IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 18-0678

In Re: J.K.N.A., S.G.N.A., and K.A.N.A.,

Minor Children,

LORA DIANE ADAMI,

Petitioner and Appellee,

and

KAREN CHERYL NELSON,

Respondent and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal From
Montana Fourth Judicial District Court, Flathead County
Before the Honorable Leslie Halligan

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STATEMENT OF THE CASE

Appellee Lora Diane Adami (hereinafter "Diane") initiated this action on March 14, 2016, by filing a Verified Petition for Parentage, Parenting Plan, Child Support, and Equitable Division of Property. (D.C. Doc. 1.) On March 16, 2016,

Karen filed a Petition for Third Party Parenting and Visitation. (D.C. Doc. 6.) On March 18, 2016, Diane filed Motions for Temporary Orders and Related Relief along with a brief in support and affidavit. (D.C. Docs. 9-11.)

On April 11, 2016, Appellant Karen Nelson (hereinafter "Karen") filed a response to the Petition, responses to the pending motions, and a proposed parenting plan. (D.C. Docs. 20-23.)

On August 2, 2016, the district court issued an Order for Temporary Child Support and Order for Temporary Economic Restraining Order. (D.C. Doc. 49.)

On September 15, 2016, Diane filed a Motion to Add Claims to Petition and a supporting brief. (D.C. Doc. 63-64.) The issue was fully briefed, and on October 25, 2016, the district court granted Diane's motion. (D.C. Doc. 71, 80, and 82.) Diane's Amended Petition was filed January 3, 2017. (D.C. Doc. 146.)

On November 9, 2016, Karen filed a motion to dismiss and for summary judgment regarding the amended petition. (D.C. Doc. 92.) The motion was fully briefed and the district court denied the motion on January 4, 2017. (D.C. Docs. 112, 137, and 147.)

On November 14, 2016, Karen filed a motion to add claims to her counter-petition. (D.C. Doc. 98.) The motion was fully briefed and the district court granted the motion on December 30, 2016. (D.C. Docs. 99, 121, 135, and 144.)

On January 6, 2017, Diane and Karen each filed a Proposed Parenting Plan. (D.C. Doc. 149 and 152.)

On January 18, 2017, Karen filed a Response to the Amended Petition. (D.C. Doc. 157.) The next day, she filed her Amended Counter Petition. (D.C. Doc. 159.) On January 26, 2017, Karen responded to the Amended Counter Petition. (D.C. Doc. 171.)

Trial was held on January 26 and 27, 2017. (D.C. Docs. 172.1-172.2) Subsequent testimony was heard from Sarah Baxter, the parenting evaluator, on February 21, 2017. (D.C. Doc. 186.)

On November 15, 2017, Diane filed a notice of additional authority. On February 5, 2018, Karen filed a notice that case is at issue. (D.C. Doc. 217.) On May 10, 2018, Karen filed a request for a status hearing, which was held June 5, 2018. (D.C. Docs. 218 and 221.)

On November 9, 2018, the district court issued its Findings of Fact, Conclusions of Law, and Judgment, along with a parenting plan and a child and medical support order. (D.C. Docs. 244-46.) Thereafter, Karen filed a timely notice of appeal. (D.C. Doc. 250.)

STATEMENT OF THE FACTS

By the time Karen and Diane began dating in 1996, Karen had put herself through medical school and was working as a first-year resident physician. (D.C.

Doc 244 at 3.) They were living in Virginia at the time and "didn't talk about marriage." *Id.*, at 4.

In 2001, Karen and Diane relocated to Palestine, Texas, to take a job at the local hospital. (D.C. Doc 244 at 6.) Karen eventually purchased a medical clinic in Texas. *Id.,* at 7. They moved to Grand Junction, Colorado, then Wyoming, eventually arriving in Montana in mid-2012. *Id.* The parties' romantic relationship ended in August 2014. *Id.,* at 10-11.

The parties had three children through artificial insemination, all of to whom Diane gave birth: J.K.N.A., born in Virginia in 2000; S.G.N.A., born in Texas in 2002; and K.A.N.A., born in Texas in 2004. (D.C. Doc. 244 at 3:20-23.)

At no time during the relationship did the parties talk about marriage. *Trial Tr.,* page 729. They did not exchange vows. *Id.* They did not exchange rings. *Id.* They did not have a ceremony. *Id.* Despite the financial ability to travel to a state that would have allowed them to marry or enter into a domestic partnership or civil union, the parties did not do so. *Id.,* at 972.

On March 14, 2016, Diane filed a Verified Petition for Parentage, Parenting Plan, Child Support and Equitable Division of Property. (D.C. Doc. 1.) Diane alleged she should be entitled to "an equitable apportionment of the assets and debts that accumulated during the relationship of the parties according to

community property principles based on the parties' agreement to form and maintain a relationship having characteristics sufficiently similar to marriage, in which resources are pooled for the benefit of both parties." *Id.,* at 14. Diane did not allege that a marriage existed and did not seek dissolution of a marriage, common law or otherwise. *Id.*

Karen filed her own Petition for Third Party Parenting and Visitation. (D.C. Doc. 6.) In her Reply, Diane alleged that "the parties began residing with each other in 1996, commenced a de facto marriage shortly thereafter…." (D.C. Doc. 27 at page 2.)

On April 21, 2016, the District Court held a hearing at which Diane admitted there was no marriage.

> THE COURT: So, Ms. Ridgeway, I just want to affirm that there is no dispute with regard to the parties not being married. Is there a dispute about that?
>
> MS. RIDGEWAY: The parties – Diane agrees that the parties were not legally married.

(4/21/16 Tr. at 15.)

On August 2, 2016, the District Court issued its Order for Temporary Child Support, and Order for Temporary Economic Restraining Order. (D.C. Doc. 49.) In the Order, the District Court found "the parties were never married, but are the parents of three minor children." *Id.*, at 2.

On September 16, 2016, Diane filed a Motion to Add Claims to Petition, including a claim of common law marriage, support payments, and attorney fees. (D.C. Doc. 63.) Despite Diane's previous admissions and filings, the District Court issued an Order Granting Petitioner's Motion to Add Claims on October 25, 2016, granting Diane the right to "file an Amended Petition that includes the new claims proposed in her Motion." (D.C. Doc. 82.) Back-peddling from its previous Order, the District Court stated that is previous finding that the parties were not married, "only references the fact that Diane and Karen never 'married' in the common usage of the term: in the sense of having a formal ceremony, solemnizing their mutual vows before a religious authority, receiving judicial approval of a marriage, or receiving some sort of certificate of marriage from a state authority that would immediately be recognized nation-wide." *Id.,* at 4.

Diane waited over two months to file her Amended Petition, but finally did so on January 4, 2017. (D.C. Doc. 146.) Diane included the claims of common law marriage, support, and attorneys' fees. Notably, Diane made no claim that the marriage should be dissolved. *Id.*

On January 4, 2017, the District Court issued its Order Denying Respondent's Motion to Dismiss and Motion for Summary Judgment. (D.C. Doc. 147.) In its Order, the District Court concluded that "it is undisputed that the parties did not officially get married, took no steps to apply for marriage, did not

apply for domestic partnership status or civil union recognition, did not hold any commitment ceremony or exchange vows, and did not take or use each other's names." *Id.,* at 5. The District Court further found that "Diane recalls not discussing marriage with Karen." *Id.*

A two-day trial was held on January 26th and 27th, 2017. At trial, Diane acknowledged that the parties "didn't talk about getting married – because we couldn't get married." Tr. page 729. Diane further acknowledged that the parties "did not exchange vows, no." *Id.* They did not exchange wedding rings or engagement rings. *Id.* They did not have a ceremony. *Id.*

On February 14, 2017, Diane filed a Request for Post-Trial Status Hearing wherein she requested the opportunity to introduce additional evidence that was not presented at trial. (D.C. Doc. 184.) Karen filed a Response with additional information on March 1, 2017. (D.C. Doc. 188.)

Despite the passage of more than a month since trial, the District Court issued an Order Regarding Petitioner's Request for Post-Trial Status Hearing, rather than its final Order. (D.C. Doc. 193.).

An additional two weeks passed, and the District Court issued a Judgment for Attorneys' Fees, reducing the interim attorney fee award of $30,000.00 to judgment in favor of Diane. (D.C. Doc. 192.)

Two more months passed and the District Court issued a Final Parenting Plan on May 16, 2017, without issuing contemporaneous Findings of Fact or Conclusions of Law. (D.C. Doc. 196.) By fall 2017, with no order from trial having been issued, Karen filed a Motion to Modify the Parenting Schedule Based on Evidence Not Available at Trial. (D.C. Doc. 197.)

Having waited 15 months since the time of trial without a ruling, Karen requested a status hearing on May 10, 2018. (D.C. Doc. 218.) Karen noted that in the time since trial, "the circumstances of the parties [had] changed dramatically." *Id.*

A status hearing was held on June 5, 2018, whereat the District Court expressed that it was "at a loss for not knowing full information from the parties over the past six (6) months." (D.C. Doc. 221.) Karen advised that despite the Court's Final Parenting Plan, the parties settled into a two-week on, two-week off *de facto* parenting schedule. Tr. dated June 5, 2018, at 1099:10-14. The Court then instructed the parties to file case updates by the end of June 2018, more than 17 months since trial. *Id.*

Diane filed an additional Motion for Award of Attorneys Fees on June 11, 2018. (D.C. Doc. 222.) Karen timely responded and objected. (D.C. Doc. 227.)

Diane filed her Status Report on June 26, 2018. (D.C. Doc. 225.) Included in the status report was a great deal of unsworn factual claims that had purportedly occurred since trial.

On August 2, 2018, the District Court issued an Order Granting Motion to Withdraw as Attorney of Record, which had been filed by Karen's trial counsel (D.C. Doc. 234.10.) Thereafter, Diane filed six additional documents, none of which were a Uniform District Court Rule 10 Notice.

22 months after trial, the Court issued its Findings of Fact, Conclusions of Law and Judgment on November 9, 2018. (D.C. Doc. 244.) Despite having already issued a Final Parenting Plan over a year before, the Court issued another Parenting Plan, as well as a Child Support and Medical Support Order. (D.C. Docs. 245-246.)

Throughout this matter, both parties repeatedly acknowledge two key facts: (1) that they never even discussed marriage; and (2) that they never exchanged any symbols of marriage such as rings or vows.

SUMMARY OF THE ARGUMENT

The District Court incorrectly found that Karen and Diane were common law married, despite there being no findings of fact that the parties mutually consented to a marriage relationship. Consent is an absolute requirement for the District Court to find parties are common law married and without it, no common

law marriage can exist. Because Karen and Diane are a same-sex couple, the District Court went out of its way to reach the result of common law marriage, which is a violation of equal protection.

Because the Court erred in finding a common law marriage, it also erred in awarding spousal maintenance and dividing the parties' property in accordance with Mont. Code Ann. § 40-4-202.

The District Court should not have allowed Diane to amend her Petition to add claims of common law marriage, spousal maintenance and attorney fees because Diane made a judicial admission the parties were not married. Diane's claims were barred by the doctrines judicial admission and judicial estoppel. Allowing amendment of her Petition was improper.

When Karen's counsel withdrew between the time of trial and the District Court's issuance of the final Judgment, Diane had an affirmative obligation to serve Karen with a notice under Uniform District Court Rule 10. Diane failed to do so and, as such, the District Court was without the authority to issue the Findings of Fact, Conclusions of Law and Order, or any other orders.

The District Court improperly awarded attorneys' fees to Diane without first making a finding that the requested fees were reasonable. There is not sufficient or competent evidence in the record to support a finding that the fees requested are reasonable.

Finally, the District Court further erred by granting a variance from the child support guidelines without first running appropriate calculations to determine if a variance was even appropriate.

This Court should reverse the District Court's Findings of Fact, Conclusions of Law and Judgment, Child Support and Medical Support Order, Parenting Plan. Further, this Court should reverse the District Court's Order Granting Petitioner's Motion to Add Claims and its Order Denying Petitioner's Motion for Finding of Contempt and Granting Partial Award of Fees and related Judgment for Attorney's Fees. The matter should then be remanded to the District Court for proceedings related to division of property for an unmarried couple, as well as for proper child support calculations.

STANDARD OF REVIEW

A determination of a common law marriage is a finding of fact, which will not be set aside unless it is clearly erroneous. *In re Marriage of Swanner-Renner,* 2009 MT 186, ¶ 13, 351 Mont. 62, 209 P.3d 238. "Findings are clearly erroneous if they are not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if the Supreme Court's review of the record convinces the Court that the district court made a mistake." *Id.*

If findings are not clearly erroneous, then the district court's distribution of property is reviewed for abuse of discretion. *In re Marriage of Stufft,* 286 Mont.

239, 243-44, 950 P.2d 1373, 1376 (1997). The standard of review for maintenance awards is whether the district court's findings are clearly erroneous. *In re Marriage of Haines*, 2002 MT 182, ¶15, 311 Mont 70, 53 P.3d 378.

The district court's denial or grant of a motion for leave to amend pleadings is reviewed for abuse of discretion. *Stundal v. Stundal*, 2000 MT 21, ¶ 12, 298 Mont. 141, 995 P.2d 420.

An award of attorney fees is reviewed for abuse of discretion. *In re Marriage of Lee,* 282 Mont. 410, 423, 938 P.2d 650, 658 (1997). "A district court has abused its discretion if its award of attorney fees is not supported by substantial evidence." *In re Marriage of Harkin,* 2000 MT 105, ¶ 70, 299 Mont.298, 999 P.2d 969.

Child support awards are reviewed for abuse of discretion. *In re Marriage of Craig,* 266 Mont. 483, 490, 880 P.2d 1379, 1384 (1994).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DETERMINING THE PARTIES WERE MARRIED BY COMMON LAW WHEN IT ALSO FOUND THE PARTIES DID NOT CONSENT TO A MARRIAGE RELATIONSHIP.

Whether the relationship began in 1999 or in 2000, the parties were living in the State of Virginia at the time and had been living there since they began their relationship in 1996. (D.C. Doc. 244 at 3.) The State of Virginia does not recognize common law marriage where the relationship is created in Virginia. *Farah v.*

Farah, 16 Va. Appl. 329, 334, 429 S.E.2d 626, 629 (1993). However, this Court has held in *Estate of Murnion* and *Marriage of Swanner-Renner* that common law marriage relationships created in states where common law marriage is not recognized can be validated by Montana when the impediment is removed. *Matter of Estate of Murnion*, 212 Mont. 107, 113, 686 P.2d 892 (1984); *Marriage of Swanner-Renner,* ¶ 20.

Although there exists some argument regarding the length of the relationship in light of *Obergefell v. Hodges,* particularly as it relates to whether or not *Obergefell* should apply retroactively, that is not the basis for Karen's appeal. The issue is not whether the parties could be common law married in light of *Obergefell,* but whether the District Court correctly concluded that the parties' relationship met the requirements of common law marriage.

To establish a common law marriage in Montana, the party alleging the existence of the marriage has the burden of proving: 1) that the parties were capable of consenting to the marriage; 2) that the parties assumed such a relationship by mutual consent and agreement; and 3) that the parties established the marriage by cohabitation and repute. *Swanner-Renner,* ¶ 17. The parties must "enter upon a course of conduct to establish their repute as husband and wife." *In re Est. of McClelland,* 168 Mont. 160, 165, 541 P.2d 780, 783 (1975).

Since this Court's decision in *Swanner-Renner*, a party seeking to establish common law marriage "must prove its elements…but is not held to the impossible burden of proving that they all happened immediately or instantly." *Swanner-Renner,* ¶ 17.

No element of common law marriage is given any more or less weight in the previous decisions of this Court. All elements must be present. Although cohabitation and public repute are not required to take place instantly, the element of consent must occur all at once. *Murnion*, 212 Mont. 107, 118 ("In addition to the consent required for a valid common-law marriage, there must be cohabitation and public repute of the marriage. The latter two factors do not take place instantly, but are continuing factors that extend through the life of the marriage.")

The element of "consent" is more specifically defined as the "mutual consent of parties able to consent and competent to enter into a ceremonial marriage, and the assumption of such relationship, by consent and agreement, as of a time certain." *Elliott v. Industrial Accident Board,* 101 Mont. 246, 53 P.2d 451, 454 (1936).

The consent required is not just the consent to enter into a committed relationship. The parties to a common law marriage must mutually consent to a *marriage relationship*. This Court has held that "mutual consent must always be given with such an intent on the part of each of the parties that marriage cannot be

said to steal upon them unawares." *Matter of Estate of Hunsaker*, 1998 MT 279, ¶ 34, 291 Mont. 412, 968 P.2d 281.

The District Court in the present action made no finding that either Karen or Diane consented to be married. There are findings that they consented to a relationship with one another, but no finding that they consented to a *marriage* relationship, which is an essential element of common law marriage. The only finding of fact to support mutual consent is the District Court's statement that, "the parties consented to build a life together, pool our resources, raise a family, and plan for a future together." (D.C. Doc. 244 at 29:19.)

The District Court misapprehended the consent requirement when it concluded that the decision before it was whether or not "two persons have consented to marital *obligations*." (D.C. Doc. 244 at 71:18 (emphasis added).) The question is not whether parties consented to marital obligations. The question is whether parties mutually consented to *be married*. There is simply no testimony or evidence that supports such a finding. The testimony and evidence clearly supports a finding that the parties did not consent to be married. Diane's own claims and testimony lead to the conclusion that the parties did not consent to be married, including her April 21, 2016 admission that "[she] agrees that the parties were not legally married." (4/21/16 Tr. at 12.)

Reviewing the facts of the instant case in relation to this Court's previous decisions supports a finding that the parties are not common law married.

In *Marriage of Geertz*, this Court upheld the district court's finding that the female cohabitant, Donna, failed to established the existence of common law marriage to Keith. *In re Marriage of Geertz*, 232 Mont. 141, 755 P.2d 34 (1988). The district court found that Donna "failed to carry her burden of proof," despite the public policy of Montana generally favoring a finding of a valid marriage. *Id.,* at 37. The parties had previously been married to one another but divorced. After divorcing, they resumed living together for a period of time on an "experimental basis." Keith acknowledged referring to Donna as his wife on a few occasions, but alleged he did so to avoid embarrassment. They filed taxes separately, held property separately, and maintained separate insurance. Donna also asked Keith to remarry her on more than one occasion. *Id.,* at 36. The district court concluded, and the Supreme Court affirmed, that Donna "failed to show the parties assumed a marital relationship with consent and agreement." *Id.*

In *Marriage of Swanner-Renner,* the district court concluded that the parties were married by common law, despite the ceremony occurring in Washington where common law marriage was not recognized. *Swanner-Renner,* ¶ 7. Jacqueline and James participated in an informal ceremony in which they "vowed their intention to be married 'under God,'" which this Court identified was a "vow

of consent." *Id.,* ¶¶ 7, 22. Approximately one year later, the couple moved to Montana where they lived together for a decade longer. Once in Montana, James executed numerous documents in which he alleged he was married to Jacqueline, including a "declaration of marriage" and tax returns filed as "married, filing separately." *Id.,* ¶ 9. The district court determined, and this Court affirmed, the parties were common law married.

In *Estate of Murnion*, this Court affirmed the district court's finding of common law marriage, determining that "the parties held themselves out as husband and wife during their period of residence in Montana." *Murnion*, 212 Mont. at 113. In *Murnion*, the husband to the marriage was deceased and the wife's claims of common law marriage were substantially supported by the decedent's close family members, including his father and mother and his brother. *Id.*

In *Estate of Ober,* the district court concluded that a party established the existence of a common law marriage between herself and the decedent at trial by introducing photographs with the decedent's handwriting calling her "my wife," as well as producing the rings both she and the decedent wore during their relationship. *In re Estate of Ober,* 2003 MT 7, ¶ 13, 314 Mont. 20, 62 P.3d 1114. The *Ober* Court relied on previous decisions in *Estate of Hunsaker* and *Matter of Estate of Alcorn,* 263 Mont. 353, 868 P.2d 629 (1994) to support its conclusion..

In *Matter of Peltomaa's Estate,* the district court concluded that the party failed to adequately prove a common law marriage. *Matter of Peltomaa's Estate,* 193 Mont. 74, 78, 630 P.2d 215 (1981). At trial, appellant alleged she and the decedent lived together for three years; that the decedent represented to others that appellant was his wife; that she went by decedent's last name on various occasions; and that she and decedent filed a joint tax return as husband and wife. *Id.*, at 76-77. The district court declined to find a common law marriage existed and the Supreme Court affirmed the same noting that the "facts used to support the existence of a common-law marriage are mere isolated instances in which appellant allegedly represented herself as decedent's wife. The facts *fail to show any specific agreement between appellant and the decedent concerning marriage." Id.,* at 78 (emphasis added).

The present matter is far more analogous to *Marriage of Geertz* and *Matter of Peltomaa's Estate* than it is to *Murnion, Swanner-Renner, Ober, Hunsaker,* and *Alcorn*. There is no evidence that Karen entered into any agreement to be married. Diane did not present evidence that the parties consented and agreed to a marital relationship. There are no photographs with "wife" inscribed. No joint tax returns. No documents identifying the parties as spouses.

The District Court did not make any findings that Karen consented to a marriage relationship. Quite the opposite, the District Court found:

1. Karen never was known to declare that she wanted to marry Diane or identify Diane as her spouse. (D.C. Doc. 244 at 28:19.)
2. Karen and Diane always filed taxes separately. *Id.*, at 29:14.
3. Besides one life insurance policy that Karen did not complete or sign, there are no documents that identify Karen and Diane as spouses. *Id.*, at 29:10-13.
4. Diane stated on the record that she and Karen were not married. *Id.*, at 29:23-24.
5. Diane and Karen referred to each other as "partners." *Id.*, at 30:2-4.

None of the findings the Court utilized as "facts in favor of finding a common-law marriage" relate to the absolute requirement of mutual consent to the marriage relationship. "Mutual consent must always be given with such an intent on the part of each of the parties that marriage cannot be said to steal upon them unawares." *Hunsaker*, ¶ 34. The finding of common law marriage in this action is an absolute example of "stealing upon the parties unawares."

It is impossible to ignore the fact that Karen and Diane are a same-sex couple. In July 2015, the U.S. Supreme Court issued its decision in *Obergefell v. Hodges,* the landmark civil rights case that guarantees same-sex couples the right to marry under the Fourteenth Amendment of the U.S. Constitution. *Obergefell v.*

Hodges, 576 U.S. __, 135 S. Ct. 2071 (2015). Since the *Obergefell* decision, same-sex couples have had the legal right to marry throughout the United States.

Article II, Section 4 of the Montana Constitution guarantees equal protection of the law to all persons. It provides that "[n]o person shall be denied the equal protection of the laws." In addition to the State Constitution, the Fourteenth Amendment of the United States Constitution guarantees equal protection to all persons. Those articles combined "embody a fundamental principle of fairness; that the law must treat similarly-situated individuals in a similar manner." *Snetsinger v. Montana University System*, 2004 MT 390, ¶ 15, 325 Mont. 148, 104 P.3d 445.

With the right to marry under *Obergefell*, axiomatic is the right to refrain from marriage. The analysis is not whether Karen and Diane could be common law married, but whether they were. However, in conducting that analysis, they cannot be treated differently because they are a same-sex couple. There is no justification for treating same-sex and opposite-sex couples differently. Doing so would be a violation of equal protection guaranteed under the Montana Constitution and the U.S. Constitution.

With that in mind, the District Court's examination should have been the same as if Karen and Diane were an opposite-sex couple. It was not.

The question is not whether Karen and Diane *could* have mutually consented to enter into a marital relationship, but whether or not they actually did. Unfortunately, the District Court engaged in a very different analysis because of the sexual preference of the parties and held their relationship to a very different standard.

The District Court's reasoning, applied broadly, compels the conclusion that every couple in a committed, long-term, cohabitating relationship that has children together, is married. Even despite a clear lack of mutual consent required under the law.

Karen does not dispute she and Diane cohabitated. She does not dispute they raised children together. She does not dispute that they were romantically involved for a substantial period of time. Those facts do not satisfy the elements of a common law marriage. And if this Court concludes those facts were sufficient in this case, every couple (opposite-sex or same-sex) who were in a long-term, committed, romantic relationship with children would be common law married.

The District Court treated the parties differently *because* they were a same-sex couple. The District Court engaged in substantial mental and legal gymnastics to avoid the fundamental question of whether the parties consented to be married, all because she was the partner of a same-sex relationship. To bend over backwards and give leniency to a same-sex couple is as much a violation of the

equal protection clause as it would be to favor an opposite-sex couple under the law.

For those reasons, this Court should reverse the District Court's determination that the parties are common law married.

II. THE DISTRICT COURT ERRED IN AWARDING SPOUSAL MAINTENANCE BECAUSE THERE IS NO MARRIAGE.

Under Mont. Code Ann. § 40-4-203(1), "in a proceeding for dissolution of marriage or legal separation or a proceeding for maintenance following dissolution of the marriage by a court that lack personal jurisdiction over the absent spouse, the court may grant a maintenance order for a spouse…"

To award maintenance, a trial court must find that the "spouse seeking maintenance (a) lacks sufficient property to provide for the spouse's reasonable needs; and (b) is unable to be self-supporting through appropriate employment…" Mont. Code Ann. § 40-4-203(1)(a)-(b).

The plain language of the statute makes clear that a maintenance award requires the parties be spouses. As set forth in detail above, the District Court incorrectly found that Karen and Diane's relationship met all the elements of a common law marriage. Because there is no marriage, there can be no spousal maintenance obligation due from Karen to Diane. For that reason, this Court should reverse the spousal maintenance award set forth in the Judgment.

III. THE DISTRICT COURT ERRED IN DIVIDING THE PARTIES' PROPERTY PURSUANT TO TITLE 40, CHAPTER 4.

The District Court paid lip-service to its "equitable power to fashion an appropriate remedy under the circumstances here." (D.C. Doc. 244 at 78:25-26.) Despite citing to cases granting trial courts equitable authority, the Court then specifically concluded that it was dividing the parties' property in accordance with "Title 40 Chapter 4," because it "provides the best available standards and guidelines for determining property division and support arrangements between the parties at the conclusion of their relationship." *Id.*, 82:105.

Title 40, Chapter 4 of the Montana Code relates to termination of marriage, child custody and support. Particularly related to division of property, a trial court is to equitably apportion between the parties the property and assets. The trial court is to consider a variety of factors, including the "duration of the marriage and prior marriage of either party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate liabilities, and needs of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income." Mont. Code Ann. §40-4-202(1).

Conversely, when a trial court divides the property of unmarried cohabitants, equitable doctrines apply. *LeFeber v. Johnson*, 2009 MT 188, ¶ 21, 351 Mont. 75, 209 P.3d 254. The Supreme Court has determined that "while the approach used

to partition property … could be termed similar to that used to divide a marital estate in a dissolution action, as equitable principles are applied and contribution is a factor, we do not utilize the Marriage and Divorce Act as a guide…" *Flood v. Kalinyaprak*, 2004 MT 15, ¶ 20, 319 Mont. 280, 84 P.3d 27.

Partition actions are based in equity and are intended to "cause the least degree of harm to the cotenants and to confer no unfair advantage on any one cotenant." *Id.* This Court held that "a partition action is a proper proceeding in which to determine the relative interests of an unmarried couple, who were in an intimate relationship and are co-owners of property." *Id.* "The fundamental goal of the court in a partition action is to allocate the property according to the respective rights of the parties." *Id.*

The District Court indicated that whether the parties are married or not, the result would be the same and, as such, it considered and applied Mont. Code Ann. § 40-4-202(1). However, *Flood* instructs that division of property for unmarried couples is not the same.

The lack of marriage introduces variables that the District Court did not address or consider. For example, because Karen and Diane are not married, the division of retirement accounts becomes substantially more complicated and has tax consequences that have not been considered by the District Court.

Because this Court should conclude the parties are not common law married, it should also reverse and remand the division of the assets for proceedings that will consider the appropriate equitable doctrines rather than the factors of Mont. Code Ann. § 40-4-202(1).

IV. THE DISTRICT COURT ERRED IN ALLOWING DIANE TO AMEND HER PETITION.

Initially, Diane filed a Verified Petition for Parentage, Parenting Plan, Child Support, and Equitable Division of Property. (D.C. Doc. 1.) The petition contained no allegation that the parties were married. *Id*. On April 21, 2016, the following exchange took place between Diane's attorney and the District Court:

> THE COURT: So, Ms. Ridgeway, I just want to affirm that there is no dispute with regard to the parties not being married. Is there a dispute about that?
>
> MS. RIDGEWAY: The parties – Diane agrees that the parties were not legally married.

(4/21/16 Tr. at 15.)

Following the hearing, the District Court issued its Order for Temporary Child Support, and Order for Temporary Economic Restraining Order. There, the District Court found that "the parties were never married…" (D.C. Doc. 49 at 2.) Despite Diane's admission and the district court's finding, Diane then filed a motion to add claims, seeking to supplement her petition with a claim that the parties were married by way of common law. (D.C. Doc. 63.) Over Karen's

objection, the district court allowed the amendment and subsequently found, contrary to its prior ruling, that the parties were married as of 1999. (D.C. Doc. 244 at 30.)

Diane should have been barred from amending her petition to include the claim of marriage based on the doctrine of judicial admission as well as judicial estoppel.

A. Diane is Precluded from Alleging the Parties Were Married Because of Her Judicial Admission.

A judicial admission is an express waiver made to the court by a party or its counsel "conceding for the purposes of trial the truth of an alleged fact." *Bilesky v. Shopko Stores Operating Co., LLC*, 2014 MT 300, ¶ 12, 377 Mont. 58, 62, 338 P.3d 76, 80. "Judicial admissions have the effect of stipulations, and were previously referred to as such. The main characteristic of a judicial admission is the conclusive effect upon the party making the admission; no further evidence can be introduced by the party making the admission to prove, disprove, or contradict the admitted fact." *Id*. (internal citations omitted).

The following criteria must all be met in order for a statement to constitute a judicial admission:

> 1) There must be a statement made to the court. The statement can be made at any stage of the proceedings. Statements made outside the litigation proceedings are not made to the court, and thus cannot be judicial admissions.

> 2) The statement must be made by a party, or the party's attorney.
>
> 3) The statement must be a statement of fact, and not a statement of opinion or law.

Bilesky, ¶ 13.

The first criterion is met because the statement was made to the District Court at a hearing. The second criterion is met because Diane's attorney made the statement. The third criterion, whether it was a statement of fact, was the District Court's basis for rejecting Karen's claim that the amendment was precluded based on the judicial admission. The District Court stated, "whether the parties were 'married' is a mixed question of law and fact." (D.C. Doc. 82 at 5.)

This Court has routinely and repeatedly analyzed challenges to the establishment of a common law marriage by a district court under an abuse of discretion standard as a finding of fact. See e.g. *Swanner-Renner*, ¶ 13; *Matter of Estate of Sartain*, 212 Mont. 206, 686 P.2d 909.

It is a fact that a person is married. Likewise, it is a fact that a person is not married. Diane, by her judicial admission, conclusively established the fact that she was not married to Karen. As a result of this admission "no further evidence can be introduced by [Diane] to prove, disprove, or contradict the admitted fact." *Bilesky*, ¶ 12.

The District Court's conclusion, that Diane's statement was not statement of fact, appears to be based on an attempt to force two separate meanings on one word: marriage. The District Court concludes that when Diane stated that "the parties were not legally married[,]" what she meant was the parties had never participated in a formal wedding ceremony. The distinction is without merit under Montana law.

There is only one legal concept of marriage. There are, however, multiple paths to that summit. For example, a couple may be married by way of solemnization and registration, as provided in Mont. Code Ann. § 40-1-301. A couple may also be married by way of a declaration of marriage, as provided in Mont. Code Ann. § 40-1-311. Or, a couple may be married by application of the common law. *Swanner-Renner*, ¶ 17. But the result, in all three scenarios is the same: the couple is married.

Diane could have said that she and Karen had not obtained a marriage certificate and recorded it. She did not. Diane could have said that she had not entered into a declaration of marriage. She did not. Diane could have said that there was not an assumption of a marital relationship by mutual consent and agreement. She did not. Instead, she addressed the factual description of her marital status; that she was not married.

The result in all three scenarios described above is the same: a marriage. While the term "common law marriage" is often used to describe a marriage entered into outside of the solemnization and registration process, it is not a distinct legal entity. Diane's statement that she and Karen were not married necessarily encompassed all the paths one might take to reach that state. To be married by common law is to be married. To be married by solemnization and registration is to be married. To admit one is not married forecloses further argument regarding all paths to marriage, not just the most common path.

The statement "Diane agrees that the parties were not legally married" must be understood to include all legal marriages. A marriage by way of declaration is a legal marriage; a marriage by way of solemnization and registration is a legal marriage; and, a marriage by application of the common law is a legal marriage. There is no meaningful distinction to be drawn between them from the statement.

The district court erred when it concluded that Diane had not made a judicial admission as to her marital status with Karen. When Diane stated, at a court hearing that she "agree[d] that the parties were not legally married" she made a binding judicial admission that conclusively established the fact that she was not married to Karen and precluded further evidence from being introduced to prove, disprove, or contradict that fact. Therefore, the district court erred in allowing

Diane to amend her petition and submit additional evidence to prove a point she had already conceded.

B. Diane is Precluded From Alleging the Parties Were Married Because of Judicial Estoppel.

This Court has held that the doctrine of judicial estoppel binds a party to her judicial declarations, and precludes a party from taking a position inconsistent with them in subsequent actions or proceedings. *In re Raymond W. George Trust*, 1999 MT 223, ¶ 51, 296 Mont. 56, 986 P.2d 427. The doctrine, sometimes referred to as the doctrine of preclusion of inconsistent positions, "binds a party to his or her judicial declarations, and precludes a party from taking a position inconsistent with previously made declarations in a subsequent action or proceeding." *Kauffman–Harmon v. Kauffman*, 2001 MT 238, ¶ 15, 307 Mont. 45, 36 P.3d 408.

This Court has previously used a four-part test when applying judicial estoppel, requiring that: (1) The estopped party must have knowledge of the facts at the time the original position is taken; (2) the party must have succeeded in maintaining the original position; (3) the position presently taken must be actually inconsistent with the original position; and (4) the original position must have misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party. See *Fiedler v. Fiedler*, 266 Mont. 133, 879 P.2d 675 (1994).

Although the four-part test may be helpful, it is not necessarily appropriate in every circumstance where a party adopts inconsistent factual positions in judicial proceedings. In *Rowland v. Klies*, 223 Mont. 360, 726 P.2d 310 (1986), this Court did not use the four-part test in preventing the appellant from asserting a contradictory factual position subsequent to an adverse ruling of the district court. In holding the appellant judicially estopped, this Court stated that "[t]he rule is well established that during the course of litigation a party is not permitted to assume or occupy inconsistent and contradictory positions, and while this rule is frequently referred to as 'judicial estoppel,' it more properly is a rule which estops a party to play fast-and-loose with the courts ..." *Rowland*, 223 Mont. at 367, 726 P.2d at 315 (citing *31 C.J.S. Estoppel* § 117B, pgs. 623–627 (1964)). The doctrine is an equitable concept and "[t]here is no pat formula for applying judicial estoppel, and a flexible standard for judicial estoppel permits consideration of all circumstances involved." *31 C.J.S. Estoppel and Waiver* § 139, p. 595 (1996). Imposition of the doctrine does not impute truth to a party's original declaration, but merely prevents the adoption of inconsistent positions where such an adoption would be an affront to judicial dignity. *Jackson v. County of Los Angeles*, 60 Cal.App.4th 171, 181, 70 Cal.Rptr.2d 96 (1997).

At the hearing on her Motion for Temporary Orders and Related Relief, Diane's attorney stated, in response to a direct question by the District Court, that

she "agree[d] that the parties were not legally married." This was consistent with her petition, motion, and all documents filed in the case up to that point. Based on those documents, at this position at the hearing, Diane was entitled to an equitable division of property the parties had acquired during their time together, but had no basis to claim attorney's fees or maintenance.

Then, six months after filing her petition, and five months after admitting to the District Court that the parties were never married, Diane changed tactics and asked for permission to amend her petition to include the claim that the parties were married. The motion makes no claim of newly discovered evidence nor offers any basis for amending the claim. In fact, in her brief in support of the motion, Diane admits that the factual basis for the petition has not changed. (D.C. Doc. 64.) Under the exact same set of facts, Diane filed her petition, filed multiple motions and documents with the court, made a judicial admission at a hearing that the parties were not married, and then decided to change strategies.

This is the exact behavior that judicial estoppel is intended to prevent. Diane occupied inconsistent and contradictory positions, while playing fast-and-loose with the court. Her behavior prejudiced Karen, and the District Court erred in allowing it.

V. THE DISTRICT COURT ERRED IN ISSUING THE JUDGMENT ABSENT A UNIFORM DISTRICT COURT RULE 10 NOTICE.

Pursuant to Mont. Code Ann. § 37-61-405, when an attorney is removed "a party to an action for whom he was acting as attorney must, before any further proceedings are had against him, be required by the adverse party, written notice, to appoint another attorney or appear in person." Under Uniform District Court Rule 10(b), the notice must include "(1) that such party must appoint another attorney or appear in person, and (2) the date of the trial or the next hearing or action required in the case, and (3) that if he fails to appoint an attorney or appear in person by a date certain, which may not be less than twenty days from the date of the notice, the action or other proceeding will proceed and may result in judgment or other order being entered against him, by default or otherwise."

This Court has specifically held U.D.C.R. 10(b) and Mont. Code Ann. § 37-61-405 "mean that 'no proceeding may be had against a party, *no judgment or order* or other step be taken, until he appoints an attorney, unless the prescribed notice is first given.'" *In re Marriage of Wallace,* 284 Mont. 360, 363, 944 P.2d 227 (1997) (emphasis added). The opposing party has a "duty to provide adequate notice to the unrepresented party." *McPartlin v. Fransen,* 178 Mont. 178, 185, 582 P.2d 1255, 1259 (1978).

Karen's trial counsel withdrew on August 2, 2018. (D.C. Doc. 234.10.) Although Diane filed a number documents with the District Court thereafter,

including proposed orders, she never served Karen with a notice in accordance with U.D.C.R. 10(b) or Mont. Code Ann. § 37-61-405.

Because no notice was served on Karen, the District Court was without authority to proceed further. It should never have issued the Findings of Fact, Conclusions of Law and Judgment, the Parenting Plan or the Child Support and Medical Support Order on November 9, 2018. As such, those Orders must be reversed.

VI. THE DISTRICT COURT ERRED BY AWARDING ATTORNEYS' FEES WITHOUT A HEARING TO DETERMINE REASONABLENESS.

An award of attorney fees must be based on (1) necessity; (2) reasonableness; and (3) competent evidence. Mont. Code Ann. § 40-4-110; *Pfeifer v. Pfeifer*, 282 Mont. 461, 466, 938 P.2d 684, 687 (1997). To determine reasonableness, the trial court is to consider (1) the amount and character of the services rendered; (2) the labor, time and trouble involved; (3) the character and importance of the litigation in which the services were rendered; (4) the professional skill and experience required; (5) the character and standing of the attorneys in their profession; and (6) the result secured by the services of the attorneys. *Morning Star Enterprises, Inc. v. R.H.Grover, Inc.*, 247 Mont. 105, 113, 805 P.2d 553 (1991).

At trial, Diane requested that Karen be ordered to pay her attorneys' fees. The Court acknowledged that "the first issue is whether or not fees should be awarded. And then, certainly, we could get into the reasonableness of fees, and we might even need to have a hearing later about that." (Tr. at 663:12-16.)

Over a year after trial, but months before the District Court issued its Judgment, Diane filed a Motion for Award of Attorneys Fees, seeking an award of $115,000 in fees to be paid by Karen. (D.C. Doc. 222.) The Motion was supported by an Affidavit setting forth the amount of fees claimed. (D.C. Doc. 220.) Karen filed a timely response and objection. (D.C. Doc. 227.)

The motion was made post-trial but before the Court issued its Judgment, meaning the Court did not hear testimony or evidence at the time of trial regarding the claimed fees. Rather, the only "evidence" before the Court when determining the award of attorneys' fees was Diane's Affidavit in support of her motion. (D.C. Doc. 220.) In it, Diane makes a blanket statement that she "currently owe[s] [her] attorney approximately $109,000." *Id.*

At the June 5, 2018 status conference, Diane's counsel alleged that she was owed $109,000.00. (Tr. 1103:12-13.) No party provided testimony related to the issue of fees, nor was any expert called to establish reasonableness. The District Court then awarded Diane $80,000.00 in attorneys' fees without a hearing. The Judgment includes no findings of fact to reflect the Court considered the factors to

determine reasonableness. Instead, the District Court concluded that its award of $80,000 must be reasonable, because "[the fees] are less than those incurred by Karen." (Tr. at 112:13-14.) The District Court failed to recognize that Karen's fees could also be unreasonable and the mere fact that Karen's attorney charged her more than Diane's did, does not mean Diane's fees were reasonable.

Similarly, the District Court failed to make sufficient findings as to reasonableness when it awarded Diane $30,000 for fees in its Order Denying Petitioner's Motion for Finding of Contempt and Granting of Partial Award of Fees, which it then reduced to Judgment. (D.C. Docs. 145 & 192.)

The Court acted arbitrarily without conscientious judgment when it selected an award of attorney's fees in the amount of $110,000, without holding a hearing to make a factual determination regarding the reasonableness factors. For that reason, this Court should reverse the District Court's award of attorneys' fees and remand for further proceedings to determine reasonableness of both the interim and final award of attorneys' fees.

VII. THE DISTRICT COURT ERRED BY GRANTING VARIANCE FROM THE CHILD SUPPORT GUIDELINES WITHOUT FIRST APPLYING THE GUIDELINES AND WITHOUT DIANE PRESENTING COMPETENT EVIDENCE SUPPORT THE SAME.

When a district court issues a child support order "the court shall determine the child support obligation by applying the standards in this section and the uniform child support guidelines adopted by the department of public health and

human services pursuant to 40-5-209." Mont. Code Ann. § 40-4-204(3)(a). "A district court, however, is required to make specific findings in writing as to how it calculated its award of child support under the guidelines and any deviation therefrom." *In re Marriage of Stufft*, 276 Mont. 454, 458, 916 P.3d 767, 770 (1996).

There is clear precedent from this Court that application of the guidelines is mandatory in all cases. "'Must' is mandatory and 'all' means every. Neither concept leaves room for exception." *In re Marriage of DeWitt,* 273 Mont. 513, 519, 905 P.2d 1084, 1088 (1995).

"The amount determined under the guidelines is presumed to be an adequate and reasonable support award, unless the court finds by clear and convincing evidence that the application of the standards and guidelines is unjust to the child or to any of the parties or is inappropriate in a particular case." Mont. Code Ann. § 40-4-204.

It is well-settled that income for child support purposes includes "alimony or spousal maintenance." A.R.M. 37.62.105(2)(a). It is also well-settled that "the amount of alimony or spousal maintenance which a parent is required to pay under a court or administrative order" is an allowable deduction from a parents' income for child support purposes. A.R.M. 37.62.110(1)(a).

This Court has held that, "in order to rebut this presumption, the party seeking the variance from the guidelines **must** present competent evidence showing that the application of the guidelines would be unjust or inappropriate." *In re Marriage of Welch*, 273 Mont. 497, 504, 905 P.2d 132, 136 (1995); *Platt v. Platt*, 267 Mont. 38, 41, 881 P.2d 634, 636 (1994) (emphasis added). This Court has also determined "that a bare claim of entitlement to a variance is insufficient." *Welch,* 905 P.2d at 136. "A district court cannot base child support upon speculation." *In re Marriage of Dishon*, 277 Mont. 501, 505, 922 P.2d 1186, 1188 (1996).

"Findings that rebut and vary the guideline amount **must** include a statement of the amount of support that would have ordinarily been ordered under the guidelines." Mont. Code Ann. § 40-4-204(3)(b) (emphasis added).

A "variance" has been defined by this Court as "a reduction in support granted to one party due to extraordinary expenses." *Welch,* 273 Mont. at 503. Seeking a variance requires a party to "present competent evidence showing why [they] are entitled one. A bare claim of entitlement alone is not enough." *Id.*

A. A Variance is not Appropriate Because Diane Did Not Present Competent Evidence Showing Why She Should be Entitled to a Variance.

In the present action, a variance is inappropriate because Diane did not present competent evidence showing why she was entitled to a variance. In fact,

the term "variance" does not appear anywhere in the two days of testimony from Diane, her attorney, or any witness on her behalf. The law clearly requires Diane to present competent evidence supporting a variance, and she did not do so.

For that reason alone, a variance was inappropriate and the child support order should be reversed and remanded for the District Court to properly apply the child support guidelines.

B. Even if a Variance Was Appropriate, the District Court Did Not Comply With the Mandate of Mont. Code Ann. § 40-4-204(3)(b).

In its Judgment, the District Court attached four child support calculations reflecting the amounts ordered during the four time periods referred to in the Order. None of the four calculations account for Diane's additional $26,400.00 in annual income, nor do any of the four calculations account for that deduction in Karen's income. The District Court clearly understood that the spousal maintenance obligation paid by Karen and paid to Diane should be included in proper support calculations.

The District Court stated that "[t]he Court grants a variance from the Montana Child Support Guidelines so that maintenance payments are not included in the child support calculations." (D.C. Doc. 244, ¶ 8.) However, the District Court failed to comply with the mandate of Mont. Code Ann. § 40-4-204(3)(b), despite quoting directly from the statute in ¶ 65 of the Judgment.

There is no statement in the Judgment reflecting the *correct* child support

calculations, nor is there any indication in any finding of fact that the District Court ran calculations in compliance with the guidelines at all. It is impossible to determine if a variance is appropriate if the underlying child support calculation is not known.

In addition to the Judgment, the Court issued a separate Child Support and Medical Support Order which reflected the same calculations referred to in the Judgment. (D.C. Doc. 246.) That Order provides no more information or support for a variance than the Judgment itself.

The language of Mont. Code Ann. § 40-4-204(3)(b) is clear in that it requires the District Court to "include a statement of the amount of support that would have ordinarily been ordered under the guidelines." Just as this Court stated in *DeWitt,* "'must' is mandatory." *DeWitt,* 273 Mont. at 518. "Without first knowing what the guidelines require, it is impossible for the district court (in the first instance) or this Court (on appeal) to know whether the variance is 'unjust' or 'inappropriate' in a particular case." *Id.,* at 518.

The District Court cannot grant a variance without first determining the support amount that would have been ordered under the guidelines and the District Court failed to do so. For that reason, the child support order set forth in ¶ 70 of the Judgment, along with the accompanying Child Support and Medical Support Order, should be reversed and the matter remanded for recalculation and

establishment of a support order in compliance with the guidelines.

CONCLUSION

The District Court erred in determining Karen and Diane were common law married when its own findings support that the parties did not mutually consent to a marriage relationship. Because the parties could not be common law married, an award of spousal maintenance was inappropriate, as was dividing the parties' assets in accordance with Mont. Code Ann. § 40-4-202.

The District Court should not have allowed Diane to amend her Petition to include claims for common law marriage, spousal maintenance and attorney fees when she had made a judicial admission that the parties were not married. Likewise, Diane should have been barred from including those claims due to the doctrine of judicial estoppel.

Additionally, the District Court should not have issued its Findings of Fact, Conclusions of Law and Judgment, Child Support and Medical Support Order and Parenting Plan when Diane had not yet served Karen with a required notice pursuant to Uniform District Court Rule 10.

The District Court erred in awarding attorneys' fees on an interim basis and in its Judgment without making sufficient findings of reasonableness based on competent evidence.

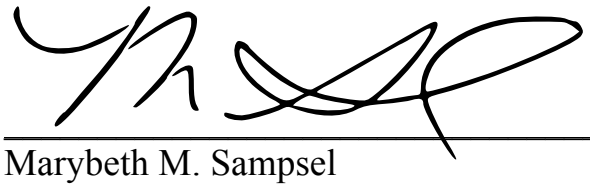
Further, the District Court erred in granting a variance from the child support guidelines without first determining the correct child support calculation.

For those reasons, this Court should reverse the District Court's Findings of Fact, Conclusions of Law and Judgment, Child Support and Medical Support Order, Parenting Plan. Further, this Court should reverse the District Court's Order Granting Petitioner's Motion to Add Claims and its Order Denying Petitioner's Motion for Finding of Contempt and Granting Partial Award of Fees and related Judgment for Attorney's Fees.

The matter should then be remanded to the District Court for proceedings related to division of property for an unmarried couple, as well as for proper child support calculations.

DATED: May 28, 2019.

MEASURE LAW, P.C.

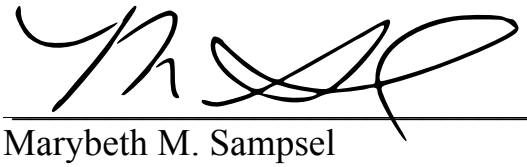
By: 

Marybeth M. Sampsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman 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 not more than 10,000 words, excluding the certificate of service and the certificate of compliance.

MEASURE LAW, P.C.

By: 

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CERTIFICATE OF SERVICE

I, Mary-Elizabeth Marguerite Sampsel, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-28-2019:

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Dated: 05-28-2019