73408-3

73408-3

Case No. 73408-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

OVERLAKE FARMS B.L.K. III LLC,

Plaintiff-Appellant,

vs.

BELLEVUE-OVERLAKE FARM, LLC,

Defendant-Respondent.

BRIEF OF RESPONDENT BELLEVUE-OVERLAKE FARM, LLC

CALFO HARRIGAN LEYH & EAKES LLP
Arthur W. Harrigan, Jr., WSBA #1751
Tyler L. Farmer, WSBA #39912
999 Third Avenue, Suite 4400
Seattle, WA 98104
Tel: (206) 623-1700
Fax: (206) 623-8717
E-mail: arthurh@calfoharrigan.com
E-mail: tylerf@calfoharrigan.com

Attorneys for Defendant-Respondent
Bellevue-Overlake Farm, LLC

E

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

This appeal is from the trial court's order adopting the Court-appointed Referees' unanimous conclusion that:

> Assuming the smaller nine lot parcel in the southeast Quadrant were platted first, the upfront cost of sewer extension...*would impose great prejudice on the value of the smaller parcel by almost any definition.*

The Referees—eminently qualified attorneys and real estate experts—reached that conclusion *twice* following over a year of analyzing whether the subject Property could be physically partitioned without great prejudice, a determination that Judge Yu, the first trial judge, ordered them to make.

The Referees concluded that a partitioned one-fourth of the Property could not be developed according to its highest and best use without building a sewer extension. The highest and best use of the entire Property, or of a partitioned one-fourth, is high-end residential development. But developing one-fourth of the Property would require that parcel to bear the entire $1.4 million cost of the sewer extension. The sewer extension would be sufficient to serve the entire developed Property and would be economical for development of the whole. But this cost would virtually wipe out the value of the developed one-fourth parcel, leading the Referees to a finding of great prejudice.

In an initial effort to address this great prejudice, the Referees proposed that the parties reach a cost-sharing agreement, splitting the sewer cost (and other costs that would benefit the entire Property) pro rata. If the parties had reached such an agreement, it could potentially have resolved the matter. But they did not. The partition statute does not provide for the Referees to order the parties to reach a settlement. It mandates a sale where great prejudice is found. In any case, the Referees' conscientious effort to avoid great prejudice via settlement ended when the Kapelas rejected the proposed agreement.

The Referees' conclusion that partition would inevitably lead to great prejudice never changed. When their creative effort to solve the problem did not work, they took the only action open to them under the statute where great prejudice exists: they recommended that a sale be ordered. The court agreed and ordered a sale.

The Kapelas agree that the trial court has discretion to adopt the Referees' recommendation, but argue it was abused, asserting that Judge Yu (who presided over the trial that led to the referral to the Referees) found that the Property could be partitioned in kind without great prejudice to the Sferras. This assertion is completely inaccurate. In fact, Judge Yu concluded that the issue of great prejudice should be referred to the Referees, finding only that the Sferras had not succeeded at trial in

excluding the possibility that physical partition could be achieved without great prejudice. Exercising her equitable powers under RCW 7.52.080, Judge Yu tasked three Referees with "consider[ing] and prepar[ing] a report on **whether** and how **the Property can be equitably partitioned**, subject to any owelty payment under RCW 7.52.440, and **without great prejudice**." CP 234-35 (emphasis added). She ruled that, "a majority of the Referees shall submit a report recommending a specific partition in kind of the Property, **or stating that**, under the provisions of RCW 7.52.130, **partition cannot be made without great prejudice to one or both Parties.**" CP 240-41 (emphasis added).

The court-appointed Referees (Jim Reinhardsen, John ("Jack") McCullough, and Dale Kingman[1]) made an exhaustive study of the available records, regulations and ordinances, held hearings at which the parties and experts provided information, and examined potential partition plans. They reached the unanimous conclusion that any partition in kind would result in "great prejudice" primarily because any one-fourth parcel would bear the entire cost of the sewer line extension with no mechanism in place to require the three-fourths owner to bear three-fourths of the cost.

[1] The Referees' depth of experience in land use, law, and real estate matters is reflected in their CV and related background materials provided to Judge Yu in July 2013. CP 247; CP 261-62; CP 267-69.

The superior court plainly acted within its considerable equitable discretion in accepting the results of the work of the Referees carried out per Judge Yu's order and the partition statute.

II. ISSUE ON APPEAL

The sole issue on appeal is whether the superior court abused its discretion in adopting the unanimous conclusion of the Referees that a partition that imposes a $1.4 million cost for a sewer extension and other burdens on the development of one fourth of the Property constitutes "great prejudice" under Washington's partition statute requiring partition by sale.

III. BACKGROUND

A. The Property.

Overlake Farm is a nearly forty-acre parcel of land located just north of downtown Bellevue and just southwest of downtown Redmond. CP 229. The Property sits in the Bridle Trails area of Bellevue, an upscale area combining a bucolic, wooded setting with easy access to Bridle Trails State Park, Bellevue Golf Club, Lake Washington, Microsoft, I-405, and Highway 520. CP 32, 53. As a very large tract of undeveloped, usable land with many desirable characteristics, near downtown Bellevue, the Property has a unique appeal. 2/19 RP 166. At trial, each party's

appraiser testified that there are no comparable properties in the Bellevue area. 2/19 RP 179-80; 2/25 RP 13-15.

The Property has attracted the attention of some of the larger residential real estate developers. 2/19 RP 89. For example, in August 2005, the Kapelas received an unsolicited offer to purchase the Property for $18 million. CP 162-72; 2/19 RP 128-30. (The Sferras were never informed of this offer. 2/21 RP 99-100.) The following year, the Kapelas received another unsolicited offer to purchase the Property for $13.5 million. CP 175-81; 2/19 RP 85. Based on this offer, the Kapelas offered to buy out their cousins' 25 percent interest for $350,000 per usable acre (suggesting the "usable" acreage to be 5 or less). CP 173-74; 2/19 RP 91. During trial, the Sferras introduced a development plan for the Property from Buchan Homes, one of the premier developers of luxury homes in the Pacific Northwest, to develop 38 lots averaging one-half acre. CP 188. Buchan Homes offered to purchase the Property for $11.4 million. CP 874-88; 2/20 RP 90-91.

The Property is zoned R-1—low-density residential. CP 229. The surrounding areas are predominantly low-density residential as well, with the exception of a condominium development adjacent to the Property on the north. CP 229.

There are several aspects of the Property that make development of one fourth of the property for its highest and best use, high end residential, uneconomic. The primary one is the disproportionate cost of installing a sewer extension. The Property is not now served by a public sewer. CP 230. Without a sewer connection (or a variance, which is not available under the Bellevue City Code), neither part nor all of the Property can be developed. CP 930-33. Connecting the Property to a sewer will cost approximately $1.4 million because the sewer line would need significant upgrades to handle an increase in capacity. CP 230.

Other contributing negative factors for a residential development of only one fourth of the Property are: a) the northern and western portions of the Property are burdened by power line easements that limit options for development (CP 927); b) there are wetland areas and steep slopes that limit development (CP 928); c) even if septic were allowed in lieu of a sewer extension (it is not), using septic would reduce the useable land in any one-fourth partition, reducing its value as contrasted with the higher value of one-fourth of the whole if a sewer were installed (2/25 RP 27); d) apart from consuming space, use of septic would adversely impact appeal, and thus value, where the highest use is development of high-end homes. CP 933.

The Property can be economically subdivided into 38 lots with construction of very high-end homes according to a common plan that utilizes some of the unbuildable areas (wetlands, slopes) as amenities. CP 231. With such a development, some negatives become positives when integrated into the whole, and the sewer expense becomes reasonable in proportion to total resulting value.

B. The Kapelas And The Sferras Own The Property As Tenants In Common.

Two family LLC's own the Property as tenants in common with undivided interests in the entire 40 acres: the Kapelas, 75 percent; the Sferras, 25 percent.[2] CP 228-29. The Property was originally purchased by Army and Betty Seijas in 1947 as part of a sixty-plus acre farm. CP 229. Army and Betty had two daughters, Betty Lou Kapela and Gloria Sferra, whose respective bequests give rise to the current 75/25 split between the cousins. CP 229. In addition to their 75 percent interest in the Property (sometimes called the "Back 40"), the Kapelas also solely own the balance of the original farm, an adjacent 20-plus acre property, sometimes called the "Front 20." CP 229. Betty Lou Kapela and her husband, Robert, live on the Front 20.

---

[2] The members of Appellant Overlake Farms B.L.K. are Betty Lou Kapela, her husband Robert Kapela, and their children Robert Kapela, Cristina Dugoni, and Dana Kapela. CP 33, 923. The members of Appellee Bellevue – Overlake Farm are Gloria Sferra's children, Lisa and Linda Sferra, and their children. CP 33, 923.

The Kapelas have used the Property primarily for grazing the horses they board as part of their family business on the Front 20. CP 229. The Sferras have permitted this activity (without receiving any share of the horse boarding profits). At trial, the Sferras testified that they would be pleased to sell their 25 percent interest to their cousins for fair market value. 2/21 RP 110-11; 2/21 RP 123-24. The highest and best use of the Property is a 38-lot development with construction of very high-end homes. 2/19 RP 165-167; 2/25 RP 11-15. The Kapelas have testified that they prefer to keep the Property indefinitely in its current, undeveloped state. The Sferras were content to be silent partners with Kapelas' keeping the Property in its current, undeveloped state until the Kapelas instituted this lawsuit seeking a partition that would have left the Sferras with the least desirable part of the Property (the northern strip, which is bisected by a wetland, has power lines running its length, and which borders the condominium development). As the Kapelas have sought partition, the Sferras have acted only to protect the value of their 25 percent interest in the Property.[3] At trial, both parties' appraisers agreed that the Property's highest and best use would be high-end residential development with

[3] At trial, the Sferras testified that the Property's unique attributes could lead to potential development as a horse farm or city park if the Property were offered for sale. 2/21 RP 101-04; 2/21 RP 119-20.

homes selling at prices ranging from $1.5 to $2.5 million (or sale to a developer). CP 230-32; 2/21 RP 118-19; 2/25 RP 32-33.

C. The Cousins Have had a Dysfunctional Relationship with Respect to all Matters Relating to the Property.

The Property was formerly owned as a partnership, but in 1999 the partnership was dissolved, resulting in the current tenancy-in-common. CP 925. Since the late 1990s there has been no written agreement governing the use or disposition of the Property. CP 925.

During the past fifteen years, the cousins have been unable to agree on the management, uses, and potential division of the Property. As Betty Lou Kapela put it, "[t]he parties cannot agree on a plan for segregation. . . . [o]r division of the subject property . . . . [o]r on basic matters relating to the use of the subject property, or management. . . . Yeah, that's true." CP 845-47.

During the period 2000-2010, the cousins tried to reach an agreement either to physically divide the Property according to their respective 75 percent and 25 percent interests, or to agree on a purchase by the Kapelas of the Sferras' 25 percent interest. CP 230. These efforts, which included a multi-day mediation, did not lead to a compromise. CP 230.

In 2003, Betty Seijas—Betty Lou Kapela's mother and Linda and Lisa Sferras' grandmother—waded into the dispute, trying "to segregate" the Property "so that there would be no bickering over the property after [her] death." CP 144. But despite the intervention of the family matriarch, the cousins remained unable to resolve the matter by partition or by purchase and also disagreed on many matters relating to the use of the Property.[4]

D. The Kapelas Sue Their Cousins.

On July 28, 2011, the Kapelas sued their cousins to require physical partition of the Property. CP 1-5. The Sferras responded by seeking a partition by sale. CP 6-11. Sale would enable the Kapelas to buy the Sferras' interest at a price determined by the market of bidders and wind up owning the entire Property, paying only fair market value for the Sferras' one fourth.

After a year-and-a-half of litigation, including another fruitless mediation, the case went to trial before Judge Yu in February 2013.

At trial, the main issue was whether physical partition of the Property would result in great prejudice—i.e., material economic loss.

---

[4] The Kapelas assert in their brief that Betty "directed" the Sferras to use the northernmost ten acres and the Kapelas to use the remaining acres, but as Judge Yu found, "[w]ith respect to Plaintiff's assertion that there was an understanding that Defendant would accept the northern strip as a basis for partition, Plaintiff did not establish that any such understanding existed." CP 233. The Kapelas do not challenge this finding on appeal.

2/27 RP 73-84; CP 231-32; Brief of Appellant ("App. Br."), pp. 10-11. The debate focused on whether the sum realized by developing a nine-lot parcel of land (resulting from physical partition) would be materially less than 25 percent of the sale price of the entire 38-lot developed Property and on the impact of any particular partition on the value of the remaining three-fourths as compared to receiving three-fourths of the market value of the whole. CP 231-32.

Experts retained by the parties created conceptual plans for development of the Property and testified about the estimated values of the Property under the various plans and in both a partitioned scenario and a development/sale of the whole. CP 231-32.

The parties' experts agreed that the Property is best suited for development of approximately 38 high-end ($1.5-$2.5 million) homes on substantial lots. 2/19 RP 165-167; 2/25 RP 11-15; 2/25 RP 32-33. But based on their differing plans and methods of estimation, the experts clashed over the value of the Property as a whole and whether physical partition would increase or diminish the value of the Property or of particular partitioned elements of the Property. CP 232.

The Kapelas' expert valued the entire Property at $5.97 million.[5] 2/20 RP 14. The Sferras' expert valued the entire Property at $11.4 million. 2/25 RP 20-21.

The expert analyses and the appraisals of resulting values were prepared before there was an appreciation of the requirement for, cost of and alternatives (if any) to a sewer extension—an issue that remained murky until after Judge Yu ruled following trial.

Thus while the sewer was the primary issue for the Referees, at trial it was unclear whether there was a viable alternative to installing the sewer, including septic, and what impact a septic alternative (had it been available) would have on value. Neither of the two appraisers' initial reports contained any recognition of the sewer issue and the impact of septic on value was not addressed in them.[6] CP 230. By the time of trial there was an understanding that the cost of a sewer extension was approximately $1.4 million, but there was no agreement on potential solutions, including septic, or on the degree to which a septic alternative would degrade the value of the one-fourth parcel compared to one fourth of the market value of a 38-lot development with a sewer. CP 231-33.

---

[5] The Kapelas' expert also valued various 9-lot parcels in the case of physical partition, and valued those parcels at between $1.44 million and $1.51 million. 2/20 RP 14-16.

[6] The parties learned about the sewer extension requirement shortly before trial and "after the preparation of expert reports." CP 230.

E. The Court Appoints Referees to Determine if Physical Partition is Feasible without Great Prejudice.

After a six-day trial, Judge Yu was "not persuaded" that there was no physical partition of the Property that would avoid great prejudice to the Sferras—i.e., this was a matter of uncertainty and a final determination of the issue would have to await the report of referees. CP 194. Judge Yu ruled that the evidence available at that point did not "convince the Court that it is not possible to carve out an equitable portion without material pecuniary loss to Defendant." CP 234. The court thus declined to award partition by sale based on the evidence at trial "subject to" a report by court-appointed referees. CP 234.

Exercising her equitable powers under RCW 52.080, Judge Yu tasked three referees with "consider[ing] and prepar[ing] a report on **whether** and how **the Property can be equitably partitioned**, subject to any owelty payment under RCW 7.52.440, and **without great prejudice**." CP 234-35 (emphasis added); *see also* CP 240-41 ("[A] majority of the Referees shall submit a report recommending a specific partition in kind of the Property, **or stating that**, under the provisions of RCW 7.52.130, **partition cannot be made without great prejudice to one or both Parties.**") (emphasis added). Judge Yu made clear that, "[a]s the parties are aware, this is not the final resolution of the parties' dispute since the

issue—the determination of an appropriate partition and of whether such a partition will result in material economic loss—is to be submitted to three referees and is then subject to further review." CP 234.

F. The Referees Unanimously Conclude That Physical Partition Is Not Possible Without Great Prejudice.

The Referees were appointed on July 17, 2013. CP 287. On February 5, 2014, after considering dossiers consisting of hundreds of pages of information presented by the parties, making visits to the Property, and holding numerous meetings with the parties, consultants, and counsel, the Referees issued their unanimous Draft Referees' Report and Recommendation ("Initial Report"). CP 717-50. The Referees outlined their view of the best physical partition of the Property should it occur (CP 733), but found that any such partition would require the one-fourth owner to build the sewer extension at a cost of about $1.4 million. CP 725-28 (discussing Bellevue City Code 24.04.100).[7] The Referees

---

[7] Specifically, the Referees analyzed Bellevue City Code 24.04.100.B.2, which provides that:

> The director shall approve a variance only if all of the following decision criteria are met:
> a. The property is more than 200 feet or such other distance as may be required by King County board of health on-site sewage regulations, via dedicated easements and/or right-of-way from the existing public sewer system or, in the case of subdivisions, the exterior boundary of the subdivision is more than 660 feet, measured in the same manner, from the existing public sewer system;
> b. The proposed septic system will not have an adverse environmental effect on potable water wells, ground water, streams or other surface bodies of water;

determined that this outcome would produce "great prejudice" as defined by the partition statute, but made a creative effort to induce the parties to reach a settlement that could avoid great prejudice from physical partition.

The Referees determined:

> Assuming the smaller nine lot parcel in the southeast Quadrant was platted first, the upfront cost of sewer extension would impose great prejudice on the value of the smaller parcel by almost any definition.

CP 737.

In an effort to avoid this outcome, the Referees proposed an agreement where the Kapelas would pay over $1 million "in cash upon partition of the Property" to cover three fourths of the estimated cost of the sewer line extension. CP 738. The Referees also called for the parties to "agree" to certain reciprocal covenants:

> c. The proposed septic system is in compliance with all applicable federal, state and local health and environmental regulations;
> d. The cost of providing sewer service to the structure will result in an economic hardship. Economic hardship is defined as an unrecoverable cost equal to or exceeding 20 percent of the fair market value of a building site with utilities in place on which the structure is to be located. (Emphasis added.)

The Referees found that the first condition was unambiguously absent because the sewer was in fact within 660 feet of the boundary of the Property and that the fourth was almost certainly absent because considering the Property as a whole, the sewer cost would probably confer a financial benefit in the form of higher lot values. CP 725-28.

Although the Referees concluded that septic systems would not be permitted on the Property under Bellevue's City Code, they went on to conclude that even if septic were a permissible alternative the "testimony of pertinent witnesses suggests that the use of on-site septic systems is inconsistent with high-end, large lot development as would be proposed with development of the Property," would potentially interfere with the new owners' use of their property, and may negatively impact the value of the Property. CP 727-28, 933.

> The Referees therefore find it critical that such an agreement be structured so that costs of the sewer extension are funded pro rata at the time they are incurred . . . . Consequently, the Referees recommend that, in order to mitigate the great prejudice resulting to the smaller parcel from a partition in kind without provision for sanitary sewer in this case, the parties enter into a reciprocal covenant.

CP 737-38. The contemplated "agreement" required the co-owners to cooperate to fund the up-front costs of extending the sewer line, fund potential future excess costs, grant each other appropriate utility easements, and "cooperate in the sewer line extension and the approval of the subdivision of the properties." CP 738-39.

No such agreement was reached. The Kapelas filed objections, disagreeing with the Referees' estimated costs, disagreeing with the timing of initial funding and timeline for subsequent funding of any excess, and arguing that the Referees' recommendation placed an "enormous burden" on them. CP 807. The Kapelas registered other objections that painted a grim picture of the endless disputes that the court would have to address had the Kapelas accepted the overall approach, which they did not. Specifically, the Kapelas argued that:

1. The City of Bellevue would support a variance to allow septic instead of sewer (notwithstanding contrary provisions of the Bellevue City Code) (CP 799-800);

2. A surety, rather than escrow, should be used to cover the Kapelas' obligation (CP 800);

3. The escrow should not be established until "it is clear that the extension is actually going to happen, e.g. approval of the developer utility extension application." (CP 800);

4. The Referees' $1.4 million sewer figure was too high by $200,000 (CP 801);

5. In the event that the soft costs exceed the escrow amount, "[t]hirty days is insufficient time to come up with additional cash of an unknown quantity. This open checkbook concept is particularly burdensome to the party pay[ing] 75% of the costs of a system they have no interest in using." CP 801;

6. If the final costs of the extension exceeded the funds in the escrow, "thirty days is insufficient to come up with additional funds. Plaintiff should not be responsible for change orders that increase cost and do not provide benefit to the system as a whole. The party paying 25% of the costs has little incentive to control cost overruns." CP 801; and

7. The Kapelas said that"[n]o part of the escrow should be used to fund any part of the sewer system that is solely for the benefit of the developing party." CP 800.

The Kapelas' opposition to critical elements of the Referees' proposed settlement agreement mirrors the cousins' longstanding inability to agree on basic elements of joint ownership of the Property. As Betty Lou Kapela testified:

> The parties cannot agree on a plan for segregation. That is true. Or division of the subject property. That is true. Or on basic matters relating to the use of the subject property, or management. I guess that would include spraying. Yeah, that's true.

CP 845-47.

Regardless of the underlying reasons, the bottom line is there was no agreement. The Referees obviously had no power to compel settlement or to recommend that the court do so.

The Referees then issued their Final Report on October 13, 2014. CP 921-49. The Final Report, like the Initial Report, was unanimous and confirmed that "the smaller parcel cannot be subdivided without provision for sanitary sewer service" at a cost of "approximately $1.4 million." CP 943. The Referees noted that the Kapelas did "not appear to be interested in the near-term development of the Property" and, if the smaller parcel were platted first the "upfront cost of sewer extension [of] approximately $1.4 million . . . would impose great prejudice on the value of the smaller parcel by almost any definition." CP 943-44. "Therefore, absent agreement between the parties, it must be assumed that the party constructing the sewer extension must bear the entire cost of that extension as an up-front cost." CP 944.[8]

The Referees also noted that, in responding to the Initial Report, the Kapelas had "suggested that [their] share of the sewer cost be provided not in cash, but in an alternative form of some kind, and that more work

[8] The Referees noted that "latecomer agreements are authorized under" Bellevue City Code, but "in a case such as this one, where one property owner constructs sewer facilities that benefit other properties, a latecomer agreement only provides the *potential* for cost reimbursement. There is no certainty under a latecomer agreement whether or when such reimbursement might occur." CP 944.

would be required to define the compatibility of single-family uses (on the smaller parcel) and horse-farm uses (on the larger parcel)." CP 946. The Sferras, meanwhile, "insisted on the availability of a cash escrow for the sewer costs." CP 947. According to the Referees, these "responses of the parties reflected their long-standing inability to agree on issues associated with the disposition of the Property." CP 947. Although the Referees were "interest[ed] in fashioning a creative solution to accommodate a partition in kind in this case, the Referees [were] forced to acknowledge that no such solution [was] feasible absent the cooperation of the parties" and "it would be counter-factual to assume such cooperation" CP 947.

The Referees found that any solution based on "cooperation would only place this Court in the position of having to police a difficult process of partition and land development over a long period of time." CP 947.

The Referees unanimously determined "that, due to the cost of the required sewer extension, a partition in kind would impose great prejudice on the smaller parcel. In these circumstances, the Referees are not persuaded that a combination of owelty and a mandatory agreement between uncooperative parties can or should play a role in addressing the issue of great prejudice." CP 947.

Accordingly, the Referees recommended the cousins be given a final ninety days to reach an agreement on the disposition of the Property.

CP 947. But absent an agreement the Referees recommended that the Property be sold with the proceeds split between the cousins. CP 947.[9]

G. The Court Adopts The Referees' Unanimous Recommendation.

Once the Referees issued their unanimous recommendations, the parties were given an opportunity to respond prior to the court's ruling. The Kapelas filed a 13-page brief, raising many (but not all) of the arguments they now raise on appeal, as well as a 9-page brief responding to the Sferras' arguments in support of the Referees' recommendations. CP 814-26, 902-10. The Kapelas also filed 45 pages of additional evidence and argument in the form of two declarations. CP 774-13, 912-16. Following oral argument and consideration of the parties' written submissions and evidence, Judge Chung adopted and confirmed the unanimous findings and recommendations of the Referees with modifications.[10] CP 918-19.

The Kapelas' motion for reconsideration was denied. CP 1006. The Kapelas appealed. CP 965.

---

[9] The Referees recommended that each party "be permitted to bid in its respective property ownership as a proportionate share of its offer, in lieu of cash." CP 949. Thus, under the proposal recommended by the Referees and approved by the Court, the Kapelas will be able to buy the entire Property by bidding in their 75 percent and paying 25 percent in cash.

[10] Judge Chung was assigned to the case following Judge Yu's appointment to the Supreme Court.

IV. ARGUMENT

A. Standard of Review.

"A partition proceeding is an equitable one, in which the court has great flexibility in fashioning relief for the parties." *Cummings v. Anderson*, 94 Wn. 2d 135, 143, 614 P.2d 1283, 1288 (1980) (citing *Leinweber v. Leinweber*, 63 Wn.2d 54, 385 P.2d 556 (1963)). "[T]he trial court is accorded broad discretion in fashioning an equitable remedy," and a trial court's selection of a particular equitable remedy in a partition case will not be overturned unless the trial court abuses that discretion. *Friend v. Friend*, 92 Wn. App. 799, 804-05, 964 P.2d 1219, 1222 (1998). "A court abuses its discretion if its decision is not based on tenable grounds or tenable reasons." *Eagle Point Condo., Owners Ass'n v. Coy*, 102 Wn. App. 697, 701, 9 P.3d 898 (2000).

When the trial court acts as the finder of fact, "an appellate court will uphold the trial court's factual findings as long as they are supported by substantial evidence." *Miller v. City of Tacoma*, 138 Wn. 2d 318, 323, 979 P.2d 429, 432 (1999) (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 819, 828 P.2d 549 (1992)). "The test of substantial evidence is whether there is 'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.'" *Id.* (quoting *Robinson v. Safeway Stores, Inc.*, 113 Wn. 2d 154, 157, 776 P.2d 676

(1989)). "Review of the findings is therefore limited to examining the record to establish whether there is substantial evidence to support each challenged finding." *Id.*

B. The Referees' Determination that the Great Prejudice Standard is Met was Clearly Correct.

Under Washington's partition statute, if "property or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof." RCW 7.52.080. "That is, the owner's right to separate ownership of property is guaranteed by statute, *'even though it can be accomplished only through the channel of a sale.'*" *Friend*, 92 Wn. App. at 803, 964 P.2d at 1221 (quoting *Huston v. Swanstrom*, 168 Wash. 627, 631, 13 P.2d 17 (1932)) (emphasis in *Friend*). Thus, "[w]hile the law always has and still does favor partition of land in kind rather than a sale thereof, yet, if such partition cannot be made without great prejudice to the owners, the court *must* order a sale." *Huston*, 168 Wash. at 630, 13 P.2d at 19 (italics added). Although the term is not defined by the statute, our Supreme Court has held that "great prejudice means material pecuniary loss."[11] *Williamson Inv. Co. v.*

---

[11] The Kapelas cited to *Hamilton v. Johnson*, 137 Wash. 92, 241 P. 672 (1925), for the proposition that "Washington courts place the burden on the party seeking a partition by sale to establish great prejudice, and require more than 'inconvenience of the other owners, or a depreciation in value of the interests by partition . . . ." App. Br., p. 30. The case actually supports partition by sale in this case. In *Hamilton,* the trial court "found that [the parties] owned the property as tenants in common and not as copartners; found that the respondents were entitled to a partition thereof; found that the property could not

Williamson, 96 Wash. 529, 537, 165 P. 385, 389 (1917). "Material pecuniary loss" is not further defined but logically depends on the cost, or prejudice, in relation to overall value.

Here, the evidence shows that great prejudice would result from any physical partition because the high cost of a sewer line extension project required to develop all or part of the Property is grossly disproportionate to the value of any one-fourth portion of the Property. A nearly 40-acre tract with 38-40 homes ranging from $1.5 million to $2.5 million can absorb the $1.4 million in sewer cost and achieve proportionately higher overall value as a result of providing sewer service to all. Such a development is the highest and best use of the Property as a whole. 2/19 RP 165-167; 2/25 RP 11-15; 2/25 RP 32-33. An approximately 10-acre tract cannot be economically developed because the entirety of the very same sewer cost would be imposed on it. The

---

be partitioned between the parties in kind without great prejudice to the respective owners . . . [and] ordered that the real property be sold." *Hamilton*, 137 Wash. at 94, 241 P. at 673. The defendant on appeal argued that the plaintiff had no right to partition, but our Supreme Court emphatically rejected this argument, holding:

> The right of partition by a tenant in common of real property is absolute, in the absence of an agreement to hold the property in such a tenancy for a definite and fixed time. Inconvenience of the other owners, or a depreciation in value of the interests by a partition, is not a defense.

Hamilton, 137 Wash. at 100, 241 P. at 675. The Court thus affirmed the trial court's order of partition by sale. Read in context, *Hamilton* says nothing about whether "inconvenience" or "depreciation in value" can suffice to meet the great prejudice standard. If anything, *Hamilton* supports the nearly opposite proposition that the court may order partition by sale even where doing so inconveniences co-owners.

Kapelas' appraiser opined at trial that the entire Property was worth $6 million. If so, one fourth would be worth $1.5 million. If the entire Property were developed with a sewer extension, the Sferras' share of the cost would be about $350,000 out of a total value of $1.5 million. But if the Sferras bore the entire $1.4 million in sewer cost in developing one fourth of the Property, the residual value of their one-fourth interest would be $100,000. It would make economic sense to spend $1.4 million to maximize the value of the whole; it makes no sense to do so to develop nine lots.[12] Even at a value of about $11 million (the Buchan offer), the sewer cost would be more than half the value of the partitioned one fourth but only about 13 percent of the value of the whole.

The court-appointed Referees closely studied the sewer extension question, which included exploring it with the parties' consultants during joint sessions and having discussions with the appropriate land use representatives from City of Bellevue. The Referees analyzed the City of Bellevue Code and determined that the Property unambiguously failed to meet the criteria for a variance under the Code. The Referees thus

[12] After trial, the Kapelas provided the Referees with a new appraisal, estimating the value of the Property at between $8.4 and $8.62 million. CP 399-402. Even taking these higher values—which would put the Sferras' one-fourth share at just over $2 million—the cost of the sewer line extension would eat up almost the entirety of the value of a nine-lot parcel and render development economically unfeasible.

correctly concluded that the sewer extension is required and the criteria for a variance to avoid this requirement are not satisfied.[13]

The Referees correctly concluded that "the upfront cost of sewer extension...would impose great prejudice on the value of the smaller parcel by almost any definition." CP 944; *see also, e.g.*, *Hegewald v. Neal*, 20 Wn. App. 517 (1978) (upholding trial court's finding of great prejudice where property worth $300,000 would be worth only $200,000 if partitioned in kind); *Snyder Fulton Street, LLC v. Fulton Interest, LLC*, 868 N.Y.S. 2d 715 (N.Y. App. Div. 2008) (concluding $1.2 million loss constitutes great prejudice where undivided property's value was $77 million).[14]

---

[13] Contrary to the Kapelas' suggestions (App. Br., pp. 39-40; addressed more fully *infra*), septic systems are not a viable or permissible alternative to a sewer line extension. But even if they were, the unchallenged evidence shows that use of septic would adversely impact the value of each lot. As the Sferras' appraiser, Bates McKee testified during trial:

> [I]n a partition scenario for a variety of reasons, the lots are smaller and more irregularly shaped. At least the partition scenarios in the northeast and southeast partitions are. As a result, you are starting off with smaller lots to start out with, and when you subtract 6,000 square feet for a septic system on them, they basically become not capable of supporting that [Buchan high-end] style [of] house.

2/25 RP 27. The Referees' agreed, finding "testimony of pertinent witnesses suggests that the use of on-site septic systems is inconsistent with high-end, large lot developments as would be proposed with development of the Property" and would potentially interfere with the buyers' use of their property. CP 727-28, 933.

[14] The Kapelas cite *Williamson Inv. Co. v. Williamson*, 96 Wash. 529, 539, 165 P. 385, 390 (1917), for the proposition that "*some* loss in value—in that case, a 10% to 30% reduction in value in a declining and depressed real estate market—is insufficient to establish great prejudice." App. Br., p. 30 (emphasis in original). But the Court did not conclude that a 10 to 30 percent reduction in value was insufficient to prove great

The Kapelas argue that the law favors partition in kind over partition by sale (App. Br., pp. 28-30). For this reason the partition statute requires sale only where the result of physical partition will be material economic loss. The Referees bent over backwards to find a workable physical partition. They developed and proposed a fairly elaborate reciprocal covenant "in order to mitigate the great prejudice resulting to the smaller parcel." CP 737-39. They were "interest[ed] in fashioning a creative solution to accommodate a partition in kind in this case," but no such agreement was possible. The Referees were "forced to acknowledge that no such solution [was] feasible absent the cooperation of the parties" and "it would be counter-factual to assume such cooperation." CP 947.

C. The Superior Court Did Not Abuse Its Discretion.

1. Appellants' Arguments are Based on Inaccurate Characterizations of the Record.

According to the Kapelas, "Judge Yu found that this 40-acre family legacy property could and should be partitioned in kind without

---

prejudice. The Court held that there was no great prejudice because a sale of the property would likely result in *even greater* loss:

> It is next urged that to divide the lot would reduce the aggregate value of the halves from 10 per cent. to 30 per cent.below its value as a whole, and that this would be great prejudice. Assuming that this is true, though respondent's witnesses could see no such excessive result, the fact remains that every one of appellant's witnesses who testified on the subject was just as positive that even a greater loss would result from a sale on the existing market, and on this point there was an absolute unanimity of opinion on the part of all the witnesses on both sides.

Williamson Inv. Co., 96 Wash. at 539, 165 P. at 390.

prejudice to the cotenants," and found that the Property could be physically separated "without any material economic loss"; thus, the Kapelas argue, the Referees and Judge Chung abused their discretion by failing to adhere to these rulings. App. Br., pp. 21-22. These assertions are the opposite of what occurred.

Judge Yu did not rule that partition was in fact possible without great prejudice; she declined to rule that great prejudice was inevitable in a physical partition and looked to the Referees to address the question further.

Specifically, Judge Yu entered these Conclusions of Law:

> 7. Defendant's claim for partition by sale is thereby denied, **subject to the report of the referees as set forth below**.
>
> 8. As the parties are aware, this is not the final resolution of the parties' dispute since the issue – the determination of an appropriate partition and **whether such a partition will result in material economic loss** – is to be submitted to three referees and is then subject to further review.
>
> 9. This Court shall use its flexible, equitable powers under the partition statute to appoint three referees under RCW 52.080 **to consider and prepare a report on whether** and how **the Property can be equitably partitioned**, subject to any owelty payment under RCW 7.52.440 and **without great prejudice**.

CP 234-35.

It was Judge Yu's intent to get the benefit of the Referees' expertise and thorough investigation of the feasibility of physical partition in making the final determination. Judge Chung acted well within his discretion in adopting that unanimous recommendation.

The Kapelas claim that it was pure speculation for the Referees to conclude that the sewer line extension was necessary, but they provide no analysis of the Bellevue code that leads to any other conclusion. App. Br., pp. 39-40.

The Kapelas also claim that the Referees' conclusion that the cousins were unable to agree to a resolution is directly contrary to "Judge Yu's finding that there was an agreement." App. Br., pp. 40-41. But Judge Yu made no such finding. There was no such agreement: the Referees proposed an agreement, but each party separately rejected it. In Judge Yu's June 6, 2013, Findings of Fact, she merely noted that Kapela's representative "Cristina Dugoni *testified* that Plaintiff would fund, or would enter into a covenant for future funding, of its 75% share of the sewer improvement expense *if sewer extension were necessary* to develop the Property." CP 230. But Ms. Dugoni and her family did not adhere to this testimony.[15] To this day, the Kapelas incorrectly maintain that the

[15] The trial testimony was equivocal at best:

sewer extension may not be necessary. App. Br., pp. 39-40. Judge Yu also found that "[t]here were differences of opinion among the expert witnesses on several issues including ....(7) the feasibility of sharing in common development burdens, such as the cost of offsite sewers, if needed, and the co-location and sharing of storm water facilities." CP 233. The Kapelas' subsequent disagreement with nearly every element of the Referees' recommended covenant removes any doubt about their refusal to share the cost.

> Q. And do I understand correctly that you, in speaking for the plaintiff, are offering to pay approximately $1.2 million toward the sewer construction project if that's what has to happen to develop one-fourth of the property?
> A. If that's what has to happen, that would be fair and equitable, I think.
> Q. So you are offering to pay for that on a current basis, not sometime in the future?
> A. No. We'd pay for it on a current basis when and if it's -- if that happened.

2/19 RP 115.

> Q. . . . I want to be clear, what was your understanding of his question?
> A. Well, he obviously wants to know -- I think he asked whether we would put $1.2 million towards a sewer expansion project, if that was deemed -- if the whole property was going to be developed. It seems like that's very reasonable to do that.
> Q. So would you be willing to put that money up when the other side was willing to put their money up?
> A. When the other side is willing to put their money up. A developer might just decide to do septic.
> Q. You weren't agreeing to just unilaterally put a quarter of whatever the sewer cost is up somewhere?
> A. Well, I think that would have to be further looked at by the developer. It seems kind of a waste of money to put it up right now. It may not happen for -- when a developer would be ready, then it would be done.

2/19 RP 142-143.

The Kapelas argue that the superior court relied on the parties' failure to agree in rejecting physical partition and abused its discretion in failing to bring about an agreement. App. Br., pp. 34-38, 42-44. Neither the Court nor the Referees can compel an agreement. But the issue of agreement is a red herring in light of the statutory mandate. The court did not base its order of sale on the parties' failure to agree, but on the great prejudice that would inevitably result from physical partition. Where there is great prejudice, a sale is mandated under Washington law. *Huston v. Swanstrom*, 168 Wash. 627, 630, 13 P.2d 17 (1932) ("[I]f [physical] partition cannot be made without great prejudice to the owners, the court *must* order a sale.") (emphasis added). The Referees tried to promote an agreement, but this admirable effort was arguably not even permissible under the statute. Once the Referees found great prejudice, the Sferras were entitled to partition by sale.

That an agreement could potentially avoid great prejudice does not distinguish this case from any other case. All outcomes mandated by law and fact can potentially be avoided by settlement. The conscientious Referees made a valiant effort to effect a settlement. But courts are not charged with compelling agreements in order to avoid a result otherwise compelled by law. *See Wilcox v. Willard Shopping Ctr. Associates*, 208 Conn. 318, 328-29, 544 A.2d 1207, 1212-13 (1988) ("[W]e find no error

in the refusal of the trial court to entertain [defendants'] offer to purchase [plaintiff's] interest and enter into a lease with him . . . At best, it has made an offer of settlement and compromise which has not been accepted by [plaintiff]. Accordingly, the referee properly refused to consider the offer in his deliberations.").

The Kapelas argue that the Referees and Judge Chung concluded that the Property could be physically separated with no economic loss. App. Br., pp. 1, 2, 22, 26, 31-32, 34. For example, the Kapelas claim "[i]t was undisputed, as Judge Yu, the Referees and Judge Chung found, that the property was capable of physical division without any material economic loss to the cotenants." App. Br., p. 22. There is no basis for this contention. The Referees' Initial and Final Reports both found that physical partition of the Property was not possible without great prejudice. *See supra*, § III.F. CP 737; CP 944. In their Initial Report, the Referees made a recommendation for a specific partition plan that they believed would be equitable if the Parties entered into a complex, long-term agreement that included sharing the sewer cost. When the Parties made no such agreement, the Referees adhered to their consistent determination that great prejudice would arise from any partition of one fourth of the Property and recommended that the court order partition by sale. This

outcome is entirely consistent with the Referees' findings and is amply supported, in fact compelled, by evidence.

The Kapelas' argument that Judge Yu made a ruling calling for physical partition is clearly wrong for reasons previously outlined (*supra*, § IV.C.1), and so is the legal premise for their argument that the Referees would be bound by any such ruling. In *Hegewald v. Neal*, "the court heard extensive evidence and initially ruled that there should be partition in kind." 20 Wn. App. 517, 519, 582 P.2d 529 (1978). The court then appointed "three referees with directions 'to examine the property in question and make such further investigation as necessary as to the feasibility of physical partition . . . and to submit a plan for such physical partition if the same is possible.'" *Id.* (alteration in original). The three referees could not agree on a conclusion: two filed a report recommending partition by sale, one filed a report urging physical partition. *Id.* at 519-20. The court heard arguments and subsequently "reversed its initial decision and entered findings based upon the evidence previously received and the report of the two referees. It ordered partition by sale rather than partition in kind." *Id.* at 520. On appeal, the appellant argued that the referees were bound by the superior court's initial ruling and thus "ha[d] authority only to devise a method of partition in kind." *Id.* The court held "[RCW 7.52.130] authorizes the procedure adopted by the court and the

referees whereby an initial determination for partition in kind can be reconsidered by the court if the referees report back that partition cannot be made without great prejudice to the owners and the court is satisfied that such report is correct." *Id.* at 521. As the court noted, the initial order appointing referees "specifically directed the referees to consider the feasibility of physical partition" and the partition statute specifically "provides for the contingency that although an initial order of partition in kind has been entered, the referees may find, after investigation, that it cannot be accomplished without great prejudice to the owners." *Id.* at 520-21.

Judge Yu ordered the Referees to determine if physical partition was feasible without great prejudice. The Referees unanimously determined it was not for sound reasons, and Judge Chung properly exercised his discretion in adopting this recommendation.

2. The Superior Court's Factual Conclusions Are Supported By Substantial Evidence.

The Kapelas argue that the Referees improperly "speculated that a [septic] variance would not be granted by finding that a sewer connection was required based on undisclosed 'interviews with [undisclosed] members of the City of Bellevue's utility division.'" App. Br., pp. 39-40 (quoting CP 943). This assertion is inaccurate. Each of the listed criteria

for septic must be met. Bellevue City Code 24.04.100.B.2 (footnote 7, *supra*). The distance from the sewer to the property line is not in dispute and defeats any septic alternative. CP 930-33. The Referees also noted

> the testimony of pertinent witnesses suggests that the use of on-site septic systems is inconsistent with high-end, large lot developments as would be proposed with development of the Property. On-site systems can interfere with an owner's desire to locate patios, sport courts, pools, and other site amenities typically associated with this type of development. Furthermore, on-site disposal of domestic sewage may be perceived as inconsistent with the high-end nature of any proposed development of the Property.

CP 933.

The Kapelas accuse the Referees of improperly "[s]peculating on future development scenarios." App. Br., p. 40. But considering the prospects for developing undeveloped property does not "contravene[]" the principles underlying partition (App. Br., p. 40); to the contrary, it is reasonable, appropriate, and routine.[16] Thus, for example, in *Hegewald v. Neal*, the court found there was substantial evidence supporting the trial court's order of partition by sale where a "witness . . . testified that if the land is partitioned in kind, it cannot be feasibly developed for the logical higher and better use of a resort-recreational development." 20 Wn. App.

---

[16] The Kapelas claim that considering the prospects for development is inappropriate because courts in partition actions "must look[s] to [a property's] *current* fair market value." App. Br., p. 40 (emphasis in original). But certainly the Kapelas cannot dispute that the development prospects of a property—including the costs required to build in the future—affect the current market value of a property.

at 526, 582 P.2d at 534. And in *Friend v. Friend*, the court looked to local ordinances to determine that a proposed subdivision "conflict[ed] with local zoning and subdivision requirements and is prejudicial to the parties." 92 Wn. App. 799, 801-02, 804, 964 P.2d 1219, 1221-22 (1998). The court made this determination despite the fact that the attempted partition had not been submitted to the county for review. *Id.; see also Borzenski v. Estate of Stakum*, 195 Conn. 368, 489 A.2d 341 (Conn. 1985) (considering the likely preferences of potential buyers in determining that partition by sale was appropriate).

Finally, the Kapelas assert that the Referees' lacked substantial evidence to find that, absent an agreement, the Sferras would bear the full cost of the sewer extension. According to the Kapelas, that conclusion is "contravened by Judge Yu's finding that there was an agreement." App. Br., pp. 40-41. But there was no finding of an agreement. At trial, the Kapelas' representative equivocated as to whether they would fund their share of the sewer development expense. CP 115; CP 142-143 (quoted above at footnote 15). Over a year later, when the Referees proposed an agreement to handle funding and improvements, the Kapelas rejected it and strenuously objected to fundamental terms of the proposal. The record before Judge Chung reflected the parties' longstanding inability to agree on *anything* concerning the Property and the fact that the Kapelas

continued to maintain that sewer improvements are not needed to develop the Property.

3. The Referees and the Superior Court Did Not Impermissibly Rely on the Cousins' Inability to Agree.

The Kapelas insist that Judge Chung erred in "adopt[ing] . . . the Referees' recommendation to direct a judicial sale of the property based on the potential for future disagreement" between the cousins. App. Br., p. 35. The parties' inability to agree on any matter related to the Property is not a "potential for future disagreement." It is a longstanding and current dispute—one that the Referees attempted to resolve by fostering an agreement to avoid great prejudice. The Referees' attempt failed. But the Referees do not have the authority, nor does the court have the authority, to compel an agreement.

More fundamentally, where there is great prejudice a sale is mandatory. *See Huston v. Swanstrom*, quoted above. Once the Referees determined that there was great prejudice, their only authorized course was to recommend sale. Their detour into what amounted to a mediation effort was creative but did not succeed. Because the trial court agreed with the Referees' unanimous finding of great prejudice, the trial court also was compelled to order a sale. The trial court does not have "discretion" to order the parties to arrive at an agreement. That the

Referees also made observations about the likely impossibility of such an agreement is beside the point.

The Kapelas also now try to characterize the dispute as one over the proper mechanism for funding the improvement. App. Br., pp. 18, 24, 40-41. In fact the cousins were really at loggerheads over whether a sewer line should be built at all. In the event of partition, the Sferras wished to receive fair market value for their share of the Property; the Kapelas wanted to keep it for their personal horse pasture. But what controls is the correct determination that physical partition results in material economic loss, which is measured by determining the highest and best use of the Property and then determining if physical partition results in such a loss. If so, the statute mandates a partition by sale.

The argument that failing to effect a settlement was an abuse of discretion (App. Br., pp. 42-44) is simply baseless and is accompanied by no citation of authority.

The admitted inability of the parties to work together does, however, further support the determination that partition by sale is the correct course of action in this case. The court is not required to adopt a remedy that would force parties to maintain a cooperative relationship indefinitely when the parties have clearly shown their inability to do that

very thing. As the *Hegewald* court noted, quoting the Iowa Supreme Court:

> The object of partition proceedings is to enable those who own property as joint tenants, or co-parceners, or tenants in common to so put an end to the tenancy as to vest in each a sole estate in specific property or an allotment of the lands or tenements. It contemplates an absolute severance of the individual interests of each joint owner, and, after partition, each has the right to enjoy his estate without supervision, let, or hindrance from the other. Unless this can be accomplished, then the joint estate ought to be sold, and the proceeds divided. Courts should be, and are, adverse to any rule which will compel unwilling persons to use their property in common.

Hegewald, 20 Wn. App. at 523, 582 P.2d at 532 (quoting *Brown v. Cooper*, 98 Iowa 444, 67 N.W. 378 (Iowa 1896)).[17] Here, the covenant proposed by the Referees—and rejected by the Kapelas—would have forced the parties to cooperate in complex ways for an extended period with the court potentially involved in resolving scores of disputes. This is precisely the outcome that partition actions are designed to avoid. And in this case the cousins' inability to agree "would only place th[e superior] Court in the position of having to police a difficult process of partition and land development over a long period of time." CP 947. The partition statute mandates sale in this case; it certainly does not contemplate that the

[17] The court in *Hegewald* added that "the minority report, by recommending that the hot springs be retained in common, that cost of improvements be assessed to the owners proportionately, and that the waters be distributed and charged for on a monthly basis, lends support to the conclusion that partition is not feasible." *Hegewald*, 20 Wn. App. at 523, 582 P.2d at 532.

court should appoint itself or a special master to become the parties' construction project manager and mediator through a complex and costly project with many tangential issues.

4. A Material Economic Impact on the Value of the One-Fourth Interest Compels Partition by Sale.

The Kapelas argue that the superior court erred by ordering a sale of the Property based 'only' on great prejudice to the Sferras, not to all owners of the Property. App. Br., pp. 32-33. Caselaw and the purpose of the partition statute compel rejection of this argument, which was not in any case preserved for appeal.

The main focus of the trial before Judge Yu was whether physical partition would materially devalue the smaller parcel as compared with one fourth of the actual fair market value of the whole. At no time during the trial, during the preparation of findings and conclusions, during any of the year-long proceedings before the Referees or during the briefing leading to Judge Chung's adoption of the Referees' Recommendation did the Kapelas argue that great prejudice had to be shown to both owners before partition by sale could be ordered.

The first time the Kapelas even noted the use of the plural "owners" in the partition statute was in a Motion for Reconsideration filed

after Judge Chung's ruling.[18] However, they did not argue that great prejudice to one owner was insufficient to support partition by sale. Instead, in a garbled statement, they referred to the term "owners" in the statute and then argued that ordering the parties to enter into a covenant would *avoid* prejudice to *both owners.* In short, the argument now being advanced on appeal was *never* advanced below.

The Kapelas did not simply fail to make the argument below that both owners had to be prejudiced; they acquiesced repeatedly in the opposite—and correct—interpretation of the partition statute. The Kapelas submitted briefs and proposed findings and conclusions advancing the correct interpretation that great prejudice to one owner meets the standard, and over literally years of litigation they made no objection to the repeated adoption of this premise by two trial judges and the three Referees. The Kapelas submitted proposed Findings and

---

[18] In their motion for reconsideration, the Kapelas wrote "partition by sale is only allowed by RCW 7.52.080, when no other option is available to avoid great prejudice to the "owners." [Emphasis added] . . . But for, the lack of a sewer cost-sharing covenant farm could be partitioned in kind without great prejudice to both owners. Such a covenant should be imposed by the Court." CP 951, 953. The Kapelas' Motion for Reconsideration simply does not raise the issue they now seek to raise and does not even qualify as "passing treatment" of an issue. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, 292 (1998), *as amended* (May 22, 1998) (citing *State v. Johnson,* 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)). Consequently, the Kapelas have waived this argument. *See Karlberg v. Otten*, 167 Wn. App. 522, 531–32, 280 P .3d 1123 (2012) ("A failure to preserve a claim of error by presenting it first to the trial court generally means the issue is waived. While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised." (citing *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967); RAP 2.5(a).

Conclusions to Judge Yu, who largely adopted their version, which included the finding that the Sferras "did not meet [their] burden of proof to convince the Court that it is not possible to carve out an equitable partition without material pecuniary loss ***to Defendant***—i.e., such that the relative value of the share would be materially less than the sum Defendant would realize from a one-fourth share of the proceeds of a sale of the whole." CP 234 ("FINDINGS OF FACT AND CONCLUSIONS OF LAW [PROPOSED BY PLAINTIFF] agreed to by Def" and signed by Judge Yu, Conclusion 6, p. 7). They made no objection to the same legal conclusion embodied in Judge Yu's orders referring the matter to the Referees or to other comparable determinations by the trial court. *See, e.g.*, CP 240-41 ("...a majority of the Referees shall submit a report recommending a specific partition in kind of the Property, or stating that, under the provisions of RCW 7.52.130, partition cannot be made without great prejudice to one or both Parties."); *see also* CP 234 (at February 2013 trial, "Defendant did not meet its burden of proof to convince the Court that it is not possible to carve out an equitable partition without material pecuniary loss to Defendant.")

Judicial estoppel bars the Kapelas from advancing on appeal the opposite of a legal position they took, which was adopted below, and

which was relied upon by the trial court, the Referees, and the parties in shaping the proceedings below.

Judicial estoppel applies to prevent "a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn.App. 222, 224-25, 108 P.3d 147 (2005). "The doctrine seeks 'to preserve respect for judicial proceedings,' and 'to avoid inconsistency, duplicity, and ... waste of time.'" *Arkison v. Ethan Allen, Inc.*, 160 Wn. 2d 535, 538, 160 P.3d 13, 15 (2007) (quoting *Cunningham,* 126 Wn.App. 225) (alteration in *Cunningham*). "A party need not finally prevail on the merits in the first proceeding. Rather, judicial acceptance means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition." *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 n. 5 (6th Cir. 1982). Moreover, the doctrine applies where, as here, a party takes one position at trial and an inconsistent position on appeal. *See Sechrest v. Ignacio*, 549 F.3d 789, 805 (9th Cir. 2008) (barring the State from "asserting one position, and then later seeking an advantage by taking a clearly inconsistent position" on a legal issue—whether a party was required to delete "defaulted claims"); 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4477

Preclusion of Inconsistent Positions—Judicial Estoppel (2d ed.) ("[G]enerally a party may not on appeal change a position deliberately advanced in the trial court.").

Judicial estoppel applies when: (1) a party asserts a position that is "clearly inconsistent" with an earlier position; (2) judicial acceptance of the inconsistent position would indicate that either the first or second court was misled; and (3) "'the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party.'" *Arkison*, 160 Wn.2d at 538-39 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S.Ct. 1808 (2001)). The doctrine applies to inconsistent legal positions where the three criteria are satisfied. *In the Matter of the Estates of Smalding v. Moen*, 151 Wn. App. 356, 363 (Div. 1 2009) (estate barred from arguing order was final and appealable after contending otherwise below); *see also Sechrest, supra.*

The Kapelas' current argument is completely inconsistent with the approach they urged to be correct below. The Kapelas would derive an unfair advantage if their inconsistent position were accepted on appeal because the main focus of the evidence, the work of the trial court and of the Referees was on evaluating great prejudice to the partitioned one fourth of the Property. The second criteria, whether one or the other court was misled, also applies with great force here. All of the participants in

the litigation below shared the same view of the applicable criterion. Judge Yu adopted the view that great prejudice to one party sufficed and conducted the trial on that basis; she specifically charged the Referees with applying the same criterion, and they carried out their work on behalf of the Court on the basis of that view of the law; and Judge Chung analyzed the Referees' Recommendation under the same legal criterion. If the Kapelas were now permitted to change the legal rules after the trial court and Referees have done their work, the lower court will have been seriously misled and will have wasted years of judicial effort.

In fact, the Kapelas' current argument is invalid. But, even if it were otherwise, their attempt to reverse course cannot be countenanced at this stage of this case.

The Kapela's argument is invalid because it ignores the equitable underpinnings of the partition statute and because Judge Yu's interpretation of the statute is in accord with other courts dealing with substantively identical provisions.

In *Haggerty v. Nobles*, 244 Ore. 428, 419 P.2d 9 (1966), the Oregon Supreme Court, applied a statute containing the identical criterion to RCW 7.52 ("without great prejudice to the owners"; 419 P.2d at 11). The contemplated physical partition would have awarded a parcel of 85 acres containing a dwelling, farm buildings and a water supply to one

party and portions of the 600 remaining acres to other parties. There would have been no prejudice to the party receiving the 85 acres with improvements and water—in fact, the opposite. Whether there would be prejudice to the Kapelas from physical partition was not the subject of a finding (since the Kapelas never raised their current argument), but, assuming great prejudice is limited to the Sferras' one-fourth, *Haggerty* is directly on point. Based on a finding of great prejudice limited to those receiving the 600 acres and none to the party receiving the improved property, the Court affirmed the trial court's order of partition by sale where the statute required great prejudice to the "owners." Id. at 12-13.[19]

There has been universal agreement throughout this proceeding that the governing criterion in a partition action is arriving at an "equitable" result. It is self-evident that an "equitable" result does not

---

[19] 244 Or. 428, 434-36, 419 P.2d 9 (Or. 1966) ("In general, the evidence on behalf of the plaintiffs is to the effect that the market value of 600 acres sold separately and apart from 85 acres on which the buildings and well are located would be diminished by 20 to 25 per cent."). The full statutory provision at issue in *Haggerty* (ORS 105.245) read:

> 'If it is alleged in the complaint and established by evidence, or if it appears by the evidence to the satisfaction of the court without an allegation in the complaint, 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 of the property, 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. The court shall appoint three referees to partition the property and shall designate the portion to remain undivided for the owners whose interest remain unknown or not ascertained.'"

Haggerty, 244 Or. at 433.

occur where one owner is treated inequitably to any material degree. The Kapelas' submissions to the trial court repeatedly acknowledge the importance of achieving an "equitable" partition,[20] and they registered no objection to Judge Yu's Order [appointing referees] in which she described the controlling criteria as

> **whether** and how **the Property can be equitably partitioned**, subject to any owelty payment under RCW 7.52.440, and **without great prejudice**."

Courts uniformly hold that physical partition may not be ordered if it cannot be done equitably. See *Sung v. Grover*, No. CV020815521S, 2003 WL 1962830, at *6 (Conn. Super. Ct. Mar. 27, 2003) ("Clearly, the value of the rest of the property would be reduced as a result of the subtraction of the one-acre parcel from it [sought by defendants]. This would be an inequitable result. An equitable partition in kind is not feasible in this situation."); *Georgian v. Harrington*, 990 So. 2d 813, 817 (Miss. Ct. App. 2008) (upholding partition by sale of a six-parcel property where one of the parcels was so disproportionately valuable as to make an even distribution impossible); *Keen v. Campbell*, 249 S.W.3d 927, 932 (Mo. Ct. App. 2008) (upholding partition by sale where "dividing in kind the northern seven or eight acres as Appellant's counsel suggests would result

[20] Plaintiff's Proposed Findings and Conclusions (as adopted), Conclusion of Law 1, p. 6. CP 233.

in Appellant obtaining the most productive portion of the property," which would "materially lessen the money value of [appellee's] interest," and where "in order to effectuate a proportionate division designed *not* to lessen the money value of [appellee's] interest would require a proportionate division of the most productive land into smaller tracts, making farming operations more cumbersome.").[21]

The purpose of allowing partition by sale is to preserve all parties' right to receive the benefit of their share of the value of the property. In cases like this one, that result cannot be achieved except by sale of the whole. As the Court noted in *Friend,* "[T]he owner's right to separate ownership of property is guaranteed by statute, '*even though it can be*

---

[21] The out-of-state cases cited by the Kapelas in support of their argument are not, on their facts, inconsistent with the great prejudice criterion applied by the trial court. In *Schnell v. Schnell*, the issue was not whether one of two owners was greatly prejudiced, but whether partition in kind should be denied because maintaining the property as a whole would *benefit* the party who was skilled in ranch management. 346 N.W.2d 713, 717 (N.D. 1984). Similarly, in *Delfino v. Vealencis*, the trial court had based its ruling in part on the benefit to one party of maintaining the property as a whole while disregarding the severe detriment (i.e., loss of home and perhaps livelihood) to the other owner. The Connecticut Supreme Court merely held that the court must consider the "interests of all of the tenants in common," and that, under the circumstances, "the interests of all owners will better be promoted if a partition in kind is ordered." 181 Conn. 533, 544, 436 A.2d 27, 33 (Conn. 1980). In *Gartner v. Temple*, the South Dakota Supreme Court held that the trial court's determination of lack of great prejudice was supported by substantial evidence, including testimony from appellant's expert witnesses, and attached importance to the personal investment of time and energy made by one of the two parties—i.e., finding prejudice *from* a sale of the whole to *one* owner supported partition in kind. 2014 S.D. 74, ¶ 15, 855 N.W.2d 846, 852-53 (S.D. 2014). None of the cases relied on by Kapelas address a situation where one of two parties will lose most of the economic value of its interest as a result of partition in kind.

accomplished only through the channel of a sale.'" *Friend*, 92 Wn. App. at 803, 964 P.2d at 1221 (quoting *Huston v. Swanstrom*, 168 Wash. 627, 631, 13 P.2d 17 (1932)).

The argument the Kapelas belatedly advance on this appeal would lead to nonsensical results. Where four owners share a property proposed to be physical partitioned to the great prejudice of three of the owners but not the fourth, the result would be physical partition, treating three-fourths of the owners inequitably. Even in cases of two-owner property, it will almost always be possible to find a physical partition that injures only one. For example, in this case, it would potentially be possible to assemble a one-fourth parcel in the center of the property taking advantage of all of the most advantageous features and leaving the Kapelas with three quarter ownership of the fringe areas, wetlands, steep slopes, power lines and street exposure. Imposing the sewer cost on one-fourth of the Property is roughly equivalent in inflicting great prejudice on only one owner.

In *Hegewald*, the property subject to partition contained an undividable hot spring that substantially added to the value of the land, making partition impossible without great prejudice. But there was certainly a way to divide the property so that only the minority tenant suffered economic loss: give the whole hot spring to the majority tenant.

The lower Court's exercise of discretion in avoiding an inequitable physical partition must be affirmed as long as it is supported by substantial evidence. The essence of the ruling, and of the Referees Recommendation, is that physical partition will render the Sferras' property economically unfeasible for development whereas the only prejudice to the Kapelas in case of a sale is "the family element" of the Property, "including that the property contains several memorial sites for deceased family members." App. Br., p. 32. While "sentimental reasons, especially an owner's desire to preserve a home, may also be considered, . . . they are necessarily subordinate to the pecuniary interests of the parties." *Fike v. Sharer*, 280 Or. 577, 582-83, 571 P.2d 1252, 1254 (Or. 1977) (citing *Anderson v. Anderson*, 27 Ga. App. 513, 108 S.E. 907 (Ga. App. 1921)).

V. CONCLUSION

For the foregoing reasons, the superior court's ruling should be affirmed.

Respectfully submitted this 28th day of December, 2015.

CALFO HARRIGAN LEYH & EAKES LLP

By: s/ Arthur W. Harrigan, Jr.

Arthur W. Harrigan, Jr., WSBA #1751
Tyler L. Farmer, WSBA #39912
999 Third Avenue, Suite 4400
Seattle, WA 98104
Tel: (206) 623-1700
Fax: (206) 623-8717
E-mail: arthurh@calfoharrigan.com
E-mail: tylerf@calfoharrigan.com

Attorneys for Defendant-Respondent Bellevue-Overlake Farm, LLC

CERTIFICATE OF SERVICE

I, Florine Fujita, declare that I am employed by the law firm of Calfo Harrigan Leyh & Eakes LLP, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On December 28, 2015, I caused a true and correct copy of the foregoing document to be served on the parties listed below in the manner indicated:

Brian E. Lawler Denise M. Hamel Jameson Babbitt Stites & Lombard, PLLC 801Second Avenue, Suite 1000 Seattle, WA 98104	☑ Via Legal Messengers ☐ Via First Class Mail ☐ Via Facsimile ☐ Via Electronic Mail
Howard M. Goodfriend Smith Goodfriend, P.S. 1619 8th Avenue North Seattle, WA 98109	☑ Via Legal Messengers ☐ Via First Class Mail ☐ Via Facsimile ☐ Via Electronic Mail

DATED this 28th day of December, 2015.

s/ Florine Fujita
Florine Fujita
999 Third Avenue, Suite 4400
Seattle, WA 98104
Tel: (206) 623-1700
Fax: (206) 623-8717
E-mail: florinef@calfoharrigan.com