

DA 21-0318

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 12

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DANIEL L. MORLEY,

Plaintiff and Appellee,

v.

CYNTHIA J. MORLEY and KENNETH E. MORLEY,

Defendants and Appellants.

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APPEAL FROM: District Court of the Third Judicial District,  
In and For the County of Powell, Cause No. DV-20-46  
Honorable Ray J. Dayton, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Craig D. Charlton, Lewis K. Smith, Smith Law Firm, P.C., Helena,  
Montana

For Appellee:


Kenneth A. Connors, Connors Law Firm, PLLC, Anaconda, Montana

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Submitted on Briefs: December 1, 2021

Decided: January 18, 2022

Filed:

  
Clerk

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Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Defendants and Appellants Cynthia J. Morley (Cynthia) and Kenneth E. Morley (Kenneth) appeal from the May 27, 2021 Order Confirming Referees' Division of Property issued by the Third Judicial District Court, Powell County. In this partition action, the District Court's order confirmed the division of property owned by Cynthia, Kenneth, and Plaintiff and Appellee Daniel L. Morley (Daniel) as set forth in the January 15, 2021 Referees Report to the Court.

¶2 We address the following restated issues on appeal:

1. *Did the District Court err by adopting the Referees' Report without holding an evidentiary hearing?*
2. *Did the District Court err by accepting the Referees' division of costs?*

¶3 We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

¶4 In early 2017, Cynthia, Kenneth, and Daniel each inherited an undivided one-third interest in real property, as tenants in common, following the death of their mother. That property is more particularly described as:

Tract A of the Stickney Minor Subdivision in the Southwest  $\frac{1}{4}$  Section 18, Township 9 North, Range 6 West, P.M.M., as said tract is designated and described on the official plat of the subdivision on file and of record as Document No. 138923 in the office of the Clerk and Recorder of Powell County, Montana.

SUBJECT TO easements for access and utilities as designated and described on the plat of the Subdivision for the benefit of Tracts B and C.

The property consists of 52.996 acres and a cabin, and is known as 148 Stickney Road in Elliston. In addition to the land and buildings, the property also contained personal

property and had appurtenant water rights. Cynthia, Kenneth, and Daniel each owned an undivided one-third interest in these as well.<sup>1</sup> Daniel and Kenneth owned an undivided one-half interest in a bank account used to pay expenses on the property, to which Cynthia had contributed as well. The parties agreed each should be entitled to a one-third interest in the bank account.

¶5 Later in 2017, Cynthia, Kenneth, and Daniel entered into an operating agreement to govern the management and operation of the property. The agreement provided that the parties intended to leave the property intact, and, if one of them wished to sell their portion of the property, the others would have the opportunity to purchase that share of the property. In the event the other members agreed to the sale but declined to purchase the share, the person selling their share agreed to “assume all costs associated with dividing and selling the ‘Property’ including but not limited to ‘Property’ surveys, all document filings, escrow payments, fencing, [and] appraisal fees.” The parties operated the property together without much incident for a couple of years after entering into the operating agreement. In late 2019 and early 2020, the parties explored options for buying out the interest of the others, but were unable to come to acceptable terms.

¶6 On June 16, 2020, Daniel filed his Complaint for Partition of Real and Personal Property in the District Court. In his complaint, Daniel sought to partition the property such that he would retain a portion of the real property which did not contain the cabin and

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<sup>1</sup> Cynthia, Kenneth, and Daniel each also owned specific items of personal property located on the property. Those items were not at issue either before the District Court or on appeal.

a portion of the water rights appurtenant to the real property he wished to retain. The complaint further alleged the property was situated such that the District Court could order its division, that the parties may be required to pay an owelty to equalize the value awarded after the division, and that Daniel, Cynthia, and Kenneth should each be responsible for one-third of the costs of the partition action. Daniel set forth a proposed division of the property in his complaint as well. On July 30, 2020, Cynthia and Kenneth filed their Answer to Complaint. In their answer, Cynthia and Kenneth asserted Daniel's proposed division of the property was inequitable and proposed their own division. Cynthia and Kenneth did not reference the 2017 operating agreement in their answer.

¶7 On November 5, 2020, the parties participated in an unsuccessful settlement conference. On November 20, 2020, the parties filed a Stipulation Regarding Referees and Other Matters. In accordance with this stipulation, the District Court issued an Order Appointing Referees on November 23, 2020, which appointed three referees and directed the referees to file a report recommending how the property should be divided. The order further ordered the parties and their counsel to provide all information and documentation requested by the referees. Daniel provided the referees with four appraisals: a March 13, 2017 appraisal completed by Mike Zimmerman of Zimmerman Appraisal Services; a July 11, 2019 appraisal completed by Shaun Moore of S P Moore Appraisal, PLLC (Moore Appraisal); an August 14, 2020 appraisal completed by Mike Zimmerman of Zimmerman Appraisal Services (Zimmerman Appraisal); and an October 31, 2020 appraisal completed by Tyler D. Warne of TD Appraisal LLC (Warne Appraisal). Cynthia and Kenneth provided the referees with the Warne Appraisal, the Moore Appraisal, and a November 1,

2020 market analysis completed by Dan Senecal of Big Sky Brokers, LLC (Senecal Market Analysis). On December 16, 2020, the referees met with the parties' attorneys and toured the property.

¶8 On January 15, 2021, the appointed referees filed their report in the District Court. The referees' report referred to each of the Moore Appraisal, Zimmerman Appraisal, and Warne Appraisal. The report did not refer to the 2017 Zimmerman appraisal or the Senecal Market Analysis. The referees' report determined the property should be divided into two parcels: Parcel I, which was 10.152 acres plus easements for access and utilities; and Parcel II, which was 42.844 acres. The referees determined Parcel I was worth \$44,000, Parcel II was worth \$100,000, and the value of the buildings, including the cabin, and personal property was \$225,000. The total value assigned to the property was \$369,000. The referees determined Daniel should be awarded Parcel II, while Cynthia and Kenneth would be awarded Parcel I, along with the buildings, including the cabin, and personal property. As Daniel's parcel was valued at \$100,000, compared with the \$269,000 value of Cynthia and Kenneth's parcel, the referees further ordered Cynthia and Kenneth to pay Daniel a total owelty of \$23,000—\$11,500 from each. The referees determined one of the property's water rights should remain owned one-third each by Cynthia, Kenneth, and Daniel, while the other, a well, should go with the cabin and Parcel I, and Daniel would have to drill a new well for Parcel II. The referees also divided the bank account one-third to each. Finally, the referees ordered the partition costs (survey, recording expenses, water transfer fees, and the costs of the referees) to be split equally among the three parties.

¶9 On February 2, 2021, Cynthia and Kenneth filed their Objection to Referees' Proposed Division of Property and Request for Hearing. Cynthia and Kenneth objected to the value the Referees gave to the cabin, the value attributed to the land, the need to pay an owelty to Daniel, and the one-third division of costs to each party. Cynthia and Kenneth attached the Warne Appraisal, the Senecal Market Analysis, the 2017 operating agreement, and their proposed division of the property as exhibits to their objection. On February 18, 2021, Daniel filed the Plaintiff's Notice of No Objection, Response to Defendants' Objection, and Motions. Cynthia and Kenneth thereafter filed a Reply Brief in Support of Defendants' Objection to Referees' Report and Request of Hearing and Opposition to Plaintiff's Motions. Cynthia and Kenneth attached one page of the Zimmerman appraisal and again attached the 2017 operating agreement as exhibits to their reply brief.

¶10 On May 27, 2021, the District Court issued its Order Confirming Referees' Division of Property. In its order, the District Court determined Cynthia and Kenneth's objections to the referees' report were insufficient to require an evidentiary hearing and confirmed the referees' report, including both its division of the property and its division of costs. On June 25, 2021, Cynthia and Kenneth appealed to this Court. After Cynthia and Kenneth filed their opening brief and appendix in this matter, Daniel filed a Motion to Strike Certain Exhibits of Appellants and Brief in Support Thereof, which requested this Court strike Exhibit E (the Moore Appraisal) and all but one page of Exhibit G (the Zimmerman Appraisal) from the record as they were not presented to the District Court. Cynthia and Kenneth responded in opposition to Daniel's Motion, and this Court issued an Order taking

the matter under advisement pending our full consideration of the appeal on November 9, 2021. For the reasons set forth in this opinion, Daniel’s motion to strike is denied as moot.

### STANDARD OF REVIEW

¶11 We review a district court’s findings of fact in a partition action to determine whether they are clearly erroneous. *Britton v. Brown*, 2013 MT 30, ¶ 20, 368 Mont. 379, 300 P.3d 667 (citing *Kellogg v. Dearborn Info. Servs., LLC*, 2005 MT 188, ¶ 9, 328 Mont. 83, 119 P.3d 20). A finding of fact is clearly erroneous if it is not supported by substantial evidence, the district court misapprehended the effect of the evidence, or if our review of the record convinces us that the district court made a mistake. *Crowley v. Crowley*, 2014 MT 42, ¶ 24, 374 Mont. 48, 318 P.3d 1031. We review a district court’s conclusions of law to determine whether they are correct. *Britton*, ¶ 20 (citing *Kellogg*, ¶ 9). Our review of whether a party was afforded due process is plenary. *Boland v. Boland (In re Estate of Boland)*, 2019 MT 236, ¶ 18, 397 Mont. 319, 450 P.3d 849 (citing *In re Marriage of Cini*, 2011 MT 295, ¶ 15, 363 Mont. 1, 266 P.3d 1257).

¶12 The construction or interpretation of a contract is a question of law which we review for correctness. *AWIN Real Estate, LLC v. Whitehead Homes, Inc.*, 2020 MT 225, ¶ 11, 401 Mont. 218, 472 P.3d 165.

### DISCUSSION

¶13 *1. Did the District Court err by adopting the Referees’ Report without holding an evidentiary hearing?*

¶14 Cynthia and Kenneth assert the District Court erred by not holding an evidentiary hearing on their objections to the referees’ report. They contend the lack of an evidentiary

hearing in this case violated their right to due process. Daniel argues the District Court's decision should be affirmed because the court's findings of fact were not clearly erroneous, its legal conclusions were correct, and the objections presented by Cynthia and Kenneth were insufficient to require an evidentiary hearing under the standard we set forth in *Britton*.

¶15 When real property is owned by joint tenants or tenants in common, one or more of those persons may exercise their right to bring an action to partition the real property under § 70-29-101, MCA. *Britton*, ¶ 24. "An order partitioning property 'extinguishes a tenant's rights in the whole property, and establishes the tenant's exclusive right of ownership in the part of the property set off to him.'" *Britton*, ¶ 24 (quoting *McCarthy v. Lippitt*, 781 N.E.2d 1023, 1029 (Ohio App. 2002)). "Because a partition action divests a person of her property, her interests are protected by the Due Process Clause of the Montana Constitution." *Britton*, ¶ 25 (citing Mont. Const. art. II, § 17). A district court must, when possible, order the partition "according to the respective rights of the parties as ascertained by the court" and appoint three referees for that purpose. Section 70-29-202(1), MCA. The appointed referees "must make a report of their proceedings, specifying therein the manner in which they executed their trust and describing the property divided and the shares allotted to each party with a particular description of each share." Section 70-29-211, MCA. After receiving the referees' report, a district court "may confirm, change, modify, or set aside the report and if necessary appoint new referees." Section 70-29-212(1), MCA.



¶16 Parties in a partition action have the right to object to the referees' report, and their objections may be founded upon a material mistake of either law or fact. *Britton*, ¶ 29 (citations omitted). "If the referees' report becomes a matter of legitimate dispute due to the submission of sufficient evidence, the report then is 'subject to challenge in an evidentiary hearing.'" *Britton*, ¶ 29 (quoting *Prostak v. Prostak*, 607 A.2d 1349, 1353 (N.J. Super. Ct. App. Div. 1992)). While failing to hold an evidentiary hearing after a party presented sufficient evidence challenging the referees' report would violate due process, an objection unsupported by sufficient evidence does not entitle a party to an evidentiary hearing. *Britton*, ¶ 29 (citations omitted).

¶17 This case turns on whether the District Court correctly determined Cynthia and Kenneth's objections to the referees' report were not supported by such sufficient evidence to classify as "substantiated" objections. It is only "when a party makes a substantiated claim of factual or legal error in the referees' report" that "due process protections and equitable concerns require the district court to hold a hearing to weigh the objections against the report." *Britton*, ¶ 30. If there are not substantiated objections supported by sufficient evidence presented, the district court may confirm the referees' report without holding a hearing. *Britton*, ¶ 30. A hearing is also required when a party presents substantiated objections to errors of law. *Britton*, ¶ 30. Citing to our decision in *Britton*, and construing a virtually identical statute, *compare* § 70-29-212, MCA, *with* N.D. Cent. Code § 32-16-15, the North Dakota Supreme Court has reached the same conclusion: "If neither party presents substantiated objections to the report supported by sufficient evidence, the district court may confirm the report under N.D.C.C. § 32-16-15 without

holding an evidentiary hearing. A party will also be entitled to be heard on substantiated objections to errors of law.” *Beach Railport, LLC v. Michels*, 903 N.W.2d 88, ¶ 27 (N.D. 2017).

¶18 As they did before the District Court, on appeal Cynthia and Kenneth make specific objections to the value of buildings, land value, the need to pay an owelty to Daniel as presented in the referees’ report, and the referees’ proposed division of costs. The division of costs will be addressed in Issue 2 below. Regarding Cynthia and Kenneth’s objections to the value of buildings, land value, and the payment of owelty to equalize the distribution, the District Court compared the evidence put forth in *Britton* with that put forth in this case before determining an evidentiary hearing was not required. As noted by the District Court, in *Britton*, the appellant “objected to the final partition report and submitted affidavits from eleven individuals, including several purported experts, challenging the conclusions reached by the referees.” *Britton*, ¶ 31. In contrast, Cynthia and Kenneth’s objection before the District Court consisted of no affidavits or experts and merely presented the Warne Appraisal and the Senecal Market Analysis, both of which were already presented to the referees, as evidence for why the referees’ report should be rejected. The referees’ report specifically references the Warne Appraisal as one of the three considered by the referees when determining the value of the buildings. In their reply brief, Cynthia and Kenneth also attached a single page of the Zimmerman Appraisal, which, again, the referees already had and expressly considered when making their determination of building value.

¶19 Cynthia and Kenneth argue the referees should have followed the Warne appraisal and Senecal Market Analysis and divided the property based on the values set forth therein. As a preliminary matter, the Senecal Market Analysis expressly “noted that this is a limited scope Market Analysis” and that a “full appraisal is warranted to make any final decisions regarding this property.” A market analysis with such a qualification is clearly insufficient to meet our substantiated objection standard, as the referees expressly considered three full appraisals when making their determination. Regarding the Warne Appraisal, this appraisal was presented to the referees and considered by them when making their report. In addition to the Warne Appraisal, the referees also considered the Moore Appraisal, the Zimmerman Appraisal, a tour of the property, and their own experience. Cynthia and Kenneth’s disagreement with the referees not choosing to follow only their preferred appraisal is not a substantiated objection supported by sufficient evidence as contemplated in *Britton*, and the District Court correctly rejected Cynthia and Kenneth’s arguments in this regard.

¶20 Cynthia and Kenneth further argue they are entitled to a hearing based on alleged factual errors in the referees’ report, namely that a portion of the Moore Appraisal’s value, the cabin’s value, was incorrectly listed in the referees’ report. Cynthia and Kenneth made this argument before the District Court, though they did not present the Moore Appraisal to the District Court for it to review. Cynthia and Kenneth have presented the Moore Appraisal as an exhibit on appeal, and Daniel has moved to strike it. We do not believe it is necessary to strike the exhibit, because it makes no difference to our consideration of

this appeal, and therefore deny Daniel’s motion as moot.<sup>2</sup> The Moore Appraisal was presented to, and used by, the referees when they created their report. Cynthia and Kenneth argued the referees incorrectly valued the cabin based on the Moore Appraisal in their reply brief in support of their objection in the District Court. The District Court considered Cynthia and Kenneth’s objections to the report and determined they failed to put forth sufficient evidence to question the conclusion of “three season[ed] referees” and the appraisals used by the referees. We agree with the District Court.

¶21 The referees in a partition action are presumed to have “acted fairly and honestly and the presumption must obtain unless overthrown by a clear preponderance of the evidence.” *In re Moran’s Estate*, 128 Mont. 189, 195, 273 P.2d 671, 674 (1954). The referees considered three appraisals with varying values and then, using their own experience, arrived at a value which matched none of them. A court only interferes with the referees’ decision regarding a partition when “a clear mistake has been made[.]” *In re Moran’s Estate*, 128 Mont. at 195, 273 P.2d at 674. We find no clear mistake in the referees’ decision in this case, including their decisions regarding the value of buildings, land value, and the need for an owelty to equalize the distribution among the three parties.<sup>3</sup>

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<sup>2</sup> For the same reason, we also deny the rest of Daniel’s motion as it relates to the Zimmerman Appraisal as moot.

<sup>3</sup> Regarding the land value, Cynthia and Kenneth take issue with the referees assigning different per-acre land values to Parcel I and Parcel II. They argue that a hearing was required to determine the factual basis for the differing land values, because the appraisals used by the referees did not provide different per-acre land values. It is true that all three appraisals relied on by the referees did not provide different per-acre land values, as all of the appraisals valued the entire property as one unit, not separate parcels—a smaller parcel with improvements and a well, and a larger parcel with only land—as the property was ultimately partitioned by the referees. While not made explicit, the referees gave their implicit reasoning for the differing land values in their report. The

Therefore, the District Court’s findings of fact are not clearly erroneous and its conclusions of law are correct. *Britton*, ¶ 20. Cynthia and Kenneth were not entitled to an evidentiary hearing on their objections and the District Court did not violate their due process rights by failing to hold one.

¶22 2. *Did the District Court err by accepting the Referees’ division of costs?*

¶23 Cynthia and Kenneth contend the District Court erred by adopting the referees’ report which divided the costs of the partition action equally among the three parties, asserting the 2017 operating agreement provides that, if one of the parties wanted to divide the property, “the requestor shall assume all costs associated with dividing and selling the [property].” Daniel argues Cynthia and Kenneth have waived consideration of this issue because they neither raised the issue of the operating agreement in their answer or made a counterclaim based upon it.

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referees deliberately placed both the home and site improvements on the smaller parcel and noted the parcel should have its boundaries modified, if needed, to ensure those improvements were contained within Parcel I. Additionally, the access and utilities easements, as well as the well water right, were also assigned to Parcel I. The referees noted Daniel would have to drill a new well for Parcel II, as the existing well and its water right were assigned to Parcel I. These material differences between the two parcels justify using a different per-acre value for each. We find Cynthia and Kenneth’s argument regarding land value does not rise to the level of a substantiated objection to the referees’ report supported by sufficient evidence, and therefore no hearing was required. *Britton*, ¶ 30. Unlike the appellant in *Britton*, who put forth eleven affidavits, some from experts, challenging the referees’ decision after they issued their report, Cynthia and Kenneth only put forth evidence the referees already expressly considered before issuing their report and the arguments of their counsel. The evidence presented was not sufficient to place the referees’ report “in legitimate dispute,” so the District Court did not err by not granting an evidentiary hearing based on this objection. As to the need for an owelty, Cynthia and Kenneth merely assert the total value of the property was \$330,000 based on the Warne Appraisal and should have been divided differently than it was. Cynthia and Kenneth simply choosing a different property value and distribution which they would have preferred and then claiming no owelty is required based on their proposed distribution is not a substantiated objection to the report supported by sufficient evidence, so the District Court properly rejected their request for an evidentiary hearing.

¶24 “Whether an ambiguity exists in a contract is a matter of law.” *Performance Mach. Co. v. Yellowstone Mt. Club, LLC*, 2007 MT 250, ¶ 39, 339 Mont. 259, 169 P.3d 394 (citations omitted). “The existence of an ambiguity must be determined on an objective basis, and an ambiguity exists only if the language is susceptible to at least two reasonable but conflicting meanings.” *Performance Mach. Co.*, ¶ 39 (citing *Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc.*, 2007 MT 159, ¶ 20, 338 Mont. 41, 164 P.3d 851). “Ambiguity does not exist just because a claimant says so.” *Holmstrom v. Mut. Benefit Health & Accident Ass’n*, 139 Mont. 426, 428, 364 P.2d 1065, 1066 (1961).

¶25 Though Cynthia and Kenneth repeatedly claim the operating agreement specifically states if one of the parties wanted to *divide* the property, that person would be responsible for all costs, the actual language of the operating agreement refers to the sale of the property, not a partition action:

In the event a member(s) of the “Party” requests to sell their portion of the “Property” the other members of the “Party” will have the opportunity to purchase the share of the “Property” at an agreed upon price. Costs associated with the transfer of the “Property” shall be the sole responsibility of the requestor. If the other members of the party agree to the sale but decline to purchase the share, the requestor shall assume all costs associated with dividing and selling the “Property” including but not limited to “Property” surveys, all document filings, escrow payments, fencing, appraisal fees.

A sale and a partition of property are not the same thing. *See* § 70-29-202(1), MCA.

¶26 “When the language of a contract is clear and unambiguous, the contract does not require the application of the rules of construction and it is the court’s duty to enforce the contract as made by the parties.” *Keller v. Dooling*, 248 Mont. 535, 539, 813 P.2d 437, 440 (1991). Because the language of the operating agreement refers to the party requesting

to sell being responsible for all costs, by its plain language, that portion of the operating agreement does not apply to the present partition action. Accordingly, the District Court correctly adopted the provision of the referees' report which determined each party should be responsible for an equal share of the costs in this case. While it is true the 2017 operating agreement was not presented to the District Court until after the referees had filed their report, because we determine the operating agreement does not apply to the present situation by its plain language, we need not reach Daniel's argument regarding waiver.

### CONCLUSION

¶27 The District Court did not err by adopting the Referees' Report without holding an evidentiary hearing on Cynthia and Kenneth's objections as they did not present substantiated objections supported by sufficient evidence in this case. The District Court did not err by accepting the Referees' division of costs and requiring each of Cynthia, Kenneth, and David to pay one-third of the costs of the partition action. In addition, Daniel's October 22, 2021 Motion to Strike Certain Exhibits of Appellants is denied as moot.

¶28 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH  
/S/ JAMES JEREMIAH SHEA  
/S/ LAURIE McKINNON  
/S/ BETH BAKER