

## IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 21-0278

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SHARON ANN HARMS,

Petitioner/Appellee,

And

CHARLES RONALD HARMS,

Respondent/Appellant.

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ANSWER BRIEF OF PETITIONER/APPELLEE  
SHARON ANN HARMS

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On Appeal from the Montana Thirteenth Judicial  
District Court, Yellowstone County  
Lower Court Docket No. DR 18-0937  
Before The Honorable District Judge Colette Davies

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CASEY HEITZ MICHAEL L. DUNPHY PARKER, HEITZ & COSGROVE, PLLC 401 N. 31 <sup>st</sup> Street, Suite 805 P.O. Box 7212 Billings, MT 59103-7212 phone: (406) 245-9991 fax: (406) 245-0971 <a href="mailto:caseyheitz@parker-law.com">caseyheitz@parker-law.com</a> <a href="mailto:mdunphy@parker-law.com">mdunphy@parker-law.com</a>	DANIEL BALL JUSTIN STARK HENDRICKSON LAW FIRM, P.C. 208 North Broadway, Suite 324 P.O. Box 2502 Billings, MT 59103-2502 phone: (406) 245-6238 fax: (406) 245-6238 <a href="mailto:dan@hendricksonlawmt.com">dan@hendricksonlawmt.com</a> <a href="mailto:justin@hendricksonlawmt.com">justin@hendricksonlawmt.com</a>
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Attorneys for Appellant

Attorneys for Appellee

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### **ISSUES PRESENTED**

1. Whether the Order of the trial court is appealable.
2. Whether the trial court abused its discretion in denying the motion for contempt.
3. Whether the trial court erred in finding that the Agreement did not include the annuity.

### **STATEMENT OF THE CASE**

In this dissolution matter, a Findings of Fact, Conclusions of Law, and Judgment and Decree of Dissolution of Marriage was entered on July 14, 2020. After the final decree, the parties disagreed about the distribution of a jointly held annuity account that had not been explicitly identified in the final decree. On January 13, 2021, the Respondent and now Appellant Charles Harms (“Bo”) moved for an order that the Petitioner and now Appellee Sharon Harms (“Sharon”) be held in contempt alleging that Sharon disobeyed the final decree by failing to execute documents necessary to transfer a jointly held annuity to Bo. Included in Bo’s contempt motion was a request for his attorney fees.

On May 6, 2021, the trial court issued a written ruling that denied Bo’s motion for contempt, ordered the parties “to attempt to divide the asset on an equitable basis without further judicial intervention, if possible,” and denied the parties’ requests for attorneys’ fees.

## **STATEMENT OF FACTS**

The trial court entered Findings of Fact, Conclusions of Law, and Judgment and Decree of Dissolution of Marriage on July 14, 2020. *Order Denying Resp't's Mot. for Contempt* (the "Order"), at p. 1. That judgment incorporated the parties' Property Settlement Agreement dated July 9, 2021 (the "Agreement"). *Id.* Exhibit A to the Agreement listed specific accounts, vehicles, and other items specifically allocated to each party. *Id.* Exhibit A to the Agreement included as an item awarded to Bo "all other real and personal property." *Id.*

The parties jointly hold an annuity with a valuation exceeding \$100,000. In December 2020, Bo requested that Sharon transfer the annuity to him. *Id.*, at p. 3. Sharon failed to respond to Bo's request. *Order*, at p. 1. Bo filed a motion for contempt on January 13, 2021.

On May 6, 2021, the trial court denied Bo's motion for contempt. *Order*, at p. 3. The trial court ordered the parties "to attempt to divide the asset on an equitable basis without further judicial intervention, if possible." *Id.* The trial court found that the annuity "was not part of the Agreement." *Id.* The trial court denied the parties' requests for attorneys fees. *Id.*

## **STANDARD OF REVIEW**

The appropriate standard of review of a District Court's denial of a motion for contempt is to affirm the district court's decision "absent a blatant abuse of

discretion.” *In re Marriage of Baer*, 1998 MT 29, ¶ 45, 287 Mont. 322, 954 P.2d 1125. An abuse of discretion occurs when the District Court acts “arbitrarily without employment of conscientious judgment or exceed[s] the bounds of reason resulting in substantial injustice.” *Id.*, ¶ 29. Moreover, the review is limited to confirming that the District Court was “within its jurisdiction and whether the evidence supports the finding of the court.” *In re Marriage of Sessions*, 231 Mont. 437, 441, 753 P.2d 1306, 1308 (1988).

### **SUMMARY OF ARGUMENT**

The Order dated May 6, 2021, is not appealable because (a) it does not include an ancillary order affecting the substantial rights of either party, and (b) it is not a final order or judgment.

The trial court did not blatantly abuse its discretion in denying the motion for contempt. The trial court, in its discretion, found that it was not reasonable to interpret the Agreement to mean that a valuable annuity would be merely other property, instead of property that should be divided on an equitable basis.

The trial court did not err in revising the Agreement by deciding that the annuity was not part of the Agreement because to have found otherwise would have been inequitable in light of the specificity of the parties’ agreement and the parties’ general intent of equitable distribution.

## **ARGUMENT**

### **I. THE TRIAL COURT’S ORDER IS NOT APPEALABLE**

The Order of the trial court dated May 6, 2021 (the “Order”), may not be appealed because (a) it does not include the requisite type of ancillary order, and (b) it is not a final order.

#### **A. The Trial Court’s Order Does Not Include the Requisite Ancillary Order.**

An appeal may be taken “[f]rom a contempt judgment or order in a family law proceeding when, and only when, the judgment or order appealed from includes an ancillary order entered as a result of the contemptuous conduct which affects the substantial rights of the parties involved.” *Mont. R. App. Proc. 6(3)(j)*. The Order does not include the requisite ancillary order entered as a result of the contemptuous conduct which affects the substantial rights of the parties involved.

First, the Order includes no ancillary order. An ancillary order “determines the rights of the parties as a result of the contemptuous conduct.” *Lee v. Lee*, 2000 MT 67, ¶ 37, 299 Mont. 78, 996 P.2d 389. Here, the trial court denied the contempt motion and ordered the parties “to attempt to divide the asset on an equitable basis without further judicial intervention, if possible.” *Order* at p.3. The order to “attempt to divide the asset” did not determine the parties’ rights with respect to the asset.

Second, the Order includes no ancillary order that was entered as a result of contemptuous conduct. Sharon was not held in contempt. Because no contemptuous conduct was found, no order could have been entered as a result of any contemptuous conduct. The trial court did order the parties to attempt to equitably distribute the annuity, but that order did not determine the rights of the parties as result of contemptuous conduct.

Third, the Order includes no order which affects the substantial rights of the parties. In one case, this Court allowed itself to review a trial court's order because the order affected a party's substantial right, i.e., the "ownership right" in a business. *In re Marriage of Cini*, 2011 MT 295, ¶ 19, 363 Mont. 1, 266 P.3d 1257. Here, the Order directed the parties to keep working between themselves to allocate one jointly-owned asset, an annuity, in a way that was equitable and in the spirit of the final settlement and decree. Thus, the Order did not affect the parties' joint ownership status in the annuity, and substantial rights of the parties were not affected. Because the Order included no ancillary order which affected the substantial rights of the parties, the Order is not appealable. Bo's appeal should be dismissed.

**B. The Trial Court's Order Is Not Final.**

The Order is not a final order. Again, the Order directed the parties to keep working between themselves to allocate one jointly-owned asset, an annuity, in a way that was equitable and in the spirit of the final settlement and decree. The



trial court directed to “attempt to divide the asset on an equitable basis without further intervention, if possible.” *Order*, p. 2. Obviously, the trial court had continuing jurisdiction of the dissolution proceeding and the trial court anticipated that further judicial attention to the matter might be necessary. In this sense, the Order did not have the finality required for the current appeal. *See* Mont. R. App. Proc. 6(3) (“an aggrieved party may appeal . . . , provided that the order is the court’s final decision on the referenced matter”).

## **II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE CONTEMPT MOTION.**

The trial court did not blatantly abuse its discretion in denying the motion for contempt. The contempt motion was fully briefed. In the motion, Bo asked that Sharon be held in contempt until she executed the transfer of the annuity to him, presuming that the annuity was part of the parties’ agreement. In responding to the motion, Sharon explained that the parties held a joint asset that had not been specifically identified in the otherwise detailed Agreement and Sharon requested an equitable distribution of the asset. In deciding the contempt motion, the trial court appropriately and necessarily examined the annuity and Agreement in light of the parties before the court. The trial court denied Bo’s contempt motion.

In deciding the contempt motion, the trial court, in its discretion, found that it was not reasonable to interpret the Agreement to mean that a valuable annuity would be merely “other personal property,” instead of property that should be divided on an equitable basis. Specifically, the trial court acknowledged that the

annuity might be defined as personal property, but that “interpreting the Agreement to include the annuity in this context is not reasonable.” *Order Denying Resp’t’s Mot. for Contempt* at p.2. The trial court explained:

The general intent of the Agreement was a fair and equitable distribution of property. To that effect, the parties split up valuable assets like bank accounts, properties, and vehicles, as well as small items like salt and pepper shakers. Given the general intent of equitable distribution and the specificity of the Agreement, it is not reasonable to interpret the Agreement to mean that the parties intended to include an annuity valued over \$100,000 as mere “other” property.

*Id.*

Obviously, in ruling on Bo’s contempt motion, the trial court considered the parties before it, the evidence, and the intent of the Agreement toward an equitable distribution of property. In finding that the Annuity was not part the Agreement, the trial court necessarily concluded that Sharon was not in contempt of the trial court’s judgment when she had failed to execute the transfer of all the annuity to Bo. In denying the contempt motion, the trial court ordered the parties “to attempt to divide the asset on an equitable basis without further judicial intervention, if possible.” *Id.*

It was not a blatant abuse of discretion for the trial court to deny the contempt motion and order the parties to continue the attempt to equitably distribute the annuity. An abuse of discretion occurs when the District Court acts “arbitrarily without employment of conscientious judgment or exceed[s] the bounds of reason resulting in substantial injustice.” *In re Marriage of Baer*, 1998

MT 29, ¶ 29, 287 Mont. 322, 954 P.2d 1125. The trial court determined that “it is not reasonable to interpret the Agreement to mean that the parties intended to include an annuity valued over \$100,000 as mere ‘other property’.” *Order*, at p. 2. Thus, the trial court employed conscientious judgment in ruling that Sharon was not in contempt because the trial court had found that the annuity was not part of the Agreement. And, the trial court’s ruling of no contempt certainly does not exceed the bounds of reason or result in substantial injustice. Indeed, the trial court’s ruling did not change the ownership in the asset that was owned jointly by the parties.

### **III. THE TRIAL COURT DID NOT ERR IN REVISING THE AGREEMENT.**

The trial court did not err in finding that the annuity was not part of the Agreement the annuity because to have found otherwise would have been inequitable in light of the specificity of the parties’ agreement and the parties’ general intent of equitable distribution.

Bo argues in this appeal that the Agreement was a valid contract which the District Court should have specifically enforced. The District Court did not see it that way. The District Court effectively revised the Agreement by clarifying that the “annuity was not part of the Agreement.” *Order*, p. 3. When, “through fraud or a mutual mistake of the parties or a mistake of one party while the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised” by the court. § 28-2-1611, MCA. The trial court

observed the “general intent of the Agreement was a fair and equitable distribution of property.” *Order*, at p. 3. The trial court noted that “Sharon concede[d] that the parties were aware of the annuity prior to the settlement” and that Sharon “argue[d] that its omission from the Agreement was essentially an oversight.” *Order*, at p. 2. The trial court acknowledged that “Sharon request[ed] an equitable distribution of the annuity and a supplement to the Agreement.” *Id.* Thus, the trial court clarified and revised the Agreement when it decided that the annuity was not part of the Agreement.

In a similar case, this Court affirmed a trial court’s revision of a property settlement agreement when the trial court “discarded the unclear attached exhibit provision,” *In re Marriage of Bourque*, 241 Mont. 38, 42, 785 P.2d 699 (1990), considering the trial court’s interpretation of the agreement in that case to be reasonable and not clearly erroneous. Here, the trial court found it unreasonable to characterize a valuable jointly-held annuity to be mere other property that would go entirely to Bo, despite the parties’ awareness of the annuity prior to the Agreement. This was an instance of mutual mistake, and the trial court’s ruling invited the parties to work further toward an equitable distribution of the asset.

Here, the trial court denied the contempt motion, and ordered the parties “to attempt to divide the asset on an equitable basis without further judicial intervention, if possible.” *Order* at p.3. The trial court found that the annuity “was not part of the Agreement.” *Id.* This finding was based on evidence and was not

erroneous. The trial court's order should be affirmed.

#### **IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING ATTORNEY FEES TO BOTH PARTIES.**

The trial court denied the parties' requests for attorneys fees arising from the contempt motion. *Order*, p.3. A denial of attorney fees is reviewed for an abuse of discretion. *Hurly v. Lake Cabin Dev., LLC*, 2012 MT 77, ¶ 14, 364 Mont. 425, 276 P.3d 854. The Agreement includes a provision entitling the prevailing party to an award of attorney fees. Bo was not the prevailing party on his contempt motion. The trial court reasoned that, "given the nature of this particular dispute and the Court's finding that this annuity was not part of the Agreement," neither party's request for attorney fees was granted. *Id.* There was no abuse of discretion in the denial of attorney fees.

#### **CONCLUSION**

For the reasons discussed above, Appellee Sharon Harms respectfully asks that the District Court's ruling be affirmed.

DATED this 14<sup>th</sup> day of October, 2021.

HENDRICKSON LAW FIRM, P.C.  
P. O. Box 2502  
Billings, MT 59103-2502

By: /s/ Justin Stark  
Justin Stark  
Attorney for Respondent/Appellee

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed:

1) with a proportionally spaced Times New Roman text typeface of 14 points; and is double-spaced, except of footnotes and quoted indented material which have a line spacing of 1.0;

2) and the word count as calculated by WordPerfect is not more than 10,000 words, excluding table of contents, table of citations, certificate of service, certificate of compliance, and appendix.

DATED this 14<sup>th</sup> day of October, 2021.

HENDRICKSON LAW FIRM, P.C.  
P. O. Box 2502  
Billings, MT 59103-2502

By: /s/ Justin Stark  
Justin Stark  
Attorney for Respondent/Appellee  
Sharon Harms

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of October, 2021, a true and correct copy of the within and foregoing was served by electronic filing and mail upon all the parties or opposing attorneys of record at their address or addresses as follows:

Casey Heitz  
Parker, Heitz, & Cosgrove, PLLC  
401 N. 31st Street, Suite 805  
P.O. Box 7212  
Billings, MT 59103

**HENDRICKSON LAW FIRM, P.C.**

By:                   /s/ Justin Stark  
                          JUSTIN STARK

## **CERTIFICATE OF SERVICE**

I, Justin W. Stark, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-15-2021:

Casey J. Heitz (Attorney)  
401 N. 31st Street  
Suite 805  
PO Box 7212  
Billings MT 59103  
Representing: Charles Ronald Harms  
Service Method: eService

Daniel O.C. Ball (Attorney)  
P.O. Box 2502  
208 North Broadway, Suite 324  
Billings MT 59103-2502  
Representing: Sharon Ann Harms  
Service Method: eService

Michael L. Dunphy (Attorney)  
401 N 31st St Ste 805  
P.O. Box 7212  
Billings MT 59103-7212  
Representing: Charles Ronald Harms  
Service Method: Conventional

Justin W. Stark (Attorney)  
44 Alderson Ave  
Billings MT 59101  
Service Method: eService  
E-mail Address: justin@starklawoffice.com

Justin Hendrickson Law Firm  
P.O. Box 2502  
Billings MT 59103  
Service Method: E-mail Delivery  
E-mail Address: justin@hendricksonlawmt.com



Electronically Signed By: Justin W. Stark  
Dated: 10-15-2021