73408-3

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Court of Appeals
Division I
State of Washington

No. 73408-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

OVERLAKE FARMS B.L.K. III LLC,
a Washington limited liability company,

Appellant,

v.

BELLEVUE-OVERLAKE FARM, LLC,
a Washington limited liability company,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SAMUEL CHUNG

REPLY BRIEF OF APPELLANT

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

JAMESON BABBITT STITES
& LOMBARD PLLC

By: Brian Lawler
WSBA No.8149
Denise M. Hamel
WSBA No. 20996

801 Second Avenue, Ste. 1000
Seattle, WA 98104
(206) 292-1994

Attorneys for Appellant

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I. INTRODUCTION

The Sferras' defense of the order for a partition by sheriff's sale bears little resemblance to the case before this Court, ignoring unchallenged findings of fact and established law of cotenancy. Judge Yu, who presided over six days of trial found that physical partition of 40-acre Overlake Farms was both feasible and practical without material economic loss to either the Sferras or the Kapelas, as did the referees, whose findings successor Judge Chung adopted. Judge Chung ordered a sale not because physical partition would result in "great prejudice to the owners" as RCW 7.52.010 requires, but because the *prospect* of future development *could* impose future costs, which *could* result in future conflicts between the cotenants, *if* the parties could not agree on how to equitably share those expenses.

While Judge Yu expressly recognized the statutory presumption in favor of a partition in kind, the referees and Judge Chung ignored it entirely, directing a sheriff's sale not because a physical partition will result in substantial economic harm, but because the prospect of future conflict meant that a sale was "the easiest thing to do." RCW 7.52.010's legal standard of "great prejudice" requires more. This Court must reverse and remand for a partition in kind.

II. REPLY IN SUPPORT OF STATEMENT OF THE CASE

The Sferras' brief mischaracterizes the underlying facts and disregards Judge Yu's findings after trial, as well as those made by the referees and adopted by Judge Chung in his order of sale.

A. The Kapelas wish to keep 75% of Overlake Farm because of its historical and economic significance to the family. The Sferras want to sell.

It is undisputed that Overlake Farm, a family property for over 70 years, has enormous significance to the Kapelas. Members of the Kapela family live on and adjacent to Overlake Farm, the location of the Kapelas' horse boarding business, the children's camps the Kapelas operate, and the memorial sites for their deceased relatives. (FF 4, CP 229) Judge Yu found "there is a human and family element to the Property that cannot be discounted." (CL 6, CP 234) The Sferras do not just "discount" that "human and family element;" they ignore it entirely in their respondent's brief.

The Kapelas invoked the court's power to order a partition that would allow them to continue using their share of the Property as a horse farm because the Sferras would not agree to a physical partition. (FF 10, CP 230) The Sferras, who feel no familial bond to the Property, insisted that the Kapelas' majority interest be sold and

the proceeds divided in proportion to the parties' respective interests – 75% to the Kapelas and 25% to the Sferras. (2/21 RP 101, 118)

B. The Property may be partitioned in kind without material economic loss.

Both Judge Yu and the referees rejected the Sferras' contention that the Property was worth more if sold as one 40-acre parcel than were it partitioned into two contiguous 30- and ten-acre parcels. (FF 16, CL 232-33; CP 938, ¶42) The referees found "equivalency of value between a larger parcel and a smaller parcel," and "no basis to assert that lots in a nine lot subdivision would sell at any different pace [or price] than a 38 lot subdivision." (CP 939-40, ¶¶46, 47) The referees thus found, as did Judge Yu, that the property could be equitably partitioned into two parcels, comprised of nine and twenty-nine developable lots, with a small payment of owelty and without material economic loss. (CP 942-43, ¶¶56, 58)

C. There is no finding, or evidence, that the Sferras will be forced to bear a $1.4 million cost of sewer extension upon partition.

The Sferras misrepresent both the findings and the record in arguing that a $1.4 million estimated cost of bringing sanitary sewer to the Property would result in "great prejudice." The cost of a future sewer extension is a red herring, as the Kapelas have always pledged to pay 75% of any required sewer connection, secured by a binding

and enforceable covenant that runs with the land. (FF 7, CP 230) The estimated future development cost (14% of the Property's current value) is not a consequence of a partition in kind, but is a potential expense that could be negotiated as a condition of future development of either partitioned parcel, or the Property as a whole.

The referees in fact found that sewer, like other development costs, will *not* result from partition: "In the event of a partition in kind, it is not known which of the two resulting parcels would develop first." (CP 943, ¶61) The Sferras concede the sewer expense is contingent on future development, regardless who develops the Property, and regardless whether it is developed as a whole following judicial sale or in stages following a partition in kind. (Resp. Br. 6)

The Sferras gloss over the conditional nature of the referees' actual finding, which was that the cost of sewer extension *might* impose great prejudice on the value of the Sferras' nine acre parcel "*[i]f the smaller parcel was required to carry the entire sanitary sewer service burden as an up-front cost.*" (CP 944, ¶61) (emphasis added) It is the prospect of future subdivision and development of the smaller parcel alone, not a partition in kind, that *may* cause the Sferras prejudice – and then only *if* they are forced to pay the entire expense. The Sferras' contention that they alone will bear the cost of

a sewer extension is unsupported by the referees' decision adopted by Judge Chung.

There is *no* evidence to support the Sferras' contention that they will be forced to fund the entire cost of connecting the Property to sanitary sewer as a result of a partition in kind. Judge Yu found the Kapelas pledged to fund 75% of the expense "if sewer extension were necessary to develop the Property." (FF 7, CP 230) The Sferras acknowledge (albeit grudgingly) that the trial testimony fully supports that finding, yet curiously characterize the finding as "equivocal." (Resp. Br. 28; *see* 2/19 RP 115: "[w]e'd pay for it on a current basis when and . . . if that happened"; 2/19 RP 143: "when a developer would be ready, then it would be done") The referees not only acknowledged Judge Yu's finding but supported the Kapelas' position, in both their initial recommendation and their final report, "that costs of the sewer extension are funded pro rata *at the time they are incurred.*" (CP 737, ¶62; 944) (emphasis added)

The referees did not find that the Kapelas repudiated their willingness to fund 75% of the costs for a sanitary sewer extension "at the time they are incurred." The Sferras, not the referees, assert this fiction as a basis for a forced judicial sale, but it lacks any support in the record. (Resp. Br. 28-29) When the referees solicited the

parties' comments to their report, the Kapelas repeated then (as they do now), that they would enter into a covenant to fund 75% of the sewer improvement expense "if septic is not available." (CP 800)

The Kapelas supported the referees' initial recommendation to secure a reciprocal covenant to fund that expense on a 75%/25% basis, suggesting only that a cash escrow should be funded when the City required the funds because "[i]t could be years before anyone elects to actually undertake the extension and . . . the parties' cash would be needlessly encumbered." (CP 800) The Kapelas also proposed that if the referees required an upfront contribution to this potential development cost as a condition to partition, the Kapelas should be allowed to remove their funds from escrow if development permits have not been "submitted and approved within 2 years of this Partition Order." (CP 807) The Kapelas never repudiated their pledge to fund a 75% share of a sewer connection if and when the Property is developed.

D. The referees ordered a judicial sale, rather than impose a cost-sharing covenant as a condition of a partition in kind.

The Sferras further misstate the rulings below in contending that the referees "promote[d] an agreement" to eliminate the "great prejudice" and attendant judicial sale that could only have been

"avoided by settlement" (Resp. Br. 30), mischaracterizing the referees' draft report as a "proposed settlement agreement." (Resp. Br. 17) The referees were not mediators, but were charged by Judge Yu with imposing upon the parties (against the Sferras' objections) a partition in kind unless it could not be achieved without great prejudice. (CP 234)

If, as the Sferras argue, the referees viewed their task as promoting a settlement, they did not tell the Kapelas. The referees' draft report contained the terms of a binding cost-sharing covenant for a sanitary sewer extension, not a settlement agreement. (CP 737-39, ¶63) The referees then solicited the parties' comments, but did not inform the Kapelas that their responses could then be a basis for reversing the referees' decision that the Property should be partitioned in kind. (CP 738-39) But that is exactly what occurred: rather than establish in their final decision a mechanism for sharing the cost of sanitary sewer, the referees reversed their recommendation of a partition in kind based solely on the parties' different suggestions for securing the uncertain cost of a sewer extension that was neither required nor planned. (CP 947, ¶65)

As requested, the Sferras, as well as the Kapelas, commented on the referees' draft report. Knowing the Kapelas would be reluctant to deposit over $1 million in cash, the Sferras "insisted on

the availability of a cash escrow for the sewer costs" that would be funded immediately, notwithstanding the lack of a pending (or even planned) permit application. (CP 947, ¶64) The Kapelas sought flexibility regarding the security for their 75% contribution, but never repudiated their willingness to fund the cost of sewer extension if and when it became necessary. (CP 800, 807) The Sferras' contention that the Kapelas disagreed with "nearly every element of the referees' recommended covenant" (Resp. Br. 29) ignores both the Kapelas' express assent to a cost-sharing covenant and the fact that the referees *invited* the parties' comments to their recommendations.[1]

Rather than choose from the parties' proposals for a covenant, the referees turned 180 degrees, stating that the parties' responses "reflected their long-standing inability to agree on issues associated with the disposition of the Property." (CP 947, ¶65) Without addressing (or honoring) the statutory preference for a partition in kind, and ignoring both the Kapelas' familial ties to the Property and

[1] To buttress their claim of irreconcilable differences, the Sferras assert that the Kapelas initially sought a different partition, for the northern "one-fourth of Property" that Betty Seijas had directed them to use (2/19 RP 75), complaining of that quadrant's "negative factors," including power line easements, wetland areas, and steep slopes. (Resp. Br. 6) But they ignore that when the Sferras objected, the Kapelas proposed that the Sferras receive the more desirable southeastern quadrant. The referees agreed. (CP 940-41, ¶¶ 50-52)

their consistent willingness to pay for a sewer extension, the referees instead reasoned that in light of the parties' "longstanding inability to agree," "due to the cost of the required sewer extension, a partition in kind would impose great prejudice on the smaller parcel." (CP 947, ¶¶65, 66) Judge Chung ratified their decision: Absent an agreement "it's better to . . . just go ahead and sell it . . . . [T]hat's the easiest thing to do." (3/13/15 RP 12; CP 968-69)

III. REPLY ARGUMENT

In this partition action between cotenants under RCW ch. 7.52, the Sferras bore the burden of overcoming the presumption in favor of a partition in kind by proving that physical partition would result in two parcels of significantly less value than one. The court instead ordered a petition as a matter of convenience, to avoid the prospect of conflict over potential future development, and not to alleviate great prejudice that would result from a partition in kind.

The referees found, as did Judge Yu, that the Property could be physically partitioned into separate parcels without any loss of its market value. The referees found that connecting the entire property to sanitary sewer if it is short-platted in the future would cost $1.4 million. (CP 947, ¶60) But that finding does not establish "great prejudice,"

particularly since the Kapelas pledged to share the cost, secured by a servitude encumbering their share of the partitioned property.

While Judge Yu recognized the statutory presumption (CL 6, CP 234), the referees, whose report Judge Chung adopted, ignored it entirely. The court erroneously ordered a sheriff's sale of Overlake Farm as a matter of convenience, and not to avoid "great prejudice."

A. The Sferras had the burden of overcoming the presumption in favor of a partition in kind by establishing that a physical partition would materially diminish the value of the Property.

The Sferras concede that Washington law presumes that co-tenancy property will be partitioned in kind, as the Kapelas asked when they filed this action. That presumption of physical division of property is expressly set out in RCW 7.52.010 and .080: The court must find that a physical "partition cannot be made without great prejudice to the owners" before ordering the property sold.

The Sferras do not contest this bedrock principle, that "[t]he power to convert real estate into money against the will of the owner is an extraordinary and dangerous power and ought never to be exercised unless the necessity thereof is clearly established." *Williamson Inv. Co. v. Williamson*, 96 Wash. 529, 535, 165 P. 385 (1917). Nor do they dispute that this policy respects the uniqueness of real property, and (as Judge Yu found) the legitimacy of a party's

familial and emotional bond to land.[2] The parties also agree on the definition of the term "great prejudice" in the partition statute: "*material* pecuniary loss, not mere temporary inconvenience or temporary impairment of an income." *Williamson*, 96 Wash. at 537 (Resp. Br. 22) (emphasis added).

In order to overcome the Kapelas' legitimate and statutorily protected interest in keeping Overlake Farm in the family, therefore, the Sferras had the burden of proving that a physical partition would result in a substantial and material reduction of the value of the Property. *Hegewald v. Neal*, 20 Wn. App. 517, 522, 582 P.2d 529 ("[G]reat *prejudice* . . . mean[s] *material pecuniary* loss and the burden of proof is upon the one asserting it."), *rev. denied*, 91 Wn.2d 1007 (1978). Yet neither the referees' final report nor Judge Chung's order approving it mentions the presumption favoring partition in kind. The Sferras in their respondents' brief similarly refuse to acknowledge not only the Kapelas' historical familial ties to the Property, but also their own statutory burden to overcome the presumption in favor of a physical division of the cotenancy property

[2] They also concede that Washington follows the great majority of courts in disfavoring forced sale of cotenancy property. (Resp. Br. 22) *See also Kaberna v. Brown*, 2015 S.D. 34, ¶16, 864 N.W.2d 497, 502 (2015) ("Forced sales are strongly disfavored.") (quotation and citation omitted).

by establishing that such a physical division would result in "great prejudice" under RCW 7.52.010.[3]

In each of the cases cited by the Sferras, a physical or legal impediment prevented physical division of real property. For instance in *Friend v. Friend*, 92 Wn. App. 799, 804, 964 P.2d 1219 (1998), *rev. denied*, 137 Wn.2d 1030 (1999), local land use regulations prohibited the subdivision of the cotenancy property into separate buildable lots. Similarly, in *Hegewald*, partition in kind "would destroy the usefulness" of property that the Court characterized as "unusually complex," as it was owned by numerous cotenants, and featured as its most valuable resource a hot spring that could only be partitioned by "collecting [the water] and assigning it through a metering and distribution system, so that it can be shared by the owners of the land in accordance with their percentage of ownership." 20 Wn. App. at 519-20, 523. *See also Huston v. Swanstrom*, 168 Wash. 627, 628, 13 P.2d 17 (1932) (cotenancy property was "improved with a two-story brick and terra-

[3] Obfuscating the issue, the Sferras argue that they had the absolute right to a partition, citing *Hamilton v. Johnson*, 137 Wash. 92, 100, 241 P. 672 (1925) (Resp. Br. 22-23, n.11). They ignore that the Kapelas themselves petitioned for a partition, the "right" to which they have never questioned. However, the Sferras had no "right" to a partition *by sale* unless they established that a physical division would result in a substantial reduction of the value of the property.

cotta building . . . covering the entire parcel" that would have to be destroyed in order to accomplish a partition in kind).[4]

By contrast, here, it is undisputed that a partition in kind would neither destroy nor substantially impair the value of Overlake Farm. The referees found, as did Judge Yu, that the 40-acre Property could be equitably partitioned (75%-25%), awarding 29 lots to the Kapelas, and nine lots, plus a $131,250 owelty payment to the Sferras. (CP 941-42, ¶¶ 53-55) There was no great prejudice arising from a partition in kind.

B. The finding that the Property may be divided without any reduction in its value establishes that a partition in kind would not cause "great prejudice."

The referees and Judge Chung misapplied the statutory requirement of "great prejudice," ordering a sheriff's sale after finding that Overlake Farm could be divided into two separate parcels without any reduction in its value. "[T]he generally accepted test of whether a partition in kind would result in great prejudice to the owners" is "whether the value of the share of each in case of a partition would be materially less than the share of the money

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[4] The out-of-state cases cited by the Sferras are in accord. *See Borzenski v. Estate of Stakum*, 195 Conn. 368, 489 A.2d 341 (1985) (partition would reduce value of land by 50-60%); *Sung v Grover*, 2003 WL 1962830 (Conn. Supr. Ct. 2003) (unpublished trial court decision) (value of the entire property significantly reduced as a result of partition in kind). *Accord, Keen v. Campbell*, 249 S.W.3d 927 (Mo. App 2008); *Georgian v. Harrington*, 990 So.2d 813 (Miss. App. 2008). (Resp. Br. 46)

equivalent that could probably be obtained for the whole." 59A Am. Jur. 2d Partition § 121 (2016); *Williamson*, 96 Wash. at 536. *See* Miceli & Sirmans, *Partition of Real Estate; Or Breaking Up Is (Not) Hard to Do*, 29 J. Legal Stud. 783, 794 (2000).

Neither Judge Yu nor Judge Chung in adopting the referees' report found that the value of the sum of the parts is materially less than the value of the whole. In fact, the referees expressly rejected an "assemblage premium," finding that the per lot value of the Property is the same whether sold as one unit or separately. (CP 937-40, ¶¶41-42, 46-47) The Referees found that the value of the Property "as is" – that is, without any sewer connection – is $9,975,000, or $262,500 for each of 38 lots. (CP 942, ¶55) The Property is neither worth an additional $1.4 million if it is sold, nor devalued by $1.4 million if it is partitioned in kind.

The Sferras' argument that a partition in kind would cause material pecuniary loss to only them ignores that whoever develops the property – whether it is the cotenants themselves after the property is partitioned in kind, or a purchaser of all 40 acres at a judicial sale – will have to pay $1.4 million if it is to be connected to the City's sanitary sewer. If the cost of a sewer connection affects the

value of the Property, it affects both parties in proportion to their respective interests.

Based on the assumption that the Sferras would sell their parcel to a developer for subdivision into nine lots with sanitary sewer, the referees found that the $1.4 million cost of sewer extension would impose great prejudice on the value of the Sferras' nine acre parcel only *"[i]f the smaller parcel was required to carry the entire sanitary sewer service burden as an up-front cost."* (CP 944, ¶61) (emphasis added) Indeed, the Sferras concede that their share of the cost of a sewer extension "would be about $350,000" (Resp. Br. 24) – or 14% of the *current* value of their nine lots, plus the mandated owelty payment of $131,250. That is substantially less than the 33% reduction in value that was deemed a "substantial pecuniary loss" in *Hegewald,* 20 Wn. App. at 526.

Because the $262,500 lot price reflected the "as-is" value of the Property, an investment in a sewer connection could be spread over all 38 lots (2/20 RP 23), and would also increase the value of both partitioned parcels, making the anticipated cost of sewer even less than 14% of its current value. The referees' final report does not support the legal conclusion that physical "partition cannot be made without great prejudice to the owners" under RCW 7.52.010.

C. The trial court erred in adopting the referees' recommendation of a sale as a matter of convenience based on speculation, rather than to avoid material pecuniary loss.

The legislature authorized partition actions where the cotenants disagree. Here, the Kapelas wanted to keep the family farm intact and the Sferras wanted to sell it – a common fact scenario in a statutory partition action. Ignoring the presumption in favor of a partition in kind, Judge Chung improperly based the order of sale on the desirability of avoiding the prospect of future conflict should the cotenants own adjoining partitioned parcels, rather than on substantial pecuniary harm or "great prejudice to the owners."

This reasoning was legally erroneous for two reasons. First, the prospect of future disagreement inheres in partition; it is precisely the type of "temporary inconvenience" that the Court held is an insufficient basis to order a partition by sale. *Williamson*, 96 Wash. at 537. Second, the prospect of future conflict, even if it constituted a proper basis for finding "great prejudice," was itself entirely speculative given the absence of immediate development plans, uncertainty concerning whether the City would require a sewer connection, and the Kapelas' demonstrated willingness to compromise, including their pledge to secure 75% of the cost of sewer

with a covenant that runs with the land. The trial court's order of sale should be vacated for any, or all, of these reasons.

1. The court improperly ordered a sale to avoid temporary inconvenience, not great prejudice.

The Sferras defend Judge Chung's order for a partition by sale based on their preference to permanently distance themselves from the Kapelas and not because it is necessary to avoid "great prejudice to the owners" under RCW 7.52.010.[5] Ignoring that the Kapelas brought this partition action, the Sferras rely on the unremarkable proposition that the purpose of a partition is to terminate common ownership of real property. (Resp. Br. 38, citing *Hegewald*, 20 Wn. App. at 523) However, the partition statute does not authorize a partition *by sale* based on nothing more than the cotenants' history of disagreement over their use of the property.

"Tenancy in common, like marriage, can be . . . prolonged, painful and expensive." *Hegewald,* 28 Wn. App. at 518. As detailed in appellant's opening brief, the partition statute exists to address such

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[5] The Sferras mischaracterize the Kapelas' position, claiming that the Kapelas should be "judicially estopped" to argue that the statute requires great prejudice to *both* owners. (Resp. Br. 41-43) The Kapelas argued below, as they do now, that the statute precludes a forced sale based solely on the minority cotenant's desire to advance their own interests, over the objection of the majority cotenant and where the value of the two parts equals that of the whole. (3/13/15 RP 31; CP 820, 826; App. Br. 22-23)

disagreement and deadlock but nonetheless contains a presumption in favor of a partition in kind that results in the former cotenants sharing a boundary. (App. Br at 35-38) The Sferras cite no authority for their argument that the "partition statute mandates sale" where the former cotenants will face the prospect of continued enmity if forced to live side by side as neighbors. (Resp. Br. 2, 30, 38) The prospect of future conflict is inherent in partition, yet the law nonetheless presumes a partition in kind.

RCW 7.52.010 does not authorize a forced sale if it is "better" for the parties to avoid future conflict, or because it is the "easiest thing to do," as the referees and Judge Chung believed. (3/13/15 RP 12) The law requires a partition in kind unless it would cause material and substantial pecuniary harm. There is a difference: Just as a "best interest" finding is legally insufficient to establish that a parent's decision will cause "harm" to a child, the referees' "best interest" findings, adopted by the court here, are inadequate to meet the statutory standard of "great prejudice." *See Parentage of C.A.M.A.*, 154 Wn.2d 52, 64, ¶24, 109 P.3d 405 (2005) (trial court's finding that third party visitation is in child's best interest is insufficient to overcome presumption in favor of parental decision-making; parent's decision must result in harm).

The referees cited unidentified challenges in "having to police a difficult process of partition and land development over a long period of time," (CP 947, ¶65), but they recognized these could be resolved by arbitration. (CP 739) Their findings do not establish "great prejudice" under the partition statute.

2. The prospect of future conflict over future development is entirely speculative.

The Sferras' contention that they will suffer "great prejudice" in paying a $1.4 million sewer connection fee fails for a separate and independent reason – it is based on speculation. The trial court ordered a sale based on the assumption that great prejudice *could* result from a partition in kind, *if* the property is developed, *if* the City requires a sewer connection, and *if* the Kapelas refuse to pay for one, and *if* that cost cannot be recouped upon sale. The predicate necessity of a sewer connection is uncertain, and the Sferras' contention that these parties would never agree to share the cost, if it is required, is refuted by the Kapelas' assent to this condition of a partition in kind.

a. The Sferras have no current plans for developing this property.

It is undisputed that the City of Bellevue does not require a sewer connection as a condition to partition. *Compare Friend*, 92 Wn. App. at 804 (local land use regulations prohibited the

subdivision of the co-tenancy property into separate buildable lots) (Resp. Br. 35). No sewer (either septic or sanitary) will be required until the Property is subdivided for development. And as the referees found (CP 943-44, ¶61), the Sferras have no plans to develop the Property themselves; when that may occur is entirely speculative. Moreover, the Sferras' expert agreed that if all or a portion of the property is sold, "[a] property owner could incur the sewer cost or not. There is no obligation." (2/25 RP 170)

The parties will not know whether sanitary sewer will be necessary, how much it will cost and how that cost will affect a future sale until some undefined future date when they or some other developer submit an application to the City of Bellevue. (2/19 RP 142-43) The court erred in relying on such speculation to find that a partition in kind would cause the Sferras "great prejudice."

b. The City of Bellevue may not require a sewer connection.

Citing to the variance criteria in the Bellevue Code, the Sferras argue that a sanitary sewer extension is a certainty if the Property is to be short platted. However, the City's Bridle Trails Subarea Plan opposes extension of sanitary sewer (Ex. 220), and the responsible planning official stated that the City would "not extend sewer to the Overlake Farms site" because "the Brid[le] Trails neighborhood . . .

feel[s] it will threaten the rural character of the area by encouraging denser development." (Ex. 5)

The referees found as fact that "no application for a sewer variance has been submitted to the City of Bellevue and, as a result, neither the parties nor the City undertook a careful analysis of whether a variance to a sanitary sewer service requirement would be possible." (CP 930, ¶30) Their conclusion that a $1.4 million sewer extension will be necessary for the development of any portion of the property if it is partitioned in kind is unsupported by the evidence.

c. The Kapelas have a demonstrated history of conciliation, not opposition.

The Sferras' argument that disagreement would doom the prospect of future development is refuted by the Kapelas' demonstrated record of conciliation, not opposition, to the Sferras' intractable demands. The premise that the parties would be deadlocked over "land development over a long period of time," (CP 947, ¶65; Resp. Br. 38) cannot be sustained on this record.

The Kapelas and Sferras have co-owned six properties and have always worked out their disagreements. (2/19 RP 95-101) The Kapelas offered several subdivision scenarios regarding this Property (FF 11, CP 231; Exs. 32, 35, 38, 39), including the one that the referees finally adopted, which gave the Sferras the most desirable southeast

quadrant. (CP 940, ¶48) The referees also found no material difference between the parties' wetland proposals. (CP 928, ¶22)

The Kapelas also agreed with the Sferras that it would be unfair for any one parcel to bear the entire cost if sanitary sewer were required because "provision of sanitary sewer service to the Property as a whole would provide a disproportionate benefit to the remaining parcel." (CP 944, ¶61; *see* CP 800-01, 807, 823, 905; 2/19 RP 115, 142-43) The Sferras will not be "required to carry the entire sanitary sewer service burden as an up-front cost" (CP 944, ¶61) because the Kapelas have repeatedly affirmed that they will pay 75% of the cost if and when it is required, secured by a binding covenant. The Kapelas questioned only the *form* of security, objecting to tying up $1 million in cash for unlimited duration for a project that was (and still is) entirely speculative. The court erred in relying on the prospect of irreconcilable conflict as a basis for its order of sale.

D. The court abused its discretion in failing to impose upon the parties a cost-sharing covenant.

The court's reliance on the prospect of future disagreement between the parties was erroneous for another reason – any uncertainty over sharing future development costs could and should have been addressed by the court's equitable power to impose a cost-sharing covenant or similar servitude on the partitioned parcels. If the City of

Bellevue were to impose a sewer extension as a condition to the property's future subdivision, the court had both the power and the obligation to equitably apportion that cost between the two partitioned parcels. The court abused its discretion in refusing to establish the terms of a cost-sharing servitude to address that contingency.

The Sferras mischaracterize as an issue of "compel[ling] an agreement" (Resp. Br. 36-38) the court's equitable authority to impose servitudes on partitioned property, as this Court authorized in *Carson v. Willstadter*, 65 Wn. App. 880, 886, 830 P.2d 676 (1992). Other courts have similarly recognized the broad scope of the court's equitable power in a partition action "to impose such servitude on another parcel where required for the beneficial partition of the property." *Machado v. Title Guarantee & Trust Co.*, 15 Cal.2d 180, 184, 99 P.2d 245 (1940).[6] The superior court's equitable authority under the partition statute is not limited to the

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[6] *See Matter of Marta*, 672 A.2d 984, 987 (Del. 1996) ("Included in these equitable powers [of partition] is the right to create an easement if the court deems that one is necessary to protect the respective value of the parcels."); *Rogers v. Ward*, 377 So.2d 1053 (Miss. 1979) (courts have the power to create easements as part of the partition jurisdiction); *Bornstein v. Doherty*, 204 Mass. 280, 90 N.E. 531, 532 (1910) ("There is no doubt of the jurisdiction of the court. . . , [to] impose reasonable servitude upon another part, for the benefit of the several owners, in the use of their respective shares of the property."); *see also Allendorf v. Daily*, 6 Ill.2d 577, 129 N.E.2d 673 (1955); *Ritchey v. Welsh*, 149 Ind. 214, 48 N.E. 1031 (1898); *Henrie v. Johnson*, 28 W.Va. 190 (1886).

physical division of cotenancy real property. *See Kelsey v. Kelsey*, 179 Wn. App. 360, 369, ¶23, 317 P.3d 1096 (court's broad equitable authority authorizes partition between cotenants of farm equipment and other personal property in addition to real property), *rev. denied*, 180 Wn.2d 1017, *cert. denied*, 135 S. Ct. 451 (2014).

The referees, whose "depth of experience in land use, law and real estate" the Kapelas tout (Resp. Br. 3, n.1), were certainly qualified to recommend to the court the terms of a covenant to secure the costs of developing any sewer extension required by the City of Bellevue as a condition of further development.[7] They spent eight paragraphs doing so in their draft report. (CP 738-39) As the Property was otherwise unencumbered, it was not a difficult matter to secure as a first position lien the parties' proportionate responsibility for such costs, and to impose alternative dispute resolution provisions, which the referees initially proposed and to which the Kapelas readily assented. (CP 800-03, ¶63)

As the Sferras' expert admitted, it is common for adjacent owners to share the off-site costs of developing raw land. (2/25 RP 173) The Sferras nowhere explain why a competent real estate

[7] The referees were familiar with latecomer agreements, under which subsequently developed properties share the cost of the initial capital outlay for beneficial improvements. *See* RCW 35.91.020. (CP 738-39, ¶63)

professional with experience in multi-party development could not have drafted a binding cost sharing covenant. If a future cost sharing arrangement was critical to achieving a fair and equitable partition, the court abused its discretion in failing to impose one.

Rather than dictate the terms of a covenant to define the parties' future relationship in developing the Property, the referees left those terms to the parties themselves. Then, when they did not agree, the referees and Judge Chung decided that it was "better to just . . . go ahead and sell it [because] that's the easiest thing to do." (3/13/15 RP 12; *see* CP 947, ¶65) That is not "great prejudice" under RCW 7.52.010. The order of sale should be reversed.

IV. CONCLUSION

This Court should reverse the order of sale. At a minimum, it should remand with directions for the court to establish the terms of a cost-sharing covenant between the parties.

Dated this 26th day of February, 2016.

SMITH GOODFRIEND, P.S.

By:_____
Howard M. Goodfriend
WSBA No. 14355

JAMESON BABBITT STITES & LOMBARD PLLC

By:_____
Brian Lawler
WSBA No.8149
Denise M. Hamel
WSBA No. 20996

Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 26, 2016, I arranged for service of the foregoing Reply Brief of Appellants, to the Court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
Brian Lawler Denise M. Hamel Jameson Babbitt Stites & Lombard PLLC 801 Second Avenue, Ste. 1000 Seattle, WA 98104	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
Arthur W. Harrigan, Jr. Tyler L. Farmer Calfo Harrigan Leyh & Eakes 999 3rd Avenue, Suite 4400 Seattle, WA 98104	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 26th day of February, 2016.

Jenna L. Sanders