

COA No. 30903-7-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**

FEB 22 2013

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

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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 APPELLANT

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

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## I. ASSIGNMENTS OF ERROR

A. The court erred by determining Janice Kelsey was not entitled to a discount for her undivided interest in certain property even though the court awarded Craig and Donna Kelsey a discount of \$86,005.00 for their undivided interest in the Stine property.

B. The court erred by making this finding in its letter opinion denying the discount: "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."

C. The court erred by denying Ms. Kelsey's motion for reconsideration of the court's decision denying her a discount for her undivided interest in certain property awarded to her.

D. The court erred by making finding of fact 3 in its May 14, 2012 findings and conclusions:

**Order on Partition.** The referee's report was adopted in full by order of the court on May 4, 2009. To equalize the division of real property a cash adjustment was necessary and that would require the payment of \$23,321.50 from Janice Kelsey to the Craig Kelsey family. Craig Kelsey accepted extra equipment valued at \$11,472.00 in order to mitigate the original figure, leaving the cash adjustment from Janice Kelsey to the Craig Kelsey family of \$11,849.50.

E. The court erred by awarding attorney fees and costs to Craig and Donna Kelsey.

F. The court erred by making finding of fact 4 in its May 14, 2012 findings and conclusions:

**Order Awarding Cost and Value of Discounted Property due to Undivided Interest.** On June 17, 2011 the court ordered that the Plaintiffs are awarded costs in the amount of \$6,015.25; that the Plaintiffs are awarded attorneys' fees in the amount of \$4,840.62; and that the Plaintiffs are awarded \$86,005.00 for their undivided interest in the Stine property.

G. The court erred by making finding of fact 3 in its order awarding costs and value of discounted property due to undivided interest:

The Plaintiffs, CRAIG J. KELSEY and DONNA J. KELSEY, are entitled to costs in the partition pursuant to RCW 7.52.480.

H. The court erred by making finding of fact 4 in its order awarding costs and value of discounted property due to undivided interest:

The plaintiffs, CRAIG J. KELSEY and DONNA J. KELSEY are entitled to attorneys' fees in the partition pursuant to RCW 7.52.480.

I. The court erred by entering its order awarding costs and value of discounted property due to undivided interest and judgment.

J. The court erred by dividing personal property in the partition action and entering an order on retrieval of personal property items.

K. The court erred by entering its order on partition.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court err by determining Janice Kelsey was not entitled to a discount for her undivided interest? (Assignments of Error A, B, and C).

2. Did substantial evidence support the finding that Ms. Kelsey 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? (Assignment of Error B).

3. Did the court abuse its discretion by denying the motion for reconsideration? (Assignment of Error C).

4. Did the court err by awarding costs to Craig and Donna Kelsey when Ms. Kelsey had incurred \$5,000 for survey costs that were not taken into consideration by the court? (Assignments of Error E, F, G, and I).

5. Did the court err by awarding attorney fees to Craig and Donna Kelsey when Ms. Kelsey had incurred attorney fees that

were not taken into consideration by the court? (Assignments of Error E, F, G, and H).

6. Did the court err by entering its order awarding costs and value of discounted property due to undivided interest and judgment? (Assignments of Error D, E, F, G, H, and I).

7. Did the 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? (Assignment of Error J).

8. Did the court abuse its discretion and thus err in entering an order on partition that "adopted in full" the referee's report when Ms. Kelsey's exceptions to it were not taken into consideration? (Assignment of Error K).

### III. 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 as well. (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 as alleged in the complaint. (CP 172-73). They further

admitted that 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, which stated 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).

Ms. Kelsey 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 Kelsey. (CP 110). Ms. Kelsey later filed supplemental exceptions to the referee's report and order on partition. (CP 188-91).

Ms. Kelsey 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 and Donna Kelsey moved for an order awarding costs and value of discounted property due to

undivided interest. (CP 214). On June 17, 2011, the court awarded them \$6,015.25 costs, attorney fees of \$4,840.62, and \$86,005 for their 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 Kelsey's property to parcels 1, 2, 11, and 12, Ms. Kelsey's counsel made a similar inquiry of Mr. Hatley as to 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). Ms. Kelsey then sought an order from the court allowing a 25% discount arising from a 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).

Ms. Kelsey 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 Ms. Kelsey for \$108,710.37. (CP 287-89, 290-91, 292-93). This appeal follows.

#### IV. ARGUMENT

A. The court erred by determining Ms. Kelsey should not get a discount for her undivided interest in certain property even though Craig and Donna Kelsey got a discount of \$86,005 for their undivided interest.

Ms. Kelsey 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).

As to Parcel 9A, the report stated:

The Adams County Assessor shows that Arlyne Kelsey has a 1/4 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 1/4 interest and Craig Kelsey and Dennis Kelsey 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 report show that the fractional ownership interest of Ms. Kelsey 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 Kelsey, 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). Indeed, it was Craig Kelsey, personal representative of Arlyne Stine's estate, who proposed a TEDRA agreement that resulted in Ms. Kelsey 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).

Substantial evidence does not support the court's finding on which it relied to deny her a discount. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). The court erred because the stated factual finding for its ruling was not supported by any evidence and thus did not support its legal conclusion denying the discount. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986). Moreover, the referee opined Ms. Kelsey should receive the discount just as Craig and Donna Kelsey did. The court adopted his report in full and should have accorded the referee's opinion on this issue the high degree of deference it must be accorded. *Carr v. Harden*, 34 Wn. App. 292, 297, 660 P.2d 1139 (1983). The court erred.

By the same token, the court abused its discretion by denying Ms. Kelsey's motion for reconsideration. *River House*

*Dev., Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012). Before it was evidence in the referee's report establishing that the property for which Ms. Kelsey requested a discount was undivided property at the time of the partition. The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or for untenable reasons. *Id.* Relying on an erroneous finding, the court abused its discretion by denying the motion for reconsideration because it was based on untenable grounds or for untenable reasons. Ms. Kelsey is entitled to a discount of \$104,663.25. (CP 243). The order and judgment based on this error must be reversed.

B. The court erred by awarding attorney fees and costs to Craig and Donna Kelsey pursuant to RCW 7.52.480.

The court awarded costs of \$6,015.25 to respondents Kelsey. The costs were set forth in their motion and affidavit for an order awarding costs and value of discounted property due to undivided interest. (CP 217-19). In response, Ms. Kelsey offered a \$5,000 invoice from Columbia Engineering Surveyors for services to confirm acreage figures from the referee's report. (CP 225).

At the hearing, the court compromised by granting Craig and Donna Kelsey half the costs contested by Ms. Kelsey. (6/17/11 RP

179). Her counsel also argued that half the costs of the \$5,000 survey should be borne by Craig and Donna Kelsey because it was a cost related to the partition that was paid by Janice Kelsey even though it did not lead to bringing an issue before the court. (*Id.* at 179-80; *see also* 6/8/09 RP 93-95). Not expressly ruling on it, the court nevertheless failed to take the survey into consideration in awarding costs. (*Id.* at 180-81). There being no reason expressed for not including it in the costs, the court erred because its decision was based on untenable grounds or reasons. *River House*, 167 Wn. App. at 231.

As for the attorney fees incurred by the respective parties, Craig and Donna Kelsey listed their amount of fees as \$43,556.75 with half, that is, \$21,783.38, to be paid by Ms. Kelsey. They estimated attorney fees paid by her to be in the neighborhood of \$16,250. (CP 220).

In her declaration, Ms. Kelsey supplemented the figures provided by Craig Kelsey and showed the amount of her attorney fees as \$51,492.32, some \$35,000 more than he estimated. (CP 224). The court awarded him \$4840.62 attorney fees. (CP 297). But his half of Ms. Kelsey'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 Mr. Kelsey, the court should have awarded Ms. Kelsey \$3962.78 in attorney fees. The court erred as substantial evidence does not support its findings and those findings in turn do not support its conclusion. *Willener*, 107 Wn.2d at 393. The award of fees to Craig and Donna Kelsey in the order and judgment must be reversed and an award made to Ms. Kelsey.

C. The court erred by dividing personal property in the partition action and entering an order on retrieval of personal property items.

In its order on retrieval of personal property items, the court found that Ms. Kelsey, "prior to her Objection to Retrieval of Personal [P]roperty filed in November, 2009, has not disputed, in any pleading submitted to the Court, that the Court lacked jurisdiction to partition personal property items." (CP 178). And she did not. But the finding is plainly one relating to waiver and nothing in the record shows Ms. Kelsey voluntarily relinquished a known right, that is, the right to contest jurisdiction. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409-10, 259 P.3d 190 (2011). Ms. Kelsey was not represented by an attorney when the motion for division of real property was filed and waived nothing. (CP 150).

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).

Ms. Kelsey disputed the jurisdiction of the court to partition real property. (CP 138-52). Her challenge is well-taken and she did not waive her right to do so. The court must be reversed on this issue as well.

D. The court erred by entering its order on partition when the exceptions taken by Ms. Kelsey to the referee's report were ignored.

In its order on partition, the court adopted the referee's report in full.<sup>1</sup> (CP 109). Ms. Kelsey made exceptions to the report. (CP 94-96). As to Parcels 1, 2, 11, and 12 (the Stine property), she noted the report failed to recognize that she and Dennis Kelsey and Craig and Donna Kelsey purchased interests in them. (CP 94-95). The consideration paid for the property identified as Parcel 7 was \$40,000. (CP 95). Ms. Kelsey excepted to the report's valuation of

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<sup>1</sup> The order on partition is reviewable under RAP 2.4(b) as it prejudicially affects the decisions designated in the notice of appeal.

the Arlyne Stine claim against the Craig Kelsey parcels for \$140,157 and the Stine claim against the Dennis Kelsey parcels for \$182,430, which as proposed imposed an "inequitable lien against the respective parcels." (CP 95). Another exception stated the report did not take into account a wasteland ("dump") on Parcel B where there was the potential for burying of hazardous material and associated cleanup costs. (*Id.*). Ms. Kelsey took exception to the report's proposed allocation of Parcel 13 to Craig Kelsey when it failed to acknowledge she had been farming the "Frederick Maxum" property under a lease. (CP 96). The allocation would thus force the parties to have ongoing contact with each other, contrary to the goals of the partition action. (*Id.*). She excepted to the report's failure to provide information relating to soil and production capabilities. (*Id.*). Ms. Kelsey also took exception to the valuation of Parcel 11 allocated to Craig Kelsey as it included improvements of \$63,000 without any indication a home on the property had been included in the valuation. (*Id.*).

Although her exceptions were argued to the court, it nonetheless decided the partition as suggested by the referee was appropriate. (6/8/09 RP 70). But even the court noted there was concern about the valuation of the property:

There is some concern, I think, about the boot or what we used to call the boot and that is, how money should change hands here. And in that case, I think what we do, the Court would request counsel to instruct Mr. Hatley to run the figures for the Court taking into consideration the concerns that Ms. Kelsey has and that counsel has and run the figures for the Court and we can decide down the line. (*Id.*).

Notwithstanding the directions of the court, the record reflects nothing was done with the valuations to address Ms. Kelsey's concerns. Indeed, the report adopted in full was the January 28, 2009 report of Mr. Hatley. In these circumstances, substantial evidence does not support the court's findings and its conclusions do not follow from them. *Willener*, 107 Wn.2d at 393. The court erred by entering its order on partition because there was no action taken on its request for further valuations taking into consideration the concerns of Ms. Kelsey.

Subsequently, she made supplemental exceptions to the referee's report and order on partition. (CP 188-91). At a June 8, 2009 hearing, Ms. Kelsey also informed the court:

I do not accept Mr. Hatley's report because he has not included the original twenty thousand dollars that I paid on the Curry place for all of the buildings. He has not included that and that would balance [the equalizer payment] out in a flash. Second, they have assessed the Stine property and the Curry place as being less

valuable than the home place where I live and that is incorrect. Those factors, they left out the house and they didn't do it properly and you agreed to it, so I think perhaps we need to consider that I am going to go for an appeal. (6/8/09 RP 109-10).

The supplemental exceptions essentially related to the report's valuation of property. Ms. Kelsey took exception to the referee's use of two figures for property values, that is, those in the section of his report entitled "valuation of property" and those based on Adams County Assessor information. (CP 57-60, 79-83). Ms. Kelsey excepted to the erroneous valuations of Parcel 7, 9A, and 11, resulting in a \$114,353 error and a credit to Ms. Kelsey of \$57,176.50 to cure it. (CP 190). She also noted the report stated wasteland was calculated at \$50/acre, but different values ranging from \$10/acre to \$25/acre were used for various parcels by the referee. (CP 191). Finally, Ms. Kelsey took exception to the mathematical error in calculating Parcel A for 123.1 acres at \$10/acre, but arriving at a figure of \$123, when the correct amount was \$1,230. (*Id.*).

These further exceptions were apparently not considered by the court. The differences in valuation are substantial and shows the inequity of the order on partition. *Carson v. Willstadter*, 65 Wn.

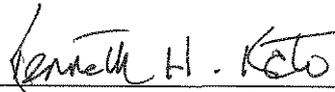
App. 880, 830 P.2d 676 (1992). A partition action is an equitable remedy in which the court has great flexibility in fashioning relief. *Id.* But when it made a decision on the partition without further input and explanation by the referee as it requested, the court abused its discretion by basing its order on untenable grounds or for untenable reasons. *River House*, 167 Wn. App. at 331. The order on partition must be reversed.

#### V. CONCLUSION

Based on the foregoing facts and authorities, Ms. Kelsey respectfully urges this Court to reverse the order on partition, the order awarding costs and value of discounted property due to undivided interest and the judgment, and the court's decision denying her a discount for her undivided interest, and remand for further proceedings.

DATED this 22<sup>nd</sup> day of February, 2013.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I certify that on February 22, 2013, I served by first class mail, postage prepaid, a copy of the Brief of Appellant on L.R. "Rusty" McGuire, Attorney at Law, PO Box 1187, Davenport, WA 98122-1187.

Kenneth H. Kato