

Michael L. Rausch, Esq.
Brian P. Thompson, Esq.
BROWNING, KALECZYC, BERRY, & HOVEN, P.C.
Liberty Center, Suite 302
9 3rd Street North
Great Falls, MT 59401
Telephone: 406.403.0041
Fax: 406.453.1634
mike@bkbh.com
brian@bkbh.com

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. _____

IN RE THE MATTER OF THE
ESTATE OF:

C. PATRICIA FIELD,

Decedent.

SCOTT FIELD,

Appellant,

v.

ESTATE OF C. PATRICIA FIELD
and GREG FIELD,

Respondents.

NOTICE OF APPEAL

On Appeal from the Montana First Judicial District Court, Broadwater County
The Honorable Christopher D. Abbott, Presiding
Case No. DDP-2020-04

NOTICE is given that Scott Field, heir to the above Estate of C. Patricia Field, the Appellant above named and who is an interested person in the above estate filed in the Montana First Judicial District Court, in and for the County of Broadwater, as Cause No. DDP-2020-04,

hereby appeals to the Supreme Court of the State of Montana from the District Court's summary judgment order filed December 2, 2022 denying Scott's motions and granting the Estate's and Greg Field's motions including but not limited to motions for summary judgment, attached hereto as Exhibit A.

After the Court's summary judgment order was entered on December 2, 2022, counsel for the Estate and Greg Field filed a joint motion for fees on December 16, 2022. Appellant Scott Field filed a brief in opposition on January 13, 2023. The Estate and Greg Field filed their reply brief on February 13, 2023. The District Court has not yet ruled on the motion for fees.

Neither party has filed a Notice of Entry of Judgment. As such, the Estate's and Greg Field's motion for fees is treated as a motion to alter or amend the judgment pursuant to M.R.Civ.P. 59. Estate of Earl Pruyn v. Axmen Propane, Inc., 2008 MT 329, 346 Mont. 162, 194 P.3d 650 (holding that Plaintiff's notice of appeal was premature because the motion for fees was filed after entry of summary judgment order and was treated as a motion to alter or amend judgment pursuant to Rule 59). See also M.R.App.P. 4(5)(a)(v) which states:

If a timely motion pursuant to the Montana Rules of Civil Procedure is filed in the district court by any party: ... (C) Under rule 59 to alter or amend judgment; ... the time for appeal for all parties shall run from the entry of the order granting or denying any such motion or, if applicable, from the time such motions is deemed denied at the expiration of the 60-day period established by M.R.Civ.P. 59(f). No notice of entry of judgment or order is required when any of the foregoing motions are granted, denied, or deemed denied....

The District Court has failed to rule on the Estate's and Greg Field's motion for fees within the 60 day time period. Therefore, the motion is deemed denied. See M.R.Civ.P. 59(f) ("If the court does not address in a written order ... a motion to alter or amend a judgment properly filed according to Rule 59(e), within 60 days from its filing date, the motion must be deemed denied.").

Appellant Scott Field has 30 days from the date the motion for fees is deemed denied to file his notice of appeal. M.R.App.P. 4(5)(a). Therefore, this Notice of Appeal is timely.

Additionally, the Court's order is a final order for purposes of appeal. M.R.App.P. 6(4) states in part:

In estate ... and probate matters, the following orders are considered final and must be appealed immediately, and failure to do so will result in waiver of the right to appeal: ... (c) an order setting apart or refusing to set apart property ...; (d) an order directing or refusing to direct the partition, sale, or conveyance of real property; (e) an order refusing, allowing, or directing the distribution of any estate or part thereof....

The District Court's order effectively conveys the Homestead property, which the Estate claimed as an asset of the Estate, to heir Greg Field (subsection (c) above). It directs the sale or conveyance of that real property to heir Greg Field (subsection (d) above). It directs the Estate to distribute the Homestead property to heir Greg Field (subsection (e) above). The District Court's orders are in error and should be reversed. In addition, the Court denied Scott's motions as follows:

1. Scott's motion for partial summary judgment regarding the interpretation of the Will filed June 2, 2022;
2. Scott's Motion for Partial Summary Judgment and Petition for Declaratory Relief regarding the legal ownership of the Homestead property filed June 7, 2022;
3. Scott's Motion to Compel Payment of Survey Costs by Greg Field filed June 8, 2022;
4. Scott's Petition to Remove Chris Field as Personal Representative of the Estate and to Appoint the Public Administrator, filed June 9, 2022; and
5. Scott's Objections to the Estates Inventory filed October 13, 2021 and to the Estate's Interim Accounting filed October 14, 2021.

Scott appeals from the denial of each of these motions and from the Court's orders granting the Estate's and Greg Field's corollary motions. For the reasons set forth in Scott's briefings at the District Court level and the briefing to be filed in this Court, the District Court's orders should be reversed and the case remanded to the District Court with instructions including but not limited to entering judgment in favor of Appellant Scott Field.

THE APPELLANT SCOTT FIELD FURTHER CERTIFIES:

1. That this appeal is subject to the mediation process required by M.R.App.P. 7.

The money judgment being sought is not less than \$5,000.

2. That this appeal is not an appeal from an order certified as final under M.R.Civ.P. 54(b).

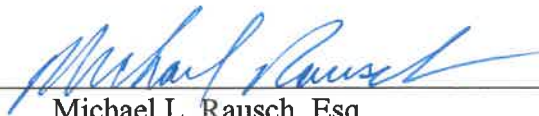
3. That all available transcripts of the proceedings in this cause have been ordered from the court reporter contemporaneously with the filing of this Notice of Appeal.

4. That included herewith is the filing fee prescribed by statute.

Dated this 15th day of February, 2023.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By



Michael L. Rausch, Esq.
mike@bkbh.com

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing NOTICE OF APPEAL with the Clerk of the Montana Supreme Court; and that I served true and accurate copies of the foregoing NOTICE OF APPEAL upon the Clerk of the District Court, each

attorney of record, by U.S. Mail, first class, postage pre-paid, and via email as noted below,
addressed to:

Valerie Hornsveld
Clerk of District Court, Broadwater County
515 Broadway Street
Townsend, MT 59644-2397
vhornsveld@mt.gov

A. Roger Little
40 W. Lawrence Suite B.
P.O. Box 1166
Helena, MT 59624
alittlemos@montana.com
Attorney for the Estate and PR Chris Field

Kelby R. Fisher
40 W. Lawrence Street, Suite A
Helena, MT 59601
kelby@kfischerlaw.com
Attorney for Greg Field

Steven D. Field
5683 Schooner Way
Boise , ID 83716

Lester L. Field
112 Leighton Road
Oxford, MS 38655-2010

Dale F. Field
211 Solomon Mountain Road
Clancy, MT 59634

Norman Grosfield
Grosfield Law Firm
P.O. Box 5015
Helena, MT 59604
norm@grosfieldlaw.com
Attorney for Patricia Grosfield


BROWNING, KALECZYK, BERRY & HOVEN, P.C.

FILED

DEC - 2 2022

ANGIE SPARKS, Clerk of District Court
By CJ RESTIVO Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
BROADWATER COUNTY**

In the Matter of the Estate of
PATRICIA C. FIELD,
Deceased.

Cause No.: DDP-2020-4

ORDER ON MOTIONS

This matter concerns the probate of the estate of Patricia Field (Pat), who died testate on January 14, 2020. The personal representative of the Estate is Christopher Field (Chris). Two of Pat's children and heirs, Scott Field (Scott) and Patricia Grosfield (Patti), contest the Estate's proposed distribution on multiple grounds. In particular, they challenge the entitlement of Pat's child and heir Gregory Field (Greg) ^{as} ~~is entitled~~ to Pat's home and the surrounding two-acre parcel (the Homestead).

Now before the Court are the following motions:

1. Scott's Objection to the Estate's Inventory (Dkt. 28), filed October 13, 2021;
2. Scott's Objection to Estate's Interim Accounting (Dkt. 31), filed October 14, 2021;

EXHIBIT

tabbles

A

1 3. The Estate's Application for Distribution of Personal Property
2 (Dkt. 39), filed January 26, 2022;

3 4. The Estate's Motion for Partial Summary Judgment (Dkt. 45),
4 filed March 22, 2022;

5 5. Scott's Motion for Partial Summary Judgment Re: Will
6 Interpretation (Dkt. 76), filed June 2, 2022;

7 6. Scott's Motion for Partial Summary Judgment and Petition for
8 Declaratory Relief Re: Legal Ownership of the Field Homestead (Dkt. 77), filed
9 June 7, 2022;

10 7. Scott's Motion to Compel Payment of Survey Costs (Dkt. 79),
11 filed June 8, 2022;

12 8. Scott's Motion to Compel the Estate to Accept his \$300,000
13 Offer for the Homestead, and to Maximize the Estate's Value (Dkt. 81), filed
14 June 8, 2022;

15 9. Scott's Petition to Remove Chris as Personal Representative
16 and Appoint Public Administrator (Dkt. 83), filed June 9, 2022;

17 10. The Estate's Motion to Strike (Dkt. 86), filed June 10, 2022;
18 and

19 11. Patti's Motion to Allow Rina Fontana Moore to Continue to
20 be Listed as an Expert Witness for Patricia (Dkt. 102), filed June 16, 2022.

21 Patti has joined in Scott's motions by filing "motions in support of
22 motion" and associated briefs. Greg and the Estate mutually join in each other's
23 opposition to Scott's various motions. Patti seeks an award of attorney fees and
24 costs as well. (Dkt. 94.)

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The Estate and Chris, in his capacity as personal representative, are represented by Amos Rogers Little III. Greg is represented by Kelby R. Fisher. Scott is represented by Michael L. Rausch and Brian P. Thompson. Patti is represented by Norman Grosfield. Finally, heirs Steven D. Field, Lester L. Field, and Dale F. Field are appearing in this case *pro se* and have not actively participated in the proceedings.

The motions are fully briefed, and oral argument was held on September 30, 2022. For the following reasons, the Estate's motions for partial summary judgment will be granted, the Estate's motion to distribute personal property will be granted, and the remaining motions will be denied.

BACKGROUND

The undisputed facts are as follows: Lester Field (Buzz) and Patricia Field (Pat) purchased their 591-acre ranch in 1970 as tenants in common. In the middle of the ranch is Pat and Buzz's family home that sits on an undivided approximately two-acre site. The parties refer to this parcel as the Homestead. Pat and Buzz had seven children: Lester, Doug, Greg, Patti, Chris, Dale, and Scott.

On September 17, 1991, Pat and Buzz entered into a contract for deed (the Contract for Deed) to sell the ranch to their son Greg for \$900,000. The Contract for Deed exempted the Homestead from the sale:

Seller [Pat and Buzz] agrees to sell and Buyer [Greg] agrees to buy the [ranch land]. . . and excepting therefrom the house presently lived in by Seller and the surrounding approximately two acres, which the parties agree will be excepted from the property contracted to be conveyed, along with a road easement to access the property.
(Contract for Deed § 1, Dkt. 46, Ex. A.1.)

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1 In the very next sentence, however, the Contract for Deed expressly
2 contemplates that the Homestead, too, will eventually be conveyed to Greg:

3 Said excepted property will be conveyed at a later date, after survey,
4 at which time the appropriate deeds will be substituted for those held
5 in escrow, and Buyer will execute a Quit Claim Deed to said two acres
6 to reflect the change made to the Notice of Purchaser's Interest. Buyer
7 agrees to pay for the survey of the approximately two acres.

8 (Id.)

9 Pat and Buzz contemporaneously executed and placed a warranty
10 deed in escrow (pending the full performance of the Contract for Deed) which
11 transferred the entire ranch, including the Homestead, to Greg. It is undisputed that
12 Greg has neither paid for a survey nor executed a quit claim deed. The warranty
13 deed placed in escrow in 1991 did not contain an exception for the Homestead
14 parcel.

15 The Contract for Deed contemplated the situation where the
16 Homestead had not been conveyed to Greg prior to Pat and Buzz's death. In such
17 case, Greg has "the right to buy said house and surveyed acreage" upon specified
18 conditions. The first condition is that if the parties to the sale cannot agree on
19 price, then an appraisal shall be conducted as follows:

20 The appraisal shall be made by three disinterested persons. One of
21 the appraisers shall be chosen by each party or representative, and the
22 two appraisers so selected shall together select a third appraiser. A
23 decision of the majority of the appraisers shall be binding and shall be
24 considered as the decision of the three appraisers.

25 (Contract for Deed § 1, Dkt. 46 Ex. A.1.)

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1 The second condition is that Greg shall pay the purchase price as
2 determined by the appraisers "in cash." (*Id.*) Finally, in the event the parties cannot
3 agree on a sale and a third party makes a bona fide offer acceptable to Pat's (or
4 Lester's) estate, then Greg has a right of first refusal to purchase at the price
5 offered by the third party. (*Id.*)

6 Pat and Buzz executed mirroring wills on September 20, 2005.
7 When Buzz died testate on December 1, 2015, his will reserved the Homestead for
8 Pat. His will, however, was never probated. On April 12, 2017, Pat updated her
9 will (using substantively identical language as her 2005 will), the validity of which
10 is uncontested.

11 The 2017 Will contains two primary devises: (1) a provision for the
12 disposition of tangible personal property; and (2) a provision for the distribution of
13 the residue of her estate. The residue devise states, in relevant part:

14 I give the residue of my estate, subject to other provisions of this
15 will, to my descendants, by representation. Provided, however, Greg's
16 share of my estate shall be adjusted, as follows: [Buzz] and I made
17 taxable gifts to Greg in 1991. . . However, because we made such
18 substantial gifts to Greg that our other children did not receive, I want
19 to reduce his share of our estate after our deaths to account for most of
20 that difference given to our children. I realize the adjustment in this
21 paragraph is not a precise balance, but I am satisfied this is a fair
22 adjustment to make the ultimate distribution of our estates among all
23 of our children equitable. . . . Greg's share of my estate shall be
24 reduced by \$190,820, and that amount shall be allocated equally
25 among my other six children (or the children of any of my children
who predeceases me, by representation). . . .

□

Further, under the terms of the contract for deed dated September 17,
1991, we also excepted and reserved our residence and surrounding
two acres located on the ranch property, and Greg obligated himself to

1 survey two acres surrounding the house, along with a road easement to
2 access the residence. Whether that survey and related deed to convey
3 that property to me is completed before I die, the house and two acres
4 shall be appraised in the manner provided in the contract for deed, and
5 Greg's share shall further be reduced by the appraised amount, and he
6 will have no further obligation to divide the house and two acres from
7 the remainder of the ranch property. I intend these provisions to be
8 contractual obligations that my other children may enforce after my
9 death, and acceptance of the benefits given to all my children under
10 this will shall be deemed sufficient consideration to support those
11 contractual obligations.
12 (Will, Dkt. 1 at 2–3.).

13
14 Greg paid off any remaining balance under the Contract for Deed on
15 April 26, 2019, and the 1991 warranty deed was released from escrow and
16 recorded in Broadwater County. An addendum to the Contract for Deed (the
17 Addendum) was signed by Pat and Greg on the same day purporting to modify the
18 Contract for Deed to expressly include the Homestead. Other heirs have challenged
19 the validity of this Addendum on a variety of grounds, and the Estate has since
20 indicated that it does not seek enforcement of the Addendum.

21 Pat passed away on January 14, 2020, and her will was admitted into
22 probate on February 3, 2020. Three appraisers (Tim Moore, Tyler Warne, and
23 Kraig Kosena) conducted appraisals of the property, conferred, and agreed that the
24 most reasonable value of the Homestead at the time of Pat's death was \$40,000.
25 Scott, dissatisfied with the appraisal, has offered to purchase the Homestead for
\$300,000. Neither Greg nor the Estate has accepted his offer. Scott and Patti now
dispute the appraised value of the Homestead and Greg's claim of ownership to it.
It is this dispute that has ripened into the numerous motions now before the Court.

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STANDARDS

Summary judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Mont. R. Civ. P. 56(c). Moreover, “the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences will be drawn therefrom in favor of the party opposing summary judgment.” *Sleath v. W. Mont. Home Health Servs.*, 2000 MT 381, ¶ 20, 304 Mont. 1, 16 P.3d 1042. The moving party bears the burden of establishing a complete absence of any genuine factual issues. *Estate of Severson v. Severson*, 2019 MT 145, ¶ 9, 369 Mont. 549, 455 P.3d 436. Once the movant has met this initial burden, the nonmoving party must establish “with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact exists or that the moving party is not entitled to prevail under the applicable law.” *Hansard Mining, Inc. v. McClean*, 2014 MT 199, ¶ 10, 376 Mont. 48, 335 P.3d 711.

DISCUSSION

The parties sharply dispute the interpretation of the Contract for Deed and the Will. The Estate and Greg focus on the Will, reading it as providing for the Homestead to be conveyed to Greg, with its value to be taken from his share of the residue of Pat’s estate. Scott and Patti, by contrast, contend the Will contains no specific bequest of the Homestead to Greg, and instead merely provides for a reduction in his share of the estate’s residue to account for the value of the Homestead. They instead emphasize the Contract for Deed, which they contend at this point gives Greg only a right of first refusal to the property at the

1 value of Scott's bona fide offer of \$300,000. The Court must therefore interpret the
2 interplay of these two instruments.

3 The Court has identified the following issues it must address to
4 resolve the pending motions:

5 1. Is there a genuine dispute of material fact regarding whether
6 Greg acquired title to the Homestead during Pat's lifetime?

7 2. Is there a genuine dispute of material fact regarding whether
8 Pat's 2017 Will devises the Homestead to Greg?

9 3. Is there a genuine dispute of material fact regarding the value
10 of the Homestead?

11 4. Does the Estate hold only a one-half undivided interest in the
12 Homestead?

13 5. Can this Court hear Scott's contention that Greg breached the
14 Contract for Deed?

15 6. Should the Personal Representative be removed, or the Estate
16 compelled to accept Scott's offer to purchase the Homestead for \$300,000?

17 7. Should the Estate be permitted to distribute personal property
18 in the manner it proposes?

19 8. Should Scott's objections to the interim accounting and
20 inventory be sustained?

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1 Each issue is addressed in turn.

2 1. Is there a genuine dispute of material fact regarding
3 whether Greg acquired title to the Homestead during Pat's lifetime?

4 The Court must first determine whether Greg fully performed the
5 obligations under the Contract for Deed and perfected his right to take title to the
6 Homestead. If Greg did, then the Will is irrelevant, for the Homestead is owned by
7 Greg and not part of Pat's estate. For the reasons that follow, however, the Court
8 cannot conclude that there is no genuine dispute of material fact regarding Greg's
9 claim to ownership of the Homestead during Pat's lifetime.

10 The Contract for Deed provides that the reserved Homestead will
11 not be conveyed to Greg until he satisfies the following conditions precedent:
12 (1) a survey, to be paid for by Greg; (2) an appraisal using the method set forth in
13 the Contract for Deed; and (3) payment of the appraised value in cash. While the
14 appraisal has now occurred, neither the survey nor payment in cash have ever
15 occurred. Thus, Greg's right to conveyance of the Homestead under the contract
16 has never matured. *See, e.g., Rubin v. Hughes*, 2022 MT 74, ¶ 43,
17 408 Mont. 219, 507 P.3d 1169 (failure to obtain survey was a failure of a condition
18 precedent for an agreement to grant an easement); Mont. Code Ann. § 28-1-406.

19 The complicating factor is the 2019 Addendum, which purported to
20 convey the Homestead to Greg upon his payment of the balance owing on the
21 contract for deed that same day. The Addendum has chiefly been attacked on two
22 grounds: (1) citing an opinion letter from Thomas C. Morrison (Patti's Br. in Opp.
23 to Mtn. for Partial Summ. J., Ex. 6, Dkt. 71 at 36-37), that the Addendum is
24 unsupported by consideration; and (2) that Pat did not validly execute the
25 Addendum.

1 Even assuming the absence of consideration were not a barrier to the
2 Addendum's enforceability, Scott has challenged the authenticity of Pat's signature
3 on the Addendum and her capacity to enter into the Addendum. These challenges
4 raise disputes of fact that cannot be resolved on summary judgment. Additionally,
5 the Estate expressly disclaimed at oral argument its intention to rest on the
6 Addendum. Thus, for purposes of summary judgment, the Addendum cannot be
7 the basis for a claim that the property passed to Greg prior to Pat's death.

8 **2. Is there a genuine dispute of material fact regarding**
9 **whether Pat's 2017 Will devises the Homestead to Greg?**

10 Because the Court must assume the Homestead is part of the Estate
11 for summary judgment purposes, the Court must address whether Pat's will devises
12 it to him. The interpretation and construction of a will is a question of law. *In re*
13 *Estate of Ayers*, 2007 MT 155, ¶ 12, 338 Mont. 12, 161 P.3d 833. The Court's
14 objective is to ascertain the testator's intent. *In re Estate of Bolinger*,
15 284 Mont. 114, 121, 943 P.2d 981, 985 (1997). The primary source of a testator's
16 intent is the testator's own words; thus, "the testator's intent gathered from the
17 words of the will governs the interpretation of the will." *State v. Keller*,
18 173 Mont. 523, 526 (1977). The will is read as a whole, and to the extent possible,
19 the Court must give every provision meaning rather than render any provision
20 inoperative. *In re Estate of Snyder*, 2000 MT 113, ¶ 10, 299 Mont. 421, 2 P.3d 238.
21 The court interprets the words used in the will according to their ordinary and
22 grammatical sense, unless a clear intention to use them in another sense can be
23 ascertained. *Ayers*, ¶ 14. If uncertainty arises on the face of the will, the testator's
24 intent should be ascertained from a consideration of the instrument as a whole and
25

1 by comparing its various parts in light of the circumstances surrounding the
2 drafting of the will. *Ayers*, ¶ 14.

3 Both the Estate and Scott have moved for summary judgment
4 regarding the interpretation of the Will. The Estate argues the Will expresses Pat's
5 intent to transfer the Homestead to Greg, with the other heirs compensated by
6 reducing Greg's share of the estate by the appraised value of the Homestead
7 (\$40,000). Scott, in turn, argues the Will makes no devise of the Homestead, and
8 thus the terms of the Contract for Deed still govern Greg's entitlement to the
9 Homestead. Scott contends that he has made a bona fide offer to purchase the
10 Homestead, and that Chris has a fiduciary duty to accept that offer on behalf of the
11 Estate, subject only to Greg's right of first refusal as set forth in the Contract for
12 Deed.

13 The Court starts with Pat's words. The relevant portion of the Will
14 states:

15 Further, under the terms of the contract for deed dated September
16 17, 1991, we also excepted and reserved our residence and
17 surrounding two acres located on the ranch property, and Greg
18 obligated himself to survey two acres surrounding the house, along
19 with a road easement to access the residence. Whether that survey and
20 related deed to convey that property to me is completed before I die,
21 the house and two acres shall be appraised in the manner provided in
22 the contract for deed, and Greg's share shall further be reduced by the
23 appraised amount, and he will have no further obligation to divide the
24 house and two acres from the remainder of the ranch property. I intend
25 these provisions to be contractual obligations that my other children
may enforce after my death, and acceptance of the benefits given to all
my children under this will shall be deemed sufficient consideration to
support those contractual obligations.
(Dkt. 1, at 3 (emphasis added).)

1 The phrase “[w]hether that survey and related deed to convey that property to me
2 is completed before I die,” expressly recognizes that the conditions necessary for
3 Greg to take title to the Homestead may not occur before Pat dies. In such an
4 event, the Will states that an appraisal is to be conducted, using the method set
5 forth for appraisal in the Contract for Deed, and that Greg’s share of the residue of
6 the estate shall be reduced by that appraised amount. Once that happens, Greg
7 “will have no further obligation to divide the house and two acres from the
8 remainder of the ranch property.” This last sentence can mean only one thing: by
9 relieving him of the obligation to divide the Homestead from the ranch as a whole,
10 Pat has relieved Greg of the obligation to share ownership of the Homestead with
11 any person who may potentially have a claim to it. So long as the appraisal method
12 is followed, and Greg’s share of the estate are reduced according to the Contract
13 for Deed’s appraisal method, then Pat’s clear testamentary intent is satisfied.

14 This is a specific (albeit contingent) devise of the Homestead to
15 Greg. A specific devise “is a gift of a specific thing, or of some particular portion
16 of the testator’s estate, which is differentiated from the balance of the testator’s
17 property.” *In re Estate of Wales*, 223 Mont. 515, 518, 727 P.2d 536, 537 (1986).
18 The foregoing can only be reasonably read as expression of intent to convey the
19 Homestead to Greg if it remains part of Pat’s estate at death, and to account for the
20 value of the gift by reducing his share of the estate’s residue by its value.

21 Scott contends that this provision of the Will is not a specific devise,
22 but merely an adjustment to Greg’s residual share should he acquire the
23 Homestead under the terms of the Contract for Deed. Scott argues his
24 interpretation is the only way “to accomplish the Decedent’s intent to treat her
25 children equitably and not give Greg a windfall.” (Dkt. 71.1, at 16). He cites

1 authority holding that a reference in a will to a prior conveyance is not itself a
2 devise, and he points out that this provision appears in the residuary clause of the
3 Will. Despite its surface appeal, however, Scott's logic is fatally flawed.

4 Much of Scott's argument—for example, that the contested clause
5 appears in the residuary section of the Will—leans too heavily on formalism. The
6 Court must look to the substance, not the form, of Pat's will. See *Snyder*, ¶ 10. If
7 Pat's will demonstrates an unmistakable intent to convey the property to Greg, it
8 does not matter what the paragraph heading says. Though the operative provision
9 is found in the paragraph entitled "Residue of My Estate," it is nevertheless a clear
10 gift of specific property to Greg upon Pat's death.

11 Scott's focus on whether this is "equitable" founders in similar
12 shoals. As with all instruments, in a will the specific prevails over the general. See
13 Mont. Code Ann. § 1-4-103; *In re Estate of Coleman*, 132 Mont. 339, 343,
14 317 P.2d 880, 882 (1957). The provisions of the Will addressing Pat's general
15 desire for an "equitable" distribution of assets cannot contravene the specific
16 language of the devise of the Homestead. And in any event, immediately after
17 expressing her desire for an "equitable" distribution, the Will expressly recognizes
18 that the adjustment will not result in a precisely balanced distribution. The Will
19 does not express any intention to mechanically divide her estate into precisely
20 equal shares.

21 Finally, this Will simply cannot be read as merely acknowledging a
22 past conveyance while also giving effect to every provision. To be sure, "a recital
23 in a will of a conveyance of land which was not in fact made, or which proved to
24 be ineffectual, will not operate as a devise." *Ayers*, ¶ 17 (quoting *In re Watts'*
25 *Estate*, 117 Mont. 505, 519, 160 P.2d 492, 499 (1945)). Such a reading requires the

1 Court to ignore the “whether” clause (“[w]hether that survey and related deed to
2 convey that property to me is completed before I die”), which specifically
3 recognizes that the conveyance may not happen prior to her death. It also requires
4 the Court to ignore the “no further obligation clause,” which allows him to keep
5 the Homestead as part of the larger ranch property—relief Greg did not have under
6 the original Contract for Deed. These provisions unambiguously provide that upon
7 Greg’s satisfaction of the conditions for acquiring the ranch writ large—whether
8 he meets the unmet conditions of the Contract for Deed or not—he will own the
9 Homestead as well.

10 The Will contains an unambiguous and specific devise of the
11 Homestead to Greg regardless of whether he satisfied the terms of the Contract for
12 Deed for acquiring it during Pat’s lifetime. Because it is unambiguous, there is no
13 need to resort to other interpretive aids. There is no genuine dispute of material
14 fact: under the Will, Greg is entitled to the Homestead.

15 **3. Is there a genuine dispute of material fact regarding the**
16 **value of the Homestead?**

17 Not only does Scott dispute Greg’s entitlement to the Homestead
18 under the Will, but he also disputes the method of appraising its value. Scott has
19 retained an appraiser, Matt Dalton, who has appraised the house at \$300,000. Scott
20 contends that this—and not the \$40,000 consensus appraisal of the three appraisers
21 selected pursuant to the Contract for Deed’s provisions—represents the true value
22 of the home.

23 Scott’s interpretation, however, assumes that Pat intended the
24 property to be valued at whatever a finder of fact would deem the fair market value
25 to be. But she did not, either in the Contract for Deed or the portions of the Will

1 expressly incorporating the appraisal provisions of the Contract for Deed. The
2 appraisal method set forth in Pat's Will is unambiguous. According to the Contract
3 for Deed, the Estate and Greg are each to select an appraiser, and those two
4 appraisers in turn select a third appraiser. Those three appraisers attempt to
5 determine a consensus value for the Homestead, and that value then becomes the
6 value of the Homestead for the purposes of these instruments. Nothing in either
7 instrument provides for a third-party appraisal or for impeachment of the
8 consensus appraisal on grounds that it does not reflect "true" fair market value.
9 Doing so would not only run counter to the express language of the Will, but it
10 would also render it completely inoperative.

11 Scott raises a number of other complaints about the appraisal,
12 including their varying methodologies for valuing the Homestead and the
13 independence of the appraiser chosen by the Estate. The Court is guided, however,
14 by the language of the Contract for Deed incorporated into the Will:

15 The appraisal shall be made by three disinterested persons. One of
16 the appraisers shall be chosen by each party or representative, and the
17 two appraisers so selected shall together select a third appraiser. A
18 decision of the majority of the appraisers shall be binding and shall be
19 considered as the decision of the three appraisers.
(Dkt. 46, Ex. A.1.)

20 There is no dispute that Tim Moore was chosen by Greg, Tyler
21 Warne was chosen by Chris on behalf of the Estate, and that Kraig Kosena was
22 chosen by Moore and Warne. There is no evidence establishing a genuine dispute
23 that all three are "disinterested," that is, without a stake or bias in the controversy.
24 See Black's Law Dict. 589 (11th ed. 2019) ("disinterested" means "[f]ree from
25 bias, prejudice, or partiality, and therefore able to judge the situation fairly; not

1 having a pecuniary interest in the matter at hand"). There is no dispute that the
2 \$40,000 value represents the joint decision of the appraisers following
3 consultation. Thus, under the plain and unambiguous terms of the Will, that
4 decision is "binding" and establishes the fair market value of the Homestead as a
5 matter of law. Accordingly, Greg's share of the residue of the estate is to be
6 reduced by \$40,000.

7 **4. Does the Estate hold only a one-half undivided interest in**
8 **the Homestead?**

9 Scott also challenges Pat's right to transfer the Homestead to Greg
10 after Buzz's death, claiming the Homestead is not Pat's (entirely) to give.
11 According to Scott, Buzz's estate still holds an undivided one-half interest in the
12 Homestead because his will was never probated. Scott claims that, at best, Pat only
13 transferred a one-half interest in the Homestead to Greg, while Buzz's estate
14 remains in possession of the other half.

15 Scott's argument is both legally and practically incorrect. For one, a
16 decedent's real property devolves to the person it was devised to by the decedent's
17 last will. Mont. Cod Ann. § 73-3-101(2). Thus, the Supreme Court has held that
18 where a house was part of a decedent's estate, that house immediately devolves to
19 the specific devisee for their use subject to the final administration of the estate. *In*
20 *re Estate of McMurchie*, 2004 MT 98, ¶ 14, 321 Mont. 21, 89 P.3d 18; *Shephard v.*
21 *Widhalm*, 2012 MT 276, ¶ 26, 367 Mont. 166, 290 P.3d 712 ("A devisee's title to
22 real property does not depend upon receiving a deed or decree of distribution.
23 Rather. . . title to the property vests in the devisee at the moment of the testator's
24 death.").

25 /////

1 Second, Buzz died in 2015. If a will is not probated within three
2 years of death, the assumption of intestacy is final. *In re Estate of Harris*, 2015 MT
3 182, ¶ 16, 379 Mont. 474, 352 P.3d 20. Because Buzz was survived by Pat and all
4 of the heirs of his estate are also heirs of Pat's estate, regardless of the existence of
5 a will, Pat acquired the entirety of his estate, including his one-half interest in the
6 ranch property and the Homestead. Mont. Code Ann. § 72-2-112(1)(b). Either way,
7 the entirety of the Homestead was Pat's to give under the will. And even if Buzz's
8 will were probated now, it contains the same provisions as Pat's will, and it would
9 have the same result. There is no scenario under which Greg's entitlement to
10 ownership of the Homestead would be any different.

11 **5. Can this Court hear Scott's contentions that Greg**
12 **breached the terms of the contract for deed?**

13 Scott contends Greg breached the Contract for Deed by
14 "fraudulently" recording the warranty deed released from escrow—which did not
15 except the Homestead from the ranch property as a whole—when he paid the
16 balance of the Contract for Deed in 2019. As discussed above, the Court agrees
17 that Greg did not hold legal title to the Homestead in 2019 and it is instead part of
18 Pat's estate. And the Court has concluded that under the terms of the Will, the
19 Homestead is to pass to Greg. Thus, whether Greg should have recorded the deed
20 in 2019 or not, Pat's intention was that he own the property upon her death. It is
21 unclear how the premature recording of the deed should cause this Court to
22 override the testator's unmistakable intent.

23 Scott contends the Contract for Deed is a succession contract and
24 that he is a third-party beneficiary. Even if that were true—and the Court expresses
25 no opinion on the question—if he is contending that either Pat (now her estate) or

1 Greg breached the contract for deed by conveying the property to Greg in the Will
2 then Scott's remedy does not lie in probate court; it lies in a breach-of-contract
3 action brought separately. *See In re Estate of Cooney*, 2019 MT 293, ¶¶ 12–13,
4 398 Mont. 166, 454 P.3d 1190 (a court sitting in probate lacks subject-matter
5 jurisdiction to consider actions for breach of a succession contract or for equitable
6 relief from an alleged breach). There is no available remedy before this Court.

7 **6. Should the Personal Representative be removed, or the**
8 **Estate compelled to accept Scott's offer to purchase the Homestead for**
9 **\$300,000?**

10 Scott seeks to compel the Estate to accept his offer to purchase the
11 Homestead for \$300,000, subject to Greg's right of first refusal. He also seeks to
12 remove Chris as personal representative, charging him with failing to maximize the
13 value of the Estate and wasting the Homestead property.

14 For the reasons already stated, the Court concludes Greg is entitled
15 to the Homestead property as a specific devise under the Will. Because of that,
16 Scott's motion to compel acceptance of his offer must be denied.

17 Scott's petition to remove Chris as personal representative has no
18 merit. A party who petitions for the removal of a personal representative bears the
19 burden of "proving some valid grounds for removal pursuant to Section 72-3-526,
20 MCA." *In re Estate of Robbin*, 230 Mont. 30, 34, 747 P.2d 869, 871 (1987).

21 Among other reasons, cause exists when the personal representative has
22 mismanaged the estate, failed to perform a duty pertaining to the office, or removal
23 is otherwise in the best interest of the estate. Mont. Code Ann. § 72-3-526(2). The
24 personal representative owes a fiduciary duty to the estate, but it is to settle and
25 distribute the estate *in accordance with the terms of any effective will* and in the

1 best interest of the estate. *Id.* § 72-3-610. The “grounds for removing a
2 representative are narrow” and the appointment of a representative “should not be
3 annulled except in the most extreme circumstances.” *Robbin*, 230 Mont. at 34,
4 747 P.2d at 871.

5 Chris has acted properly to effectuate Pat’s intentions in her Will,
6 for the reasons stated above. And in any event, the statutes Scott cites as his
7 authority for removal primarily impose *powers*, not *duties*, on Chris. For example,
8 Mont. Code Ann. § 72-3-606 provides only that a PR “may maintain an action to
9 recover possession of property or to determine the title to the property.” (Emphasis
10 added.) And, the statute only authorizes a personal representative to take control of
11 property for the necessary purposes of paying “creditor claims, administration
12 expenses, or a family allowance.” *See Widhalm*, ¶ 25. Chris has no need to take
13 control of the Homestead or any other property for these purposes. In arguing to
14 remove Chris as personal representative, Scott has failed to show he violated any
15 statutory duty. And even if there were deficiencies, these would amount only to
16 “mere irregularities” that could be remedied with a court order compelling Chris to
17 comply. *See Robbin*, 230 Mont. at 34, 747 P.2d at 871.

18 Scott also supports removing Chris as personal representative by
19 asking the Court to adopt a novel fiduciary duty: to maximize the Estate’s value.
20 Scott argues an estate’s personal representative should have a responsibility to
21 maximize the estates value out of “fairness to the heirs” and that a “public auction
22 is the best way to do it.” (Dkt. 82, at 7.) Scott, however, ignores the personal
23 representative’s primary fiduciary duty to distribute the estate in accordance with
24 the terms of the will. Mont. Code Ann. § 72-3-610. That is what Chris is doing.

25 /////

1 7. Should the Estate be permitted to distribute personal
2 property as it proposes?

3 Chris requests permission to begin distributing items of Pat's
4 personal property. He proposes auctioning Pat's personal property to the seven
5 heirs, with certain items requiring minimum bids pegged to their appraised value.
6 Any items not purchased by an heir at the auction would be sold to a third party.
7 The proceeds would be paid to the estate and ultimately re-distributed equally
8 among the heirs. Scott opposes this auction. Chris's application also identifies that
9 Scott and Patti are the only heirs interested in the property which remains in the
10 Homestead's residence. The Estate proposes that Patti and Scott may set up a
11 mutually acceptable date and time for them to recover whatever property they
12 desire from the residence.

13 The law requires that "to the extent possible" the "distributable
14 assets of a decedent's estate must be distributed in kind" and that "the residuary
15 estate must be distributed in any equitable manner." Mont. Code Ann. § 72-3-902.
16 Furthermore, the testator's intent controls the distribution of assets pursuant to a
17 will. *Snyder*, ¶ 10; *In re Estate of Evans*, 217 Mont. 89, 94, 704 P.2d 35, 38 (1985).
18 Pat intended that "any tangible personal property not otherwise specifically
19 designated" be distributed by "any reasonable method to approximate equal
20 division" among her heirs. (Dkt. 1, at 1). Accordingly, the legislature (and Pat) has
21 given great deference to Chris on how to distribute the estate's assets so long as it
22 is done in an equitable manner. Chris's proposed distribution ensures all heirs
23 receive equal monetary benefit from Pat's personal property and is therefore
24 directly aligned with her intent. Furthermore, the proposed auction provides a
25 straightforward method to settle conflict between heirs who may have a desire to

1 gain possession of the same item. Given the already contentious nature of the
2 probate of this estate, Chris's proposed method is a reasonable and equitable
3 means of ensuring all heirs have equal opportunity to obtain ownership of items
4 they desire. It also ensures all heirs share equally in the economic benefit of those
5 specific items. Furthermore, it makes a specific allowance for Scott and Patti's
6 desire to recover items from the Homestead. Chris's petition will be approved.

7 **8. Should Scott's objections to the interim inventory and**
8 **accounting be sustained?**

9 Scott has raised numerous objections to the Estate's interim
10 accounting and inventory. To the extent those objections pertain to the inclusion of
11 the Homestead, its value, and Scott's purchase offer, those objections are resolved
12 above.

13 As to the other objections to the inventory, the inventory must list
14 the decedent's "property with reasonable detail and indicating for each listed item
15 its fair market value as of the date of the decedent's death and the type and amount
16 of any encumbrance that may exist with reference to the item." Mont. Code Ann.
17 § 72-3-607(1). Except for those modifications noted in the Estate's response to
18 Scott's objections, the Court is satisfied that the Estate has complied with this
19 obligation to the best of its ability.

20 Scott objects that the accounting lacks notarization. The accounting
21 is expressly executed under penalty of perjury. This is an adequate substitute for
22 notarization. See Mont. Code Ann. § 1-6-105. Moreover, the Uniform Probate
23 Code does not require notarization of a verification under oath. *See id.* § 72-1-310.

24 Scott makes a number of other objections to the interim accounting,
25 but it appears some objections were resolved by separate discovery production or

1 further explanation by the Estate. Scott has not demonstrated any further need for
2 court intervention in the first interim accounting, particularly as the Estate
3 represents it will be supplementing the accounting and submitting a final
4 accounting when it is time to close the estate. Accordingly, the Court overrules
5 Scott's objections.

6 **8. Remaining Motions**

7 The parties have filed various other motions. The Court denies the
8 motion to strike Patti Grosfield's brief in opposition to the Estate's motion for
9 summary judgment; given the understandable confusion about deadlines, Patti is
10 entitled to be heard. Patti and Scott are not entitled to their attorney fees and costs.
11 The remaining motions are moot.

12 Based on the foregoing, the Court enters the following:

13 **ORDER**

14 1. The Estate's Motion for Partial Summary Judgment (Dkt. 45),
15 filed March 22, 2022, is **GRANTED**.

16 2. The Estate's Application for Distribution of Personal Property
17 (Dkt. 39), filed February 4, 2022, is **GRANTED**.

18 3. All other pending motions are denied.

19 DATED this 2nd day of December 2022.

20 

21 CHRISTOPHER D. ABBOTT
22 District Court Judge

23 CDA/sm/DDP-2020-04 Ord on Motions

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1 cc: Michael L. Rausch, Esq., via email to: mike@bkbh.com
2 Brian P. Thompson, Esq., via email to: brian@bkbh.com
3 A. Roger Little, Esq., via email to: alitlmos@montana.com
4 Kelby R. Fisher, Esq., via email to: kelby@kfisherlaw.com
5 Steven D. Field, 5683 Schooner Way, Boise ID 83716
6 Lester L. Field, 335 Vivian Street, Oxford MS 38655
7 Dale F. Field, 211 Solomon Mountain Road, Clancy MT 59634
8 Norman Grosfield, Esq., via email to: norm@grosfieldlaw.com
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CERTIFICATE OF SERVICE

I, Michael L. Rausch, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appeal to the following on 02-15-2023:

Amos Rogers Little (Attorney)
PO BOX 1166
Helena MT 59624
Representing: Estate of C. Patricia Field
Service Method: eService

Kelby R. Fischer (Attorney)
40 W Lawrence Suite B
Helena MT 59601
Representing: Greg Field
Service Method: eService

Norman H. Grosfield (Attorney)
Grosfield Law Firm
P.O. Box 5015
Helena MT 59604-5015
Representing: Estate of C. Patricia Field
Service Method: E-mail Delivery

Steven D. Field
5683 Schooner Way
Boise ID 83716
Service Method: Conventional

Lester L. Field
112 Leighton Road
Oxford MS 38655-2010
Service Method: Conventional

Dale F. Field
211 Solomon Mountain Road
Clancy MT 59634
Service Method: Conventional

Valerie Hornsveld (Clerk of District Court)
515 Broadway

Townsend MT 59644
Service Method: eService
E-mail Address: vhornsveld@mt.gov

Electronically signed by Francine Polacek on behalf of Michael L. Rausch
Dated: 02-15-2023