CONCLUSION

We conclude that Gene's obligation to name Helga as the beneficiary of $100,000 of the death benefit was to merely secure unpaid alimony. Although Gene violated the terms of the decree by removing Helga as the beneficiary prior to his death, he complied with the provision requiring payment of $100 for every month that Helga was not named as the beneficiary. Because there was no unpaid alimony at the time of Gene's death—when his support obligation ended—Helga was not entitled to any of the proceeds. Accordingly, the court erred in granting Helga's motion for summary judgment and in denying Vetta's motion. We reverse the order of the district court and remand the cause with directions to vacate its order entering summary judgment in favor of Helga and to enter summary judgment in favor of Vetta.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMAS P. STACKHOUSE AND KIMBERLY A. STACKHOUSE, APPELLANTS, V. TODD GAVER, DOING BUSINESS AS GAVER CUSTOM HOMES AND/OR GAVER CONSTRUCTION, AND JAMES MARRIOTT, APPELLEES.

801 N.W.2d 260

Filed August 2, 2011. No. A-10-846.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy that is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
3. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
4. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.

5. **Contracts.** A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties.
6. **Contracts: Evidence: Intent.** If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract. In contrast, the meaning of an unambiguous contract is a question of law. When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
7. **Contracts.** The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
8. **Real Estate: Loans: Words and Phrases.** In the realm of the residential housing market, the term "conventional financing" is commonly known and understood to mean long-term financing provided by a bank, savings and loan company, mortgage company, or similar organization that is in the business of loaning money for housing purchases by consumers, and such loans are evidenced by a promissory note and secured by a mortgage or deed of trust executed by the buyers in favor of the lender.
9. **Contracts: Breach of Contract.** Broken contractual promises give rise to actions for breach of contract, whereas unfulfilled conditions mean that an enforceable contract was never formed.
10. **Contracts: Intent.** Where the intent of the parties is not clear, the disputed language is generally deemed to be promissory rather than conditional.
11. **Breach of Contract.** In the context of a breach of contract, inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful.
12. **Contracts: Rescission.** A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform. Difficulties, even if unforeseen and however great, are no excuse, and the fact that a contract has become more burdensome in its operation than was anticipated is not ground for its rescission.
13. **Contracts: Parties.** Nebraska law recognizes that there is an implied covenant of good faith and fair dealing that exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
14. **Real Estate: Contracts: Parties.** The purchaser must exercise good faith in attempting to secure the financing required by a real estate purchase contract.
15. **Contracts: Parties.** Where a "subject to financing" clause is held to be a valid condition precedent, the courts have recognized that a purchaser has an implied obligation to attempt to obtain the requisite financing through the application of reasonable effort, good faith effort, bona fide effort, or reasonable diligence. If the purchaser's attempt is unavailing and the court determines that a sufficient effort was made, the purchaser is not required to perform his contractual obligations, because of the failure of a condition precedent. However, if financing is not secured as a result of what the court determines to be an insufficient effort, the purchaser's contractual performance may be enforced.
16. **Parol Evidence: Contracts.** The general rule is that unless a contract is ambiguous, parol evidence cannot be used to vary its terms.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Richard A. Drews, of Taylor, Peters & Drews, for appellants.

George E. Martin III, of Baird Holm, L.L.P., and, on brief, Aimee C. Bataillon, of Spencer, Fane, Britt & Browne, L.L.P., for appellee Todd Gaver.

Susan M. Napolitano, of The Hoppe Law Firm, L.L.C., for appellee James Marriott.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Thomas P. Stackhouse and Kimberly A. Stackhouse, a married couple, entered into two written agreements with Todd Gaver, doing business as Gaver Custom Homes and/or Gaver Construction (collectively Gaver), the result of which was to have been the purchase of a lot and the construction of a home for the Stackhouses. The contracts were not performed, and this litigation ensued between the parties over who was entitled to the $45,000 in earnest money paid by the Stackhouses. The determinative language is that performance of the agreements was "**Conditioned Upon Financing:** Balance of $840,170," by "**Conventional**" financing. The Stackhouses claim that they did not obtain such financing and that thus, the contracts are null and void and they are entitled to a return of their $45,000 in earnest money. Gaver contends that because the Stackhouses did not apply for such financing as they had agreed to, they breached the contracts, which provided that he was entitled to retain the earnest money as liquidated damages. The district court for Sarpy County found in favor of Gaver, ruling that he was entitled to keep the $45,000 in earnest money. The Stackhouses appeal.

FACTUAL BACKGROUND

This dispute begins with the execution of a "Uniform Purchase Agreement" on a Realtor's preprinted form dated

May 26, 2005. The handwritten portions of this agreement, hereinafter the "lot purchase agreement," provided that the Stackhouses would purchase from Gaver "LOT 17, CHEYENNE COUNTRY ESTATES," Sarpy County, Nebraska, for the sum of $115,000 with an earnest deposit in the amount of $500. Paragraph 6.2 of the agreement provided that the balance of $114,500 would be paid all in cash, and none of the blanks for provisions relating to financing found in paragraphs 6.3 and 6.3.1 were filled in. An earnest money deposit of $500 was provided for, and was made.

On March 29, 2006, a second purchase agreement, which shall be referenced as "house purchase agreement," was executed by the parties for property at lot 17, Cheyenne Country Estates, with an address of 16307 Sedona Circle, Omaha, Nebraska. Collectively, as appropriate, we shall reference the two contracts as "the agreements." The house purchase agreement provided for consideration of $884,670, with an earnest money deposit of $44,500 as detailed in paragraph 6.1. The evidence is that this sum was paid directly to Gaver and then used by him to apply to the acquisition of lot 17. At paragraph 6.3, the house purchase agreement provides that it is "**Conditioned Upon Financing:** Balance of $840,170." The immediately following paragraph, 6.3.1, provides, "**The financing will be**" and then five choices with a box in front of each. The choices are "**FHA**," "**VA**," "**Conventional with PMI**," "**Conventional**," and "**Other**." The box for "**Conventional**" is checked. Paragraph 6.3.1 also has blanks wherein one could fill in such items as a maximum interest rate per annum, a minimum number of years for the note, a minimum number of years for amortization, and an initial payment amount excluding taxes and insurance. None of these blanks are filled in, other than with a handwritten "dash" through each to indicate that these details of the loan form were no part of terms of the agreement—and apparently of no great consequence to the Stackhouses. Paragraph 6.3.2 provides, "Buyer agrees to make application for financing within five (5) days of final acceptance of this offer to" and then two choices with a box in front of each. The choices are "'The Mortgage Group'" and "other." There is a blank following the word "other," and in

that blank is handwritten "T.B.D."—the parties agree that such means "to be determined." Paragraph 6.3.2 further provides, "This offer shall be null and void, and the Deposit will be returned to Buyer, if the financing is not approved within ___ days from the date of acceptance." No number is filled in at the blank for the number of days, but, rather, a handwritten dash appears, indicating that such is not specified. Then the paragraph contains language that provides for automatic extension of any designated time limit for "processing of the application," so that "such time limit shall be automatically extended until the lending agency has, in the normal course of its business, advised either approval or denial." The final portion of paragraph 6.3.2 provides that "[u]pon notification of denial, the contract shall be void and the Deposit will be refunded to Buyer unless Seller and Buyer mutually agree" that another loan application will be made.

The Stackhouses filed suit against Gaver on November 7, 2008, and the operative amended complaint was filed on March 2, 2009. The Stackhouses' core contention is that they did not obtain acceptable conventional financing for the required amount and that thus, the agreements are null and void and they are entitled to the return of their earnest money. Gaver filed an answer and counterclaim, asserting a number of affirmative defenses, seeking a finding that the Stackhouses breached both the lot purchase agreement and the house purchase agreement in that they never applied for conventional financing, and asserting that as a result, under paragraph 6.1 of the agreements, he is entitled to retain the earnest money as liquidated damages for the Stackhouses' failure to complete the terms of the agreements.

We note that at the same time the lot purchase agreement was signed, the Stackhouses and Gaver entered into an "Informed Written Consent and Limited Dual Agency Agreement" with James Marriott, a real estate agent. The Stackhouses have also sued Marriott, alleging that with respect to the $44,500 earnest money provided for in the house purchase agreement, Marriott did not deposit such with an escrow agent as provided for in the agreement, and that they have thereby been damaged. However, the undisputed evidence is that the Stackhouses made

the earnest money check payable directly to Gaver and delivered it to him.

PROCEDURAL BACKGROUND

Ultimately, after a period of discovery which we will not detail, the parties all filed motions for summary judgment. In its decisional order, the district court sets forth the procedural background and operative facts similar to our foregoing recitation. The analytical framework used by the district court is illustrated by the following observation in the court's decision: "While [the Stackhouses] are quick to rely on the contractual language in regard to obtaining financing as a prerequisite to going forward with the agreement, they seem to overlook their own contractual obligation, which clearly delineates a requirement upon [them] to actually make application for such financing." After that observation, the court finds that the testimony of Thomas Stackhouse supports Gaver's claim that the Stackhouses never applied for financing, be it conventional or otherwise, and the court quotes Thomas Stackhouse's deposition testimony in response to questions by Gaver's attorney, which colloquy we repeat in part:

> Q. And it's my understanding that you never applied for financing in connection with this particular transaction.
>
> A. Because the [initial public offering] never happened.
>
> Q. And after you signed [the house purchase agreement] you didn't think you had any obligation to go apply for some conventional financing? . . .
>
> A. No, nor did I think that we needed to. I was never contacted by . . . Gaver, was never contacted by . . . Marriott[, saying,] "Hey, five days is up, two weeks is up, 30 days, 60 days is up. How you coming on the financing?" Was never contacted.
>
> . . . .
>
> Q. If you didn't think you had any duty to go apply for conventional financing or any financing at all, why did you go to Sharp Pencil and get your letter . . . ?
>
> A. If I remember right, it was because you or — somebody's legal team said "You don't have any denial

> letter." If you look at our W-2's, you don't really need a denial letter.

(Emphasis omitted.) This testimony makes more sense if we explain how the initial public offering (IPO) and "Sharp Pencil" relate to this case. During the timeframe when the agreements were executed, Thomas Stackhouse was working for a company formed by a longtime acquaintance. The company's function "was to locate companies that had a special little niche in their market that wanted to be taken public, to raise anywhere from a million to five million dollars for them and assist them through the public process," according to Thomas Stackhouse's testimony. (Emphasis omitted.) In addition to the IPO assistance company, the same acquaintance also had a separate company, Sharp Pencil Investments (Sharp Pencil), whose business was, according to Thomas Stackhouse's testimony, to "acquire funds from companies, . . . pool investors. It operated like a mutual fund." (Emphasis omitted.) Thomas Stackhouse was also a director of Sharp Pencil.

Direct Pharmacy Services, Inc. (Direct Pharmacy), a private company which was working with the IPO assistance company to go public through an IPO, is mentioned in the evidence because the deposition testimony of both Stackhouses is that their housebuilding project and the two agreements at issue in this case were "contingent" on the occurrence of the Direct Pharmacy IPO. That IPO did not happen, and thus, they further contend that they were excused from completing any of their obligations under the agreements. This claim is also asserted in the Stackhouses' affidavits offered on summary judgment, including the claim that Gaver and Marriott were aware of the need for the IPO to happen in order for the Stackhouses to build the house. However, such condition was not mentioned in the agreements; nor does either agreement contain any mention of an IPO involving Direct Pharmacy, or any other IPO.

The Stackhouses' affidavits aver that in October 2007, they "applied for financing of the purchase of the home with Sharp Pencil . . . , but . . . were denied such financing." However, the evidence shows that no written application was ever made to Sharp Pencil and that the "application" to Sharp Pencil was simply a conversation with one of the principals of Sharp

Pencil which produced a letter on Sharp Pencil stationery, dated October 8, 2007, to "Mr. & Mrs. Stackhouse" (without any address), stating, "It is with regret that I will not be able to provide your mortgage needs at this time." While the letter is unsigned, it closes with "Sincerely, [the named principal], President." There is no evidence that Sharp Pencil was in any way involved in making home mortgages.

With reference to the Stackhouses' claim against Marriott, the court found that even if there had been some breach of Marriott's duty with respect to the handling of the earnest money, such did not proximately cause any damage to the Stackhouses, given that once entitlement to the funds was contested, an escrow agent would not have released the funds absent a court order or a mutual release signed by both parties. Thus, even if Marriott did not place the $44,500 earnest money with an escrow agent as required by the house purchase agreement, no damage resulted to the Stackhouses.

ASSIGNMENTS OF ERROR

The Stackhouses assign four errors, restated as follows: (1) The trial court erred in granting summary judgment because there were genuine issues of material fact regarding the terms of the agreements and the Stackhouses' efforts and inability to obtain acceptable financing, (2) the trial court erred in finding no genuine issues of material fact as to Gaver's entitlement to retain the earnest money deposits as liquidated damages, (3) the trial court erred in granting summary judgment for Marriott because there were genuine issues of material fact regarding his breach of contractual duties and the damages caused thereby, and (4) the trial court erred in overruling the Stackhouses' motion for summary judgment, as they were entitled to recover their earnest money as a matter of law. In short, the trial court allegedly erred in granting summary judgment to Gaver and Marriott, and therefore, much of the discussion of the assignments of error can be combined.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no

genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. See Neb. Rev. Stat. § 25-1332 (Reissue 2008). See, also, *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002).

[2] When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy that is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007).

ANALYSIS

[3-6] We begin with some well-established principles of law relating to contracts. In *Ruble v. Reich*, 259 Neb. 658, 664-65, 611 N.W.2d 844, 849-50 (2000), the Nebraska Supreme Court provides a "roadmap" for analysis of contract disputes:

> In interpreting a contract, we must first determine, as a matter of law, whether the contract is ambiguous. . . . When an appellate court is deciding questions of law, the court has an obligation to resolve the questions independent of the conclusions reached by the trial court. . . .
>
> A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. . . . A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the

> parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. . . . If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract. . . . In contrast, the meaning of an unambiguous contract is a question of law. . . . When a contract is unambiguous, the intentions of the parties must be determined from the contract itself. . . .
>
> . . . .
>
> We view a contract as a whole in order to construe it. . . . A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. . . . The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.

(Citations omitted.)

Does Language "Subject to Acceptable Financing," Previously Delineated as "Conventional Financing," Create Condition Precedent to Existence of Enforceable Contract?

Paragraph 32 of the house purchase agreement, as opposed to its other numbered paragraphs, does not have a printed heading or any printed language—simply printed blank lines. Therein appears the handwritten phrase, "SUBJECT TO ACCEPTABLE FINANCING PRIOR TO CLOSING." The Stackhouses argue that paragraph 32 creates an unmet condition precedent in that they had to obtain financing that was "acceptable" to them, which they did not do, and that thus, the house purchase agreement was not enforceable against them. Brief for appellants at 15.

[7] A contract's meaning is to be ascertained by reading the contract as a whole. See *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988). Therefore, paragraph 32 cannot be read in isolation, but, rather, must be read in conjunction with paragraph 6.3, which provides, "**Conditioned Upon Financing:** Balance of $840,170," as well as with paragraph 6.3.1, which

provides, "**The financing will be . . . Conventional**." As the court in *Ruble v. Reich, supra*, said, the terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. Thus, when these principles are applied to paragraphs 32, 6.3, and 6.3.1, it is clear that the condition "acceptable financing" contemplated and intended by the house purchase agreement at paragraph 32 is defined by the term "conventional financing" specified in paragraph 6.3.1. Therefore, the words of paragraph 32—"acceptable financing"—do not allow the Stackhouses to avoid their obligation simply by asserting, for example, "Because Warren Buffet would not give us $840,000 at 1-percent interest with a 75-year amortization, we did not get 'acceptable financing,' and thus, there is no contract."

[8] That said, we note that while the house purchase agreement requires "conventional financing," the agreement does not have an express definition of what that is. But, when the agreement is read as a whole in its proper factual context—an agreement to purchase a lot upon which Gaver would build a house for purchase by the Stackhouses—the term "conventional financing" has a clear and commonly understood meaning. When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them, and in such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). To that end, we examine the agreement's paragraph 6.3.1, which in printed language provides the buyers with five choices for financing and a box to check for the type of financing selected—"**FHA**," "**VA**," "**Conventional with PMI**," "**Conventional**," and "**Other**." The box for "**Conventional**" is checked, whereas hypothetical financing from Warren Buffet would obviously be "**Other**" financing. In the realm of the residential housing market where this case occurs, the term "conventional financing" is commonly known and understood to mean long-term financing provided by a bank, savings and loan company, mortgage company, or similar organization that is in the business of loaning

money for housing purchases by consumers, and such loans are evidenced by a promissory note and secured by a mortgage or deed of trust executed by the buyers in favor of the lender. Accordingly, we find that this is the type of financing for which the Stackhouses agreed to apply when they checked the box for "conventional" in paragraph 6.3.1 of the house purchase agreement and that "acceptable financing" in paragraph 32 is "conventional" financing according to the terms we have outlined above.

[9,10] We now turn to the issue of whether the conventional financing as described above was a condition precedent to formation of enforceable agreements. In *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991), the court discussed the difference between contractual promises and conditions precedent. We summarize that discussion: Broken contractual promises give rise to actions for breach of contract, whereas unfulfilled conditions mean that an enforceable contract was never formed. The *Harmon Cable Communications* court said that "[t]erms such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' 'subject to,' 'on condition that,' or some similar phrase are evidence that performance of a contractual provision is a condition." 237 Neb. at 883, 468 N.W.2d at 359. In *Harmon Cable Communications*, the court also observed that where the intent of the parties is not clear, the disputed language is generally deemed to be promissory rather than conditional. Here, the house purchase agreement is clear and uses words that denote a condition under *Harmon Cable Communications*. We conclude that the obtaining of conventional financing for the sum of $840,170 was a condition precedent to the existence of an enforceable contract. See, also, *Parker v. Averett*, 114 Ga. App. 401, 151 S.E.2d 475 (1966); *Airport Inn Enterprises, Inc. v. Ramage*, 679 N.W.2d 269 (N.D. 2004).

Did Trial Court Err in Finding That There Were No Genuine Issues of Material Fact and in Granting Summary Judgment Against Stackhouses?

[11,12] There is no dispute that the Stackhouses did not obtain the financing in excess of $800,000 required by the

house purchase agreement. However, this was because the Stackhouses never applied for "conventional" financing as required by paragraph 6.3 of that agreement. Gaver argues that such failure does not mean a contract never existed and has not been breached, and that he is entitled to retain the earnest money as liquidated damages per the agreement. Initially, the Stackhouses argue that there is no evidence that they had the financial wherewithal to obtain a loan of this size and that "[a]bsent any evidence of the ability to obtain such financing, the financing contingency could never have been met, and the agreement should have been declared null and void." Brief for appellants at 18-19. However, no authority whatsoever is cited to support this proposition. Nonetheless, it appears that the Stackhouses may be alluding to the "impossibility of performance defense." There is such a defense, but its application is quite limited. In *Wilson & Co., Inc. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 177, 43 N.W.2d 657, 666-67 (1950), a case involving a suit for damages due to a breach of contract, the court said:

> "Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful. Parties sui juris bind themselves by their lawful contracts, and courts cannot alter them because they work a hardship. . . . A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform. It has been said that difficulties, even if unforeseen and however great, are no excuse, and that the fact that a contract has become more burdensome in its operation than was anticipated is not ground for its rescission." . . .
>
> ". . . A contract which is possible of performance when made does not become invalid or unenforceable because conditions afterwards arise which render performance impossible. . . . If a party by his own contract creates a duty or imposes a charge on himself, he must

> under any and all conditions substantially comply with the undertaking."

(Citation omitted.)

[13] Thus, we hold to the general view that the Stackhouses have bound themselves unconditionally to apply for conventional financing. Gaver argues that not only does the evidence show that the required application for financing was never made by the Stackhouses, but that the law imposes a duty that they act in "good faith" to perform their agreement to attempt to obtain conventional financing—which they did not do. Nebraska law recognizes that there is an implied covenant of good faith and fair dealing that exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract. See *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). In *Airport Inn Enterprises, Inc. v. Ramage*, 679 N.W.2d 269 (N.D. 2004), the defendant agreed to purchase a hotel from the plaintiff, paying $25,000 in earnest money. After failing to complete the contract and being sued, the defendant filed a counterclaim for the return of his earnest money. While the trial court awarded the plaintiff the earnest money on the basis of a contract clause providing for liquidated damages if the defendant failed to complete the purchase, the North Dakota Supreme Court reversed because the defendant's obtaining financing acceptable to him was a condition precedent to a binding contract. The North Dakota court reasoned:

> In this case, the language in . . . the agreement states, "this Agreement is contingent upon Buyer(s) obtaining financing acceptable to Buyer(s)." No bad faith has been alleged in [the defendant's] attempt to obtain acceptable financing. We conclude this financing contingency is a condition precedent to the contract's becoming effective. Because obtaining financing is a condition precedent, the contract is conditioned upon Ramage's obtaining financing acceptable to him, and there can be no enforceable contract until financing is obtained. Because the condition precedent in this case never materialized, the agreement

> was not binding on the parties, and the liquidated-damages clause never became effective.

679 N.W.2d at 273.

[14,15] From this decision, Gaver argues, in effect, that if it was important to the North Dakota court that no bad faith on the part of the purchaser of the property was alleged, then it naturally follows that the purchaser must exercise good faith in attempting to secure the requisite financing. That view certainly has support in the cases and treatises. In an annotation entitled "Sufficiency of Real-Estate Buyer's Efforts to Secure Financing Upon Which Sale Is Contingent," Annot., 78 A.L.R.3d 880 § 2[a] at 883-84 (1977), the summary states:

> Since most buyers of real estate find it necessary to finance a major part of the price of their purchase, normally by obtaining a loan for which the purchased property serves as security, it is not unusual to find "subject to financing" clauses included in contracts or agreements of sale and purchase of real estate. These clauses, which contain provisions referring to the financing arrangements proposed to be made by the purchaser, may create a condition precedent to performance of the contract, depending upon the intention of the parties, as deduced from the language of the contract, the surrounding circumstances at the time of execution, and the purpose sought to be accomplished by the contract.
>
> As indicated by a number of representative cases, where a "subject to financing" clause is held to be a valid condition precedent, the courts have recognized that the purchaser has an implied obligation to attempt to obtain the requisite financing through the application of reasonable effort, good-faith effort, bona fide effort, or reasonable diligence. If the purchaser's attempt is unavailing and the court determines that a sufficient effort was made, the purchaser is not required to perform his contractual obligations, because of the failure of a condition precedent. However, if financing is not secured as a result of what the court determines to be an

> insufficient effort, the purchaser's contractual performance may be enforced.

There are numerous cases, albeit none from Nebraska's appellate courts that we can find, holding that a purchaser in a land or house purchase contract that is conditioned upon obtaining financing has an implied obligation to seek or apply for such financing before the lack of such financing excuses nonperformance by the purchaser. These cases speak in terms of a good faith effort or reasonable efforts or due diligence to obtain the required financing. See, *Jamieson v. MacRae*, 599 A.2d 1359 (R.I. 1991); *Housley v. Mericle*, 57 S.W.3d 360 (Mo. App. 2001); *Bushmiller v. Schiller*, 35 Md. App. 1, 368 A.2d 1044 (1977); *Liuzza v. Panzer*, 333 So. 2d 689 (La. App. 1976); *Fry v. George Elkins Co.*, 162 Cal. App. 2d 256, 327 P.2d 905 (1958).

In this case, the house purchase agreement required that the Stackhouses apply for conventional financing, but clearly, the telephone conversation with a work associate at Sharp Pencil about the Stackhouses' finances is not an application for conventional financing—there was no real application proved, nor is Sharp Pencil a "conventional real estate lender." Therefore, the evidence is undisputed that the Stackhouses did not apply for conventional financing, which they were obligated to do under the house purchase agreement. Moreover, even the above-mentioned telephone conversation did not occur until the Stackhouses had already told Gaver that they were not going to go through with the agreements. As earlier mentioned, the Stackhouses' evidence was that their performance was contingent on there being an IPO of Direct Pharmacy. However, in the Stackhouses' answer to Gaver's counterclaim for summary judgment that he was entitled to retain the $45,000 in earnest money, there is no allegation that the agreements were contingent on the happening of an IPO for Direct Pharmacy. Under our current pleading rules, the key for claims and for affirmative defenses is whether the opponent is given "fair notice of the nature of the defense." See *Weeder v. Central Comm. College*, 269 Neb. 114, 125, 691 N.W.2d 508, 516 (2005). The Stackhouses' answer to Gaver's counterclaim is simply that they "did not obtain conventional financing"

in the amount of $884,670, that they notified Gaver of such fact, and that the house purchase agreement "was null and void," entitling them to the return of their earnest money. This allegation can hardly be read as "fair notice" of a defense that the performance of the agreements was contingent upon the occurrence of an IPO for Direct Pharmacy—in addition to the house purchase agreement's stated contingency of obtaining conventional financing. Moreover, in addition to the failure of the Stackhouses to plead such a contingency, the agreements themselves contain no reference to, or mention of, an IPO of Direct Pharmacy.

[16] In short, the Stackhouses' evidence was, "Everybody involved knew we could not do this unless the Direct Pharmacy IPO happened." But, aside from neither pleading it nor having such contingency in the agreements, their evidence about such would constitute the modification of a clear and unambiguous agreement by parol evidence. The general rule is that unless a contract is ambiguous, parol evidence cannot be used to vary its terms. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000). The agreements at issue here are not ambiguous. We find the case of *Cosgrove v. Mademoiselle Fashions*, 206 Neb. 275, 292 N.W.2d 780 (1980), to be instructive. In *Cosgrove*, the Supreme Court rejected the plaintiffs' claim that the contract with the defendant was subject to a condition precedent that the plaintiffs be able to obtain a Small Business Administration loan. The Supreme Court reasoned:

> It appears to be the general rule that, even though parol evidence is admissible to show conditions precedent which relate to the delivery or taking effect of a written instrument, if the condition precedent is inconsistent with, or contradictory to, the written instrument, parol evidence thereof is not admissible. 30 Am. Jur. 2d *Evidence* § 1038 (1967); 32A C.J.S. *Evidence,* § 935 (1964). See, also, *Meadow Brook Nat. Bank v. Bzura,* 20 App. Div. 2d 287, 246 N.Y.S.2d 787 (1964). In this case, the contract signed by the parties specifically provided: "This order is NOT subject to cancellation." Even if we were to find in this case that the contract was subject to

> a condition that the purchasers obtain [a Small Business Administration] loan, such condition, we believe, would be inconsistent with, or contradictory to, the provision against cancellation in the contract; and hence, under the rules above cited, parol evidence would not be admissible to show the condition.

Cosgrove v. Mademoiselle Fashions, 206 Neb. at 282, 292 N.W.2d at 785. The house purchase agreement in the case at bar provides that it is conditioned on "acceptable financing" at paragraph 32, which financing, as we have found, is defined in paragraph 6.3.1 as "conventional" financing. The occurrence of a successful IPO so that one has the financial wherewithal to build a nearly $900,000 house is more akin to winning the lottery than to "conventional" financing. That the agreements had a second condition precedent—the occurrence of a successful IPO—is clearly inconsistent with, and contradictory to, the condition precedent of obtaining conventional financing. Thus, under *Cosgrove*, this additional condition precedent cannot be added to the agreements by parol evidence—even if one overlooks the failure to plead such as an affirmative defense.

Therefore, in conclusion, we find that the Stackhouses were obligated to at least apply for conventional financing, and the evidence is undisputed that they did not. As such, they have breached the agreements entered into with Gaver, and under the agreements, Gaver is entitled to retain the earnest money deposits as the district court determined.

Finally, it is apparent from the evidence that Marriott did not comply with the terms of the house purchase agreement with the Stackhouses by depositing the $44,500 of earnest money from that agreement with an escrow agent. However, while there is some dispute in the evidence as to how that money came to be delivered to Gaver, this is of no consequence, as under the facts of this case, an escrow agent would be obligated to deliver the funds to Gaver—either voluntarily (an unlikely event) or by virtue of a court order resolving the entitlement to such funds in Gaver's favor. Thus, Marriott's failures did not cause the Stackhouses any damage, and the trial court properly entered judgment in his favor.

CONCLUSION

We find that there were no genuine issues of material fact for trial and that Gaver was entitled to retain the $45,000 of earnest money under the lot and house purchase agreements as a matter of law. Therefore, we affirm the decision of the district court in all respects.

AFFIRMED.

IN RE INTEREST OF KARLIE D., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. GARY D., APPELLEE, AND MARTHA D., INTERVENOR-APPELLEE.

809 N.W.2d 510

Filed August 2, 2011. No. A-11-323.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
3. **Final Orders: Appeal and Error.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
4. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
5. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
6. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Appeal dismissed.

Donald W. Kleine, Douglas County Attorney, Jennifer C. Clark, and Amy Schuchman for appellant.

Chad M. Brown, of Chad Brown Law Offices, for intervenor-appellee.