STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

COLE EDWARD ANDERSON FKA CALVIN EDWARD MATHIS,

Plaintiff,

vs.

GAILORD LYNN MATHIS, ET AL,

Defendant.

Case No. **CV 2015 6401**

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYIING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff Cole Edward Anderson's (Anderson) Motion for Summary Judgment.

On October 20, 1980, Calvin Ben Mathis and Clara Marie Mathis, husband and wife, executed a Warranty Deed to a parcel of real property located in Kootenai County, Idaho. Decl. Under Oath Patricia Hatch Supp. Summ. J. (Hatch Decl.) 2, ¶ 5, Ex. 2. The Warranty Deed states:

> WARRANTY DEED
> (RESERVING LIFE ESTATE)
>
> KNOW ALL MEN BY THESE PRESENTS:
>
> FOR VALUABLE CONSIDERATION, the Grantors, CALVIN BEN MATHIS and CLARA MARIE MATHIS, husband and wife, do hereby grant, bargain, sell and convey unto their children, with right of survivorship, namely, CALVIN EDWARD MATHIS, GAILORD LYNN MATHIS, LAURA DE:VERE ROLL, REBECCA KAY MATHIS and RICKY WALTER MATHIS, as their sole and separate property, whose address is Route 1, Box 98T, Coeur d'Alene, Idaho 83814, the Grantees the following described property

in Kootenai County, Idaho, to-wit:

> The West Half of the Southeast Quarter, lying South of the country road, in Section 12, Township 50 North, Range 5 West, Boise Meridian, as recorded in the records of Kootenai County, Idaho.
>
> TOGETHER WITH ALL AND SINGULAR, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.
>
> RESERVING UNTO GRANTORS an estate in said real property, together with possession thereof, so long as they both, or either of them, shall live.
>
> . . . .

Id. at Ex. 2.

Both Calvin Ben Mathis and Clara Marie Mathis are now deceased; Clara Marie Mathis died on March 20, 1993, and Calvin Ben Mathis died on February 13, 2012. *Id.* at 2–3, ¶¶ 6–7; Aff. Cole Edward Anderson (Anderson Aff.) 2, ¶ 4, Exs. 3, 4. Upon Calvin Ben Mathis' death, the real property as described in the Warranty Deed was conveyed to Calvin Edward Mathis, Gailord Lynn Mathis, Laura De:Vere Roll, Rebecca Kay Mathis, and Ricky Walter Mathis. *Id.* at 2–3, ¶¶ 6–7; Anderson Aff. 2, ¶ 4, Exs. 3, 4.

There are three additional facts relevant to this matter. First, on April 24, 1996, Calvin Edward Mathis changed his name to Cole Edward Anderson (i.e., the plaintiff in this case). Anderson Aff. 2, ¶ 2, Ex. 1. Second, on May 6, 1996, Rebecca Kay Stafford[1] executed a deed of trust on the real property for a bail bond in favor of Gailord Lynn Mathis.[2] Hatch Decl. 3, ¶ 9. Third, in his Affidavit, Anderson states that Ricky Walter Mathis is deceased; however, the date of his death is not a part of the record in this case.

[1] Presumably, Rebecca Kay Mathis is now known as Rebecca Kay Stafford.

[2] In his Memorandum, Anderson states: "Originally, a deed of trust executed by Rebecca Kay Stafford for a bail bond for Gailord Lynn Mathis in favor of Surety Management of Idaho, Inc. dba Allwest General Bail Bond Agency Inc. and Amwest Surety Insurance Company clouded the title. However, the title company has removed this item as outdated and involving entities no longer in business. These companies are no longer necessary parties and should be dismissed from this action." Mem. Supp. Mot. Summ. J. Partition and Distribution Proceeds

Id. at 2, ¶ 5. Anderson also states that he believes Ricky Walter Mathis had three children, Travis Mathis, Brook Mathis, and Chad Mathis, and that Chad Mathis is also deceased and left behind minor children. *Id.*

On September 10, 2015, Anderson filed a Complaint for Partition seeking a partition by sale of the real property subject to the Warranty Deed.[3] He filed an Amended Complaint for Partition on April 8, 2016, and on June 16, 2017, Anderson filed a Second Amended Complaint for Partition. The Second Amended Complaint lists the defendants in this litigation as: Gailord Lynn Mathis; Laura DeVere Roll; Rebecca Kay Stafford; Travis Mathis, Brook Mathis, and all other heirs and devisees of Ricky Walter Mathis; and two corporations. On August 3, 2017, Randy Krieg, purporting to represent the defendants, submitted an "Answer" (really just a letter) on behalf of the defendants. Krieg is not an attorney and is not a party, thus, Krieg's "answer" is disregarded by this Court.

On September 21, 2017, Anderson filed a Motion for Summary Judgment. In support of that Motion, he filed a Memorandum, a Declaration Under Oath of Patricia Hatch, and an Affidavit of Cole Edward Anderson. As of October 23, 2017, the defendants have not filed a response to Anderson's Motion for Summary Judgment.

A hearing on this matter was held on October 25, 2017.

II. STANDARD OF REVIEW.

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the

---

2–3.

[3] A current legal description for the real property is included in the abstract for title. *See*

materials cited do not establish the absence or presence of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> > (1) give an opportunity to properly support or address the fact;
> > (2) consider the fact undisputed for purposes of the motion;
> > (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
> > (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea*, 156 Idaho at 545, 328 P.3d at 525 (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

Hatch Decl., at Ex. 1.

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

III. ANALYSIS.

In his Memorandum in Support of Motion for Summary Judgment, Anderson argues that there is no genuine dispute of material fact as to four issues: (1) he has an ownership interest in the real property; (2) the real property cannot be partitioned in kind without great prejudice to the owners and, therefore, the Court must order a partition by sale; (3) the parties must share the cost of the abstract of title and attorney's fees incurred as a result of this action pursuant to Idaho Code § 6-512 and § 6-547; and (4) an order directing final distribution of the proceeds from the sale of the real property in proportion to each party's ownership interest. Mem. Supp. Mot. Summ. J. Partition and Distribution Proceeds 4–5. Each issue is addressed in the order in which it is listed. However, because the Court concludes that there is a genuine issue of material fact as to the second issue, it does not reach the third or fourth issues presented in Anderson's Motion.

A. There is no genuine issue of material fact as to Anderson's ownership interest in the real property.

The first issue is whether Anderson's evidence demonstrates that there is no genuine dispute of material fact as to his ownership interest in the real property. Anderson argues that the evidence he presented shows that he has an undivided interest in the real property, and, in turn, that ownership interest entitles him to seek partition of the real property pursuant to Idaho Code § 6-501. *Id.* at 6. Anderson

asserts that the Warranty Deed establishes ownership of the real property. *Id.* Further, he contends that his parents' deaths terminated their life estate in the real property and title to the real property is now shared by him, his siblings, and his deceased brother's descendants. *Id.* The defendants have not responded to Anderson's argument that he has an ownership interest in the real property.

Idaho Code § 6-501[4] provides that a joint tenant or tenant in common may bring an action to partition real property. I.C. § 6-501. Under Idaho Code § 55-104, "[e]very interest created in favor of several persons in their own right is an interest in common, . . . unless declared in its creation to be a joint interest . . . ." I.C. § 55-104. Here, Anderson submitted a certified copy of the Warranty Deed. Anderson Decl., at Ex. 2. The Warranty Deed demonstrates that on October 20, 1980, Calvin Ben Mathis and Clara Marie Mathis retained a life estate in the real property and simultaneously granted Anderson and his siblings a remainder interest. *Id.* Anderson's Declaration shows that Calvin Ben Mathis and Clara Marie Mathis are now deceased. *Id.* at Exs. 3, 4. Upon the death of Calvin Ben Mathis and Clara Marie Mathis, the life estate ended and the real property was conveyed to Anderson[5] and his siblings. Hatch Decl. 2–3, ¶¶ 6–7. Together, this evidence

---

[4] Idaho Code § 6-501 provides:

> When several cotenants hold and are in possession of real property as parceners, joint tenants or tenants in common, in which one (1) or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one (1) or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition cannot be made without great prejudice to the owners.

I.C. § 6-501.

[5] As noted above, Anderson submitted evidence showing that he was formerly known as Calvin Edward Mathis.

demonstrates that Anderson has an ownership interest in the real property.

However, an additional issue is raised by Anderson failing to directly address the "type" or "kind" of ownership interest he has. Anderson is silent as to whether he is a joint tenant or tenant in common, and he must be either a joint tenant or tenant in common to seek partition. While this could be a "threshold issue" that has to be decided before the Court can find that there is no genuine issue of material fact as to Anderson's ownership interest, the Court is convinced Anderson is either a joint tenant or a tenant in common. That is an issue that will need to be resolved at a later point.

Without deciding this issue at this point, it appears the Warranty Deed created a joint tenancy (i.e., right of survivorship). It may be something subsequent to that Warranty Deed destroyed the joint tenancy, but that is another issue left for another day.

Anderson's briefing suggests that he thinks he's a tenant in common (i.e., the only reason Ricky's kids matter is if the siblings are tenants in common). The first problem is that Anderson never explicitly states that he's a joint tenant or, alternatively, tenant in common. While either type of owner can seek partition, the type of ownership is important to determining who, besides Anderson, has an interest in the property. The second problem is that the Court cannot "interpret" a deed without the parties putting the deed at issue and having a chance to brief it.

Because Anderson as the moving party has met his burden of showing that there is no genuine dispute of material fact as to his interest in the real property, the burden shifts to the defendants as the non-moving party to provide the Court with specific facts showing that there is a genuine issue of fact for trial. The defendants in this case have not done so; they have not submitted any evidence demonstrating

that Anderson's ownership interest in the real property is disputed. As a result, the Court concludes that the undisputed facts demonstrate that Anderson holds an ownership interest in the real property,[6] and pursuant to Idaho Code § 6-501, Anderson may seek partition of that real property. Again, the Court finds the undisputed facts show that Anderson has an ownership interest; it's just not clear whether his ownership interest is as a tenant in common or joint tenant. That issue must be resolved in order for Anderson to actually *obtain* partition.

B. Anderson has failed to present sufficient evidence to meet his burden of showing that he is entitled to summary judgment of partition by sale as a matter of law.

The second issue is whether Anderson's evidence shows that a partition in kind cannot be made without great prejudice to the owners. Anderson contends that a partition in kind of the real property cannot be made without prejudicing the owners for two reasons. Mem. Supp. Mot. Summ. J. Partition and Distribution Proceeds 6–8. First, he states that that the real property "is zoned agricultural and cannot be divided in a financially feasible manner[,]" and "[a]ny property line adjustment or division would result in violation of Kootenai County Zoning rules and is not allowed." *Id.* at 3, 6 (citing Anderson Aff., at Ex. 5). Second, Anderson contends that a partition in kind "appears" impossible due to disparities in street access, timber, altitude changes, and "other significant differences in character of any parcels that would be created . . . ." *Id.* at 7. The defendants have not responded to Anderson's assertions.

[6] As mentioned, while the undisputed facts demonstrate that Anderson holds an ownership interest in the real property, it's not clear whether Anderson is asserting he is a joint tenant or tenant in common. Because Anderson has not raised that issue in his Motion for Summary Judgment, the Court does not address it. However, the Court notes that Idaho Code § 6-508 provides that the rights of a plaintiff and a defendant may be put in issue, tried, and determined in an action for partition. I.C. § 6-508. When a sale of the real property is necessary, "the title must be ascertained by proof to the satisfaction of the court before the judgment of sale can be made . . . ." I.C. § 6-508.

Under Idaho Code § 6-512, a court may order the sale of real property where the evidence shows, to the court's satisfaction, that the real property is so situated that a partition in kind cannot be made without great prejudice to the owners. I.C. § 6-512. Idaho appellate courts have not clearly articulated a test for what constitutes great prejudice under that code section.[7] Nevertheless, in *Cox v. Cox*, 138 Idaho 881, 71 P.3d 1028 (2003), the Idaho Supreme Court affirmed a trial court's conclusion that a partition in kind "would result in great prejudice because the property include[d] one house and one barn, preventing an equal division of the property." *Id.* at 886, 71 P.3d at 1033. It also noted that the trial court had "stated [that] zoning laws very likely prohibited division of the property." *Id.*

In this case, the Court must first determine whether Anderson has met his burden of showing that he is entitled to summary judgment of partition by sale as a matter of law. The Court concludes that he has not met his burden. That is because Anderson has not presented sufficient evidence demonstrating that a partition in kind cannot be made without great prejudice to the owners. The only evidence offered by Anderson is his own affidavit. In his affidavit, Anderson testifies that partition in kind is not possible because of local zoning and subdivision regulations and the character of the real property at issue.

---

[7] In *Lay v. Raymond*, 265 Or. App. 488, 336 P.3d 550 (Or. Ct. App. 2014), the Oregon Court of Appeals considered a similar statute and stated: "The 'established test' for great prejudice is 'whether the value of the share of each [owner] in case of a partition would be materially less than his share of the money equivalent that could probably be obtained from the whole.'" *Id.* at 498, 336 P.3d at 556. Similarly, according to American Jurisprudence (Second Edition),

> [t]he generally accepted test of whether a partition in kind would result in great prejudice to the owners is whether the value of the share of each in case of a partition would be materially less than the share of the money equivalent that could probably be obtained for the whole. Property thus may be sold, rather than partitioned in kind, when it cannot be divided without materially impairing its value or the value of an owner's interest in it.

59A Am. Jur. 2d Partition § 121 (footnotes omitted).

As for his first argument, Anderson testifies that the real property subject to this litigation consists of 33.86 acres and is zoned agricultural. Anderson directs the Court to the tax billing for the real property. He explains that the tax bill demonstrates that he and his siblings receive an agricultural/timber exemption and that while the tax statement lists improvements to the real property, the listed improvements do not appear to exist any longer. He then makes the following conclusions:

> 8. As a result of the property being less than forty (40) acres and being zoned agricultural, it is impossible to divide it because at least one of the resulting parcels would be less than twenty (20) acres which is the smallest parcel allowed by this type of division. (Code 8.6.102 and 8.6.103(E), Copy attached as Exhibit "5")[.]
>
> 9. The only manner in which the property can be divided is to secure approval from Kootenai County for a subdivision to create several parcels. This would mean applying to Kootenai County to change the zoning for the property and then seek approval of the subdivision from the County. It is my understanding that depending upon the number of subdivided lots created the costs could run between $5,000 and $10,000 at a minimum.

Anderson Aff. 3, ¶¶ 8–9.

There are four problems with Anderson's testimony as summarized above. First, the tax statement(s) referenced by Anderson in his Affidavit are not a part of the record in this case. Second, Anderson appears to lack personal knowledge of the current condition of the real property, and, in turn, he appears to make inferences not supported by evidence (e.g., according to his own testimony, the real property's tax statements list improvements, but Anderson asserts, without explanation, that those improvements no longer exist). Third, Anderson does not have the requisite "expertise" to conclude that subdivision of the real property is impossible or otherwise summarize the steps required to subdivide the real property and estimate the costs associated with such action. The Court is not finding at this point that "expert" testimony is required, but at a minimum there needs to be some explanation/foundation as to how Anderson reached these conclusions. Fourth, to the extent that Anderson is qualified to make conclusions

regarding zoning and subdivision regulations as applied to the real property, the Court is not convinced that Anderson's brief analysis and corresponding conclusions are correct. Anderson cites to section 8.6.102 and section 8.6.103, subsection (E), of the Kootenai County Code, for the proposition that subdividing the real property is impossible because at least one of the parcels would be less than 20 acres. Turning to those code sections, sections 8.6.102 and 8.6.103 provide:

> 8.6.102: ZONES ALLOWED: Subdivisions are allowed in all zones with the exception of the Agricultural zone. Divisions of land which meet the requirements of one or more of the exemptions set forth in section 8.6.103 of this article are permitted in all zones.
>
> 8.6.103: EXEMPT DIVISIONS OF LAND: The following divisions of land shall be exempt from the provisions of this chapter. A parcel of land created under an exemption set forth in this section will be recognized as a separate parcel as of the day the instrument which created the parcel is recorded.
>
> > . . .
> > E. Divisions of parcels which are at least forty (40) acres in size, when each resulting parcel is at least twenty (20) acres plus or minus three percent (3%) in size. For purposes of this subsection, acreage may be based on the aliquot parts of the section of land in which the parcel is located. For example, a quarter-quarter section would be deemed to be a forty (40) acre parcel. Boundary line adjustments of parcels divided pursuant to this subsection shall be exempt from the provisions of this chapter so long as all such parcels remain at least twenty (20) acres plus or minus three percent (3%) in size.
> > . . .
> > H. Parcels of land created by court order other than one associated with a decedent's estate or exercise of eminent domain shall be considered a legally created parcel, but shall not be eligible for development permits until they are validated through approval of a major subdivision, minor subdivision, or minor amendment pursuant to this chapter.

Anderson Aff., at Ex. 5. Accordingly, the Kootenai County Code prohibits subdivisions of real property zoned agricultural unless an exemption listed in section 8.6.103 applies. While Anderson cites to the exemption listed in subsection E to conclude that the real property cannot be subdivided, the subsection E exemption is inapplicable to this case

because the real property at issue is not at least 40 acres in size; according to Anderson, it is only 33.86 acres. Moreover, subsection H appears to contradict Anderson's assertion that the real property cannot be partitioned in kind because it is zoned agricultural. That is, section 8.6.103(H) appears to permit the Court to order the real property to be partitioned in kind even if the real property is zoned agricultural. Therefore, based on a review of that portion of the Kootenai County Code submitted by Anderson, the Court is not persuaded that local zoning and subdivision regulations prohibit partition of the real property.

With regard to his second argument, Anderson testifies that the real property is not amenable to partition in kind due to the character of the real property. He states:

> 10. Further, subdivision of the lots would not create parcels equal in quality or value since some would have direct access from the road and others would only have an easement. I believe it would prejudice the interest of some parties based upon who received the better quality parcel, i.e., access, building site, etc. Further the property has a drop off and timber that would otherwise affect the value of each parcel so that the result parcels would not be equal in value.

Anderson Aff. 4, ¶ 10. While this assertion may ultimately prove true, Anderson's statement is conclusory, lacks foundation and is not supported by evidence. For example, Anderson has not submitted evidence as to the location of any road and how access from the "road," rather than access by easement, creates inequality among the owners. Anderson has not explained or provided evidence showing what portion of the real property contains timber, is sloped or flat, or otherwise demonstrated that the real property's topography precludes a partition in kind. Lastly, Anderson has not presented evidence related to the real property's value (as a whole or as partitioned), but nevertheless asserts that partitioning the real property cannot be done in an economically equal manner. In summary, Anderson has not presented sufficient evidence for the Court to find that the real property's topography or character prevents a partition in kind.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the Court grants Anderson's Motion for Summary Judgment on the issue of his ownership interest and right to seek partition of the real property; the Court denies Anderson's Motion for summary judgment as to the remaining issues.

IT IS HEREBY ORDERED Anderson's Motion for Summary Judgment on the issue of his ownership interest and right to seek partition of the real property is GRANTED.

IT IS FURTHER ORDERED Anderson's Motion for summary judgment as to the remaining issues is DENIED.

Entered this 1st day of November, 2017.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2017, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Party Pro Se**
		Rebecca Kay Stafford, pro se 9856 W. Riverview Dr. Coeur d'Alene, ID 83814
		Laura Devere Roll, pro se 9856 W. Riverview Dr. Coeur d'Alene, ID 83814
		Gailord L. Mathis, 691186 c/o Stafford Creek Correction Center 191 Constantine Way Aberdeen, WA 98520
Gregory L. Decker	667-1742	

_____
Jeanne Clausen, Deputy Clerk