

FILED

DEC 16 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 31671-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STEVE HEITSTUMAN,

Appellant,

v.

WAYNE HEITSTUMAN, et al.,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ASOTIN COUNTY

The Honorable John W. Lohrmann

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Steve Heitstuman accepts this opportunity to reply to the Respondents' brief and to clarify issues raised in this appeal. As to the issues not addressed in this reply, Mr. Heitstuman requests that the Court refer to his opening brief.

B. ARGUMENT IN REPLY

ISSUE 1: WHETHER THE TRIAL COURT LACKED AUTHORITY UNDER RCW 7.52 TO PARTITION HEITSTUMAN BROTHERS' PERSONAL PROPERTY BECAUSE RCW 7.52 GOVERNS PARTITION OF ONLY REAL PROPERTY?

Respondents argue that Steve is judicially estopped from assigning error to the trial court's decision to divide the parties' farming equipment under chapter 7.52 RCW. Respondents argue that Steve's assignment of error is contrary to his argument at trial.

The doctrine of judicial estoppel does not apply here. The doctrine precludes a party from making inconsistent assertions of *fact*. *King v. Clodfelter*, 10 Wn. App. 514, 521, 518 P.2d 206 (1974). It does not preclude a party from taking inconsistent positions on points of law. *Id.* Steve's claim that the court lacked authority to divide personal property under RCW 7.52 is not an assertion of fact; it is a position on a point of law. Steve, then, is not judicially estopped from pursuing this issue on appeal.

Moreover, Steve's legal argument on appeal is consistent with his position at the trial court level. Steve's position on appeal is that a court lacks the power to divide personal property under RCW 7.52. Steve's position at trial was that the proper vehicle for dividing Heitstuman Brothers' real *and* personal property was to dissolve and wind up the partnership under the Revised Uniform Partnership Act, chapter 25.05 RCW. Respondents initially asserted a cause of action for an accounting under the Revised Uniform Partnership Act but dismissed the cause of action at the beginning of trial, leaving only their action for partition. Steve's closing argument recognized that personal property could not be partitioned under RCW 7.52 and asked the court to liberally construe the pleadings to request a division of Heitstuman Brothers' personal property even though the Respondents failed to assert a cause of action for such relief.

Because Steve's legal positions are consistent and are not assertions of fact, judicial estoppel does not prevent Steve from challenging the court's authority to partition Heitstuman Brothers' personal property under RCW 7.52.

ISSUE 2: WHETHER THE COURT MISINTERPRETED AND MISAPPLIED RCW 7.52 BY PARTITIONING PROPERTY WITHOUT APPOINTING REFEREES, WITHOUT AWARDED STEVE A PRO-RATA RECOVERY OF HIS EXTRA PROPERTY PAYMENTS, AND WITHOUT CONSIDERING THE QUALITY AND QUANTITY OF THE LAND DIVIDED?

Respondents set forth several arguments in an attempt to convince this Court that the trial court did not misinterpret or misapply RCW 7.52 when partitioning Heitstuman Brothers' real property. Each of these arguments fails.

Respondents argue that the court properly exercised its discretion by dividing the land equally because capital accounts could not be reconstructed. This argument completely ignores the issue. The issue is whether the court properly interpreted and applied the law to the facts of this case. The standard of review, then, is *de novo*, not abuse of discretion as Respondents contend. *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 926, P.3d 860 (2013).

Even if abuse of discretion is the proper standard of review, a trial court abuses its discretion if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard, or its decision is outside the range of acceptable choices given the facts and the legal standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

Here, the court essentially required Steve to produce a formal capital accounting to establish his right to reimbursement for his extra payments. This is an incorrect standard. The partition statutes do not require the establishment of capital accounts. *See RCW 7.52.010, et seq.*

A lack of formal capital accounts, then, is not a fact upon which the court can rely to deny a party's right to reimbursement.

Respondents' reliance upon capital accounts is also misplaced. Respondents would like to have this Court conclude otherwise but have cited no law to support their position. In fact, Respondents have continuously interwoven and confused two separate legal processes – partnership dissolution (RCW 25.05) and partition (RCW 7.52). For example, Respondents have argued that “although capital accounts could not be reconstructed, Steve Heitstuman tried to convince the Court that he was entitled to a larger share of the property than his brothers.” Br. of Resp'ts at 9.

The dissolution of a partnership entitles each partner to the settlement of all partnership accounts. *See* RCW 25.05.330 (entitled “Settlement of accounts and contributions among partners”). Respondents refer to these accounts and contributions as capital accounts. The partition statutes, on the other hand, require proof of a person's interest in real property but do not require an accounting. *See, e.g.,* RCW 7.52.010, .070. Respondents pursued the division of Heitstuman Brothers' property under the partition statutes, not the partnership statutes. They should not now be permitted to pick and choose sections of the partnership statutes to apply to their partition action.

Respondents further incorrectly assert that “Steve did not make the Floch payment, it was the combined sale of his and Wayne’s cows that made the Floch payment and Steve was reimbursed by receiving all of the farming income.” Br. of Resp’ts at 11. They then cite findings of fact 23 and 24 and rely upon Exhibits D-517 and D-521 for support.

Finding of fact 23, however, does not say the Floch payment was paid through the sale of Wayne’s cows. In fact, the unchallenged finding says Wayne sold only *Steve’s cows* to make the Floch payment: “In 1998, Steve and Wayne entered into an oral agreement, whereby Wayne would be authorized to sell the calves from Steve’s cows, and keep the proceeds therefrom, using them to make the payment on the Floch property of approximately \$75,000 per year, until that property would be paid off in 2002.” CP at 143 (emphasis added). It, then, is not false to assert that Steve alone paid the Floch payment from 1998 to 2002.

Finding of fact 24 does not show that Steve was reimbursed for these Floch payments. Finding of fact 24 says, “The oral agreement also provided that, in exchange, Steve would receive the proceeds of the Heitstuman Brothers farming income, and make the annual payments on the Barkley property.” CP at 143. This finding shows that Steve received Heitstuman Brothers’ farming income to pay Heitstuman Brothers’

Barkley mortgage and operating expenses, not to reimburse himself for the use of his cow sale proceeds to pay the Floch mortgage.

Respondents' exhibits D-517 and D-521 also fail to contradict Steve's proof of his extra payments. Respondents produced an illustrative exhibit (Exhibit D-521) and a bank statement showing that a check was written from the partnership account (Exhibit D-517). Respondents did not produce the cancelled check itself but merely speculated that the check must have been issued to Steve. Respondents attempted to use illustrative exhibit D-521 to show that Steve pocketed over \$400,000 of Heitstuman Brothers income between 1998 and 2002 because the Barkley mortgage payment and Steve's one-third share of the expenses equaled less than Heitstuman Brothers' income. Exhibit D-521, however, is incomplete. It excludes Steve's Floch payments and principal payments and ignores that Steve claimed only one-third of the operating expenses he paid; he allotted the remaining two-thirds of Heitstuman operating expenses to Wayne and David. This fictitious profit then was consumed by Wayne and David's share of the farming expenses. There was no profit. In fact, Heitstuman Brothers and David Heitstuman had been bankrupt just a handful of years earlier and Steve's extra payments were instrumental in pulling the partnership out of bankruptcy.

Next, Respondents argue that the court properly exercised its discretion when it divided the real property by awarding Steve, a rancher, 840 acres of mostly farmland because farmland is more valuable than rangeland and because awarding Steve more rangeland would have taken rangeland away from Wayne. Again, Respondents' arguments fail to respond to the issue raised by the Petitioner. An argument that partition was proper because the court had discretion to divide the land according to its agreed upon value does not respond to the question of whether the court erroneously failed to consider the quality and quantity of the land being divided as statutorily required.

Finally, Respondents argue that a trial court did need not appoint referees as RCW 7.52.080 requires. First, they assert that no referees were needed because the parties stipulated to an appraisal of the land's value. This argument is unsound. It mutates a stipulation on the value of land into a waiver of the statutorily-required referees without any legal support whatsoever. The fact that the parties agreed to use Steve Rynearson's appraisal is not an agreement to forego the proper procedures for partition set forth in RCW 7.52.080.

The Respondents also suggest that a court need not appoint referees because the court has the ultimate power to partition anyway. This argument ignores the plain language of RCW 7.52.080 that mandates

the appointment of referees and RCW 7.52.090, which states, in relevant part, that “the referees shall divide the property.”

Steve is not arguing that referees have greater power than the trial court. He did not assert or imply that the court would not have had the ultimate authority to disregard the referees’ recommendations. His argument did not get that far because no referees were even appointed in this case. Steve is arguing that the trial court is statutorily required to appoint referees when it decrees a partition of real property. *See* RCW 7.52.080 (stating “upon requisite proofs being made, it shall decree a partition . . . and appoint three referees, therefor”). The trial court failed to do so, and its failure to do so was an error.

Respondents next quote *Carson v. Willstadter*, 65 Wn. App. 880, 883, 830 P.2d 676 (1992), for the proposition that appointing referees is discretionary because the *Carson* court said the court “may” appoint three referees. Br. of Resp’ts at 15-16.

Carson does not stand for the proposition asserted by Respondents. *Carson* did not interpret or even cite RCW 7.52.080, the statute setting forth the referee appointment mandate. 65 Wn. App. 880-87.

Respondents claim that the referees’ purpose “is simply to prepare a report to aid the Court in determining the relative value, quality, and general makeup of the land.” Br. of Resp’ts at 16.

That claim is disproved by the plain language of RCW 7.52.090, which shows that the referees do much more than prepare a report about the quality and general makeup of the land:

In making the partition, the referees shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them therein. The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided and the shares allotted to each party, with a particular description of each share.

RCW 7.52.090.

Respondents claim that appraiser Steve Rynearson and his appraisal should satisfy the court's duty to appoint referees. If the Legislature meant for the trial court to appoint one appraiser instead of three referees, it would have said so. RCW 7.52.080 clearly demands otherwise. Moreover, Mr. Rynearson did not examine the property like a referee. *See* RCW 7.52.090; *see also, Carson*, 65 Wn. App. at 882; *see also, Hegewald v. Neal*, 20 Wn. App. 517, 522, 582 P.2d 529 (1978). For example, as Wayne testified, Mr. Rynearson did not leave the road when appraising the Floch property. RP 408. Mr. Rynearson also did not propose a fair division of the land. Lastly, Mr. Rynearson is one

appraiser, not three referees. Mr. Rynearson and his appraisal should not be considered to satisfy the court's duty to appoint referees.

Respondents further argue that Steve did not ask the court to appoint a referee. The statutes do not require a motion. *See, e.g.*, RCW 7.52.080. The plain language of the statute simply requires the court to appoint referees after decreeing a partition without a motion.

Respondents contend that Steve's legal argument that the court misapplied RCW 7.52 by failing to appoint referees should be barred by judicial estoppel. As noted earlier, judicial estoppel applies to factual assertions, not legal positions. *King*, 10 Wn. App. at 521. The doctrine, therefore, does not apply here. Steve's legal argument is properly before this Court.

Respondents argue that Steve has waived his right to the appointment of referees because he did not raise the issue at the trial court level. First, Respondents offer no citation to legal authority to support their argument. Second, Steve was denied permission to file a post trial motion. Third, RCW 7.52.080 does not require the court to appoint referees until it decrees a partition. Despite the fact that this case began several years ago, the court did not decree a partition until 2013. Finally, agreeing on the value of the land should not be construed as an agreed-upon division of the land. Those are two different things. If the parties

had agreed upon how to divide the land, the matter would not have gone to trial.

The court is required to unilaterally appoint referees. *See* RCW 7.52.080. The appointment of referees would not have been wasteful. The referees would have considered the quality and quantity of the land to be divided and provided an independent recommendation for dividing the property in a manner that would have been equitable for all three brothers, not just Wayne and David.

C. CONCLUSION

Respondents inaccurately argue, in essence, that the trial court has unfettered discretion to divide real property and personal property however it sees fit regardless of statutory limitations on that discretion. Partition is an historically equitable remedy, but RCW 7.52 limits the court's discretion to fashion relief by partition. It limits the application of the doctrine to only real property and only with the appointment of referees and consideration of the quality and quantity of the land according to the respective rights of the parties.

Respectfully submitted this 16th day of December, 2013.



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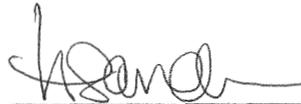
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| Wayne Heitstuman, et al. |) | |
| |) | |
| Respondents. |) | |

I, Hailey L. Landrus, counsel for the Appellant, do hereby certify under penalty of perjury that on December 16, 2013, I deposited for mail with the U.S. Postal Service, first-class and postage prepaid, a true and correct copy of the Appellant's attached reply brief, addressed to:

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Dated this 16th day of December, 2013.



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