whole, and particular language is interpreted in the context of other contract provisions. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116

(2014). “Under the principle of freedom to contract, parties are free to enter into, and courts are generally willing to enforce, contracts that do not contravene public policy.” *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945 (2004). The parties to a contract are bound by its terms. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). Courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have made for themselves. *Clements v. Olsen*, 46 Wn.2d 445, 448, 282 P.2d 266 (1955).

Washington case law defines an option to purchase as a contract whereby the owner of the property, for valuable consideration, sells to the optionee the right to buy the property within the time, for the price, and upon the terms and conditions specified in the option, but which in itself imposes no obligation on the purchaser to acquire the property. *Spokane School Dist. No. 81 v. Parzybok*, 96 Wn.2d 95, 633 P.2d 1324 (1981) citing *Hopkins v. Barlin*, 31 Wash.2d 260, 196 P.2d 347 (1948); *Crowley v. Byrne*, 71 Wash. 444, 129 P. 113 (1912).

An option to purchase property is a contract wherein the owner, in return for a valuable consideration, agrees with another person that the latter shall have the privilege of buying the property within a specified time upon the terms and conditions expressed in the option. *McFerran v. Heroux*, 44 Wash.2d 631, 638, 269 P.2d 815 (1954), and authorities cited.

The terms of a contract must be sufficiently definite. *Keystone*, 152 Wash.2d at 178, 94 P.3d 945. If an offer is so indefinite that a court cannot decide just what it means and fix exactly the legal liability of the parties, its acceptance cannot result in an enforceable agreement. *16th Street Investors, LLC v. Morrison*, 153 Wn.App. 44, 223 P.3d 513 (Div. 2 2009) citing *Sandeman v Sayres*, 50 Wn.2d 539 at 541, 314 P.2d 428.

The language in the NJBSA is quite clear that Respondent has an “option” to purchase the subject property based upon a current appraisal obtained by the Croggs. Black’s Law Dictionary defines an “option” as “In contracts. An option is a privilege existing in one person, for which he has paid money, which gives him the right to buy certain merchandise or certain specified securities from another person, if he chooses, at any time within an agreed period, at a fixed price, or to sell such property to such other person at an agreed price and time. Black’s Law Dictionary defines an “option to purchase” as “The granting of a right to the potential purchaser to be able to buy the product at a certain price.” *Black’s Online Legal Dictionary* (2nd Ed) April 2017. Both of these definitions state “ at a fixed price” or “at a certain price”. The price under this certain agreement was the value of the property as determined by “a current appraisal obtained by Ken & Dennis”. The option is therefore subject to the value of the appraisal. There is no ambiguity in any of these terms. If

all options to purchase real estate were allowed to be amended by the Court in order to please an unhappy party to the option, then options would never be upheld and would be rendered useless.

The trial court used Kristen Moe's \$150,000 appraisal as a basis for its findings against the appraisal obtained by the Croggs. There was no substantial evidence offered by Respondent to support that Ms. Moe's appraisal was any more valid or reasonable than the Croggs' appraisal prepared by Mr. Yohe. The language in the NJBSA agreement is clear and is not susceptible to more than one meaning. The Moe appraisal was not incorporated into the terms of the agreement nor should it be considered as relevant evidence when attempting to define the terms of the agreement.

Washington courts have addressed ambiguity in contract terms in numerous cases on appeal and the introduction of evidence concerning circumstances surrounding an agreement has been permitted by the court in certain cases. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). However, there are times when the court cannot use extrinsic evidence, specifically: (1) to show a party's unilateral intent as to the meaning of a contract word or term, (2) to show an intention independent of the instrument or (3) to vary, contradict or modify the written word. Extrinsic evidence is to be used to illuminate what was written, not what was

intended to be written. *Hollis v. Garwell, Inc.* 137 Wn.2d 683 (Wash. 1999), 974 P.2d 836. See also *Broga & Snensen, LLC v. Lamphiear*, 165 Wash. 2d 773, 202 P.3d 960 (2009) wherein the court allowed extrinsic evidence because the term in question did not modify or add to the contract terms but defined a term which was undefined.

In the present case, there is no ambiguity in the language granting the Respondent his option to purchase the property nor is the option susceptible to different interpretations. The court should not allow extrinsic evidence to clarify an ambiguity if the contract is not ambiguous in the first place. *Spratt v. Crusander Ins. Co.*, 109 Wash. App. 944, 37 P.3d 1269 (2002).

The option to purchase the subject property was written in plain, unambiguous terms. The trial court's use of Ms. Moe's prior appraisal as a basis to modify the terms of the agreement and order another appraisal on the property was not appropriate under the circumstances nor did it bear any relevance to the agreement or assist in the interpretation of the meaning of any of the terms within the agreement.

III. ATTORNEY'S FEES

A. RESPONDENT'S MOTION FOR ATTORNEY'S FEES

Respondent's Motion for Attorney's Fees should be denied. As briefed herein, the appeal of the trial court's modification of the terms of

the Non-Judicial Binding Settlement Agreement is not meritless.

Appellants have a solid argument as to the court's lack of authority to modify the terms of the NJBSA. The Respondent is simply using the court as a means to obtain a purchase price that he is willing to pay.

B. APPELLANTS' MOTION FOR ATTORNEY'S FEES

Appellants request an award of attorney's fees pursuant to RAP 18.1, the terms of the NJBSA and also RCW 11.96A.150(1). The terms of the NJBSA provide for an award of fees to the prevailing party in the event an action to enforce the terms of the agreement is initiated. Page 6, Paragraph K, of the NJBSA (CP 1) states:

“In the event a suit or action is commenced to enforce any of the terms of the Agreement, including but not limited to, an action for a declaration of the parties rights or obligations hereunder or for any other judicial remedy (including appeals of such suit or action), the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses incurred thereby, including, but not limited to, reasonable attorney fees and cost for the services rendered to such prevailing party.

In addition, the TEDRA statutes grant the court discretion to award fees when appropriate. RCW 11.96A.150(1) states:

(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 Appellants request an award for both attorney's fees and costs incurred during this appeal and also for their fees and costs incurred at the trial court level to enforce the terms of the Non-Judicial Binding Agreement of January 21, 2016.

IV. CONCLUSION

In conclusion, as with the trial court, the Respondent has continued to mischaracterize the trial court's ruling as a compliance issue and has inferred language into the Non-Judicial Binding Settlement Agreement which simply does not exist. The language in the agreement is quite clear that the Respondent had the option to purchase the real estate. He had no obligation under the agreement to purchase the property. The agreement confers no further rights upon Respondent nor does it provide for any modification of the agreement if Respondent is unhappy with the appraisal value attained by the Croggs. The property at issue was awarded to the Croggs as part of their distributive share of their mother's estate with the understanding that Respondent would have the option to purchase the property at a value determined by the appraisal obtained by the Croggs. Respondent is in no way being forced to exercise his option. Respondent has no other rights to the property and he should not be allowed to use the Court as a means to obtain a better purchase price.

Appellants once again request that the appellate court:

1. Vacate the trial court's April 22, 2016 Order Re:

Compliance with Settlement Agreement;

2. Vacate the trial court's August 5, 2016 Order Denying Motion For 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 the requirement for an additional appraisal; and

3. Award attorney's fees and costs to Appellants at both the appellate court and trial court levels pursuant to the terms of the Non-Judicial Binding Settlement Agreement, RAP 18.1 and RCW 11.96A.150(1).

RESPECTFULLY SUBMITTED this 28th day of April, 2017.



LISA I. TOTH, WSB #27389
for **RONALD W. GREENEN**, WSB #6334
of Attorneys for Appellants

FILED
COURT OF APPEALS
DIVISION II

2017 MAY -1 AM 9:52

CERTIFICATE OF SERVICE

STATE OF WASHINGTON

BY AP
DEPUTY

I hereby certify that on April 28, 2017, I submitted for service the foregoing REPLY BRIEF to Vancouver Legal Messengers courier service for delivery to the following:

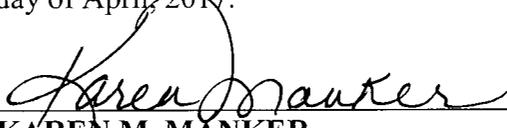
Steven E. Turner
Steven Turner Law PLLC
1409 Franklin Street, Suite 216
Vancouver, WA 98660

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

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

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

Dated this 28th day of April, 2017.


KAREN M. MANKER