No. 84948-4-I



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

JORGE H. NAVAS,

Respondent,

v.

MYRNA LINETT DUARTE SAS,

Petitioner.

# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

Petitioner Myrna Duarte seeks review of the opinion in Part B.

## B. COURT OF APPEALS DECISION

Division I filed its opinion on September 16, 2024, and denied Duarte's motion for reconsideration on November 27, 2024. *See* appendix.

## C. ISSUES PRESENTED FOR REVIEW

1. The partition statute, Chapter 7.52 RCW, and published precedent establish that a single-family home can be awarded to one cotenant with the other cotenant receiving a payment based on their equitable share in the property's value. The trial court tried to effectuate this unequal partition, known as owelty partition, because Myrna Duarte single-handedly saved a single-family home from foreclosure by undergoing bankruptcy while her former spouse and cotenant abandoned the property. Did Division I error in reversing that decision, made by a trial court sitting in equity, while suggesting that that a single-family home can only be partitioned by sale?

## D. STATEMENT OF THE CASE

### (1) Duarte Singlehandedly Saved the Former Couple's Family Home from Foreclosure, Which They Owned as Cotenants After Their Out-of-State Dissolution Failed to Divide the Property

Myrna Duarte and Jorge Navas were married in 1999 and had a child together who is now an adult. A few years later they bought a single-family home together in Mill Creek using community funds.

Duarte and Navas divorced in 2012 in El Salvador, but the divorce decree did not dispose of their Mill Creek home, meaning they then owned the home as cotenants. Ex. 106. They reconciled for a short time, living together again in the Mill Creek home in 2013 and having a second child in June 2014. RP 137-38.

Around this time, both Duarte and Navas became unemployed and the mortgage on the house fell into arrears. CP 139-40. They could not pay the mortgage, HOA dues, and other joint debts, including debts for prenatal medical care for their young daughter. RP 143, 153-54. The couple received foreclosure notices as their debt mounted. *E.g.*, exs. 107-09. For a short time, they began a trial repayment program with their bank, but they could not make the required payments. RP 145-

46.

In 2016, the couple received notice that their home would be sold at foreclosure auction. RP 148-49; ex. 142. Duarte was "panic[ked]," and she immediately began discussing options for bankruptcy with Navas to save the home. RP 148-49, 220-21. Navas testified that he wanted to sell the house, through a short sale or some other mechanism. RP 283-84.

Duarte and Navas met with a bankruptcy lawyer several times, but only Duarte filed for bankruptcy to try to save the home. CP 4; RP 149-50. Under the bankruptcy plan, Duarte agreed to pay $4,000 per month for 60 months to save the home from foreclosure. Originally, Navas agreed to help make those payments, but he made just two, $2,000 payments. RP 102.

Around that time the parties separated for good and Navas stopped paying toward the bankruptcy plan. RP 210. Duarte testified that he "abandon[ed]" their agreement and she was left on her own. RP 248-49. Navas moved out in October 2016, and never spent another night in the house. RP 209-10.

Aside from the two *di minimus* $2,000 payments, very early on before he abandoned his agreement to help Duarte, Navas made no further payments on the property. He paid nothing toward the $4,000 monthly bankruptcy payments for five years, necessary to rescue the property from foreclosure. He paid nothing in taxes, HOA fees, insurance, maintenance, or any other costs associated with the property. RP 248-49. Other than unclogging a drain and drilling a hole in some drywall on one occasion, he never did any work on the property. RP 209-10. Duarte testified:

> He left me with a home that was going to be foreclosed and auctioned out, and when he left, I had filed for bankruptcy, and that stopped that proceeding, but at the same time, he knew that I was not going to be able to afford those payments of $4,000 a month without his help. So he decided at the moment that he moved out that he was not going to help. He decided to leave that debt to deal with on my own. So if I would have not been able to afford this, the house would have been sold, foreclosed, auctioned out….Gone. Absolutely. No second chances, no third chances, absolutely no way out [] of losing the house.

RP 270-71.

Over the next five years, Duarte managed to make enough payments save the home. RP 204. She worked, having regained the job she lost employment around the time she became pregnant. RP 138; ex. 6. She also got help from family, help from her boss, and scaled back her expenses to accomplish this feat. RP 272. Duarte paid all expenses and maintenance associated with the home. RP 268-69. Duarte testified that the stress of making bankruptcy payments and ends meet was "absolutely exhausting." RP 202.

Duarte also lived with roommates, which Navas has stressed was part of an agreement they had that he would move out and she would rent rooms to pay the bankruptcy. Duarte denied that such an agreement existed. RP 221. No other evidence supported Navas's allegation of an agreement, certainly nothing that would satisfy the statute of frauds as the partition referee appointed at trial would later point out.[1] RP 181.

[1] Agreements to answer for the debts of another,

The couple had rented out rooms before Navas moved out, historically earning about $700 in rental income. RP 61-62; ex. 6. But Duarte testified that after Navas moved out she did not have "consistent roommates," it was "[v]ery difficult" to find roommates, the roommates she did find did not always pay her, and the amount she could obtain in any month from renting a portion of the property was "very inconsistent." RP 266-67. She took on this exhausting role of property manager and landlord along with all her duties related to the bankruptcy while Navas "did not in any way help" once the bankruptcy was filed. RP 262. Navas offered no testimony that he helped Duarte find tenants, or otherwise helped with the alleged deal he claimed they had regarding rental income assisting with the bankruptcy.

On top of the exhausting work Duarte undertook to save

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agreements that cannot be performed within one year, and most conveyances related to real estate, including lease agreements must be in writing to satisfy the statute of frauds. RCW 19.36.010; RCW 62A.2-201; RCW 64.04.010.

the home, she was diagnosed with breast cancer three and a half years into bankruptcy, right as the COVID-19 pandemic hit. RP 205. She endured surgery, four months of chemotherapy, and radiation therapy. RP 205-07. Navas did not offer to assist her with any payments as she went through cancer treatment, which he knew about. RP 207. She even asked him to help pay for childcare expenses as she went through cancer treatment during COVID, but "[h]e would not help." RP 258.

Bankruptcy ended in June 2021, after Duarte made 56 payments. RP 204, 228. Having gone through bankruptcy alone, Duarte alone suffered the negative credit that continues. RP 253 (noting at trial her credit score was not high enough to refinance). Duarte continued to make mortgage payments on her own when the bankruptcy ended. RP 207-08.

(2) Navas Filed a Partition Action, and the Trial Court Awarded the Home to Duarte

Duarte exited bankruptcy in 2021, just as real estate in Western Washington was skyrocketing. The home that Duarte

saved from foreclosure now appraised for over $1 million. Ex. 11. Navas wanted a cut of the home's value, filing an action for partition under chapter 7.52 RCW in Snohomish County Superior Court. CP 202-07. At the time he left in 2016, their mortgage had been interest only, RP 274-75, so there was little to no equity in the home when he abandoned it.[2] Ex. 6. Even though Duarte took on bankruptcy to save the home by herself and it only appreciated in value through her efforts alone, Navas claimed a one-half share in the full value of the home. *Id.*

Duarte answered, denying many false statements that Navas made in his partition complaint.[3] CP 194-97. For relief she pleaded, "Using its equitable powers, the court should award

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[2] Navas admitted at trial that by filing for bankruptcy, Duarte reduced around $34,000 of the mortgage debt on the home, increasing the little equity that existed. RP 275. The bankruptcy also settled late fees, medical bills, outstanding car loans they held as codebtors and came with its own expenses. RP 275-76; ex. 6.

[3] Despite coming to the trial court in equity, Navas's petition continued many overblown or misstated facts, to try to inflate his supposed stake in the home. *See* Resp't br. at 2-17.

100[ percent] of this asset to the defendant." CP 196.

The court appointed a partition referee to examine the case and make recommendations. CP 164-65. The referee concluded that partition should result in Duarte receiving the house because Navas abandoned the property when it was essentially worthless, and Duarte's investments alone saved it from foreclosure and allowed it to appreciate in value. CP 133-39. He looked to case law discussing legal doctrines like abandonment and ouster, noting the uniqueness of this station because there "are very few cases" dealing with these subjects in a partition action. RP 164. The referee concluded that Duarte should receive the property under the guidelines established by the few cases that do exist. CP 133-39.

The referee also recognized that the trial court could make some other award regardless of legal doctrines like ouster or abandonment, because a court hearing a partition action sits "in equity, and the Court can make some other allocation." RP 191. He concluded that if the court chose not to follow legal "guiding

principles" like ouster, then whatever the Court awarded as Navas's share should be reduced to "frankly less" than some *legal* share given his "total lack of involvement and support." RP 191; CP 139. Meaning, the referee recommended that even after the trial court reduced Navas's share in equity by all the mortgage, taxes, insurance, HOA, maintenance, and other costs/fees he failed to pay for over seven years, the court should reduce his share *even further* because Duarte's efforts alone allowed the house to appreciate and have any value. *Id.*

The trial court, the Honorable Marybeth Dingledy, held a two-day trial, at which the partition referee, Navas, and Duarte all testified. *See generally*, RP. The court found that Duarte should receive the home, writing:

> [Duarte] single-handedly saved the house, even when she was undergoing cancer care. [Navas] did not participate other than paying a couple of thousand dollars towards the arrears. Ms. Duarte Sas was the only person who paid the mortgage and all expenses related to this property. Mr. Navas never submitted any creditor's claim. He did not live in the residence. Although he said he did work on the house, there was no evidence of that with

> regards to photos or even a description of what was done other than it was a patio… I will award the house to mother. She has single-handedly saved this house and worked very hard to keep her asset and her children safe.

RP 305-06. The court was satisfied based on the legal authorities presented by the referee that this was a case in which one cotenant ousted the other. RP 306.

Because he had been ousted, the trial court awarded Navas reasonable rental value during the ouster period, $25,025 in total. That represented a 50 percent share of $770 in reasonable rental income per month for 71 months, with some adjustments to account for the difficult rental market during COVID. RP 308-09; CP 5.

(3) Division I Reversed, Creating Conflicts in Law

Navas appealed, arguing that ouster did not apply. Duarte argued that even if the court erred in relying on an ouster theory – a theory that the partition referee raised, *not* Duarte, as a "guiding principle"– the appellate court should affirm because any error was harmless. A court sitting in a partition action has

broad, equitable authority and Duarte singlehandedly saved the home from foreclosure. *Leinweber v. Leinweber*, 63 Wn.2d 54, 58, 385 P.2d 556 (1963) (partition should allow a person "to recover the benefits created by the sweat of his or her brow and prevent a windfall to the other cotenants") (cleaned up).

Division I determined that ouster did not apply and reversed, refusing to apply a harmless error analysis for which Duarte argued. Despite the vast equitable power a trial court wields to fairly partition property, Division I included a lengthy discussion about partition by sale that conflicts with existing case law. This discussion dominated oral argument, where the Court opined that a partition sale was the proper remedy, a remedy that could leave *both* parties "much worse off." *See* Oral Argument https://www.tvw.org/watch/?clientID=9375922947&eventID=2024031181 (at 8:10) ("I'm trying to make sure your client understands that he could end up much worse off when this is all

done.").[4]

This discussion made it into the Court's opinion, where Division I specified that the single-family home likely had to be partitioned by sale as the only "possible" option:

> On remand, the trial court must take the necessary steps to partition the property and the ownership interests thereto. As a single-family residence in a single-family zone, statutory partition appears possible only by sale. S*ee Friend*, 92 Wn. App. at 804-05 (where partition in kind conflicts with local zoning ordinances, division of property is prejudicial and partition by sale is the appropriate remedy). Any deviation from this result should be closely analyzed pursuant to the discussion set forth in the preceding section of this opinion.

Slip op. at 15-16.

Despite the Division I's reasoning, neither party asked for partition by sale as their primary relief. Both sought owelty partition under RCW 7.52.440, which allows one cotenant to keep possession of a property and compensate the other spouse

[4] This transcription was performed by undersigned counsel and approximates the audio captured at argument to the best of undersigned counsel's abilities.

for their equitable share with a monetary payment. CP 196, 205. Navas asked that Duarte keep the home while he receive a 50 percent share through a refinance, while Duarte argued that she should receive 100 percent as a matter of equity, whether or not ouster applied, because the house was essentially underwater when Navas abandoned it. CP 196. As discussed below, these unequal (owelty) partitions are authorized by statute and occur often in Washington, especially in the case of partitioning single-family homes.

Duarte pointed out these overlooked facts and authorities through a timely statement of additional authorities and motion for reconsideration, but Division I denied reconsideration. Appendix. This timely petition follows.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### (1) Division I's Opinion Undermines a Trial Court's Ability to Effectuate Equitable Partition, in Conflict with the Partition Statute and Longstanding Precedent

Review is warranted because Division I's opinion creates

conflicts in law and adds confusion to a statute where none existed before. RAP 13.4(b)(1), (2). Partition of a single-family home is not "possible *only*" by sale. Slip op. at 15-16 (emphasis added). Division I's opinion contradicts the partition statute's plain language and published precedent from this and other Washington courts.

This Court has held for decades that partition actions are equitable matters where the trial court is afforded "great flexibility." *Leinweber*, 63 Wn.2d at 56. "In all cases of partition a court of equity does not act merely in a ministerial character and in obedience to the call of the parties who have a right to the partition, but it founds itself upon its general jurisdiction as a court of equity." *Id.* (cleaned up). A trial court hearing a partition action "administers its relief *ex aequo et bono* according to its own notions of general justice and equity between the parties." *Id.*

As this Court has stated, "Equitable claims are not dependent on the 'legality' of the relationship between the

parties" but rather, "equitable claims must be analyzed under the specific facts presented in each case." *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107-08, 33 P.3d 735 (2001) (court sitting in equity could grant relief to same-sex partner even though case law and statutes prevented finding a quasi-martial relationship or imposing community property concepts upon same-sex partners); *see also, e.g.*, *Arzola v. Name Intelligence, Inc.*, 188 Wn. App. 588, 596, 355 P.3d 286 (2015) ("In matters of equity, trial courts have broad discretionary powers to fashion equitable remedies.").

A court sitting in equity with *ex aequo et bono* authority is not even bound by the partition statute itself. *Kelsey v. Kelsey*, 179 Wn. App. 360, 368, 317 P.3d 1096, *review denied*, 179 Wn. App. 360, *cert. denied*, 574 U.S. 975 (2014). While the partition statute, "provides guidance to a court in a partition action, it does not mark the outer limits of a court's exercise of its equitable powers." *Id.* Thus, a court in the exercise of its equitable powers may fashion remedies to address facts of each case, even if the

partition statute does not strictly provide for such a remedy. *Id.* at 370 (court could discount certain shares of property owned by tenants in common and partition personal property along with the real property to make transfer equitable).

Emphasizing the broad, flexible nature of an equitable position action, the Legislature enacted RCW 7.52.440, which provides for unequal partition if traditional partition would be inequitable to "some" of the parties. In *Adams v. Rowe*, 39 Wn.2d 446, 447, 236 P.2d 355 (1951), this Court explained that this statute affirms the common-law doctrine "owelty of partition." Owelty is "a lien created or a pecuniary sum paid by order of the court to effect an equitable partition of property (as in divorce) when such a partition in kind would be impossible, impracticable, or prejudicial to one of the parties." "Owelty." *Merriam-Webster.com Legal Dictionary*, https://www.merriam-webster.com/legal/owelty. In conflict with Division I's opinion, Washington courts have been applying owelty partition to single-family homes for years.

In *Adams*, a divorced spouse sued for partition of the homestead held as tenants-in-common. In discussing how a judgment because attached to the property, this Court noted that the land was not partitioned in kind or by sale because the lot "could not be divided equally." 39 Wn.2d at 447. So instead, the home was partitioned unequally in owelty, with 100 percent of the lot to one party with a compensating payment to the other. *Id.*

Division I discussed owelty partition of a former couple's single-family home in *Hartley v. Liberty Park Associates*, 54 Wn. App. 434, 438, 774 P.2d 40 (1989). In discussing how a judgment came to be on a home, the court noted:

> In the dissolution proceedings the superior court had Michael and Patricia's property before it for partitioning. *See* RCW 26.09.050. The court determined that the family home could not be appropriately divided, so it awarded the Issaquah property to Patricia, and gave Michael a money award of $40,000 to equalize the distribution. The court's authority for the compensation is the "time-honored doctrine of owelty".

*Id.* citing (*Adams*). Thus, a court has authority in owelty to do what the trial court did here: award property to one cotenant

based on her equitable interest.

Division II also noted *in re Marriage of Wintermute*, 70 Wn. App. 741, 745-46, 855 P.2d 1186 (1993), that the "ancient doctrine of owelty…may be decreed…as an equitable alternative to partition" under RCW 7.52.440. "When, as in this case [of a single-family home], a particular piece of real property cannot be fairly apportioned, an equalizing monetary award can be made in lieu of partition."

Division I's ruling that partition "appears possible only by sale" conflicts with these authorities recognizing the "time honored" and ancient doctrine of owelty partition authorized by the partition statute itself. The property need not only be partitioned in kind or via a courthouse auction. Rather, the trial court sitting in equity could partition the property "according to the respective rights of the persons interested," RCW 7.52.010, including unequally, up to 100 percent in owelty, with Navas's interest (however equitably small) being monetarily compensated, as the trial court did here. RCW 7.52.440.

The Legislature did not intend to make partition by sale the default. Far from it – it made owelty partition more freely available than partition by sale. Property is partitioned "according to the respective rights of the parties as determined by the court" and sale "may" (permissive) occur if all owners would be "great[ly] prejudice[d]." RCW 7.52.080, .090. Unequal (or owelty) partition, on the other hand, may occur if "some" owners are prejudiced by traditional partition. RCW 7.52.440.[5] Duarte would surely be prejudiced by traditional partition, given she has lived in the family home for nearly two decades and fought bankruptcy to save it, as other Washington

[5] *Kapcsos v. Benshoff*, 194 A.3d 139 (Pa. Super. Ct. 2018), is a recent case from another state that succinctly describes at 142-44 the proper approach to partition. Comparing partition to a pie, the court describes that a partition court can either: (1) cut and divide the pie in parts; (2) "give the whole pie to one party and order that person to pay the other parties for their respective shares… based upon the equities of what everyone invested in the land…known as 'owelty'"; or (3) order the pie to be sold and the profits split "if neither of the first two scenarios are possible." Washington's partition statute likewise recognizes that partition by sale is a permissive, last option, not the default or first option as Division I wrongfully concluded.

courts have long recognized.

Division I's opinion creates ambiguity and uncertainty where none existed before. Review is warranted to resolve the conflicts in law Division I's opinion creates, particularly with respect to interpreting the partition statute to provide clarity for future litigants. RAP 1.34(b)(1), (2); *Nat'l Elec. Contractors Ass'n, Cascade Chapter v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999) (this Court is the "final arbiter" of questions of statutory interpretation). A published opinion on this topic would assist future parties as shown by the record in this case, where the partition referee and trial court struggled to analogize to the "very few cases" that exist. RP 164.

Review is warranted.

(2) Division I's Opinion Undermines Appellate Review Creating Additional Conflicts

Division I's opinion also conflicts with notions of appellate review by dismissing Duarte's harmless error argument. In doing so, Division I created additional conflicts

with appellate jurisprudence, especially on harmless error. RAP 13.4(b)(1), (2).

An appellate court may "affirm on any ground the record adequately supports." *Skinner v. Holgate*, 141 Wn. App. 840, 849, 173 P.3d 300 (2007). This includes affirming based "on any alternative basis supported by the record and pleadings, even if the trial court did not consider that alternative." *Eubanks v. Klickitat County*, 181 Wn. App. 615, 619, 326 P.3d 796 (2014). Even legal errors will not require reversal if they are "harmless," and the record supports the trial court's outcome. *In re Marriage of Morris*, 176 Wn. App. 893, 903-04, 309 P.3d 767 (2013) (legal error was harmless because a trial court "has broad equitable powers in family law matters" and the ultimate ruling was within its discretion; *Courchaine v. Commonwealth Land Title Ins.*, 174 Wn. App. 27, 36, 296 P.3d 913 (2012) (where court mischaracterized a legal duty, making a legal error, a court could still "look beyond that characterization error to the essence of the complaint, the evidence, and the findings" and affirm if the

decision was supported in the record).

As discussed above, Duarte did not plead or brief ouster at trial, she merely asked that the court use its equity power to award her 100 percent of the asset, as the owelty partition statute and precedent like *Leinweber*, 63 Wn.2d at 58, commands. Rather, the partition referee raised ouster as a "guiding principle" for the court who also had the power in equity to "make some other allocation" however it sought fit as a matter of equity. RP 191. Duarte has argued that any mistake in applying ouster was harmless error, but Division I refused to accept that argument. Slip op. at 13-15.

Even if its legal reasoning stumbled by relying on ouster, the trial court knew what it was doing – awarding the asset to Duarte who "single-handedly" saved it from foreclosure. RP 305-06. The home appreciated in value due to Duarte's efforts *alone*. Precedent established that she should be allowed "to recover the benefits created by the sweat of his or her brow and prevent a windfall to the other cotenants" through equitable

partition. *Leinweber*, 63 Wn.2d at 58. Owelty partition allows the trial court to make this *exact* award, without any need to resort to ouster.

The trial court acted well within its vast discretion to award her title to the home, while providing some equitable compensation ($25,025) to Navas for whatever diminished interest he had, as owelty partition and precedent establishes. *Leinweber*, 63 Wn.2d at 58; *Cummings v. Anderson*, 94 Wn.2d 135, 142, 614 P.2d 1283 (1980) ("a cotenant should not be permitted to take inequitable advantage of another's investment" when the property is partitioned); *see also*, *e.g.*, *Barth v. Hafey*, 189 Wn. App. 1018, 2015 WL 4610987, *4 (2015) ("trial court was well within its discretion in awarding the [one cotenant who performed all the work on a property] the full enhancement value of the Property"). Division I's opinion is an outlier, conflicting with these decisions and principles of harmless error review.

The trial court's discretion is doubly strong in this case that rests in equity. Courts are frequently asked to make

equitable determinations in the context of real property, and appellate courts defer to trial courts' balancing of equitable facts and their decisions on flexible, fair remedies. *See*, *e.g.*, *Neighbors v. King County*, 15 Wn. App. 2d 71, 90, 479 P.3d 724 (2020) (no abuse of discretion where trial court found a county had an equitable right to pursue ejectment to preserve the public's interest in public lands); *Glepco, LLC v. Reinstra*, 175 Wn. App. 545, 560, 307 P.3d 744 (2013) (no abuse of discretion where trial court dismissed a quiet title action by equitably reforming a deed that contained an obvious scrivener's error); *State, Dep't of Ecology v. Acquavella*, 112 Wn. App. 729, 748, 51 P.3d 800 (2002) (no abuse of discretion in water rights case, where trial court sitting in equity must weigh what is fair to competing landowners). Division I's opinion is an outlier, second-guessing an equitable, *ex aequo et bono* decision, creating conflicts with precedent and statute along the way.

There is no sense in remanding this case, where the trial court has the power to make the identical, equitable decision it

already determined was appropriate under the facts. Duarte single-handedly saved the home. Without her efforts it would have been lost to foreclosure years ago, and the enhanced value caused by the skyrocketing real estate market never would have occurred. The trial court properly found, *sitting in equity*, that Duarte alone should enjoy the fruit of her investments alone, with Navas receiving a modest sum for his equitably diminished interest in the home he abandoned.

The trial court's decision was consistent with partition precedent. Division I's outlier decision only creates confusion and conflicts in law. Review is warranted. RAP 13.4(b)(1), (2), (4).

(3) Partition of Single-Family Homes Is an Issue of Public Importance

Review is also warranted under RAP 13.4(b)(4) because the partition of single-family homes is an issue of public importance likely to recur. As shown above, multiple courts have noted in published opinions that owelty partition is

appropriate when dividing family home in the aftermath of a marriage or other committed relationship. *Adams*, *Hartley*, *Wintermute*, *supra*. Like the parties in the cases cited above, Duarte and Navas did not enter a joint-owner relationship as business partners, real estate developers, farmers, ranchers, *et cetera*, as is the case in many traditional partition actions. They were cotenants by virtue of a marital community, and it is common in such cases that the home they own together would be awarded to one spouse upon dissolution. RCW 26.09.080. That did not happen here only because the dissolution took place in El Salvador, and these parties of modest means did not take further legal action in Washington.

Division I's opinion, forcing Duarte back to court to potentially lose the family home she saved where she raised her children, is terrible public policy. RAP 13.4(b)(4). It contracts the owelty partition statute, and benefits no one except fee-charging lawyers and speculative purchasers. It is easy to imagine this scenario recurring when couples without the means

to access to premier legal representation separate informally or in other jurisdictions, without properly dividing their legal assets. These issues will recur.

Indeed, the partition statute is infrequently cited in Washington, perhaps suggesting this was not as big of an issue in decades past, when property values were much lower across the state. In many cases, the cost of a lawsuit likely outweighed what parties stood to gain. But now that home values have skyrocketed, Division I's opinion will only encourage cotenants, like former spouses or heirs who inherit family property, to litigate to try to forcibly dispossess one another from valuable single-family homes.

Division I was wrong to opine that partition can only occur in kind or by sale, creating terrible public policy that will affect future cases. This is especially true for parties like Duarte, who singlehandedly saved her home from foreclosure and should be allowed "to recover the benefits created by the sweat of his or her brow and prevent a windfall to the other cotenants," like

Navas, who did nothing to contribute to the asset's current value. *Leinweber*, 63 Wn.2d at 58. Review is warranted RAP 13.4(b)(1), (2), (4).

F. CONCLUSION

For these reasons, the Court should grant review and reverse.

This document contains 4,987 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 27th day of December, 2024.

Respectfully submitted,

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# APPENDIX

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State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JORGE H. NAVAS, an individual,

Appellant,

v.

MYRNA L. DUARTE, an individual,

Respondent,

M & T BANK, a foreign corporation registered to do business in Washington,

Defendant.

DIVISION ONE

No. 84948-4-I

UNPUBLISHED OPINION

DWYER, J. — In this partition action, cotenant Jorge Navas appeals from the order of the superior court granting to cotenant Myrna Duarte, his former wife, sole interest in certain real property on the basis that Duarte had ousted him from that property. On appeal, Navas asserts that the trial court erred by so determining. We agree. We conclude that the trial court abused its discretion in making that determination and that we cannot affirm the trial court's order on any other basis in the record presented to us on appeal. Accordingly, we reverse.

I

In December 1999, Jorge Navas and Myrna Duarte became married to one another. In 2006, they acquired community property in the form of a house in Mill Creek, Washington. They purchased the house and the single-family

zoned lot on which it was constructed for $425,435 using both sale proceeds of their prior community property home and loan proceeds from a mortgage secured by the Mill Creek house. In January 2008, they refinanced their loan on the Mill Creek property.

In December 2012, Navas and Duarte obtained a divorce decree in El Salvador. It being a foreign divorce, the decree entered did not address the disposition of the Mill Creek home. As a result, the parties became tenants in common of that property. After the divorce, Duarte moved out of the home and Navas continued to reside on the property. In late 2013, Navas and Duarte reconciled their relationship and lived together in the house, eventually having a second child together in June 2014.

By then, both parties had become unemployed. They stopped making loan payments on the mortgage. In November 2014, they received a notice that their loan provider was foreclosing on the property. More than one year later, in January 2016, the parties were informed that their home would be sold at an auction occurring on May 20, 2016, in order to satisfy the debt owing on their loan.

Three days before the auction, on May 17, 2016, Duarte filed for Chapter 13 bankruptcy, which paused the foreclosure and imminent auction. As part of the bankruptcy process, Duarte agreed to make payments of $4,000 per month for 60 months, an amount which included the monthly loan payment due on the property. According to Duarte, Navas agreed to pay one half of the bankruptcy

payments each month. However, Navas gave Duarte only one payment of $2,000 while he lived in the home.

On October 1, 2016, Navas moved out of the home, in part so that Duarte could rent out his bedroom. The Mill Creek home had five bedrooms, one of which the parties had previously rented out for $700 per month. After Navas left, Duarte was able to also rent out the room that he had previously occupied.

Thereafter, during the time in question, Navas did not return to reside in the home. He paid to Duarte one additional payment of $2,000 after which he did not make—or assist with—the property's loan payments, taxes, or maintenance costs. Navas did not receive any portion of the rental income from the property.

At the time of Duarte's discharge from bankruptcy in June 2021, she had paid $217,000 to the bankruptcy trustee, satisfying the terms of the bankruptcy plan and saving the home from foreclosure and auction despite undergoing intensive cancer treatment in 2020 and 2021. In August 2021, two months after Duarte emerged from bankruptcy, Navas petitioned the Snohomish County Superior Court to partition the Mill Creek property. Duarte responded, arguing that Navas had abandoned the property in 2016. She requested that the trial court use its equitable powers to award her a 100 percent interest in the property "as she is the only one who preserved the asset and has used her separate income and funds for years to maintain the property."

The court appointed a referee to create a report detailing recommendations as to the equitable interests of each of the parties. The

referee did so, identifying "a hierarchy of issues that should cascade to resolution of this matter," and that the court should begin by asking "Did [Navas] abandon and thus lose his interest in the property? If he did, then no partition is needed and [Duarte] should be awarded the subject property as her sole and separate property (subject to refinancing)." The trial court later reviewed the referee's report and held a trial with testimony from the parties and the referee.

The trial court then issued an order awarding full interest in the property to Duarte. The court ordered Navas to execute a quitclaim deed to transfer the property to Duarte. In arriving at this conclusion, the trial court cited the referee's opinion that Navas had abandoned his interest in the property when he left the home and ceased financial contributions. However, rather than applying the referee's theory of abandonment, the trial court concluded that Duarte's ownership of the property was open and adverse to Navas and that she had ousted him from the property. Notably, the trial judge handwrote in the margins of the order that "this was ouster." In its written findings of fact and conclusions of law, the trial court also recited the three elements of ouster as set forth in Yakavonis v. Tilton, 93 Wn. App. 304, 306, 968 P.2d 908 (1998):

> a cotenant obtaining sole possession of a property adverse to the other tenant; the cotenant repudiates or disavows the relation of the co-tenancy; the tenant does not have possession of the premises and is aware of actions by the cotenant that signify his or her intent to hold, occupy, and enjoy the premises exclusively.

In its final order, the trial court "crossed off" the term "preponderance of the evidence" (the burden of proof applicable to a partition action) and interlineated

the term "clear and convincing evidence" (the standard of proof applicable to an ouster claim). She found that Duarte's proof met this standard.[1]

In addition, the trial court ordered that Navas was entitled to one half of the rental income from October 1, 2016 to September 1, 2022. The trial court found that the value of the rent was $770 per month during that time, with a reduction in the rental amount from March 2020 to March 2021 due to the pandemic. The court then calculated and ordered Duarte to pay Navas a sum of $25,025.

Navas moved for reconsideration, requesting that the trial court award the equity of the property equally to the parties. The trial court denied the motion for reconsideration.

Navas now appeals.

II

Navas asserts that the trial court erred by quieting title based on a theory of ouster. Because neither party pled ouster and because we cannot affirm the trial court's order on such a theory based on the record presented to us on appeal, we hold that the trial court abused its discretion by divesting Navas of his present and future ownership interest in the property in reliance on a theory of ouster.

[1] In the case of cotenancies, abandonment and ouster are far from the same. Abandonment requires a voluntary relinquishment of a cotenant's ownership interests. Ouster is a wrongful deprivation of one cotenant's ownership interests by a second cotenant. See Section II B, infra.

A

In his petition to the trial court, Navas brought a cause of action for a partition. He requested relief in the form of a partition of the Mill Creek property. Therefore, we review the trial court's order in this matter as if we are reviewing a request for partition.

"The right of partition by a tenant-in-common of real property is absolute in Washington, and is governed by statute in RCW 7.52." Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 130 Wn.2d 862, 873, 929 P.2d 379 (1996) (footnote omitted). In addition to being a statutory right, partition is an equitable remedy subject to judicial discretion. Friend v. Friend, 92 Wn. App. 799, 803, 964 P.2d 1219 (1998). As an equitable proceeding, the court has "great flexibility in fashioning relief for the parties." Cummings v. Anderson, 94 Wn.2d 135, 143, 614 P.2d 1283 (1980).

Hence, we review a trial court's decision when deciding an action for partition for abuse of discretion. Overlake Farms B.L.K. III, LLC v. Bellevue-Overlake Farms, LLC, 196 Wn. App. 929, 939, 386 P.3d 1118 (2016). "A decision constitutes an abuse of discretion when it 'is manifestly unreasonable or based on untenable grounds.'" Kreidler v. Cascade Nat'l Ins. Co., 179 Wn. App. 851, 861, 321 P.3d 281 (2014) (quoting In re Marriage of Fiorito, 112 Wn. App. 657, 663-64, 50 P.3d 298 (2002)). A decision is manifestly unreasonable "if it is outside the range of acceptable choices, given the facts and the applicable legal standard," and is based on untenable reasons "if it is based on an incorrect

standard or the facts do not meet the requirements of the correct standard." Fiorito, 112 Wn. App. at 664.

Accordingly, we review the trial court's order in this matter for abuse of discretion.

B

To reiterate, as a cotenant, Navas filed a petition for a partition of the Mill Creek property. His right to this "is absolute in Washington." Anderson & Middleton, 130 Wn.2d at 873. The trial court, in response, issued a final order in reliance on an unpled theory of ouster. Given all of this, in order to determine whether the trial court abused its discretion, it is instructive to set forth the legal standards applicable to partition and ouster.

1

The right to partition has existed in Washington, largely unchanged, since it was enacted by the territorial legislature in 1869.[2] The statute provides:

> When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, 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.

RCW 7.52.010. While the statute allows for partition in kind[3] or by sale, partition in kind is favored when practicable. Hegewald v. Neal, 20 Wn. App. 517, 522, 582 P.2d 529 (1978).

[2] LAWS OF 1869.

[3] "In a partition in kind, the property is physically divided, and the individual interests of each joint owner are severed so that, after partition, each has the right to enjoy an estate, or dispose of the estate, without hindrance from the other." 59A AM. JUR. 2D Partition § 3 (footnote omitted).

To effectuate a partition, the trial court appoints one or more referees who "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. The court should order a sale of the property when "the property or any part of it, is so situated that partition cannot be made without great prejudice to the owners." RCW 7.52.080. The court may award monetary equalizing compensation—known as an owelty— when a "partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them." RCW 7.52.440; see Hartley v. Liberty Park Assocs., 54 Wn. App. 434, 438, 774 P.2d 40 (1989).

2

Ouster "is the wrongful dispossession or exclusion by one tenant in common of his or her cotenant or cotenants from the common property." 86 C.J.S. Tenancy in Common § 28 (2017). "Ouster occurs when a cotenant obtains sole possession of the land that is adverse to the other cotenants, where the cotenant repudiates or disavows the relation of the cotenancy or where the tenant without possession is aware of actions by the tenant in possession that signify his or her intention to hold, occupy, and enjoy the premises exclusively." Yakavonis, 93 Wn. App. at 308. An ouster, by itself, does not cause an alteration of the ownership interests of the cotenants. Only after the applicable statute of limitation has expired, without the wronged cotenant taking steps to assert that cotenant's interest, can the possessory cotenant acquire "absolute title by the

succeeding and continued adverse possession." Church v. State, 65 Wash. 50, 55, 117 P. 711 (1911).

To be clear, an ouster can result in an alteration of ownership only when the ouster is "'followed by adverse possession for the statutory period.'" McKnight v. Basilides, 19 Wn.2d 391, 398, 143 P.2d 307 (1943) (quoting Church, 65 Wash. at 55).

The law has developed in this manner because when land is owned by cotenants, "there is a presumption that possession by one tenant is possession by all and inures to the benefit of all." Peters v. Skalman, 27 Wn. App. 247, 254, 617 P.2d 448 (1980). Mere possession by one cotenant does not constitute ouster. Yakavonis, 93 Wn. App. at 308. Because ouster is a wrongful act whereby one cotenant's use of the property excludes others, the occupying cotenant is liable to be required to reimburse the other cotenants for losses or damages such as the rental value of their frustrated property interests. In re Marriage of Maxfield, 47 Wn. App. 699, 708, 737 P.2d 671 (1987). Thus, the remedy for ouster is an award of damages for the past wrong of depriving the ousted cotenants of their right to use the property.

As previously set forth, ouster does not warrant quieting title in one cotenant absent adverse possession for the requisite statutory period. Adverse possession between cotenants "must be established by outward acts of 'such an unequivocal character as to impart notice' of the intended ouster." Peters, 27 Wn. App. at 254 (quoting Nicholas v. Cousins, 1 Wn. App. 133, 137, 459 P.2d

970 (1969)).[4] Ouster "requires proof which is 'stronger and more convincing than that necessary to sustain an ordinary claim of adverse possession,'" described as "clear, unequivocal, unmistakable or convincing evidence." Thor v. McDearmid, 63 Wn. App. 193, 207, 817 P.2d 1380 (1991) (quoting Silver Surprize, Inc. v. Sunshine Mining Co., 88 Wn.2d 64, 66, 558 P.2d 186 (1977)).

C

We next consider whether the trial court abused its discretion by (1) relying on a theory of ouster to determine rightful possession of the Mill Creek property and (2) granting to Duarte an exclusive property interest therein. As to both determinations, the trial court abused its discretion.

Here, the parties agree that their divorce decree from El Salvador did not dispose of the ownership of the Mill Creek home, resulting in their possession of the property as tenants in common. As was his right as a cotenant, Navas petitioned the superior court to partition the property pursuant to RCW 7.52.010.

Given the applicable legal standards, the trial court's statutory obligation was to determine the parties' respective rights to the property and whether partition would be effectuated in kind or by sale. RCW 7.52.010.

Instead, the court concluded that Duarte held a 100 percent interest in the property based on clear and convincing evidence that she had ousted Navas on October 1, 2016 when Navas left the home and ceased making direct financial

[4] Adverse possession requires a showing of hostility by one cotenant. Abandonment, to the contrary, rests on a voluntary relinquishment of ownership rights by the other cotenant. Proof of one cannot prove the other.

payments toward the property. According to the trial court, Duarte's ownership was then "open and adverse" to Navas.

The trial court abused its discretion by so concluding. We say this for three reasons. First, ouster is a separate cause of action. An action for a partition is not a cause of action for ouster. Here, Navas filed an action for partition of the property. He did not file an action seeking an award of damages for a wrongful ouster. Similarly, Duarte—in her various answers—never asserted a claim for ouster. Ouster was not a cause of action that was put at issue in this case. The trial court erred by deciding an action for a partition as if it were an action for an ouster.

Second, a cotenant's sole possession or use of the property does not amount to the hostile assertion of adverse possession necessary to prove ouster. Rather, ouster requires an act of "an unequivocal character as to impart notice" of ouster. Nicholas, 1 Wn. App. at 137. The record before the court does not adduce any evidence of an act of that nature. Duarte testified that Navas's departure was "amicable," and that she did not "kick him out." Navas chose to leave the home, in part, to allow Duarte to rent his room. Navas's voluntary departure from the home does not provide clear and convincing evidence that Duarte asserted, or gave notice of an intention to assert, exclusive possession of the property. Because the record does not support a finding of ouster, the trial court's reliance on the theory was erroneous.

Third, even if an ouster had been established—and it was not— the remedy imposed by the trial court (quieting title exclusively in Duarte) was erroneous.

Ouster can only result in a cotenant's loss of an ownership interest after the statutory period for adverse possession has run. Church, 65 Wash. at 55. As pertinent here, we note a division of authorities as to whether the applicable statutory period is seven years (pursuant to RCW 7.28.050) or ten years (pursuant to RCW 4.16.020(1)). See Peters, 27 Wn. App. at 250; In re Kelly & Moesslang, 170 Wn. App. 722, 736, 287 P.3d 12 (2012). However, we need not resolve that dispute in order to resolve this matter.

Here, less than five years passed between October 1, 2016 (when Navas left the house) and August 24, 2021 (when Navas filed his petition for partition). Thus, regardless of which limitation period applies to this situation, neither expired during that period of time.

Accordingly, the trial court plainly erred. Navas submitted a claim to possession of the Mill Creek property within the allowable period of time to preclude either the seven-year or the ten-year statute of limitation for adverse possession from expiring. RCW 7.28.050; RCW 4.16.020(1).[5] The evidentiary record simply does not reflect that Duarte presented the trial court with evidence sufficient to support finding an ouster for a duration that exceeded the statutory

[5] The remedy for ouster absent adverse possession would be an award of damages to Navas for past loss of use of his property interest. Navas and Duarte would remain tenants in common. However, Navas did not plead ouster and did not request an award of damages for past deprivation of his property interest.

limitation period for adverse possession. Thus, the trial court's decision to quiet title in Duarte based on a theory of ouster was an abuse of discretion.

D

Nevertheless, Duarte asserts that the trial court's erroneous rulings do not warrant reversal because the record contains evidence sufficient to deem the error harmless and affirm the trial court's decision. We disagree.

"It is well established that errors in civil cases are rarely grounds for relief without a showing of prejudice to the losing party." Saleemi v. Doctor's Assocs., Inc., 176 Wn.2d 368, 380, 292 P.3d 108 (2013). Additionally, we may affirm a trial court's decision on any ground established by the pleadings and supported by the record. Pub. Util. Dist. No. 2 of Pac. County v. Comcast of Wash. IV, Inc., 8 Wn. App. 2d 418, 455 n.41, 438 P.3d 1212 (2019). Conversely, it logically follows that we cannot affirm a trial court on a ground neither established by the pleadings nor supported by the record. See Pub. Util. Dist., 8 Wn. App. 2d at 455 n.41.

To affirm the decision to quiet title in Duarte, we must consider whether the record supports the legal conclusion that Duarte possessed a 100 percent interest in the property pursuant to the laws applicable to a partition action. It does not.

Although the trial court properly credited Duarte with preventing foreclosure on the property, the testimony presented to the trial court reflected that the Mill Creek property was purchased with community funds, and the income generated by renting Navas's room contributed to the payments made to

the bankruptcy trustee. This evidence suggests that Navas never voluntarily surrendered his interest in the property. Thus, we cannot affirm the trial court's decision to award title solely to Duarte based on the record before us.

To determine whether the errors were harmless we would need the record to inform us as to many questions that were never answered. What was the gross value of the house and lot? What was its value net of the mortgage owed? Given that cotenants begin the analysis as equal owners, what share or percentage of ownership was equitably attributable to Duarte or to Navas? What were the factual findings that supported this determination?

In addition, the monetary award entered in Navas's favor constituted a monetary amount calculated as if it was a damage award to compensate him for a past wrong. This is in no way the equivalent of an owelty amount sufficient to compensate him for the loss of his present and future ownership interest in the property at issue.

On this record, it is impossible to find the errors harmless.

E

We acknowledge that partition is an equitable doctrine which bestows upon the trial court great flexibility in fashioning a remedy. However, that discretion exists within the confines of a statutory scheme that came into existence prior to statehood and continues in effect to this day.

It is easy to predict that on remand one or both of the parties will urge the trial court to depart from a strict adherence to the statutory scheme. Because the

issue was not briefed herein, we will refrain from opining on whether—or under what circumstances—the trial court is free to do so.

However, if urged to so depart, the trial court may be well advised to seek answers to—and enter factual findings and legal conclusions on—the following related questions:

1. When the legislature has spoken and created a statutory mechanism to resolve a particular type of dispute, under what circumstances may a trial court properly depart from adherence to that scheme?

2. Recognizing that a partition action bestows great discretion upon a trial judge and is equitable in nature, may the judge depart from the statutory scheme in order to achieve the most equitable ("the best") result?

3. Or may the trial court depart from the statutory scheme only when no equitable result can be obtained by adherence thereto?

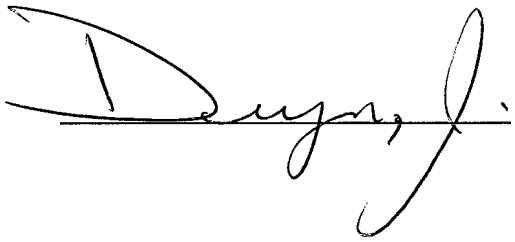
Because the legislature has spoken in this area of law, any decision to depart from its duly enacted scheme should be supported by all necessary factual findings and legal conclusions.

III

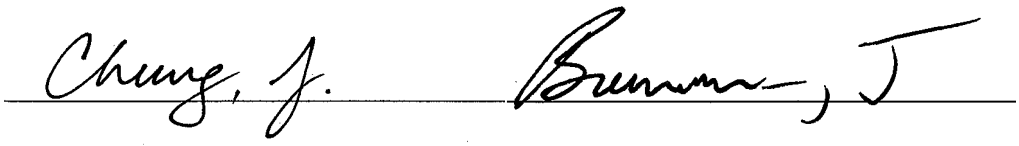
On remand, the trial court must take the necessary steps to partition the property and the ownership interests thereto. As a single-family residence in a single-family zone, statutory partition appears possible only by sale. See Friend, 92 Wn. App. at 804-05 (where partition in kind conflicts with local zoning ordinances, division of property is prejudicial and partition by sale is the

appropriate remedy). Any deviation from this result should be closely analyzed pursuant to the discussion set forth in the preceding section of this opinion.

Reversed and remanded for further proceedings consistent with this opinion.[6]



WE CONCUR:



[6] In light of this decision, we need not consider Duarte's request for an award of attorney fees on appeal.

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JORGE H. NAVAS, an individual,

Appellant,

v.

MYRNA L. DUARTE, an individual,

Respondent,

M & T BANK, a foreign corporation registered to do business in Washington,

Defendant.

DIVISION ONE

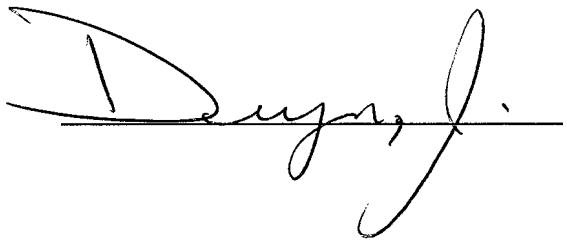
No. 84948-4-I

ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, Myrna L. Duarte, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is hereby denied.

For the Court:



DECLARATION OF SERVICE

On said day below I electronically delivered a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 84948-4 to the following:

Adam Tobin Strand, WSBA #47577
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Original delivered by appellate portal to:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 27, 2024 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

# TALMADGE/FITZPATRICK

## December 27, 2024 - 11:41 AM

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| **Appellate Court Case Number:** | 84948-4 |
| **Appellate Court Case Title:** | In Re: Jorge H. Navas, Appellant v. Myrna Linett Duarte Sas, Respondent |
| **Superior Court Case Number:** | 21-2-03887-0 |

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