

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. 20-0498

THOMAS JAMES BICK)

Petitioner, Obligor and Appellant,)

vs.)

KATHLEEN JO JOHNSON)

Respondent, Obligee and Appellee,)

and)

STATE OF MONTANA EX REL.)

MONTANA DEPARTMENT OF)

PUBLIC HEALTH AND HUMAN)

SERVICES, CHILD SUPPORT)

ENFORCEMENT DIVISION)

Respondent and Appellee.)

FILED

MAY 26 2021

Bowen Greenwood
Clerk of Supreme Court
State of Montana

APPELLEE'S ANSWER BRIEF

ON APPEAL FROM THE
MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY CAUSE NO. DR 16-1241 AND DV 19-1188
THE HONORABLE ROD SOUZA, PRESIDING

Appearances:

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Helena, MT 59620

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CERTIFICATE OF INTEREST

Robert J. Waller, counsel for Kathleen Jo Johnson certified the following:

1. The full name of every party or amicus represented by us is:

Kathleen Jo Johnson.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:

None.

3. All parent corporations and publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by us is:

None.

4. The names of all law firms and partners or associates that appeared for the party or amicus now represented by us in the trial court or agency or are expected to appear in this Court is:

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STATEMENT OF THE ISSUES

The Appellee, hereafter referred to as “Kathy”, accepts the Statement of Issues set forth by the Appellant, hereafter referred to as “Bick”.

STATEMENT OF THE CASE

This case was a case in which Kathy, as Petitioner, sought the dissolution of her marriage to Bick, the Respondent. The case was tried before the Honorable Rod Souza on two separate days: April 30, 2018, and July 11, 2018. Judge Souza entered his Findings of Fact, Conclusions of Law, Order and Decree of Dissolution on December 31, 2018. Curiously, none of the three (3) Notices of Appeal referred to below, mention this Order and Decree.

Bick has filed three (3) separate Notices of Appeal. The first Notice of Appeal was filed on June 27, 2019. That Notice of Appeal states it is an appeal from a final written judgment or order entered in the District Court on May 28, 2019. The Order referenced is the Order on Pending Motions and Requiring the Parties Mediate All Personal Property Issues by June 28, 2019, Appendix B. This Appeal was dismissed without prejudice in this Court’s Order dated October 8, 2019. In that Order, this Court specifically stated the “. . . appeal of the Decree of Dissolution is time barred.”

The second Notice of Appeal was filed on October 14, 2020. It states Bick is appealing from a final judgment or Order entered on September 14, 2020. The Order

referenced is the Order Affirming Administrative Law Judge on Remand. None of the issues listed by Bick have their source in this very brief Order. Appendix G.

The Third Notice of Appeal was filed on January 22, 2021. It states Bick is appealing from a final judgment or order entered on December 23, 2020. The Order referenced is the Second Order on Pending Motions. Appendix E.

On February 16, 2021, Bick filed a Combined Motion To Consolidate And For Extension of Time. This Motion sought to consolidate the October 14, 2020, appeal (DA 20-0498) and the January 22, 2021, appeal (DA-21-042). By Order dated February 17, 2021, this Court granted the Motion to Consolidate. The causes were consolidated under Cause No. DA 20-0498.

There is no mention of the June 27, 2018, appeal in the Motion To Consolidate or in any other pleading. Consequently, Kathy does not view that appeal as a part of the appeal now before this Court.

STATEMENT OF FACTS

Three (3) of the five (5) issues that Bick presents for review all involve decisions made by Judge Souza as part of his Findings of Fact, Conclusions of Law, Order and Decree of Dissolution dated December 31, 2018. In Issue No. 1, Bick questions the District Court's decision regarding the date used to value marital assets including the marital home and the parties' retirement accounts. The District Court's

decision that October 24, 2016, would be the date of valuation is found at Findings of Fact No. 16, page 3, Findings of Fact No. 24, page 5, Findings of Fact No. 41, pages 8-9 and Conclusion of Law No. 3, page 15. All paragraph numbers and page references refer to Appendix A.

In Issue No. 3, Bick makes a vague reference to “Issues of Taxation.” However, the brief provides more specifics. Bick is raising an issue regarding the District Court’s decision to allow Kathy to file a separate tax return for 2017. Findings of Fact Nos. 45 and 46, pages 9-10. Bick is also raising an issue regarding the District Court’s decision to give the dependent exemption for the parties’ child, K.B., to Kathy. Finding of Fact No. 47, page 10. All references to paragraph numbers and pages refer to Appendix A.

In Issue No. 4, Bick questions the District Court’s decision to not give Bick credit for certain expenditures against back child support. Findings of Fact Nos. 55 and 56, pages 12-13. The District Court explained that it was not giving Bick credit for all expenses because it was also giving Bick a variance from the child support amount calculated in accordance with the Montana Child Support Guidelines. Finding of Fact No. 64, page 14. All references to paragraph numbers and pages refer to Appendix A.

With regard to the foregoing issues, there is only one fact that is relevant and

it is not found in any of the transcripts. The central fact is that all of these issues seek to overturn decisions made as part of the District Court's Findings of Fact, Conclusions of Law, Order and Decree of Dissolution dated December 31, 2018. This Court, in its Order filed on June 27, 2019, has already held that "... the appeal of the Decree of Dissolution is time barred. Only thirty days' time may elapse between a ruling and a notice of appeal. M.R.App.P. 4(5)(a)(i)."

There are not any transcript references to the facts relating to Bick's Issue No. 2. This issue concerns an award of interest on Bick's obligation to purchase Kathy's interest in the family house. The facts are that Judge Souza, as part of his December 31, 2018, Order, ordered Bick to pay Kathy an equalization payment for her interest in the family house. Finding of Fact No. 51, page 11. Bick was given 90 days from December 31, 2018, to make this payment. Order, paragraph 1, page 16. The payment was due on April 1, 2019. The payment was not made until October 21, 2020. Appendix E, page 3, lines 6-7. In the District Court's Second Order on Pending Motions, Kathy was awarded post-judgment interest on the house equalization payment.

Bick's Issue No. 5 had never been raised before it appeared in his appellate brief. The undisputed facts are that Bick was charged \$300.00 by the holder of his Billings Clinic 403(b) Plan and his Billings Clinic Pension Plan to process the

Qualified Domestic Relations Orders (QDROs), Appendix C and Appendix D, and to divide those two Plans. The QDROs were signed by the Court on November 6, 2019. Both Plans have been divided. Kathy has received the interest in these Plans that she was awarded by the Court. Despite having knowledge of these QDROs since November 2019, Bick has never raised any issue regarding said Orders or the payment of a fee until now.

STANDARD OF REVIEW

Three (3) of Bick's appellate issues are based upon the District Court's Findings of Fact as discussed above. In this Court's Order dated June 27, 2019, this Court stated the ". . . appeal of the Decree of Dissolution is time barred. Only thirty days' time may elapse between a ruling and a Notice of Appeal. M.R.Civ.P. 4(5)(a)(i)." Consequently, none of the three (3) said issues are appealable. Any questions regarding the appropriate standard of review for these issues are meaningless.

Nevertheless, the standard of review for post-trial Findings of Fact was clearly stated in *In Re M.A.L.*, 2006 MT 299, 334 Mont. 436, 148 P.3d 606. In that case, the Court stated:

This Court reviews a district court's findings of fact to determine whether the findings are clearly erroneous. (Omitting citations) A finding of fact is clearly erroneous

if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence or, if after review of the record, this Court is left with a definite and firm conviction that the district court made a mistake. (Omitting citations)

Any ruling by a Court involving a party's entitlement to post-judgment interest is considered a conclusion of law. Conclusions of law are reviewed de novo. *In Re Marriage of DeBuff*, 2002 MT 159, 310 Mont. 382, 385, 50 P.3d 1070, 1073.

Bick's final issue dealing with the QDROs has no applicable standard of review. The issue involves two post-judgment QDROs that were signed by the District Court on November 6, 2019. Bick has never filed any motion regarding these QDROs nor has he otherwise questioned the language of the QDROs. This issue does not fall into one of the narrow categories in which the Supreme Court may exercise original jurisdiction such as a habeas corpus application, writs of supervisory control or constitutional questions. Section 3-2-202, MCA, Rule 14, M.R.App.P. As far as Kathy is concerned, there is nothing about the QDROs that could form the basis for an appealable issue.

SUMMARY OF ARGUMENT

With regard to the issues numbered 1, 3 and 4 as set forth in Bick's Statement of Issues, the argument would be the same as to all three issues. That argument is: These three issues are all based on the District Court's December 31, 2018, Order and

Judgment. As this Court has already stated in its October 8, 2019 Order, the time for appealing these three issues expired approximately 30 days after the District Court's Order entered on December 31, 2018. These issues are not appealable issues and require no response from Kathy other than that. However, in the interest of being complete, a brief response to each of those issues is set forth below.

The argument against Bick's second listed issue is simple. Case law unequivocally states once a person is liable for a money judgment and payment is not made, the person entitled to the judgment is further entitled to a fair rate of interest. In the Argument section of this brief section, many of these cases will be cited.

Bick's last issue regarding QDROs is not appealable for all the reasons set forth herein.

ARGUMENT

I. WHETHER THE DISTRICT COURT ERRED IN USING OCTOBER 24, 2016, TO VALUE THE MARITAL PROPERTY.

As specifically pointed out above, the District Court's decision to use October 24, 2016, the date on which the Petition for Dissolution was filed, as the date on which to value the family home and all the retirement accounts is set forth in the Court's Findings of Fact, Conclusions of Law, Order and Decree of Dissolution dated December 31, 2018. Appendix A. In its Order dated October 8, 2019, this Court

observed that any appeals of the Decree of Dissolution were “time-barred.” In so observing this Court cited Rule 4(5)(a)(i), M.R. App. P., for the rule that only thirty (30) days could elapse between a ruling and a notice of appeal. In this case, the District Court ‘s decision was dated December 31, 2018, and the first Notice of Appeal was filed on June 27, 2019. Obviously, Bick missed his date to appeal anything related to the Decree of Dissolution by approximately five (5) months.

In his Brief, Bick contends no “final judgment has yet issued.” Appellant’s Opening Brief, page 7. As this Court has already recognized, the District Court did issue the “final” judgment in this case on December 31, 2018. The appeal of this issue is time barred.

Bick can seek consolation in the fact it is well-established law that a District Court may elect to value assets as of the time of separation or on any other date. *In Re Marriage of Hockhalter*, 2001 MT 268, 307 Mont. 261, 37 P.3d 665. The District Court has “broad discretion” as to when it chooses to value the marital estate. *In re Marriage of Tummerello*, 2012 MT 18, 363 Mont. 387, 270 P.3d 28. An equitable division of the marital estate is more important than the date on which the Court values the parties’ assets. *Schwartz v. Harris*, 2013 MT 145, 370 Mont. 294, 308 P.3d 949. Based on the foregoing, even if his appeal had been timely, Bick had no chance to prevail on this issue.

II. WHETHER THE DISTRICT COURT ERRED IN AWARDING STATUTORY INTEREST ON THE EQUITY PAYMENT?

The District Court did not err in awarding Kathy post-judgment interest on the money Bick was to pay Kathy for her interest in the marital home. There is a veritable mountain of authority to support the District Court's decision to award Kathy interest.

Post-judgment interest is a right, not a matter of discretion. *Warrington v. Great Falls Clinic, LLP*, 2020 MT 174, ¶10, 400 Mont. 360, 467 P.3d 567. In *Knudson v. Knudson*, 19, Mont. 204, 208, 622 P.2d 1025, 1027, (Mont. 1981), this Court stated:

Once a person is liable for a money judgment, and payment is not made, the person entitled to the judgment is further entitled to a fair rate of interest.

See also, *In re Marriage of Dalley (Dalley II)*, 237 Mont. 287, 292-293, 773 P.2d 295, 298-299, (Mont. 1989); *Gendron v. Mont. Univ. Sys.*, 2020 MT 82, ¶¶ 20-21, 23, 399 Mont. 470, 467 P.3d 115.

Bick does not dispute the amount of interest. He disputes only whether there should be interest in any amount. The District Court was correct in determining that Kathy was entitled to interest. Bick essentially had Kathy's money for approximately 19 months before making his payment. To deny Kathy interest would be the very

definition of unfair.

III. WHETHER THE DISTRICT COURT ERRED ON ISSUES OF TAXATION.

As pointed out above in the Statement of Facts section of this Brief, the issues actually raised by Bick, under this heading, deal with the District Court allowing Kathy to file a separate tax return for 2017 and the District Court awarding Kathy the dependent exemption for the parties' child, K.B. Both of these matters were specifically decided in the Court's Findings of Fact, Conclusions of Law, Order and Decree of Dissolution dated December 31, 2018. For all the reasons set forth in the discussions of Issue No. 1 above, these issues are not appealable.

Even if these issues had been appealable, Bick could not have prevailed. Both issues involve matters that are entrusted to the discretion of the District Court. As such, in order to overturn these rulings, Bick would have to show the District Court abused its discretion by acting arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *C. Haydon Ltd v. MT Min. Properties, Inc*, 286 Mont. 138, 146, 951 P.2d 46, 61 (Mont. 1997). Bick has not even tried to make such a showing.

IV. WHETHER THE DISTRICT COURT ERRED IN CREDITING CHILD SUPPORT PAYMENTS.

This is the third and final issue that is based on the District Court's Decree of

Dissolution. This time, Bick is contending the Court gave him most, but not everything, he wanted in terms of in kind payments that would count against child support. For all the reasons set forth in the discussions of Issues 1 and 3 above, this issue is not appealable.

V. WHETHER THE DISTRICT COURT ERRED IN MAKING BICK PAY 100 PERCENT OF THE COSTS TO DIVIDE HIS RETIREMENT ACCOUNTS.

The first mention of this issue in this case occurred when it appeared in Bick's Brief. This Court can review all the other various Orders listed in Bick's Appendix and will find no mention of this issue.

Is there any basis on which this Court could consider an issue raised for the first time at the appellate level? The Montana Supreme Court has original jurisdiction as outlined in Section 3-2-202, MCA, and Rule 14, M.R.App.P., and Article VII, Section 1 and 2 of the Montana Constitution. However, this question regarding Qualified Domestic Relations Orders (QDRO) does not fit into any of the areas defined by the law discussed above.

If it is not a question that can be addressed using original jurisdiction, then it follows it should have been raised in the District Court. The only authority to raise a post-trial issue regarding QDROs that counsel can think of would be the authority afforded by something like Rule 60(b), M.R.Civ.P. Rule 60(c)(1), M.R. Civ. P.,

states that a motion under Rule 60(b) must be made no more than a year after the entry of the order in question. The QDROs were signed by the District Court on November 6, 2019. The first mention of an issue regarding said QDROs comes in a Brief filed April 29, 2021. The year has expired specified by Rule 60(c)(1). If the reference to Rule 60(b) is appropriate, Bick cannot use this rule because he, again, waited too long.

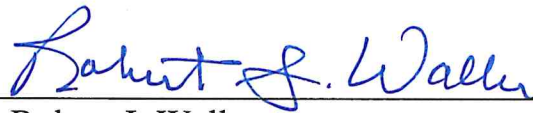
Bick clearly feels the imposition of these two \$300.00 fees is something that was done to him with malice. Counsel understands that he cannot create facts by making statements in this Brief. However, it feels important that Bick understand that the language of the QDROs making Bick responsible for payment of the \$300.00 fees is not something counsel dreamed up. The language was simply part of the QDRO forms that came from the holder of Bick's hospital retirement accounts. As is usually the case, counsel followed the sample forms carefully. To not follow the forms is generally a guarantee the company will refuse to accept your orders.

CONCLUSION

This Court should find that Bick's appeal is without merit. All Bick's requests for relief should be denied. The decisions of the District Court should be affirmed.

Respectfully submitted this 20 day of May, 2021.

ROBERT J. WALLER
ATTORNEY AT LAW PLLC

By: 

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Counsel for Appellee
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STATEMENT OF RELATED CASES

- A. Related Case: *Thomas James Bick v. Kathleen Jo Johnson, State of Montana ex rel. Montana Department of Public Health and Human Services, Child Support Enforcement Division, In the Supreme Court of the State of Montana, Supreme Court Cause No. DA 21-0042 consolidated to DA 20-0498(c)*

CERTIFICATE OF COMPLIANCE

Pursuant to the Rules of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing Appellee's Answer Brief is proportionally spaced, has a 14-point typeface, and has determined by the undersigned's word processing program, contains 2,855 words, not including the Certificate of Interest, the Table of Contents, Table of Authorities, Statement of the Issues Presented for Review, Statement of Related Cases, Certificate of Compliance and the Certificate of Service.

DATED this 20 day of May, 2021.

By: Robert J. Waller
Robert J. Waller
Counsel for Appellee
Kathleen Jo Johnson

CERTIFICATE OF SERVICE

This is to certify that on this 24 day of May, 2021, a true and accurate copy of the foregoing Appellee's Answer Brief is duly served by U.S. Class Mail, postage prepaid, upon the following counsel of record.

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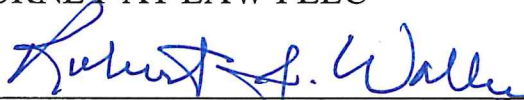
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The original and 9 copies of the Appellee's Answer Brief is also sent on the above date via U.S. Class Mail to:

Clerk of the Montana Supreme Court
Bowen Greenwood
Room 323, Justice Building
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Helena, MT 59620-3003

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