No. 30372-1-III

MAR 23 2012

WASHINGTON STATE COURT OF APPEALS
DIVISION III

BEN CHRISTOPHER SCHOENWALD, as Personal Representative for the ESTATE OF BENNIE WALTER SCHOENWALD, DECEASED,
Plaintiff/Respondent,

vs.

AMERICAN TRADING AND EXCHANGE CORPORATION, formerly TRI NITE MINING COMPANY, a Washington Corporation; ELIZABETH HOFFMAN; and JANET M. STUART,
Appellant/Defendant.

BRIEF OF RESPONDENT BEN CHRISTOPHER SCHOENWALD, as Personal Representative for the ESTATE of BENNIE WALTER SCHOENWALD, DECEASED, Plaintiff/Respondent

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

III. STATEMENT OF THE CASE.....3

3.1. Statement of Facts. 4

3.2 Procedural History.....6

IV. SUMMARY OF THE ARGUMENT 9

V. ARGUMENT 10

5.1 Standard of Review. 10

5.2 The trial court properly quieted title via a tenancy in common between Mr. Schoenwald and Ms. Stuart.....11

5.2.1 There cannot be adverse possession through color of title as a matter of law because Mr. Schoenwald and Ms. Stuart held legal title to the properties.....12

5.2.2 Mr. Schoenwald was not ousted from his co-tenancy because Ms. Stuart presented no evidence to establish common law adverse possession of a cotenant's interest. 14

5.2.2.1 Mr. Schoenwald was not ousted from his co-tenancy because there is no evidence that he had any knowledge of Ms. Stuart's claimed exclusive ownership. 16

5.2.2.2 The only admissible evidence in the record contradicts Ms. Stuart's alleged hostile intent to adversely possess Mr. Schoenwald's cotenant interest. 19

5.3 There are no facts to support Ms. Stuart's claim that the doctrine of laches bars the Estate's action to quiet title or partition the property. 21

5.4 The Estate's complaint to quiet title and partition the property is not barred by any statute of limitations. 22

5.5 The partition should be affirmed because no evidence in the record shows an abuse of discretion in ordering the partition based on a single referee's report. 23

VI CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Carson v. Willstadter,
65 Wn. App. 880, 830 P.2d 676 (1992) 24

Carr v. Harden,
34 Wn. App. 292, 660 P.2d 1139 (1983) 25

Chelan County v. Wilson,
49 Wn. App. 628, 744 P.2d 1106 (1987) 13

Chaplin v. Sanders,
100 Wn.2d 853, 676 P.2d 431 (1984) 20

Church v. State,
65 Wn. 50, 117 P. 711(1911) 15

Cummings v. Anderson,
94 Wn.2d 135, 614 P.2d 1283 (1980) 23

Friend v. Friend,
92 Wn. App. 799, , 964 P.2d 1219 (1998) 23

Heg v. Alldredge,
157 Wn. 2d 154, 137 P.3d 9 (2006) 11

Juel v. Doll,
51 Wn.2d 435, 319 P.2d 543 (1957) 13

Lindblom v. Johnston,
92 Wn. 171, 158 P. 972 (1916) 21

Maier v. Giske,
154 Wn. App. 6, 223 P.3d 1265 (2010) 10

McCoy v. Lowrie,
42 Wn.2d 24, 253 P.2d 415 (1953) 12

McFarland v. Dep't of Labor and Indus.,
180 Wn. 357, 62 P.2d 714 (1936) 16

McKnight v. Balisides,
19 Wn.2d 391, 143 P.2d 307 (1943) 21

National City Bank of Seattle v. Int'l
Trading Co. of America,
167 Wn. 311, 9 P.2d 81 (1932) 21

Peeples v. Port of Bellingham,
93 Wn.2d 766, 613 P.2d 1128 (1980) 19, 20

Peninsula Truck Line, Inc., v. Tooker,
63 Wn.2d 724, 388 P.2d 958 (1964) 11

Petersen v. Schafer,
42 Wn. App. 281, 709 P.2d 813 (1986) 22

Schull v. Shepherd,
63 Wn.2d 505, 387 P.2d 767 (1963) 15, 19

Silver Surprize, Inc. v. Sunshine Mining Co.,
15 Wn. App. 1, 547 P.2d 1240 (1976),
aff'd, 88 Wn. 2d 64 (1977) 14, 15, 19

Spence v. Terrel,
17 Wash. 514, 50 P. 468 (1897) 17

Stokes v. Polley,
145 Wn.2d 341, 37 P.3d 1211 (2001) 22

Teel v. Stading,
155 Wn. App. 390, 228 P.3d 1293 (2010) 14

Thor v. McDearmid,
63 Wn. App. 193, 817 P.2d 1380 (1991) 15, 16

Van Sant v. Seattle,
47 Wn.2d 196, 287 P.2d 130 (1955) 22

Wildman v. Taylor,
46 Wn. App. 546, 731 P.2d 541 (1987) 16, 17

RULES & STATUTES

82 A.L.R. 2d,
Adverse Possession-Co-Tenants 23-24 (1962) 15

RCW 4.16.020 14

RCW 4.16.020(1) 14

RCW 5.60.030 16

RCW 7.25.100 25

RCW 7.28.070 12

RCW 7.28.240 14

RCW 7.52.080 .....7, 24

RCW 7.52.100 .....25, 27

RCW 64.04.020 13

I. INTRODUCTION

Janet M. Stuart ("Ms. Stuart"), Appellant, was formerly married to Bennie W. Schoenwald ("Mr. Schoenwald"), who is now deceased. In their dissolution proceeding, all of their community held real property was converted to property held as tenants in common. The Decree of Dissolution required that following a short period, during which Ms. Stuart was awarded possession of the house, the real property was to be sold and the proceeds divided after paying tax debts. The sale never took place, and Mr. Schoenwald and Ms. Stuart's occupancy arrangement continued in conformance with the Decree of Dissolution until Mr. Schoenwald passed away in 2007.

Following his death, Ms. Stuart made several offers to purchase Mr. Schoenwald's 40% tenant in common interest from his Estate (the "Estate"). However, none of Ms. Stuart's offers resulted in a finalized purchase and sale agreement. Eventually, the Estate was forced to commence an action to quiet title to the property and sought partition and severance of the tenancy in common through the sale of the property.

The trial court considered cross motions for summary judgment and determined as a matter of law title would be quieted in the Estate and Ms. Stuart as tenants in common—the Estate owning an undivided 40% tenant in common interest and Ms. Stuart owning an undivided 60% tenant in common interest. Ms. Stuart appeals that determination on the basis that she allegedly ousted her cotenant from the property during her court

ordered possession of the house and then adversely possessed Mr. Schoenwald's tenant in common interest.

The trial court concluded that Ms. Stuart could not utilize the directive in the Decree of Dissolution to assist her in adversely possessing property from a cotenant. And, Ms. Stuart could not establish that Mr. Schoenwald had knowledge that she was holding his property in a manner inconsistent with his continued ownership. The only thing that is apparent from the facts in this dispute is that Mr. Schoenwald and Ms. Stuart maintained the court ordered status quo longer than intended. The Court of Appeals should affirm the order on summary judgment because there is no genuine issue of material fact for trial.

Following summary judgment the trial judge ordered that the property be partitioned as recommended by the court appointed referee, David Sitler. The Estate requested the court appoint a referee from Spokane and Ms. Stuart recommended Mr. Sitler, a local appraiser, familiar with the Colville area. In the interest of keeping costs to a minimum, the Estate acquiesced to her request. Ms. Stuart now argues the referee, appointed at her request, recommended an unfair division of the property, and that the trial court abused its discretion by partitioning the property in accordance with Mr. Sitler's report. However, Ms. Stuart did not object to the court appointing only her requested referee until after Mr. Sitler filed his report.

Despite Ms. Stuart's dissatisfaction with Mr. Sitler's recommendation, she has not offered any evidence nor is there any basis in the record to conclude the trial court abused its discretion by relying on Mr. Sitler's report and ordering the property partitioned as recommended. The trial court in its sound discretion ordered the property partitioned in kind as recommended by Mr. Sitler, and this ruling should also be affirmed on appeal.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether as a matter of law the Estate and Ms. Stuart respectively own 40% and 60% of an undivided tenant in common interest in the real property formerly held by Mr. Schoenwald and Ms. Stuart as community property.

2. Whether the trial court acted within it broad discretion in ordering the equitable distribution of the property through a partition in kind as recommended by the court appointed referee.

III. STATEMENT OF THE CASE

This appeal is the result of the Stevens County Superior Court granting summary judgment quieting title and subsequently ordering that the disputed property be partitioned in kind. Specifically, Ms. Stuart claims to have adversely possessed former community property that was held as tenants in common with her ex-husband, Mr. Schoenwald, pursuant to a court order in the Decree of Dissolution.

3.1. Statement of Facts.

During their marriage, Ms. Stuart and Mr. Schoenwald acquired a community interest in two parcels of property located in Stevens County, Washington. (CP 283) Ms. Stuart and Mr. Schoenwald owned fee simple title to one parcel, commonly referred to as the "Mine Hole Property" also referenced as Parcel B and Stevens County Parcel No. 2692701. (CP 262, 277, 198) Mr. Schoenwald and Ms. Stuart held the other parcel, commonly referred to as the "Joe Creek Property" subject to a real estate contract. (CP 287-289) The Joe Creek Property is also referenced as Parcel A and Stevens County Parcel No. 2692200. (CP 198, 287) The married couple made payments on the real estate contract from December 15, 1978 until May 25, 1995, when their marriage was dissolved and a Decree of Dissolution entered. (CP 250, 283)

In the dissolution proceedings, the trial decreed that all real property belonging to the community of Mr. Schoenwald and Ms. Stuart "shall hereafter be owned by the parties as tenants in common." (CP 253) The trial court ordered the wife to retain possession of the family home for eighteen months and continue to pay the taxes and the real estate contract obligations. (CP 253) After the expiration of Ms. Stuart's court ordered exclusive possession, the property was supposed to be sold and the proceeds distributed between the parties, "with 60 percent going to the wife and 40 percent going to the husband." (CP 253-54)

But the property was not sold, and Ms. Stuart and Mr. Schoenwald continued to act in accordance with the Decree of Dissolution, such that Ms. Stuart lived in the house and made the remaining payments until the loan was paid off on March 31, 1998. (CP 262, 283-84) Following the final payment on the real estate contract, USB Mortgage Company mailed a letter to "Mr. and Mrs. Schoenwald" accompanied by the statutory warranty deed conveying the Joe Creek Property to "Ben Schoenwald and Janet Schoenwald, husband and wife" (herein "Deed"). (CP 290-93) The letter also stated that it was "imperative that the documents be recorded or the title won't be changed to your name." (CP 290) However, the Deed was never recorded. (CP 262) Ms. Stuart has retained possession of the deed to the Joe Creek Property since receiving it in March 1998. (CP 284)

Mr. Schoenwald wrote a letter to Ms. Stuart in April 2005 expressing concern about delinquent property taxes and the possibility of losing his 40% interest in the property in a tax sale. (CP 243) In that letter, Mr. Schoenwald wrote, "I want to come up with an agreement so you can have your 60% and I want my 40% of the property. . . . I've notified you various times on getting this settled. And now it has to be settled." (CP 72 & 243)

Mr. Schoenwald passed away in August 2007 after suffering a severe brain injury, which rendered him unconscious and incapacitated for more than a year. (CP 197, 231) Ben Christopher Schoenwald was named as the Personal Representative for Mr. Schoenwald's Estate.

(CP 40, 204) Upon his death, all of Mr. Schoenwald's assets and liabilities passed to his Estate.

Ms. Stuart filed a formal Creditor's Claim against his Estate in order to obtain a cash payment in exchange for her 60% tenant in common interest in the real estate. (CP 294-95) Ms. Stuart personally signed the Creditor's Claim. (CP 278, 295) However, the Personal Representative of the Estate denied the Creditor's Claim, because the Estate did not claim to own one hundred percent of the property—it only owned Mr. Schoenwald's 40% tenant in common interest. (CP 307)

After her Creditor's Claim was denied, Ms. Stuart offered to purchase the Estate's tenant in common interest in the Joe Creek Property. (CP 309-10) Ms. Stuart followed this offer with another offer in 2009 to purchase the Estate's cotenant interest in both the Mine Hole Property and the Joe Creek Property. (CP 245) Ms. Stuart specifically asked in an email written to the Personal Representative of the Estate, "[w]hat about the parcel 200 'the House' what do I need to do about getting it?" (CP 245) In 2010, Ms. Stuart again recognized the Estate's interest in the property and expressed her desire to purchase it. (CP 311-14) Although Ms. Stuart and the Estate agreed to material terms of the purchase in the fall of 2009, the sale was never finalized. (CP 312, 314)

3.2 Procedural History.

When it became apparent that the parties could not reach an agreement in which Ms. Stuart would purchase the Estate's tenant in

common interest, the Estate filed an action to quiet title and partition the Mine Hole Property and Joe Creek Property by sale. (CP 197-203, 232) Ms. Stuart answered and counterclaimed to quiet title in her own name, alleging that she had adversely possessed the property from Mr. Schoenwald. (CP 1-6) Thereafter, both parties moved for summary judgment. (CP 33, 227) Specifically, the Estate requested the court quiet title to the Estate's tenant in common interest and partition that interest from Ms. Stuart through a sale. (CP 227-28, 253) In her motion for summary judgment, Ms. Stuart argued that she had adversely possessed the Estate's tenant in common interest. (CP 33-41)

The trial court ruled in favor of the Estate, granting its motion for partial summary judgment and quieting title in the name of the Estate to an undivided 40% interest in both properties as a tenant in common with Ms. Stuart and for partition and appointment of a referee per RCW 7.52.080. (CP 153-56) The court found that Mr. Schoenwald's actions were "consistent with the terms that existed by virtue of the decree [of Dissolution]," and Ms. Stuart could not establish the elements of adverse possession because she did not exhibit the kind of hostility required to adversely possess the property from her cotenant. (CP 145)

After prevailing on summary judgment, the Estate asked the court to appoint Bruce C. Jolicoeur as referee, so that he could make a recommendation on how to best partition the property. (CP 374-75) However, Ms. Stuart requested that the trial court appoint David Sitler of

Am-Pac Appraisal Service, located in Colville, Washington. (CP 381) Ms. Stuart requested that particular referee because of his local knowledge and experience. (CP 381-82) The Estate acquiesced to Ms. Stuart's request and Mr. Sitler was appointed as referee. (CP 389) Ms. Stuart did not object to the appointment of a single referee until after his report was filed. (CP 417-18)

After Mr. Sitler filed his report, Ms. Stuart complained about several aspects of it, including the alleged failure to consider the water source to the residence. But, Mr. Sitler acknowledged in his report that if it was determined that there was not a water source to the residence "there should be an easement created for the right of use and right for maintenance [of a water source]. . . ." (CP 388) And, after considering the Estate's memorandum in support of confirming the referee's report and Ms. Stuart's response, the trial court entered an order confirming Mr. Sitler's report for partitioning the property in kind. (CP 185-88) Ms. Stuart appeals the order on summary judgment and the trial court's partition of the property in accordance with the referee's report.

The Superior Court of Stevens County properly granted summary judgment quieting title in favor of Mr. Schoenwald's Estate and confirmed the referee's report partitioning the property in kind, and these rulings should be affirmed on appeal.

IV. SUMMARY OF THE ARGUMENT

The Estate's motion for summary judgment quieting title and denying Ms. Stuart's motion for summary judgment was properly granted. There is no genuine issue of material fact that Mr. Schoenwald and Ms. Stuart were tenants in common and that Mr. Schoenwald's Estate succeeded to his 40% tenant in common interest. Ms. Stuart did not raise a genuine issue of material fact to support her claim of adverse possession or submit sufficient evidence to establish the ouster of her cotenant. The only competent evidence in the record shows in 2005 Mr. Schoenwald recognized that he owned a 40% tenant in common interest in the property, and Ms. Stuart had not conveyed her hostile intent to adversely possess that interest. Therefore, this Court should affirm the trial court's grant of summary judgment quieting title in favor of Mr. Schoenwald's Estate and Ms. Stuart as tenants in common with undivided 40% and 60% interests, respectively.

Moreover, a trial judge has the statutory authority to exercise his or her discretion to partition a tenancy in common. Judge Nielson properly exercised his discretion by confirming the report of the single appointed referee and ordering that the property be partitioned in kind. Ms. Stuart now complains that the opinion of the referee, which she requested, was insufficient to support the trial judge's ruling in this regard.

However, there is no evidence or basis to infer that Mr. Sitler's report is unreasonable or biased, or that the court abused its discretion in

confirming his report. Nevertheless, Ms. Stuart argues that the trial court abused its discretion by only appointing a single referee. The Estate submits the decisions of the trial court are both equitable and well founded in fact and law and should be affirmed.

V. ARGUMENT

The trial court properly granted summary judgment ordering that the Estate and Ms. Stuart own the property as tenants in common with undivided 40% and 60% interests, respectively; and that Ms. Stuart did not destroy that tenancy in common by adverse possession. As a tenant in common the Estate is entitled to have its interest severed from Ms. Stuarts through partition, either by sale or in kind. How the property is partitioned is based on the sound discretion of the trial court, which is guided by the court appointed referee. In this case, the trial judge relied on the opinion of the referee that was appointed at the request of Ms. Stuart.

Accordingly, the Estate asks the Court of Appeals to affirm the orders of the trial court, there being no basis in the record to reverse those decisions.

5.1 Standard of Review.

This court reviews the trial court's order for summary judgment de novo and engages in the same inquiry as the trial court. Maier v. Giske, 154 Wn. App. 6, 14, 223 P.3d 1265 (2010). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

not genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c).

The court will consider "all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party." Heg v. Alldredge, 157 Wn. 2d 154, 160, 137 P.3d 9 (2006). But, the evidence submitted however, must be admissible at trial to preclude summary judgment. See Peninsula Truck Line, Inc., v. Tooker, 63 Wn. 2d 724, 726, 388 P.2d 958 (1964). If, after considering all the evidence, "reasonable minds could reach but one conclusion," summary judgment should be granted. Id. at 160-61, 137 P.3d 9.

Both the Estate and Ms. Stuart offered evidence in support of their respective motions for summary judgment. That same evidence when considered by this court on appeal leads inevitably to the same conclusions reached by the trial court: there is no genuine issue of material fact that both the Mine Hole Property (Stevens County Parcel No. 2692701) and Joe Creek Property (Stevens County Parcel No. 2692200) were owned by Ms. Stuart and Mr. Schoenwald and his Estate and as tenants in common, and it was property partitioned. Thus, the Estate asks the Court of Appeals to affirm the trial court's decisions.

5.2 The trial court properly quieted title via a tenancy in common between Mr. Schoenwald and Ms. Stuart.

The undisputed evidence establishes that Mr. Schoenwald and Ms. Stuart held the subject properties as tenants in common, with 40% and 60% undivided interests, respectively, based on the court ordered Decree

of Dissolution. Ms. Stuart failed to establish that she adversely possessed the property either statutorily or via common law because Mr. Schoenwald held actual title to the property and because the admissible evidence failed to establish the necessary element of Mr. Schoenwald's knowledge of Ms. Stuart's alleged hostile intent to gain exclusive ownership of the properties.

5.2.1 There cannot be adverse possession through color of title as a matter of law because Mr. Schoenwald and Ms. Stuart held legal title to the properties.

Ms. Stuart argues that she adversely possessed the Estate's tenant in common interest by operation of RCW 7.28.070.[1] This argument fails as a matter of law because "[a]n instrument which actually passes title does not provide color of title...because the term 'color of title' . . . means that which is a semblance or appearance of title, but is not title in fact or law." McCoy v. Lowrie, 42 Wn. 2d 24, 29, 253 P.2d 415 (1953) (citation omitted) (internal quotation marks omitted). In essence, a person cannot hold legal title to property and possess the same property under color of title—the two concepts are mutually exclusive.

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[1] RCW 7.28.070 reads:

> Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

In Washington, a deed is valid and sufficient to convey real property, and all interest therein, so long as it is in writing, signed by the grantor and acknowledged before a notary public. RCW 64.04.020. Conveyance is complete when the grantor delivers the deed with the intent to transfer title to the grantee. Juel v. Doll, 51 Wn.2d 435, 436-37, 319 P.2d 543 (1957). Delivery of the Deed vested fee simple title or "legal title" to the Joe Creek Property in both Ms. Stuart and Mr. Schoenwald, even though it was never recorded. See Chelan County v. Wilson, 49 Wn. App. 628, 632, 744 P.2d 1106 (1987) ("Unrecorded conveyances of realty . . . are valid as between the parties.").

The Joe Creek Property was held as community property at the time the Decree of Dissolution was entered, albeit subject to the real estate contract. And, the Decree of Dissolution was sufficient to create a tenancy in common in the Joe Creek Property at the time it was entered. Thereafter, when the Deed was finally delivered it was effective to vest fee simple title in Mr. Schoenwald and Ms. Stuart as tenants in common in accordance with the directive of the Decree of Dissolution.

Therefore, Ms. Stuart cannot have color of title or adversely possess the Estate's tenant in common interest pursuant to RCW 7.28.070 as a matter of law. As a result, she must provide admissible evidence to satisfy the elements of common law adverse possession and ouster for ten consecutive years, which she also cannot do, as discussed below.

5.2.2 Mr. Schoenwald was not ousted from his co-tenancy because Ms. Stuart presented no evidence to establish common law adverse possession of a cotenant's interest.

The trial court correctly concluded that Ms. Stuart did not and cannot establish the elements necessary to adversely possess the property from her cotenant, Mr. Schoenwald. Adverse possession requires claimants to establish by a preponderance of the evidence that they possessed the disputed property "in a manner that was (1) exclusive, (2) open and notorious, (3) hostile, and (4) actual and uninterrupted for the statutory period of 10 years." Teel v. Stading, 155 Wn. App. 390, 393-94, 228 P.3d 1293 (2010); RCW 4.16.020(1).[2] Moreover, in the case of a tenancy in common the cotenant claiming adverse possession must satisfy a higher burden of proof and provide evidence of his or her hostile intent, acts of exclusive ownership and knowledge of the same by the cotenant out of possession.

A cotenant claiming adverse possession must present evidence that is "stronger and more convincing than that which would be required to establish title by adverse possession in a stranger." Silver Surprize, Inc. v. Sunshine Mining Co., 15 Wn. App. 1, 22-23, 547 P.2d 1240 (1976), aff'd, 88 Wn. 2d 64 (1977); see RCW 7.28.240 "In an action by a tenant in

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[2] RCW 4.16.020 states in part:

The period prescribed for the commencement of actions shall be as follows:

Within ten years:

(1) For actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appears that the plaintiff, his or her ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action.

. . . .

common, or a joint tenant of real property against his or her cotenant, the plaintiff must show, in addition to his or her evidence of right, that the defendant either denied the plaintiff's right or did some act amounting to such denial." Silver Surprise, 15 Wn. App. at 22-23; see also Thor v. McDearmid, 63 Wn. App. 193, 207, 817 P.2d 1380 (1991); see Schull v. Shepherd, 63 Wn. 2d 505, 505-06, 387 P.2d 767 (1963) (quoting Church v. State, 65 Wash. 50, 55, 117 P. 711(1911)) ("There must be an ouster followed by adverse possession for the statutory period to determine the estate of the tenant not in possession").

As the appellate court noted in Silver Surprize, "in order for one cotenant to render his possession adverse to the others There [sic] must be on his part some act or *acts of exclusive ownership* . . . making manifest the fact of a hostile holding and carrying *knowledge or notice* of it to the ones out of possession." Silver Surprize, 15 Wn. App. at 21, 547 P.2d 1240 (emphasis added) (quoting Annot, 82 A.L.R. 2d, Adverse Possession-Co-Tenants 23-24 (1962)).

Ms. Stuart failed to provide any admissible evidence to create a genuine issue of material fact of whether she adversely possessed Mr. Schoenwald's tenant in common interest. There is no evidence that Mr. Schoenwald had the requisite knowledge or that Ms. Stuart had the requisite hostile intent or that she acted as the exclusive owner. In fact, the evidence in the record is to the contrary.

5.2.2.1 Mr. Schoenwald was not ousted from his co-tenancy because there is no evidence that he had any knowledge of Ms. Stuart's claimed exclusive ownership.

Mr. Schoenwald asserted his right to his undivided 40% tenant in common interest in the Mine Hole and Joe Creek Properties through a letter to Ms. Stuart dated April 25, 2005. This knowledge is consistent with the Decree of Dissolution, and deeds conveying the property to Mr. Schoenwald and Ms. Stuart. Ms. Stuart did not offer any admissible evidence to create a genuine issue of material fact as to Mr. Schoenwald's knowledge. The only evidence offered by Ms. Stuart to contradict Mr. Schoenwald's knowledge of his right to an undivided 40% interest in the property was her self-serving testimony, which is inadmissible according to RCW 5.60.030 (herein "dead man's statute").

Testimony from a "party in interest" must be excluded when it relates to any "transaction" he or she had with the decedent or any statement made in his or her presence by the decedent. See Thor, 63 Wn. App. at 199, 817 P.2d 1380 (citing McFarland v. Dep't of Labor and Indus., 180 Wash. 357, 362-63, 62 P.2d 714 (1936)). Ms. Stuart is a "party in interest" to the extent she stands to gain property rights, and this is a "transaction" because it involves the management of an affair, such as ownership of real property. See Wildman v. Taylor, 46 Wn. App. 546, 549, 731 P.2d 541 (1987). Accordingly, Ms. Stuart is "incompetent to testify against the [E]state about either a transaction with the deceased or a statement made to [her] by the deceased." Id. And Ms. Stuart's testimony

purporting to interpret the language of Mr. Schoenwald's 2005 letter is not admissible.

Further, a party in interest is precluded from testifying about the meaning of the terms of a document, to which he or she and the decedent were parties. Wildman, 46 Wn. App. at 553. Although the dead man's statute does not bar a written document as evidence, it does bar testimony interpreting or explaining a written document. Id. at 553, 731 P.2d 541. In an early case analyzing the dead man's statute, the Supreme Court explained:

> Parol evidence...and its tendency to induce perjury, and consequent insecurity of paper and record titles, weighs heavily against the admission of the testimony of a party to the suit...when the testimony of the party originally adversely concerned cannot be had, because of his death, and his representatives and heirs are thus without the means of meeting a claim, which may be purely fictitious, by any direct evidence....Obviously a claim so inconsistent with the tenor and ordinary effect of deeds conveying real estate ought not to be allowed except upon proof sufficient to satisfy a reasonable mind of its validity.

Spence v. Terrel, 17 Wash. 514, 521-522, 50 P. 468 (1897) (citations omitted). The same analysis is applicable here.

Ms. Stuart's self-serving testimony attempts to contradict the statutory warranty deeds and Decree of Dissolution. The deeds to the properties are competent evidence that title vested initially in Mr. Schoenwald and Ms. Stuart as husband and wife, and the Decree of Dissolution converted title from community property to a tenancy in common. These documents are consistent with Ms. Stuart's Creditor's Claim, in which she conceded she owns only an undivided 60% interest in

the property. Ms. Stuart did not offer any admissible evidence to contradict the effect of these documents.

For the same reasons that Ms. Stuart's testimony is inadmissible, any of her witnesses that stand to gain from an increase in her property rights as likely heirs to her estate are similarly incompetent to testify against the interests of the Estate with regard to the property at issue.

The only reasonable inference that can be drawn is that Mr. Schoenwald knew of and claimed the right to his 40% undivided interest in the property as evidenced by his letter sent in April 2005, and further supported by the deeds and Decree of Dissolution. This is true even though he had not used or possessed the property as directed by the Decree of Dissolution.

The fact that Ms. Stuart retained possession of the property does not meet the required evidentiary threshold to dispossess a cotenant. Mere possession and use of the property by the cotenant is consistent with a co-tenancy and is not an act of exclusive ownership. See Shull v. Sheperd, 63 Wn.2d 503, 505, 387 P.2d 767 (1963). Mr. Schoenwald's absence from the property was never anything more than compliance with a court order, and Ms. Stuart's possession of the house could never ripen into adverse possession without some other affirmative act that put Mr. Schoenwald on notice that she was claiming exclusive ownership.

Moreover, even if Ms. Stuart could offer proof of exclusive ownership there is no evidence of the correlating knowledge by

Mr. Schoenwald for the requisite 10 years. Ms. Stuart argues two possible dates for when the 10 year period began to run, May 25, 1995, the date the court entered the Decree of Dissolution or July 1996, when Ms. Stuart's possession was supposed to end and the property be sold. Regardless of which date could have begun the time for adverse possession Mr. Schoenwald's letter in April 2005 shows at that time he did not have the requisite knowledge, and thus the 10 years required for adverse possession could not have passed. Accordingly, the court below was correct in its conclusion that there is no genuine issue of material fact for trial and Ms. Stuart did not oust or adversely possess her cotenant's interest.

5.2.2.2 The only admissible evidence in the record contradicts Ms. Stuart's alleged hostile intent to adversely possess Mr. Schoenwald's cotenant interest.

By filing a Creditor's Claim against the Estate and offering to purchase the Estate's cotenant interest, Ms. Stuart conceded that she did not own all of the property. And, without the requisite hostile intent and acts of exclusive ownership she cannot dispossess her cotenant by adverse possession. See Silver Surprize, 15 Wn. App. at 22-23, 547 P.2d 1240. Ms. Stuart cannot meet the heightened evidentiary standard to adversely possess her cotenant's interest where she unequivocally recognized her cotenant's property right. See Schull, 63 Wn. 2d at 506 (rejecting adverse possession claim where a "purchase offer constituted a recognition of plaintiff's interest"); Peeples v. Port of Bellingham, 93 Wn. 2d 766, 776,

613 P.2d 1128 (1980) ("[N]egotiations to purchase . . . property are evidence that a claimant views his own title as subordinate."), overruled on other grounds, Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984).

Ms. Stuart's ability to make any claim of adverse possession is barred by the fact that she personally signed and filed the Creditor's Claim. By signing and submitting the Creditor's Claim, she admitted that she did not have exclusive ownership of the Mine Hole and Joe Creek Properties. This admission, by its terms, is contrary to Ms. Stuart's adverse possession claim and the elements of hostile intent and exclusive ownership.

Moreover, after the Creditor's Claim was rejected, Ms. Stuart tried to purchase the Estate's undivided 40% tenant in common interest. Even if the Creditor's Claim were not conclusive proof that Ms. Stuart recognized the Estate's property interest, her purchase offer alone would preclude her adverse possession claim. See Peeples, 93 Wn. 2d at 776. Ms. Stuart expressly recognized the validity of the Estate's interest in the property, and she cannot now establish the element of hostility or the intent required to adversely possess the property. Ms. Stuart's inconsistent position, taken solely for purposes of this litigation, does not create a genuine issue of material fact for trial. Thus her claims were properly dismissed as a matter of law.

5.3 There are no facts to support Ms. Stuart's claim that the doctrine of laches bars the Estate's action to quiet title or partition the property.

"Laches is a doctrine of equity." McKnight v. Balisides, 19 Wn.2d 391, 400, 143 P.2d 307 (1943) (quoting Lindblom v. Johnston, 92 Wash. 171, 158 P. 972 (1916)). "To constitute laches, not only must there have been delay in the assertion of the claim, but also a change in conditions that would make it inequitable to enforce the claim." Id. at 400-01. Mere delay, lapse of time, and acquiescence do not implicate laches unless the changed conditions continued for so long that it would be inequitable to allow recovery. Id. at 401. Furthermore, it is a "general rule that, where parties are equally at fault, neither can successfully assert laches against the other." National City Bank of Seattle v. Int'l Trading Co. of America, 167 Wash. 311, 314, 9 P.2d 81 (1932).

Ms. Stuart and Mr. Schoenwald were both responsible to comply with the Decree of Dissolution and sell the property. Mr. Schoenwald demanded in writing that Ms. Stuart cooperate with selling the property in April 2005, but she did not. Unfortunately, on August 14, 2006 Mr. Schoenwald sustained serious injuries that left him in a vegetative state and ultimately lead to his death on August 23, 2007. Thereafter, there has been no delay by the Estate or any change in circumstances that would render its claim for partition untimely and subject to the doctrine of laches.

The only measurable delay occurred in the years when the property should have been sold pursuant to the Decree of Dissolution. However,

both Ms. Stuart and Mr. Schoenwald are responsible for this delay, so Ms. Stuart cannot assert laches as a bar to the Estate's right to partition the property. Further, there was never any change in conditions between the parties that would implicate laches, because, as already discussed, the parties remained in the court ordered status quo.

5.4 The Estate's complaint to quiet title and partition the property is not barred by any statute of limitations.

An action to quiet title is not subject to a statute of limitations. Petersen v. Schafer, 42 Wn. App. 281, 284, 709 P.2d 813 (1986), (citing Van Sant v. Seattle, 47 Wn.2d 196, 287 P.2d 130 (1955)). Further, where a dissolution decree awards an actual property interest there is no applicable statute of limitations. Contra Stokes v. Polley, 145 Wn.2d 341, 351-52, 37 P.3d 1211 (2001) (noting that the 10 year statute of limitations applies to enforcing an award of "equity" in community property).

The Decree of Dissolution divided the community real property by awarding Mr. Schoenwald and Ms. Stuart an interest in the property as tenants in common. The court also ordered the real property be sold no later than July 9, 1996. However, Mr. Schoenwald and Ms. Stuart did not comply with this portion of the Decree of Dissolution, resulting in Mr. Schoenwald and Ms. Stuart remaining as tenants in common. An alternative conclusion is wholly inequitable as it would divest Mr. Schoenwald and his Estate of a known property right, which he had prior to and following dissolution of the marriage, and give a windfall to

Ms. Stuart, who was equally responsible for failing to follow the court's order to sell the property.

Consequently, neither Mr. Schoenwald nor his Estate are barred by a statute of limitations from seeking to quiet title and partition its interest in the properties.

5.5 The partition should be affirmed because no evidence in the record shows an abuse of discretion in ordering the partition based on a single referee's report.

The Estate is entitled to partition as a matter of law because it owns the property as a tenant in common with Ms. Stuart. The 40% undivided interest is the last asset of the Estate of Schoenwald to be probated. In order to close the estate, pay the expenses of administration and satisfy to the greatest extent possible the remaining creditors, this action must be resolved and property partitioned.

An action to partition property "is both a right and a flexible equitable remedy subject to judicial discretion." Friend v. Friend, 92 Wn. App. 799, 803, 964 P.2d 1219 (1998). Accordingly, the standard of review for a trial court's order partitioning property is abuse of discretion. Id. at 805, 964 P.2d 1219.

The trial court had broad discretion and great flexibility to determine the division of property among the cotenant s. Cummings v. Anderson, 94 Wn.2d 135, 143, 614 P.2d 1283 (1980). As a tenant in common, the Estate has a statutory right to partition the property. See Friend, 92 Wn. App. at 803, 964, P.2d 1219. Although partition in kind is

preferred, the partition should be by sale if the property "cannot be divided without great prejudice to the owners." Id.; RCW 7.52.080.[3]

It was the Estate's position that the geographic and topographic characteristics of the property, along with the improvements and limited access made it prejudicial to partition the property in kind, so the Estate requested partition by sale. (CP 201) The Estate requested a referee, but Ms. Stuart would not agree to the Estate's proposal. Instead, Ms. Stuart requested her own referee, Mr. Sitler, because he was local to Colville. The Estate conceded to Mr. Sitler's appointment in an effort to keep costs and delays to a minimum. In his report, Mr. Sitler concluded that the property could be reasonably partitioned in kind and made a recommendation on how to physically divide the property. The Estate, having no reasonable basis to dispute this conclusion, acquiesced to the partition in kind and asked the trial judge to confirm the referee's report.

Although the partition statute contemplates the appointment of three referees for a partition in kind, neither party requested that the court appoint three referees. See RCW 7.52.080. But see Carson v. Willstadter, 65 Wn. App. 880, 883, 830 P.2d 676 (1992) ("The court *may* appoint three referees to determine the rights of the owners." (emphasis added)). The

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[3] RCW 7.52.080:

> If it be alleged in the complaint and established by evidence, or 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, and for that purpose may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall decree a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees, therefor, and shall designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained.

partition statute contemplates that the referee's recommendation and report "is to be considered highly authoritative and to set the direction for the court." Carr v. Harden, 34 Wn. App. 292, 297, 660 P.2d 1139 (1983). However, the trial court is not bound to comply with the recommendations set forth in any referee's report. See Id. at 296, 660 P.2d 1139. In other words, the report does not bind the court, but it "is for the use of the court to aid in the exercise of its discretion." Id.; see also RCW 7.25.100.[4]

The trial court did not abuse its discretion in appointing only one referee as agreed by the parties, and then partitioning the property according to his report. The statute and case law clearly indicate that the referee's function is to assist the court in making an equitable division of the property. Here, the trial court made an equitable division. Because the report was only a guide, the court was free to use its discretion and partition the property without reference to the report if it deemed appropriate.

But, the referee appointed in this matter, at Ms. Stuart's recommendation, had the confidence of the trial judge as evidenced by the

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[4] RCW 7.52.100:

> The court may confirm or set aside the report in whole or in part, and if necessary, appoint new referees. Upon the report being confirmed a decree shall be entered that such partition be effectual forever, which decree shall be binding and conclusive:
>
> (1) On all parties named therein, and their legal representatives who have at the time any interest in the property divided, or any part thereof as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder or inheritance of such property or any part thereof, after the termination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life.
>
> (2) On all persons interested in the property to whom notice shall have been given by publication.
>
> (3) On all other persons claiming from or through such parties or persons or either of them.

court's appointment and later confirmation of the report. Mr. Sitler has extensive experience in this type of proceeding and there is no evidence that his report is anything but an unbiased, adequate and reasonable basis for partitioning the property. Additionally, considering the value of the property and the perceived assets of the parties, it was reasonable to appoint only one referee, and none of the parties or the court deemed it necessary to appoint three referees—that is, until Ms. Stuart became dissatisfied with her referee's conclusion. The parties agreed that only one referee was necessary to save time and money, and the court did not abuse its discretion by appointing only one.

Mr. Sitler evaluated the quality and quantity of the Property and determined that it could be physically partitioned. His report is substantial evidence that the Property can be divided and allotted to each party in order to satisfy their respective interests. Mr. Sitler evaluated the physical attributes of Property and the improvements thereon, and he determined that Ms. Stuart's 60% tenant in common interest in the property was best satisfied by allotting her the home and surrounding seven acres. The remaining property, about 32.9 acres, which is encumbered by two county roads and a sizeable utility right-of-way, was the allotment that would best satisfy the Estate's 40% tenant in common interest.

The trial judge determined, and the Estate asks this Court to affirm, that the partition proposed in Mr. Sitler's report is adequate and reasonable under these circumstances. There is no material issue of fact that the

Estate and Ms. Stuart are tenants in common, thus, the Estate is entitled to partition the property as a matter of law. Further, the trial court did not abuse its discretion by recognizing and agreeing that because of the limited value of the property and other Estate assets, the best course of action was to minimize the costs associated with appointing two additional referees.

After determining that the Property could be partitioned in kind, the trial court entered a decree dividing the property and binding the parties and their successors in interest. RCW 7.52.100. Since there is no evidence in the record that Mr. Sitler's report and recommendation were biased or unreasonable, and the trial court had broad discretion to fashion an equitable remedy in a partition action, the underlying order and judgment should be affirmed.

VI. CONCLUSION

The Court of Appeals should affirm the trial court's order on summary judgment ruling as a matter of law that the property is owned as tenant in common and dismissing Ms. Stuart's claim of adverse possession. The Deed and Decree of Dissolution are sufficient to vest title in Ms. Stuart and the Estate as tenants in common. And, Ms. Stuart has not come forth with any admissible evidence to establish Mr. Schoenwald had knowledge of her alleged hostile intent to claim exclusive ownership of the property.

Moreover, the Court of Appeals should affirm the trial court's judgment partitioning in kind the real property and severing the tenancy in common between Ms. Stuart and the Estate. The trial court in its sound discretion concluded that the referee, appointed at the request of Ms. Stuart, made a reasonable and equitable division of the tenancy in common, and this determination should not be disturbed on appeal.

DATED this 23 day of March, 2012.

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Attorneys for Plaintiff/Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on March 23rd, 2012, I caused the foregoing document to be served on the following counsel in the manner indicated:

Janet Stuart	VIA REGULAR MAIL	☒
1013 Joe Creek Rd.	VIA CERTIFIED MAIL	☐
Colville, WA 99114	HAND DELIVERED	☐
	BY FACSIMILE	☐
Pro Se Appellant	VIA FEDERAL EXPRESS	☐

DATED on March 23rd, 2012, at Spokane, Washington

Cheryl Krengel

Cheryl Krengel