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

BEN CHRISTOPHER SCHOENWALD, as Personal Representative for the ESTATE OF BENNIE WALTER SCHOENWALD, Deceased, Respondent, v. AMERICAN TRADING AND EXCHANGE CORPORATION, formerly TRI-NITE MINING COMPANY, a Washington corporation; ELIZABETH HOFFMAN; and JANET M. STUART, Appellants.	)	No. 30372-1-III UNPUBLISHED OPINION

Brown, J. • First, Janet M. Stuart appeals the probate court's summary decision for Ben C. Schoenwald, personal representative of the Estate of Bennie W. Schoenwald, rejecting her adverse possession claim to certain Stevens County real property she held as a tenant in common with her former husband, the decedent. Second, Ms. Stuart appeals the court's decision to partition in kind the contested real property. Because Ms. Stuart fails to establish she adversely held the real property and the probate court did not abuse

its broad discretion in dividing the property, we affirm and deny her attorney fee and costs requests for this appeal.

FACTS

While married, Ms. Stuart and Mr. Schoenwald acquired a community interest in two Stevens County properties. The couple held the Mine Hole property in fee simple and held the Joe Creek property as real estate contract purchasers until May 25, 1995, when their marriage was dissolved. The dissolution court decreed all real property belonging to the marital community, "shall hereafter be owned by the parties as tenants in common." Clerk's Papers (CP) at 253. Ms. Stuart was to retain the family home for 18 months and pay the taxes and contract obligations. Then, the real property was supposed to be sold and the proceeds distributed between the parties, "with 60 percent going to the wife and 40 percent going to the husband." CP at 254. The property was not sold, but the former spouses still acted consistently with the dissolution decree.

After the real estate contract was paid off in March 1998, USB Mortgage Company mailed a letter to the Schoenwalds accompanied by the statutory warranty deed conveying the Joe Creek property to "Ben Schoenwald and Janet Schoenwald, husband and wife." CP at 291. The mortgage company notified the parties they needed to record the documents, "or the title won't be changed to your name." CP at 290. The deed was never recorded.

Ms. Stuart retained possession of the Joe Creek deed since receiving it in 1998. Mr. Schoenwald wrote to Ms. Stuart in April 2005 expressing his concern about delinquent property taxes and the possibility of losing his 40 percent interest in the property in a tax sale. Mr. Schoenwald specified, "I want to come up with an agreement so you can have your 60% and I want my 40% of the property. . . . I've notified you various times on getting this settled. And now it has to be settled." CP at 243.

Mr. Schoenwald died in August 2007. Ben C. Schoenwald was named personal representative for Mr. Schoenwald's estate that received all assets and liabilities. Ms. Stuart filed a creditor's claim against the estate to obtain cash in exchange for her 60 percent tenant in common interest in the real estate, but the estate reasoned its interest was limited to Mr. Schoenwald's 40 percent tenant in common interest and denied it. Ms. Stuart then offered to purchase the estate's tenants in common interest in the Joe Creek Property and later offered to purchase the estate's cotenant interest in both the Mine Hole property and the Joe Creek property. The parties agreed to terms, but the sale was never finalized. In 2010, Ms. Stuart again expressed her desire to purchase the estate's interest.

In July 2010, the estate sued to quiet title to its 40 per cent tenants in common interest and partition the Mine Hole property and the Joe Creek property by sale. Counterclaiming, Ms. Stuart sought to quiet title in her name, alleging adverse

possession. Both parties requested summary judgment; the estate prevailed and the court allowed the appointment of a referee under RCW 7.52.080. The court found Mr. Schoenwald's actions were "consistent with the terms that existed by virtue of the decree," and Ms. Stuart could not establish the elements of adverse possession because she did not exhibit the kind of hostility required to adversely possess the property from her cotenant. CP at 145. Ultimately, the estate acquiesced to Ms. Stuart's request for appointment of referee David J. Sitler of Am-Pac Appraisal Services of Colville, Washington. Ms. Stuart did not object to the appointment of a single referee until after his report recommending a partition in kind was filed. After considering the estate's memorandum in support of confirming the referee's report and Ms. Stuart's response, the trial court entered an order confirming Mr. Sitler's report for partitioning the property in kind. Ms. Stuart appealed.

ANALYSIS

The issue is whether the trial court erred in summarily deciding each party owned a percentage of the contested property and ordering a partition in kind.

We review summary judgment orders de novo, performing the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). "A motion for summary judgment is properly granted where 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Michak v.*

Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003) (quoting CR 56(c)). We view "the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party." *Id.* at 794.

We agree the evidence shows Mr. Schoenwald and Ms. Stuart held the disputed properties as tenants in common, with respective 40 percent and 60 percent undivided interests, since the dissolution court's decree. We, like the trial court, reject Ms. Stuart's adverse possession claims. "To establish adverse possession, the claimant must show use that was open, notorious, continuous, uninterrupted, and adverse to the property owner for the period of 10 years." *Cole v. Laverty*, 112 Wn. App. 180, 184, 49 P.3d 924 (2002) (citing *Beebe v. Swerda*, 58 Wn. App. 375, 383, 793 P.2d 442 (1990)). The use must also be hostile to the title owner's use. *Herrin v. O'Hern*, 168 Wn. App. 305, 310, 275 P.3d 1231 (2012).

Mr. Schoenwald held actual title to the property. Nothing indicates he had knowledge of Ms. Stuart's alleged hostile intent to gain exclusive ownership of the properties. In his 2005 letter, Mr. Schoenwald asserted his 40 percent interest in the property while acknowledging Ms. Stuart's 60 percent interest. Most joint estate uses are not hostile. *Cole*, 112 Wn. App. at 184. Additionally, "'in order for one cotenant to render his possession adverse to the others, there must be on his part some act or *acts of exclusive ownership* . . . making manifest the fact of a hostile holding and carrying

knowledge or notice of it to the ones out of possession.'" *Silver Surprize, Inc. v. Sunshine Mining Co.*, 15 Wn. App. 1, 21, 547 P.2d 1240 (1976) (quoting Annot., 35 A.L.R.2d Minerals-Adverse Possession § 24 at 175 (1954)). (Emphasis added.) Without hostility, Ms. Stuart's adverse possession claims necessarily fail.

Ms. Stuart next argues she adversely possessed the estate's tenants in common interest under RCW 7.28.070: "Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements." Her argument fails: "An instrument which actually passes title does not provide color of title . . . because the term 'color of title'. . . means that which is a semblance or appearance of title, but is not title in fact or law." *McCoy v. Lowrie*, 42 Wn.2d 24, 29, 253 P.2d 415 (1953) (citations omitted) (internal quotation marks omitted). Essentially, holding legal title and possessing the same property under color of title are mutually exclusive concepts.

The parties do not dispute the deed delivery vested fee simple title to the Joe Creek property in both Ms. Stuart and Mr. Schoenwald, even though it was never recorded. *See Chelan County v. Wilson*, 49 Wn. App. 628, 632, 744 P.2d 1106 (1987) ("Unrecorded conveyances of realty . . . are valid as between the parties."). And, the parties do not

dispute the Joe Creek property was held as community property at the time the decree was entered. The decree was sufficient to create a tenancy in common in the Joe Creek property. The fulfillment deed did not change that status.

Ms. Stuart argues the partition should be reversed because the court used but one referee's report. A partition action "is both a right and a flexible equitable remedy subject to judicial discretion." *Friend v. Friend*, 92 Wn. App. 799, 803, 964 P.2d 1219 (1998). Our standard of review for a trial court's order partitioning property is abuse of discretion. *Id.* at 805. The trial court had broad discretion and great flexibility to determine the division of property among the cotenants. *Cummings v. Anderson*, 94 Wn.2d 135, 143, 614 P.2d 1283 (1980).

As a tenant in common, the estate has a statutory right to partition. *Friend*, 92 Wn. App. at 803. Although partition in kind is preferred, the partition should be by sale if the property "cannot be divided without great prejudice to the owners." *Id.* Ms. Stuart requested Mr. Sitler as referee because of his local knowledge. Mr. Sitler concluded the property could be reasonably partitioned in kind and recommended a particular division. The estate asked the trial judge to confirm the referee's report. If a partition by sale is necessary, the court "may appoint one or more referees." RCW 7.52.080. Otherwise, the court will "decree a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees." *Id.* Although the partition statute

contemplates the appointment of three referees for a partition in kind, neither party requested the court appoint three referees. In *Carson v. Willstadter*, 65 Wn. App. 880, 883, 830 P.2d 676 (1992), the court stated a trial court "*may* appoint three referees to determine the rights of the owners," implying such appointment is discretionary. (Emphasis added.)

The partition statute contemplates the referee's recommendation and report "is to be considered highly authoritative and to set the direction for the court." *Carr v. Harden*, 34 Wn. App. 292, 297, 660 P.2d 1139 (1983). But, the trial court is not bound to comply with the recommendations set forth in any referee's report. *Id*. at 296. In other words, the report does not bind the court, but it "is for the use of the court to aid in the exercise of its discretion." *Id.* The parties agreed one referee was necessary to save time and money. Nothing in the record suggests Mr. Sitler's report and recommendations were biased or unreasonable. Considering all, we hold the trial court in equity did not abuse its discretion in appointing one referee as agreed by the parties, and then partitioning the property according to his report.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Korsmo, C.J.

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Kulik, J.