

No. 70918-6-I

COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

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DENISE E. FERRY, an individual,  
Respondent.

vs.

ROBERT L. EVANS, an individual,  
Appellant,

and

ALLISON SHERMAN EVANS, an individual,  
Respondent,

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE JIM ROGERS

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BRIEF OF RESPONDENT DENISE E. FERRY

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## I. INTRODUCTION

In this dispute, three siblings, as tenants in common, cannot reach agreement for the disposition of their family's Lake Sammamish beachfront property. The Evans siblings grew up using the property for summertime vacations and other family gatherings, but this tradition has not continued into the siblings' adulthood and retirement. Today, Robert Evans is the only sibling who frequents the property. Denise Ferry and Allison Sherman Evans live in California and desire to sell their interests in the property.<sup>1</sup> Years of Denise and Allison's unsuccessful attempts to sell their ownership to Robert for fair market value left this lawsuit as the only viable option for Denise and Allison to realize the value of their assets.

This partition action involves the waterfront Lake Sammamish property where the family cabin is located ("Beach Property"). Because the 16,685-square-foot Beach Property is subject to a minimum lot size restriction of 12,500 feet, the property cannot legally be physically split into three parts. Accordingly, Denise and Allison sought an order from the trial court for partition by sale. Robert opposed an open-market sale of the Beach Property. To prevent this sale, Robert claimed that the trial court should consider an entirely separate property co-owned by the Evans

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<sup>1</sup> Because two of the siblings share the same last name, the parties are referred to by first name throughout the brief to avoid confusion.

siblings (“Upland Property”) together with the Beach Property. Robert contends that the Upland Property should be added to the Beach Property and that the combined properties should be physically split three ways with Robert retaining the Beach Property and Denise and Allison sharing the Upland Property.

The two properties are depicted below. As shown, a two-lane roadway, bike trail, and greenbelt separate the Upland and Beach Properties. The Upland Property has no waterfront or other lake access. It is far less valuable than the Beach Property.



(CP 239 excerpt)

Although Robert raises numerous issues on appeal, there are two fundamental issues for this Court to consider:

1. Whether the trial court reasonably concluded that partition in kind of the Beach Property would result in great prejudice to the Evans siblings; and
2. Whether the trial court properly rejected Robert's request to treat the two separate properties as one for purposes of partition.

First, the trial court reasonably concluded that partition in kind of the Beach Property would result in great prejudice because the resulting lots would violate Sammamish zoning ordinances. A partition by sale is appropriate when physical division results in parcels that violate minimum lot size requirements. There is not any conflicting authority, and Washington law grants trial courts broad discretion to fashion equitable remedies in partition matters.

Second, the trial court properly rejected Robert's request to physically partition the Upland and Beach Properties together in such a manner that he would retain the valuable Beach Property and Denise and Allison would be left to share the unimproved Upland Property. As a threshold matter, Robert presented no evidence that he should be the sibling awarded the Beach Property, and none could possibly exist. Perhaps more importantly, Robert failed to present any evidence of the

overall fairness of his proposal (regardless which sibling were awarded the Beach Property), and all of the evidence that does exist is to the contrary. There is as much as a \$1,450,000 difference in value between the properties. As such, this Court should affirm the trial court's order for partition by sale of the Beach Property.

## II. RESTATEMENT OF FACTS

### A. The Parties Own Two Separate Parcels of Land, the Beach Property and the Upland Property, as Tenants In Common.

The Beach Property is located on the waterfront of Lake Sammamish at 2629 East Lake Sammamish Parkway Northeast, Sammamish, Washington. (CP 42–44) The parties each own a one-third interest in this property as tenants in common. (CP 35–37, 39–40) The property consists of 16,685 square feet, with nearly 300 feet of shoreline, and has several improvements, including a cabin and dock. (CP 42–44, 196) In 2012, the tax-appraised value of the property was \$1,116,000. (CP 42–44) Realtors, however, value the property between \$1,683,600 and \$2,000,000. (CP 56, 58, 60–65)

The parties also each own one-third of the Upland Property as tenants in common. (CP 240–43) The Upland Property is located east of the Beach Property and consists of 63,048 square feet. (CP 237–39) The Upland Property does not have any water access and is undeveloped. (CP 196, 237–39) The property has its own tax parcel number. (CP 237–38)

In 2012, the tax-appraised value of the Upland Property was \$273,000. (CP 237–38) One realtor has valued the property between \$550,000 and \$650,000, depending on whether it is subdivided. (CP 58)

Although the parties inherited both properties, the properties are separate. (See CP 239) They are not contiguous. (CP 239) A two-lane roadway and county-owned parcel of land with a bike trail, greenbelt, and its own tax parcel number lies between the Beach and Upland Property, separating them entirely. (CP 239) Due to these obstructions, it is not possible to cross directly from one property to the other. (See CP 239) The properties were transferred to the parties at different times pursuant to different deeds and different staged ownership percentages. (CP 35–37, 39–40, 240–43)

In this lawsuit, Denise and Allison seek to sell this property and divide the proceeds equally between the three siblings. (CP 1–5, 11–14) Robert opposes his sisters' request. (CP 119–23) He contends that the Upland Property should be added to the Beach Property and that the combined properties should be partitioned such that he will own the Beach Property, and his sisters will each own half of the Upland Property. (See CP 120–22)

**B. For Years, Denise and Allison Have Unsuccessfully Attempted to Sell Their Interests in the Beach Property to Robert.**

Though the parties used the Beach Property throughout their

childhood for summertime family retreats, this is no longer the case. (CP 67, 197) Denise currently lives in California and does not use the Beach Property. (CP 67, 197) Allison also lives in California and only uses the Beach Property one-to-two weeks per year. (RP 27; CP 197) Denise is in her early seventies and needs potential sale proceeds from the Beach Property to meet her financial obligations. (CP 67)

Denise and Allison have attempted to work with Robert to sell their interests in the Beach Property for many years without resorting to litigation. (CP 12–14, 67, 215) Robert has refused to sell the Beach Property unless he is allowed to purchase Denise and Allison’s interests at a price well below market value. (CP 67; *see also* CP 12–14) Because Denise and Allison were unable to reach agreement with Robert on a sale, this lawsuit was begun. (*See* CP 12–14, 67) Allison supports Denise’s position that the Beach Property should be sold. (CP 12–14, 165-67; *see generally* Allison’s Resp’t Br.)

**C. Procedural History.**

On April 17, 2013, Denise filed a complaint against her siblings seeking partition by sale of the Beach Property because minimum lot size requirements preclude partition in kind. (CP 1–5) Allison filed an answer and cross-claim on May 20, 2013, in which she joined Denise in requesting partition of the Beach Property by sale. (CP 11–14) On June

14, 2013, Robert filed an answer and counterclaim, in which he requested partition in kind of the Beach Property via aggregation of the square footage of both the Beach and Upland Properties. (CP 119–23) He seeks to retain the Beach Property for himself. (CP 123)

On June 6, 2013, Denise filed a motion for appointment of referee, seeking partition by sale of the Beach Property managed by a court-appointed referee. (CP 18–25) Oral argument occurred on August 30, 2013. (CP 257) On September 17, 2013, the trial court ruled that partition in kind of the Beach Property could not be made without great prejudice and granted Denise’s motion for appointment of a referee to sell the property. (CP 258–61)

### III. ARGUMENT

#### A. Standard of Review in Partition Actions.

Washington appellate courts review partition orders for an abuse of discretion. *Friend v. Friend*, 92 Wn. App. 799, 803–04, 964 P.2d 1219 (1998), *review denied*, 137 Wn.2d 1030, 980 P.2d 1283 (1999). “A partition action is both a right and a flexible equitable remedy subject to judicial discretion.” *Id.* at 803. Abuse of discretion is found only when a trial court’s decision is “manifestly unreasonable or based on untenable grounds.” *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 582, 220 P.3d 191 (2009) (citations and internal quotation marks omitted).

Here, the trial court properly granted Denise's motion for appointment of referee because the evidence presented, together with Washington law, support only one conclusion: the Beach Property cannot be partitioned in kind without great prejudice to the parties because of minimum lot size requirements. Partition by sale is, therefore, appropriate. This conclusion is reasonable, if not inevitable, based on the size of the Beach Property, its separateness from the Upland Property, and the unfairness of an unequal division. Consequently, this Court should affirm the trial court's ruling.

**B. The Trial Court Correctly Ordered Partition by Sale of the Beach Property Under the Partition Statute, Case Law, and Local Land Use Regulations.**

It is undisputed that Denise, as a tenant in common, has an absolute right to partition. RCW 7.52.010 provides:

When several persons hold and are in possession of real property as tenants in common . . . an action may be maintained by one or more of such persons, for a partition thereof, according to the respective rights of the persons interested therein, and for sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

Although the law favors partition in kind when practicable, a court may order partition by sale when it finds that partition in kind cannot be made without great prejudice to the co-owners. *Hegewald v. Neal*, 20 Wn. App. 517, 522, 582 P.2d 529 (citing RCW 7.52.080), *review denied*, 91 Wn.2d

1007 (1978).

Even with the law's preference for partition in kind, a court-ordered partition by sale is not a rarity. "The right of an owner to separate ownership of his property, even though it can be accomplished only through the channel of a sale, is guaranteed by the [partition] statute . . ." *Huston v. Swanstrom*, 168 Wash. 627, 631, 13 P.2d 17 (1932) (citations omitted). The partition statute provides that "if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof . . ." RCW 7.52.080.

Courts typically find that partitions in kind result in great prejudice to the owners when physical division causes the value of the co-tenants' interests to fall or when the property's geography renders physical division unmanageable or impossible.<sup>2</sup> For example, in *Hegewald*, the appellate court affirmed an order of partition by sale when substantial evidence supported that partition in kind would reduce the property's value from \$300,000 to \$200,000 given the significantly varied terrain of the property. 20 Wn. App. at 526. This "substantial pecuniary loss"

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<sup>2</sup> Although Robert's briefing describes the properties' historical value and uniqueness at length (*see* App. Br. 6–9), these factors are not relevant considerations under the partition statute or applicable case law.

constituted great prejudice so as to warrant court-ordered sale. *Id.* Similarly, in *Friend*, the appellate court upheld an order for partition by sale when physical division of the property would violate local zoning and subdivision requirements. 92 Wn. App. at 804–05.

**1. Land Use Regulations Apply to the Partition of Property.**

Robert argues that local land use regulations do not apply in partition actions. (App. Br. 20–22) Over 15 years ago, however, a Washington appeals court determined in *Friend v. Friend* that “divisions made under the partition statute are not exempt from land use regulations.” 92 Wn. App. at 804. The *Friend* court made this determination in the context of whether *lot size restrictions apply to partitions in kind*. *Id.* at 801–02. The court applied this rule based on statutory language and precedent. *Id.* at 803–04. There, the trial court ruled, and the appellate court affirmed, that only partition by sale was available for the two subject properties because physical division would result in great prejudice to the co-owners by creating lots smaller than the minimum lot size restrictions. *Id.* at 802, 804–05.

Robert contends that *Friend* does not apply because in that case the co-tenants must have colluded to circumvent the partition statute. (App. Br. 21–22) However, as Denise successfully argued below (*see* CP 221-22), Robert’s theory was neither addressed nor relied upon by the

*Friend* court. Instead, the *Friend* court carefully considered numerous theories advanced regarding why the partition statute should not be subject to land use regulations and rejected them all. 92 Wn. App. at 804 n.3.

*Friend* is controlling in Washington and is in accord with other states that have considered whether local zoning and land use regulations apply for the purposes of partition. See, e.g., *Leake v. Casati*, 363 S.E.2d 924, 927 (Va. 1988) (“[Z]oning and other valid land-use ordinances and statutes continue to apply to partitioned land.”); *Withers v. Jepsen*, 246 P.3d 1215, 1216–17 (Utah Ct. App. 2011) (affirming partition by sale given minimum lot size restrictions).

**2. The Trial Court Properly Determined that Partition in Kind of the Beach Property Would Result in Great Prejudice Because of the Property’s Size.**

Chapter 25.07 of the Sammamish Municipal Code requires a minimum lot size of 12,500 square feet at the Beach Property’s location. (CP 46–48) At 16,685 square feet, physically dividing the Beach Property in any manner would violate the applicable zoning regulations. (See CP 42–44) If the property was divided, it could not be developed. Against this backdrop, it was not an abuse of discretion for the trial court to conclude that partition in kind of the Beach Property would result in great prejudice to the Evans siblings. When partition in kind conflicts with local land-use regulations, Washington courts hold that it “is prejudicial to

the parties. Under these circumstances, partition by sale is the appropriate remedy.” *Friend*, 92 Wn. App at 804–05.

**C. The Trial Court’s Rejection of Robert’s Request to Treat the Two Properties as One for Purposes of Partition Is Not an Abuse of Discretion.**

Robert asserts that the square footage of the Beach and Upland Properties should be considered together to determine whether partition in kind can be made without great prejudice to the parties. (App. Br. 17–20) Robert alleges that partition in kind of the two parcels together will not violate applicable lot size restrictions because of the aggregated square footage between the properties. (App. Br. 17–20) The trial court’s refusal to treat the two properties as one was correct: the trial court has discretion both in equity and under binding case law to treat the properties as separate parcels, and the record demonstrates that the properties cannot be divided so as to have equal value. In addition, the properties are separate in both geography and use.

**1. The Trial Court Appropriately Exercised Its Authority to Treat the Properties Separately.**

Because the partition of property is an equitable remedy, trial courts have broad discretion and great flexibility to devise a remedy among co-tenants. *Hegewald v. Neal*, 28 Wn. App. 783, 786, 626 P.2d 535 (1981) (citations omitted). A trial court’s equity power is “fact-specific” and may be used “to do substantial justice to the parties and put

an end to the litigation.” *Buck Mountain Owner’s Ass’n v. Prestwich*, 174 Wn. App. 702, 715 n.14, 308 P.3d 644 (2013) (citations omitted). In some partition actions, trial courts exercise this equity power to consider mutually owned properties as a whole and divide the individual parcels between co-tenants. *See, e.g., Von Herberg v. Von Herberg*, 6 Wn.2d 100, 106 P.2d 737 (1940). In others, trial courts partition each property separately. *See, e.g., Friend*, 92 Wn. App. 799.

For example, *Friend* involved the partition of two properties. 92 Wn. App. at 800. One property was zoned residential and subject to a minimum lot size requirements. *Id.* at 801. The other was located in a geologically sensitive area and also subject to minimum lot size requirements. *Id.* The co-owners of the properties stipulated to physical partition of each parcel individually. *Id.* The trial court’s order, which the appellate court affirmed, partitioned each property on its own, not as a composite estate. *Id.* at 802, 804–05.

Robert incorrectly asserts that *Friend* supports the propriety of considering two non-contiguous lots together in a partition action. (App. Br. 18) The *Friend* court did not lump the properties together and divvy up the parcels between the tenants in common to avoid a forced sale. *See id.* at 802, 804–05. Instead, the two properties were considered *separately* to determine if partition in kind of each property *individually* could be

made without great prejudice. *Id.* at 801–02. The court noted each property’s unique ownership history and considered the different zoning regulations that applied to each property under local regulations. *Id.* at 801. Thus, *Friend* instructs that it is within the trial court’s discretion to determine whether to pool commonly owned properties for purposes of partition.<sup>3</sup>

Conversely, the *Von Herberg* court considered the propriety of allotting certain commonly owned properties to each party in a petition to modify an interlocutory divorce decree. 6 Wn.2d 119–24. There, the trial court’s allocation of properties between the former husband and wife was not equal when measured by square footage. *Id.* at 120–21. Instead, the wife was allotted a smaller amount of more valuable, unencumbered land in consideration of the husband’s past-due support money, the husband’s higher draws against the income of the jointly owned properties, and each party’s capacity to earn a livelihood. *Id.* The appellate court affirmed the trial court’s distribution of individual properties to each party because “the holdings were divided so as to enable each cotenant to receive property in exact proportion and value to his or her respective interest in the

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<sup>3</sup> Case law outside of the partition context provides additional support for the trial court’s reasoned decision to treat the Beach and Upland Properties as separately. *See, e.g., Doolittle v. City of Everett*, 114 Wn.2d 88, 95-107, 786 P.2d 253 (1990) (upholding trial court’s refusal, as a matter of law, to treat four *contiguous* lots under the same ownership as a single parcel in assessment proceeding for special benefits in local improvement district when fourth lot was developed and used for separate, independent commercial use).

commonly owned property.” *Id.* at 124.

Here, the trial court did not abuse its discretion in electing to partition the Beach and Upland Properties individually. Unlike in *Von Herberg*, unequal division of the Beach and Upland Properties (*i.e.*, allotting Robert the Beach Property and Denise and Allison the Upland Property) will *not* provide each sibling with a proportionate share of the properties. The Evans siblings own equal shares of each property. (CP 35–37, 39–40, 240–42) Because the Beach Property is worth at least three times the Upland Property (depending on the estimate used) (*see* CP 42–44, 56, 58, 60–65, 237–38), awarding Robert the Beach Property will grant him approximately three-quarters of the properties’ combined value. With the Upland Property, Denise and Allison will be left to split the remaining quarter of the properties’ value. Such a distribution among equal owners is unfair on its face, and the record contains no evidence that Robert is willing remedy this unfairness by purchasing Denise and Allison’s interests in the Beach Property. (*See* CP 67)

Moreover, the Evans siblings’ relationship as tenants in common does not carry any of the same marital obligations as those present in *Von Herberg* to otherwise justify awarding Robert the Beach Property. Nor does the record contain any evidence of other countervailing considerations, such as encumbrances, that might serve to equalize an

unequal division of the Beach and Upland Properties. Under these circumstances, it would have been an abuse of discretion if the trial court had aggregated the properties to make an unequal division.

**2. The Record Does Not Contain Any Evidence that Owelty Is an Adequate Remedy.**

Robert contends that, to the extent partition in kind of the Beach and Upland Properties together creates lots of unequal value, this unfairness can be remedied by owelty pursuant to RCW 7.52.440. (Br. App. 2, 19–20) RCW 7.52.440 provides, “When it appears that partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them, the court may adjudge compensation to be made by one party to another on account of the inequality of partition . . .” This compensation for the purpose of adjusting unequal physical division is called owelty.<sup>4</sup> Such a remedy, however, is not required by the partition statute and, even if it were, does not overcome the fact that the Beach Property cannot be partitioned in kind due to minimum lot size requirements.

**a. Owelty Is Not Required by the Partition Statute to Effectuate an Unequal Partition.**

The partition statute does not require owelty when property cannot

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<sup>4</sup> A judgment of owelty is an equitable lien on partitioned property in the nature of a vendor’s lien, which attaches to a particular property to assure payment of debt related to that property. See *Adams v. Rowe*, 39 Wn.2d 446, 449, 236 P.2d 355 (1951).

equally apportioned. Rather, an equalizing owelty lien is an equitable alternative that may be available in lieu of partition when property cannot be fairly divided. *In re Marriage of Wintermute*, 70 Wn. App. 741, 745, 855 P.2d 1186 (1993). In the instance of unequal division, the statute permissively allows a court to order owelty. See RCW 7.52.440 (“When it appears that partition cannot be made equal between the parties . . . the court *may* adjudge compensation to be made by one party to another on account of the inequality of partition . . .”) (emphasis added).

Here, under RCW 7.52.010 and 7.52.080, the trial court instead opted to order sale of the Beach Property. (CP 264–67) These provisions of the statute permit a court to order sale when it appears by evidence, to the satisfaction of the court, that partition in kind cannot be made without great prejudice. See RCW 7.52.080. The trial court’s decision to partition the Beach Property by sale, rather than grant the property to Robert with an accompanying owelty award, was not an abuse of discretion. The record lacks any evidence that owelty is practical. See discussion *infra* Part III.C.2.b. Moreover, as discussed, substantial evidence indicates that partition in kind of the Beach Property would result in great prejudice to the Evans siblings, and owelty would not cure that prejudice. (CP 264–67) See discussion *supra* Part III.B.2.

**b. No Evidence Supports Owelty as a Possible Remedy.**

The parties discussed owelty at oral argument. (RP 10–13, 23) The record contains no evidence that it is fair to award Robert the Beach Property rather than part of the Upland Property, and none could possibly exist. In addition, there is no evidence that Robert will pay Denise and Allison for the value of their interests in the Beach Property. (CP 67; *see also* CP 12–14) For years, the Evans sisters have attempted to find a solution with Robert in which they can sell their ownership interests. (CP 12–14, 67, 215–17) To date, Robert has refused to sell the Beach Property outright or to offer Denise and Allison anything close to a fair price for their interests. (CP 67; *see also* CP 12-14) It is disingenuous at such a late stage for Robert to present owelty as a possibility on remand.

**c. Owelty Is Not Grounds for Reversal.**

Likewise, even if this Court were to assume, without any evidence, that owelty is an available remedy that Robert can finance, this assumption does not justify reversal. If the Beach Property is marketed and sold as the trial court ordered, there is nothing to stop Robert from purchasing the property. (*See* RP 25) This result is functionally identical to any award of owelty the trial court may order on remand.<sup>5</sup> Such an equivalent outcome

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<sup>5</sup> It would, however, take significant time to achieve this outcome through an award of owelty. Owelty would require an evidentiary hearing, if not a full-fledged trial, regarding

makes it difficult, if not impossible, to justify the expense all parties will incur if this Court reverses and the litigation continues.

Moreover, remand is an inappropriate mechanism to impose Robert's desired remedy of owelty because it would require this Court to establish the remedy. See *Magana*, 167 Wn.2d at 593–94 (“Appellate courts may not substitute their discretion for that vested in the trial court, absent abuse. Where there is no abuse of trial court discretion, we may not reverse simply because there are other possible ways the trial court could have possibly exercised it.”); *Zink v. City of Mesa*, 140 Wn. App. 328, 340, 347, 166 P.3d 738 (2007) (“The appropriate course is to remand to the trial court to make specific findings under the proper legal analysis and provide a suitable remedy. . . . An appellate court’s function is to review a trial court’s exercise of discretion . . . , not to exercise such discretion itself.”) (citations omitted).

**3. Common Sense Dictates that the Beach and Upland Properties Should Not Be Considered Together as One.**

By any measure, it strains common sense to consider the Beach and Upland Properties as one parcel. The properties are physically separated by a roadway, bike path, and greenbelt. (CP 239) These obstructions create an actual division between the properties and prevent

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the value of the Beach Properties, which may later be appealed. An open-market sale is the quickest and most efficient route to determine the fair value of the property.

the properties from ever functionally being used as a single parcel. (*See* CP 239) To navigate between the two properties by foot, one must cross a two-lane road and bike path and bushwhack through a greenbelt. (*See* CP 239) To do so by car, there is no direct route. (*See* CP 239) One must drive on both a frontage road and East Lake Sammamish Parkway Northeast. (*See* CP 239) These obstacles preclude any connection between the use of either property. (*See* CP 239)

On top of the reality of the physical barriers between the properties, the nature and use of each property is different. The Beach Property has a waterfront with choice amenities and serves as a vacation and gathering spot. (CP 42–44, 196, 239) In stark contrast, the undeveloped Upland Property is hardly visited. (*See* CP 196, 237–38) Even if fully developed, the Upland Property will never qualitatively compare to the waterfront property. The valuations of each property recognize this fact. (*See* CP 42–44, 56, 58, 60–65, 237–38)

The properties' shared ownership and related history does not overcome the separateness of the Beach and Upland Properties. These factors have not led the Evans siblings to continue to use the Beach Property together as adults. (*See* CP 67, 197; RP 27) Instead, Robert is the only sibling who regularly uses the Beach Property. (CP 67, 197; RP 27) More importantly, the common ownership and history of the

properties have certainly not led to equal development of the properties or to any connection between the use of each property. (*See* CP 42-44, 196, 237-39) By every standard, the trial court had ample grounds to conclude that the properties are separate and should be treated as such for purposes of partition.

**D. The Trial Court Properly Refused to Consider the Map Robert Submitted at Oral Argument.**

Robert assigns error to the trial court's refusal to consider a map he submitted at oral argument. (App. Br. 23, *see also* CP 272-73) He printed a map from the King County Department of Assessments' website and presumably would have used the map to argue that physical partition of the Beach Property *might* be possible through a variance. (App. Br. 22-23; *see also* RP 3-5) Given the unexplained relevance of the map, as well as its untimely submission, the trial court's refusal to consider it was not error.

**1. The Map Was Not Properly Submitted to the Trial Court.**

The map Robert sought to have the trial court consider was not timely submitted. Robert did not submit the map as part of his opposition papers. (*See* CP 185-217, 269-70) Instead, he submitted it to the court at oral argument. (CP 269-70; RP 3-5) Thus, Denise, Allison, and the trial court did not have sufficient time to evaluate the map's meaning and

relevance. (*See* RP 3) This is not a scenario in which Robert's earliest opportunity to present the map was at the hearing. (*See* CP 269) The map is publically available online. (CP 269) With the exercise of minimal diligence, Robert could and should have submitted the map with his response to Denise's motion for appointment of referee.

Moreover, Robert did not lay a sufficient factual foundation to establish the map's relevance to the proposed partition. The map appears to be a graphic depiction of nearby lots along the Lake Sammamish waterfront. (*See* CP 272–73) It shows waterfront lots that are smaller than the Beach Property. (*See* CP 272–73) However, the map does *not* show the square footage of the parcels depicted. (*See* CP 272-73) The map also does not show the date when the parcels were created or the law that applied to the creation of the parcels. (*See* CP 272–73) In other words, the map does not establish if the lots were created under a prior version of the Sammamish Municipal Code or pursuant to a variance. Even to this Court, Robert did not explain the map's relevance (*see* App. Br. 23, 26), and he had over 26 weeks since the trial court's hearing to research the map. Under these circumstances, it was not error for the trial court to refuse to consider the map.

**2. The Speculative Possibility of Obtaining a Variance Does Not Render Partition by Sale of the Beach Property Error.**

Even had Robert properly submitted the map for the trial court's consideration, his putative use of the map would not have impacted the appropriateness of the trial court's decision-making. First, the map's supposed purpose, *i.e.*, to establish that a variance for the Beach Property might be possible (*see* App. Br. 22–23; RP 3–5), is improper. Courts may take judicial notice of facts within the common knowledge of the community, such as inflation trends. *Hegewald*, 28 Wn. App. at 786. However, a court may not apply such trends to a specific property via judicial notice. *Id.* This is precisely what Robert seeks to accomplish—he suggests that because other Lake Sammamish waterfront lots appear to be smaller than 12,500 square feet, subdivision of the Beach Property into substandard sized parcels should be permitted. (*See* App. Br. 22–23) The trial court dismissed this argument:

I know generally that there are many historical reasons why lots are bigger or smaller . . . I have no idea how that applies here, so I'm going to have to sustain the objection, because I don't know that I would have enough of a context to use these maps and know what they really represent without knowing the law behind the maps.

(RP 4–5)

Second, Washington courts primarily consider a property's present nature in partition actions. *See, e.g., Kelsey v. Kelsey*, — Wn. App. —,

317 P.3d 1096, 1099 (2014) (noting that “[t]he nature of the assets *at the time of partition* is controlling” in challenge to trial court’s valuation of partitioned property) (citations and internal quotation marks omitted) (emphasis in original); *Hegewald*, 20 Wn. App. at 526 (citing with approval trial court’s refusal to consider higher future values of property to be partitioned because the values “were not present values”).<sup>6</sup>

Thus, if Robert could somehow explain the map’s relevance, it still would be proper for the trial court to refuse to consider it. At present, there is no evidence that the City of Sammamish would grant a variance for partition in kind of the Beach Property. There is also no evidence that Robert has made any effort to subdivide the Beach Property. Robert’s suggestion that obtaining a variance is possible is both speculative and contrary to the current municipal code. The trial court properly refused to give credence to Robert’s guesswork as to the availability of a variance for subdivision of the Beach Property.

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<sup>6</sup> See also *Carson v. Willstadter*, 65 Wn. App. 880, 884, 830 P.2d 676 (1992) (noting that whether partitioned property may be subdivided is relevant to parcel’s value and stating, “Although no Washington courts have specifically stated that the respective values between the resulting parcels are to be determined *at the time of partition*, common sense and Washington authority suggests this to be the case”) (emphasis in original). Unlike here, in *Carson*, the referees were instructed to partition the property in half. *Id.* The referees recommended partition in kind and evidence existed regarding the subdividability of the partitioned property. See *id.* at 882–86. The *Carson* court remanded and instructed the trial court to consider the likelihood of whether the partitioned property was subdividable. *Id.* at 886. However, the *Carson* court did not require the trial court to determine with certainty if the property could be subdivided. See *id.*

### **3. The Map Was Not Properly Submitted to This Court.**

At a minimum, this Court should refuse to speculate about the meaning of the map in its review because the map was not properly called to the attention of the trial court. CR 56(h) requires a trial court's order to "designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered." RAP 9.12, in turn, provides:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. . . . Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

Here, the trial court's order does not designate Robert's map. (*See* CP 258–61) The order does include a catchall designation, noting that it reviewed "[t]he papers and pleadings on file." (CP 259) However, at the time the trial court entered its order, the map was not on file with the trial court. (*See* CP 258–61, 269–73) Robert did not submit the map to the trial court until two weeks later. (CP 269–73) He also did not follow the method the rules prescribe to properly designate the map at such a late date. This Court should, thus, not consider the map in its determination of whether the trial court abused its discretion when it ordered partition by sale of the Beach Property.

**E. The Trial Court Did Not Abuse Its Discretion by Ordering Sale of the Beach Property in a Commercially Reasonable Manner.**

Robert contends that the trial court erred in ordering partition by sale of the Beach Property in a commercially reasonable manner. (App. Br. 23-24) RCW 7.52.270 states, “All sales of real property made by the referees [in partition actions] shall be made by public auction . . .” Here, the trial court decreed that the referee is to “sell the [Beach] Property in a commercially reasonable manner as soon as practical.” (CP 259) This Court should affirm the trial court’s order because Robert failed to raise the argument below, and the trial court has authority in equity to order such a sale.

**1. Robert Has Waived Any Challenge to the Manner of Sale.**

RAP 2.5(a) permits an appellate court to “refuse to review any claim of error which was not raised in the trial court.” *See also* RAP 9.12. Accordingly, appellate courts generally do not consider arguments or theories not presented to the lower court. *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001); *see also Cano-Garcia v. King Cnty.*, 168 Wn. App. 223, 248, 277 P.3d 34 (2012), *review denied*, 175 Wn.2d 1010, 287 P.3d 594 (2012) (“Issues and contentions neither raised by the parties nor considered by the trial court when ruling on a motion for summary judgment may not be considered for the first time on appeal.”)

(citations omitted).

Robert had ample opportunity at the trial court to challenge the method of sale of the Beach Property and did not do so. Denise's first proposed order, which accompanied her motion for appointment of referee, provided that the sale would occur in a commercially reasonable manner. (CP 28) Robert provides no justification for his failure to timely challenge a court-ordered open-market sale, and there is no applicable exception from the general rule permitting him to do so. Therefore, this Court should refuse to consider this assignment of error.

**2. Sale in a Commercially Reasonable Manner Is Consistent with the Trial Court's Equitable Powers in Partition Actions.**

Even if this Court allows Robert to challenge the terms of the Beach Property sale, it should uphold the terms of sale in the trial court's order. Because a court exercises its equitable powers in partition actions, it is afforded significant flexibility in fashioning an appropriate remedy and is not subject to searching appellate review. See *Friend*, 92 Wn. App. at 804.

As such, the partition statute does not constrain a court's equitable powers in partition proceedings. *Kelsey*, 317 P.3d at 1101. Instead, "a court in the exercise of its equitable powers may fashion remedies to address the particular facts of each case, *even if the partition statute does*

*not strictly provide for such a remedy.”* **Id.** (emphasis added) (upholding trial court’s power to partition personal property along with real property under RCW 7.52); *see also McKnight v. Basilides*, 19 Wn.2d 391, 408, 143 P.2d 307 (1943) (affirming lien upon another co-tenant’s interest for rents, rental use, and attorney’s fees even though the partition statute does not provide such remedy). It was, thus, consistent with the trial court’s equity powers to order partition by sale in a commercially reasonable manner.

Moreover, the Evans siblings will not be prejudiced by an open-market sale. The sale of partitioned property by public action is outdated: this provision of the partition statute was written over 130 years ago. *See* Code of 1881 § 578. It no longer reflects the reality of modern property sales. To maximize a property’s value today, sales are completed on the open market with current technologies, such as multiple listing services. Sale by public auction will dramatically decrease the pool of potential buyers for the Beach Property and will risk a sale of the property for a price well below market value. Sale through the normal commercial process, on the other hand, effectuates the underlying purpose of the partition statute. An open-market sale best enables the Evans siblings to realize the full value of their assets. Certainly, if trial courts have the ability to invent forms of relief available under the partition statute from

whole cloth, trial courts have the discretion to alter the terms of relief available under the statute.

*Blackwell v. McLean*, 9 Wash. 301 (1894), replied upon by Robert (App. Br. 24), does not require reversal. In *Blackwell*, the Washington Supreme Court found error when a partition order permitted sale to be public or private, rather than by public auction as the statute provides. 9 Wash. at 304. However, since its publication, *Blackwell* has never been cited to limit partition by sale to a public auction. To the contrary, over the past century, Washington courts have assumed increasing authority under the partition statute to exercise their equitable powers to provide remedies outside of the text of the statute. See, e.g., *Kelsey*, 317 P.3d at 1101; *McKnight*, 19 Wn.2d 391.

### **3. Robert Still Has the Ability to Purchase the Property in an Open-Market Sale.**

Robert states that the importance of sale by public auction is a cotenant's ability to acquire the property by applying her respective share toward purchase of the property. (App. Br. 23–24) This ability, however, is not unique to a public auction of the Beach Property. In an open-market sale, Robert will still have the ability to purchase the Beach Property and to contribute his interests in the property toward its purchase price. If Robert acquires the property in an open-market sale, the price will be discounted by one-third because he will be purchasing one-third of the

property from himself. This is no different from the effect of a public auction.

**F. The Trial Court Properly Refused Additional Discovery.**

Robert asserts that the trial court erred in refusing his request under CR 56(f) for additional time to conduct discovery. (App. Br. 2427) CR 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Appellate courts review a trial court's refusal to grant a continuance for an abuse of discretion. *Schmitt v. Langenour*, 162 Wn. App. 397, 408, 256 P.3d 1235 (2011) (citations omitted). A trial court may properly refuse to continue the proceedings for various reasons, including: "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Baechler v. Beaunoux*, 167 Wn. App. 128, 132, 272 P.3d 277 (2012) (citations and internal quotation marks omitted).

**1. Robert Had Sufficient Time to Conduct Discovery.**

Between the filing of the complaint and the motion for appointment of referee, Robert had 7 weeks to engage in discovery. (*See* CP 1–5, 18–25) He then had an additional 7 weeks to conduct discovery before filing of his opposition briefing. (*See* CP 18–25, 185–94) Robert even purported to reserve the right to supplement his opposition briefing, giving himself further time to conduct discovery. (CP 186)

Although the amount of time for discovery alone should be adequate for this Court to affirm the trial court’s refusal to grant a continuance, the record evidences that this time was, in fact, sufficient. Before Robert filed his opposition, the parties engaged in extensive written discovery. (CP 224, 233) One month before Robert filed his opposition papers, Denise had responded to Robert’s first discovery requests, and two weeks later, Allison did the same. (CP 185-94, 233)

Importantly, this is not a case in which the issues in dispute have changed between the time of filing the complaint and the motion for appointment of referee, necessitating a continuance. (*Compare* CP 1-5, *with* CP 18-25) The Sammamish Municipal Code’s minimum lot size requirements have not changed since at least 2011. (*See* CP 46–48) Thus, Robert could and did conduct relevant discovery since the day the complaint was filed.

**2. Robert Has Not Established How Additional Discovery Would Help His Case.**

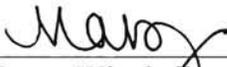
Robert states that additional discovery would have developed evidence regarding whether the Beach Property may be subdivided or further developed. (App. Br. 25–26) Evidence regarding the first issue had already been generated. The Sammamish Municipal Code requires 12,500 square foot lots (*see* CP 46–48), and Washington courts apply such local land-use regulation to partitioned property, *Friend*, 92 Wn. App. at 804. Depositions of City of Sammamish officials would not have changed the law. Evidence regarding the second issue is irrelevant. Whether the Beach Property is buildable does not impact whether the parcel may be physically divided in conformity with the Sammamish code.

**IV. CONCLUSION**

The Beach Property cannot be partitioned in kind without great prejudice to the Evans siblings. It also cannot be somehow aggregated with the separate Upland Property to render physical division appropriate. No amount of discovery will change these facts. The trial court properly exercised its discretion to grant partition by sale of the Beach Property in a commercially reasonable manner. Consequently, this Court should affirm the trial court's ruling.

Dated this 16th day of April 2014.

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CERTIFICATE OF FILING AND SERVICE

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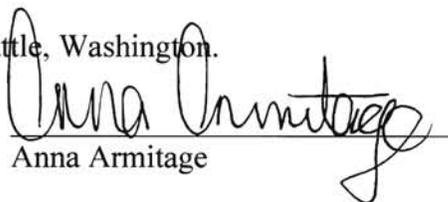
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