No. 94128-7

SUPREME COURT
OF THE STATE OF WASHINGTON

OVERLAKE FARMS B.L.K. III LLC,
a Washington limited liability company,

Respondent,

v.

BELLEVUE-OVERLAKE FARM, LLC,
a Washington limited liability company,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. Introduction.

Following unambiguous statutory language and settled law, the Court of Appeals held that the statutory prerequisite to a court-ordered sale of cotenancy property – that a physical "partition cannot be made without great prejudice to the owners," RCW 7.52.010, .080 – requires proof that "partitioning the property would create two parcels whose aggregate value was materially less than the value of the whole property." Its decision presents no ground for review under RAP 13.4(b)(1) or (4).

The petition rests on the false contention that a physical partition of 40 undeveloped acres will force the petitioner alone to bear the entire expense of connecting their partitioned parcel to municipal sewer. To the contrary, the trial court found after a six day trial that partition in kind of would not result in any economic loss to either of the cotenants and would respect the familial and emotional ties to the property of the majority cotenant, who did not want to sell this ancestral property and who expressly agreed to pay its share of a municipal sewer connection that would benefit both cotenants. After court-appointed referees found that a physical partition would yield 38 buildable lots, divided between the cotenants with no reduction in the property's overall value, a successor judge nonetheless ordered the

property sold at sheriff's sale, not because it was worth more as a single parcel, but because the prospect of future disagreement over the mechanics of implementing the sewer connection would prejudice the minority cotenant, who opposed partition in kind and insisted on a sale of the property.

The Court of Appeals reversed, correctly holding that prejudice to one cotenant is not "great prejudice to the owners" under the plain language of RCW 7.52.010 and .080. Absent a finding – or *any* evidence – that potential disagreement between cotenants would materially affect the value of the cotenancy property, and particularly where the majority cotenant agreed to share the expense of a sanitary sewer connection that would equally benefit all of the developable lots, a partition in kind does not cause "great prejudice to the owners." There are no grounds for review.

II. Restatement of Issues Presented for Review.

A. Did the Court of Appeals correctly hold that RCW 7.52.010, by its terms, authorizes a partition in kind unless the court finds that dividing the property between the cotenants would cause "great prejudice to the owners," and not to any single one of them?

B. Did the Court of Appeals correctly hold that cotenancy property that is capable of division without material economic loss may not be sold at sheriff's sale based solely on the desire of one of the cotenants to avoid the inconvenience of disagreement over a development expense the other cotenant expressly agreed to share?

III. Restatement of the Case.

Petitioner's argument that they established "great prejudice" justifying a judicial sale of the parties' family property is premised on a false assertion – that they will be "forced" to shoulder sanitary sewer expenses that will benefit the entire 40-acre property. That misstatement ignores the trial court's unchallenged findings entered after a six day trial and those of the referees, adopted by a successor superior court judge, that respondent, the majority cotenant, unequivocally agreed to pay its proportionate share of a sewer connection. This restatement of the case relies upon those unchallenged findings, the record from trial and the post-trial documentary record, as well as the Court of Appeals decision.

A. The Kapelas and Sferras own as tenants in common a 40-acre property in Bellevue, which the Kapelas wish to keep and the Sferras want to sell.

Overlake Farm, located in the Bridle Trails area of Bellevue, was originally part of a 60-acre horse farm that Army and Betty Seijas purchased in 1947. (FF 3, CP 229; CP 292) It is now a 40-acre farm owned in tenancy in common by two limited liability companies formed by the Seijas' descendants. The Seijas' daughter Betty Lou Kapela and her three children have the beneficial interest in 75% of Overlake Farm through their limited liability company respondent

Overlake Farms BLK III, LLC. The remaining 25% interest is beneficially owned by the other Seijas daughter Gloria Sferra and her two daughters through petitioner Bellevue Overlake Farm, LLC. (Op ¶4)[1]

The Kapelas own the 20-acre parcel adjacent to the cotenancy property (respectively described as "the Front 20" and "the Back 40") that was once part of the Seijas' 60-acre parcel. Betty Lou and her husband Bob Kapela live on the Front 20. They use both the Front 20 and Back 40 to board horses, operate a summer children's camp, and host family gatherings. The Kapelas maintain dedicated burial sites of deceased family members on the Back 40. (Op. ¶5; FF 4, CP 229; 2/19 RP 73) The Kapela children, now adults with children of their own, still live adjacent to Overlake Farm or very close to it. (2/19 RP 64, 74)

In contrast to the Kapelas, the Sferras feel no strong familial ties to the property. (2/21 RP 101, 118) No written agreement governs the parties' respective rights as tenants in common (FF 4, CP 229), and they were unable to reach agreement when the Sferras rejected the Kapelas' attempt to physically partition the property or

[1] The respondent Overlake Farms BLK III, LLC is referred to here and in the Court of Appeals decision as "the Kapelas," and petitioner Bellevue Overlake Farms, LLC, as "the Sferras."

to purchase the Sferras' 25% interest, preferring a sale of the entire 40-acre property. (2/19 RP 79-85; 2/21 RP 99, 108-09)

B. The trial court, the referees and the successor judge all found that the property may be partitioned into 38 parcels without material economic loss and that the Kapelas would fund their 75% of the sewer development cost.

The Kapelas commenced a partition action pursuant to RCW ch. 7.52. (CP 1-5) They sought a physical partition to continue using their horse farm and to provide the Sferras 25% of the Back 40 to use as they wished. (FF 10, CP 230) The Sferras claimed that physical partition was not feasible because the parties "cannot cooperate with respect to this property" (2/19 RP 98), asserted that the property could not be physically divided without "great prejudice," and sought an order forcing a sheriff's sale of the property pursuant to RCW 7.52.080. (CP 8-11)

After a six day trial in 2013, King County Superior Court Judge Mary Yu rejected the Sferras' contention that "there was no partition scenario that would yield an equitable result." (FF 16, CP 232-33) Judge Yu found that the property was capable of subdivision into 38 residential lots under existing single family zoning, resulting in 29 lots to the Kapelas, and nine lots to the Sferras. (Op. ¶¶ 5, 9, FF 11, CP 231) Judge Yu rejected the Sferras' assertion that a subdivision

of nine lots would yield a lower price per lot than if the entire Back 40 were sold as one. (2/26 RP 34-36) Judge Yu concluded that any incidental loss in the property's value was insufficient to result in "great prejudice," which she defined as "material economic loss." (Op. ¶9; CP 194-95; FF 16, CL 4-6, CP 232-34) She also considered the "human and family element" – the significant familial attachment the Kapelas have to the property:

> Defendant did not meet its burden of proof to convince the Court that it is not possible to carve out an equitable partition without material pecuniary loss to Defendant – i.e., such that the relative value of the share would be materially less than the sum Defendant would realize from a one-fourth share of the proceeds of a sale of the whole. The Court also cannot overlook the fact that Plaintiff, as one of the co-tenants, desires to keep and utilize the Property. There is a human and family element to the Property that cannot be discounted.

(CL 6, CP 234)

Judge Yu found that were the City of Bellevue to require a sanitary sewer extension as a condition of subdivision, the Kapelas agreed to fund, or enter into a covenant to fund, their 75% share of the sewer expense. (FF 7, CP 230; *see* 2/19 RP 111, 142-43) She provisionally granted the Kapelas' claim for partition in kind, subject to the final report of three referees appointed pursuant to RCW 7.52.080 "on whether and how the Property can be equitably

partitioned, subject to any owelty payment under RCW 7.52.440, and without great prejudice." (CL 9, CP 234-35; CP 236-42)

Consistent with Judge Yu's findings, the referees rejected the Sferras' contention that the property would be worth more as a whole than if partitioned in kind, finding that "the value per lot between large and small projects is roughly equal, with developers paying the same pro rata value for 25% of the Property as they would for the entire Property," (CP 732, ¶42), and that "there is no basis to assert that lots in a nine lot subdivision would sell at any different pace than a 38 lot subdivision." (CP 733, ¶46) The referees preliminarily found the "as is" value of each lot was $275,000 – midway between the $250,000 price set by the Kapelas' appraiser and the $300,000 price set by Sferras' appraiser. The referees recommended equalizing the partition in kind by directing an owelty payment of $137,500 from the Kapelas to the Sferras. (CP 735-36, ¶¶55-56)

The referees also reported that any development for single family homes would require connecting to Bellevue's sanitary sewer, estimating the cost of the sewer extension at $1.4 million. (CP 736, ¶¶59, 60) The referees concluded that the Sferras "would sustain great prejudice" if required to carry the entire cost of a sewer extension benefitting all parcels, (CP 737, ¶61), but acknowledged

Judge Yu's finding that the Kapelas agreed to fund 75% of the expense. (CP 728, 738, ¶¶35, 62) Assuming the Sferras would develop their nine lots first, the referees recommended a "reciprocal covenant," requiring the parties to pay their respective shares of $1.4 million into escrow, released upon construction. (CP 737-39, ¶63)[2]

C. The Court of Appeals reversed the trial court's judgment directing a sheriff's sale, which was based on the referees' finding that the burden to the Sferras in working with the Kapelas to obtain a sewer connection constituted "great prejudice to the owners" under RCW 7.52.010.

In response to the referees' recommendation, the Kapelas reaffirmed their commitment to share the cost of sewer. But because it could be years before that work is permitted and performed, they proposed posting a surety bond to secure their 75% share of the estimated cost. The bond would convert to a cash escrow upon approval of a developer's sewer extension application. (CP 800-01, 807) By contrast, the Sferras argued that the referees had no authority to attempt to prevent the "great prejudice" that the Sferras claimed they would suffer were they to unilaterally fund the entire cost of bringing sewer to their nine lots. (CP 760) Rather than

[2] Any unpaid costs in excess of the funds in escrow would be a lien against a party's property, foreclosable in accordance with law, with disputes between the parties resolved by binding arbitration. (CP 739, ¶63(d), (g))

recommending the precise terms of a sewer covenant, in their final report the referees recommended that the property be sold if the parties could not agree to the terms of a covenant. (Op. ¶12; CP 947)

Predictably, the Sferras, who insisted on a sale (CP 763), rejected the Kapelas' proposal to secure their share of the expense with a bond. Judge Chung ordered the property sold at sheriff's sale, accepting the referees' finding that "that a partition-in-kind would cause great prejudice to the one-fourth owner" (CP 969), based upon the parties' inability to cooperate in the "difficult process of partition and land development over a long period of time." (CP 947, ¶65)

The Court of Appeals reversed, holding that "great prejudice" under the partition statute "mean[s] that a partition in kind would reduce the value of the whole property." (Op. ¶28) Acknowledging the statutory and common law preference for partition in kind (Op. ¶32), the Court held that "prejudice to one party, but not the other," does not justify a court-ordered sale of cotenancy property. (Op. ¶28) Because the Court based its order of sale on the impact of a sewer extension to the Sferras alone, rather than on "how the need for a sewer extension would impact the value of the entire property or the value of the Kapelas' property," the Court remanded for the

"the trial court to consider the facts under the correct legal standard." (Op. ¶¶38-39)

IV. Argument Why Review Should be Denied.

A. The Court of Appeals properly held that the statutory term "great prejudice to the owners" mandates a partition in kind unless it would materially reduce the value of the property that is divided between the cotenants.

1. The Legislature imposed a presumption that cotenancy land be partitioned in kind, authorizing a court-ordered sale of land only if its division would result in material economic loss to the cotenants.

Washington's partition statute requires a physical division of cotenancy property in proportion to the cotenants' respective interests, with an equalizing owelty payment, if necessary, unless a physical partition "cannot be made without great prejudice to the owners," not just to a single cotenant. RCW 7.52.010, .080. The Sferras redefine the term "great prejudice" to allow a court ordered sale based upon inconvenience to a single cotenant, rather than the economic burden that a partition imposes upon each of the cotenants, contrary to established precedent.

The Court of Appeals correctly held that the court must find that a partition in kind would greatly prejudice "the owners," and not just

any single one of them, before compelling a forced sale of cotenancy property. The partition statute, since territorial times, has contained a presumption that cotenancy property will be partitioned in kind by requiring the court find that a physical "partition cannot be made without great prejudice to the owners" before ordering the property sold. Code 1881, § 564. This Court need go no further than the plain language of RCW 7.52.010 and .080 to reject the Sferras' argument that the Legislature "intended" to authorize a judicial sale whenever a physical division would prejudice a single cotenant. *See Jepson v. Dep't of Labor & Indus.*, 89 Wn.2d 394, 403, 573 P.2d 10 (1977) ("We must assume the legislature meant what it said.").[3]

The Court of Appeals relied on settled precedent in holding that "great prejudice to the owners" "mean[s] that a partition in kind would reduce the value of the whole property." (Op. ¶28) This Court,

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[3] Other states with similar statutory language are in accord. *See Delfino v. Vealencis*, 436 A.2d 27, 33 (Conn. 1980) (reversing order for sale and directing partition in kind; "the court must consider not merely the economic gain of one tenant"); *see also Schnell v. Schnell*, 346 N.W.2d 713, 717 (N.D. 1984) (reversing order for sale and directing partition in kind; "the question in a partition action is whether or not partition can be accomplished without great prejudice to the owners; not to the owner, but to all of them."); *Gartner v. Temple*, 855 N.W.2d 846, 854 (S.D. 2014) (affirming partition in kind; "the undervaluation of permanent structures . . . affects only him. Thus, such an undervaluation could . . . not militate against a partition in kind.").

100 years ago in the case relied upon by the Sferras, recognized the presumption favoring partition in kind, as an important check on the state's power to divest an owner of private property. "'The power to convert real estate into money against the will of the owner, is an extraordinary and dangerous power, and ought never to be exercised unless the necessity therefor is clearly established.'" *Williamson Inv. Co. v. Williamson*, 96 Wash. 529, 535, 165 P. 385 (1917), quoting *Vesper v. Farnsworth*, 40 Wis. 357 (1876). The Sferras turn on its head both the presumption and its doctrinal basis in arguing that the "right to separate ownership of property" is "guaranteed" "through a partition by sale." (Pet. 16)

The Court of Appeals decision does not conflict with *Williamson*, which affirmed a trial court's order partitioning cotenancy land between two cotenants because the value of the whole was not significantly less than the value of the two halves. The *Williamson* Court defined the statutory term "great prejudice" as "material pecuniary loss," directing the court's inquiry to "'whether the value of the share of each in case of a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole.'" 96 Wash. at 536, quoting

Idema v. Comstock, 131 Wis. 16, 110 N.W. 786, 787 (1907). The Court held that *some* loss in value –a 10% to 30% reduction in a declining and depressed real estate market – did not establish great prejudice:

> Simply because the aggregate value of the halves would be somewhat less than the value of the whole, must the law on that account force one, or possibly both, of the common owners to change the form of his holding, a thing never favored in law . . .? We think not.

96 Wash. at 539.

The Sferras' reliance on *Falk v. Green*, 154 Wash. 340, 282 P. 212 (1929), to argue for review under RAP 13.4(b)(1) is equally misplaced. The *Falk* Court first noted the trial court's finding that "the land was subject to partition," 154 Wash. at 340, and then, relying on *Williamson's* "presumption that land held in common can be equitably divided according to the interests of the parties, measured by value," affirmed a partition in kind giving three cotenants equal parcels and requiring the appellant to pay owelty because he received the most valuable parcel. 154 Wash. at 342, quoting *Williamson*, 96 Wash. at 537. The "pronouncement" cited by the Sferras, that the complaining party in *Falk* failed to show "that great prejudice would result to him from dividing the property," 154 Wash. at 342, was unnecessary to the *Falk* Court's affirmance of a partition in kind. *See*

In re Domingo, 155 Wn.2d 356, 366, 119 P.3d 816 (2005) (language "unnecessary to decide the case" is dicta)

Subsequent cases similarly confirm that under RCW ch. 7.52, there are two relevant questions: (1) whether the real property is physically capable of partition and (2) whether a partition will significantly reduce its value. For instance in *Friend v. Friend*, 92 Wn. App. 799, 804, 964 P.2d 1219 (1998), *rev. denied*, 137 Wn.2d 1030 (1999), local land use regulations prohibited the subdivision of cotenancy property into separate buildable lots, mandating a judicial sale. Similarly, in *Hegewald v. Neal*, 20 Wn. App. 517, 582 P.2d 529, *rev. denied*, 91 Wn.2d 1007 (1978), a partition in kind "would destroy the usefulness" of property that the court characterized as "unusually complex," as its most valuable resource was a hot spring that could only be partitioned by "collecting [the water] and assigning it through a metering and distribution system, so that it can be shared by the owners of the land in accordance with their percentage of ownership." 20 Wn. App. at 519-20, 523. *See also Huston v. Swanstrom*, 168 Wash. 627, 628, 13 P.2d 17 (1932) (cotenancy property was "improved with a two-story brick and terra-cotta building . . . covering the entire parcel" that would have to be destroyed in order to accomplish a partition in kind).

The Court of Appeals decision follows this established authority, recognizing the undisputed fact that a physical partition would not substantially impair the value of Overlake Farm. In unchallenged findings, Judge Yu and Judge Chung, who adopted the referees' findings, determined that the undeveloped property could be equitably partitioned (75%-25%) by awarding 29 lots to the Kapelas, and awarding the Sferras nine lots plus a $131,250 owelty payment, with *no* diminution in the property's value. (CP 941-42, ¶¶ 53-55) The Court of Appeals decision does not conflict with *Williamson* or any other case. *See* RAP 13.4(b)(1), (2).

2. The Court of Appeals properly held that Sferras could not force a sale based solely on the inconvenience to them were the cotenants unable to agree to the mechanics of funding a sewer extension.

The Court of Appeals correctly reversed because the trial court's order directing a sheriff's sale was premised on a finding that the parties' inability to agree on the mechanism to jointly fund a sewer extension would cause great prejudice to the Sferras alone. The Court of Appeals held that the trial court erred in ordering a sale without finding that resolving a mechanism for funding "a sewer extension would impact the value of the entire property or the value of the Kapelas' property." (Op. ¶38) This fact-specific decision does

not conflict with this Court's cases nor raise any issue of substantial public interest. RAP 13.4(b)(1), (4).

The Sferras' petition rests not only on their erroneous legal argument that "great prejudice to the owners" under RCW ch. 7.52 is satisfied by prejudice to only one of the cotenants, but more fundamentally, on their demonstrably false assertion that the Sferras would be forced to bear the entire cost of a sewer extension. The Sferras' misstatement flies in the face of Judge Yu's, the referees' and her successor's unchallenged findings that the Kapelas agreed unconditionally to share in the expense of bringing sewer to the property. (FF 7, CP 230; CP 933, 944, ¶¶35, 62)[4]

The Sferras do not take issue with the Court of Appeals' holding that the trial court may "consider the development potential of the property." (Op. ¶ 41, citing *Carson v. Willstadter*, 65 Wn. App. 880, 830 P.2d 676 (1992)) Here, the referees found that the value of the Property "as is" – that is, without any sewer connection – is $9,975,000, or $262,500 for each of 38 lots (CP 942, ¶55) and that a

[4] The Kapelas' voluntary agreement to share that development expense is not a payment of "owelty." (Pet. 20) The only "owelty" was the equalizing payment of $131,250 – the value of one-half lot, ordered "to be made by one party to another on account of the inequality of partition." RCW 7.52.440. (CP 942)

sewer connection would increase the development potential of the entire property, rejecting the Sferras' contention, as did Judge Yu, that there was any "premium" in selling the property as a whole. (FF 16, CP 232-33; CP 939-40, ¶¶ 46-47) The anticipated $1.4 million development cost of a municipal sewer extension – a shared expense that would increase the value of the entire property and thus benefit both parties – did not prejudice (let alone greatly prejudice) either of these cotenants.

Rather than basing its order of sale on a finding that a physical partition would materially reduce the value of the property, the referees and the court erroneously found "great prejudice" based on the parties' "long-standing inability to agree." (CP 947, ¶65) The Court of Appeals correctly reversed that decision as contrary to this Court's repeated definition of "great prejudice" as "material pecuniary loss, not temporary inconvenience," *Williamson*, 96 Wash. 537, or "[i]nconvenience of the other owners." *Hamilton v. Johnson*, 137 Wash. 92, 100, 241 Pac. 672 (1925).

The Sferras' attempt to equate "inability to agree" with "great prejudice" does not present an "issue of substantial public interest." RAP 13.4(b)(4). The Legislature codified an action for judicial partition precisely because cotenants could not agree. It nonetheless

mandated a presumption in favor of partition in kind, necessarily recognizing that a partition would result in disputing cotenants living side by side as neighbors. If "long-standing inability to agree," were sufficient to justify a court-ordered sheriff's sale of cotenancy property, as the successor judge ordered here, the presumption in favor of a partition in kind would always be rebutted by the cotenant favoring a sale. The Court of Appeals correctly held the Sferras' desire to avoid the inconvenience of disagreements on the mechanics of a sewer connection the Kapelas agreed to fund could not, standing alone, establish "great prejudice" under RCW ch. 7.52.

The Sferras' interpretation of the partition statute would give preference to the cotenant favoring a sale of cotenancy property and encourage that cotenant's intransigence, in derogation of equity's historical respect for the uniqueness of real property that is capable of partition without great cost. Judge Yu recognized this common law basis for the presumption favoring a partition in kind. (CL 6, CP 234: "[t]here is a human and family element to the Property that cannot be discounted.") The Court of Appeals properly held, as have other courts, that in the absence of material economic detriment to

both parties, the trial court erred in ordering the parties' family property to be sold at sheriff's sale rather than partitioned in kind.[5]

3. If this Court grants review, it should direct a partition in kind rather than a remand.

The Court of Appeals reversed and remanded because "the trial court and the referees, should have determined whether partitioning the property would create two parcels whose aggregate value was materially less than the value of the whole property." (Op. ¶38) But the trial court already made that determination. In the event this Court accepts review, it should hold that the Sferras failed as a matter of law to meet their burden of showing that a partition in kind would result in great prejudice under the proper standard.

In unchallenged findings, the trial court found that the value of the property as a whole – almost $10 million – is the same as the sum of the parties' respective interests upon a partition in kind. (CP 942, ¶55) It also found that the Kapelas will pay 75% of the cost of

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[5] *See* , e.g., *Ark Land Co. v. Harper*, 215 W. Va. 331, 599 S.E.2d 754, 761 (2004) ("sentimental or emotional interests in the property . . . should ordinarily control when it is shown that the property can be partitioned in kind, though it may entail some economic inconvenience to the party seeking a sale."); *Delfino v. Vealencis*, 181 Conn. 533, 436 A.2d 27, 33 (1980) (reversing order for sale; co-tenant "made her home on the property; . . . derives her livelihood from the operation of a business on this portion of the property, as her family before her has for many years.").

extending sanitary sewer to the property. (FF 7, CP 230; CP 944, ¶62) In the absence of any evidence that the "cost" of cooperating in the building a sewer extension that, when completed, will benefit all 38 parcels would materially diminish the value of the parties' respective interests, there is no basis for the Sferras on remand to rebut the presumption favoring a partition in kind.

Where as here the evidence is undisputed, a "remand for further fact finding . . . would be a useless act." *Heriot v. Lewis*, 35 Wn. App. 496, 502, 668 P.2d 589 (1983). In the unlikely event that this Court accepts review, it should hold based on the undisputed record that the Sferras failed to meet their burden of establishing "great prejudice" and direct entry of judgment in favor of the Kapelas.

V. Conclusion.

This Court should deny the petition for review.

Dated this 20th day of March, 2017.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 20, 2017, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

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DATED at Seattle, Washington this 20th day of March, 2017.

Patricia Miller