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

No. 31671-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STEVE HEITSTUMAN,

Appellant,

v.

WAYNE HEITSTUMAN, et al.,

Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR ASOTIN COUNTY

The Honorable John W. Lohrmann

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APPELLANT'S BRIEF

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## **A. SUMMARY OF ARGUMENT**

Steve Heitstuman was a one-third partner in Heitstuman Brothers farming partnership. He and his two partners owned real property worth nearly \$2 million and farm equipment worth \$25,000. Mr. Heitstuman's partners asked the court to partition the real and personal property under RCW 7.52. RCW 7.52 governs partition of only real property. Partitioning real property includes a partner's right to pro-rata recovery of any sums paid beyond his share for property-related expenses. Mr. Heitstuman paid hundreds of thousands of dollars beyond his one-third interest for real property taxes, mortgage debt payments, necessary repairs, and other expenses. The other partners did not reimburse him for many of these payments. The court, therefore, erred when it awarded Steve Heitstuman only one-third of the partners' real property, and it lacked authority to partition the partners' farm equipment.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court erroneously found that "[a]ll parties agree that capital accounts for either the cattle partnership or for the Heitstuman Brothers partnership cannot be accurately reconstructed." (Finding of Fact (FF) 15)
2. The court erroneously concluded that "[p]artition under RCW 7.52 provides the appropriate legal framework for dividing the property, rather than the Revised Uniform Partnership Act, RCW 25.05." (Conclusion of Law (CL) 1)
3. The court erroneously concluded that "Wayne Heitstuman, David Heitstuman, and Steve Heitstuman should each be

awarded an equal one-third share of the total value of the real property.” (CL 3)

4. The court erroneously concluded that “[t]he most equitable way to divide the jointly-owned real property is to award Steve Heitstuman Tracts A and B, as those properties are described in the appraisal prepared by Steve Rynearson.” (CL 5)
5. The court erroneously concluded that “Wayne and Becky Heitstuman , and David and Tracie Heitstuman, should be awarded Tracts C and D, as those properties are described in the appraisal prepared by Steve Rynearson, and shall each pay Steve Heitstuman \$5,733.50 to equalize the distribution, for a total owelty payment of \$11,467.” (CL 6)
6. The court erroneously concluded that “[t]he jointly owned farming equipment should be divided with Wayne Heitstuman and David Heitstuman, jointly, purchasing Steve Heitstuman’s share of said equipment by paying Steve Heitstuman a total of \$8,333 within 60 days after the entry of this Order. However, if any of the equipment is currently in the possession of Steve Heitstuman and ordinarily used by him, he shall have the option of retaining said equipment with the agreed market value thereof being deducted from his share. The court should retain jurisdiction for the limited purpose of resolving any disputes relating to the final division of the equipment.” (CL 7)
7. The trial court erroneously denied Steve Heitstuman’s Motion for Reconsideration of Court’s Findings of Fact and Conclusions of Law.
8. The trial court’s judgment erroneously partitions real property. (Judgment, par. 1-2)
9. The trial court’s judgment erroneously partitions personal property. (Judgment, par. 3)
10. The trial court erroneously denied Steve Heitstuman’s Motion for Leave to File a Further Motion for New Trial and Reopening Judgment, and Altering or Amending Judgment.

### **C. ISSUES PRESENTED FOR REVIEW**

1. Whether the trial court lacked authority under RCW 7.52 to partition Heitstuman Brothers' personal property because RCW 7.52 governs partition of only real property?
2. Whether the court misinterpreted and misapplied RCW 7.52 by partitioning property without referees, without awarding Steve a recovery of sums he paid beyond his share of property expenses, and without considering the quality and quantity of land divided?

### **D. STATEMENT OF THE CASE**

Steve Heitstuman, Wayne Heitstuman, and David Heitstuman are brothers.<sup>1</sup> (Report of Proceedings (RP) 25) Steve and Wayne are cattle ranchers who began a beef cattle ranching partnership in the 1970s. (RP 25) Steve Heitstuman also owned long-horned cattle separate and apart from the beef cattle ranching partnership he had with Wayne. (RP 330)

In 1979, Steve, Wayne, and David started a farming partnership known as Heitstuman Brothers. (RP 25) Each brother had an undivided one-third ownership interest in Heitstuman Brothers. (RP 86)

Heitstuman Brothers owned 20-year old farming equipment: a combine, a wheel tractor, a Caterpillar, a semi-trailer, grain drills, plows, rod wielders, a rock picker, cultivators, a chisel plow, and discs with a fair market value of approximately \$25,000.00. (RP 87-88, 414)

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<sup>1</sup> Each brother will be referred to by his first name for clarity. No disrespect is intended.

Heitstuman Brothers also acquired three properties known as the Floch property, the Hendrickson property, and the Barkley property in 1979, 1980, and 1981, respectively. (RP 87, 93, 98, 104) These properties were each deeded to Steve, Wayne, and David rather than to Heitstuman Brothers. (Exhibits P-21, P-22, and P-23)

The Floch property “is about 1,000 acres of cropland and hayfields and about 3,000-acres of pastureland.” (RP 87; *see also* RP 91, Exhibit P-25 at 37-41) The property also consists of farm buildings, hay barns, and three farmstead homes. (RP 97; Exhibit P-25 at 38-41) Some of the cropland was placed into the Conservation Reserve Program (CRP) in 1986 where it remained until 2012. (RP 91) Heitstuman Brothers raised wheat and barley on the remaining cropland. (RP 87) Steve and Wayne grazed their cattle on the rangeland. (RP 91)

The Hendrickson property is 680 acres of steep and rugged rangeland at the mouth of the Grande Ronde River with no improvements. (RP 96, 100) The property is accessible only through the Floch property. (RP 96) Wayne and Steve ran their cattle on the Hendrickson property. (RP 133)

According to an appraisal, the Barkley property is 840.29 acres – 761 acres of cropland and 79.29 acres of rangeland. (Exhibit P-25 at 34-35, 68; RP 100) Heitstuman Brothers farmed the cropland until the

partnership put 742 acres of cropland into CRP in 1986. (RP 100, 106; Exhibit P-25 at 35) The cropland remained in CRP and was, therefore, unusable until October 2012 when the CRP contract ended. (RP 100) But the first crop could not be planted until the fall of 2013 or reaped until 2014. (RP 342) Only three acres of pastureland around the barnyard could be used for cattle. (RP 101) The Barkley property has no water, “so if you want to use that 50 acre pasture you have to haul water to either livestock or horses.” (RP at 100) Another 48-acre parcel of rangeland (“Tract B” in the appraisal) nearby and also known as the Barkley property also lacks water and public access and is, therefore, unusable. (Exhibit P-25 at 37; RP 100)

The Barkley property has improvements, including a livable home where Steve previously lived. (RP 100-102) The barn, however, needed a new roof, which would cost between \$10,000 and \$15,000. (RP 103; Exhibit P-25 at 35) The machine shed also needed a new roof. (RP 103; Exhibit P-25 at 36) Steve paid \$7,600 of his personal money to reroof the bunkhouse and water storage building and to remove large, dead locust trees from the property. (RP 103) Neither Wayne nor David reimbursed Steve for these expenses. (RP 103)

Steve Rynearson appraised Heitstuman Brothers’ three properties in February 2011 at a total value of \$1,974,800. (RP 117-18; Exhibit P-25

at 69) He valued the Barkley property at \$646,800, and the Floch and Hendrickson properties at a combined total of \$1,328,000. (Exhibit P-25 at 68-69) Mr. Rynearson, however, did not leave the county road to view the timber situated on the Floch property. (RP 408)

Heitstuman Brothers purchased the Floch property for \$1,429,000, the Hendrickson property for \$85,000, and the Barkley property for \$615,000. (RP 94, 99, 104) The annual mortgage payment on the Floch property was \$75,773. (RP 95) The annual mortgage payment on the Barkley property was \$55,000 until it was reduced to \$43,000 when the mortgage was refinanced in 1998. (RP 104, 203) The annual mortgage payment on the Hendrickson property was \$12,506. (RP 99, 204) All total, the mortgage payments amounted to more than \$170,000 per year. (*Compare* RP 95, 99, 104, 204) Before 2003, “[t]here was no profit. There was income; the income was spent to pay all the bills and the mortgage payments.” (RP at 203)

In the 1980s and 1990s, Heitstuman Brothers paid its mortgages with Heitstuman Brothers’ grain income, CRP payments, and other farm program payments. (RP 168) However, this income was never enough to cover all of the mortgage payments. (RP 168) “[Steve] had to kick in [his] own money or the defendant, Wayne, had to kick in his money to keep things afloat for almost every one of those years.” (RP at 168) Steve

generally paid certain bills – the mortgages, the property taxes, and insurance on the crops and buildings. (RP 90; Exhibit P-20) Indeed, Steve contributed a net total of \$383,503.81 of his personal cattle and logging income to Heitstuman Brothers from 1980 through 1997. (Exhibit P-20, pp. 1-30; RP 178-89) This amount includes \$109,215.19 that Steve paid in 1990 to get Heitstuman Brothers out of bankruptcy. (RP 180; Exhibit P-20 at 5) If Steve had not made this payment, Heitstuman Brothers would have lost the Barkley property. (RP 180)

From 1998 to 2002, Wayne and Steve had an arrangement regarding the income and expenses of their cattle partnership and Heitstuman Brothers. (RP 112) Wayne sold Steve's share of the cattle partnership's calves and used the proceeds to pay Heitstuman Brothers' annual mortgage payment on the Floch property. (RP 168-69, 189-90) Steve received Heitstuman Brothers' Direct payments, CRP payments, and wheat and grain income and paid as much of the partnership's remaining mortgage payments and expenses as possible. (RP 238, 335-36) Steve Heitstuman would then make extra payments from his personal income for partnership expenses that exceeded what Heitstuman Brothers' grain and CRP income could generate. (RP 336) Thus, between 1998 and 2002, Steve's personal income paid \$393,945 towards the Floch and Barkley properties. (Exhibit P-20, pp. 31-38; RP 189-96) These payments were in

addition to his one-third share of Heitstuman Brothers' expenses.

(Exhibits P-8-P-10)

Several times Wayne and Steve each paid half the payment on a Heitstuman Brothers mortgage. (RP 337) Wayne, however, produced no proof of extra payments he made from his personal sources of income for Heitstuman Brothers' expenses. (RP 363-401) David did not make payments from his separate income because he did not have a separate source of income. (RP 337, 415-16) His only source of income was Heitstuman Brothers' income. (RP 337, 415-16)

After a falling-out between Steve and Wayne in October 2003, the underlying litigation began. (Clerk's Papers (CP) 1-3) Steve asserted breach of contract, quantum meruit, conversion, and permanent injunction claims against Wayne that related primarily to their cattle partnership. (CP 1-3, 115-119) Wayne and David and their spouses counterclaimed for partition of the Heitstuman Brothers' real and personal property. (CP 23-33)

To separate Steve Heitstuman from Heitstuman Brothers, Steve proposed that he be awarded the Barkley property and that portion of the Floch property known as the Campbell Place. (RP 344) The Campbell Place is an 850-acre parcel on the western edge of the Floch property in Tract C of Mr. Rynearson's appraisal. (RP 344, 405) A county road

separates the Campbell Place from the remainder of the Floch property.

(RP 344) Steve Heitstuman had been using the Campbell Place for summer pasture. (RP 344) Wayne Heitstuman had not run cattle on the Campbell Place for a few years due to an agreed order. (RP 406) David is a farmer, not a cattle rancher, so he never used the Campbell Place. (RP 410, 415, 421)

David and Wayne proposed that Steve be awarded only the 840-acre Barkley property and that the remainder of Heitstuman Brothers' 4,776-acres of real property be awarded to David and Wayne. (RP 343, 370, 412) David and Wayne's proposal was problematic because the appraised value of Tracts A and B (the Barkley property) was approximately \$12,000 less than one-third of the value of all three properties. (RP 313) This proposal also did not consider the unreimbursed hundreds of thousands of extra dollars Steve paid on the properties over the years. (RP 344-45) The proposal also contemplated a lopsided division of property – the Barkley property's 840 acres are far fewer than the Floch and Hendrickson properties' 4,776 acres. (RP 342) Moreover, the Barkley property is mostly farmland and has only three acres of usable pastureland, and Steve Heitstuman is a cattle rancher, not a farmer. (RP 342, 365) The Floch, Hendrickson, and Bennett properties, however, have 3,776 acres of pastureland, which a cattle rancher can use

to run 200 to 300 cows in the wintertime and 75 to 80 cows in the summertime. (RP 343)

After a two-day trial, the trial court concluded that each brother should be awarded one-third of the total value of the real property despite finding that Steve, Wayne, and David acted independently in committing funds and/or labor to Heitstuman Brother and that Steve's personal cattle income alone paid the Floch mortgage between 1998 and 2002. (CP 140-150, Finding of Fact (FF) 23 and 40, Conclusion of Law (CL) 3) The court awarded Steve only the Barkley property and an owelty payment and awarded Wayne and David and their spouses the remainder of the properties. (CP 140-150, CL 6) The court further awarded Heitstuman Brothers' farming equipment to Wayne and David and required them to pay Steve \$8,333 for his interest in the equipment. (CP 140-150, CL 7)

Steve moved the court to reconsider, in relevant part, its partition decision, arguing that the court's partition did not consider the significant amount of personal funds Steve paid for Heitstuman Brothers' expenses in addition to his one-third share of the expenses or the quality or quantity of the land divided. (CP 151-56) The court declined to reconsider its partition decision. (CP 172-73) The court then entered its judgment. (CP 174-83)

After the court entered its judgment, Steve moved for leave to file an additional CR 59 motion. (CP 184-87) He argued that the court (1) partitioned property that was not before the court to partition (the Bennett property), and (2) failed to partition the Winter Wheat crop that had already been planted and would be harvested in August 2013, the Direct Payment for the Floch property that would be paid in October 2013, and equipment that Heitstuman Brothers purchased in 2011. (CP 184-87) The court denied Steve's motion. (CP 220-22)

Steve Heitstuman appeals. (CP 194-219)

#### **E. ARGUMENT**

ISSUE 1: WHETHER THE TRIAL COURT LACKED AUTHORITY UNDER RCW 7.52 TO PARTITION HEITSTUMAN BROTHERS' PERSONAL PROPERTY BECAUSE RCW 7.52 GOVERNS PARTITION OF ONLY REAL PROPERTY?

The trial court lacked authority to partition Heitstuman Brothers' farming equipment under Chapter 7.52 RCW. A superior court's statutory authority is a question of law that this Court reviews de novo. *In re Schneider*, 173 Wn.2d 353, 358, 268 P.3d 215 (2011).

RCW 7.52 governs partition of only real property. The chapter's opening section 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.” RCW 7.52.010 (emphasis added). RCW 7.52 does not define “real property.”

Statutory interpretation is also a question of law that is reviewed de novo. *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 926, P.3d 860 (2013). When interpreting a statute, the Court’s goal is to determine the Legislature’s intent. *A & W Farms v. Cook*, 168 Wn. App. 462, 468, 277 P.3d 67 (2012). The Court must give effect to a statute’s plain language if that language is unambiguous. *Id.* Here, the term “real property” is unambiguous; therefore, this Court should define the term according to its plain meaning.

“Real property” is “[l]and, and generally whatever is erected or growing upon or affixed to land.” Black’s Law Dictionary 1383 (4th rev. ed. 1968). This definition is how this Court should define the term “real property” in RCW 7.51.010. Indeed, this Court noted in an earlier RCW 7.52 case that “[p]artition’ involves division of *land* by joint owners of *real property* into distinct portions, to be owned separately.” *Schultheis v. Schultheis*, 36 Wn. App. 588, 589 n.1, 675 P.2d 634 (1984) (citing Black’s Law Dictionary 1276 (4<sup>th</sup> rev. ed. 1968) (defining “Partition”)) (emphasis added).

If the Legislature had intended for RCW 7.52 to apply to personal property, it would have explicitly stated so. “Under the statutory canon

*expressio unius est exclusio alterius*, the express inclusion in a statute of situations in which it applies implies that other situations are intentionally omitted.” *Freeman v. Gregoire*, 171 Wn. 2d 316, 336, 256 P.3d 264 (2011) (quoting *In re Det. of Strand*, 167 Wn.2d 180, 190, 217 P.3d 1159 (2009)). Such an implication is present here because the Legislature uses the term “personal property” one time in RCW 7.52. Its sole reference to “personal property” can be found in RCW 7.52.440, which sets forth the law for compensation by infants in the event of an unequal partition. Thus, interpreting RCW 7.52.010’s use of the term “real property” to mean land best reflects and furthers the Legislature’s intent for RCW 7.52 as a whole. RCW 7.52 codifies an action to partition real property, not personal property.

Unlike real property, “personal property” is “everything that is the subject of ownership, not coming under denomination of real estate . . . The term is generally applied to property of a personal or movable nature, as opposed to property of a local or immovable character, (such as land or houses,) the latter being called ‘real property[.]’” Black’s Law Dictionary at 1382. Heitstuman Brother’s farming equipment, which Steve, Wayne, and David held and possessed in common, was personal, movable property, not immovable land or houses. The property was personal property and could not be partitioned under RCW 7.52. The trial court,

then, acted without statutory authority when it partitioned Heitstuman Brothers' personal property under RCW 7.52.

The court's partition of Heitstuman Brothers' equipment was prejudicial to Steve even if partition under RCW 7.52 was proper. Property that cannot be partitioned without great prejudice to the owners should be sold. RCW 7.52.080. "Great prejudice" means a material pecuniary loss. *Hegewald v. Neal*, 20 Wn. App. 517, 522, 582 P.2d 529 (1978).

Steve is a cattle rancher who, pursuant to the court's decision, was awarded real property that is 90.5 percent farmland. Steve's only farming equipment was Heitstuman Brothers' farming equipment. Yet the court awarded Steve none of Heitstuman Brothers' farming equipment. Steve was awarded only \$8,333 for his one-third interest in a combine, a wheel tractor, a Caterpillar, a semi-trailer, grain drills, plows, rod wielders, a rock picker, cultivators, a chisel plow, and discs. While the agreed-upon value of Heitstuman Brothers' farming equipment was \$25,000, the pecuniary loss of this equipment is far higher. Steve cannot replace all of this equipment for \$8,333. Thus, the court's partition of equipment in this matter was inequitable and greatly prejudicial because (1) Steve cannot farm without the farming equipment and (2) Steve must incur the substantial expense of purchasing new or used farming equipment to farm

the land awarded to him. Neither Wayne nor David will have to incur such expense to farm the property awarded to them because they were also awarded all of Heitstuman Brothers' farming equipment.

The partition of Heitstuman Brothers' farming equipment should be reversed because the court lacked statutory authority to partition it. Alternatively, the matter should be remanded with orders to sell Heitstuman Brothers' farming equipment because the trial court's partition cannot be made without great prejudice to Steve.

ISSUE 2: WHETHER THE COURT MISINTERPRETED AND MISAPPLIED RCW 7.52 BY PARTITIONING PROPERTY WITHOUT APPOINTING REFEREES, WITHOUT AWARDING STEVE A PRO-RATA RECOVERY OF HIS EXTRA PROPERTY PAYMENTS, AND WITHOUT CONSIDERING THE QUALITY AND QUANTITY OF THE LAND DIVIDED?

The trial court misinterpreted RCW 7.52.090 and misapplied RCW 7.52.080 and .090 by dividing Heitstuman Brothers' real property to Steve, Wayne, and David one-third each without appointing referees, without awarding Steve a recovery for extra property payments, and without considering the quality and quantity of the land divided. This Court reviews the interpretation and application of statutes to specific facts de novo. *Lakey*, 176 Wn.2d at 926; *City of Puyallup v. Hogan*, 168 Wn. App. 406, 426, 277 P.3d 49 (2012).

- a. **The court misapplied RCW 7.52.080 by failing to appoint referees to partition the land.**

RCW 7.52.080 requires a trial court judge who decrees a partition to appoint three referees to partition the land:

[U]pon the requisite proofs being made, [the court] shall decree a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees, therefor[.]

RCW 7.52.080. The use of the word “shall” in RCW 7.52.080 imposed a mandatory duty upon the court to appoint referees. *See Perry v. Rado*, 155 Wn. App. 626, 642, 230 P.3d 203 (2010) (reciting general rule that “[t]he use of the word, ‘shall’ in a statute ordinarily means that some action is mandatory”).

Here, the court decreed a partition in its findings, conclusions, and judgment but did not appoint referees to divide the land. Instead, the court divided the land. The court’s failure to appoint referees is error. That error was not harmless.

Steve had a procedural due process right under RCW 7.52.080 to have referees appointed. Referees are charged with (1) dividing property, (2) allotting the several portions thereof to the respective parties, (3) designating the several portions by proper landmarks, (4) employing a surveyor as an aid, and (5) making a report of their proceedings, describing the property divided and the shares allotted to each party, with a particular description of each share. RCW 7.52.090. In carrying out their duties, referees meet, visit and examine the property, and issue a

report with a recommended division of property. *Carson v. Willstadter*, 65 Wn. App. 880, 882, 830 P.2d 676 (1992); *Hegewald*, 20 Wn. App. at 519. The court did not do visit the property or issue a report. It simply entered findings, conclusions, and judgment dividing the property without the input of referees.

**b. The court misinterpreted RCW 7.52.080's mandate that property be partitioned "according to the respective rights of the parties as ascertained by the court."**

The trial court failed to divide the real property according to the proof of the parties' respective rights as ascertained by the court. No law specifically defines the term "respective rights." The law is clear, however, that a co-tenant's "respective right" includes sums that co-tenant paid beyond his share of property expenses; a co-tenant may recover the other co-tenants' pro-rata shares of any sums of money he has paid beyond his share for taxes, mortgage debt payments, and necessary repairs. 17 Wash. Prac., Real Estate § 1.32 (2d ed.) (emphasis added); W. Stoebuck & D. Whitman, *Law of Property* § 5.9 (3d ed. 2000); *McKnight v. Basilides*, 19 Wn.2d 391, 143 P.2d 307 (1943); *In re Foster's Estate*, 139 Wn. 224, 246 P. 290 (1926); *Stone v. Marshall*, 52 Wn. 375, 100 P. 858 (1909).

The trial court misinterpreted RCW 7.52.090 to require a formal capital accounting before a party's respective right can include a recovery for extra payments. No statute or case law requires that a co-tenant's

respective right to recovery for extra payments be established by a formal capital accounting. In *Foster's Estate*, the decedent's estate produced proof of insurance premiums the decedent paid while he occupied the property, and the estate was awarded a pro-rata recovery of those insurance premiums. 139 Wn. at 226-27.

Similarly, Steve produced testimony and Exhibit P-20, which shows cancelled checks and deposit slips of money Steve personally paid for Heitstuman Brothers' property expenses beyond his one-third share of the partnership's expenses. For example, the evidence showed Steve paid \$19,000 for the down payment on the Hendrickson property. He paid \$109,215.19 to get the Barkley property out of bankruptcy. He also paid the entire Floch mortgage debt payment from 1998 to 2002. No evidence shows he did not make these payments, and no evidence shows he was reimbursed for these extra payments.

Indeed, the court found Steve, Wayne, and David acted independently in committing funds and/or labor to Heitstuman Brother and that Steve's personal cattle income alone paid the Floch mortgage between 1998 and 2002. These findings support a right to recovery for Steve. They do not support the court's conclusions that each party should be awarded a one-third interest in the three properties. Based on these findings, the court should have awarded Steve his one-third interest in the

real property plus two-thirds of the extra sums of money he personally paid for Heitstuman Brothers property-related expenses.

Steve's right to recover two-thirds of his extra payments should not be denied simply because a formal capital accounting was not produced or simply because Wayne and David did not present evidence of extra payments they made for Heitstuman Brothers' property expenses. Again, no law requires a formal capital accounting, and denying a party's right to recovery in the absence of a formal accounting gives junior interest-holders a windfall. A junior interest-holder need produce no evidence of his interest in such a case to ensure that he will be awarded a property interest consistent with the face of the deed despite other proof of another co-tenant's extra payments.

Trial was the time for each party to produce proof of his extra payments for property expenses, if any. The records shows Wayne did not produce proof that he made extra payments. The record shows David did not make extra payments for Heitstuman Brothers' expenses and only began paying his one-third share of expenses in 2003 when Heitstuman Brothers' income began being distributed to each partner. It also shows that David was paid for his labor.

Steve met his burden and produced proof of his extra payments. In light of Steve's extra payments, the burden was on Wayne and David to

*show* that Steve did not make or was reimbursed for these extra payments. Wayne and David failed to satisfy their burden of production. Steve should not be penalized as a result. Had the court properly interpreted the term “respective right,” Steve would have been awarded an interest in Heitstuman Brothers’ real property that equals his one-third interest in the property plus two-thirds of the extra payments he made beyond his one-third share for Heitstuman Brothers’ property expenses.

**c. The court misapplied RCW 7.52.090 by partitioning the land without considering the quality and quantity of the land divided.**

The trial court failed to consider the relative quality and quantity of the land it divided. RCW 7.52.090 requires that referees divide the property according to the parties’ respective rights and in consideration of the relative quality and quantity of land divided:

In making the partition, the referees shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court.

RCW 7.52.090. Here, the trial court, not referees, divided the land.

According to RCW 7.52.090, the court lacked authority to divide the property. Assuming, without conceding, that the court had authority to divide the land, it should be required to divide the property according to RCW 7.52.090. The court awarded Steve the Barkley property, and it

awarded Wayne and David each an undivided one-half interest in the Floch and Hendrickson properties. It then denied Steve's motion for reconsideration that, in part, asked the court to reconsider its partition in light of the quality and quantity of the divided land.

The relative quantities of the divided land are drastically lopsided in favor of Wayne and David. Wayne and David were awarded 4,776 acres or 85 percent of the total acreage whereas Steve was awarded only 840 acres or 15 percent of the acreage.

The relative qualities of the partition were also drastically lopsided in favor of Wayne and David. All total, the three properties consist of 1,875.5 acres of farmland (33.3 percent) and 3,740.77 acres of pastureland (66.6 percent). Wayne and David, a rancher and a farmer, were awarded 1,114.5 acres of farmland (59 percent). Steve, who does not farm, was awarded 761 acres of farmland (41 percent). And the farmland he was awarded is inferior to the farmland awarded to Wayne and David. The farmland awarded to Wayne and David enjoys more rainfall and higher bushel yields. It also had a growing crop that Steve helped pay for, while Steve's farmland had no crop.

Wayne and David were also awarded 3,661.48 acres of the rangeland (97.9 percent)! The rangeland awarded to Wayne and David can be used to run 200 to 300 cows in the wintertime and 75 to 80 cows in

the summertime. Wayne is a cattle rancher. David is not. Therefore, Wayne received the benefit of nearly 98 percent of Heitstuman Brothers' rangeland. Meanwhile, Steve, also a cattle rancher, was awarded only 79.29 acres of the rangeland (2.1 percent). Nearly all of the rangeland awarded to Steve is unusable because it lacks water. He, then, cannot run cows at all on the rangeland awarded to him. The division of rangeland alone will harm Steve's cattle ranching business. He will have to reduce the number of cows he keeps because he will not have the rangeland on which to run them. Cows are the factory of a cattle ranching operation. If a rancher does not have cows, he does not make money.

The court's partition was based on the appraised value of the land. While each received roughly one-third of the land's value, the partition resulted in a grossly disproportionate division of the quality and quantity of the land. Steve, Wayne, and David each make their living by using land. However, the court's partition harmed only Steve's business.

The court's misinterpretation and misapplication of RCW 7.52.080 and .090 was not only erroneous but inequitable. The court's conclusions, judgment, and order on motion for reconsideration regarding partition and its order denying further CR 59 motions should be set aside. This matter should be remanded to the trial court with instructions to appoint referees to recommend a proposed division of land according to the parties'

respective rights, including Steve's right to a pro-rata recovery of his extra payments.

#### F. CONCLUSION

The trial court lacked authority under RCW 7.52 to partition Heitstuman Brothers farming equipment because RCW 7.52 applies to the partition of real property, not personal property. Moreover, the court's partition of personal property was prejudicial to Steve because it requires him to incur the expense of replacing all of the farming equipment in order to farm the property awarded to him.

The trial court also misinterpreted and misapplied the partition statutes when ordering the partition of the parties' real property, resulting in the court's failure to (1) appoint referees to partition the land, (2) apportion Steve an interest in the land according to his one-third interest plus a recovery for the sums he paid beyond his one-third share for property expenses, and (3) divide land in consideration of the quality and quantity of the portions divided. These errors prejudiced Steve's property rights and will result in actual harm. The court's decisions should, therefore, be set aside and remanded for further proceedings.

Respectfully submitted this 15<sup>th</sup> day of October, 2013.



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Attorney for Appellant

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

Steve Heitstuman,	)	
	)	COA NO. 31671-8-III
Appellant,	)	
	)	PROOF OF SERVICE
v.	)	
	)	
Wayne Heitstuman, et al.	)	
	)	
Respondents.	)	
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I, Hailey L. Landrus, counsel for the Appellant, do hereby certify under penalty of perjury that on October 15, 2013, I deposited for mail with the U.S. Postal Service, first-class and postage prepaid, a true and correct copy of the Appellant's attached brief, addressed to:

Roger Sandberg  
Esser & Sandberg, PLLC  
520 East Main Street  
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Dated this 15<sup>th</sup> day of October, 2013.



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