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STATE OF WASHINGTON
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Court of Appeals No. 68407-8

Skagit County Superior Court No. 07-2-02415-1

IN THE COURT OF APPEALS - STATE OF WASHINGTON

DIVISION I

TASSO SCHIELKE,

Defendant-Appellant,

v.

GUENTHER and URSULA THOMAS,

Plaintiffs-Respondents,

and

The ESTATE OF ULRIKE SCHIELKE,

Defendant-Respondent.

REPLY BRIEF OF APPELLANT

K. GARL LONG, WSBA #13569

Attorney for Appellant

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ORIGINAL

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APPENDIX

A. ORDER ON MOTION FOR CLARIFICATION, 4-3-10, CP 136-137

I. SUMMARY

Thomas asserts that a final order of partition existed months before he requested Judge Needy to enter a final order of partition, and that Schielke is therefore barred from appealing the final order of petition. He claims that Schielke proposed and agreed to the partition line, but then concedes that the partition order “did not result from a settlement agreement between the parties”.¹ Finally he argues that an order of partition does not need to be supported by findings of fact.

Judge Cook, who heard the partition trial, repeatedly refused to enter a final order of partition. Judge Needy had no basis upon which to do what Judge Cook refused to do. His order does not enforce an agreement made by the parties. His order is not supported by the necessary findings of fact. There are no facts in the record to support the parcel equality of the partition he ordered. The decision below must be reversed.

¹ Response Brief of Respondents Thomas at page 12.

II. ARGUMENT

A. This Appeal was Timely Filed

Thompson seeks to prevent review by arguing that review of the order he sought from Judge Needy, entitled Order Enforcing Order For Partition, does not bring with it review of the prior decisions on which the order was based. The scope of appellate review includes review of the decision designated in the notice of appeal, and decisions in the case that lead to the decision appealed from. RAP 2.4(a). The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if the prior order or ruling prejudicially affects the decision designated in the notice. RAP 2.4(b). A ruling prejudicially affects a later order if the later order would not have been entered without the prior ruling. *Right-Price Recreation, LLC, v. Connells Prairie Community Council*, 146 Wn.2d 370, 46 P.3d 789 (2002).

Here the order appealed from expressly refers to prior decisions. CP 63-65. Appellant contends those prior orders were never final orders and that Judge Needy erred in deciding they were. Respondent contends there was a final partition order, but fails to explain why he then needed another final order. Judge Needy crossed out and initialed findings proposed by Thomas that stated the time for review of earlier decision had

expired. CP 65. Judge Needy ruled based on his interpretation of prior orders that prejudiced Schielke, and his ruling was timely appealed. The appeal brings with it the prior rulings.

Only final judgments and decisions terminating an action are appealable. RAP 2.2((a)).² Here Judge Cook, who issued the orders Thomas alleges were final, did not believe a final order was issued. If she had, she would not have repeatedly refused to order a final line of partition and would not have held a settlement conference to attempt to find an agreed partition line.

Thomas relies on outdated rules and authority in an attempt to convince the court of his position.³ The trap he attempts to spring was disarmed decades ago:

As noted in the comment at the time RAP 2.4(b) was adopted in 1976, a trap for the unwary existed under prior rules in that a failure to appeal an appealable order could prevent its review upon appeal from a final judgment. It is not always clear, however, what is an appealable order. RAP 2.4(b) solved the problem by including prior appealable orders within the scope of review.

Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 135, 750 P.2d 1257 (1988). (Footnote references removed.)

² The rule also includes a list of specific types of orders that are appealable.

³ At page 19 of his brief Thomas cites “Court of Appeals Rules on Appeal” and provides rule numbers. He does not explain why a set of rules that are no longer in affect would govern this appeal. The cases he cites predate the rule change.

At most, the various orders entered by Judge Cook could be no more than a partial judgment as no final line was ever established. A party need not appeal such partial orders, and is free to appeal them even after entry of post judgment orders. *Wlasiuk V. Whirlpool Corp.*, 76 Wn.App. 250, 884 P.2d 13 (1994).

B. Schielke's Proposed Straight Line of Partition is not the Line Ordered by Judge Needy

Thomas states at page 12 of his response that the “partition in this case did not result from a settlement agreement between the parties”. However, he also argues that Judge Cook adopted Schielke's proposal and Schielke is therefore stuck with it. Response Brief 30-31.

Thomas does not explain why Schielke should be stuck with the crooked line proposed by Thomas when Schielke had proposed a straight line. Nor does he even attempt to explain why Judge Cook would continue to attempt to bring the parties back into agreement.

After agreeing to the straight line on the trial exhibit Thomas has repeatedly attempted to move the line in his favor. Judge Cook did not allow it; Judge Needy should not have allowed it.

C. There are No Facts and No Findings to Support the Partition

Thomas seems to concede that there are no findings to support the partition line adopted by Judge Needy. He argues none are needed because Schielke had proposed a straight line. But Schielke's straight line is not the line in Judge Needy's order. There are no findings to support the crooked line finally adopted. It seems evident that findings are required as to the partition as the court is required to take evidence when considering partition. RCW 7.52.070. Findings are required in a physical partition. *Carson v. Willstadter*, 65 Wn.App. 880, 883, 830 P.2d 676 (1992).

D. There was No Final Line of Partition Before Judge Needy Imposed One

Thomas argues that Judge Cook entered a final order on September 22, 2009, and that the lack of findings as to the value of the resulting parcels is excusable because the line was based on what Schielke proposed. But he fails to explain how the order could be final, when, after Schielke moved for clarification, Judge Cook entered a written finding stating her order of September 22 "should be considered further". CP 136. Appendix A. What followed was a series of hearings in which Judge Cook gave the matter further consideration.

Thomas also argues that, despite Judge Cook's decision to

consider the September 22 order further, a July 2, 2010 order combines with it to create a final order of petition that Judge Needy then entered an order enforcing. However, Judge Cook orally ruled that the July 2, 2010 order did not impose a line, it just ordered the surveyor to produce a drawing showing the line for consideration. RP 8-5-10, 23. Judge Cook's interpretation of her order is consistent with the language used. CP 159-160.

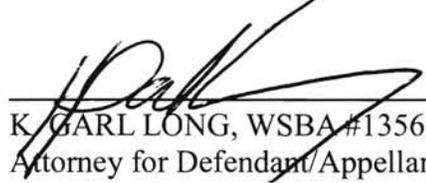
In contradiction to Judge Cook's rulings, Thomas continues to argue that Judge Cook made a final ruling on the partition line. There would have been no reason for a settlement conference if she had imposed a line of partition. Thomas' argument is not consistent with either the orders or the actions of Judge Cook.

III. CONCLUSION

There is no evidence and no findings supporting the physical partition ordered by Judge Needy. His order is not supported by agreement of the parties. The trial court must be reversed and the case be remanded, with instructions for the trial court to refer the physical partition of the property to referees as set forth in the partition statute. An

equitable physical partition can then be based on the ownership interests of the parties.

RESPECTFULLY SUBMITTED this 7th day of
September, 2012.


K. CARL LONG, WSBA #13569
Attorney for Defendant/Appellant

APPENDIX

A. ORDER ON MOTION FOR CLARIFICATION, 4-3-10, CP 136-137

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA
2010 APR 30 AM 9:50

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SKAGIT

GUENTHER THOMAS, et ux,

Plaintiff,

v.

TASSO SCHIELKE, et ux.

Defendant.

No. 07-2-02415-1

**ORDER ON MOTION FOR
CLARIFICATION**

~~(PROPOSED)~~

THIS MATTER having come regularly before the Court on the Defendant's Motion for Clarification of Order on Petition, and the parties having appeared through their counsel, and the Court having considered the motion and being familiar with the records and files herein and having listened to the arguments of counsel;

The Court FINDS that the Court's prior order, entered September 22, 2009 should be considered further after the Court hears from the surveyor and reviews a transcript of the September 22, 2010 hearing.

It is THEREFORE HEREBY ORDERED that:

- 1) A hearing shall be set for the Court to hear the testimony concerning the survey, including the testimony of the survey company.
- 2) The parties shall provide a transcript of the hearing held September 22, 2009.

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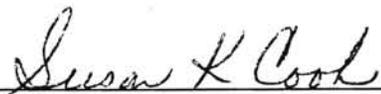
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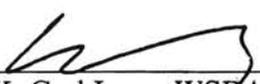
- 1 3) Either party may access all of the property as long as they cause no harm; however the
- 2 Defendant shall not enter the residence. ~~Both~~ ^{Each} parties shall advise his counsel
- 3 4) The Court reserves the question of who pays the survey cost pending the evidentiary hearing.

DATED this 30 day of April, 2010.


 JUDGE SUSAN K. COOK

Presented by:

Approved for entry:


 K. Garl Long, WSBA #13569
 Attorney for Defendant


 Alan R. Souders, WSBA #26192
 Attorney for Plaintiff

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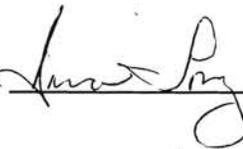
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TO THE FOLLOWING PARTY:

<p>Alan R. Souders Attorney at Law 913 Seventh Street P.O. Box 1950 Anacortes, WA 98221-1950</p>	<p><input checked="" type="checkbox"/> U. S. Regular Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivered by <input type="checkbox"/> <u>Electronic Mail</u></p>
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Under penalty of perjury of the laws of the State of Washington I declare the above to be a true, accurate and correct statement to the best of my knowledge and belief.

DATED this 7th day of September, 2012.

By:  _____