NICK LETANG
PASSAMANI & LETANG, PLLC
Physical: 40 West 14th Street, Helena, MT 59601
Mail: P.O. Box 1778, Helena, MT 59624
(406) 422-4522
nick@plmontana.com
Bar #: 54057898
Attorney for Plaintiff

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0376

JAMES "BUCK" MACLAURIN, JR.,

Plaintiff / Appellant,

v.

FISCHER LAW, PLLC, D/B/A KELBY R. FISCHER ATTORNEY AT LAW,

Defendant / Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the First Judicial District of the State of Montana in and for Lewis and Clark County, Cause No. DV 25-2024-143-NE, Lewis and Clark County, Hon. Seeley

---

Attorneys of Record

Nicholas A. LeTang

nick@plmontana.com

PASSAMANI & LETANG, PLLC
40 W. 14th St., Ste. 2A
Helena, MT 59601
Representing: James "Buck" MacLaurin, Jr.
Service Method: eService

Matthew B. Hayhurst

mhayhurst@boonekarlberg.com

BOONE KARLBERG P.C.
201 W. Main, Suite 300
P.O. Box 9199
Missoula, MT 59807

Representing: Fischer Law, PLLC
Service Method: eService

Tyler M. Stockton

tstockton@boonekarlberg.com

BOONE KARLBERG P.C.
201 W. Main, Suite 300
P.O. Box 9199
Missoula, MT 59807

Representing: Fischer Law, PLLC
Service Method: eService

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and statutory provisions

Other authorities

STATEMENT OF LEGAL ISSUES

I. Whether the District Court erred when it dismissed Appellant's complaint pursuant to Mont. R. Civ. P. 12(b)(6) for failure to state a claim?

STATEMENT OF THE CASE

Existing case law in Montana concerning what acts sever joint tenant relationships is underdeveloped—indeed almost non-existent. This case illustrates the difficulty in applying the little case law Montana has in this area.

To simplify facts, three individuals owned property in joint tenancy beginning in 1986. In 1987, the owners came to a property sharing agreement wherein one owner received a life estate while also being responsible for insurance and property taxes. The terms of this agreement were contained in the life estate deed. In 2013, one of the joint owners passed away leaving two living joint owners, which included Appellant Buck MacLaurin and his stepmother Mary MacLaurin.

In 2020, Buck MacLaurin went to Fischer Law, PLLC for estate planning services. During this representation, Fisher Law drafted a family trust for Buck; additionally, Fisher Law drafted a quitclaim deed placing Buck's interest in the property into Buck's newly formed trust. Buck executed both the trust and the quitclaim deed the same day at the direction of Fisher Law. At this time, Fisher Law did not inform Buck that the act of deeding a joint interest into a trust is universally

recognized in American jurisprudence to sever such interest from the remaining joint owners.

In 2022, Mary MacLaurin passed away, leaving Buck as the sole remaining joint owner. Thereafter, Buck went to sell the property. At this time Buck was informed by the title insurance company that his action of deeding his joint interest in the property into his trust in 2020 severed the joint tenancy relationship between he and Mary MacLaurin—and therefore the property was owned 50% by Buck and 50% by Mary's estate as tenants in common.

After learning that his estate planning resulted in losing full ownership in the property, Buck questioned Mr. Fischer. After being confronted and in a conflict of interest with his client, Mr. Fischer researched severance of joint tenancy relationships to reach a desired conclusion: that the severance of the joint tenancy relationship was not derived from his legal advice, but by the joint owners' prior life estate agreement. Feeling that Mr. Fischer's legal advice was conflicted and incongruent with the title insurance company's conclusion, Buck sought the opinion of other attorneys.

In March of 2024, Buck brought this action. Counsel for Fischer Law, PLLC filed a motion to dismiss for failure to state a claim. In briefing, Fischer Law's legal argument was the same as before, arguing that the joint owners' prior property sharing agreement contained in the life estate deed severed the joint tenancy

relationship and therefore Fischer Law's advice could not be the cause of any alleged damages.

More specifically, in briefing the parties disagreed on the scope of this Court's case law in *Barrett v. Ballard*[1] and whether Montana law was firmly entrenched in a Traditional "Four Unities" Approach when determining issues of severance of joint tenancy relationships or whether a "Intent to Sever" Approach was more appropriate. Buck, however, never disagreed that *Barrett* is good law on two legal conclusions addressing joint tenancy: (1) that every joint tenant to jointly held property reserves the right to unilaterally sever the joint tenancy relationship absent an agreement stating otherwise; and (2) that a joint tenant severs her joint interest when selling such interest to a third party. Instead, Buck argued that extending *Barrett*—a case that for forty-five years has been cited by this Court almost exclusively on grounds of contract law—to the facts in Buck's case was inappropriate.

This case presents an opportunity for the Court to provide clarity on the severance of joint tenancy relationships in the absence of legislative guidance. *Barrett* does not address the nuances of severing joint tenancy relationships, including the creation of property sharing agreements, leases, and life estates amongst joint owners.

[1] 191 Mont. 39, 622 P.2d 180 (1980).

The undersigned, of course, does not expect this Court to address all the factual scenarios (listed in the immediately preceding paragraph) when resolving this case: A pillar of our legal system is that courts rule on the narrowest possible grounds so as to avoid unintended consequences. However, in deciding this case, the Court must choose between one of two ideological frameworks, which include (A) Traditional "Four Unities" Approach; or an (B) "Intent to Sever" Approach. The former approach is an unforgiving hatchet that does not account for any intent by the joint tenants to sever a joint interest; the latter more a scalpel that would allow courts to do justice in all circumstances where the severance of a joint interest is at issue.

STATEMENT OF THE FACTS

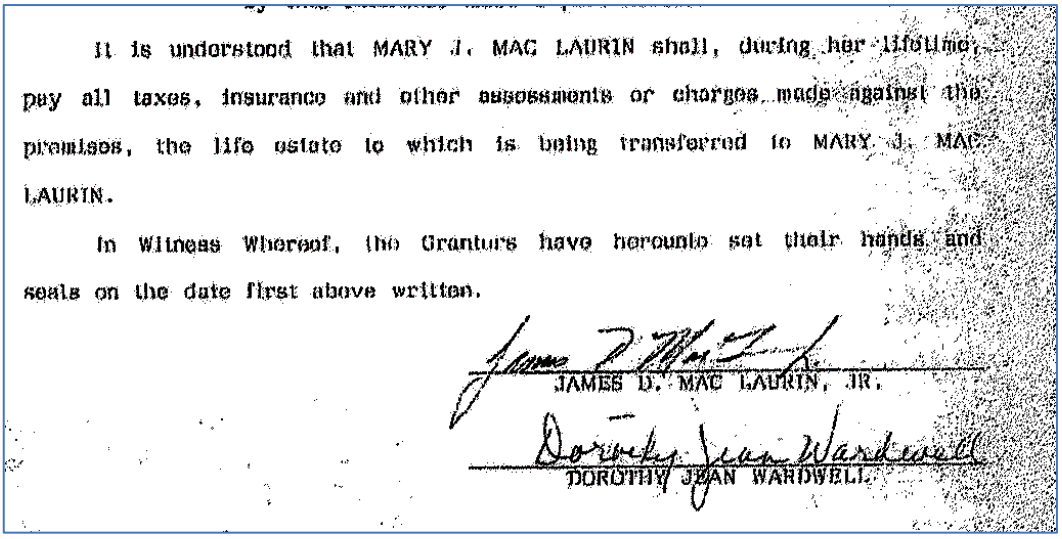
A. Factual background

Appellant is James "Buck" D. MacLaurin, Jr. (hereinafter referred to as "Buck"). Doc. 1 at 2, ¶7. James D. MacLaurin, Sr. was Buck's father. *Id.* at 2, ¶ 8. Mary MacLaurin was Buck's stepmother. *Id.* at 2, ¶9. On July 22, 1986, Buck MacLaurin, James MacLaurin and Mary MacLaurin purchased 422 Mill Street in Sheridan, Montana (hereinafter the "Property"). *Id.* at 2, ¶10.

On November 26, 1986, Buck, James, and Mary issued a deed to Buck, Mary, and Dorothy Wardwell as joint tenants with rights of survivorship. *Id.* at 2, ¶ 11. This

deed served the purpose of removing James MacLaurin and adding Dorothy Wardwell. *Id.*

On January 9, 1987, the owners came to a property sharing agreement wherein Mary MacLaurin received a life estate while also being responsible for the property's insurance and associated taxes. The terms of this agreement were contained in the life estate deed. *Id.* at 2, ¶12.



It is understood that MARY J. MAC LAURIN shall, during her lifetime, pay all taxes, insurance and other assessments or charges made against the premises, the life estate to which is being transferred to MARY J. MAC LAURIN.

In Witness Whereof, the Grantors have hereunto set their hands and seals on the date first above written.

JAMES D. MAC LAURIN, JR.

DOROTHY JEAN WARDWELL

On October 5, 2013, Dorothy died, leaving Mary and Buck as the remaining joint tenants. *Id.* at 2, ¶ 13-14.

On May 1, 2020, Buck created the J.D.M Living Trust, Dated May 1, 2020 (hereinafter the "Trust"). *Id.* at 2, ¶15. Kelby R. Fischer of Fischer Law, PLLC drafted the Trust. *Id.* at 2, ¶16. Also on May 21, 2020—at the advice and direction of Kelby R. Fischer—Buck quitclaimed his interest in the Property into his Trust. *Id.*

at 2, ¶17. At the time Buck' deeded his interest into his Trust, the following were true:

- The remaining joint owner to Buck, Mary MacLaurin, was in her 90's—a generation older that Buck;
- Fischer Law did not advise Buck that deeding Buck's interest in the Property would sever the joint tenancy relationship between Buck and Mary MacLaurin—and as a consequence, Mary MacLaurin's estate would own 50% of the Property upon her passing;
- That had Buck not deeded his interest into his Trust, that he would own 100% of the Property upon Mary MacLaurin's passing.

Id. at 2, ¶19, 23.

On December 29, 2022, Mary MacLaurin died. *Id.* at 3, ¶20. After Mary MacLaurin died, her Estate claimed 50% ownership to the Property; accordingly, Mary MacLaurin's heir, Bob Brown, inherited 50% ownership to the Property. *Id.* at 3, ¶ 21. The title insurance company handling the transaction agreed. *Id.* at 3, ¶22.

After Buck learned that Fischer Law's advice deprived Buck 100% ownership of the Property upon Mary's passing, Buck confronted Mr. Fischer. *Id.* at 3, ¶24. Mr. Fischer denied that his legal advice resulted in a severance, did not disclose his ongoing conflict with Buck, and proceeded to represent Buck until the circumstances of these events strained the attorney-client relationship. *Id.*

B. Procedural background

On March 5, 2024, Buck filed his Complaint. Doc. 1. On April 1, 2024, Fischer Law filed its motion to dismiss pursuant to Montana Rules of Civil Procedure Rule 12(b)(6). Doc. 3. Fischer Law's motion to dismiss was fully briefed on May 2, 2024. Doc. 5. On January 1, 2025, Buck filed a Reminder of Submittal. Doc. 7. On March 18, 2025, Buck filed his Second Reminder of Submittal. Doc. 8. Oral argument was held on April 3, 2025. Doc. 9, 10. On April 25, 2025, the District Court issued its order granting Fischer Law's motion to dismiss.

STANDARD OF REVIEW

A district court's ruling on a motion to dismiss for failure to state a claim is reviewed de novo. *Lozeau v. Anciaux*, 2019 MT 235, ¶5, 449 P.3d 830. In evaluating the motion, this Court considers the complaint in the light most favorable to the plaintiff and will not affirm the district court's decision unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Id.* The district court's determination that a complaint failed to state a claim presents a conclusion of law, which is reviewed for correctness. *Id.*

SUMMARY OF ARGUMENT

When granting Fischer Law's Rule 12(b)(6) motion, the District Court appeared to rely on *Barrett v. Ballard* in determining whether the 1987 property sharing agreement, contained within the life estate deed to fellow joint owner Mary

MacLaurin, severed Mary's joint interest from the other joint owners. As argued for by Fischer Law, the District Court's order appears to have applied a four unities-based approach (referenced in *Barrett v. Ballard*) to determining whether a severance occurred. Not only is *Barrett v. Ballard* factually inapposite since in involves the sale of a joint interest to a third party, it has never been subsequently cited by this Court to support a unities-based approach to severance of joint tenancy relationships. Extending *Barrett v. Ballard* to affirm a unities-based approach to resolving all inquiries of severance would lead to unintended consequences. A strict unities-based approach is overly theoretical and lacks practical application; such approach functions as a blunt instrument that ignores evidence of intent, thereby allowing joint tenants to stumble into a severance effect that was neither intended or contemplated. Instead of extending or affirming a unities-based approach to resolve questions of severance, this Court should utilize an intent-based approach as it has done before *In re Estate of Rickner.* The creation of joint interest requires express intent—and so too should the severance of a joint tenancy relationship.

DISCUSSION

In Montana, joint ownership of property in several persons can occur in three ways: (1) joint tenancy; (2) partnership interests; and (3) interests in common. § 70-1-306, MCA. The distinguishing factor of joint tenancy is the right of survivorship incident to each joint owner's interest: If there are more than two joint tenants, the

death of one increases the individual fractional shares of the survivors; this increase of individual fractional shares of survivors continues until the ultimate survivor becomes the sole owner in severalty. Roger A. Cunningham et al., *The Law of Property* § 5.4, pg. 189.

The *creation* of a joint tenancy in Montana occurs when three requirements are established in an instrument of conveyance or transfer: (1) two or more owners must own the property in equal shares; (2) the title creating the joint interest must come from a single will or transfer; and (3) the will or transfer must expressly declare it to be a joint tenancy. Mont. Code Ann. § 70-20-105; 70-1-307. In all conveyances of real property made in joint tenancy where the right of survivorship is contained in the grant of such conveyance, the right of survivorship exists by virtue of such grant. *Id.* at § 70-20-310. In summary, the creation of a joint tenancy relationship requires the express intent to do so.

Unlike creation of joint interests in real property (which is enumerated in statute and well discussed in case law), the law concerning *severance* of joint tenancy relationships in Montana is underdeveloped. Regarding statutory law, the Montana Code merely addresses severance in circumstances of divorce. § 72-2-814(2)(b), MCA. Regarding case law addressing severance of a joint tenancy relationship, relevant cases are *Barrett v. Ballard*, 191 Mont. 39, 43, 622 P.2d 180 and *In re Estate of Rickner,* 164 Mont. 51, 518 P.2d 1160. This Court's decision in *Barrett*—the scope of

which is a primary point of dispute in this appeal—includes two undisputed legal conclusions addressing the severance of a joint tenancy relationship: (1) every joint tenant to jointly held property reserves the right to unilaterally sever their joint interest absent an agreement stating otherwise; and (2) a joint tenant exercises her right to sever her joint interest when selling such interest to a third party. *Barrett v. Ballard*, 191 Mont. 39, 43, 622 P.2d 180.

I. *Barrett v. Ballard* is factually inapposite to Buck's pleading, is primarily a contracts case, and does not address the nuances of severing joint tenancy relationships.

A. *Barrett v. Ballard*

In *Barratt v. Ballard,* a husband and wife, Mr. and Mrs. Ballard, owned property as joint tenants with rights of survivorship. During the Ballard's joint ownership, Mrs. Ballard signed multiple listing agreements with her real estate agent, Ms. Barrett, to sell the Ballard's property. Unlike Mrs. Ballard, Mr. Ballard did not sign the listing agreements.

Pursuant to the listing agreement, Ms. Barrett advertised the Ballard's property and procured a buyer. Subsequently, the interested buyer began negotiating with Mr. Ballard directly, thereby cutting Ms. Barrett out of the buy-sell process.

After cutting Ms. Barrett out of the process, a purchase agreement was reached directly between Mr. Ballard and the buyer. Consequently, Ms. Barrett

brought an action against Mrs. Ballard for payment of her commission pursuant to the listing agreement. The district court ruled in Ms. Barrett's favor.

Upon appeal, the Appellant, Mrs. Ballard, argued that the absence of Mr. Ballard's signature on the listing agreements precluded the existence of an enforceable agreement. When affirming the district court's judgment, the Court cited in part the following to support its decision that Mrs. Ballard's signature alone on the listing agreements was sufficient to uphold the commission owed to Appellee:

> It has long been recognized that a cotenant in joint tenancy has a right and ability to sell her interest. See 20 Am.Jur.2d *Cotenancy and Joint Tenants*, § 16 at 109, which states: "Any act of a joint tenant which destroys one or more of its necessarily coexisting unities operates as a severance of the joint tenancy and extinguishes the right of survivorship. The act of one joint tenant in severing his interest in the property by alienation severs the joint tenancy to that extent, so that if there were but two tenants, the joint tenancy is terminated."
>
> This is the law in Montana. See State Board of Equalization v. Cole (1948), 122 Mont. 9, 195 P.2d 989, where the Court construed Section 6680 of the Revised Codes of Montana 1937, which provided a definition of joint interest almost identical to the one existing in today's codes. Construing that statute, the Court said:
>
> "… For example either co-tenant of a joint tenancy in real property could sever the estate by conveying his interest to a third party and as between the remaining co-tenant and the transferee the new estate became a tenancy in common…" 195 P.2d at 994.

Barrett v. Ballard, 191 Mont. 39, 43-44, 622 P.2d 180. This reasoning supported the Court's conclusion that Mrs. Ballard alone was "free and capable of acting without her husband, even though her husband knew at all times she had put the property up for sale." *Barrett v. Ballard*, 191 Mont. 39, 43-44, 622 P.2d 180.

Here, as mentioned above, there is no dispute that *Barrett* is good law on two legal conclusions addressing joint tenancy: (1) that every joint tenant to jointly held property reserves the right to unilaterally sever the joint tenancy relationship absent an agreement stating otherwise; and (2) that a joint tenants severs her joint interest when selling such interest to a third party. *Id.* The first conclusion (allowing one joint tenant to unilaterally transfer their interest) is necessary to fundamental property rights. Without the ability to sever a joint interest, a joint tenant's interest would be reduced to a life estate with a mere possibility of survivorship. *Ellingsworth, In re*, 266 A.2d 890, 892 (Del. Ch. 1970).

Regarding the second conclusion, concluding that the act of selling one's joint interest *automatically* severs such interest to the other joint owners is necessary to both prevent abuse and honor the original intent of the joint owners to vest only those such owners with right of survivorship. For instance, imagine the scenario where one joint owner—advanced in age and likely to die before the other joint owners—desires for his own family to receive the property fully. Without the automatic severance, such joint owner could fulfill his devious plan by simply selling (or

transferring) his share to a younger member of his family (i.e., someone who is likely to outlive the other joint owners) or placing such interest in a trust (which, of course, does not die and would "outlive" all other joint tenants). Historically, courts have prevented this sort of gamesmanship by determining that the act of selling or transferring an interest automatically severs such interest from the remaining joint owners.[2]

B. Unlike in Buck's case, *Barrett* involved the sale of a joint interest to a third-party stranger who was not privy to the joint tenancy relationship.

Here, Buck's case is factually inapposite to *Barrett v. Ballard*. Buck's case involves a private agreement amongst joint owners *all of whom were all privy to the joint tenancy relationship* (Buck MacLaurin, Mary MacLaurin, and Dorothy Wardwell). Buck's case is about a property sharing agreement evidenced in a life estate deed that enumerated such agreement: that Mary would receive a life estate, but would also be responsible for the property's insurance and taxes during such time. There were no third parties added as owners to the property that were uncontemplated at the time the joint tenancy relationship was created between Buck, Mary, and Dorothy. There was no gamesmanship by any joint tenants to take advantage of the right of

[2] The gamesmanship is eliminated because the severed interest receives a *tenant in common* relationship to the original joint owners, while the remaining original joint owners retain the right of survivorship between themselves.

survivorship: all parties to the life estate deed were one and the same to the deed vesting the owners as joint tenants. No additional parties were added or substituted that would give any joint owner (and their heirs) an unfair advantage to the right of survivorship (e.g., placing an interest with a younger family member or in a trust). And during the creation of the life estate agreement, there was no contemplation by the joint owners—and certainly never by Buck who was considerably younger than his fellow joint tenants in Mary and Dororthy—that their life estate agreement would sever any joint tenancy relationship. Instead, any determination that Mary's interest was severed through the life estate arrangement resulted from the parties unwittingly stumbling into it.

Unlike in Buck's case, *Barrett* is a case concerning the sale—i.e., the complete alienation—of a joint tenant's interest to a third-party stranger who was not previously privy to the joint tenancy relationship. Accordingly, *Barrett* should stand only for the general rule that is already universally recognized across this country: that joint tenants may freely alienate their joint interest and—by selling to a third party who was not privy to the joint tenancy relationship—sever such interest from the remaining joint tenants. As mentioned previously, the automatic severance that occurs when a joint owner transfers her interest of a third party is necessary to both prevent abuse and honor the original intent of the joint owners to vest only such those owners with right of survivorship. *Barrett* is good law in this sense, but misses

the mark when applied to other factual scenarios wherein joint owners are using their property as any persons would in the everyday normal course of life—including creating property sharing agreements, leases, and life estates amongst joint owners. What abuse is prevented when severing a joint tenant relationship simply because the joint owners freely entered into an agreement amongst each other? How would a severance of the joint tenancy relationship be consistent with—and respectful of—the original intent to create a joint tenancy relationship amongst the original owners?

The limitation of *Barrett* as this Court's definitive case on severing joint tenancy is apparent when considering how the Court has used *Barrett* these last forty-five years. *Barrett* has been cited almost exclusively by the Court only to support conclusions of contract law—not property law. Since *Barrett* was decided in 1980, the Court has cited *Barrett* in eleven cases. Within these eleven cases, *Barrett* was cited nine times on grounds of contract law, once on standard review grounds, and only once on grounds of property law. The chronological listing of Montana Supreme Court cases citing *Barrett*, and for what purpose, is as follows:

Year	Case	Purpose
1981	*Miller v. Titeca*, 192 Mont. 357, 363, 628 P.2d 670 (1981).	Cited on grounds of property law
1981	*Kartes v. Kartes*, 195 Mont. 383, 390, 636 P.2d 272 (1981).	Cited on grounds of standard of review
1982	*In re Estate of Matye*, 198 Mont. 317, 645 P.2d 955 (1982).	Cited on grounds of property law
1983	*Adams v. Cheney*, 203 Mont. 187, 197, 661 P.2d 434 (1983).	Cited on grounds of contract law

1992	*Lane v. Smith*, 255 Mont. 218, 224, 841 P.2d 1143 (1992).	Cited on grounds of contract law
1994	*Hall & Hall, Inc. v. Hyde*, 264 Mont. 190, 196-97, 870 P.2d 1362 (1994).	Cited on grounds of contract law
1994	*Wilson v. Terry*, 265 Mont. 119, 123, 874 P.2d 1234 (1994).	Cited on grounds of contract law
1996	*360 Ranch Corp. v. R & D Holding*, 278 Mont. 487, 493, 926 P.2d 260 (1996).	Cited on grounds of contract law
2009	*Andersen v. Schenk*, 2009 MT 399, ¶22, 220 P.3d 675.	Cited on grounds of contract law
2022	*Lewis & Clark Cnty. v. Wirth*, 2022 MT 105, ¶35, 510 P.3d 1206.	Cited on grounds of contract law

The absence of citations to *Barrett* in the property law context should give pause. The entirety of this Court's case law does not cite *Barrett* to support the four unities theory. Instead, *Barrett* has continually proved to be a contracts case, largely cited in disputes related to real estate commissions.

II. If *Barrett* controls this case, then this Court will be embracing the Traditional "Four Unities" Approach, thereby eliminating the ability of Montana courts to inquire into the intent of the parties on issues of severance and do justice.

To extend the *Barrett* decision to address all questions of severance would be to adopt the Traditional "Four Unities" Approach. The "four unities" refer to a set of four conditions that traditionally must exist for a joint tenancy to be created or maintained: (1) Unity of Time; (2) Unity of Title; (3) Unity of Interest; and (4) Unity of Possession. Under the Traditional "Four Unities" Approach, any act that would "break" a unity would cause a severance of the joint tenancy relationship.

When analyzing common factual scenarios involving potential severance of a joint tenancy, the traditional "Four Unities" approach is overly theoretical and lacks practical application. It functions as a blunt framework that ignores evidence of intent, often leading to absurd results. For example, under the Traditional "Four Unities" Approach, the following factual scenarios would result in a severance of joint tenancy without any intent by the joint owners to do so:

(1) Joint tenants to a Montana cabin create a cabin sharing agreement that establishes periodic exclusive control to each tenant (a very, very common factual scenario in Montana).

(2) Joint tenants to a Montana farm or ranch, wherein one joint owner is allowed a commercial lease on the property for agricultural production, thereby establishing exclusive control in one joint owner.

(3) Likewise, a Montana residence wherein one joint tenant is allowed a residential lease, thereby establishing exclusive control in one joint owner.

Under the rigid Traditional "Four Unities" Approach, the joint tenancy relationship would be severed in all these scenarios since all joint owners would not have an equal right to possess and enjoy the property at any given time (i.e., the Unity of Possession is broken). This would be the case for any property sharing agreement, lease, or life estate amongst joint owners. Under the traditional "Four Unities" Approach, it does not matter what the parties intended by their innocuous

actions of managing the use of their property amongst themselves; instead, rather than attempting to do justice, the traditional "Four Unities" Approach turns a blind eye and allows joint tenants to stumble into a severance effect that was neither intended or contemplated.

Assuming this Court intended *Barrett* to extend to all factual inquiries of severance, the use of *Barrett* and its Traditional "Four Unities" Approach will eliminate any inquiry addressing whether the joint owners intended to sever the joint tenancy relationship. Instead, joint tenants (or their heirs) seeking a severance will simply point to any *temporary* disruption in the Unity of Possession (e.g., a cabin agreement, lease, life estate, etc.) and engage in gamesmanship to reach their desired consequence. Joint owners will unwittingly stumble into a severance by merely using their property as any persons would in the everyday normal course of life, including creating property sharing agreements, leases, and life estates amongst joint owners. The joint owners' prior intent to create joint tenancy relationship will be disrespected, and whether the joint owners intended an act to sever the joint tenancy relationship will be disregarded.

III. The "Intent to Sever" Approach is a superior framework to addressing nuances of severing joint tenancy—and has already been used by this Court in *In re Estate of Rickner*.

A. The "Intent to Sever" Approach is a superior framework for handling the nuances of severing joint tenancy relationships.

In US jurisprudence on property law, the modern "Intent to Sever" Approach refers to a doctrine for determining when a joint tenancy with a right of survivorship is terminated based on a joint tenant's clear intention to end the joint tenancy. Under this approach courts focus on whether a joint tenant's actions or statements unequivocally demonstrate an intent to sever the joint tenancy (thereby destroying the right of survivorship) as opposed to merely examining technical formalities like the "four unities" alone. In practical terms, if a joint tenant engages in conduct that clearly signals an intent to terminate the survivorship estate, courts will treat the joint tenancy as converted to a tenancy in common at that point.

The "Intent to Sever" Approach is not incongruent with this Court's case law in *Barrett*. Like *Barrett*, the "Intent to Sever" Approach preserves a joint tenant's unilateral ability to sever his/her joint interest by simply manifesting a deliberate attempt to do so, including selling one's joint interest. However, unlike extending or affirming *Barrett*, using the "Intent to Sever" Approach does not do violence to the original intent of the joint tenancy relationship; instead, this approach elevates respect for the intent to establish and maintain a joint tenancy relationship over the rigid adherence to the four unities' technical formalities. If the "Intent to Sever" Approach were used, then Montana courts would not be powerless to avoid absurd results, such as requiring all joint owners to simultaneously possess exclusive control over the joint property to maintain the joint tenancy relationship. Additionally, joint

tenants would be able to reach agreements related to their joint property amongst themselves without stumbling into a severance that was never intended or contemplated.

Because the creation of a joint tenancy relationship requires an express act of intent, the superior methodology to resolving severance is the 'intent to sever' approach—which calls for the same deliberate intent to dissolve such a relationship as was required to create it. Under Montana law, the creation of a joint tenancy relationship requires an act of intent to do so. *See* § 70-20-105, MCA. If an intent is necessary to create a joint tenancy relationship, then the law should respect such intent absent: (1) an act intending to sever such relationship; or (2) a potential act of gamesmanship, intended or otherwise, wherein one joint tenant would seek to take advantage of the right of survivorship (e.g., transferring a joint interest to a younger family member or placing such interest in a trust). Requiring a coextensive intent to abandon/revoke a right—after an intent to invest in such right has been established—is not a novel concept. For example, both the creation and abandonment of county roads in Montana require overt acts of intent. § 7-14-260, MCA et al. Likewise, both the creation and revocation of testamentary devices also require clear acts of intent. § 72-2-521, MCA et al. Lastly, this Court has already applied an "intent to sever" approach in prior case law in *In re Estate or Rickner*, while also quoting the Kansas court: "It would appear that in view of our statute[,] a joint

tenancy is severed only in the manner which it was created, i.e., by clear intent of the parties." *In re Estate of Rickner*, 164 Mont. 51, 55, 518 P.2d 1160 (1974).

It is important to note that when using the "Intent to Sever" Approach, courts often graft such approach onto the "four unities" language. These courts may reference the four unities, yet nonetheless abandon the "Four Unities" Approach's rigid technicalities by determining that acts by the joint tenants that do not manifest an intent to sever do not break a unity. Take the following for examples:

> Nor does Helen's receipt of the rents, with John Jr.'s consent, destroy the unities of interest or possession. *See* Roger A. Cunningham et al., *The Law of Property* § 5.3 n. 38.5 (Supp.1987). "[C]ourts have frequently held that the 'unity of possession' may exist even though by express agreement between the joint tenants one of them retains the exclusive right to the possession of, and/or income from, the jointly owned property." *See also Porter v. Porter*, 472 So.2d 630, 633 (Ala.1985), and cases cited therein: "The mere temporary division of property held by joint tenants, without an intention to partition, will not destroy the unity of possession and amount to a severance of the joint tenancy."

Downing v. Downing, 326 Md. 468, 479, 606 A.2d 208 (emphasis added).

> An additional issue regarding whether the property settlement agreement operated to sever the joint tenancy involves the trial court's determination that an intent to sever could be found from the alleged severance of the unity of possession. The trial court concluded that the parties' agreement to arrange for exclusive possession of a section of the property for each party severed the unity of possession. We disagree. It is well settled in Illinois that joint tenants may contract with each other concerning the use of the common property, such as for the exclusive

> use of the property by one of them. (*Tindall v. Yeats* (1946), 392 Ill. 502, 64 N.E.2d 903; see 48A C.J.S. *Joint Tenancy* sec. 27, (1981).) They may, by contract, provide for the exclusive possession of one for such time as may be agreed upon by them. (*Curtis v. Swearingen* (1826), 1 Ill. (Breese) 207.) In the instant case, the parties' contracting for exclusive possession was not an indication of an intent to sever the joint tenancy, and it should not have been a factor in the trial court's determination.

Sondin v. Bernstein, 126 Ill. App. 3d 703, 707-08 (emphasis added). Meanwhile, other courts and scholars utilize the "Intent to Sever" Approach by simply concluding that acts without the intent to sever do not terminate the joint tenancy relationship without referring to the unities.

B. The "Intent to Sever" Approach is not radical and has been used by this Court before in *In re Estate of Rickner*.

The "Intent to Sever" Approach is supported by respected authority such as *Thompson on Real Property,* which recognizes that severance turns on whether the act in question reflects a clear intent to terminate the joint tenancy:

> This result has the benefit of being consistent with other aspects of the law of joint tenancy. Because it is generally accepted that joint tenants may agree among themselves on their respective use of the property, even providing by contract for the exclusive possession of one, without causing a severance, it seems only logical to permit one joint tenant to lease his or her interest to a stranger without terminating the joint. tenancy. This conclusion is bolstered by the fact that the lessor does not ordinarily intend by the lease to sever the tenancy. Other acts, such as the conveyance of the entire interest in the freehold, unequivocally express an intention to sever.

4 Thompson on Real Property, Thomas Editions § 31.08 (2024)

The "Intent to Sever" Approach has precedent in this Court's jurisprudence, including *In re Estate of Rickner*. 164 Mont. 51, 52-53, 518 P.2d 1160 (1974). In *Estate of Rickner*, Mrs. Rickner ("Decedent") passed away in April of 1970. Decedent's husband, Mr. Rickner, was appointed as personal representative of Decedent's estate. Mr. Rickner filed an inventory and appraisement showing that Decedent owned real and personal property as a joint tenant with Mr. Rickner. Included in the personal property was Decedent's portion of the seller's interest in that part of a contract for deed ("Contract") which pertained to 147 acres of land owned jointly by Decedent and Mr. Rickner. Pursuant to the contract for deed, Decedent and Mr. Rickner placed a warranty deed in trust with the local bank. At the time of Decedent's passing, $48,000 and interest remained to be paid on the Contract. *In re Estate of Rickner*, 164 Mont. 51, 52-53, 518 P.2d 1160 (1974).

Decedent's daughter, Ms. Birkeland, objected to the inventory and appraisement on grounds that the payments attributable to the contract for deed was mistakenly characterized as in joint tenancy. Ms. Birkeland argued that the sale of the 147 acres severed joint tenancy and therefore the Contract was held as tenants in common. Accordingly, Ms. Birkeland argued that Decedent's Estate was owed half of the remaining proceeds owned on the Contract. *Id.* at 54.

After conducting a hearing, the district court rejected Ms. Birkeland's severance argument and concluded "That absent any evidence of intent to terminate the joint tenancy the proceeds of the property so held should be deemed held in joint tenancy." *Id.*, at 53. Upon appeal, this Court agreed with the district court and referenced case law cited by the district court in *Hewitt v. Biege,* [3] quoting:

> "It appears to us much more logical to say that when all joint tenants concur in an act and none dissent there has been no hostile or adverse act which would terminate the tenancy. Changing the form of the property is an act unrelated to the holders' status as joint tenants. Joint tenancy is a relationship between certain people who have as a result of that tenancy certain rights in the *res.* If under our statute joint tenancy may be had in both personalty and realty, there is no reason to alter the personal relation of joint tenancy because of an act done jointly to the property.
>
> * * *
>
> It would appear that in view of our statute a joint tenancy is severed only in the manner in which it was created, i.e., by clear intent of the parties. * * *"

Id., at 53 (quoting *Hewitt v. Biege*, 183 Kan. 352, 3327 P.2d 872). This Court went on to conclude that a mere change of form does not change the nature of a joint interest, stating "There is no provision in the contract in the instant case showing an intent by deceased and Rickner to constitute a severance of the joint tenancy." *Id.* at 56, 58 (emphasis added).

[3] 183 Kan. 352, 3327 P.2d 872.

Estate of Rickner is this Court applying an intent-based approach to questions of severance of joint tenancy. It is good law, and it does not unnecessarily entangle itself in the technical formalities of a unities-based approach. Intent was the Court's lodestar. ("There was no provision in the contract in the instant case showing an intent by deceased and Rickner to constitute a severance of joint tenancy.") *Id.*

As quoted by this Court in *Estate of Rickner*, it is more logical to say that when all joint tenants concur in an act and none dissent, there has been no hostile or adverse act which would terminate the tenancy. *Id.*, at 53. Stated another way: joint tenants should be allowed to freely arrange for the management, possession, or income of their jointly held property without stumbling into a severance effect that was neither intended nor contemplated. The Traditional "Four Unities" Approach suffocates any intent; the "Intent to Sever" Approach does not.

Here, this Court should follow its sound law in *Estate of Rickner* and determine that the joint owners' 1987 property sharing agreement contained in the life estate deed to a fellow joint owner Mary MacLaurin did not constitute an intent to sever the joint tenancy relationship and therefore the right of survivorship remained intact at this time.

//

//

//

CONCLUSION

The Court should reverse and remand with instructions consistent with its opinion.

DATED this 28th day of July 2025.

PASSAMANI & LETANG, PLLC

/s/ Nick LeTang
Nick LeTang
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellant Procedure, I certify that this primary brief is printed with proportionately spaced serif font text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,183, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Nicholas LeTang
NICHOLAS LETANG

APPENDIX INDEX

CERTIFICATE OF SERVICE

I, Nicholas LeTang, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-28-2025:

Matthew B. Hayhurst (Attorney)
P. O. Box 9199
Missoula MT 59807
Representing: Fischer Law, PLLC, Kelby R. Fischer
Service Method: eService

Tyler M. Stockton (Attorney)
201 W. Main St., Suite 300
P.O. Box 9199
Missoula MT 59807-9199
Representing: Fischer Law, PLLC, Kelby R. Fischer
Service Method: eService

Electronically Signed By: Nicholas LeTang
Dated: 07-28-2025

CERTIFICATE OF SERVICE

I, Nicholas LeTang, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-31-2025:

Matthew B. Hayhurst (Attorney)
P. O. Box 9199
Missoula MT 59807
Representing: Fischer Law, PLLC, Kelby R. Fischer
Service Method: eService

Tyler M. Stockton (Attorney)
201 W. Main St., Suite 300
P.O. Box 9199
Missoula MT 59807-9199
Representing: Fischer Law, PLLC, Kelby R. Fischer
Service Method: eService

Electronically Signed By: Nicholas LeTang
Dated: 07-31-2025