

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA-22-0490

IN THE MATTER OF THE ESTATE)
 OF ALBERT J. LARGHI,)
)
 Deceased.)
)
 Anthony Charles Larghi and)
 Mary Patricia Fleming,)
 Foreing Ancillary Personal Representative)
 Appellee)
)
 Marisa Root)
 Petitioner-Heir)
 Appellant)

APPELLANT’S OPENING BRIEF

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STATEMENT OF THE ISSUE

Are “nullify” and “repudiate” legally synonymous terms?

STATEMENT OF THE CASE

In the Matter of the Estate of Albert J. Larghi is an ancillary probate originally opened in 2009. Apparently, the *Estate* was inadvertently closed by the district court later that year. The beneficiaries of the *Estate* continued to negotiate the manner of distribution until it became evident the beneficiaries could not agree, so the case was re-opened in June of 2020 by the Appellant, who sought a distribution of real property in-kind.

Once the *Estate* was re-opened, the manner of distribution was mediated and settled. Appellant believed material terms were omitted from the settlement agreement, which resulted in Appellee filing a motion to enforce the settlement, and Appellant filing a competing motion to nullify or modify the settlement. The district court resolved the issue by determining Appellant had repudiated the settlement agreement by her motion to nullify or modify the settlement, and this appeal ensues.

STATEMENT OF THE FACTS

The *Estate of Albert J. Larghi* owns approximately 154 acres just south of Hamilton, Montana, on Roaring Lion Road. Appendix 1, p. 2. The property had been owned by the Decedent since at least 1975, who allowed his daughter, the Appellant, and her family to live in the ranch home for nearly forty-five (45) years. Appendix 2, ¶ 4. Decedent's Will directed the property to be split "equally, share and share alike" between his five (5) daughters, one of whom is Appellant. Appendix 3, p. 2. The Co-Personal Representatives attempted to distribute the property equally in-kind, but ultimately determined it was not feasible to do so. Appendix 4, p. 2. Nevertheless, Appellant moved the district court for an order distributing approximately 1/5 of property to her in-kind. Appendix 5. Appellant's *Motion* resulted in a settlement conference in which the parties agreed to distribute a portion of the property ("Tract 2") to Appellant, who would then be responsible for making an "equalization payment" to the other beneficiaries to ensure all would receive an equal inheritance. Appendix 6.

As set forth in the settlement agreement, both parties nominated a Realtor to conduct a comparative market analysis (CMA), although those two Realtors never timely nominated a third Realtor as required

by the settlement agreement. Appendix 7, p. 4. At some point, Appellant became concerned the settlement agreement was unworkable, so she filed a *Motion for Nullification or Modification of Settlement Agreement, Motion to Remove a Co-Personal Representative, and a Motion for an Accounting*. [DKT# 15]. In the *Brief in Support* of her *Motion*, Appellant express concern that if “the terms of the settlement agreement are not tightened up, the estate’s fear of unequal distribution will have been fulfilled.” Appendix 7, p. 6. Appellant requested a hearing on her *Motion*, but no hearing was held. No order was ever issued either granting or denying Appellant’s *Motion*.

After a year passed by, Appellant filed a second *Motion for Modification of Settlement Agreement to Allow In Kind Distributions of the Property to Petitioner and a Motion for an Accounting and Motion for a Lis Pendens*. [DKT# 24]. In her *Brief in Support*, Appellant specifically averred she “does not want to scrap the entire settlement agreement.” Appendix 8, p. 7. The district court thereafter denied Appellant’s second *Motion for Modification* and sought a response from the *Estate* whether such denial impacted the *Estate*’s position on the enforcement of the settlement agreement. Appendix 9. The *Estate* informed the district court the property was under contract and the *Estate* withdrew its

Motion to Enforce the Settlement Agreement. [DKT# 29].

The district court thereafter issued the *Order* from which this appeal is taken. The district court found Appellant “overtly repudiated the settlement agreement, as reflected in her Motion for Nullification or Modification of Settlement Agreement, Motion to Remove a Co-Personal Representative, and a Motion for an Accounting filed on April 1, 2021.” Appendix 10, ¶ 2. From the district court’s finding, it concluded “[i]n taking the overt act of repudiating the agreement, Marisa Root allowed the Estate to no longer be bound by the terms of the agreement.” *Id.*, at ¶ 5.

STANDARD OF REVIEW

When reviewing a district court's exercise of equitable powers, this Court reviews "all questions of fact arising upon evidence presented in the record" to determine if the district court's findings are clearly erroneous. *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 11, 307 Mont. 45, 36 P.3d 408 (citations omitted). The district court's determination of law is reviewed for correctness. *Id.*

SUMMARY OF THE ARGUMENT

The district court made an incorrect conclusion of law and clearly erroneous exercise of equitable power when it determined Appellant “overtly repudiated” the settlement agreement by filing her *Motion for Modification or Nullification*. Repudiation must be entire, absolute, and unequivocal. An expression of non-performance, standing alone, is insufficient for repudiation. Appellant never made a threat of non-performance. The district court misapprehend the effect of Appellant’s *Motion to Modify or Nullify* when it concluded nullification and repudiation are legally synonymous terms.

ARGUMENT

I. **The district court’s determination that the settlement agreement was repudiated was incorrect.**

The Montana Supreme Court reviews lower court conclusions and applications of law *de novo* for correctness. *VanBuskirk v. Gehlen*, 2021 MT 87, ¶ 12, 484 P.3d 924 (citations omitted). Here, the district court concluded “[i]n taking the overt act of repudiating the agreement, Marisa Root allowed the Estate to no longer be bound by the terms of the agreement.” Appendix 10, ¶ 4. In other words, the district court concluded Appellant’s *Motion for Nullification or Modification* was entirely, absolutely, and unequivocally an expression of an intent to not perform her obligations under the settlement agreement. *Chamberlin v. Puckett Const.*, 277 Mont. 198, 202, 921 P.2d 1237, 1239. Appellant expressed precisely the opposite. Twice she told the district court she did not want to “scrap” the settlement agreement. Appendix 11, p. 10 and Appendix 8, p. 7.

The district court makes “nullify” and “repudiate” legally synonymous. The district courts determination is incorrect as a matter of law. Black’s Law Dictionary defines “nullify” as “[t]o make void; to render invalid.” *Baldwin v. Board of Chiropractors*, 2003 MT 306, ¶ 40, 79 P.3d 810 (Nelson, J. dissenting). “Repudiate” is an “entire, absolute,

and unequivocal” expression of intent not to perform, which does not occur standing alone. *Chamberlin*, at 202, 921 P.2d at 1239.

Importantly, the actor who nullifies or who repudiates is determinative: a court may “nullify” a contract and a party may “repudiate” a contract, but not *vice versa*. A party cannot nullify a contract because it is a party. A court cannot repudiate a contract because it is not a party. *Grady v. City of Livingston*, 115 Mont. 47, 141 P.2d 346, 350 (1943). (“Voidable contracts are not legally void and cannot be set aside or disregarded *until they are decreed to be void by a court having jurisdiction*”) (emphasis added).

The distinction is important in this case. The district court specifically found the parties “entered into a settlement agreement.” Appendix 10, ¶ 1. The district court then concludes Appellant took “the overt act of repudiating the agreement” by filing her *Motion to Nullify or Modify*. *Id.*, at ¶ 2. The district court’s conclusion is wrong because the settlement contract could not be set aside or disregarded “until [it was] decreed to be void by a court having jurisdiction. *Grady*, at 350. In other words, the settlement agreement was enforceable until or unless the district court determined it was void. The district court never made that determination.

The district court was, in fact, informed Appellant abided by her obligations under the settlement agreement. (“Prior to the motion to enforce the settlement, Marisa Root through counsel, submitted the name of a realtor [sic] to perform a CMA. No response has been received.”) Appendix 8, p.4. The *Estate* also submitted the name of a Realtor to perform a CMA, and the next step in the process was for the two nominated Realtors to appoint a third, and the three would provide an opinion as to the fair market value of the properties. See Appendix 6, ¶ 2. The Realtors never provided an opinion, but Marisa had fulfilled her obligation to nominate a Realtor.

The record is devoid of any statement Appellant made threatening not to perform. The record is replete with Appellant’s statements seeking to modify the settlement agreement, but those statements were never accompanied with an ultimatum not to abide by the agreement if the modifications were not made. Appellant was simply asking the district court to compel modification or alternately nullify the contract.

II. The district court’s exercise of equitable power was clearly erroneous.

Montana has adopted a three-part test to determine if a finding is clearly erroneous. *Interstate Production Credit Ass’n of Great Falls v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287. First, the Court will

review the record to see if a finding is supported by substantial evidence. *Id.* Second, if the findings are supported by substantial evidence, the Court will determine if the trial court misapprehended the effect of the evidence. *Id.* (Citations omitted). Third, if substantial evidence exists and the effect of evidence has not been misapprehended the Court may still find a finding is clearly erroneous when a review of the record leaves the Court with a definite and firm conviction that a mistake has been committed. *Id.* (Citations omitted).

a. Appellant concedes the record reflects substantial evidence to find the settlement agreement was repudiated.

“Substantial evidence” is evidence that a reasonable mind might accept as adequate to support a conclusion; it may be less than a preponderance of evidence, but must be more than a mere scintilla. *Fish v. Harris*, 2008 MT 302, ¶ 8, 192 P.3d 238. Appellant concedes the record reflects less than a preponderance, but more than a mere scintilla of evidence to conclude the settlement agreement was repudiated.

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b. The district court misapprehended the effect of Appellant’s Motion for Nullification or Modification of Settlement Agreement.

The repudiation of a contractual duty must be “entire, absolute, and unequivocal” to excuse further performance by the other party. *Chamberlin*, at 202, 921 P.2d at 1239. A promissor’s expression of intent not to perform, standing alone, is insufficient to excuse the performance of the non-repudiating party. *Id.* Montana has adopted the *Restatement (Second) of Contracts* § 250, comment d (1981), which requires when a party’s demand for performance of a term not contained in a contract, *accompanied by an unequivocal statement that it will not perform unless the additional term is met*, excuses the non-repudiating party from performance. *Id.*, at 203, 921 P.2d at 1240 (emphasis added).

i. Appellant’s request for nullification was not entire, absolute, or unequivocal.

The district court found “Marisa Root overtly repudiated the settlement agreement, as reflected in her Motion for Nullification or Modification of Settlement Agreement, Motion to Remove a Co-Personal Representative, and a Motion for an Accounting filed on April 1, 2021.” See Appendix 10, ¶ 2. The district court did not identify any other action taken by the Appellant as an act of repudiation.

Appellant's filed a *Motion for Nullification or Modification of the Settlement Agreement*. (Emphasis added). The mere fact Appellant made her *Motion* in the alternative means her intent was not unequivocal. Appellant concludes her brief in support of her *Motion* with an if/then conditional sentence: "[i]f this settlement agreement cannot be modified to at least enable a fair evaluation of the property, then it needs to be nullified..." See Appendix 7, p. 7. Appellant did not express an intent to not perform, rather she sought alternative judicial remedies, which she is permitted to do. Mont. R. Civ. P. 8.

The district court acknowledges Appellant's *Motion for Nullification or Modification* was not absolute when it found "Marisa Root has made subsequent attempts to modify, and now enforce, the settlement agreement." See Appendix 10, ¶ 3. A party's repudiation "must appear only in the clearest terms." *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 104, 192 P.3d 186. Appellant's subsequent attempts to modify and enforce the settlement agreement demonstrate her *Motion for Nullification or Modification* was not absolute. The district court misapprehended Appellant's intent when it found Appellant's attempt to nullify or modify was a repudiation.

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ii. Appellant made no unequivocal expression of intent not to perform unless additional term was met.

While Appellant demanded performance of a term not contained in the settlement agreement, she never expressed her intent not to perform. In fact the opposite is true. Appellant repeatedly told the district court she did not want to “scrap” the settlement agreement. See Appendix 11, p. 10 and Appendix 8, p. 7.

Appellant did not express an intent not to perform. But, even if she had made such an expression, it would have been insufficient to find a repudiation. (“A promissor’s expression of intent not to perform, standing alone, is insufficient to excuse the performance of the non-repudiating party”). *Chamberlin*, at 202, 921 P.2d at 1239. When a party is seeking modification to an agreement, Montana requires any expression of intent not to perform be “accompanied by an unequivocal statement that it will not perform unless the additional term is met” for repudiation to occur. *Id.*, at 203, 921 P.2d at 1240.

The district court very specifically cited Appellant’s April 1, 2021 *Motion to Nullify or Modify* as Appellant’s act of repudiation. Appendix 10, ¶ 2. A fair reading of either the *Brief in Support of Motion to Nullify or Modify* or the *Reply Brief in Support of Motion to Nullify* does not

include any “unequivocal statement that [Appellant] will not perform unless the additional term[s] are met.” *Chamberlin*, at 203, 921 P.2d at 1240. See generally Appendix 7 and 11. Actually, the *Reply Brief* asserts Appellant had fully performed her obligations, up to that point in time, by nominating a Realtor to conduct a CMA. Appendix 11, p. 4.

The district court misapprehended the contents of Appellant’s April 1, 2021 *Motion to Nullify or Modify*. The briefing contained neither an expression of intent not to perform, nor any other ultimatum of non-performance unless modifications were made.

c. This Court should be left with a definite and firm conviction that the district court committed a mistake.

If this Court is left with a definite and firm conviction that the district court made a mistake, it may overturn the district court’s finding that Appellant’s *Motion to Nullify or Modify* was an overt repudiation as a mistake. *Interstate Production*, at 323, 820 P.2d at 1287. As indicated, *supra*, Appellant never expressed an intent not to perform and never conditioned her performance upon modification. The converse is true. Appellant twice told the district court she did not want to “scrap” the settlement agreement and Appellant performed her obligation to nominate a Realtor. The record definitively and firmly reflects a mistake

was made.

d. The district court's exercise of equitable powers was incorrect.

After the Co-Personal Representatives allowed the *Estate* to lay dormant for nearly eleven (11) years, Appellant petitioned the district court for an in-kind distribution of a portion of the real property.

Appendix 5. In its' *Response to Petitioner-Heir's Petition and Requests*, the *Estate* correctly noted the district court possessed the power to partition the real property to accomplish an in-kind distribution.

Appendix 3, p. 6 (citing Mont. Code Ann. § 72-3-914). Of course, an estate's property "must be distributed in kind to the extent possible..." and a personal representative is "to make distributions in kind whenever feasible and to convert assets to cash only where there is a special reason for doing so." Mont. Code Ann. § 72-3-902 and Mont. Code Ann. § 72-3-902 official cmt.

Appellant persisted in her desire for an in-kind distribution throughout the proceeding. Her *Brief in Supp. of Motion to Nullify or Modify* presumed an in-kind distribution of the real property. See generally Appendix 7. After the district court failed to rule upon her original *Motion to Nullify or Modify*, Appellant filed a subsequent *Motion for Modification of Settlement Agreement to Allow the In Kind*

Distribution of Property. Appendix 12. Appellant consistently requested what the statute prefers: an in-kind distribution of her inheritance, which is imminently understandable because the real property was the place in which she had lived for forty-five (45) years.

The district court concluded the “Co-Personal Representatives have fiduciary duties to maximize the value of the estate, and to distribute the estate, and the Co-Personal Representatives are upholding these obligations by finalizing the pending sale of the real property.” Appendix 10, ¶ 6. The district court’s conclusion of law is not supported in statute or law. Although the Uniform Probate Code (UPC) requires the personal representative to “use [their] authority...for the best interests of successors to the estate,” Mont. Code Ann. § 72-3-610, the UPC expressly favors in-kind distribution of property. Mont. Code Ann. § 72-3-902. The “best interest” of the beneficiaries is not the same as “a fiduciary dut[y] to maximize the value of the estate,” in particular when the district court’s *Order Requiring Sale of Real Property and Distribution of the Estate* lacks any findings or conclusion regarding the feasibility of an in-kind distribution. The district court summary conclusion that the Co-Personal Representatives are obligated to maximize the value of the *Estate* is incorrect.

CONCLUSION

The record is devoid of any statement from the Appellant that she would not perform her obligations under the settlement agreement. Actually, she twice told the district court she wanted to abide by its terms and, in fact, nominated a Realtor as she was bound to do. The district court misapprehended the effect of Appellant's *Motion to Nullify or Modify* when it concluded she overtly repudiated the settlement agreement. Nullification and repudiation are not legally synonymous terms. This matter should be remanded to the district court to determine if an in-kind distribution of the real property upon which Appellant lived for decades is feasible.

Dated this 11th day of November, 2022.

ST. PETER LAW OFFICES, P.C.

By: /s/ Michael O'Brien
Michael O'Brien

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Arial text, typeface of 14 points, is double spaced, and the word count does not exceed 10,000 words, excluding Certificate of Service and the Certificate of Compliance.

Dated this 11th day of November, 2022.

ST. PETER LAW OFFICES, P.C.

By: /s/ Michael O'Brien
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CERTIFICATE OF SERVICE

I, Michael Hawkins O'Brien, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-11-2022:

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