STATE OF IDAHO)
County of KOOTENAI)ss

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AT___________ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

WILMA CLAIRE JUSTAD, *Plaintiff*, vs. **RONALD WARD, Personal Representative of the Phyllis A. Gasser Estate.** *Defendants*.	Case No. **CV 2006 4679** **MEMORANDUM DECISION AND ORDER ON PLAINTIFF'S MEMORANDUM OF FEES AND COSTS, AND DEFENDANT'S OBJECTION TO MEMORANDUM OF FEES AND COSTS**

I. INTRODUCTION.

This matter was tried to this Court on October 15, 2007. At the conclusion of that hearing, the Court found in favor of plaintiff Wilma Claire Justad (Claire Justad). Judgment was entered November 15, 2007. As is discussed below, Claire Justad prevailed on her claims and was the prevailing party. On November 20, 2007, Justad's attorneys filed a "Memorandum of Fees and Costs" on her behalf. On December 4, 2007, defendant Ronald Ward's attorney filed "Defendant's Objection to Memorandum of Fees and Costs" on his behalf. Oral argument on the issue was held December 17, 2007, and the issue was taken under advisement, primarily to review *Cannon v. Perry,* 2007 WL 3036816, 2007 Opinion No. 106, 07.22 ISCR 855 (October 19, 2007), which was cited in Claire Justad's Memorandum of Fees and Costs.

Attorney fees are requested by Claire Justad pursuant to I.C. § 12-120(1) and (3), and I.R.C.P. 54(e)(1). Memorandum of Fees and Costs, pp. 1-2. Ronald Ward objects that there is not sufficient evidence to show Claire Justad's action was a "commercial transaction." Defendant's Objection to Memorandum of Fees and Costs, p. 1. A discussion of the evidence is necessary to determine these claims.

II. ANALYSIS.

At the end of the trial the Court held Claire Justad is entitled to specific performance on a May 8, 1978, option contract which Claire Justad had with Phyllis Gasser. Claire and Phyllis were sisters. The option concerned some real estate bordering Lake Coeur d'Alene, Idaho. That land bordered additional land that Claire Justad and her husband bought from Phyllis Gasser at the same time the option contract was entered into. Claire Justad testified that the reason she wanted this option was to provide this land as a legacy for her son. Gasser died and Ronald Ward was appointed personal representative of Gasser's estate. Ron Ward was Phyllis Gasser's nephew, the son of Phyllis' other sister Leila. Under the terms of the option contract (Exhibit A/ Exhibit 3), Claire Justad had 60 days to exercise her rights under the option, or her rights under the option would be lost. If Claire's rights under the option were not exercised, the property would remain in Gasser's estate. Ward not only administered Gasser's estate, but he stood to inherit under the terms of Gasser's will.

Claire testified before this Court that she was present in Coeur d'Alene when her sister Phyllis died. The hearing on appointment of Personal Representative was held on April 11, 2006, fifty-one days after Gasser died, nine days before the 60-day period under the option would expire. Claire Justad's daughter, Jodi Justad, traveled all the way from Boise to Coeur d'Alene to provide that acceptance at that April 11, 2006, hearing. Claire Justad testified before this Court that immediately after she received notice in the mail of this April 11, 2006, hearing, because Claire had recently fallen and could not make the trip herself, she told Jodi Justad to travel to Coeur d'Alene for the hearing for the sole purpose of exercising that option. Claire Justad testified at the trial before this Court, that Jodi did so at Claire's request, and Claire Justad testified that the reason she had Jodi do this was Claire understood Claire needed to give notice of intent to exercise the option to the personal representative and to the court.

Jodi Justad attended court before Magistrate Judge Friedlander on April 11, 2006, and attempted to give notice. Jodi Justad was there for no other reason. Jodi wasn't a devisee under the will, nor was she an heir of the decedent Phyllis Gasser.

Jodi Justad had a power of attorney for her mother, Claire Justad, who was physically unable to be present at the hearing. At the April 11, 2006, hearing, Judge Friedlander asked Jodi who she was, and Jodi replied:

> My name is Jodi Justad, I am Claire Justad's daughter, um, Phyllis Gasser's last surviving, uh, sibling. Um, my mother was Phyllis Gasser's power of attorney and administrator of her estate for many years. Uh, this went on um – Ron Ward uh, became her um, power of attorney and uh, administrator of her estate without my mother's knowledge. And um, I also – my mother told – my mother has—
>
> The Court: All right. Wait a minute. So. You're objecting, but you haven't filed any pleadings at all with the Court.
>
> MISS JUSTAD: No. I'm here just to hear what I – I was not sure what this court date—what this court was – was about. And I flew up here from Boise last night.
>
> Um, my point is, is that my mother sold some – that my mother owns a --

Even though Judge Friedlander construed Jodi's presence as an objection to Ronald Ward's appointment it is obvious that Jodi Justad was not there to object to Ron Ward's appointment. This Court so found. This Court found Jodi was at that hearing because: "My mother told me (something), my mother has (something) and my mother owns (something)." From the context at that hearing and all the evidence at this trial (from

Claire Justad and Jody Justad), the only reason she was there was to exercise the option and the ONLY thing that her mother "owned" was the option. That testimony was uncontradicted. This was in open court before Judge Friedlander, it was on the record, and if Jodi would have been allowed to finish her statement, she would have provided clear notice on the record to Judge Friedlander and Ronald Ward.

This Court found this was adequate notice, in and of itself. Without more, this was notice to the court and it was notice to Ron Ward. The fact that Ronald Ward knew who Jodi was (Claire's daughter), and knew Claire had bought from and paid for an option years before from Phyllis and her husband, makes it even more clear to Ron Ward, the man who at the April 11, 2006, hearing was seeking to become the personal representative (and the man who would later become personal representative), that Claire was in fact giving notice on April 11, 2006.

Claire gave notice of her intent to exercise her option to Ronald Ward on April 11, 2006, through Jodi at the hearing. There simply could have been no other interpretation made by Ronald Ward at that time. Ronald Ward had more information than Judge Friedlander at that time. Ronald Ward knew there was an option, knew Claire knew about the option, knew Claire was not mentioned in Phyllis' will, and knew Jodi had no reason to be in Court on April 11, 2006, *other* than to exercise Claire's option. The few words Jodi got out were consistent with Claire exercising her option on that day.

Claire also gave notice to the court on April 11, 2006. While misinterpreted by Judge Friedlander because Jodi was not allowed to get her entire statement out, it is clear from the transcript what Jodi was trying to do. The result was to cause Judge Friedlander to continue the hearing. That continuance is not a recognition of the notice of intent to exercise the option, but the effect of Judge Friedlander's decision to continue the hearing was to extend the 60-day period Claire had under the option. Ronald Ward did not come away from the April 11, 2006, hearing with the authority he was seeking. At the end of the June 15, 2006, hearing, he finally obtained that authority. But earlier that day, before the hearing, he had also received notice of Claire's intent to exercise the option.

At that April 11, 2006 hearing, who had the higher duty? Jodi was trying to give notice of her mother's acceptance of the option. That is crystal clear. That communication didn't happen in its entirety, but there is no doubt in this Court's mind that at that hearing Ronald Ward knew exactly what Jodi was trying to communicate. At that hearing Ronald Ward is trying to get appointed as personal representative. A personal representative has a fiduciary duty, both to the court and to heirs and devisees. A person in a fiduciary duty also has a duty to speak when he or she should speak and not remain silent before Judge Friedlander. Ronald Ward knew what Jodi was trying to communicate. Ronald Ward had knowledge that Claire had an option. Were Ronald Ward to fulfill his fiduciary obligations, he should have told Judge Friedlander, "Judge, I think Jodi is here to notify the court and me of her mother's intent to exercise an option on some property owned by Phyllis, the decedent, and the record can reflect that, but I don't think she has any objection to my being the personal representative."

Alternatively, the Court found that notice occurred on June 15, 2006. Judge Friedlander continued the hearing to June 15, 2006. On June 15, 2006, Claire Justad, through her attorney this time, exercised her rights under the option. Exhibit I4. This Court found this exercise of Claire Justad's option on June 15, 2006, was not timely from time of death, but it is timely as a matter of law. Up until later in the day on June

15, 2006, after Ron Ward was appointed, there was no one *to give notice to* regarding the option. There was no evidence adduced that Claire knew who the heirs were under Phyllis' new will, nor was there evidence Claire knew there was a new will. Claire got notice from Ronald Ward regarding the hearing, and that was sent out on March 21, 2006. Exhibit F. Idaho Code § 15-3-103 supports this conclusion.

Up until the time Judge Friedlander appointed Ronald Ward there was no person, no entity to give notice. Claire could have given notice to the three individuals listed in Phyllis' will: Ronald Ward, Dennis Stott and Thomas Stott, but there is *no* evidence that Claire ever knew there was a new will. There is no evidence that Ronald Ward mailed such to Claire. Claire testified she wasn't sure if she ever read the application, and nothing on the application (Exhibit D) shows it was sent to Claire.

Under *Estate of Baker v. Lahrman,* 505 N.E.2d 104, 107 (Ind.App. 1987), she could have given notice to the devisees (if she had known who they were) <u>or</u> she could have given notice to the personal representative. Claire did that on June 15, 2006, the very day the personal representative came into existence. The Court found, as a matter of law, the 60-day period does not begin to run until the PR has been admitted into probate.

The Court found the option is supported by consideration. The testimony is uncontroverted that Claire and her husband paid Phyllis' husband $100 cash.

As to all of her claims, Claire Justad is the prevailing party.

Claire Justad's factual basis for claiming attorney fees under I.C. 12-120(3), is that Claire Justad testified at trial the reason she wanted this option was to provide this land as a legacy for her son. That factual basis is bolstered by the fact that Claire lived in Boise for many years, had no desire to move to Coeur d'Alene and live on the property, but wanted the option on the lake property in order to make the property she bought from Phyllis back in 1978 more valuable for her son. Claire testified she wanted the option on this property so her son could develop the property and have more income for himself. In 1978, Claire and her husband bought 113 acres from Phyllis and her husband John because Phyllis and John decided to get out of the cattle business and retire. In 1978, Claire's son was not yet grown. Exhibit 2. Claire testified:

> …we asked if we could have an option on the rest of the property, he was thinking about the upper property, hundred and thirteen acres I think it was, and, uh, so we said that, well, when we – if we purchase it we'd like to have an option on the rest of it because we're gonna leave that part – all the property up here we were gonna leave to my son who since was killed, and – so that they could develop it, he could develop it when the time was right.

The 113 acres and the optioned parcel were bought for the same reason. Claire testified why she bought this option:

> We wanted it because, uh, eventually when my son would inherit that, uh, he would have more property to make a development up there and have income for himself.
> Q. You entered into a contract of sale, but you also wanted an option. Is that what you're testifying?
> A. Absolutely.

The 113-acre parcel had no residence on it. Phyllis and her husband also sold an option to Claire and her husband for $100 for the parcel where Phyllis and John continued to reside. John Gasser died in 1984, and Phyllis continued to reside on that parcel until she died. The option price, when Phyllis and her husband died or decided to sell, was for $97,000.00. Claire testified that her son, for whom they had purchased this parcel, was murdered in Boise. Claire did not testify when that occurred, but it appears to have happened prior to Phyllis' death and Clarie's exercise of her option rights in 2006.

The pertinent case is *Cannon v. Perry,* 2007 WL 3036816, 2007 Opinion No. 106, 07.22 ISCR 855 (October 19, 2007). A more complete title of that case is *Cannon,* *Hinrichs and Moreno v. Perry.* In that case, Perrys owned a house and Cannons leased it for a year with an option to buy at a set price. Cannons moved in and began paying rent, but they couldn't get financing for the purchase. Cannons' friend Moreno said she would buy at that same option price the Perrys had given Cannons, and Perrys agreed. In turn, Moreno was unable to obtain financing. Subsequently Moreno's friend Hinrichs agreed she would be the buyer and the Perrys agreed. The Idaho Supreme Court noted "…the record reflects that Moreno and Hinrichs had entered into a partnership to purchase the property to rent to the Cannons with the intent of eventually selling to the Cannons." 07.22 ISCR 855, 856. Closing was postponed a few times and the last extension was to December 30, 2004. Before closing, the Perrys visited the home and saw the improvements the Cannons had made. The Perrys then sent a letter to Hinrichs and the Cannons rescinding all previous agreements. The buyers were ready to buy, but December 30, 2004, came and went, and a few days later the Perrys sold the property to a different buyer for about $30,000 more than the price agreed upon between Cannons, Moreno and Hinrichs. The Cannons, Moreno and Hinrichs sued, alleging breach of contract and wrongful eviction. The district court granted Perrys' summary judgment on the ground that the contract unambiguouisly expired on December 16, 2004, and thus, Perrys were free to rescind the contract on December 17, 2004. The district court granted Perrys' request for attorney fees against Hinrichs and Moreno under I.C. § 12-120(3), which provides for the prevailing party "in any commercial transaction" to recover reasonable attorney fees, but the district court refused Perrys' request to award attorney fees against the Cannons. On appeal, the Idaho Supreme Court held summary judgment should not have been awarded. All parties contested the attorney fees decision before the Idaho Supreme Court. Hinrichs and Moreo argued the award of attorney's fees against them was barred because the transaction was not a commercial transaction since the property was to be used for residential purposes and Hinrichs and Moreno entered the transaction not as commercial investors, but as friends trying to help the Cannons. The Perrys argued attorney's fees should have been awarded against the Cannons pursuant to a provision in the lease/option agreement. Because it reversed the district court in its summary judgment decision, there was no longer a prevailing party. Since there was no prevailing party, the Idaho Supreme Court also vacated the attorney's fees decision of the district court, but discussed the attorney's fees issue as follows:

> Commercial transactions are "all transactions except transactions for personal or household purposes." I.C. § 12-120(3). The statute does not require that there be a contract. *Blimka v. My Web Wholesaler, L.L.C.,* 143 Idaho 723, 152 P.3d 594 (2007). There is no dispute that the Cannons' involvement in these transactions was for personal or household purposes. Although Hinrichs and Moreno contend that they were acting only as friends of the Cannons, each of them testified in their depositions that they were buying the property for investment purposes. The arrangement was not a gift to the Cannons; Hinrichs and Moreno would collect rent and ultimately sell it to the Cannons at an appraised price. The district court correctly found, therefore, that the transaction was a commercial transaction with respect to Hinrichs, Moreno and the Perrys.

07.22 ISCR 855, 857.

Under the above language and reasoning of the Idaho Supreme Court in *Cannon v. Perry,* it is possible to reach two interpretations given the facts of this case.

The first interpretation is that Claire Justad purchased this property as a "commercial transaction" because it was for her "investment purposes", and not for Claire Justad's personal or household purposes. In *Cannon,* the Idaho Supreme Court found Cannons' involvement in the transaction was "personal" or for "household purposes", apparently because the Cannons were going to live on the property and live in the house. As to Hinrichs and the Morenos, since they were buying for investment purposes, even as friends of Cannons, the transaction was a commercial transaction. In the present case, there is no testimony that Claire Justad, or even her son, would ever live on this optioned property. The exercise of the option and the resulting purchase was an investment. That would tend toward a commercial transaction. Even though Claire's intent is to "give" the property to her son, Claire has no intent to use the property for personal purposes.

The second interpretation is that Claire Justad purchased the 113 acres and the option for the remaining property from her sister as an eventual gift to her son, and that this fact makes this transaction one for "personal" purposes. One cannot imagine a more "personal" purpose than to exercise an option obtained from one's sister to purchase property to give to one's own child or to leave to one's own child by way of inheritance. A sub issue under this interpretation is: "At what point in time does the Court view the personal vs. commercial nature." Does the Court view it at the time Claire purchased the property or at the time Claire tried to exercise the option? At the time Claire purchased the 113 acres and the option contract she intended all of this property to be a gift to her son. As just indicated, a gift would be for a "personal" purpose, even if the asset you are gifting would be one hoped to be a good investment. In other words, a gift is a gift, whether it be something of extreme value that the recipient would never personally use (live on), or something of little value to the recipient. It is still a gift and it is for personal purposes. At the time Claire tried to exercise the option, the evidence indicates her son had previously died. That would mean that Claire simply wanted to exercise the option to increase the size of her estate. While the property would undoubtedly be a good investment (comparing 2006 prices to 1978 prices), it would be an investment for Claire's personal estate.

One interpretation of *Cannon* is that if there is no residence, then it is a commercial transaction, and if there is a residence but no intent to live at that residence, then it is still a commercial transaction, and if there is a residence with an intent to live at that residence, then it is purchased for personal reasons. The Idaho Supreme Court seems to recognize this fact, when in *Cannon,* while referring to "The arrangement [between Morenos/Hinrichs on one hand and Cannon on the other] was not a gift to the Cannons." While the Idaho Supreme Court did not make clear the significance of that comment, the inference is that had Morenos/Hinrichs become involved in this transaction purely gratuitously, simply to help out the Cannons and arrange the financing for the Cannons, then it would have been a "personal" transaction. As mentioned above, the Idaho Supreme Court noted "…the record reflects that Moreno and Hinrichs had entered into a partnership to purchase the property to rent to the Cannons with the intent of eventually selling to the Cannons." 07.22 ISCR 855, 856. Understandably, that would place Hinrichs and the Morenos in a commercial transaction with Perry.

This Court finds that since the dispute is over the exercise of the option, the pertinent time period is 2006 when the option was sought to be exercised by Claire and not 1978 when Claire purchased the option. This Court also finds the transaction must be viewed from Claire's standpoint, not from her son's standpoint. If Claire had intended to buy this property at its option price and sell it to her son at a profit, even a slight profit, then purchasing this option would clearly be a commercial transaction under *Cannon*. But instead, her intent in buying the option was to simply give it to her son so that he could develop it. More importantly, the pertinent time period is at the time of the exercise of the option, and at that time Claire's son had already died. In either event, exercising the option to give to her son or exercising the option to add to her estate, it is a personal transaction.

Finally, plaintiff requests attorney fees under Idaho Code § 12-120(1) because plaintiff was the prevailing party and the amount pled was less than twenty-five thousand dollars. Memorandum of Costs and Fees, p. 2. Plaintiff is correct that she prevailed,a nd that she pled less than twenty-five thousand dollars in relief sought. However, there are certain other requirements with which a plaintiff must comply under that subsection, and no evidence has been given as to that compliance.

III. ORDER.

IT IS HEREBY ORDERED that as to plaintiff's Memorandum of Costs and Fees, all costs requested are GRANTED and all attorney's fees are DENIED as the transaction was a personal transaction pursuant to Idaho Code § 12-120(3), and pursuant to Idaho Code § 12-120(1).

Entered this 11th day of January, 2008.

____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _______ day of January, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Peter J. Smith IV, Paul Harrington	664-4125	Willim Appleton	667-9576

____
Jeanne Clausen, Deputy Clerk