

FILED

MAR 06 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

S. Ct. No.
COA No. 30903-7-III

SUPREME COURT OF THE STATE OF WASHINGTON

90006-0

CRAIG J. KELSEY, aka CRAIG KELSEY and
DONNA KELSEY, husband and wife,

Respondents,

v.

DENNIS E. KELSEY, aka DENNIS KELSEY,

Defendant,

and

JANICE N. KELSEY, aka JANICE KELSEY,

Petitioner.

PETITION FOR REVIEW

FILED
MAR 12 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
RF

Kenneth H. Kato, WSBA # 6400
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER.....	1
B. COURT OF APPEALS DECISION.....	1
C. ISSUES PRESENTED FOR REVIEW.....	1
1. Did the trial court err by determining Janice Kelsey was not entitled to a discount for her undivided interest in partitioned property?.....	1
2. Did substantial evidence support the trial court's finding that Janice was not entitled to a discount on property awarded to her by the court because it was not undivided property at the time the property was partitioned?.....	1
3. Did the trial court abuse its discretion by denying the motion for reconsideration?.....	1
4. Did the trial court err by awarding costs to Craig Kelsey when Janice had incurred \$5000 for survey costs that were not taken into consideration?.....	1
5. Did the trial court err by awarding attorney fees to Craig when Janice had incurred attorney fees that were not taken into consideration?.....	2
6. Did the trial court err by entering its order awarding costs and value of discounted property due to undivided interest and judgment?.....	2
7. Did the trial court err by dividing personal property and entering its order on retrieval of personal property items when it did not have jurisdiction to do so in a partition action?.....	2

8. Did the trial court abuse its discretion and thus err in entering an order on partition that “adopted in full” the referee’s report when Janice’s exceptions to it were not taken into consideration?.....	2
D. STATEMENT OF THE CASE.....	2
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....	9
F. CONCLUSION.....	20

TABLE OF AUTHORITIES

Table of Cases

<i>Carrara, LLC v. Ron & E Enter.</i> , 137 Wn. App. 822, 155 P.3d 161 (2007).....	15
<i>River House Dev., Inc. v Integrus Architecture, PS</i> , 167 Wn. App. 221, 272 P.3d 289 (2012).....	11, 12
<i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wn.2d 570, 343 P.2d 183 (1959).....	10
<i>Wagers v. Goodwin</i> , 92 Wn. App. 876, 964 P.2d 1214(1998).....	14
<i>Witt v. Young</i> , 168 Wn. App. 211, 275 P.3d 1218, review denied, 175 Wn.2d 1026 (2012).....	14
<i>Willener v. Sweeting</i> , 107 Wn.2d 388, 730 P.2d 45 (1986).....	11, 13

Statute

RCW 7.52.010.....	14
-------------------	----

Rules

RAP 2.2(a).....	14
RAP 2.4(b).....	14, 15

RAP 13.4(b)(1).....	9, 11, 14
RAP 13.4(b)(2).....	9, 12, 13, 14
RAP 13.4(b)(4).....	9, 14, 15

A. IDENTITY OF PETITIONER

Janice N. Kelsey asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Janice seeks review of the decision of the Court of Appeals, filed February 4, 2014. A copy of the decision is in the Appendix at pages A-1 through A-15.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err by deciding Janice was not entitled to a discount for her undivided interest in partitioned property?

2. Did substantial evidence support the trial court's finding that Janice was not entitled to a discount on property awarded to her by the court because it was not undivided property at the time the property was partitioned?

3. Did the trial court abuse its discretion by denying her motion for reconsideration?

4. Did the trial court err by awarding costs to Craig when Janice had incurred \$5,000 for survey costs that were not taken into consideration?

5. Did the trial court err by awarding attorney fees to Craig when Janice had incurred attorney fees that were not taken into consideration?

6. Did the trial court err by entering its order awarding costs and value of discounted property due to undivided interest and judgment?

7. Did the trial court err by dividing personal property and entering its order on retrieval of personal property items when it did not have jurisdiction to do so in a partition action?

8. Did the trial court abuse its discretion and thus err in entering an order on partition that "adopted in full" the referee's report when Janice's exceptions to it were not taken into consideration?

D. STATEMENT OF THE CASE

Craig and Donna Kelsey filed a complaint for partition in Adams County against Dennis and Janice Kelsey. (CP 1). Along with certain real property, the complaint sought partition of personal property. (CP 2). It alleged the parties were tenants in common in 15 parcels of real property. (CP 2-4). Dennis and Janice Kelsey admitted they were tenants in common in that real property. (CP 172-73). They further admitted the ownership of certain parcels

was as stated in paragraphs 3.2 through 3.4 of the complaint. (CP 173). Their answer requested a just and equitable division of real property pursuant to RCW 7.52, but denial of the claims for partitioning personal property. (CP 173).

The court entered an order directing Allen Hatley to prepare a report for it on a proposed division of the real property jointly owned by the parties and including the property held as remaindermen. (CP 26). On January 28, 2009, Mr. Hatley prepared a report, stating in part:

Per your signed court order of October 1, 2008 I was asked by you on behalf of various ownership interests of the Kelsey family to prepare an equitable division of the farmland and waste areas located southeast of Lind. The farm is to be divided in such a fashion that the Craig Kelsey family and the Dennis Kelsey family no longer share any common ownership. In addition there are numerous other family members that own a partial interest in some of the parcels and that ownership will remain the same with no change in percentages or tracts of land. There are also some tracts of land that Arlyne Stine Kelsey either has a direct ownership in or a life interest in. I was directed by attorney Rusty McGuire to consider those interests to actually being owned by Craig Kelsey and Dennis Kelsey equally and that interest was also divided among the Craig Kelsey family and the Dennis Kelsey family. . .

After my initial inspection of all of the property including the improvements located on them I attempted to determine the current fair market value of the land and improvements. The major portion of this farm is the tillable land which is actually quite similar for it is

located in close proximity of each other. After my inspection I felt the land in Adams County was similar enough to assign one value for all of the tillable land. The value I arrived at was \$350 per acre and that number is used in my analysis of the tillable land in Adams County.

Also based upon my inspection of the land that was in Franklin County it appeared to me that it may be of somewhat poorer quality so I used a value of \$325 per acre on that land excluding the one parcel that is in the Conservation Reserve Program. On that parcel I felt that it was even somewhat poorer land so I assigned a value of \$300 on that tract of land.

The final part of the valuation of the property was the Improvements that are located in three separate tracts. The improvements are quite extensive consisting of one place that is used and occupied by the Craig Kelsey family and the other portion is used by the Dennis Kelsey family. Both of these sites included not only the residence but shop and machinery storage facilities as well as some grain storage. The final set of buildings does not have the numerous outbuildings as compared to the other places and is located at the "Stine Place."

. . . In this case I felt the fairest and most equitable way to treat the valuation of the improvements was to use the value that has been assigned by the Adams County assessor on all of the improvements.

Based upon all this information I have come up with a division of the property that I think is the most practical and also has each of the two parties getting values that are very close with only a minor cash adjustment. The way I have divided it will hopefully not require a survey and only one of the county assessor parcels will be divided under this division. . .

In this case I have divided the land into two units that are very close in value. The first parcel is identified as the "**Craig Kelsey Parcels**". The second parcel will be identified as the "**Dennis Kelsey Parcels**". Under this division the "**Craig Kelsey Parcels**" have a value of \$889,314 . . . The numbers are shown as the Arlyne Stine Kelsey interest of \$140,157 and Craig Kelsey of \$698,191 and Craig & Donna Kelsey of \$50,966.

The amount due for the "**Dennis Kelsey Parcels**" is done in the same way to arrive at a value of \$935,957 with the Arlyne Stine Kelsey interest being \$182,430 and the Dennis Kelsey amount being \$753,527. To equalize the division a cash adjustment is necessary and that would require the payment of \$23,321.50 from the Dennis Kelsey family to the Craig Kelsey family. (CP 29-31).

Janice filed exceptions to the referee's report. (CP 94-102).

On May 4, 2009, the court entered an order on partition, which adopted in full the referee's report. (CP 109). Among other things, the order also directed Mr. Hatley to prepare a report for the court on any average discounts for the undivided interests being received by Craig. (CP 110). Janice later filed supplemental exceptions to the referee's report and order on partition. (CP 188-91).

Janice challenged the court's jurisdiction to partition personal property. (2/1/10 RP 140-49). After further briefing at its request, the court denied the challenge. (5/11/10 RP 156-162). It later

entered an order on retrieval of personal property items reflecting its finding. (CP 177-87).

In an August 26, 2010 letter, Mr. Hatley discussed the issue of a fractional ownership interest discount in value on the Kelsey properties. (CP 221). He opined the value of the parcels would decrease based upon a fractional ownership interest, the reason being that when a property is owned as a fractional interest, the rights associated with ownership are limited as compared to fee simple ownership. (*Id.*). Mr. Hatley's experience had been that a discount of 20% or higher was not unusual, depending on the percentage of the fractional interest. (*Id.*). Noting there was no real good sales data to accurately reflect discounts for fractional interest ownership, he nonetheless felt very comfortable "in saying if one were asked to go out on the market to sell a fractional interest in the Kelsey ownership that the value would be discounted in order to sell it." (CP 222).

On May 11, 2011, Craig moved for an order awarding costs and value of discounted property due to undivided interest. (CP 214). On June 17, 2011, the court awarded him \$6,015.25 costs, attorney fees of \$4,840.62, and \$86,005 for the value of his

undivided interest in the Stine property. (CP 297; 6/17/11 RP 169-183).

In response to Mr. Hatley's opinion that a fractional ownership interest justified a discounted value of 25% to Craig's property in parcels 1, 2, 11, and 12, Janice's counsel made a similar inquiry of Mr. Hatley as to a discounted value on her fractional ownership interests. (CP 245, 249). Mr. Hatley replied and opined: "I believe that same fractional ownership discount would apply for Janice Kelsey as it does for Craig Kelsey." (CP 250). Janice then sought an order from the court allowing a 25% discount arising from the fractional ownership interest in property owned by her. (CP 260). In its letter opinion, the court denied the discount:

[Ms. Kelsey's counsel] seeks an order from the Court allowing a twenty five % discount arising from a fractional ownership interest in property owned by his client Janice Kelsey. It appears from [counsel's] letter dated June 23, 2011, that he is requesting discounts for parcels 9A and A as designated in the Order of Partition and the report of Allen Hatley, the duly appointed referee.

On May 4, 2009, the Order on Partition was signed and filed by the Court. The order adopted the referee's report in full and ordered that the property be divided as suggested. The order also directed Allen Hatley to report to the Court on any discounts for undivided interest being received by Craig Kelsey.

Subsequently this Court adopted the recommended discount for an undivided interest. The discount applied to property that remained undivided at the time of the partition.

It appears to the Court that [counsel], on behalf of his client, Janice Kelsey, now seeks a discount for Ms. Kelsey. It also appears that the undivided nature of that property has occurred subsequent to this Court's Order for Partition. Therefore it appears to the Court that Ms. Kelsey is not entitled to a discount on property awarded to her by order of this Court, since it was undivided property at the time the property was partitioned. (CP 260-61).

Janice moved for reconsideration on November 20, 2011.

(CP 262). The court denied the motion. (CP 281).

The court entered findings of fact and conclusions of law, an order awarding costs and value of discounted property due to undivided interest, and a judgment against Janice for \$108,710.37. (CP 287-89, 290-91, 292-93). She appealed.

The Court of Appeals affirmed the trial court, with Judge Korsmo dissenting solely on the discount issue: "I would remand to apply a discount to all parcels that were subject at the time of partition to an ownership interest by someone other than the parties to this litigation." (A-12).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This court should grant review of the Court of Appeals decision because it conflicts with other appellate decisions and involves issues of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1), (2), (4).

As to the discount for undivided interests, Janice as well as Craig had undivided interests in the parcels at the time of the partition. Janice asked for a discount on two parcels of property, 9 and 9A, in which she had an undivided interest. Parcel 9 was 645 acres of farmland and Parcel 9A contained a home site and one acre. (CP 238). The referee's report stated as to parcel 9:

The Adams County Assessor shows Arlyne Kelsey has a one-quarter (1/4) interest in this parcel, No. 25 33 26 0100001 and I am not sure how you want to handle that, but I assumed that she had no ownership interest in the parcel. (CP 74).

On Parcel 9A, the report stated:

The Adams County Assessor shows that Arlyne Kelsey has a ¼ interest and it is parcel number 25 33 26 0430001 and I am not sure how you want to handle that but I assumed that she had no ownership interest in the parcel. (CP 75).

As shown on the records of the Adams County Assessor, the referee's report indicated that for Parcel 9, Arlyne Stine had a ¼

interest and Craig and Dennis each had a 9/24 interest. (CP 81). With respect to Parcel 9A, the same fractional ownership interests as for Parcel 9 are reflected. (*Id.*). Expressly adopted by the trial court in its order on partition, these records in the referee's report show that the fractional ownership interest of Janice existed before the order for partition, contrary to the trial court's stated basis for denying her a discount. (10/19/11 RP 201).

Although suggested by Craig, she did not orchestrate events in any way so as to create a divided interest in Parcels 9 and 9A. (CP 240, 244-51, 252-53, 254-55; 8/19/11 RP 194-95). It was Craig, personal representative of Arlyne Stine's estate, who proposed a TEDRA agreement resulting in Janice having a divided interest with her sons in Parcels 9 and 9A after the order on partition. (CP 253, 254; 8/19/11 RP 194-96).

Since substantial evidence did not support the trial court's finding on which it relied to deny her a discount, the Court of Appeals decision conflicts with decisions of the Supreme Court. *See, e.g., Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Moreover, as noted by Judge Korsmo, "it was unfair to discount some property on the basis that someone other than one of the brothers owned a portion of a parcel, but

refuse to apply that same principle to property partially owned by Arlyne.” (A-12). The trial court’s reason denying the discount to Janice was unsupported by the evidence and in turn did not support its legal conclusion that was based on an untenable ground.

Willener v. Sweeting, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).

Indeed, the referee opined Janice should receive the discount just as Craig did. Review is warranted under RAP 13.4(b)(1).

The trial court likewise abused its discretion by denying Janice’s motion for reconsideration. *River House Dev., Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012). The referee’s report established that the property for which Janice requested a discount was undivided property at the time of the partition. The record thus supports Judge Korsmo’s observation that the trial court erroneously believed the consequences of the deaths of Dennis and Arlyne after the partition “were the only reason Janice Kelsey was seeking a discount in the parcels she co-owned with Arlyne.” (A-13, fn. 1). Judge Korsmo further recognized these errors of the trial court:

Here, however, there are two apparent errors. First, the court appeared to believe that the divided interests in some of the parcels awarded to Dennis and Janice arose only after partition. That was not the case. The

divided interests arose at partition when the land was awarded, just as it did for the parcel co-owned with the cousins. Second, the court used two different valuation systems by discounting the property co-owned with the cousins but not the property co-owned with the mother. The latter parcels were overvalued in relation to the former. Janice and Dennis were treated as 100 percent owners for valuation purposes of land they owned in common with their mother. Meanwhile, Craig and Donna were recognized, for valuation purposes, as owning less of the Stine property. (A-14).

The trial court abused its discretion by relying on these errors.

River House Dev., 167 Wn. App. at 231. By affirming, the Court of Appeals decision thus conflicts with other appellate decisions and review is appropriate under RAP 13.4(b)(2).

As for the attorney fee issue, Craig listed his fees to be \$43,556.75 with half, that is, \$21,783.38, to be paid by Janice. He estimated she paid attorney fees in the neighborhood of \$16,250. (CP 220). In her declaration, Janice corrected the figures provided by Craig and showed her attorney fees were \$51,492.32. (CP 224). The court awarded him \$4840.62 attorney fees. (CP 297). But his half of Janice's fees of \$51,492.32 was \$25,746.16. She owed him \$21,783.38 for half of his fees. Instead of ordering fees for Craig, the court should have awarded Janice \$3962.78 in attorney fees.

The Court of Appeals exacerbated the trial court's error by dismissing her affidavit detailing actual fees of \$51,492.32 for lack of "proof of this amount to substantiate her claim." (A-8). But she declared under penalty of perjury she paid that sum. (CP 224; see also CP 123). Craig likewise substantiated payment of his fees by way of declaration. (CP 214). The Court of Appeals decision conflicts with other decisions of the Court of Appeals holding that reliance on untenable grounds, as here, is an abuse of discretion. RAP 13.4(b)(2).

With respect to costs, Janice offered a \$5,000 invoice from Columbia Engineering Surveyors to confirm acreage figures from the referee's report as a cost related to partition. (CP 225; see also 6/17/11 RP 179-80). Expressing no reason for its decision, the trial court did not consider the survey in awarding costs. (*Id.* at 180-81). The Court of Appeals nonetheless affirmed "[s]ince Craig and Donna paid most of the expenses out of pocket." (A-7). But that is no reason at all. *Willener*, 107 Wn.2d at 393. The Court of Appeals decision conflicts with other appellate decisions, thus warranting review under RAP 13.4(b)(2).

A partition action is a creature of statute and deals only with real property. RCW 7.52.010. In *Wagers v. Goodwin*, 92 Wn. App. 876, 880-81 fn 1, 964 P.2d 1214 (1998), the court stated:

We note that RCW 7.52.010 does not apply in this context because it gives a right of action to tenants in common wishing to partition *real property*, not other types of assets, such as a pension. (emphasis theirs).

In *Witt v. Young*, 168 Wn. App. 211, 275 P.3d 1218, *review denied*, 175 Wn.2d 1026 (2012), however, the court found a partition action for personal property as well as real property was not barred.

These decisions conflict and the Supreme Court should resolve the issue. RAP 13.4(b)(1), (2), (4).

Finally, the Court of Appeals refused to consider Janice's challenge to the 2009 partition order on which the discount was based. She relied on RAP 2.4(b) to now challenge the order, which was not then appealed:

The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepted review. A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise

appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.

Citing *Carrara, LLC v. Ron & E Enter.*, 137 Wn. App. 822, 825, 155 P.3d 161 (2007), the Court of Appeals determined review of the 2009 partition order was precluded since a timely appeal of that order was not filed and the present appeal stemmed from a decision on attorney fees. (A-11-12).

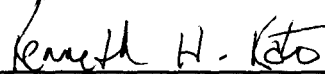
The court's reliance on *Carrara* is misplaced because the order appealed here not only awarded attorney fees and costs, but also the value of the discounted property due to undivided interest. (CP 287-89, 290-91, 292-93). The parcels in question and the undivided interests in them were based on the 2009 partition order, which thus prejudicially affected the court's award of discounted property value to Craig only. RAP 2.4(b). This discount has nothing to do with attorney fees and costs so *Carrara* is inapposite and the court should have reviewed the partition order under RAP 2.4(b). The scope of bringing up an appealable order in this circumstance pursuant to RAP 2.4(b) is an issue of substantial public interest that warrants determination by the Supreme Court. RAP 13.4(b)(4).

F. CONCLUSION

Based on the foregoing facts and authorities, Janice Kelsey respectfully urges this Court to grant her petition for review.

DATED this 6th day of March, 2014.

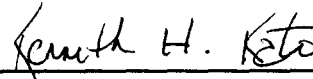
Respectfully submitted,



Kenneth H. Kato, WSBA #6400
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on March 6, 2014, I served by first class mail, postage prepaid, a copy of the Petition for Review on L.R. "Rusty" McGuire, Attorney at Law, PO Box 1187, Davenport, WA 98122-1187.



APPENDIX

FILED

Feb. 04, 2014

**In the Office of the Clerk of Court
WA State Court of Appeals, Division III**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

**CRAIG J. KELSEY, a/k/a CRAIG
KELSEY and DONNA J. KELSEY, a/k/a
DONNA KELSEY, husband and wife,**

Respondents,

v.

**DENNIS E. KELSEY, a/k/a DENNIS
KELSEY and JANICE N. KELSEY, a/k/a
JANICE KELSEY, husband and wife,**

Appellants.

No. 30903-7-III

PUBLISHED OPINION

BROWN, J. — Janice Kelsey appeals the Adams County trial court's order partitioning real and personal property. In 2009, the trial court adopted a referee's report to partition farmland. To equalize the division of real property, a \$23,321.50 cash adjustment was necessary from Janice to her brother-in-law and sister-in-law, Craig and Donna Kelsey.¹ Craig and Donna accepted extra equipment valued at \$11,472.00 to mitigate the original figure, leaving the cash adjustment owing from Janice to Craig and Donna of \$11,849.50. The court later ordered Janice to pay an additional \$86,005.00 to Craig and Donna because a portion of the property awarded to them had a discounted

¹ Since all parties have the same last name, first names will be used for clarification.

value. The court further ordered Janice to pay \$6,015.25 in costs and \$4,840.62 in attorney fees. Janice contends the trial court erred by (1) not discounting the value of her property as it did for Craig and Donna's property, (2) awarding attorney fees and costs to Craig and Donna, (3) dividing personal property, and (4) adopting the referee's report in its partition order. We find no error, and affirm.

FACTS

Craig and his brother, Dennis Kelsey (Janice's husband), operated the family farm for approximately 41 years. They owned some of the ground together and farmed the rest for their parents. Their mother, Arlyne Stine Kelsey, had a life estate in a large portion of the land. In late 2007, Craig and Donna sued Dennis and Janice to partition real and personal property, alleging the parties were tenants in common in 15 parcels of real property. We could not find an answer in our record. Dennis died in June 2008.

In October 2008, the court ordered referee Allen Hatley to prepare a report on a proposed property division of the parties' property, including property held as remaindermen. Mr. Hatley's January 28, 2009 report stated the purpose was to divide the farm "in such a fashion that the Craig Kelsey family and the Dennis Kelsey family no longer share any common ownership. In addition there are numerous other family members that own a partial interest in some of the parcels and that ownership will remain the same with no change in percentages or tracts of land." Clerk's Papers (CP) at 29. The report states Janice's attorney instructed Mr. Hatley to consider Arlyne's interests "to actually being owned by Craig Kelsey and Dennis Kelsey equally and that

interest was also divided among the Craig Kelsey family and the Dennis Kelsey family.”
CP at 29.

Mr. Hatley “divided the land into two units . . . [u]nder this division the ‘**Craig Kelsey Parcels**’ have a value of \$889,314 . . . [and] the ‘**Dennis Kelsey Parcels**’ . . . \$935,957.” CP at 31. Mr. Hatley further recommended “a cash adjustment . . . payment of \$23,321.50 from the Dennis Kelsey family to the Craig Kelsey family.” CP at 31. On May 4, 2009, over Janice’s objections, the court adopted the report in full and entered a partition order. A portion of the land designated to Craig, known as the Stine property, had an undivided interest between him and his cousins. The court directed Mr. Hatley to prepare a report on any average discounts for the undivided interest being received by Craig.

Craig and Donna successfully requested the court divide the parties’ personal property based on the need to divide the farm equipment when dividing the property. While Janice did not initially object, she later unsuccessfully objected to the court’s jurisdiction to partition the personal property, consisting mainly of farm equipment, including trucks, and directed the parties to divide and retrieve the remainder.

In an August 26, 2010 letter, Mr. Hatley discussed the issue of a fractional ownership interest discount in value on the Kelsey properties. He opined the value of the parcels would decrease based upon a fractional ownership interest and gave supporting reasons that the court apparently accepted.

On May 11, 2011, Craig and Donna requested an order awarding costs and discounted property value due to the undivided interests. In Mr. Hatley's opinion, a fractional ownership interest justified a discounted value of 25 percent to Craig's property for parcels 1, 2, 11, and 12. This discount was not originally considered because Mr. Hatley had been instructed to value the property as if both parties owned the land in fee simple.

The court found Craig and Donna were entitled to receive compensation for the undivided interest in certain parcels. Janice's counsel inquired to Mr. Hatley as to equal treatment for Janice, considering her fractional ownership interests. Janice sought an order from the court allowing a 25-percent discount arising from a fractional ownership interest in property owned by her. The court denied the discount, stating:

On May 4, 2009 . . . [the court] also directed Allen Hatley to report to the Court on any discounts for undivided interest being received by Craig Kelsey. Subsequently this Court adopted the recommended discount for an undivided interest. The discount applied to property that remained undivided at the time of the partition.

It appears to the Court that [counsel], on behalf of his client, Janice Kelsey, now seeks a discount for Ms. Kelsey. It also appears that the undivided nature of that property has occurred subsequent to this Court's Order for Partition. Therefore it appears to the Court that Ms. Kelsey is not entitled to a discount on property awarded to her by order of this Court, since it was not undivided property at the time the property was partitioned.

CP at 260-61.

The court entered findings of fact and conclusions of law, an order awarding costs and value of discounted property due to undivided interest, and a judgment

No. 30903-7-III
Kelsey v. Kelsey

against Ms. Kelsey for \$108,710.37 (\$11,849.50 remaining on original partition; \$6,015.25 in costs; \$4,840.62 in attorney fees; and \$86,005.00 for undivided interest in the Stine property). After her reconsideration request was denied, Janice appealed.

ANALYSIS

A. Discounts

The first issue is whether the trial court erred in denying Janice's request for a discount of her property value similar to the discount the court afforded to Craig and Donna. Janice contends her property interests on Parcels 9 and 9A are undivided with others and the property is worth less to her.

Partition is an equitable action. *Leinweber v. Leinweber*, 63 Wn.2d 54, 56, 385 P.2d 556 (1963). The trial court has "great flexibility" in fashioning equitable relief for the parties. *Cummings v. Anderson*, 94 Wn.2d 135, 143, 614 P.2d 1283 (1980). Washington courts have upheld the trial court's discretion to value the property in a partition action. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 206, 580 P.2d 617 (1978); *Carson v. Willstadter*, 65 Wn. App. 880, 884, 830 P.2d 676 (1992). "A court abuses its discretion if its decision is not based on tenable grounds or tenable reasons." *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 701, 9 P.3d 898 (2000).

If one cotenant improves property, the trial court has discretion to reimburse him or her for the improvement values. See *Leinweber*, 63 Wn.2d at 58 (cotenant could recover "the benefits created by the sweat of his brow (the enhanced valuation realized upon the partition sale)," preventing a windfall to the other cotenants). Likewise, the

No. 30903-7-III
Kelsey v. Kelsey

court can discount the value of property if it is encumbered. "The nature of the assets at the time of partition is controlling." *Yeats*, 90 Wn.2d at 206 (emphasis added).

Here, at the time of partition both parties held property that was encumbered by Arlyne's life estate. Mr. Hatley was instructed to treat all property as if Arlyne had predeceased. Therefore, at the time of the partition, Craig and Donna received real property in fee simple and they received the Stine property sharing an undivided interest with their distant cousins. Contrarily, Janice received real property either owned by Dennis and Janice or by Arlyne without undivided interests.

Janice requested a discount later after Arlyne died, not at the time of partition. Because Dennis predeceased his mother, his share of her life estate went to his lineal descendants who are Dennis and Janice's three sons. At the time of partition, "only jointly owned property was that which the Court allowed the discount." Report of Proceedings at 198. Because the nature of the assets at the time of partition is controlling and because both parties' properties were encumbered at the time of partition with a portion of Craig and Donna's property further encumbered by joint ownership with Craig's cousins, the trial court had tenable grounds to discount the property value for Craig and Donna and not discount the value of Janice's property. Given all, we conclude the trial court did not abuse its discretion in denying Janice's discount request and the subsequent request for reconsideration.

B. Attorney Fees and Costs

The issue is whether the trial court erred in its calculation of costs and attorney fees. Janice contends the court failed to take into account a survey she paid for when calculating costs and wrongly estimated her own attorney fees.

We review the amount of any attorney fee award for an abuse of discretion. *Gander v. Yeager*, 167 Wn. App. 638, 646, 282 P.3d 1100 (2012). “A court abuses its discretion if its decision is not based on tenable grounds or tenable reasons.” *Eagle Point Condo. Owners Ass’n*, 102 Wn. App. at 701.

The court ordered fees under RCW 7.52.480, partly providing, “The cost of partition, including fees of referees and other disbursements including reasonable attorney fees . . . shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the decree.” The court ordered \$6,015.25 costs and \$4,840.62 attorney fees to Craig and Donna. The \$6,015.25 was Janice’s portion of the partition fees, including Mr. Hatley’s fees. These fees were paid out of pocket by Craig and Donna. Janice paid a \$5,000.00 survey fee, but the survey was limited to land she received in the partition. Therefore, tenable grounds exist for the trial court to limit costs to those associated with the partition and those that apply to both parties’ properties. Since Craig and Donna paid most of the expenses out of pocket, the trial court did not abuse its discretion in awarding them costs in the amount of \$6,015.25.

Next, our record shows a breakdown of attorney fees with Craig and Donna paying approximately \$43,600.00 and Janet paying approximately \$33,800.00, requiring an equalization payment of \$4,840.62. Janice filed a later affidavit, claiming her fees were actually \$51,492.32, but did not include proof of this amount to substantiate her claim. Based on the evidence of fees before it, the court had tenable grounds to set attorney fees at \$4,840.62.

C. Personal Property

The issue is whether the trial court erred in partitioning the personal property along with the real property.

In 2009, when Craig and Donna moved to divide personal property, Dennis and Janice did not object. After 2007, the parties seemed to agree the farm equipment needed division. Janice claims she was acting pro se in 2009, but a pro se litigant is held to the same standard as an attorney. *Batten v. Abrams*, 28 Wn. App. 737, 739 n.1, 626 P.2d 984 (1981). Nevertheless, in 2010, Janice argued the court lacked jurisdiction to divide personal property. Although raised three years after the initial request to divide personal property, a party may raise a question of subject matter jurisdiction for the first time at any point in a proceeding, even on appeal. *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 205-06, 258 P.3d 70 (2011). We review de novo questions of a court's subject matter jurisdiction. *Id.* at 205.

RCW 7.52.010 states, "When several persons hold and are in possession of *real property* as tenants in common, in which one or more of them have an estate of

No. 30903-7-III
Kelsey v. Kelsey

inheritance, or for life or years, an action may be maintained by one or more of such persons, for a partition thereof.” (Emphasis added.) In dicta, the court in *Wagers v. Goodwin*, 92 Wn. App. 876, 881 n.1, 964 P.2d 1214 (1998) noted, “RCW 7.52.010 does not apply in this context because it gives a right of action to tenants in common wishing to partition *real property*, not other types of assets, such as a pension.” But in *Witt v. Young*, 168 Wn. App. 211, 217, 275 P.3d 1218, *review denied*, 175 Wn.2d 1026 (2012), the plaintiff brought an action for “Partition of Real and Personal Property” and the court did not find the partition action for personal property was barred. While the statutory provision provides guidance to a court in a partition action, it does not mark the outer limits of a court’s exercise of its equitable powers. The Supreme Court case of *McKnight v. Basilides*, 19 Wn.2d 391, 143 P.2d 307 (1943) is instructive.

There, cotenants of real property commenced an action for partition of real property and for an accounting of the income collected by the cotenant in possession of the property. *Id.* at 392-93. At the conclusion of trial, the court decreed rents, rental use of the property, and attorney fees in favor of the plaintiffs against the other cotenant. *Id.* The decree further provided that the judgment was a lien in favor of plaintiffs against the interest of the other cotenant in the proceeds of sale. *Id.* On appeal, one issue was whether some cotenants were entitled to a lien upon another cotenant’s interest in the property for amounts found due after an accounting. *Id.* at 393. The partition statute does not provide for such a lien. Nevertheless, our Supreme Court stated:

Finally, it is argued that the court erred in impressing a lien upon the interest which appellant owned in the property. It is true that no lien exists in favor of one cotenant against the share owned by the others. However, the court may, in the exercise of its equitable powers and in order to do full justice to all parties concerned, impose a lien upon the interest in the property owned by the one who has benefited by possession, and may provide for the payment of the judgment from the proceeds of the sale in a partition action.

Id. at 408.

Thus, a court in the exercise of its equitable powers may fashion remedies to address the particular facts of each case, even if the partition statute does not strictly provide for such a remedy. Here, the partitioned farm land contained farm equipment accumulated over the years to work the land that needed division “to do full justice to all parties concerned.” *Id.* Therefore, we conclude the court had subject matter jurisdiction to divide the farm equipment along with the farm land.

D. Partition Order

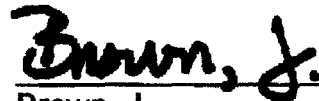
Janice contends the court erred in valuing the assets in its 2009 partition order but her arguments are untimely. RAP 5.2(a) requires filing a notice of appeal within 30 days after the trial court enters its decision. Janice’s argument relates to an unappealed decision filed on May 4, 2009. She cites RAP 2.4(b) as review authority.

RAP 2.4(b) provides that we “will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.” However, RAP 2.4(b) does not revive a final order not appealed. By comparison, RAP 2.4(b) allows a party to

No. 30903-7-III
Kelsey v. Kelsey

timely appeal a trial court's attorney fee decision, but "makes clear that such an appeal does not allow a decision entered before the award of attorney fees to be reviewed (i.e., it does not bring up for review the judgment on the merits) unless timely notice of appeal was filed on *that* decision." *Carrara, LLC v. Ron & E Enters., Inc.*, 137 Wn. App. 822, 825, 155 P.3d 161 (2007). Because a timely notice of appeal was not filed on the partition order, Janice's final assignment of error is not properly before us.

Affirmed.



Brown, J.

I CONCUR:



Kulik, J.

30903-7-III

KORSMO, C.J. (dissenting) — While I agree with the majority that the trial court did not abuse its discretion in the partition ruling, in apportioning the personal property, or in the attorney fee award, I disagree that the court could properly discount one of the parcels but not the others. I would remand to apply a discount to all parcels that were subject at the time of partition to an ownership interest by someone other than the parties to this litigation.

It is one thing to ignore Arlyne Kelsey's interests in the parcels for purposes of partition. It was a very practical approach and simplified the problem for the court, the appraiser, and the parties. For those same reasons it would even have been fine to ignore her ownership interests in deciding whether or not to discount the property values. However, it was unfair to discount some property on the basis that someone other than one of the brothers owned a portion of a parcel, but refuse to apply that same principle to property partially owned by Arlyne.

The purpose for discounting the value of the Stine property (parcels 1, 2, 11, 12) awarded to Craig and Donna Kelsey was to recognize that they did not have the full value of that parcel because it was partially owned by their cousins. That same principle applies to each of the parcels, whether awarded to the Craig or Dennis Kelsey families, that Arlyne had an ownership interest in at the time of the partition.¹ By using different valuation principles depending upon whom the ownership interest was shared with, the court effectively grossly overvalued the parcels partially co-owned by Arlyne by ignoring her interest, with the result that Janice Kelsey owed Craig and Donna Kelsey a larger transfer payment than she should have made. As the majority notes, the appraiser concluded quite appropriately that discounting properties due to fractional ownership reduces their value. The reduced value to Craig and Donna of the Stine property due to their cousins' ownership interests was recognized by the discount. Failing to give that discount to the parcels co-owned with Arlyne effectively treated the brothers as 100 percent owners of those parcels even though that was not the case. Janice and Dennis could not have sold their interests in the land for anything close to the value used for partition purposes due to the fact that they did not entirely own the parcels. Nonetheless,

¹ I agree with the trial court that the deaths of Dennis and Arlyne after the partition, and the passage of their shares to their heirs, were irrelevant to the discount decision. However, I think the trial court erroneously believed that the consequences of those deaths were the only reason Janice Kelsey was seeking a discount in the parcels she co-owned with Arlyne.

they were required to compensate Craig and Donna as if they did realize the full value of their shares.

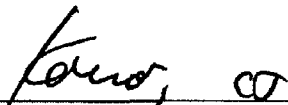
Even if Arlyne had ownership interests in all of the parcels, it still would benefit Janice and Dennis to discount all of them because it would lower the figure needed to equalize their properties with those of Craig and Donna.

Courts acting in equity have great discretion and I am loathe to conclude that a judge abuses that discretion when fashioning an equitable remedy. Here, however, there are two apparent errors. First, the court appeared to believe that the divided interests in some of the parcels awarded to Dennis and Janice arose only after partition. That was not the case. The divided interests arose at partition when the land was awarded, just as it did for the parcel co-owned with the cousins. Second, the court used two different valuation systems by discounting the property co-owned with the cousins but not the property co-owned with the mother. The latter parcels were overvalued in relation to the former. Janice and Dennis were treated as 100 percent owners for valuation purposes of land they owned in common with their mother. Meanwhile, Craig and Donna were recognized, for valuation purposes, as owning less of the Stine property.

It simply is not equitable to discriminate in that manner. The same rules for discounting should apply to all of the parcels without regard to who the co-owners were. Because I believe the court erred in its reason for rejecting Janice's request for partition

No. 30903-7-III
Kelsey v. Kelsey - Dissent

and also erred in applying two different valuation approaches to similarly situated land, I respectfully dissent.



Korsmo, C.J.