

**IN THE SUPREME COURT OF THE STATE OF MONTANA**  
**Supreme Court Cause No. DA-23-0499**

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**IN RE THE MATTER OF THE ESTATE OF:**

**CAL R. NUNN,**

Deceased.

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On Appeal from the Montana Tenth Judicial District Court,  
Petroleum County, Cause No. DP-2020-06, Hon. Wm. Nels Swandal

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**APPELLEE RANDY L. NUNN'S RESPONSE TO OPENING BRIEF**

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| 2. | Findings of Fact, Conclusions of Law, and Judgment<br>(Dated 03/29/2023)              |

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## **STATEMENT OF THE ISSUES**

Whether a few of the heirs can bring a partition action in a probate prior to determination as to which heirs will get the distribution of the subject property.

## **STATEMENT OF THE CASE**

The origins of this action arose from the Estate of Cal R. Nunn (“Estate”). The Decedent, Cal R. Nunn (“Cal”), is survived by a wife and four children. The Estate is composed of interests in three (3) ranches known as 1) Chimney Rock; 2) Skibby Place, and 3) Walking Seven.

Chimney Rock is owned solely by the Estate.

The Skibby Place is owned by Cal and Cal’s brother, Randy L. Nunn (“Randy”), as Tenants in Common.

Walking Seven is owned by a corporation in which Cal and Randy own minority interests.

Randy has no interests in the other issues on appeal, except for his Co-Ownership of the Skibby Place with his brother Cal.

Three of Cal’s children, Molly Nunn, Jacy Nunn, and Cy Nunn (“Nunn Children”) filed a partition action seeking to partition the Skibby Place. The wife, Brandi R. Nunn (“Brandi”), moved to dismiss the partition.

The District Court held that the plain language of the statute allowed the partitioners, the Nunn Children, to file a partition action prior to formal/informal closing. *Appendix 1*. Brandi appealed.

### **STATEMENT OF FACTS**

1. Cal, died on November 18, 2020.
2. Randy's only interest in the issues on appeal are his ownership interests in the Skibby Place.
3. The Skibby Place is owned 50% by the Estate and 50% by Randy, as tenants in common.
4. The Skibby Place consists of +/- 7,608 deeded acres, but also has +/- 12,200 acres of State land and BLM land, and other leased acres. The legal description of the deeded land is set forth in the District Court's Findings of Fact, Conclusions of Law dated March 29, 2023. *Appendix 2*.
5. The Skibby Place was originally purchased by Georgia Delaney and M. R. Delaney (Randy's grandparents), and the family has operated this ranch for several generations.
6. Through the years, Cal and Randy ended up owning the Skibby Place. The Nunn Children brought this partition action in order to divide the property between the Estate and Randy in order for the Estate to be administered and distributions could be had.

7. Randy has no interest in the result of the other matters on appeal, but wishes the Skibby Place be partitioned so his interest in the Skibby Place can be defined and he can have sole interest of the portion, which is determined to be owned by him wholly and individually.

8. On June 14, 2023, the Nunn Children filed a partition to partition the Chimney Rock and the Skibby Place (*Appendix 1*) seeking to partition the property amongst the heirs of the Estate and Randy. The Court held that the plain language of the Statute (§ 72-3-914, MCA) allows partitioner to file a partition action prior to formal or informal closing.

### **STANDARDS OF REVIEW**

The standard of review of the District Court's interpretation of law is de novo. *Carbon County v. Union Reserve Coal Co Inc.*, 271 Mont. 459, 469, 898 P.2d 680, 686 (1995); *City of Missoula v. Fox*, 2019 MT 250, 397 Mont. 388, 392, 450 P.3d 898, 901.

### **SUMMARY OF THE ARGUMENT**

The first two inter-related issues relate to when an estate has a partial interest in real estate can the estate or any of the heirs of the estate bring a partition action in the probate court which has jurisdiction over the estate. The District Court ordered the heirs could and the decision should be affirmed.



## **ARGUMENT**

### **I. The Court's order denying Brandi's Motion to Dismiss the Partition Action should be affirmed.**

This Estate has been difficult to administer. One of the difficulties of administering this Estate is a large portion of the value of the Estate is the one-half interest the Estate owns in the Skibby Place. Not only is it in the best interest of the Estate, but it is in the best interest of Randy, that the Skibby Place be partitioned in-kind so that the Estate and Randy can go on with their business as it has been very cumbersome to the Estate and Randy to come up with joint decisions as to how the Skibby Place should be managed.

The Uniform Probate Code provides for partition in such situations.

It states as follows:

#### **“72-3-914. Partition for purpose of distribution**

When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the court, prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the court shall partition the property in the same manner as provided by the law for civil actions of partition. The court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party...”

§ 72-3-914, MCA (2024).

The official comments of that statute made clear that the District Court has jurisdiction to order partitions of property.

“Official Comment.

Ordinarily heirs or devisees desiring the partition of a decedent’s property will resolve the issue by agreement without resort to the courts. (see [72-3-915].) If the court determination is necessary, the court with jurisdiction to administer the estate has jurisdiction to partition the property.”

Because the property to be partitioned is done in the same manner as provided by the law for civil actions of partition, the civil laws pertaining to partition of property is set forth in 70-29-101, et al.

Section 70-29-101, MCA, states as follows:

**“70-29-101. Action for partition authorized - who may bring**

When several cotenants hold and are in possession of real property as joint tenants or tenants in common, in which one or more of them have an estate of inheritance or for life or lives or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property or a part thereof if it appears that a partition cannot be made without a great prejudice to the owners.

§ 70-29-101, MCA (2024).

The rules of partition when it comes to heirs’ property are a bit different, but to the extent they are the same. § 70-29-101, et al, applies.

Heirs’ property is defined under § 70-29-402(5):

## **“70-29-402. Definitions**

As used in this part, the following definitions apply:

...

(5) "Heirs property" means real property held in tenancy in common that satisfies all of the following requirements as of the filing of a partition action:

(a) there is no agreement in a record binding all the cotenants that governs the partition of the property;

(b) one or more of the cotenants acquired title from a relative, whether living or deceased; and

(c) any of the following applies:

(i) 20% or more of the interests are held by cotenants who are relatives;

(ii) 20% or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or

(iii) 20% or more of the cotenants are relatives.”

§ 70-29-402, MCA (2024).

There are no Supreme Court cases in Montana that are informative of the issue at hand, but going to secondary sources we find:

“In many states, by virtue of statutes whose constitutionality has been upheld<sup>5</sup> and whose provisions have received frequent judicial interpretation,<sup>6</sup> courts of probate jurisdiction, whether called “probate court,” “Surrogates’ courts,” or orphans’ courts,” have, or have had, power to make partition among heirs or devisees in connection with and ancillary and supplemental to the settlement and distribution of estates of decedents. The power so conferred may be exercised only within the limits

prescribed by organic law or statute<sup>7</sup> and cannot be extended even by consent of the parties.<sup>8</sup>

...

***Uncertainty as to rights of parties.***

In order to deprive the probate court of jurisdiction to make partition, there must be a real doubt or uncertainty as to the rights of the respective parties<sup>15</sup> such an uncertainty as to facts or law that warrants submission to a jury or other legal tribunal for decision<sup>16</sup> and it is not enough that assertion be made that there is a dispute<sup>17</sup> or even that the parties are not in agreement as to their rights<sup>18</sup> or that the shares due parties are uncertain and therefore not partitionable under statute since, if the judge erroneously decides that an uncertain share is certain and orders a partition, there can be an appeal from such decision.<sup>19</sup>

**Footnotes**

- 5 U.S. – *Robinson v. Fair*, 128 U.S. 53, 9 S. Ct. 30, 32 L. Ed. 415 (1888).
- 6 Ala. *Holt v. Holt*, 249 Ala. 215, 30 So. 2d 664 (1947).  
Me. – *Estate of Haynes*, 594 A.2d 1112 (Me. 1991).  
S.C. – *Anderson v. Anderson*, 299 S.C. 110, 382 S.E. 2d 897 (1989).
- 7 Ga. – *Crumley v. Laurens Banking Co.*, 141 Ga. 603, 81 S.E. 871 (1914).
- 8 Cal. – *Buckley v. Superior Court of San Francisco County*, 102 Cal. 6, 36 P. 360 (1894).
- 15 Mass. – *Dearborn v. Preston*, 89 Mass. 192, 7 Allen 192, 1863 WL 3522 (1863).  
Me. – *In re Roukos' Estate*, 140 Me. 183, 35 A.2d 861 (1944).
- 16 Me. – *In re Roukos' Estate*, 140 Me. 183, 35 A.2d 861 (1944).  
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- 17 Me. – *In re Roukos' Estate*, 140 Me. 183, 35 A.2d 861 (1944).  
Mass. – *Dearborn v. Preston*, 89 Mass. 192, 7 Allen 192, 1863 WL 3522 (1863).

- 18 Me. – *In re Roukos’ Estate*, 140 Me. 183, 35 A.2d 861 (1944).  
19 Me. – *Earl v. Rowe*, 35 Me. 414, 1853 WL 1858 (1853).  
Mass. – *Dearborn v. Preston*, 89 Mass. 192, 7 Allen 192, 1863 WL 3522 (1863).”

§ 72. Jurisdiction of probate courts in partition proceedings, 68 C.J.S. Partition §72.

Appellant Brandi complains that a partition of heir property would result in a determination of what property would be distributed to a particular heir. Moreover, Brandi argues that upon distribution, the Nunn Children may not have an interest in the property, but would receive other property. However, the purpose of the partition is not to divide the Skibby Place among the heirs, but to divide the Skibby Place between the Estate and Randy. Once the partition between the Estate and Randy can be completed, the Estate will then know what property it owns and then would be able to distribute it accordingly. Likewise, Randy would be able to identify what property he owns and he can deal with his property as he sees fit and not be burdened with the consent of the Estate, which now feels obligated to have unanimous heir consent to proceed.

## CONCLUSION

The probate court has jurisdiction to oversee a partition of probate property. The jurisdiction is provided for by statute. The partition is not to determine what property is to be distributed to each heir, rather to determine what property the estate owns which can be distributed. This Court should affirm the District Court.

DATED this 19<sup>th</sup> day of March, 2024.

PATTEN, PETERMAN, BEKKEDAHL & GREEN, PLLC

By: /s/ W. Scott Green  
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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Georgia text typeface of 14-points; is double spaced; and the word count is **1875** words, excluding Table Of Contents, Table of Authorities, Table Of Citations, Certificate of Compliance, and Appendix.

DATED this 19<sup>th</sup> day of March, 2024.

PATTEN, PETERMAN, BEKKEDAHL & GREEN, PLLC

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