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OCT 07 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**DIVISION III COURT OF APPEALS  
STATE OF WASHINGTON**

No. 33243-8

**Spokane County Superior Court Case No. 13-3-00783-3  
The Honorable Maryann Moreno  
Superior Court Judge**

**APPELLANT'S OPENING BRIEF**

**In Re:**

**DUANE COOK, RESPONDENT/PETITIONER**

**V.**

**ELAINE COOK, APPELLANT/RESPONDENT**

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## I. FACTS

On the date of July 25, 2014, the parties to this appeal were divorced by a trial and decree. Their decree included a lengthy order detailing how their family home would be sold. CP 16-18. That order stated in part:

### 3.4 SALE OF FAMILY HOME.

[X] The family home of the parties shall be immediately listed for sale and sold at a price which reasonably reflects the fair market value of the same (appraised at \$450,000.00 and therefore [sic] sale price should be reasonably close to this value). As pertains to the sale and division of the real property as ordered herein, until the property is sold the husband and wife shall hold the property as tenants in common with each having and undivided in interest in said property, namely, fifty per cent (50%) each according to the terms of this decree. In this regard both parties shall mutually employ the services of a licensed real estate agent to assist with the sale of the real property. Such cooperation shall include, but not be limited to, signing all documents necessary to list the property, maintain the property in a manner directed by the real estate agent, and make the property available for potential buyers. The real estate agent shall have the requisite experience and credentials to sell high end properties and shall not be a friend of either party. Each party shall also have access to the realtor and neither party shall change the listing price, the terms of the sale, or the realtor without the written consent of the other or upon an order of the court after hearing. In the event of a dispute as to the agent to be employed or replacement of the agent employed, or any other matter affecting the real property, when agreement is not possible, the court will decide the dispute. All offers of purchase shall be communicated to each party in a timely manner.

[X] In the event the parties are unable to agree on any matter or issue regarding the home, the issue shall be decided on the exparte motion calendar with the Spokane County Superior Court on five days' notice to the opposing party not including intervening weekends. the judicial officer may then decide the issues. Such notice and motion shall be deemed sufficiently given when sent by certified or registered mail to the home address of the other party or his/her agent. The associated costs and expenses of each party shall be borne by that party.

[X] As pertains to the sale of the real property neither party shall borrow against the equity in the real property, pledge the real property as security for any debt, and/or deed any other person an interest in the real property. Each party shall also keep the other informed of any future litigation that may result in a lien against the real property. Until the property is sold the husband shall be responsible for payment of one-half of the first mortgage and one-half of the line of credit until the home is sold. The wife shall be responsible for payment of one-half of the first mortgage and one-half of the line of credit until the home is sold together with all utilities and other reasonable expenses associated with the home pending sale. At all times prior to the sale of the home the parties shall maintain the existing homeowner's policy with the premium being shared equally when due. Property taxes shall be paid by the wife pending sale of the home. *Id.*

As is somewhat obvious there are various components to this rather wordy contract (decree). They are organized as follows:

1. The home shall be put up for sale at \$450,000, or within that reasonable value;
2. The parties shall hold the home as tenants in common having an undivided 50/50 interest;
3. The parties shall employ an agreed qualified realtor to sell their home;
4. The parties shall cooperate with the sale - maintaining the property as requested by the realtor, signing all sale documents;
5. *Each party shall have access to the realtor;*
6. *Neither party shall change the listing price, the terms of the sale, or the realtor without written consent of the other or upon an order of the court after hearing;*
7. *All offers of purchase shall be communicated to each party in a timely manner;*
8. Notice shall be given to both parties of any legal problems related to the home;
9. If a dispute about the sale of the property cannot be resolved it shall go to ex parte court;

10. Payment of the home's costs until sale was outlined - primarily equal payments from both.

CP 16-18.

Soon after the decree was entered the parties agreed on a joint realtor and a sale price of \$469,000.00. CP 40-42. In January 2015 an offer was communicated to Mr. Cook from his friend Peter (his last name is not being used for anonymity) for 450,000.00 and Mr. Cook countered with \$455,800.00. CP 37, 54, 56. This offer was then communicated to the realtor who said she told Ms. Cook, but the evidence showed that was not true, or was after the signing of an official offer. CP 82-83 Eventually, the offer went down to a low of \$450,000.00 and the \$470,000.00 appeared to be totally scrapped. CP 37, 54, 56. Ms. Cook, the appellant, refused to agree to the sale because of the way it was handled, who was making the offer, and how the realtor and Mr. Cook were not following the precepts of the decree (See numbers 5, 6, & 7 above).

Mr. Cook filed a motion pursuant to the decree but instead of placing it on the Ex parte docket, he placed it on the family law docket, a process deemed close enough to Ex parte to complain about. A hearing was held in front of the "Monday" family court commissioner and after reading all the evidence, emails, and declarations, found that "the house was the main point of contention at the trial, heavily litigated" (CP 101 In. 9-10), and was to be sold according to section 3.4 of the decree. She goes on in her decision to say that on January 16th, 2015 at 9:20AM Mr. Cook received an email from the realtor (who had been chosen by the wife) and he agreed to Peter's new counter offer of \$450,000.00. CP 101 In.

17-21). Then she points out that Ms. Cook told Mr. Cook that the offer of \$450,000.00 was too low because they had agreed to a listing price of \$470,000.00 and that she would make her own offer to buy the home from him with her offer that would be better. CP 102 ln. 7-17. [It should be noted that on page 3 (CP 102) of the commissioner's record of the proceeding (transcript) there is a typo that says "270,000" when it should say "470,000"].

The commissioner goes on to say that Mr. Cook told Ms. Cook to "either accept it, you counter it with a counter I can agree to or make an offer through Brandi", allowing Ms. Cook to now potentially buy the family home by paying off his half interest. See CP 102 ln. 17-19. She then indicates that a couple days later on January 17th, at 10:12AM Mr. Cook has a change of heart and says in an email to Ms. Cook "I never accepted your offer" [CP 102 ln. 25] and he leaves it at that.

While these emails and correspondence were going back and forth between the parties, the commissioner found that on January 19th, Mr. Cook and the realtor received a counter offer from Peter (Mr. Cook's friend) of \$455,800.00. CP 103 ln. 1-3. At the same time Ms. Cook emails Mr. Cook telling him that she thought there might be another counter offer and she would like to know what it was. CP 103 ln. 4-6. She further finds that this new offer was never given to Ms. Cook by either the realtor or Mr. Cook as the decree (see number 6-7 above) required. CP 103 ln. 8-18.

The commissioner found that Mr. Cook did not have authority to unilaterally accept the offer from his friend Peter without conveying it to Ms. Cook first. CP 103 generally. She then found that they both had not been operating fair to one another and that Ms. Cook needed to make her offer if she was going to do so. CP 103 ln. 24-25. Ms. Cook would have from that Monday February 9th, 2015 to Friday the 13th, to make her offer that would net Mr. Cook more than he would receive under the \$455,800 offer. *Id.* Ms. Cook made her official offer on or before noon Friday 13th, 2015. See CP 94-97. The offer provided Mr. Cook more than he would have received if he sold the home for \$455,800.00 (even though the offer was at \$455,000). *Id.* The reason for this was the changes in the realtor fees (see offer letter). *Id.*

Ms. Cook made an offer so that Mr. Cook would receive \$77,000.00 from the sale of their home. This transfer would be a divorce equalization payment from Ms. Cook to Mr. Cook. In addition, Ms. Cook's representative also indicated that if the offer somehow does not exceed his receipt payment from the sale of the home that it would be off somehow, that she would insure he received at least \$1,000 above the original amount of \$255,800.00 via the realtor. *Id.* Mr. Cook filed a motion for revision of the commissioner's orders.

The Family Law Superior Court Judge revised the court commissioner's ruling and ordered that the \$455,800.00 be accepted for the sale to Mr. Cook's friend Peter. Ms. Cook was ordered to sign all the paperwork to sell the property. See CP 116. Ms. Cook appealed this revision order.

## II. ASSIGNMENT OF ERROR

1. The Judge committed error by ignoring the ex-husband's violation of the decree requirements, by unilaterally accepting his friend's counter offer.
2. The Judge committed error by ignoring the "law of the case" rules in this matter.
3. The Judge committed error by forcing the Appellant to cooperate with the sale of the family home when the process used by the ex-husband to try and sell the family home to his friend was clearly a violation of the ordered process for its sale;
4. The Judge committed error by revising the Commissioner's ruling.

## III. Law and Argument

- A. The Law of the Case indicated that there was a specific procedure to be followed before any offer or sale could even be considered by either party, or the realtor for that matter.

What does the term "Law of the Case" mean? Law of the Case was described in the case of *Bank of America, N.A. v. Owens*, 177 Wn.App. 181, 189, 311 P.3d 594 (Wash.App. Div. 1 2013) as either "[a]n appellate court's mandate" or an "unchallenged" finding and conclusion of law. *King Aircraft Sales, Inc. v. Lane*, 68 Wn.App. 706, 716-7, 846 P.2d 550 (Wash.App. 1993), See also *Knies v.*

*Knies*, 96 Wn.App. 243, 979 P.2d 482 (Wash.App. Div. 1 1999)<sup>1</sup>. Also, the failure to appeal a final order or decree makes a judge's final ruling the Law of the Case as well. See *Detonics ".45" Assocs. v. Bank of Cal.*, 97 Wn.2d 351, 353, 644 P.2d 1170 (1982); *Rossmiller v. Rossmiller*, 48 P.3d 377, 112 Wn.App. 304 (Wash.App. Div. 2 2002). Therefore, if a Decree indicates that there is a specific process that lays out how property is to be dealt with, and if not appealed, that process ordered is the law of the case.

In this case the original trial judge set out in the parties Decree that the parties were to sell their family residence post dissolution. CP 16-18. Their Decree did not say that the parties could not make their own offer to buy the other party out of their interest in the home, nor did it say that one of the parties could not hire a ghost buyer (for example) to purchase the other out of their share. *Id.* The process of the sale was very clear and specific. As indicated the three most important features of the decree ordered process was that both were to receive any offers of any kind that would affect the price in a timely fashion. That clearly implied that the offers were to go to the other party for permission to sell for that amount in writing before any offer was accepted. However, in clear violation of this part of the decree, Mr. Cook accepted his friend Peter's offer of \$455,800 without letting Ms. Cook in on that offer or acceptance. He clearly

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<sup>1</sup> It must also be said that the "Law of the Case" doctrine may not apply to a specific case if there are facts that show there has been a change in circumstances as to the specific issue before the court, or that there is a new issue dealt with by the court that does not apply to the present application of the decree. See e.g. *In re Marriage of Ayyad*, 38 P.3d 1033, 110 Wn.App. 462 (Wash.App. Div. 1 2002).

violated that part of the decree, therefore, the commissioner was absolutely correct in denying Mr. Cook's original motion to force Ms. Cook to accept that offer.

With the above decree requirements of the decree on how to sell their family home in mind, it was imperative that the parties strictly follow that process, unless waived specifically by the spouse who did not receive the benefit of the decree's required process. If that spouse does not waive those requirements and the other spouse unilaterally decides to accept an offer, then there is nothing in the decree that would make that offer and its inappropriate acceptance appropriate and binding.

In this case Mr. Cook absolutely did not follow the decree's requirements, hence the decision of the Commissioner was proper since she followed the specifics of the decree and the "law of the case" in this matter.

B. The interpretation of the application of the decree as to the sale of the family residence must follow the rules of interpretation of a contract.

When interpreting a decree of dissolution, especially as to the transfer or sale of property, the court must turn to the rules of interpretation of contracts. See *In re Marriage of Sager*, 71 Wn.App. 855, 862, 863 P.2d 106 (Wash.App. 1993). When interpreting a contract the court should read the plain language of the document and give it its ordinary meaning. In this case, the decree indicates that the parties are to provide any offers different from the listed price to the other party in a timely fashion, and that secondly, any

changes in the list price must be verified in writing from the other party. Mr. Cook was to insure that the offer from his friend Peter get to Ms. Cook before he accepted this offer. He did not and violated the contract/decreed. The Appellant was well within her rights to refuse to cooperate with the proposed sale to the ex-husband's friend given the fact that he failed to abide by the terms and conditions of their decree. The judge's revision order should be overturned.

C. The ex-husband should pay the attorney fees of the Appellant pursuant to the parties' decree.

It is the law on appeal that if there is a statute and/or contractual reason for the payment of attorney fees between two litigants, those fees are appropriate, regardless of whether it is a divorce or not. See *Fisher Properties, Inc., v. Arden-Mayfair, Inc.*, 106 Wash.2d 826, 849-50, 726 P.2d 8 (1986). In this case the parties Decree indicates at page 4 lines 16-23 that should either party file a motion to enforce the decree's provisions regarding the sale of the family home, the "associated costs and expenses of each party shall be borne by that party". CP 16-18. Meaning the party who does not file the motion. This appeal was filed to enforce the decree's provisions regarding the house's sale. Mr. Cook failed to follow that process and the Revision Judge should have enforced those provisions as the commissioner did. Mr. Cook should pay Ms. Cook's fees in this matter.

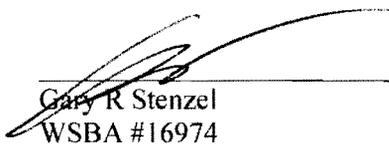
#### IV. Conclusion.

In 2013 the parties were divorced. They were required by their decree to sell their house by a strict process and split the profits. The process included not accepting any offers without the other party's approval. However, the decree also did not say that one spouse could not buy the other spouse out of the family home.

Ms. Cook expressed a desire to buy Mr. Cook out, but Mr. Cook refused and apparently worked with his friend at work to buy their home. Mr. eventually accepted his friends offer behind Ms. Cook's back and filed a motion to force her to agree with it. The Commissioner ordered instead that Mr. Cook had to sell the home to Ms. Cook instead of his friend if she made an offer by a certain date and time and it would net more money to the ex-husband. Ms. Cook served Mr. Cook with that offer and he rejected it and took the Commissioner's ruling up on a revision motion.

The Superior Court Judge revised the Commissioner and ordered Ms. Cook to comply with the friend's purchase and sale. The Commissioner rather than the Judge properly followed the Decree's requirements. The husband did not have clean hands since he failed to involve Ms. Cook in the offer and acceptance process as was required. Ms. Cook has appealed the Judge's ruling and asks that the court overturn the Judge's ruling since it did not follow the Law of this Case, violated the Decree's stated requirements for a proper sale of the home and should award Ms. Cook her fees.

Respectfully submitted this 1<sup>st</sup> day of October 2015.



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**Declaration of Mailing**

I, Lori Scarano, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on August 31, 2015, a copy of this opening brief was delivered by mail to the office of Keith Briggs, Attorney for Petitioner, at 621 W. Mallon Ave, Spokane, WA 99201, and Jason R. Nelson, 2222 N. Monroe St, Spokane, WA 99205.

Dated this 1<sup>st</sup> day of October 2015.



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Lori Scarano

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**FILED**

OCT 16 2015  
CLERK OF SUPERIOR COURT  
DIVISION III  
STATE OF WASHINGTON

**APPEALS COURT OF THE STATE OF WASHINGTON  
DIVISION III**

**In Re:**

**DUANE COOK,**

**Respondent/Petitioner,**

**And**

**ELAINE COOK,**

**Appellant/Respondent.**

**Appeal Ct. No. 332438  
Superior Ct. No. 13-3-00783-3**

**AMENDED DECLARATION OF  
MAILING**

I, Lori Scarano, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on October 1, 2015, a copy of the Appellant's Opening Brief was mailed to the office of Jason Nelson, 2222 N. Monroe, Spokane, WA 99205 and to Keith Briggs, 621 West Mallon, Spokane WA 99201.

Dated this 6<sup>th</sup> day of October 2015.

  
Lori Scarano

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**FILED**

OCT 15 2015  
COURT OF APPEALS  
MOUNTAIN  
STATE OF WASHINGTON  
BY \_\_\_\_\_

**APPEALS COURT OF THE STATE OF WASHINGTON  
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**In Re:**

**DUANE COOK,**

**Respondent/Petitioner,**

**And**

**ELAINE COOK,**

**Appellant/Respondent.**

**Appeal Ct. No. 332438  
Superior Ct. No. 13-3-00783-3**

**DECLARATION OF MAILING**

I, Lori Scarano, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on October 6, 2015, a copy of the Table of Contents and Citations to Authorities was mailed to the office of Jason Nelson, 2222 N. Monroe, Spokane, WA 99205 and to Keith Briggs, 621 West Mallon, Spokane WA 99201.

Dated this 6<sup>th</sup> day of October 2015.

  
\_\_\_\_\_  
Lori Scarano