

NO. 49983-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

GABRIEL E. GOURDE and
CHARBONNEAU D. GOURDE,

Appellants,

vs.

ANN L. GANNAM,

Appellee.

DECLARATION OF SERVICE

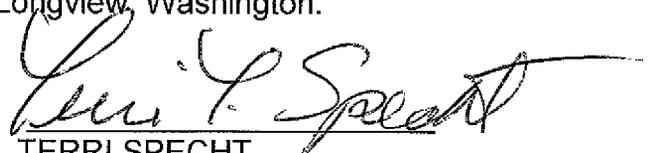
I, Terri Specht, declare as follows:

On April 20, 2017, I hand delivered a true and correct copy of Appellants' Brief, to the following:

Meredith A. Long
Law Office of Meredith A Long PLLC
1315 14th Ave.
Longview, WA 98632

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

DATED: April 20, 2017, at Longview, Washington.


TERRI SPECHT

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GABRIEL E. GOURDE and
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Appellee.

APPELLANTS' BRIEF

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A. IDENTITY OF APPELLANTS

Gabriel E. Gourde and Charbonneau D. Gourde are the Appellants.

B. ASSIGNMENT OF ERROR

The trial court erred in granting summary judgment in favor of the Appellee.

C. DECISION

Cowlitz County Superior Court granted summary judgment in favor of the Appellee.

D. ISSUES PRESENTED FOR REVIEW

1. In interpreting a deed, is the Court required to consider all of the words in the deed, including the language referred to an attached will referred to in the deed as follows: "According to Article IV of the decedent's Last Will and Testament (a true and accurate copy which is attached as exhibit A hereto)?"
2. Is res judicata applicable to a declaratory judgment action for interpretation of a deed, where the deed was executed by the personal representative of an estate just prior to closing the estate,

where the deed is subject to two or more meanings, and the deed has never been interpreted by the Court and where there was no TEDRA or other prior adversarial cause of action commenced to interpret the Deed?

E. STATEMENT OF THE CASE

Daniel A. Gourde passed away on June 10, 2014. He was 65 years old. CP at 37. He left approximately 6.5 acres of land and a house at 144 Chapman Road, Castle Rock, Washington. CP at 38, 39. Prior to his death, the Appellants, and their family, were allowed to use the land for recreational purposes, including fishing. The land is waterfront property on the Cowlitz River. CP at 37, 42.

Daniel Gourde made a will signed on May 12, 2009. CP 19-13. The will was admitted to probate with no objection on June 20, 2014. CP at 4, 21 & 91. Daniel Gourde's intent with respect to the real property is expressed in his will, in part, as follows:

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ARTICLE IV.

Specific Request

In the event that ANN L. GANNAN is residing in my home ^{*the house*} located at 144 Chapman Road, Castle Rock, Washington, at the time of my death, I bequeath to her the right to reside there at her expense. In lieu of rent, she shall pay all expenses of upkeep, property taxes, fire insurance, all utilities, repairs and routine maintenance, keeping the property in good condition, reasonable wear and tear expected.

This bequest will terminate upon the death of ANN L. GANNAN, or if she abandons the property for a period of six consecutive months, whichever first occurs.

CP at 10.

Article IV of the will contains the type written phrase "my home" and the handwritten phrase "the house", is handwritten directly above the phrase "my home". CP at 10. No objection or contest was made regarding the will or any of the language in the will.

The will refers only to "the house" and not the land, which is approximately 6.5 acres. There is nothing in the will that devises any interest in the land to the Appellee. Further, in the will, Daniel Gourde references rent that would be excused so long as the expenses of the upkeep, property taxes, fire insurance, all utilities,

repairs and routine maintenance of the property is taken care of by the Appellee. CP at 9-13.

In her capacity as the personal representative of the Estate of Daniel Groude, the Appellee executed a deed to herself and the Appellants on June 25, 2015. However, the Appellants' objected to the language because the language used by the personal representative was broader than the conveyance language in the will. CP at 64.

The Appellee, acting as the personal representative, signed and caused to be recorded a Corrected Deed of Personal Representative on August 11, 2015. CP at 7. The deed states as follows:

THE UNDERSIGNED GRANTOR, ANN L. GANNAM, the duly appointed and qualified Personal Representative of the Estate of DANIEL A. GOURDE, appointed by the Cowlitz County Superior Court in Probate Cause No. 14-4-00152-3, which Court entered an Order of Solvency dated June 20, 2014, being authorized to settle said estate without the intervention of any court, and not in her individual capacity, hereby GRANTS, CONVEYS and QUIT CLAIMS to ANN L. GANNAM, a single women, for her lifetime or until she abandons the property, whichever is sooner, according to Article IV of the decedent's Last Will and Testament (a true and accurate copy which is attached as Exhibit A hereto), then to CHARBONNEAU D. GOURDE and GABRIEL E. GOURDE, married men each to their separate

estates, all of the decedent's interest in real property situate in Cowlitz County, Washington, and more particularly described as follows:

Parcel No. WJ0302015.

All that portion of Government Lot No. 2, Section 3, Township 9 North, Range 2 West of the W.M., lying East of Chapman Road and lying between a line 510 feet South of and parallel to the North Township line of Section 3, Township 9 North, Range 2 West, and line 770 feet South of and parallel to the North Township line of Section 3, Township 9 North, Range 2 West, W.M., Cowlitz County, Washington.

SUBJECT TO and TOGETHER WITH easements, restrictions and reservations record.

[Emphasis added.]

CP at 7.

The deed appears to grant a life estate to the Appellee. However, the life estate is limited as follows: "for her lifetime or until she abandons the property whichever is sooner, according to Article IV of the decedent's Last Will and Testament". CP at 7.

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The corrected deed describes the Appellants' interest, in the property, as:

all of the decedent's interest in the real property situate in Cowlitz County, Washington, and more particularly described as follows:

Parcel No. WJ0302015.

All that portion of Government Lot No. 2, Section 3, Township 9 North, Range 2 West of the W.M., lying East of Chapman Road and lying between a line 510 feet South of and parallel to the North Township line of Section 3, Township 9 North, Range 2 West, and line 770 feet South of and parallel to the North Township line of Section 3, Township 9 North, Range 2 West, W.M., Cowlitz County, Washington.

SUBJECT TO and TOGETHER WITH easements, restrictions and reservations record.

[Emphasis added.]

CP at 7.

After the death of Daniel Gourde, the Appellee refused to allow the Appellants access to the river front real property for recreational purposes. CP at 37. Therefore, the Appellants filed a declaratory judgment action to determine the meaning of the Corrected Personal Representative Deed. CP at 3.

The Appellants' filed a summary judgment motion. CP at 28. A Court Commissioner ruled that there were genuine issues of material fact and denied the motion. CP at 102-104. The Appellee filed a separate summary judge motion. CP at 75. A Superior Court Judge granted the Appellee's motion, dismissing the case. CP at 105-107.

F. ARGUMENT

1. It is the Duty of the Court to Consider all Language on the Face of the Deed and Consider all Language in Article IV of the Will Attached and Incorporated Into the Deed to Determine the Meaning of the Deed.

In *Hodgins v. State*, 9 Wash.App 486 513 P.2d 304 (1973), the court stated the in part as follows:

In the construction of a deed, a court must give meaning to every word if reasonably possible. *Fowler v. Tarbet*, 45 Wash.2d 332, 274 P.2d 341 (1954). Further, in the construction of a deed a court is required to carry out the real intention of the parties and, as stated in *Healy v. Everett & C.V. Traction Co.*, 78 Wash. 628, 633, 139 P. 609, 611 (1914), 'If a deed admits of more than one construction, it must be construed most strictly against the grantor, and most favorably to the grantee.'

The interpretation of a deed is a mixed question of law and fact. *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest Inc.*, 168 Wn.App 56, 277 P.3d 18 (2012).

It is the duty of the court to construe a deed so as to give some meaning to every word, if reasonably possible. *Fowler v. Tarbet*, 45 Wash.2d 332, 274 P.2d 341 (1954). In interpreting a deed, the court must look into the entire document to ascertain intent. *Veach v. Culp*, 92 Wash.2d 570, 599 P.2d 526 (1979).

In the present case, the Corrected Deed of Personal Representative refers to Article IV of the Last Will and Testament of Daniel Gourde to describe the Appellee's interest in the subject property. The Last Will and Testament of Daniel Gourde is attached as an exhibit to the Corrected Deed of Personal Representative. Article IV of the will is directly referred to on the face of the deed. Therefore, it is the duty of the court to give meaning to all of the words in the deed, including Article IV of the Last Will and Testament of Daniel Gourde attached to the deed.

In interpreting the meaning of the deed, if ambiguities exist, the deed should be interpreted strictly against the Grantor, the Appellee.

Article IV of the Last Will and Testament of Daniel Gourde limits the Appellee's interest in the real property to "the house". Nowhere in Article IV does the will refer to any land associated with the house.

In construing the intent of a testator, the court must give effect to any lawful intent of the testator, regardless of the reasonableness of conditions imposed. *In re Estate of Campbell*, 97 Wash.App 506, 942 P.2d 1008 (1997).

Black's Law Dictionary defines "house" as follows:

House. Structure that serves as living quarters for one or more persons or family. See also *Curtilage*; *Domicile*; *Home*; *Residence*.

Black's Law Dictionary, 665 (5th ed. 1979)

The *Merriam-Webster Dictionary* defines "house" as follows:

¹**House.** [pronunciations omitted] a building for human habitation.

Merriam-Webster Dictionary, 520 (2006)

Where there is a conflict between written and typewritten provisions of a writing, the former will prevail in case of irreconcilable inconsistency and the absence of any manifestation of an intent to the contrary. The reason for this rule is that the handwritten provision is a more deliberate and immediate expression of the intention of the writer than is a typewritten provision. 17 *Am Jur*, 2d Contracts § 271 (1964).

In the present case, the Last Will and Testament of Daniel Gourde was admitted to probate at the request of the Appellee.

Neither the Appellants nor Appellee contested any of the provisions of the will. The handwritten phrase, "the house", set forth in Article IV of the will, serves to define the Appellee's interest in the subject real property. The phrase "the house" clarifies the phrase "my home" in Article IV of the will. The Last Will and Testament that was admitted to probate was attached as exhibit A to the Corrected Personal Representative Deed. Article IV of the Last Will and Testament was incorporated into the deed with the handwritten language "the house" intact. there were no modifications to Article IV.

In interpreting the Appellee's interest in the subject real property, the court has a duty to give meaning, if possible, to every word in the deed, including Article IV of the Last Will and Testament of Daniel Gourde. Therefore, Appellee's interest in the subject real property is limited to "the house" which is defined under common dictionary meanings as structure, living quarters, or a building for human habitation. The ordinary meaning of house does not include land surrounding the house. This is the interpretation that should be given even if the testator's intent is determined to be unreasonable.

In summation, the trial court erred in considering only the face of the deed and not considering all of the terms set forth in

Article IV of the Last Will and Testament of Daniel Gourde, incorporated into the deed. To find that the Appellee's interest includes the house and the entire 6.5 acres of land is in error because it fails to give effect to the intent of Daniel Gourde.

2. The Declaratory Judgment Action is not Precluded by Res Judicata.

In *Mellor v. Chamberlin*, 100 Wash.2d 643, 673 P.2d 610 (1983), the court discussed res judicata as applied to the case of a covenant of title in part as follows:

Res judicata ensures the finality of decisions. A final judgment on the merits bars parties or their privies from relitigating issues that were or could have been raised in that action. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). In Washington res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Seattle-First Nat'l Bank v. Kawachi*, 91 Wash.2d 223, 588 P.2d 725 (1978).

. . .

Although the general test as to the applicability of res judicata is sufficient in this case, we maintain our view that res judicata principles are less strictly adhered to in the case of covenants of title. 2 L. Orland § 361, at

402 (citing *Harsin v. Oman*, 68 Wash. 281, 123 P. 1 (1912)).

In *Washington Nickel Mining & Alloys, Inc. v. Martin*, 13 Wash.App. 180, 534 P.2d 59 (1975), the court declined to find res judicata with respect to the issue of location of a boundary where the court had ruled in a previous cause of action that the corner was obliterated. As part of its ruling the court stated as follows:

The evidence accumulated during trial related almost entirely to the location of the east quarter corner, i.e., whether that corner was 'lost' or 'obliterated.' The trial court found the latter. It is clear from the evidence that neither party actually conducted a survey on the ground and staked the disputed boundary under either theory. Thus, the precise location of this boundary was not established at trial. The only issue resolved was that the point of beginning of the legal description in an 'obliterated' rather *183 than a 'lost' corner. We hold that the trial court's dismissal of plaintiff's complaint was proper, but that the judgment of dismissal is res judicata only as to the trial court's finding that the east quarter corner of section 24 is an 'obliterated corner.'

In the event a survey using the 'obliterated corner' as the point of beginning fails to resolve the dispute between the parties, then the parties may seek a determination of the location of the disputed boundary line in a future action.

In analyzing the applicability of res judicata the starting point is the burden of proof. The party asserting res judicata bears the

burden of proof. *Anastasia Forston-Kemmerer v. Allstate*, 2017 WL 1153451, __P.3d__(2017).

To find res judicata in this case there must be a concurrence of identity in four respects between the probate proceeding and the declaratory judgment action. First, the subject matter would need to be the same. The Corrected Personal Representative Deed did not exist until after the declaration of completion was filed at the end of the probate proceeding. Whereas the Appellant and the personal representative agreed to the language of the Corrected Personal Representative Deed, the Appellant and personal representative maintain differing interpretations as to the meaning of language in the Corrected Personal Representative Deed and attachment. The Appellants, utilizing the ordinary definition of "the house", believe that the Corrected Personal Representative Deed conveyed only an interest in the house, and not the land, to the Appellee. On the other hand, the Appellee has taken a position that the corrected deed conveys to her an interest in the house and all of the surrounding land.

The subject matter of the probate proceeding was to administer the estate and distribute assets to the beneficiaries. That was accomplished. Unfortunately, the distribution of the real

property according to the terms set forth in Article IV of the will of Daniel Gourde, did not resolve the issue of the extent of the Appellee's interest in the real property. The subject matter of the declaratory action is to determine the extent of the Appellee's property interest conveyed in the Corrected Personal Representative Deed.

It should be noted that basic probate administration is not designed to resolve disputes of an adversarial nature. In 1999, the legislature passed the TEDRA act to be used for dispute resolution of an adversarial nature in trusts and probate matters. To commence a TEDRA action, an action must be filed separate from the probate action, complete with a separate cause number and separate filing fee. A TEDRA action must be commenced as a new action. RCW 11.96A.090. In the present case, the interpretation of the Corrected Personal Representative Deed was not addressed in the probate action. It would have been necessary to address it in a separate adversarial action such as a TEDRA action or a declaratory action.

The probate and the declaratory judgment action are separate and distinct causes of action. A probate action is for the purpose of distributing the estate. The declaratory action was filed

for the purpose of interpreting a Corrected Personal Representative Deed after distribution of the estate had taken place. Therefore, the causes of action are not of the same identity.

The persons and parties in the probate are different from the persons and parties in the declaratory action. First, the Appellants herein were never made parties to the probate action. Being a beneficiary to a probate estate does not equate to becoming a party to the probate. No summons, complaint or petition was ever served on the Appellants in the probate.

Further, the Appellee was not acting in her personal capacity in the probate. She was acting as the personal representative for the estate. It was only after the Corrected Personal Representative Deed was conveyed from the estate that the Appellee became a record interest holder in the subject real property. The parties in the declaratory action are the Appellants and Appellee herein. There was only one party in the probate, the personal representative.

Finally, the qualities of the persons in the probate and in the declaratory action are different. In the probate, the Appellee acted in the capacity of an administrator as the personal representative. She did not serve in the capacity of a record deed holder. In the

declaratory action, all parties have a personal interest in the subject real property, conveyed by the deed.

In addressing the applicability of res judicata to the declaratory judgment action, it should be reviewed from the point of view that the interpretation of the parties' interests in the real property should be treated less strictly.

In the present case, both of the parties have different interpretations as to the meaning of the Corrected Personal Representative Deed. The interpretation issue was never put before the court in the probate proceeding because the probate proceeding is not designed to resolve adversarial disputes. If the Corrected Personal Representative Deed is left uninterpreted by the court, the Corrected Personal Representative Deed, filed for public record, will remain open to multiple interpretations. This is similar to the court finding an obliterated corner and then precluding the parties in a subsequent proceeding from determining the location of the boundary. It simply does not make sense.

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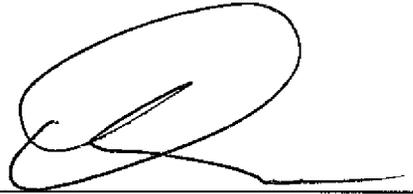
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G. CONCLUSION

Based upon the foregoing, the Appellant requests that the trial court's summary judgment order be reversed.

Respectfully Submitted this 20 of April, 2017.

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Darrel S. Ammons
WSBA #18223
Attorney for Appellants

DARREL S AMMONS ATTORNEY AT LAW PLLC
April 20, 2017 - 4:42 PM
Transmittal Letter

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Court of Appeals Case Number: 49983-5

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