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MAR 26 2013

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

COA No. 30903-7-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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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,

Appellant.

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BRIEF OF RESPONDENTS

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**I. RESPONSES TO ASSIGNMENTS OF ERROR AND ISSUES THERETO**

A. The court did not err by determining Janice Kelsey was not entitled to a discount for her undivided interest in real property, because as the court pointed out, she received the property in the partition prior to the death of Arlyne Kelsey.

B. The court did not abuse its discretion when denying Ms. Kelsey's motion for discount.

C. The court did not abuse its discretion when denying Ms. Kelsey's motion for reconsideration.

D. The court did not abuse its discretion in ordering personal property be divided in order to mitigate the attorney's fees owed by Janice Kelsey.

E. The court did not abuse its discretion in awarding costs and fees.

F. The court did not err in making its find of fact number 4 in its May 14, 2012 findings.

G. The court did not abuse its discretion in awarding costs.

H. The court did not abuse its discretion in awarding costs and values.

- I. The court did not err in awarding costs and fees.
- J. The court did not err by dividing personal property.
- K. The court did not abuse its discretion in dividing real property pursuant to the partition.

## II. STATEMENT OF THE CASE

Respondents adopt the first paragraph of the Appellant's statement of the case. The gap between the first and second paragraphs can be filled in with an attempt to mediate the matter, which failed. After the failed mediation Appellant moved the court to maintain the status quo as to who was farming and who would be farming land prior to the partition. (CP 9). The court entered the order to maintain status quo and also to direct the appointment of a referee. (CP 17). The Respondents moved for an order quashing status quo. (CP 20). This motion was based on the affidavit of counsel. (CP 21). That affidavit gives a clear indication of the direction of the entire case.

Allen Hatley prepared a report for a proposed division of the real property, including the property that was held as remaindermen. (CP 26). The Respondents adopt Appellant's reference to Mr. Hatley report on pages 5, 6 and 7 and adopts the remainder of the Appellant's statement of facts.

### III. ARGUMENT

A. The court did not err by determining Janice Kelsey was not entitled to a discount for undivided interest in real property even though Craig and Donna Kelsey received a discount for their undivided interest. Factually, the two party's real property interests were completely different at the time of the partition. In the court's order of October 1, 2008 it required Allen Hatley report on a proposed division of the real property jointly owned by the parties which also included the property that they held as remaindermen with Arlyne Kelsey having the life estate. (CP 28). The Appellant is asking the Court to find that the trial court was in error when it found that Craig and Donna Kelsey were receiving property with undivided interest and that Dennis and Janice Kelsey were receiving property that did not have an undivided interest. What's not stated is that prior to the partition all of the real property was encumbered by Arlyne Kelsey's life estate interest as to a half interest and she had a fee simple interest in the rest. The court specifically gave instructions to Allen Hatley to treat all property as if Arlyne Kelsey had predeceased. Therefore, at the time of the partition, Craig and Donna Kelsey received real property in fee simple but they also received the Stine property of which they

owned at the time and still own an undivided share with their distant cousins. Contrarily, Janice Kelsey received real property in the partition that did not include any distant cousins and only included property either owned by Dennis and Janice Kelsey, or by Arlyne Kelsey.

When Arlyne Kelsey passed away her son, Dennis, had predeceased and therefore his share went to his lineal descendants who are the 3 sons of the marriage of Dennis and Janice Kelsey. The Appellant would like the Court to believe that Craig Kelsey orchestrated via a TEDRA agreement some sort of shenanigans that prejudiced Janice Kelsey. Just the opposite is the case. The TEDRA agreement conveyed title to real property to Craig that was near his home and conveyed to the three boys real property that was near what their mother received. If this had not taken place Craig Kelsey would have had the opportunity to make the same argument that Janice Kelsey is making now: that there would be an additional discount for the change in circumstances after the partition order.

There is substantial evidence to support the court's finding in denying the discount available to Janice Kelsey. *Thorndike v. Hepesrian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183



(1959). Janice Kelsey did not seek a discount at the time the discount was applied to the real property that Craig and Donna Kelsey received. She only sought the discount some 2 years later after the death of Arlyne Kelsey upon finding that, not surprisingly, the real property interests that would've gone to Dennis Kelsey were instead devised, per stirpes to the 3 sons of Janice and Dennis Kelsey. The court did not abuse its discretion in denying Janice Kelsey's motion for reconsideration. If Janice Kelsey would not have continually delayed the proceedings in this matter the entire file would've been closed years before Arlyne Kelsey's death. Therefore she would not be able to create an appeal issue because she owns property now with her sons. Again, all of the real property was divided equally but there was a discount for the acres that Craig and Donna Kelsey received with the Stine family. The substantial evidence is based on the trial court's having heard at the time he made the ruling against an additional discount to Janice Kelsey 5 years of argument on this case. The Court at (RP 200) accurately details that it didn't feel it was within the law to "go back and change the ruling based on a subsequent transaction between some of the parties which actually created undivided interests.

That it had to speak---that the Court's decision had to speak at the time of partition not what happened later."

B. The court did not err in awarding attorney's fees and costs pursuant to RCW 7.52.480. The court awarded those costs based on the fact that Craig and Donna Kelsey not only paid their half of the bill for Allen Hatley, but paid the bill entirety. Janice Kelsey offered an invoice from Columbia Engineering Surveyors for services to confirm acreage figures from the referee's report. What she did not point out was that she only had the property surveyed that she received in this partition and did not have the entire property surveyed. As her counsel pointed out (RP 180) ..."It (the survey) did not lead to bringing an issue before the court."

As to attorney's fees there's never been any clarity as to what was actually paid by Janice Kelsey. There are affidavits in the file showing what was owed but nothing that shows what was paid. The court could only make up its mind based on the numbers it had in front of it and not guess at what she actually paid.

C. The court did not err in dividing personal property in the partition action. Again, Ms. Kelsey did not object to the retrieval of personal property other than in her answer. Even though she was not represented by counsel at the time she had been

represented by at least 4 to 5 separate counsel prior to the division of property and no one objected to it. The court in *Wagers v Goodwin*, 93 Wn. App. 876, 964 P.2d 1214 (1998) in a footnote indicated that RCW 7.52.010 does not apply in this context because it gives a right of action of tenants-in-common wishing to partition real property, not other types of assets, such as a pension. Courts in other jurisdictions have found that partition is a sensible way of dividing personal property even though there is no statute authorizing it. The absence of such statute should not mean that such an action cannot be maintained. *59A Am. Jur. 2d Partitions Sec.10* (2013). In this case it would be similar to partnership dissolution in that the real property interests would be divided and the personal property interests would be divided. The trial court used its equitable powers to divide personal property of an informal partnership which consisted of farm equipment that went with each farm that was also separated in the partition. It would make no sense to force the parties to divide personal property when all of the personal property is part and parcel of the farm operation that goes with the real property.

D. The court did not err by entering its order on partition over the exceptions taken by Ms. Kelsey. The Court's reasoning is

set forth in RP 52-58. The court did not have to take notice of the fact that Dennis and Craig Kelsey had purchased interest in the Stine property because their purchase was not used for any other reason than to show vested ownership. In other words, it didn't matter what interest the parties had in the Stine property just like it didn't matter what interests they held in any other property since the purpose of the partition was to separate their undivided interests.

Another exception that was stated was to the potential for an inequitable lien that could come about as a result of ongoing long term care costs for Arlyne. Janice Kelsey was concerned that she would potentially have to pay a bill for Arlyne's health care. Again, as stated above, the referee's report was based on a premise that Arlyne predeceased. She was able to pay all her bills so there was not an issue.

Another exception was the fact that she received some wasteland that included a dump and some potential hazardous materials. The court found that the property all lied in close proximity to the other properties that Janice and Dennis Kelsey were receiving and put a very low value on it.

Another exception she raised was that Craig Kelsey had more leased land than she had and she wanted the court to take that into consideration. The court wisely disagreed with her since what Craig Kelsey could lease on his own had nothing to do with a partition of undivided property.

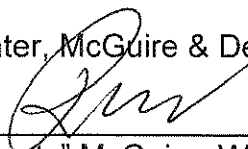
She also took exceptions to the buildings on the property without ever getting to the issue of who purchased the buildings and who paid for the improvements. The referee in the matter valued all the buildings at assessor's market value. The court had substantial evidence in front of it and the Court of Appeals shouldn't substitute its judgment for that of the trial court. *Wright v. Dave Johnson Ins., Inc.* 167 Wn. App. 758, 275 P.3d 332 (2012).

#### **IV. CONCLUSION**

The trial court did not err as to the partition of real and personal property and did not err in apportioning fees and costs.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of March, 2013.

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**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury of the laws of the State of Washington that on this 25<sup>th</sup> day of March, 2013, I caused true and correct copies of the foregoing *Brief of Respondents* to be served on the following person(s) in the manner indicated.

Kenneth H. Kato 1020 N. Washington St. Spokane, WA 99201	<input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile Transmission <input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified, Return Receipt <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Email Transmission
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Darci E. Kennedy