**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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# APPELLEES', MOLLY NUNN, JACY NUNN AND CY NUNN, RESPONSE BRIEF

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2. Whether the District Court erred in discounting the value of the stock in the Walking Seven, Inc.

3. Whether the District Court erred in finding that a restrictive covenant prohibiting grazing of bison is valid.

## STATEMENT OF THE CASE

Cal Nunn ("Decedent") died intestate and is survived by his wife Brandi Nunn ("Brandi"), and four children, Jacy Nunn, Molly Nunn, Cy Nunn, and Forrest Hodges.[1] (Doc. 55, at ¶ 8). The Nunn Children filed a petition for partition of two parcels of real property, namely Chimney Rock and Skibby Place pursuant to Mont. Code Ann. § 72-3-914. (Doc. 78). Brandi opposed the partition and filed this present appeal pursuant to Rule 6(4)(d) Mont. R. App. Proc. (Doc. 115). Brandi is also seeking appellate review of the March 29, 2023, Findings of Fact, Conclusions of Law and Order arguing that such is a previous order or ruling with led to and resulted in the August 21, 2023,

[1] As necessary, Jacy Nunn, Molly Nunn, and Cy Nunn will be referred to collectively hereinafter as "Nunn Children" and Forrest Hodges will be referred to hereinafter as "Hodges."

Order denying Brandi's Motion to Dismiss Petition for Partition of Real and Personal Property. (Doc. 115).

The District Court followed Montana law in denying Brandi's Motion to Dismiss and its decision should be affirmed. The plain language of Mont. Code Ann. § 72-3-914 makes mandatory partition of property upon proper petition. "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." *Id.* (emphasis added). By operation of law, the Nunn Children had the absolute right to obtain a partition of the real property upon their father's death and Brandi's assignment of error is erroneous. *See, e.g.*, State ex rel. Wilson v. Musburger, 114 Mont. 175, 133 P.2d 586, 587 (1943) ("Title to property of a deceased person passes immediately upon his death to his heirs, and it does not pass by reason of a decree of distribution."). The District Court also correctly held that valuation discounts were appropriate in determining the value of Walking Seven, Inc., and that negative bison easements recorded by Decedent remains enforceable against all real property of the estate. The District Court's Order Denying Motion to Dismiss Partition

dated August 21, 2023, and its Findings of Fact, Conclusions of Law and Order dated March 29, 2023, should be affirmed.

## STATEMENT OF FACTS

Brandi served as Personal Representative of the Estate from December 14, 2020, to June 13, 2022. (Doc. 2, Doc. 25). After disputes arose among the heirs, Brandi stepped down and Seth Blades, CPA, became Personal Representative of the Estate. (Doc. 25). Decedent's estate is subject to significant debt which must be paid from Decedent's assets. (Doc. 54, at p. 2; Doc. 65, at FOF 9 and 29; Doc. 137). The main assets of Decedent's estate are:

1. Chimney Rock, owned solely by Decedent, consists of approximately 2,082 acres of deeded land, and is subject to a debt of $650,000 owed to Georgia Delaney and is collateral for a loan held by Stockman Bank (Doc. 54, at p. 1-2; Doc. 65, at Findings of Fact "FOF" 7-9; and Doc. 91, at ¶ 7);

2. Skibby Place, owned 50% by Decedent as tenants in common with his brother Randy Nunn, consists of 7,608 deeded acres and 12,200 leased acres. Skibby Place has operated as a family ranch for several generations and is subject to a mortgage held by Stockman Bank (Doc. 54, at p. 2; Doc. 65, at FOF 10-12);

3. Hanging T, Inc. ("Hanging T"), owned by Decedent and his brother Randy Nunn, is utilized as the operating entity for the Skibby

Place under the supervision of Decedent. Hanging T is subject to significant debt, including taxes, penalties and interest for failing to file tax returns, and is the subject of a plan of liquidation approved by the District Court (Doc. 94; Doc. 104; and Doc. 137); and

4. Walking Seven, Inc., ("Walking Seven") is owned 13.8% by Decedent, 13.8% by his brother Randy Nunn, 36.2% by his grandmother Georgia Delaney as life tenant (remainderman interest one-half to Decedent and Randy Nunn).[2] Walking Seven owns 19,081 deeded acres. (Doc. 65, at FOF 13-16).

Chimney Rock, Skibby Place, and the land owned by Walking Seven are all subject to a Negative Bison Easement, duly recorded as Document 054936 in Petroleum County, Montana, which prohibits the grazing of bison on these properties until 2037. (Doc. 145, at Exhibit A; Doc. 146).

Two real estate appraisers, namely French and Herbold[3], were retained to value the real property and Dan Vuckovich was retained to value Walking Seven, Inc. (Doc. 65, at FOF 19, 21). Following hearing on January 5, 2023, the District Court made the following Findings of Fact:

1. "Mr. Vuckovich's determined discounts for both lack of marketability and minority interest were appropriate. The Court finds Mr. Vuckovich's determination regarding appliable discounts

[2] The remaining 36.2% interest in Walking Seven is owned by Georgia Delaney personally.

[3] Brandi retained Herbold and the Estate retained French. (Transcript of January 5, 2023, Hearing at p. 96, ln 25 and p. 97, ln 1).

reasonable and appropriate." (Doc. 65, at FOF 20);

2. "The Personal Representative came up with his value for the properties by adding the [French Appraisals and the Herbold Appraisals] and dividing by two to the get the average value. The Court; after hearing testimony and reviewing the appraisals entered into evidence disagrees with that method of determining the fair market value of the property at issue (Doc. 65, at FOF 22);

3. "The Court finds that the French Appraisals more accurately represent the fair market value of the properties as of the date of death and adopts those values. The French appraisal took into account the drought conditions and overgrazing of the properties; the USDA findings for the price per acre for agricultural land in the area; the restrictive covenant on the property prohibiting the use of the property for grazing access issues on some of the property; and applicable IRS Regulations." (Doc. 65, at FOF 23); and

4. "The Personal Representative should amend the inventory to reflect the following value: i) Chimney Rock - $949,756, ii) Skibby Place - $1,920,263 (Decedent's ½ interest), and iii) Walking Seven, Inc. – a)13.8% interest

> $741,100, and b) 18.1% remainder interest $972,000." (Doc. 65, at FOF 25).

Following hearing on January 5, 2023, the District Court made the following Conclusions of Law:

> 1. "The Personal Representative is required to determine fair market value of the assets." (Doc. 65, at Conclusions of Law ("COL") 2);
>
> 2. "Restrictive covenants are enforceable against purchasers of burdened land." (Doc. 65, at COL 5) (internal citations omitted);
>
> 3. Restrictive covenants are examined under the same laws as contract law. The Covenant would only be invalid if it is (1) contrary to an express provision of law, (2) contrary to the policy of an express law though not expressly prohibited; or (3) otherwise contrary to good morals." (Doc. 65, at COL 6) (internal quotations and citations omitted);
>
> 4. "The restrictive covenant is valid." (Doc. 65, at COL 7);
>
> 5. "[T]he negative easement preventing bison from inhabiting the land is enforceable and thus should be taken into consideration when valuing assets." (Doc. 65, at COL 8); and
>
> 6. "[T]he French Appraisals most accurately reflect the fair market value of the properties in question at the date of death of the decedent." (Doc. 65, at COL 9).

Given the nature of the property and the substantial debts, the District Court gave the Nunn Children reasonable time to reach an agreement with

the other parties for the in-kind distribution of the property with sufficient remaining saleable assets to pay debts of the estate and until June 15, 2023, to file a partition action. (Doc. 65, at COL 12).

After the parties failed to reach a settlement to fund the payment of debts and provide for in-kind distribution of property, the Nunn Children petitioned to partition Chimney Rock and Skibby Place among the Decedent's heirs pursuant to the Montana Uniform Partition of Heirs Property Act. (Doc. 78). Brandi and the Estate[4] opposed the partition action and Randy Nunn supported the same. (Doc. 91, 94, 108). The District Court denied Brandi's Motion to Dismiss the Partition action, which Brandi appeals here. (Doc. 109).

## STATEMENT OF THE STANDARD OF REVIEW

The Montana Supreme Court reviews a District Court's findings of fact for abuse of discretion and will only overturn if such findings are clearly erroneous. *See* Baltrusch v. Baltrusch, 2003 MT 357, ¶23, 319 Mont. 23, 83 P.3d 256. A District Court's findings are clearly erroneous if substantial credible evidence does not support them, if the trial court has misapprehended the effect of the evidence or if a review of the records leaves this Court with

[4] The Estate opposed the partition action on the grounds that the estate's debts remained unpaid but provided no legal authority establishing the partition action as inappropriate. (Doc. 108).

the definite and firm conviction that a mistake has been committed. *See* Ray v. Nansel, 2002 MT 191, ¶19, 311 Mont. 135, 53 P.3d 870. The Montana Supreme Court reviews a District Court's conclusions of law de novo for correctness. *See* Baltrusch, at ¶23. The Montana Supreme Court reviews a District Court's interpretation of statutes de novo. *See* Board of Trustees, Butte-Silver Bow Public Library v. Butte-Silver Bow County, 2009 MT 389, ¶10, 353 Mont. 326, 212 P.3d 1175. The Montana Supreme Court reviews discretionary rulings for an abuse of discretion. *See* City of Missoula v. Girard, 2013 MT 168, ¶10, 370 Mont. 443, 303 P.3d 1283.

## SUMMARY OF ARGUMENT

The District Court properly denied Brandi's Motion to Dismiss the Partition Action as the plain language of the statute explicitly requires the District Court to partition property upon petition by an heir or devisee of an estate. *See* Mont. Code. Ann. §§ 72-3-914; 72-3-101(2). The District Court correctly applied discounts to Decedent's interest in Walking Seven pursuant to the governing corporate Bylaws and applicable Montana and Federal law. *See* Mont. Code Ann. § 35-14-732 ("An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this Chapter."). The District Court correctly applied

Montana law in ordering that the negative bison easement on the real property was enforceable against successors in interest. *See* Mont. Code Ann.§ 70-17-203. Further, the District Court's finding that the French Appraisals were more accurate and reliance thereon was supported by the record.[5] *See* Frazier v. Frazier, 208 Mont. 150, 154 676 P.2d 217 (1984) ("[W]hile the District Court is to give reasons for choosing one appraisal over another when there is a wide disparity in proposed values, the District Court will not be reversed if the record reveals a proper exercise of discretion.").

## ARGUMENT

### I. PARTITION ACTION

The District Court properly allowed the partition action to proceed after motion by heirs of the Estate. *See* Mont. Code Ann. §§ 70-29-403 and 72-3-914. Chimney Rock and Skibby Place are heirs' property, and the Nunn Children obtained a right to petition for partition immediately upon the death of their father. *See* Mont. Code Ann. §§ 70-29-403; 72-3-101(2); and 72-3-914. Brandi's assertion that additional determination must occur to provide the Nunn Children an "entitlement" to Chimney Rock and Skibby Place is

[5] The record shows that the Herbold appraisal represented an unjustified increase of over 300% in fair market value over an appraisal performed in 2016 for the same property.[5] (Doc. 46, at p. 3-4). The Herbold appraisal also failed to address potential access and water issues. Transcript, p. 92-93.

contrary to established Montana law. *See, e.g.,* State ex rel. Wilson v. Musburger, 114 Mont. 175, 133 P.2d 586, 587 (1943) ("Title to property of a deceased person passes immediately upon his death to his heirs, and it does not pass by reason of a decree of distribution."). The District Court's partition of Chimney Rock and Skibby place is mandatory upon the Nunn Children's partition petition.[6] *See* Mont. Code Ann. § 72-3-914.

### A. Chimney Rock and Skibby Place Constitute Heirs Property

"In an action to partition real property under Title 70, chapter 29, parts 1 through 3, the court **shall determine** whether the property is heirs' property. If the court determines that the property is heirs' property, the property **must be partitioned under this part** unless all of the cotenants otherwise agree in a record." Mont. Code Ann. §70-29-403(2) (emphasis added). Further:

> Heirs property means real property held in tenancy in common that satisfies all of the following requirements as of the filing of the 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 interest are held by cotenants who are relatives; (ii) 20% or more of the interest are held by an

[6] In the partition action, the District Court may order a portion of the property partitioned off and sold to satisfy estate creditors or require an heir to make payment to the estate. *See* Mont. Code Ann. §§ 72-3-914, 70-29-412(3).

> individual who acquired title from a relative, whether living or deceased; or (iii) 20% of more of the cotenants are relatives. . .

Mont. Code Ann. § 70-29-402(5). In context of "heirs' property", Montana law defines a relative to mean "an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption, or law of this state other than this part." Mont. Code Ann. § 70-29-402(9). Here, Decedent and his brother Randy Nunn acquired their interest in the Skibby Place from their grandparents. (Doc. 78, ¶ 6). Decedent acquired his interest in Chimney Rock from his grandmother, who holds the mortgage on the property. (Doc. 78, ¶ 7). Decedent, Randy Nunn, and decedent's grandparents are relatives as defined by Montana law. *See* Mont. Code Ann. § 70-29-402(9). Further, such property passed to decedent's heirs by virtue of Decedent's death. *See* Mont. Code Ann. §§ 72-2-112(4) and 72-3-101(2). Decedent's heirs at law are relatives of each other and of co-tenant Randy Nunn. *See* Mont. Code Ann. § 70-29-402(9). Chimney Rock and Skibby Place are not subject to an agreement regarding partition, all interest by cotenants was acquired from a relative, and all interest is held by cotenants who are relatives. (Doc. 78, at ¶¶ 6-7; Doc. 91, at ¶¶ 6-7; and Doc. 99, at ¶¶ 1-2). Chimney Rock and Skibby Place are by definition heirs' property and subject to the Montana Uniform Partition of Heirs Property Act. *See* Mont. Code Ann. §§ 70-29-402(5) and (9); and 70-29-403.

### B. Decedent's Heirs at Law Became Entitled to All Property of Decedent's Estate at Decedent's Death

Brandi's argument that the Nunn children have not shown that they have "an entitlement" to Chimney Rock and Skibby Place is contrary to established Montana law. *See* Mont. Code Ann. § 72-3-101(2). At the instant of Decedent's death, his heirs at law, including the Nunn Children, obtained an immediate property interest in all decedent's property including Chimney Rock and Skibby Place (subject to administration, creditors, and statutory allowances).

> "Upon the death of a person, decedent's real and personal property devolves . . . in the absence of testamentary disposition, to the decedent's heirs or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property, and family allowance, to the rights of creditors, . . . and to administration."
>
> *Id.*

Black's Law Dictionary defines "devolve" to mean to pass land, money, or other asset by transmission or succession. Black's Law Dictionary, 548 (10th ed., 2014). "A devisee's title to the property does not depend upon receiving a deed or decree of distribution. Rather as § 72-3-101(2) indicates, title to the property vests in the devisee at the moment of the testator's death." Shephard v. Widhalm, 2012 MT 276, ¶ 26, 367 Mont. 166, 290 P.3d 712. Likewise, in an intestate estate, a decedent's title to property passes to

decedent's heirs immediately upon decedent's death. *See* Mont. Code Ann. § 72-3-101(2). Here, decedent's heirs at law, namely Brandi, the Nunn Children, and Hodges, immediately acquired title [or became "entitled to a distribution of"] to decedent's property at the time of his death. *See id*; Mont. Code Ann. § 72-3-914. *See also* State ex rel. Wilson v. Musburger, 114 Mont. 175, 133 P.2d 586, 587 (1943) ("Title to property of a deceased person passes immediately upon his death to his heirs, and it does not pass by reason of a decree of distribution."). The immediate interest or entitlement of decedent's heirs is subject to the qualified right of the personal representative to control property for purposes of administration; however, the personal representative's qualified right does not negate the immediate entitlement of decedent's heirs to said property. *See* Shephard v. Widhalm, 2012 MT 276, ¶¶ 25-26, 367 Mont. 166, 290 P.3d 712 ("This Court long has held that a personal representative possesses only a qualified right to control property for purposes of administration. . . [which] include the need to pay creditors' claims, administration expenses, or a family allowance.") (internal citations omitted). The Nunn children and Decedent's other heirs at law obtained an immediate entitlement to Chimney Rock and Skibby Place at Decedent's death. *See id.* at ¶ 26 ("A devisee's title to the property does not depend upon receiving a deed or decree of distribution. Rather, as § 72-3-101(2) indicates,

title to the property vests in the devisee at the moment of the testator's death."). Brandi cites four Montana Supreme Court cases arguing the Nunn Children lacked standing to seek partition, but such decisions are distinguishable from the present facts as such either do not involve pending probate actions or were decided under Montana's general partition statutes and not the Montana Uniform Partition of Heirs Property Act.[7]

### C. Partition Pursuant to Mont. Code Ann. § 72-3-914 Is Mandatory Upon Petition of an Estate Heir

> 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.

Mont. Code Ann. § 72-3-914.

Given the unique nature of probate estates, Montana law allows for such partition to be completed upon petition of an estate heir prior to the closing of an estate. See Mont. Code Ann. § 72-3-914. The District Court must then partition such property prior to final distribution of an estate. *See*

[7] Brandi's bald assertion to the contrary fails to overcome the plain language of Mont. Code Ann. § 72-3-914 specifically authorizing the probate court to partition real property prior to final decree.

*id. See also, e.g.*, Shephard, at ¶ 26 ("A deed of distribution merely confirms that which already has taken place and releases the property from any conditions to which it was subject during probate."). As explained in the official comments to Mont. Code Ann. §72-3-914:

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

Here, because the heirs have not reached an agreement regarding the distribution of estate property, the Nunn Children were absolutely entitled to invoke their rights under Montana law to have the District Court partition the estate property, specifically Chimney Rock and Skibby Place.

## II. VALUATION DISCOUNTS APPLY TO WALKING SEVEN

Montana law permits shareholders to enter contractual obligations governing share transfers and setting the process for and valuation of a buy-out. *See* Mont. Code Ann. §§ 35-14-627 and 35-14-732 ("An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this chapter."). Walking Seven's Bylaws states that "[t]he purchase price of the stock shall be the value per share as finally accepted by the Internal Revenue Service for Estate tax

purposes **including all discounts allowed by the Internal Revenue Service**."[8] (Doc. 46, at p. 6) (emphasis added). The IRS requires that the value of corporate shares must be determined at fair market value. *See* Rev. Rul. 59-60, 1959-1 CB 237, modified by Rev. Rul. 65-193, 1965-2 CB 370, and amplified by Rev. Rul 77-287, 1977-2 CB 319. Here, the valuation discount applied to Walking Seven, a closely held family corporation, by CPA Vuckovich is appropriate based on the explicit terms of the corporation's bylaws and by longstanding precedent for valuing closely held corporations for estate tax purposes by the IRS. *See, e.g.*, 26 CFR § 20.2031-2(f) ("The degree of control held by a shareholder of the stock being value must be considered"); *see* Estate of Lee v. Comm., 69 T.C. 860, (1978) (explicitly holding that minority discounts are applicable for closely held family corporations); Mandelbaum v. CIR, TC Memo 1995-255, 1995 WL 350881, at *11 (1995) ("When determining the value of unlisted stock . . . a discount from the listed price is typically warranted in order to reflect the unlisted stock's lack of marketability . . . to reflect[ ] the absence of a recognized

[8] Brandi's assertion that no purchase price is set by the Bylaws fails to tell the whole story. While no per se price per share is set, Walking Seven Bylaws do set a definitive mechanism to determine the purchase price in the event a purchase is necessary due to transfer to a non-qualified person.

market for closely held stock . . ."); Whittemore v. Fitzpatrick, 127 F. Supp 710 (D. Conn. 1954) (providing for 66% valuation discount for a 24% ownership interest); Estate of Kirkpatrick v. Comm, 34 TCM 1490 (1975) (allowing a 70% discount from net asset value); Estate of Andrews v. CIR, 79 TC 938 (1982) (superseded on other grounds by statute as stated in Estate of Jelke v. CIR, 507 F.3d 1317 (11th Cir. 2007) (allowing a 64-66% discount for a 20% interest); Estate of Campbell v. CIR, 62 TCM 1514 (1991) (allowing for a 57% discount from net asset value); Estate of Smith v. CIR, 78 TCM 745 (1999) (allowing for a 75% discount from net asset value for a 33% interest in a farming corporation).

Despite Brandi's attempts to frame this issue as a sale of corporate stock, such is simply not the case. *Cf.* Hanson v. 75 Ranch, Inc., 1998 MT 77, ¶ 41, 288 Mont. 310, 957 P.2d 32 ("Applying a discount is inappropriate when the shareholder is **selling her shares** to a majority shareholder or to the corporation. The sale differs from a sale to a third party and, thus, different interests must be recognized.") (emphasis added). Here, Walking Seven is valued for the estate inventory and no sale is contemplated. Further, in the event of a future sale, Brandi has failed to establish that the sale would be to

either the corporation or to a majority shareholder.[9] The Walking Seven Bylaws require only that in the event a non-qualifying person acquires stock through operation of law, then it shall be mandatory that the "person becoming entitled to the shares held by the deceased shareholder . . . sell all or any of his or her stock, he or she shall first offer such for sale to the other shareholders and then to the corporation . . ." The plain language does not require that the ultimate purchaser of the stock be the corporation or a majority shareholder, but only a right of first refusal and sets a price for such buyout. As such, Brandi's reliance on Hanson is misguided. "[A] discount for a minority interest is appropriate when the minority shareholder has no ability to control salaries, dividends, profit distributions and day-to-day corporation operations." *See* Hanson, at ¶ 40-41 ("We . . . therefore overrule our decision in *McCann Ranch* **to the extent that** it holds a minority discount is appropriate when calculating "fair value" for the sale of a minority shareholder's shares in a closely held corporation **to a majority shareholder or to the corporation**.") (emphasis added). Given the stated purposes of the estate inventory, the explicit provisions of Walking Seven's Bylaws, and

[9] At this time, the only majority shareholder of the Corporation is Georgia Delaney (who owns 72.4% either individually or as a life tenant) and all remaining shareholders (whether current or as decedent's heirs at law are minority shareholders (namely Randy Nunn at 13.8% and decedent's heirs at law at 13.8%).

applicable law, the District Court correctly determined that appraisal of Walking Seven by CPA Vuckovich was reliable and that the applied valuation discounts were appropriate and supported by the record herein.

## III. RESTRICTIVE COVENANTS ARE ENFORCEABLE

"[E]very covenant contained in a grant of an estate in real property that is made for the direct benefit of the property or some part of the property then in existence runs with the land." Mont. Code Ann. § 70-17-203. Longstanding Montana law recognizes the enforceability of negative easements and restrictive covenants. *See id; see also, e.g.,* Reicher v. Weeden, 190 Mont. 95, 100, 618 P.2d 1216, 1219 (1980) (concluding an agreement between property owners restricting operation of a tavern construed an enforceable "negative easement" that ran with the land); Kelly v. Lovejoy, 172 Mont. 516, 519-20, 565 P.2d 321, 323 (1977) ("We have stated before that where the language of a restrictive covenant is plain, unambiguous, direct and certain and admits of but one meaning, it is the duty of this Court to declare what the terms of the covenants contains and not to insert a limitation not contained therein."); Haggerty v. Gallatin County, 221 Mont. 109, 119-20, 717 P.2d 550, 556-57 (1986) (concluding that commercial-use restriction covenant, or "negative easement," on conveyed ski-area property was enforceable); Hampton v. Lewis and Clark County, 2001 MT 81, ¶¶ 26-27,

305 Mont. 103, 23 P.3d 908 ("Purely restrictive covenants ('negative easements') may benefit of burden estates in fee simple absolute, whether granted, retained, or . . . owned concurrently."); Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937) (recognizing enforceable "restrictive covenants" contained in a deed that prohibited subsequent purchasers of conveyed lot from using premises for the sale of vinous, spirituous or fermented liquors as a beverage, nor for gambling, nor for any immoral purpose' under negative easement analysis).

Here, thirty-five landowners, including decedent Cal Nunn, voluntarily chose to burden their respective real property with a negative easement which prohibited the "wild, free roaming, or domestic bison to be on Grantors' property, located in Fergus County, Montana, Petroleum County, Montana, and Garfield County on the real property listed above, for a period commencing March 10, 2020, and terminating March 10, 2037." (Doc. 145, Exhibit A). This Negative Bison Easement was recorded in Petroleum County as Document 054936 on August 31, 2020, and in Fergus County as Document No. 136045 on July 29, 2020. (Doc. 145, Exhibit A). All grantees, including decedent Cal Nunn, received the stated benefit of "preserv[ing] the historic, cultural, and natural values on or related to Grantors' and Grantees' property, which due to the migratory behavior of bison, their social and other innate

behaviors, and tendency to carry brucellosis and other diseases, can create a negative and lasting impact on Grantors' and Grantees' way of life." (Doc. 145, Exhibit A). The Negative Bison easement is enforceable as a covenant that runs with the land, is enforceable against a transferee or purchaser of the same and must be factored into the determination of fair market value in Decedent's estate to the extent such negative easement affects the value. *See* Mont. Code Ann. § 70-17-203; Mont. Code Ann. § 72-3-607 ("The inventory must include a statement of the fair market value of decedent's interest in every item listed in the inventory. The personal representative may employ a qualified and disinterested appraiser to assist in ascertaining the fair market value as o the date of the decedent's death of any assets included in the estate."); Revenue Ruling 59-60 ("Fair market value is calculated as being the price at which a willing buyer would buy, and a willing seller would sell the item, both having reasonable knowledge of relevant facts. Additionally, this hypothetical transaction is one that occurs when the buyer is not under any compulsion to buy, and the seller is not under any compulsion to sell."). *see also, e.g.,* Reicher, 190 Mont. at 100. "Although conflicts may exist in the evidence presented, it is the duty of the trial judge to resolve such conflicts. His findings will not be disturbed on appeal when they are based on substantial though conflicting evidence, unless there is a clear preponderance

of evidence against such findings." Frazier, 208 Mont. at 155. Here two appraisers prepared appraisals and testified at hearing. Following full briefing and hearing, the Court concluded that Mr. French's valuation was more accurate given the facts and adopted the same. (Doc 65, at FOF 3 and COL 6). *See* Frazier, at 154 ("[W]e have held that while the District Court is to give reasons for choosing one appraisal over another when there is a wide disparity in proposed valued, the District Court will not be reversed if the record reveals a proper exercise of discretion.") (internal citations omitted).

Brandi asserts that the Negative Bison Easement is unenforceable and an unlawful restraint on alienation meaning the District Court erred in including such as a factor effecting the fair market value of the subject real property. But Brandi provides no applicable Montana law to support her contentions. Nor does Brandi distinguish the subject negative bison easement

from the multitude of negative easements previously upheld by this Court.[10] Instead, Brandi mistakenly relies on Edgar v. Hunt and its progeny but fails to provide any support for her conclusion that the restriction of one potential use is patently unreasonable. Instead, Brandi opines that the negative easement is unreasonable because it affects the value of the property and provides no benefit to the property. In making such unsupported assertions, Brandi blatantly ignores the plain language of the agreement mutually entered by consent of all thirty-five Montana landowners to "preserve the historic, cultural, and natural values on or related to Grantors' and Grantees' property, which due to the migratory behavior of bison, their social and other innate behaviors, and tendency to carry brucellosis and other diseases, can create a negative and lasting impact on Grantors' and Grantees' way of life." Even if analysis under the Edgar line of cases is relevant, Brandi fails to overcome the

[10] The only three cases Brandi cites have nothing to do with negative easements and instead deal with contractual options for the purchase of real estate or rights of first refusal. *See* Baker v. Berger, 265 Mont. 21, 873 P.2d 940 (1994) (finding that the right to purchase an interest in land at the death of a cotenant for a fixed price was not an unlawful restraint on alienation); Edgar v. Hunt, 218 Mont. 30, 706 P.2d 120 (1985) (holding that a preemptive fixed price repurchase option in an agreement executed contemporaneously with a deed transferring property did not constitute an unlawful restraint against alienation in violation of Mont. Code Ann. § 70-1-405); and Urquhart v. Teller, 1998 MT 119, 288 Mont. 497, 958 P.2d 714 (Mont. 1998) (finding that a right of first refusal contained in a contract for deed was unreasonable an unreasonable restraint on alienation").

undisputed fact that the decedent entered the restrictive covenant voluntarily in exchange for a mutual agreement by the other signatories and the mere fact that a potential successor dislikes the negative restriction does not negate that such mutual agreement was reasonable. *See*, *e.g.*, Urquhart v. Teller, 1998 MT 119, ¶20, 288 Mont. 497, 958 P.2d 714 ("In determining the reasonableness of a restraint, we also consider whether the restraint was entered into by mutual consent as a normal incident of an equal bargaining relationship or whether the parties intended for it to restrain the alienation of property."). The negative bison easement does not prevent the sale of the property, does not set an unreasonable fixed price, or impose any burden that is against public policy. Instead, the negative bison easement simply prohibits the property from being used for one specified purpose for a specified period of time. The negative bison easement was voluntarily place on the estate's property by the decedent prior to his death. Given the longstanding enforcement of and benefits of negative easements and restrictive covenants

in Montana, this Court should affirm the District Court's decisions herein regarding the same.[11]

## CONCLUSION

The District Court correctly determined the Nunn Children have a right to bring a partition action in the probate pursuant to Montana Code Annotated §72-3-914 and its Order Denying the Motion to Dismiss Partition action should be affirmed. Further, the District Court's correctly valued the shares Walking Seven and the estate real estate by applying proper valuation discounts and determining that the negative bison easement was enforceable. Such conclusions by the District Court were fully supported by the record and complied with appliable law and should be affirmed.

Dated March 21, 2024.

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

By: /s/ Laura E. Walker
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[11] Brandi's argument, if accepted, would invite infinite actions by parties in subdivisions who do not wish to be bound by restrictive covenants which existed long before the parties' purchase. For instance, many subdivisions have restrictive covenants which restrict the keeping of hooved animals, place a limitation on the number of dogs may be kept per property, and prohibit the keeping of fowl.

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word, and is 6,299 words excluding table of contents, table of citations, certificate of service, and certificate of compliance.

Dated March 21, 2024.

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## APPENDIX INDEX

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