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Court of Appeals
Division I
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UNPUBLISHED OPINION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?

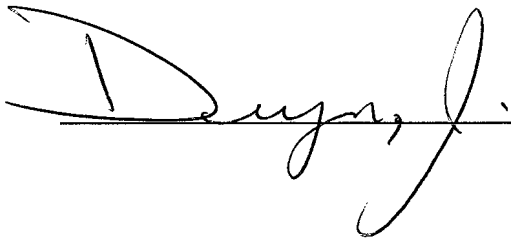
Because the legislature has spoken in this area of law, any decision to depart from its duly enacted scheme should be supported by all necessary factual findings and legal conclusions.

III

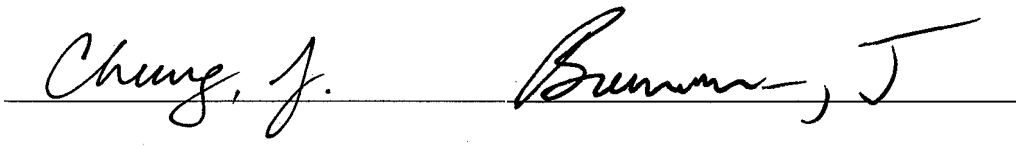
On remand, the trial court must take the necessary steps to partition the property and the ownership interests thereto. As a single-family residence in a single-family zone, statutory partition appears possible only by sale. See Friend, 92 Wn. App. at 804-05 (where partition in kind conflicts with local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