

NO. 68109-5-1

COURT OF APPEALS, DIVISION I

STATE OF WASHINGTON

In re the Estate of)	
EDDIE KANYER)	
Decesased)	
MARY ELLEN KANYER,)	APPELLANT'S REPLY BRIEF
Respondent)	
vs.)	
KEVIN KANYER)	
Appellant)	

2012 OCT 11 PM 2:43
 COURT OF APPEALS
 STATE OF WASHINGTON
 DIVISION I



THORNTON P. PERCIVAL

Attorney for Appellant

18478 Angeline Avenue NE

Suquamish, WA 98392

TABLE OF AUTHORITIES

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Waits v. Hamlin 55 Wn. App. 193, 776 P2d 1003
(1989).....1

I ARGUMENT

A. The trial court improperly held that Mary Ellen's Actions as Trustee were appropriate under the ambiguous terms of the trust agreement.

In construing a will or trust, the intent of the testator or trustor controls. **Eisenbach v Schneider**, 140 Wn. App. 641, 651, 166 P.3rd 858 (2007). The courts gather intent from the trust instrument as a whole, giving effect to each part. **In re Estate of Sherry**, 158 Wn. App. 69, 78, 240 P.3rd 1182 (2010). If a trust term is ambiguous, extrinsic evidence may explain the language used. **Sherry**, 158 Wn. App. at 82. Terms are ambiguous if they are susceptible to more than one reasonable interpretation. **Waits v. Hamlin** 55 Wn. App. 193, 200, 776 P.2d 1003 (1989)

The respondent maintained the beach property for years preceding his living at the property from 2006-2006. (CP 16, 67,78). It was in such a state of disrepair that the insurance was cancelled in 1988. (CP 16,67) Thus, Kevin's occupancy of the beach property between 2000 -2006 is mischaracterized by the respondent as being caused only by hard times between 2000-2006. His involvement with the beach property to maintain the property was one of necessity to both Mary Ellen and Eddie years before the so

called period of hardship. He also paid the property taxes as well during the 2000-2006 period. (CP16, 68)

The trust is ambiguous as to whether the beach property was an asset that could be exchanged for assets that would otherwise be in the survivors trust. First, there was a reason why the first right of refusal for the beach property was designated within the family trust. Those reasons are a result of consideration paid, and the labors of the Appellant, to maintain and save the beach property. As a result, Mary Ellen and Eddie made a conscious decision when the trust was established in 2000 that the beach property was intended to be in the family trust because of the Appellant's efforts. For this reason, Mary Ellen and Eddie specifically identified the beach property in paragraph 11.4.1 as an asset for the family trust. (CP 54, 190) Second, if the beach property was interchangeable with other assets applicable to the survivors trust, Mary Ellen and Eddie would not have carved out or made reference to the beach property as a family trust asset given their specific designation in paragraph 11.4.1. Thus the trust is ambiguous as to whether the beach property was intended solely for the family trust or whether it could be exchanged for other assets to be included in the survivor's trust..

After Eddie's death, Mary Ellen chose to place the beach property into the survivor's trust allegedly because Eddie had no separate

property. (Respondent's brief at page 5) She then ignored the community property agreement and filed a TEDRA action seeking a declaration that the beach property was Mary Ellen's separate property. (CP 54, 215-216 and CP 1) The inference from these actions being an attempt to modify the intended trust terms after Eddie's death so that the beach property, if available, would not be in the family trust and available for the appellant to exercise a right of first refusal.

The Respondent contends that language in the trust did not require Mary Ellen to fund the family trust with any specific assets. (Respondent's brief at page 2) While the lower court said it didn't matter, it agreed that the trust intent was to put the beach property into the family trust. (CP 84, 477-484) Hence, it does matter if Eddie's intent was to place the beach property into the family trust as both Eddie and Mary Ellen agreed that any changes to the trust instrument including amendments or withdrawals after his death would only apply to the survivor's one half share of community property. (CP 54, 179). Exhibit 2 of the TEDRA petition indicates an estate value of \$840,000. (CP 1, 48) Putting the beach property into the survivors trust may have been contrary to Eddie's intent if \$420,000 was available to the respondent without the beach property.

Even though a mediation and trial date was set, the lower court's order on summary judgment terminated exploration as to evidence regarding the value of the trust estate upon Eddie's death to determine whether placing the beach property into the survivor's trust was or was not necessary. Instead we are left with little evidence to determine whether it did matter or whether the intent, as expressed in the trust, required that it remain in the family trust until such time as other needs required its disposition. While Paragraph 18.1 gives the surviving trustor power to sell and manage the assets, it also requires that such actions may not "be inconsistent with other express provisions" of the trust. This standard also governs the powers referenced by the lower court in paragraph 18.3. The initial placement of the beach property upon Eddie's death into the survivor's trust is contrary to the express requirements of paragraphs 11.4.1 and 9.2 (CP 54, 203, 190, 186) Further, there is no evidence that it was necessary when this action took place to maintain Mary Ellen's needs for health, education, support and maintenance. Thus, the matter should be reversed for a determination as to whether the beach property was properly placed in the survivor's trust given the express terms of the trust and lacking substantive evidence as to whether there was or was not a need to place the beach property into the survivor's trust.

B. The Court in its discretionary powers should not Award attorney's fees to Mary Ellen for having to defend This Appeal.

This matter was appealed by a son who had a first right of refusal in the original trust for the beach property and who had also expended hours maintaining and curing issues related to it before the death of his father and thereafter. (CP 16, 78) He was the only sibling of Mary Ellen who was served with the TEDRA petition for the obvious reason that Mary Ellen chose to eliminate, justify or rationalize a decision to eliminate his potential future interest in the beach property for whatever may have been her reasoning. This is not an appeal made by a far removed descendent such as nieces or nephews. To the contrary, the appeal of her son is premised on a promise between Mary Ellen and Eddie that the son was to have a first right of refusal regarding the beach property, the placement of it in the family trust as expressed in paragraph 11.4.1 the trust.

While **In re Estate of Black**, 116 Wn App. 476,492, 66 P. 3rd 670 (2003) allows the Court of Appeals to make an independent decision on the question of fees, this matter is not suitable for awarding attorney's fees given since the actions of the appellant in contesting the conclusions of the trial court was reasonable under the circumstances.

Dated this 10th day of October, 2012.

THORNTON P. PERICVAL

A handwritten signature in black ink, appearing to read "Thornton P. Percival", is written over a horizontal line.

Thornton P. Percival WSBA NO. 4755

Attorney for Appellant

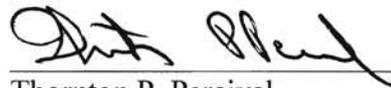
1 Bruce Moen
2 Moen Law Offices, P.S.
3 One Union Square
4 600 University Street
5 Suite 3312
6 Seattle, WA 98101

7 Howard Mark Goodfriend
8 Smith Goodfriend PS
9 1109 1st Avenue
10 Suite 500
11 Seattle, WA 98101-2988

12 Court of Appeals Division I
13 One Union Square
14 600 University Street
15 Seattle, WA 98101-4170

16 In accordance with RCW 9A.72.085 I declare under penalty of perjury under the laws of the
17 State of Washington that the foregoing is true and correct this 10th day of October, 2012.

18 Signed in Suquamish, Kitsap County, Washington on this 10th day of October, 2012

19 

20 Thornton P. Percival
21 Attorney for Kevin Kanyer
22 WSBA # 4755
23 18478 Angeline Avenue N.E.
24 Suquamish, WA 98392
25 Telephone (360) 697-4295
Fax : (360) 697-4195
E-Mail: tpplaw@embarqmail.com