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Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 20-0545

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**IN THE SUPREME COURT OF THE STATE OF MONTANA  
SUPREME COURT CAUSE NO. 20-0545**

AMANDA ANN JOHNSON,  
Petitioner,

And

TYLER JAMES JOHNSON,  
Respondent,

Appellant Opening Brief

TYLER JAMES JOHNSON,  
Appellant,

VS

AMANDA ANN JOHNSON,  
Appellee.

**ON APPEAL FROM THE MONTANA THIRTEENTH  
JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY  
THE HONORABLE ROD SOUZA PRESIDING**

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95 I. STATEMENT OF JURISDICTION

96 This Court has jurisdiction of this appeal pursuant to Rule 6 of the Montana  
97 Rules of Appellate Procedure and Rule 4 of the Montana Rules of Appellate  
98 Procedure. The parties have engaged in Mandatory Appellate Alternative Dispute  
99 Resolution pursuant to Rule 7 of the Montana Rules of Appellate Procedure which  
100 was not successful. The Mediator's Report has been filed in this matter. The  
101 Honorable Rod Souza signed and issued his Findings of Fact, Conclusions of Law,  
102 Order, and Decree of Dissolution after Non-Jury Trial on the 22<sup>nd</sup> day of October,  
103 2020 (No. 71 Record on Appeal Transmitted to the Supreme Court). A timely appeal  
104 was filed with the Notice of Appeal on the 13<sup>th</sup> day of November, 2020. (No. 76  
105 Record on Appeal Transmitted to the Supreme Court). A Final Parenting Plan was  
106 entered on the 18<sup>th</sup> day of November, 2020 (No. 77 Record on Appeal Transmitted  
107 to the Supreme Court) and an Amended Notice of Appeal was filed on the 11<sup>th</sup> day  
108 of December, 2020. (No. 77.001 Record on Appeal Transmitted to the Supreme  
109 Court).

110 II. STATEMENT OF THE ISSUES

111 District Court Judge Rod Souza made numbers reversible errors in his  
112 decision which was set forth in the *Findings of Fact, Conclusions of Law, Order,*  
113 *and Decree of Dissolution after Non-Jury Trial* in Cause No. DR-56-2019-0000796-  
114 DU. The issues can be summed as follows:

1. The District Court committed reversible error when it awarded Amanda Ann Johnson a share of the income of Octane Addictions and OA Promotions when neither party requested the income be distributed to Amanda Ann Johnson and her income was not then taken into consideration.

2. The District Court committed reversible error when it calculated the amount of cash available for Octane Addictions and OA Promotions.

3. The District Court committed reversible error when it informed the parties that it was not taking the exhibits as truth in lieu of testimony and then did exactly that in forming the Court's final decision and ignoring the testimony of Amanda Ann Johnson that directly contradicted her own exhibits.

4. That the District Court committed reversible error by extending the trial in this matter out over five (5) months during the middle of the pandemic and then extending a decision in this matter another four (4) months and ignoring the financial repercussions.

5. That the District Court committed reversible error when it gave Amanda Ann Johnson credit for all payments she made on the marital home and gave Tyler James Johnson no credit for the payments he made on the other assets. Then distributed the assets by awarding each party half of the equity.

133 6. That the Court committed reversible error when it converted the assets of  
134 Octane Addictions to be divided equally between the parties but did not treat the  
135 premarital house of Amanda Ann Johnson the same.

136 7. That the Court committed reversible error when it based its custody decision  
137 in deciding Amanda Ann Johnson was the primary care giver on her denying Tyler  
138 James Johnson parenting time and when the Court specifically refused to enforce its  
139 own orders related to parenting time during the pandemic.

140 8. That the Court committed reversible error when it indicated that Amanda Ann  
141 Johnson was more credible based off of financial spreadsheets of the parties' assets  
142 in making a determination as to Child Custody.

143  
144 STATEMENT OF THE CASE

145 A. *Nature of the Case and Course of Proceedings.*

146 This case came before the District Court in front of the Honorable Rod Souza  
147 for hearing on the *Verified Petition for Dissolution of Marriage* filed by Amanda  
148 Ann Johnson on the 26<sup>th</sup> of July, 2019 (No. 1 Record on Appeal Transmitted to the  
149 Supreme Court) along with her *Petitioner's Proposed Parenting Plan* filed on the  
150 26<sup>th</sup> of July, 2019 (No. 2 Record on Appeal Transmitted to the Supreme Court) and  
151 the *Respondent's Response to Verified Petition for Dissolution of Marriage and*  
152 *Counterclaim for Dissolution of Marriage* filed by Tyler James Johnson on the 19<sup>th</sup>

day of August, 2019. (No. 9 Record on Appeal Transmitted to the Supreme Court) along with the Respondent's *Proposed Parenting Plan* filed on the 19<sup>th</sup> day of August, 2019. (No. 10 Record on Appeal Transmitted to the Supreme Court). The District Court entered a *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution after Non-Jury Trial* on the 22<sup>nd</sup> day of October, 2020 (No. 71 Record on Appeal Transmitted to the Supreme Court) which was appealed from in this matter.

B. *Disposition in Below*

The District Court issued its *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution after Non-Jury Trial* on the 22<sup>nd</sup> day of October, 2020.

The Court in making this Order made the following errors:

1. The Court sets forth in Paragraph 1 of the Findings of Fact on page 1 of the *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution after Non-Jury Trial* simply that the Exhibits 1-35 were admitted without limitation. The record does not support this. Limitations were imposed on the admission of the Exhibits and the Court instead of staying within the confines of what it Ordered in the trial took the exhibits in lieu of testimony or evidence.

2. The Court sets forth in Paragraph 12 of the Findings of Fact on page 3-8 of the *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution after Non-Jury Trial* values "evidence" related to premarital assets. However, this again

173 is against the direction of the Court. Limitations were imposed on the admission of  
174 the Exhibits and the Court instead of staying within the confines of what it Ordered  
175 in the trial took the exhibits in lieu of testimony or evidence.

176 3. The Court sets forth in paragraph 13 of the Findings of Fact on page 8 of the  
177 *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution after Non-*  
178 *Jury Trial* discusses a premarital home of Amanda Johnson. The Court awarded her  
179 the entire value of this home without giving any credence to Tyler Johnson's  
180 premarital assets (such as \$60k-\$70k in cash and the value of the items that Tyler  
181 Johnson sold to upgrade to newer items). This premarital home of Amanda Johnson  
182 was placed into TnA Properties. A business jointly owned by Amanda Johnson and  
183 Tyler Johnson. Yet the Court did not take that into account.

184 4. The Court sets forth in paragraph 19 of the Findings of Fact on page 10 of the  
185 *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution after Non-*  
186 *Jury Trial* that there was \$29,500.00 in cash that was used when the parties separated  
187 to pay down marital debt. But the Court does not reduce the Cash that it sets forth  
188 in its distribution of property by the \$29,500.00. Basically for purposes of the  
189 Court's distribution of property this \$29,500.00 in cash just disappeared and this is  
190 not supported by either parties' testimony in the trial.

191 5. The Court sets forth in paragraph 21 of the Findings of Fact on page 11 of the  
192 *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution after Non-*



193 *Jury Trial* information related to the 2020 Polaris Ranger but fails to account for the  
194 additional \$5,000.00 in cash that Tyler Johnson put down to purchase this 2020  
195 Polaris Ranger and fails to take this into account on the Court's distribution of  
196 property.

197 6. The Court sets forth in paragraph 33 on page 14 of the Findings of Fact in the  
198 *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution after Non-*  
199 *Jury Trial* an acknowledgment of the severe financial impact COVID-19 has had on  
200 OA Promotions. Yet the Court somehow comes to the conclusion that there is still  
201 \$106,000.00 in cash to be distributed from OA Promotions and Octane Addictions  
202 from 2018 and 2019 when the Court is acknowledging that OA Promotions went  
203 from 15-16 shows in 2019 and was down to possibly 4 or 5 total in 2020.

204 7. The Court sets forth in paragraph 34 on page 15 of the *Findings of Fact,*  
205 *Conclusions of Law, Order, and Decree of Dissolution after Non-Jury Trial* that  
206 Amanda is not seeking a share of the income of Octane Addictions or OA  
207 Promotions. Yet the Court awards her a share of the income of Octane Addictions  
208 and OA Promotions when calculating the equity payment. [On page 19 the Court  
209 adds Octane Addictions Income (Cash) into Tyler Johnson's assets and adds OA  
210 Promotions Income (Cash) into Tyler Johnson's assets without adding any of  
211 Amanda Johnson's income into her assets (\$115,000.00 from her testimony). This  
212 results in Tyler Johnson having a value of \$557,693.50 in assets and Amanda

Johnson having a value of \$382,873.50 in assets. If the Court treated the income equally and added Amanda Johnson's income from the end of 2018 and the beginning of 2019 her assets would increase by a minimum of \$115,000.00 which would put her assets at \$497,873.50. Or in the alternative if the income was reduced from Tyler Johnson's assets it would be a reduction of \$35,662.00 for Octane Addictions Cash and \$71,079.00 for OA Promotions Cash which would reduce Tyler Johnson's assets to the amount of \$450,952.50. Either scenario greatly changes the equity payment ordered by the Court. Additionally, the Court does not take into consideration the \$29,500.00 that both parties agreed was paid out of the available cash in April of 2019 when the parties' separated.

8. The Court sets forth at paragraph 35 of the *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution after Non-Jury Trial* how Amanda Johnson arrived at the estimated value of Cash for Octane Addictions. Again, this is the Court taking exhibits in lieu of testimony or evidence as it indicated it was not doing. This is also the Court ignoring the COVID-19 Pandemic. It is beyond incredulous that even if Octane Addictions had cash of \$35,662.00 at the end of 2019 that with little to no income as the Court has acknowledged that there would be anything left in 2020. This is also the Court ignoring that Amanda Ann Johnson stated and the Court accepted that she wanted nothing related to the income of Octane Addictions or Octane Promotions.

233 9. The Court sets forth at paragraph 37 of the *Findings of Fact, Conclusions of*  
234 *Law, Order, and Decree of Dissolution after Non-Jury Trial* a value of the Polaris  
235 Ranger without giving any value of the Cash that Tyler Johnson put in.

236 10. At paragraph 39 the Court sets forth in the *Findings of Fact, Conclusions of*  
237 *Law, Order, and Decree of Dissolution after Non-Jury Trial* a value of a 2012  
238 Clothing Trailer at \$30,000.00. This again is the Court taking an exhibit in lieu of  
239 testimony which it stated it was not doing. It is also ignoring the premarital trailer  
240 that was sold to purchase this trailer with there being only a difference of \$4,000.00.  
241 This was not contradicted at trial. The Court completely ignored \$26,000.00 of  
242 premarital value of Tyler Johnson's which again makes a great deal of difference in  
243 the equity payment.

244 11. The Court at paragraph 41 values the 2017 27-foot enclosed trailer at  
245 \$10,000.00. This is the trailer that the Court acknowledges that Amanda Johnson  
246 used an insurance check of over \$11,000.00 in damage. Yet the Court still values  
247 the trailer at \$10,000.00 with no acknowledgement of the agreed upon damage to  
248 the trailer and the decrease in value.

249 12. The Court at paragraph 46 sets forth a calculation of value of Cash at  
250 \$71,079.00. First, the testimony of Amanda Johnson sets forth a great deal of  
251 variance in the amount of Cash. Second, the Court sets forth that Amanda Johnson  
252 does not want any income of the OA Promotions or Octane Addictions. Third, the

253 Court does not value Amanda Johnson's income in the value of assets received by  
254 the parties. Fourth, the Court ignores the parties agreed upon statements that out of  
255 any cash that was present with OA Promotions that there was at a minimum  
256 \$29,500.00 spent in April of 2019 when the parties separated. Fifth, the Court  
257 ignores the testimony of Amanda Ann Johnson and her exhibits which demonstrates  
258 a minimum of \$31,700.00 in cash deposited into the accounts which she was  
259 monitoring herself during 2019.

260 13. That the paragraphs one (1) through twelve (12) above demonstrate that the  
261 Court's equalization payment is far from correct.

262 14. The Court in paragraph 55 of the *Findings of Fact, Conclusions of Law,*  
263 *Order, and Decree of Dissolution after Non-Jury Trial* awards Amanda Johnson  
264 reimbursement of her payments towards the mortgage while the parties were  
265 separated. The Court refuses to award Tyler Johnson reimbursements of the  
266 payments that he made towards the Niehenke Building in paragraph 57 yet awards  
267 her half of the equity. The argument of Pre-Tax / Post-Tax dollars does not hold any  
268 weight when the parties both received the tax benefits as the testimony established  
269 and when the Court still awards Amanda Johnson half of the benefit of the "Pre-  
270 Tax" dollars.

271 15. The Court at paragraph 76 sets forth that the "Continuity and Stability of  
272 Care" strongly favors Amanda Ann Johnson. However, the only reason this is

present is that Amanda Ann Johnson denied Tyler Johnson parenting time and the Court refused to enforce its own orders.

16. The Court at paragraph 85 sets forth credibility for a child custody determination based on exhibits related to the parties' finances prepared by Amanda Ann Johnson being remarkable in detail. This should not be a consideration related to Child Custody.

17. Related to the issues set forth in paragraphs one (1) through sixteen (16) in the *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution after Non-Jury Trial* the Court's Orders at paragraphs 1, 2, 3, 4, and 6 on pages 39 and 40 are incorrect.

#### IV. STATEMENT OF FACTS

For purposes of this appeal there are relevant facts that are set forth in the testimony of the parties that is further confirmed in some aspects by the District Court.

1. Cash Receipts of Octane Addictions and OA Promotions is considered income. (Transcript Record on Appeal 3/4/2020 am Session pg 32 lines 1-25).

2. Amanda Ann Johnson does not want any income of Octane Addictions or OA Promotions. (Transcript Record on Appeal 3/4/2020 am Session pg 63 through 66). Amanda Ann Johnson further sets forth her income at \$115,000.00. *Id.* Additionally set forth by Amanda Ann Johnson who wishes to relinquish any ownership as of

12/31/2018. (Transcript Record on Appeal 3/4/2020 pm Session pg 10-11 and 18-20). This again is set forth in the discussion between Mr. Graves and Amanda Ann Johnson Q. First of all, let's just - - we already talked about personal property. We want the Court to include personal property assets of Octane Addictions, but there is - - the Sandalwood home has all of your marital property in it?

A The majority of it yes. (Transcript Record on Appeal 3/4/2020 am Session pg 69 Lines 14-19).

3. The Court took additional testimony for using the April 2019 separation date as the date for the debts and to reimburse Amanda Ann Johnson for payments on the marital home. (Transcript Record on Appeal 3/4/2020 pm Session pg 24).

4. The Court took additional evidence that Amanda Ann Johnson is not seeking any of the income and only one asset to be awarded to her which is a camera with lenses. (Transcript Record on Appeal 3/4/2020 pm Session pg 25-26).

5. Amanda Ann Johnson did not work for OA Promotions or Octane Addictions at any point after the parties separated in April of 2019 and the testimony was that all she did in 2019 was collect money for the first couple of shows. (Transcript Record on Appeal 3/4/2020 pm Session pg 56 Lines 15-25).

6. Amanda Ann Johnson's testimony demonstrates and is corroborated by her exhibit 19 that there is \$16,500.00 in cash deposited Lines 20-25 on Page 81. Another \$13,200.00 on Page 82 lines 1-4 (OA Promotions paid \$3300 per month

313 payment and Octane Addictions paid \$3300.00 per month payment for the shop –  
314 two months of payments is \$13,200.00) – further corroborated by page 154 and 155  
315 of June 9, 2020 session). Another \$2,000.00 on page 82 Lines 12 through 14. Her  
316 testimony along with the rest of the exhibit greatly reduces the amount of cash.  
317 (Transcript Record on Appeal 3/4/2020 am Session pg 80-82 and June 9, 2020  
318 Session pages 154-155).

319 7. Amanda Johnson admits that there is \$29,500 in cash deposited into their  
320 account – but she claims that the cash still existed. Page 63 of June 9, 2020 hearing  
321 Tyler Johnson admits that the \$29,500.00 in cash was all deposited and that was all  
322 that was in the safe in April of 2019. Numbers again do not add up and the Court is  
323 creating wealth. (Transcript Record on Appeal 3/4/2020 am pg 98 lines 1-16).

324 8. Page 48 – because of the Lemon Law the 2020 side-by-side had another  
325 \$3,000.00 put into it well after the parties separated but no credit would have been  
326 \$8,000.00 so he put \$5,000.00 in cash – not taken into account. (Transcript Record  
327 on Appeal 6/9/2020 pg 48).

328 9. Admission of Amanda Johnson that there was a total of \$30k - \$35k in 2019  
329 cash at the end of the year in the business. (Record on Appeal 6/12/2020 pg 30-31).

330 10. Ending cash of 2018 - \$44,900.00. (Record on Appeal 6/12/2020 pg 35).

331 11. The Court sets forth in the first day of trial as follows: Page 42 – 43 **Admission**  
332 **of Exhibits are demonstrative of testimony only.** This is further discussed by the

Court on Page 42 Line 18 through Page 43 Line 11. The Court goes on to clarify when Jim Graves (Counsel for Amanda Johnson) attempts to expand the meaning of the admission of the exhibits on Page 49 Line 11 through Page 50 Line 3.

**Mr. Graves:** Based upon those admissions, your Honor, I - - just shows that the allegations that the Petitioner had no input or contribution to Octane Addictions or the promotion company are false. That is an admission against interest, your Honor.

**The Court:** Well, Ms. Johnsons is testifying about her contributions, and I anticipate Mr. Johnson will testify that it was not as extensive. And that will be a decision for me to make.

**Mr. Graves:** Mr. Johnson sets forth in his testimony - - in his pleadings she made no contributions to Octane Addictions, which now by admission of these exhibits is wrong.

**The Court:** I don't deem admitting these exhibits in lieu of testimony to be an acknowledgement by Mr. Johnson everything Ms. Johnson is telling me is the truth. That is a credibility question for me to determine. (Transcript Record on Appeal 3/4/2020 am Session pg 42-43).

12. Exhibit 39 is demonstrative only as to her request to the Court not as to any actual values or how she arrived at them. (Transcript Record on Appeal 6/12/2020 session pg 18).

13. COVID-19 had huge financial repercussions on OA Promotions and Octane Addictions and Tyler Johnson sets forth all of the financial repercussions and the cancelled shows in 2020. (Transcript Record on Appeal 6/9/2020 session pg 20-22). He sets forth that West Yellowstone show was actually a loss. *Id.* at pg 22 lines 16-20. The Court goes on to further inquire about the devastation that the COVID-19



Pandemic has had on OA Promotions and Octane Addictions. (Transcript Record on Appeal 6/9/2020 pg 218 and pg 225 lines 17-23).

14. Counsel for Amanda Ann Johnson gave incorrect Exhibit[s] that were used the entire first day of trial. (Record on Appeal 3/4/2020 pm Session pg 61-62).

15. That from the first day of trial to the last day of trial due to COVID-19 information changed that would not have been present or been able to be used if the Court had concluded the trial when originally scheduled. (Transcript Record on Appeal 6/12/2020 Page 10 lines 22-25).

16. During the Course of the parties separation and all the way through the Court's Order of October 22, 2020 Tyler James Johnson paid all of the payments on the Niehenke building. (Transcript Record on Appeal 3/4/2020 am Page 76 – 78 ).

17. Tyler James Johnson continued to pay all of the bills Octane Addictions was paying. (Transcript Record on Appeal 6/9/2020 session pg 101-102 starting on line 25 of page 101).

18. The amount that Octane Addictions was paying on the vacant land which went to pay down the loan on the Niehenke Building was all paid by Octane Addictions. (Transcript Record on Appeal 6/9/2020 session pg 118 lines 8-18).

19. That Tyler Johnson was making over \$12,000.00 a month in payments and Amanda Johnson was making a little over \$2,000.00 a month in payments. (Transcript Record on Appeal 6/9/2020 session pg 120).

382 20. The District Court heard evidence that Octane Addictions and OA Promotions  
383 are basically the same thing. The only reason that Octane Addictions no longer was  
384 doing the promotion side was due to insurance and tax issues. This is demonstrated  
385 in the testimony of Amanda Ann Johnson. (Transcript Record on Appeal 3/4/2020  
386 am session page 34-36) where she starts the explanation on pg 34, line 24:

387 Q Why was OA promotions originated? I understand there is three specific  
388 reasons why they are not all [pg 35 Lines 1- 9] part of - - the OA productions is  
389 completely different than Octane Addictions. Can you tell the Court if I'm correct  
390 there is three reasons why they were split apart?  
391

392 A That's correct. They were split apart in 207 so prior to that the promotion  
393 business was all done through the same company Octane Addictions as all of the  
394 other activities the graphics business and the clothing lines.  
395

396 21. Amanda Johnson admits the motor home purchased before the marriage. Title  
397 is only in Octane Addictions – premarital asset that the Judge gave no consideration  
398 for but gave her a premarital home (Record on Appeal 3/4/2020 am session pg 65).

399 22. The only difference in value between the clothing trailer that Tyler Johnson  
400 owned premarital which was traded in on the 2012 clothing trailer was \$4,000.00.  
401 (Transcript Record on Appeal 6/9/2020 session pg 44).

402 23. The side-by-side was paid for entirely by selling off previous assets of Octane  
403 Addictions. (Transcript Record on Appeal 6/9/2020 session pg 47).

404 24. Octane Addictions had \$60,000.00 to \$70,000.00 in premarital cash.  
405 (Transcript Record on Appeal 6/9/2020 session pg 210).

406 25. On January 27, 2020 on page 4 – Lines 8 through 23 – the parties and the  
407 Court discussed the temporary custody arrangement and the needs for adjustments.  
408 Line 13-14 James Graves states “It’s okay, Your Honor, we will - - we’ll  
409 accommodate whatever day Mr. Johnson needs. (Transcript Record on Appeal  
410 1/27/2020 session pg 4, lines 8-23).

411 26. Amanda Ann Johnson specifically chose to not allow Tyler Johnson visitation  
412 after the temporary arrangement was in place. (Transcript Record on Appeal  
413 3/4/2020 session pg 39).

414 27. That Amanda Ann Johnson specifically denied numerous visitations with no  
415 evidence of any threat to the minor child. Tyler James Johnson outlined all of the  
416 restrictions, denials and efforts he was taking to ensure the minor child would be  
417 safe which included isolating at a remote location in Ennis, MT where he spent a  
418 majority of time and only traveling to Billings, MT for work on two different  
419 occasions. (Transcript Record on Appeal 4/13/2020 session pgs 10-37).

420 28. That the Court discusses the Governor’s Orders and Quarantine requirements  
421 and the Court’s understanding of the Orders. Yet makes no reference to the  
422 applicability to Child Visitation. (Record on Appeal 4/13/2020 session pgs 42-43).

423 29. That there is a specific acknowledgement by Amanda Ann Johnson that she  
424 was in violation of the temporary custody arrangement before the COVID-19

restrictions were in place and she was denying parenting time. (Transcript Record on Appeal 4/13/2020 session pgs 97-99).

30. That Amanda Ann Johnson acknowledges a denial of parenting time and on overnights from separation (April 2019) until January of 2020. (Transcript Record on Appeal 4/13/2020 session pgs 84-86).

31. That Amanda Johnson further acknowledges that she denied all parenting time from Christmas of 2019 through January of 2020. (Transcript Record on Appeal 4/13/2020 hearing pgs 87-88).

32. That Amanda Ann Johnson was able to update information and provide new information that would not have been considered at the time of the originally scheduled trial due to the COVID-19 restrictions and the effect it had on trials. (Transcript Record on Appeal 6/12/2020 session pgs 100-102).

## V. STANDARD OF REVIEW

The Montana Supreme Court has set forth as to property and debt division the following standard of review:

Section 40-4-202, MCA, governs the distribution of a marital estate. A district court's interpretation of a statute is a conclusion of law that we review de novo for correctness. In re C.D.H., 2009 MT 8, ¶ 21, 349 Mont. 1, 201 P.3d 126. Section 40-4-202, MCA, vests the district court with broad discretion to apportion the marital estate in a manner equitable to each party under the circumstances. We review a district court's division of marital property to determine whether the court's findings of fact are clearly erroneous and the conclusions of law are correct. Absent clearly erroneous findings, we will affirm a district court's division of property and award of maintenance unless we identify an abuse of discretion. As we have stated previously, each case must be examined individually, with an eye to its unique

circumstances. Marriage of Spawn, 2011 MT 284, ¶ 9, 362 Mont. 457, 269 P.3d 887 (citations omitted).

We have further instructed that " the factors listed in [§ ] 40-4-202, MCA, must be considered and referred to in the [district] court's findings and conclusions and there must be competent evidence presented on the values of the property." Marriage of Collett, 190 Mont. 500, 504, 621 P.2d 1093, 1095 (1981).

*In re Marriage of Funk*, 363 Mont. 352, 270 P.3d 39, 2012 MT 14, (2012).

The Montana Supreme Court has set forth the following as to Child Custody and allocation of parenting time as the standard of review:

This Court will not substitute its judgment for that of the trier of fact. We will consider only whether substantial credible evidence supports the findings and conclusions. Findings will not be overturned unless there is a clear preponderance of evidence against them, recognizing that evidence may be weak or conflicting, yet still support the findings. *Jensen v. Jensen* (Mont. 1981), 629 P.2d 765, 768, 38 St.Rep. 927, 930, cited in *In re the Custody of C.C.* (Mont. 1985), 695 P.2d 816, 818, 42 St.Rep. 190, 193. The Appellant must overcome the presumption that the Judgment of the District Court is correct. [712 P.2d 1301] *In re the Marriage of Jensen* (Mont. 1979), 597 P.2d 733, 36 St.Rep. 1259.

*In Re Custody and Support of B.T.S.*, 219 Mont. 391, 712 P.2d 1298, (1986).

## VI. SUMMARY OF THE ARGUMENT

The District Court abused its' discretion as follows:

1. When it awarded a share of the income of Octane Addiction and OA Promotions when neither party requested the income be distributed to Amanda Ann Johnson and then in doing so did not take into consideration Amanda Ann Johnson's income.

480 2. The District Court's calculation of the amount of Cash available for Octane  
481 Addictions and OA Promotions was clearly erroneous.

482 3. The District Court committed reversible error when it informed the parties  
483 that it was not taking the exhibits as truth in lieu of testimony and then did exactly  
484 that in forming the Court's final decision and ignoring the testimony of Amanda Ann  
485 Johnson that directly contradicted her own exhibits and ignoring the testimony of  
486 Tyler James Johnson that was uncontradicted by anything other than an un-testified  
487 to spreadsheet.

488 4. That the District Court committed reversible error by extending the trial in  
489 this matter out over five (5) months during the middle of the pandemic and then  
490 extending a decision in this matter another four (4) months and ignoring the financial  
491 repercussions to the parties and to the assets available for distribution.

492 5. That the District Court abused its' discretion when it gave Amanda Ann  
493 Johnson credit for all payments she made on the marital home and gave Tyler James  
494 Johnson no credit for the payments he made on the other assets. Then distributed  
495 the assets by awarding each party half of the equity.

496 6. That the Court committed reversible error when it converted the assets of  
497 Octane Addictions to be divided equally between the parties but did not treat the  
498 premarital house of Amanda Ann Johnson the same.

499 7. That the Court committed reversible error when it based its custody decision  
500 in deciding Amanda Ann Johnson was the primary care giver on her denying Tyler  
501 James Johnson parenting time and when the Court specifically refused to enforce its  
502 own orders related to parenting time during the pandemic.

503 8. That the Court committed reversible error when it indicated that Amanda Ann  
504 Johnson was more credible based off of financial spreadsheets of the parties' assets  
505 in making a determination as to Child Custody.

## 506 VII. ARGUMENT

507 **The District Court abused its discretion when it awarded a share of the**  
508 **income of Octane Addiction and OA Promotions when neither party requested**  
509 **the income be distributed to Amanda Ann Johnson and then in doing so did not**  
510 **take into consideration Amanda Ann Johnson's income.** The evidence in this  
511 matter which is clearly taken from Amanda Ann Johnson's own statements is that at  
512 no point in time did she request income from Octane Addictions or from OA  
513 Promotions. In fact, she specifically as set forth in the Statement of Facts above  
514 stated her desire to not have any of the income and to be released from any  
515 responsibility as of 12/31/2018. While the Court did not find it appropriate to release  
516 her prior to the parties separation the Court did end up making a decision to release  
517 her as of 12/31/2019. In 2019 it is is not contradicted that Amanda Ann Johnson  
518 and Tyler Johnson separated in April of 2019 and then Amanda Ann Johnson filed

for divorce in July of 2019. Nor is it contradicted that Amanda Ann Johnson after the date of separation kept all of her income for the year, whether it be through her payments for herself or whether it be through reimbursement of payments by Tyler Johnson in the District Court Order. Nor is it contradicted that cash is income. In fact, this as set forth above in the Statement of Facts is specifically what Amanda Ann Johnson, a Certified Public Accountant that the Court seemed to put much emphasis on, set forth. The issue seems to be that what the District Court did is it took a single spreadsheet created by Amanda Ann Johnson which showed cash (income) for OA Promotions and Octane Addictions and then added that into the property distribution. This was clearly erroneous and an abuse of discretion. If the District Court is going to allow Amanda Ann Johnson to keep all of her income for 2019 it would not make sense to not allow Tyler James Johnson to keep all of his income. This is further compounded by the fact that while the Court does make some allowance for payment of taxes for OA Promotions and Amanda Johnson's liability for taxes. It does not do so for Octane Additions. Thus, Tyler Johnson would be responsible for all taxes with no consideration as the Court did for OA Promotions. The Court's dates simply do not make sense when it is calculating debts and assets and this applies several times over. However, here, the Court took evidence from both parties that prior to the separation date of April 2019 Amanda Johnson did some minor bookkeeping for the year 2019 and collected cash at a



couple of shows. After April of 2019 she did no additional work for the year. The Court further sets forth a division date of July 2019 for the parties to reimburse payments etc... [such as on the marital home] yet skews the assets of the parties by including the income of Octane Addictions and OA Promotions in the assets of Tyler Johnson. This is an abuse of discretion and clearly erroneous and should remand this matter to the District Court.

**The District Court's calculation of the amount of Cash available for Octane Addictions and OA Promotions was clearly erroneous.** The District Court sets forth that there was \$35,662.00 in Octane Addictions Cash and \$71,079.00 in OA Promotions Cash. This is clearly erroneous as the testimony of Amanda Ann Johnson and Tyler Johnson sets forth. Amanda Ann Johnson testifies and this is supported by her Exhibit 19 that there were numerous cash deposits in 2019. This included in her testimony from March 4, 2020 the amounts of \$16,500.00 (pg 81, lines 20-25). It included \$13,200.00 on pg 82 lines 1-4) [she testifies as to two (2) months worth of mortgage payments. The mortgage payments are split between the two entities at the rate of \$3,300.00 per entity. This equates to the \$6,600.00 per month. She sets forth an additional \$2,000.00 on pg 82 lines 12-14. Just through her testimony and not considering the remainder of her exhibit this would be a reduction of cash in the amount of \$31,700.00.

558 The cash is further reduced when the testimony of Tyler Johnson, which was  
559 not disputed was taken into account related to the 2020 side-by-side and the lemon  
560 law purchase where Tyler Johnson had to use an additional \$5,000.00 of cash for the  
561 upgrade to the 2020 side-by-side.

562 The cash is further reduced and both parties agreed that in April of 2019 there  
563 was \$29,500.00 deposited to pay a variety of bills. The Court further describes this  
564 in Finding of Fact no. 19 then makes no allocation or reduction of the amount of  
565 Cash available. In fact, the District Court simply ignores this amount. Both parties  
566 as set forth in their testimony and the District Court all agree that \$29,500.00 in cash  
567 was used but the Court does not account for it in finding the amounts of Cash that it  
568 does.

569 There is simply no way the District Court's calculations are correct and this  
570 is a reversible error that requires remand as it completely changes the amounts that  
571 are due on equalization.

572 **The District Court committed reversible error when it informed the**  
573 **parties that it was not taking the exhibits as truth in lieu of testimony and then**  
574 **did exactly that in forming the Court's final decision and ignoring the testimony**  
575 **of Amanda Ann Johnson that directly contradicted her own exhibits and**  
576 **ignoring the testimony of Tyler James Johnson that was uncontradicted by**  
577 **anything other than an un-testified to spreadsheet.** The first day of trial due to

the sheer numbers of exhibits it was requested that the exhibits be admitted for purposes of demonstrative or backing up testimony and evidence of the parties. This was done. Immediately there was an attempt by James Graves to indicate this meant something more than it did. The District Court was clear when it stated that the exhibits were not admitted in lieu of testimony and changing its' position without notice to the parties is reversible error.

This was further confirmed when on the last day of trial the exhibits were once again discussed and admitted only as demonstrative or requests to the Court. "Exhibit 39 is demonstrative only as to her request to the Court not as to any actual values or how she arrived at them. (Record on Appeal 6/12/2020 session pg 18)." However, what is evident is that when the Court wrote its decision the Court did exactly opposite of what it said it was doing.

As attorneys and as our clients are participants in the legal system there are the Rules of Civil Procedure along with the various rules of the individual Courts. However, when litigating a case something else that has to be relied upon is the statements made by the Trier of Fact as to how the Courtroom runs. In this matter, there were specific, strategic decisions made based on the Court's statements. Then, four (4) months after the final day of trial it appears that what was done was the Court backtracked on the rulings it made and pulled an exhibit out of a stack and wrote a decision based on that exhibit, in essence admitting it in lieu of testimony

and in contradiction as to what the Court directed at the time of trial. This is further demonstrated where, as set forth above, the Court ignored the evidence and set forth an amount of cash that was completely incorrect. This is a reversible error that requires remand.

**That the District Court committed reversible error by extending the trial in this matter out over five (5) months during the middle of the pandemic and then extending a decision in this matter another four (4) months and ignoring the financial repercussions to the parties and to the assets available for distribution.** The year 2020 will go down in history and changing many aspects of numerous different professions. The impacts will continue to be felt across a wide-spectrum of businesses for years to come. In this matter we have a direct consequence of COVID-19 to which the Court while giving lip-service at the end of the day failed to take into account the compounding errors that it had made in addition to the consequences of COVID-19. The first day of trial in this matter was March 4, 2020. Due to COVID-19 the second day of trial did not occur until June 6, 2020 and the third day of trial did not occur until June 12, 2020. The Court then took an additional four (4) months to make a decision. All of this set against the backdrop of the Court stating how important it was to get the matter heard. However, the end result demonstrates a complete disregard for the Court's own statements and a complete disregard for the realities of COVID-19 to OA Promotions and Octane

Addictions. The Court as set forth in the Factual Statements above recognized the almost complete destruction of OA Promotions and Octane Addictions in 2020. The uncontradicted testimony was that OA Promotions and Octane Addictions went from having 15-16 shows in 2019 plus additional fairs to a total of 4-5 shows in 2020 and West Yellowstone being a loss and a Canadian show with a greatly reduced take due to the drop in oil prices. The Court recognizes these things and in fact speaks to Tyler Johnson directly about the impact. The Court asks him questions. Then recognizing the significant impact completely ignores this when issuing its' decision. It is an abuse of discretion where, even if the numbers on income were taken as accurate by the Court, to not recognize that Tyler Johnson's business did not even approach ¼ of the 2019 business and then to set aside more than \$100,000.00 in cash stating that it would still be in existence from the end of 2018 and through 2019. The arguments related to the miscalculations of cash set forth above are further incorporated herein.

COVID-19 created a situation in this case where not only did the Court ignore the financial repercussions after he recognized the impact but it further exacerbated the situation where as set forth above in the factual statements it allowed the changing of information from the first day of trial to the last day of trial and took it into consideration. This is evident when the Court does things such as on the first day of trial set forth an amount for his 2018 Truck and then because the Court has

638 this trial extend over five (5) months puts into Tyler Johnson's equity category an  
639 additional approximately \$14,000.00 of equity. (Tyler Johnson's 2019 Ford F-350  
640 valued at \$70,000.00 with a loan of \$57,867.00). This vehicle was purchased well  
641 after the parties separated and after the Divorce was filed for by Amanda Ann  
642 Johnson. The only party the Judge did this to was Tyler Johnson was also indicates  
643 at the minimum an unfairness to Tyler Johnson.

644 The impact of COVID-19 caused issues with this Trial and to the finances of  
645 Tyler Johnson that the Court while giving lip service then ignored the realities of the  
646 Pandemic and the restrictions on OA Promotions and Octane Addictions. This is an  
647 abuse of discretion. The Court cannot on one hand recognize the COVID-19  
648 situation and not hold Amanda Johnson in contempt because of the Pandemic related  
649 to Tyler Johnson's parenting time but then turn around and ignore those same  
650 realities when estimating the Cash that was still available and the financial  
651 repercussions. This demands remand by this Court.

652 **That the District Court abused its' discretion when it gave Amanda Ann**  
653 **Johnson credit for all payments she made on the marital home and gave Tyler**  
654 **James Johnson no credit for the payments he made on the other assets. Then**  
655 **distributed the assets by awarding each party half of the equity. James Graves,**  
656 Amanda Johnson and ultimately the Court made many comments related to pre-tax  
657 and post-tax dollars. The Court even specifically addresses this in paragraph 27 on

page 12 and 13 of the *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution after Non-Jury Trial*. Ultimately though this seems to be more of an excuse than anything for not affording Tyler Johnson the same consideration as this Court did to Amanda Johnson. The District Court ultimately ordered that Tyler Johnson had to repay all expenditures that Amanda Johnson made for the marital home during the parties' separation *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution after Non-Jury Trial* pg 21-22 paragraph 55. However, during this same timeframe it is not contradicted as set forth in the factual statements above that Tyler Johnson paid \$6,600.00 a month for the Niehenke building that the Court ultimately awarded Amanda Johnson ½ of the equity with no reimbursement of any amount to Tyler Johnson. During the same amount of time that the Court found that Amanda Johnson paid \$39,378.45 Tyler Johnson paid \$105,600.00. This is not contradicted as both parties agreed that Tyler Johnson was paying \$6600.00 per month for the Niehenke building. Whether it is pre-tax or post-tax does not make a difference as ultimately the Court awarded Amanda Johnson ½ of the equity and Tyler Johnson was not reimburse for any of the payments. Again, at the very minimum this seems to indicate an unfairness towards Tyler Johnson and when looked at in an overall of all of the other items seems to indicate bias against Tyler Johnson and is an abuse of discretion.

677           **That the Court committed reversible error when it converted the assets**  
678 **of Octane Addictions to be divided equally between the parties but did not treat**  
679 **the premarital house of Amanda Ann Johnson the same.** The Court in this matter  
680 took all of the assets of Octane Addictions and OA Promotions and gave Tyler  
681 Johnson zero credit for pre-marital contributions yet awarded Amanda Johnson her  
682 premarital value of her retirement and her premarital home. It was not contradicted  
683 that Tyler Johnson had \$60,000.00 to \$70,000.00 in cash prior to the marriage. It  
684 was testified to that the value of the Clothing Trailer that the Court set over to Tyler  
685 Johnson at \$30,000.00 was actually only a \$4,000.00 difference in value. The  
686 motorhome of the parties as set forth by Amanda Johnson was a premarital purchase  
687 of Octane Addictions that she was simply on the loan for a better credit score. The  
688 Court treated the premarital assets of the parties completely differently. Again, this  
689 demonstrates at a minimum an unfairness towards Tyler Johnson and when  
690 combined with all other aspects above indicates bias. The District Court abused its  
691 discretion in treating the assets of the two parties so differently as it has done herein  
692 and the matter should be remanded.

693           **That the Court committed reversible error when it based its custody**  
694 **decision in deciding Amanda Ann Johnson was the primary care giver on her**  
695 **denying Tyler James Johnson parenting time and when the Court specifically**  
696 **refused to enforce its own orders related to parenting time during the pandemic**




697 **and when it indicated that Amanda Ann Johnson was more credible based off**  
698 **of financial spreadsheets of the parties' assets in making a determination as to**  
699 **Child Custody.** This Court as set forth in the Factual Statements above  
700 acknowledged that Amanda Johnson had withheld parenting time. That she would  
701 drop the minor child off at daycare instead of allowing Tyler Johnson to care for his  
702 child. This Court acknowledged that Amanda Johnson was withholding visitation  
703 during the pandemic even though the Court could not indicate that the Governor's  
704 Orders were not to apply to child visitation orders. The testimony of Amanda  
705 Johnson demonstrated that from the time the parties separated until Christmas of  
706 2019 she did not allow a single overnight and would allow very little time for Tyler  
707 Johnson to parent. From Christmas of 2019 to the end of January of 2020 Amanda  
708 Johnson withheld all parenting time. Ultimately, this Court found that Amanda  
709 Johnson was the primary caregiver not because that is what occurred between the  
710 parties but because Amanda Johnson refused to allow Tyler Johnson parenting time  
711 and the Court refused to enforce the Orders that it entered. This combined with the  
712 Court indicating that because a CPA has great financial spreadsheets so she should  
713 get more credibility was reversible error.

#### 714 VIII. CONCLUSION

715 The District Court abused its discretion and made numerous errors which  
716 requires both the asset / debt distribution and the child custody to be remanded.

Dated this 1<sup>st</sup> day of March, 2021.

  
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### CERTIFICATE OF SERVICE

I, Molly Lockard, paralegal for Christopher J. King, hereby certify that on the 1<sup>st</sup> day of March, 2021 a true and correct copy of the foregoing document was delivered as follows:

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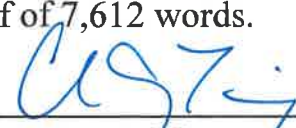
Honorable Rodney Souza  
Via Joanna Mong

Cori Cook  
Via Email

  
\_\_\_\_\_  
Molly Lockard

### CERTIFICATE OF COMPLIANCE

I, Christopher J. King, Attorney for the Appellant herein, hereby certify that this document is proportionately spaced with a typeface of Times New Roman in 14 point. There is a total word count for this brief of 7,612 words.

  
\_\_\_\_\_  
Christopher J. King

## APPENDIX

756

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758 *Findings of Fact, Conclusions of Law, Order, and Decree of Dissolution After Non-*  
759 *Jury Trial* (43 pages).

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