IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 21-0259

CHELSEY E. GEORGE f/k/a
CHELSEY E. FRANK,

Petitioner/Appellant,

v.

MICHAEL E. FRANK,

Respondent/Appellee.

APPELLEE'S ANSWERING BRIEF

On Appeal from the Montana First Judicial District Court
Lewis and Clark County, Cause No. ADR-19-50
Honorable Mike Menahan

David B. Cotner
COTNER LAW, PLLC
2700 Radio Way
Missoula, Montana 59808
Telephone: (406) 541-1111
Facsimile: (406) 541-1122
Email: dcotner@cotnerlaw.com

Attorneys for Petitioner/Appellant

Molly K. Howard
J.R. Casillas
DATSOPOULOS, MacDONALD & LIND, P.C.
201 West Main Street, Suite 201
Missoula, Montana 59802
Telephone: (406) 728-0810
Facsimile: (406) 543-0134
Email: mhoward@dmllaw.com
jrcasillas@dmllaw.com

Attorneys for Respondent/Appellee

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I. STATEMENT OF THE CASE

Chelsey filed a Petition for Dissolution on January 8, 2019 (Doc. 1). Mike answered the Petition. (Doc. 2). On February 15, 2019, Chelsey moved for a temporary economic restraining order ("TERO"), requesting $10,000.00 a month for temporary family support, and $25,000.00 for attorney fees. (Docs. 9-11). The parties filed a Stipulation regarding fees. (Doc. 92).

On June 7, 2019, the parties filed a Stipulated Final Parenting Plan resolving custodial issues and leaving child support open. (Doc. 93) (*Tr.* 663:16-24). The plan provides 50/50 parenting only after Mike fought for equal time with E.F. and an unnecessary transition plan was demanded by Chelsey. (*Tr.* 663:10-24, 466:18 – 467:8).

In September 2019, after Mike was already paying all mortgages, taxes, household, medical, and other expenses, the parties filed a Stipulation and Mike began paying $5,000.00 a month in support. Chelsey also received a lump sum of $100,000.00. Mike maintained and still maintains responsibility for all mortgages, insurance, and taxes including those for Chelsey's residence. Mike also paid one of Chelsey's outstanding medical bills. *Id.* Despite the Stipulation, Chelsey filed a motion requesting Mike pay $1,802.00 for another medical bill. (Doc. 163). Chelsey's motion was denied as "unwarranted." (Doc. 173).

The parties submitted pre-trial proposed findings. (Docs. 203, 205). A three-day trial was held in June 2020 where six witnesses, including three experts, testified and 260 exhibits were admitted. Judge Menahan listened, took copious notes, and asked numerous questions. (*Tr.* 826:17-24).

Post-trial briefs were submitted. (*Tr*. 830:24 – 831:2). The briefs addressed important issues, all which Chelsey again raises on appeal, including growth, date of valuation and premarital property. (Docs. 238, 242, 243, 244). The parties submitted information regarding tax liabilities and post-trial proposed findings with citations to the record. (Docs. 226, 234, 236, 240, 247, 248, 250). Judge Menahan entered Findings of Fact and Conclusions of Law on April 22, 2021. (Doc. 261). Chelsey appealed seeking to relitigate the same issues previously considered and decided by Judge Menahan. (Doc. 267).

Judge Menahan did his job regardless of largely adopting Mike's proposed findings. This appeal presents no new arguments, no new facts, and no new law. The gravamen of Chelsey's position is Judge Menahan should have made findings more favorable to her. (Opening Brief). That is not the standard of review. This Court should affirm.

II. STATEMENT OF FACTS

A. Marriage, Premarital Property & Lifestyle

The parties married in November 2007. (*Tr.* 9:14-19). Chelsey is nine years Mike's junior. (*Tr.* 456:25 – 457:1).

By 2007, Mike had worked for Blue Cross Blue Shield for eight years, was Vice President of Corporate Integrity (*Tr.* 11:9-13, 688:4-7), and was already climbing the corporate ladder. (*Tr.* 414:14-20). Chelsey was Vice President of George's Distributing. (Doc. 261, p. 3, ¶ 7).

Both parties received pre-marital property credit. Mike's total pre-marital credit was $1,494,554.86. (Doc. 261, p. 32, ¶ 89). Chelsey's total pre-marital credit was $136,960.00. (Doc. 261, p. 33, ¶ 92). Judge Menahan exercised discretion. Mike proposed different credit amounts. (Doc. 261, pp. 9-11, ¶ 21).

Both parties are gainfully employed and travel for work. (*Tr.* 232:3-8). During the marriage they shared responsibility for child and home care and hired help for cleaning, childcare, and yard work. (*Tr.* 299:11-15, 680:8-11). Despite her contentions, Chelsey did not care for Mike's older children while he traveled. (*Tr.* 464:9-14). A right of first refusal in his parenting plan required the children's mother to care for the children if Mike was absent. (*Tr.* 233:12-19, 464:19-25).

The parties lived on a budget based on their base salaries, taking only "a few trips." (*Tr.* 264:10-11). Trips were usually taken in connection with Mike's business meetings or paid for by George's. (*Tr.* 264:10-14).

Extraordinary expenses were paid from Mike's investment or retirement accounts or Chelsey's bonuses from George's. (*Tr.* 445:4-11). The parties agreed Mike would defer almost 100% of his bonuses and incentive pay. (*Tr.* 476:2-4). Chelsey had access to the parties' financial information. (*Tr.* 463:4).

Chelsey took fifteen trips post-separation in 2019-2020, often with E.F. (*Tr.* 418:1 – 419:25). George's paid for all travel expenses even when they involved business and pleasure. (*Tr.* 415:23 – 416:9, 418:6-14, 419:18-24). Chelsey is not a homemaker and built a thriving business while married to Mike. (*Tr.* 346:3-6). The $18,500.00 a month budget Chelsey presented at trial was based on wants, not needs. (*Tr.* 435:25 – 436:21). When cross-examined about her post-separation lifestyle and expenditures, Chelsey was evasive thus prompting Judge Menahan to instruct her to "just answer the questions." (*Tr.* 439:8-12).

B. George's Distributing

George's Distributing is Montana's only statewide beer and wine distributor. (Exhibit B, p. 19; *Tr.* 192:3-7). George's distribution rights are very valuable. (Exhibit B, p. 11). George's continues growing. (*Tr.* 204:14 – 205:2, 475:8-12, 521:8 – 522:22).

Montana uses a three-tier system for the distribution and regulation of wine and beer. (Exhibit B, p. 7). Wholesalers are prevented from selling beer or wine products directly to consumers. *Id.* That is not the case in most other industries. (*Tr.* 496:10-20). Distributors like George's become even more valuable by benefitting from regulatory protections. (*Tr.* 496:15 – 497:2).

From the date of marriage to 2019, George's produced the following annual gross sales due to Chelsey's leadership:

Year	**Gross**	**Cite:**
2007	$ 10,444,271	Exhibit 76
2008	$ 7,213,738	Exhibit 77
2009	$ 8,270,154	Exhibit 78
2010	$ 9,903,910	Exhibit 79
2011	$ 11,497,892	Exhibit 80
2012	$ 12,625,453	Exhibit 81
2013	$ 14,152,145	Exhibit 82
2014	$ 15,268,126	Exhibit 83
2015	$ 13,449,434	Exhibit 84
2016	$ 18,749,656	Exhibit 85
2017	$ 20,514,546	Exhibit 86
2018	$ 22,680,666	Exhibit 87
2019	$ 24,534,610	Exhibit 88

(Doc. 241, p. 22, ¶ 64).

Sales more than doubled during the marriage. Chelsey also became President during that time. (Exhibit B, p. 20). She owns a 32.87% interest (Exhibit W) and controls an additional 11% held by the parties' child in trust. (Exhibit VV). Chelsey owned 200 shares on the date of marriage and acquired more shares between 2007

and 2015. (Exhibit WW). The share value increased significantly during the marriage. (*Tr.* 430:24 – 431:14). Per Chelsey, George's could still be even "more profitable." (*Tr.* 463:11-14). "We could do better." (*Tr.* 464:8). There is ample opportunity for more growth. Chelsey's father, James George, testified that Chelsey will eventually own all of the business. (*Tr.* 90:14 – 92:20).

In October 2008, the parties loaned George's $33,401.00. (*Tr.* 282:22 – 283:3). The loan was evidenced by a Promissory Note. (*Id.*, Exhibits 98, SS). George's repaid the loan in part by transferring 200 additional shares to Chelsey a year later, further commingling this asset. (*Tr.* 284:6-14, Exhibits UU, WW).

Despite her contentions that Mike did nothing to support George's growth, he did so both financially and non-financially. Mike's contributions to George's started before the marriage. (*Tr.* 685:1-6). He attended fundraisers and functions and provided physical labor to improve George's warehouse. He also supplied furniture for George's offices. (*Tr.* 685:6-14).

Mike's contributions continued during the marriage. He helped network and attended functions, assisted with set-up or cleanup, and introduced Chelsey to business and political contacts. He provided business and legislative advice. The parties allowed George's customers and employees to stay at their properties while traveling. (*Tr.* 685:15 – 686:23).

Through the support of Mike's compensation, Chelsey took decreased compensation from George's, facilitating further growth. (*Tr.* 263:19-22, 321:2-7, 326:1-12, 395:14 – 396:8). Chelsey did not "take much money" from George's during the marriage for this reason. (*Tr.* 396:2-8, 401:1 – 402:5). Chelsey is "trying to grow a really great company and hopefully make some money off it someday." (*Tr.* 463:23 – 464:2). Chelsey's compensation is wholly discretionary and unilaterally determined by her and her father. (*Tr.* 96:4 – 97:7).

Conflicting evidence was presented regarding George's value. Mike called Patrick Anderson, an economist. (*Tr.* 488:5-14). Anderson specializes in valuing distributorships. (*Tr.* 489:1-5). His reports were admitted. (Exhibits B, AAAAA). Anderson's experience includes valuing sixteen distributorships across the country, 160 beer distributions rights, and 74 wine distribution rights. (*Tr.* 493:2-25). Anderson valued George's at $9.15 million and Chelsey's interest at $2.56 million. (Exhibit B, pp. 12, 16).

Anderson valued George's as of May 1, 2020. (*Tr.* 507:18-20). Per Anderson, the date of valuation for George's is immaterial because the "company is very stable, profitable, growing. It's going to be that way. It was that way on January 1, and it's that way on May 1." (*Tr.* 508:6-10).

Chelsey's expert for valuation and tax issues was Thomas Copley, an accountant. (*Tr.* 114:10 – 115:3). Copley has a history of working for Chelsey's

counsel. (*Tr*. 167:7-13). His report was admitted. (Exhibit 144). Copley's experience is limited to valuing "three or four" distributorships. (*Tr*. 186:16-24). Copley recognized George's as "a nice business" with a valuable "distribution system." (*Tr*. 191:22-24). Chelsey's interest is not being oppressed. (*Tr*. 207:11-13). George's is growing faster than the industry standard of three percent per year. (*Tr*. 159:6-10). Copley valued Chelsey's interest at $654,000.00. (Exhibit 144). Copley used a valuation date of December 1, 2019. (*Id*.).

C. Apportionment

Mike made two proposals for apportioning the estate and Chelsey made her own. Judge Menahan had three proposals to choose from and the ability to create his own equitable apportionment. One of Mike's proposals identified all assets existing on the date of separation. (Exhibit EEEEE).

Mike's HCSC Mater Deferred Compensation Plan (the "Plan") offers a tax-favored way to pursue financial goals. (Exhibit CC). One important feature of the Plan is Mike's ability to postpone income taxes on his deferrals and returns, reducing his current income taxes. However, the Plan is explicit in that all deferrals and returns are subject to income tax upon distribution. (Exhibit CC) (citing I.R.C. § 409A). Copley testified that tax liabilities will be a certainty upon Plan distributions. (*Tr*. 172:7-10). Chelsey did as well. (*Tr*. 453:19-25). Exhibit GGGGG established

a post-tax present Plan value of $4,553,177.60. Mike's revised first proposal is in the findings. (Doc. 261, pp. 6-8, ¶ 18).

Mike's second proposal identifying all assets as of the date of separation was as follows:

Real Property	**Value**	**Mike**	**Chelsey**
2622 Gold Rush, Helena	$393,000.00	$393,000.00	
1922 Gold Rush, Helena	$650,000.00		$650,000.00
13519 Albright Lane, Big Fork	$985,000.00	$985,000.00	

Vehicles/Boats/Trailers	**Value**	**Mike**	**Chelsey**
2014 Audi A6 Quattro	$15,000.00	$15,000.00	
Wave runner and trailer	$4,000.00	$4,000.00	
Checking/Investment Accounts			
Merrill Lynch account 1290 Blackrock	$971,729.10	$971,729.10	
Merrill Lynch account 2260 Mike & Bonita	$1,008.13	$ 1,008.13	
Merrill Lynch account 0425	$5,642.61	$5,642.61	
Merrill Lynch account 2647 2019 Bonus Account	Established post separation	X	
Merrill Lynch account 2808 "New Banking"	Established post separation	X	
Merrill Lynch account 2894 2017 2019 LTIP – paid in 2020	Established post separation	X	
Bank of the Rockies Check account. 6300 Mike's Checking	Established post separation	X	
Glacier Bank account 1851 Chelsey's Checking	$17,733.54		$17,733.54
Chelsey Money Market Checking	Established post separation		X
Retirement Accounts			
Merrill Lynch acct # ending 6206- Mikes IRA Managed	$573,280.06	$573,280.06	
Prudential 401K	$240,067.05	$240,067.05	

HCSC Master Deferred Compensation Plan Prudential	$4,553,177.60	$2,276,588.80	$2,276,588.80
HCSC Pension – Prudential Cash Balance	$82,530.41	Rolfe division with numerator of 11	Rolfe division with numerator of 11
HCSC Pension – Benefit Restoration Plan**	$32,304.73	Rolfe division with numerator of 11	Rolfe division with numerator of 11
American Fund's George's Distributing 401k	$311,123.98		$311,123.98
Business Interests			
Chelsey's interest in George's Distributing	$2,560,000.00		$2,560,000.00
Big Sky			
Valley Bank Account No. 7238 Big Sky Sale Proceeds	$944,887.99	$ 944,887.99	

LIABILITIES	**Value**	**Mike**	**Chelsey**
2622 Gold Rush, Helena Mortgage – First Trust	$ (301,607.00)	$ (301,607.00)	
1922 Gold Rush Mortgage- First interstate Bank	$(261,776.00)	$ (261,776.00)	
13519 Albright Lane, Big Fork Mortgage – Valley Bank	$ (632,496.00)	$ (632,496.00)	
Taxes			
2019 Personal Taxes – Federal – Estimated	$(108,755.00)	$ (108,755.00)	
2019 Personal Taxes – State – Estimated	$ (11,580.00)	$ (11,580.00)	
2020 Personal Taxes – Federal – Estimated	$ (100,000.00)	$ (100,000.00)	
2020 Personal Taxes – State – Estimated	$(20,000.00)	$ (20,000.00)	
Big Sky Sale Tax Liability – Estimated	$ (30,000.00)	$(30,000.00)	
		Mike	**Chelsey**
TOTAL ASSETS		$6,410,203.74	$5,815,446.32
TOTAL LIABILITIES		$(1,466,214.00)	$(0.00)
TOTAL PREMARITAL CONTRIBUTIONS		$1,239,677.52	$27,494.00
TOTAL		**$3,704,312.22**	**$5,787,972.32**

(Doc. 261, pp. 9-11, ¶ 21). Under this proposal and as ordered by Judge Menahan, Mike would transfer $1,234,758.75 to Chelsey to equalize the estate. (Doc. 261, pp. 11-12, ¶ 22). This distribution results in almost $5 million of assets awarded to Chelsey.[1]

Chelsey's asset values are grossly inflated and fail to consider taxes, liabilities, or George's. (Opening Brief, Appendix B, C). They also fail to consider Mike's post-separation contributions. By way of example, and without limitation, the spreadsheet in Chelsey's Appendix B inflates the value of the Plan to $10,542,988.11, which fails to consider concrete and imminent tax liabilities. Chelsey, Copley, Mike, and Judge Menahan all agree tax liabilities are concrete and will be paid.

Judge Menahan clearly saw through Chelsey's inflated values and identified the true values. There was not an inequitable apportionment of either 85.78% / 14.21% or 83.75% / 16.24%. *Id.* Indeed, it is nearly 50/50. Chelsey's spreadsheets are not in the record or appropriate for inclusion in an appendix. M.R.App.P. 12(1)(i). The plain language of the Rule contemplates only evidence or documents contained within the record as being appropriate for inclusion in an appendix – i.e., the relevant judgment, orders, findings of fact, conclusions of law, jury instructions,

[1] $5,787,972.32 (Doc. 261, ¶ 21) – $2,5600,000.00 (Doc. 261, ¶ 22) + $1,234,758.75 (*Id.*) = $4,462,731.00.

rulings, or decisions from which the appeal is taken together with any written memorandum or rationale, and those pages of the transcript containing any oral ruling in support. The Rule does not allow for the inclusion of documents or information that are not in the record, such as Chelsey's factually inaccurate and misleading spreadsheets. Chelsey's appendix should be disregarded or given no weight. Chelsey's spreadsheets are fanciful and not based on any actual evidence or reality regarding how Judge Menahan properly apportioned the estate.

D. Date of Separation Assets

Judge Menahan correctly valued the estate for all assets that existed as of the November 1, 2018 date of separation. He summarized his reasoning at trial. (*Tr.* 828:9 – 830:22). He kept an open mind and considered Chelsey's post-trial briefs, but was not persuaded to include assets that did not exist on the date of separation. (*Tr.* 830:24 – 831:20; Docs. 238, 242, 243, 244).

The parties separated by November 1, 2018. (*Tr.* 236:15). Mike moved out and lived separately. (*Tr.* 696:21-24). He continued paying for the marital home where Chelsey stayed as well as all mortgages, taxes, bills, and liabilities. (*Tr.* 829:20-24). Mike purchased a home near Chelsey for co-parenting. (*Tr.* 306:2-11). There was no continued support from Chelsey to the estate or Mike's career. (*Tr.* 696:21 – 697:1-4). Mike fully and completely supported the estate post-separation. (*Tr.* 696:23 – 697:20).

Mike paid Chelsey's separate credit card bills. (*Tr.* 752:1-8). Per Chelsey, Mike paid "everything during the time of separation." (*Tr.* 697:14-16). The parties maintained separate bank accounts, credit cards, and lives. (*Tr.* 828:9 – 830:23). Mike's support obligation increased from $1,500.00 per month to $5,000.00 per month in September 2019. (*Tr.* 829:20-24).

The Big Sky property sold before trial. Mike paid all expenses, including the mortgage, taxes, and insurance for the Big Sky property prior to its sale. (*Tr.* 306:20 – 307:9). Tax liabilities associated with the sale are reflected in Doc. 248.

Chelsey's contribution to any part of the estate other than George's terminated with the relationship by November 1, 2018. (*Tr.* 829:25 – 830:13). Mike continued advancing his career post-separation with numerous positions all involving a different bonus structure and goals. (*Tr.* 830:5-13). Judge Menahan found it "hard" "to attribute that portion of Mike's income or success to the marital estate when the parties had clearly separated prior to that time." *Id.* Chelsey did nothing to maintain or support any asset except George's post-separation. Because the parties were no longer living as a marital unit post-separation, Mike had to move post-trial to amend the TERO to allow him to refinance the mortgages against the real properties at 2622 Gold Rush in Helena and 13519 Albright Lane in Big Fork. (Doc. 220).

E. Deferred Compensation & Taxes

Mike's compensation includes an Annual Performance Incentive ("API") and a Long-Term Incentive Program ("LTIP"). (Exhibits LLL, MMM). The API is a discretionary annual incentive rewarding employees for achieving business goals over a twelve-month period. There is no accrual or vesting anytime during that period. Any payment is based on the full twelve months. The API is unfunded, non-guaranteed, non-transferrable and non-assignable. (Exhibit LLL).

The LTIP is a discretionary incentive plan rewarding employees for achieving goals over a rolling three-year period. There is no accrual or vesting anytime during that period. The LTIP is unfunded, non-guaranteed, non-transferrable and non-assignable. LTIP bonus amounts, if any, are based on performance over the entire three years. *Id.* One bad year can entirely eviscerate the three-year LTIP bonus thereby resulting in no payment. *Id.* LTIP payments were made approximately 5, 17, and 29 months post-separation. Mike has always deferred most API and LTIP bonuses. Chelsey agreed with this decision as the parties lived primarily on base salaries. (*Tr.* 263:19-22, 772:2-5).

The Plan provides an option to defer up to 100% each year. (Exhibit BB, pp. 3-5). The Plan is unfunded, unsecured, and not vested until paid. (Exhibit BB, *Tr.* 168:15 – 169:24). The Plan is non-transferrable and non-assignable. (Exhibit BB, p. 9).

Judge Menahan awarded the Plan to Mike. (Doc. 261, p. 11, ¶ 22). The post-tax value is $4,553,177.60. (Exhibit GGGGG). Chelsey's expert acknowledged that tax liabilities are an absolute certainty with the Plan. (*Tr.* 137:6-23, 172:7-10). He took "no exception to the account balances or tax rates utilized in the Yonce [tax] report [Exhibit GGGGG]." (Doc. 234, p. 4).

The Plan also identifies concrete and imminent tax liabilities. The Plan notes that deferrals and returns are not subject to income tax until distributed, with reference to compliance with I.R.C. § 409A. (emphasis supplied) (Exhibit CC, p. 2 fn. 1). § 409A addresses the inclusion in gross income of deferred compensation under non-qualified plans like Mike's. (*see also* Exhibit BB, p. 10; Exhibit WWWW, p. 22 re: employer right to deduct). Judge Menahan acknowledged tax liabilities associated with the Plan during trial. (*Tr.* 777:13-15).

Chelsey proposed Mike act as her fiduciary by managing the Plan and to divide the Plan upon Mike's separation from employment. (*Tr.* 451:7 – 453:7). That would keep the parties tied together financially until the final distribution when Mike is 72. It would also require tax reconciliation and equalization payments with each distribution. (*Tr.* 453:3-14). Mike is not interested in being Chelsey's fiduciary. He expressed concerns about future tax liabilities and financial disagreements detracting from effective co-parenting of E.F. He does not want to make investment decisions for Chelsey. Administrative burden is also a concern. (*Tr.* 782:8 – 783:16).

Judge Menahan agreed with Mike. "…[I]n a divorce, the parties separate all their marital estate. They don't leave these assets tethered to one another." (*Tr.* 780:9-11).

F. Child Support

The parties have one child, E.F., age 11. (Tr. 229:13-19). The Stipulated Parenting Plan provides 50/50 parenting and requires Mike to pay 100% of E.F.'s health insurance and uncovered expenses. (Tr. 663:25-3) (Doc. 93). Per Chelsey, Mike is a "[g]reat dad to his kids." (Tr. 235:18-21).

Chelsey requested $9,471.00 a month in support but admitted she does not "need" that much and had been living on $5,000.00 a month since September 2019. (*Tr.* 345:1-3, 348:17-19). Mike proposed three alternatives for establishing support. (Exhibits BBBBB, CCCCC, DDDDD). Determining Chelsey's true income was difficult because she is grossly undercompensated by George's. Chelsey took minimal compensation to grow George's during the marriage and additional distributions post-separation.

Mike called an expert, Jim Kerins, to testify about Chelsey's appropriate and expected earnings. (*Tr.* 592:15 – 593:7). Kerins' report was admitted. (Exhibit A). Chelsey's appropriate and expected earnings are at least $220,000.00 per year, excluding her numerous valuable perks. (*Tr.* 617:2-9) (Exhibit A, p. 13).

Kerins' testimony was unrefuted. Kerins considered external market factors and Chelsey's compensation history. (*Tr.* 608:21-24). Despite being President and a significant shareholder, Chelsey is paid less than eight other employees below her in the hierarchical scheme. (*Tr.* 648:23 – 649:1). Chelsey's compensation for 2018 is depicted in Exhibit 105. Chelsey's work life expectancy is nine years longer than Mike's. (*Tr.* 457:4-9, 459:23-25).

At $9,471.00 a month in support, Chelsey would receive nearly $700,000.00 by the time E.F. graduates high school despite only caring for him half of the time. (Exhibits BBBBB, CCCCC, DDDDD) (*Tr.* 345:1-22). This would be a clear windfall to Chelsey.

E.F.'s lifestyle will not change due to the support amount determined by Judge Menahan. He will enjoy the same kind of life he had during the marriage. (*Tr.* 428:22 – 429:8). The parties continued providing for E.F. at a marital level post-separation. (*Tr.* 786:11 – 787:6).

Chelsey took bonuses and distributions from George's post-separation. (Doc. 241, p. 45, ¶ 155) (*Tr.* 400:2-18). Chelsey took at least the following bonuses from George's post-separation: $10,000.00 in July 2019; $17,000.00 in December 2019; and $16,066.50 in January 2020. (*Tr.* 407:12-14, 410:4-5, 411:1-5). Chelsey received these monies while Mike continued financially supporting the entire estate.

(*Tr.* 696:23 – 697:20). These monies exceed the amounts Chelsey took from George's during the marriage.

Judge Menahan applied a variance to determine support using each of the parties' base salaries. (*Tr.* 775:21 – 778:14). He did not impute income to Chelsey despite Kerins' undisputed expert testimony. Mike's deferred compensation was treated as a retirement plan. The parties lived primarily on base salaries during the marriage. *Id.* E.F.'s lifestyle during the marriage was established accordingly. Judge Menahan's determination of support was based on clear and convincing evidence concerning the income of the parties, their standard of living, and other factors. *Id.* The figure he used for Chelsey's income did not include her bonuses or valuable fringe benefits and in-kind remuneration from George's, including trading wine for personal goods and services. (*Tr*. 613:6-10). Those reduce her personal living expenses and were fairly considered in the overall analysis.

III. STANDARD OF REVIEW

§ 40-4-202, M.C.A., governs distribution of marital estates and vests District Courts with broad discretion to apportion assets equitably. *Marriage of Bartsch*, ¶ 9, 337 Mont. 386, 162 P.3d 72 (2007). This Court reviews Judge Menahan's distribution to determine if his findings are clearly erroneous. *Marriage of Swanson*, ¶ 12, 321 Mont. 250, 90 P.3d 418 (2004). A finding is clearly erroneous if not supported by substantial evidence, if Judge Menahan misapprehended the effect of

evidence, or if this Court's review convinces it he made a mistake. *Patton v. Patton*, ¶ 18, 378 Mont. 22, 340 P.3d 1242 (2015).

Absent clearly erroneous findings, this Court must affirm unless an abuse of discretion is identified. *Marriage of Rudolf*, ¶ 15, 338 Mont. 226, 164 P.3d 907 (2007). The test is whether Judge Menahan acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in a substantial injustice. *Id.* Conclusions of law are reviewed for correctness. *Marriage of Williams*, ¶ 14, 352 Mont. 198, 217 P.3d 67 (2009).

Judge Menahan's child support award is reviewed for an abuse of discretion. *Marriage of Helzer*, ¶ 20, 324 Mont. 371, 102 P.3d 1263 (2004).

IV. SUMMARY OF ARGUMENT

Judge Menahan equitably apportioned the estate. He valued the estate for all assets existing as of the date of separation. He gave both parties premarital property credit and considered all debt. He then apportioned the estate from the date of marriage to the date of separation approximately 50/50, with Mike assuming all marital liabilities of nearly $1.5 million. Chelsey was awarded nearly $5 million in assets with no liabilities whatsoever. Both parties have sufficient assets and can continue acquiring capital in the future. Judge Menahan applied a variance and correctly determined child support.

Chelsey waived her right to seek a new trial by failing to move for one before appealing. *See, e.g., D.R. Four Beat Alliance, LLC v. Sierra Prod. Co.*, 352 Mont. 435, 218 P.3d 827 (2009). Even if the Court exercises jurisdiction over Chelsey's request for a new trial, her request must be denied because none of the grounds set forth in § 25-11-102, M.C.A., are present here. Chelsey received a fair trial. The relevant evidence was discovered through written requests and depositions. Post-trial briefing was also considered. Judge Menahan's decision must be affirmed.

V. ARGUMENT

A. Judge Menahan appropriately considered all assets existing as of the date of separation and selected proper dates of valuation.

§ 40-4-202(1), M.C.A., does not mandate a time to account for assets. Judge Menahan was free to select whatever value he wished for each asset, so long as there is substantial evidence to support it. *Marriage of Staudt*, 216 Mont. 196, 200, 700 P.2d 175, 177 (1985). A strong presumption exists in favor of his valuation. *Marriage of Gochanour*, ¶ 34, 300 Mont. 155, 4 P.3d 643 (2000).

A proper distribution requires District Courts to determine net worth near dissolution. *Vivian v. Vivian*, 178 Mont. 341, 344, 178 Mont. 341, 583 P.2d 1072 (1978). "The basic reason for this rule is obvious; however, it is equally apparent that the application of the rule is dependent upon the kinds of marital assets under consideration. *The time for proper valuation cannot be tied to any single event in the dissolution process*. The filing of a petition, trial of the matter, or even the

granting of the decree of dissolution do not control the proper point of evaluation by the District Court." *Marriage of Wagner*, 208 Mont. 369, 377, 679 P.2d 753, 757 (1984) (emphasis in original).

Marriage of Milesnick, 235 Mont. 88, 96, 765 P.2d 751, 756 (1988), explained the general rule is "not hard and fast." "If a single valuation date would lead to an inequitable distribution of property, the District Court may choose several different times for valuation." *Id.* Equitable apportionment is more important than "designating the moment" when the court should value marital property. *Marriage of Alexander*, ¶ 18, 359 Mont. 89, 246 P.3d 712 (2011).

This Court affirms the use of date of separation where the parties began managing their finances and living separately. *Marriage of Tipton*, ¶ 24, 357 Mont. 1, 239 P.3d 116 (2010). *Marriage of Tipton* found a March 31, 2008 separation date because "the parties were no longer living together in the same household or commingling their assets by that time." *Id.*

Marriage of Wagner recognized:

> The statute [§ 40-4-201, M.C.A.] does not mandate a specific time period within which marital assets should be accounted for. The logical time period is the duration of the marriage. To include in the valuation of the marital estate any accumulation of financial wealth or, conversely, the increase in financial liabilities of either spouse subsequent to the termination of the "marital relationship" may effectuate an injustice and frustrate the intended purpose of division of marital property. Stated differently, to consider for distribution those assets acquired by one spouse after the marital relationship was terminated, might unjustly award a "windfall" to the dilatory spouse

> who did not work to accumulate those post-marital assets and penalize the diligent spouse for sound business judgment.

Marriage of Wagner, 208 Mont. at 378.

Marriage of Gallagher, 2003 Mont. LEXIS 211 (2003), explained:

> To include in the valuation of the marital estate any accumulation of financial wealth or, conversely, the increase in financial liabilities of either spouse subsequent to the termination of the "marital relationship" may effectuate an injustice and frustrate the intended purpose of division of marital property.

Id., ¶¶ 51-52.

Here, the marital relationship terminated by November 1, 2018. The parties lived separately thereafter, a second home was purchased for Mike to live in, and Mike paid all marital liabilities, bills, and real property expenses on the parties' four properties with no contribution from Chelsey.

Post-separation assets were acquired, and growth accrued through Mike's efforts. Chelsey did nothing to aid Mike post-separation. Mike's position and duties changed four times post-separation with different job responsibilities, goals, and payouts. Post-separation funds were deposited to comply with the TERO, not because Chelsey contributed to their accumulation. Chelsey continued to work without the burden of paying liabilities.

Chelsey should not receive a windfall. Mike should not be penalized for hard work and sound judgment. For example, API and LTIP payments were made approximately 5, 17, and 29 months post-separation. Those assets did not exist as

of the date of separation. Both assets, but especially the LTIP, could have been eviscerated due to poor performance. Neither the API nor the LTIP are vested or accrued prior to payment actually being made. Judge Menahan summarized why he used date of separation to identify which assets to apportion between the parties. (*Tr.* 829:25 – 830:13). Chelsey's contributions ceased by November 1, 2018. She cannot equitably benefit from Mike's sole accumulation of post-separation assets.

Chelsey cites *Schwartz v. Harris*, 370 Mont. 294, 308 P.3d 949 (2013). *Schwartz* affirmed the valuation of the estate as of 2009 instead of the separation in 2002. *Id.*, ¶¶ 16-20. The parties "continued a family relationship until May 2009" and "continued to function as a family unit" by traveling and vacationing together and giving their children joint gifts. *Id.*, ¶ 19.

This case is different. Mike maintained the estate himself. The parties did not continue spending time together. *Id.*, ¶ 17. They made separate financial decisions, held separate accounts, and used separate credit cards. They lived as separately as possible within the confines of the TERO and given the need to co-parent. Mike had to seek Judge Menahan's permission to amend the TERO to allow him to refinance two real properties. (Doc. 220).

Chelsey is critical of Judge Menahan for valuing George's closer to dissolution but most other assets as of date of separation. Her criticism is unwarranted. Valuing different assets at different times is not an abuse of discretion

so long as the findings are sufficient to determine the net worth and to decide whether the distribution is equitable. *Marriage of Walls*, 278 Mont. 413, 416-418, 925 P.2d 483, 485-486 (1996). Judge Menahan adopted Anderson's opinion, including the May 1, 2020 valuation date. The findings provide sufficient reasoning. Anderson considered 2020 financial information and COVID-19 impacts. Copley did not. An earlier valuation date would not have materially affected Anderson's value conclusion. (*Tr.* 508:6-10). Judge Menahan valued other assets using logical dates such as the appraisal dates for real properties.

B. Judge Menahan declined to consider growth because he properly valued assets as of the date of separation.

Post-separation assets are not marital because they have yet to accrue or exist and did not "belong to either or both" spouses upon apportionment. *Marriage of Elder & Mahlum*, ¶ 19, 399 Mont. 532, 462 P.3d 209 (2020).

In *Hutchins v. Hutchins*, 393 Mont. 283, 430 P.3d 502 (2018), the District Court apportioned four investment accounts to the husband using date of separation. The wife argued the accounts increased in value between separation and dissolution. *Id.*, ¶ 57. This Court affirmed, explaining "Michele was not necessarily entitled to the increase in the accounts' values after the parties separated and we cannot say the District Court abused its discretion in its valuation." *Id.*, ¶ 63.

Like *Hutchins*, accounts where Mike's bonuses were deposited grew post-separation. However, not all accounts grew because Mike refrained from investing

some monies due to uncertainties surrounding COVID-19. Mike made those decisions on his own and without Chelsey post-separation. Chelsey characterizes the parties' arrangement differently. But "[h]er characterization does not change the fact that, starting in [November 2018], the parties had completely separate bank accounts and made separate financial decisions." *Hutchins*, ¶ 61. Chelsey controlled how she spent her money. The parties' separate financial arrangements as of November 1, 2018, compounded by being physically separated, signifies the end of the financial relationship.

C. George's was properly included.

In re Funk, 363 Mont. 352, 270 P.3d 39 (2012), obligates District Courts to equitably apportion all property of either or both spouses. *Id.*, ¶ 19. This applies to all assets, including those acquired by gift, bequest, devise, or descent. *Id.*

Parties claiming gifted property can argue it would be equitable to award them the property in its entirety, which Judge Menahan did. *Id.* He awarded all of George's to Chelsey. District Courts consider contributions of the other spouse to the marriage, and account for the factors in § 40-4-202(1)(a)-(c), M.C.A. *Id.* However, *Funk* "stress[ed] that while the [statutory factors] must be considered by the court, they are not limitations on the court's obligation and authority to equitably apportion all assets and property of either or both spouses, based upon the unique factors of each case." *Id.*

Like *Nang Loi v. Feeley*, 365 Mont. 7, 277 P.3d 1195 (2012), Chelsey's claim of error fails by review of the record. The parties addressed *Funk* and how it relates here. Judge Menahan's findings cite to *Funk*. He considered the facts and statutory factors in arriving at an equitable apportionment.

Chelsey cites *Marriage of Axelberg*, 378 Mont. 528, 347 P.3d 1225 (2015). Like that case, Judge Menahan gave premarital credit to each party. The value of premarital assets was apportioned as contemplated by *Marriage of Axelberg*.

Chelsey also cites *Frank v. Frank*, 396 Mont. 123, 443 P.3d 527 (2019). *Frank* awarded premarital credit to the husband. *Id.*, ¶ 21. The credit decreased the portion of the business available for division, which decreased the value of the equivalent estate distribution. *Id.* Chelsey received premarital credit for 200 shares of George's. The credit decreased the portion of George's available for distribution. It also decreased the overall value of the marital estate.

Chelsey lastly cites *Marriage of Lewis*, 399 Mont. 58, 458 P.3d 1009 (2020), to say gifted assets acquired by a spouse are excluded unless the other spouse contributed to the preservation, maintenance, or increase in value. Mike agrees. He contributed to George's financially and non-financially. The District Court in *Marriage of Lewis* "correctly included the value of Craig's inheritance from his father as part of the total value of the marital estate under our precedent in *In re Marriage of Funk* and § 40-4-202(1), M.C.A." *Marriage of Lewis*, ¶ 22. The wife

made contributions to the inherited ranch. This Court awarded the ranch to the husband given his desire to maintain it within his family. *Id.* *See also Johnston v. Johnston*, 249 Mont. 298, 815 P.2d 1145 (1991).

Judge Menahan correctly included George's because Mike made contributions to it. *See*, *e.g.*, *Marriage of Nordberg*, 265 Mont. 352, 361, 877 P.2d 987, 992 (1994). Mike promoted George's with business and political associates. He volunteered physical labor and provided advice on business matters. Mike's financial support of the estate allowed Chelsey to minimize her income and bonuses taken from George's, which facilitated growth. George's grew exponentially and Chelsey's share values increased substantially during the marriage. Chelsey baldly contends "there is no testimony or evidence in the record to support [Judge Menahan's] findings." The characterization of her testimony as "undisputed" that Mike provided no advice and made no contributions to George's is inaccurate. Judge Menahan found Mike's testimony regarding his financial and non-financial contributions to George's to be credible. (*Tr*. 685:1-14). Credibility determinations are for the trier of fact to make. *State v. Faber*, ¶¶ 28-29, 346 Mont. 449, 197 P.3d 941 (2008).

Commingling of gifted assets with the marital estate is another reason to include them. *See*, *e.g.*, *Marriage of Chadwick*, 2004 ML 1120, at *19 (Mont. 18th Jud. Dist. Ct. 2004). George's was commingled with the marital estate and was

treated as marital property without error. On October 3, 2008, the parties loaned George's $33,401.00. The loan was evidenced by a Promissory Note. George's repaid the loan in part by transferring 200 common shares of additional stock to Chelsey in 2009, thereby further commingling this asset. Chelsey will one day own all of George's. (*Tr*. 90:14 – 92:20).

D. George's was properly valued.

Chelsey argues Judge Menahan should have adopted her expert's valuation. Chelsey cites no legal authority but asks this Court to reweigh expert evidence in her favor. Doing so is improper.

Conflicting evidence does not preclude a District Court's determination that substantial evidence exists to support a finding of fact. *In re A.K.*, ¶ 31, 379 Mont. 41, 347 P.3d 711 (2015). "The credibility of witnesses and the weight to be given their testimony are matters for the District Court's determination in a non-jury case. Thus, in examining the sufficiency of evidence, we must view the same in a light most favorable to the prevailing party, and we will presume the findings and judgment by the District Court are correct." *Fairview v. Deming*, 238 Mont. 496, 498, 778 P.2d 876 (1989).

In *Meeks v. Meeks*, 276 Mont. 237, 915 P.2d 831 (1996), the husband offered a valuation of a farm from Wicks. The wife called her own appraiser, Anderson. *Meeks*, 276 Mont. at 247. The District Court rejected Anderson's appraisal and

adopted Wicks'. *Id.* The wife alleged the District Court ignored assumptions underlying Wicks' appraisal while adopting contrary assumptions underlying Anderson's. *Id.* She quarreled with Wicks' methodology and conclusions. *Id.*, 276 Mont. at 248. This Court said it would "not substitute its judgment for that of the trial court regarding the credibility of witnesses or the weight to be given to their testimony." *Id.*, 276 Mont. at 247-48 (citing *In re the Seizure of $23,691 in U.S. Currency*, 840 P.2d 148, 155, 52 Mont. St. Rep. 1063, 1065 (1995); *Matter of B.T.B.*, 254 Mont. 449, 840 P.2d 558 (1992); *Trustees of Washington-Idaho-Montana Carpenters-Employers Retirement Trust Fund v. Galleria Partnership*, 250 Mont. 175, 184, 819 P.2d 158, 163 (1991)).

In *Marriage of Lewis*, experts testified about the ability of a ranch to service a loan. *Id.*, ¶ 11. The husband challenged the District Court's reliance on the wife's expert. *Id.* This Court rejected his argument, explaining he asked it to improperly reweigh expert testimony. "It is the province of the district court to weigh evidence and witness credibility. The district court was free to weigh one expert's testimony over another to determine whether the ranch could service a $1 million loan. There was no clear error." *Id.*, ¶ 12. *See also Marriage of Edwards*, 378 Mont. 45, 340 P.3d 1237 (2015) (affirming District Court's adoption of one expert's testimony over the other's regarding a divisive reorganization); *Marriage of Tummarello*, ¶ 34, 363 Mont. 387, 270 P.3d 28 (2012) ("[J]udgments regarding the credibility of witnesses

and the weight to be given their testimony are within the province of the District Court and [this Court] will not substitute [its] judgment for [the District Court's] determinations."); *Marriage of Watson*, 227 Mont. 383, 739 P.2d 951, 954 (1987) ("The trier of fact has the discretion to give whatever weight he sees fit to the testimony of an expert.").

Meeks is on all fours. Chelsey alleges errors in Anderson's valuation. She refers to Anderson as an out-of-state "advocate." Like *Meeks*, Chelsey quarrels with Anderson's methodology and conclusions. She argues "Anderson's methodology and valuation should have been dismissed" in favor of the "capitalized cash method" used by Copley, which she says, "is a better measure of value." Chelsey is not an expert or the finder of fact. Applying her desired standard of review would leave the District Court with no meaningful role in litigation. This Court would constantly be second-guessing discretionary rulings and serving as a second trial court.

Anderson specializes in valuing franchise industries. He has more than a decade of experience valuing distributorships and wholesalers of branded products like George's. Copley's experience is limited to valuing "three or four" distributorships. Anderson performed a market area analysis specific to George's and used the income and market approaches to estimate the value. Anderson also applied a conservative 15% discount for Chelsey's lack of control. Judge Menahan

weighed conflicting expert evidence. He found Anderson simply more credible than Copley.

Anderson's testimony carried the day because:

> The Court accepts Anderson's opinion concerning the value of Chelsey's interest in George's and rejects Copley's opinion of value. Copley admitted that he changed his methodology and valuation procedures at the request of Chelsey's counsel and in direct response to a motion *in limine* to exclude Copley's limited value calculation. Notably, Copley did not complete a full valuation until after Mike's motion was on file. Copley's opinion of value changed from $502,988.00 to $654,000.00 between reports. Copley has no particular expertise in valuing interest in a wine and beer distributorship. Anderson's valuation report is industry specific, narrowly tailored and credible.

(Doc. 261, ¶ 77).

Valuing George's was a factual issue within Judge Menahan's province and this Court cannot substitute its judgment for his or set aside his findings because they are not "clearly erroneous." *Meeks*, 276 Mont. at 247-48. Judge Menahan was free to adopt Anderson's testimony over Copley's.

E. Judge Menahan considered the parties' ability to acquire future capital.

Judge Menahan considered all statutory factors in § 40-2-202, M.C.A., including the opportunity of the parties for future acquisition of capital assets and income. "Opportunity" is a broad word in this context and includes the capacity of the parties to earn future income. *Karr v. Karr*, 192 Mont. 388, 404, 628 P.2d 267, 276 (1981).

Chelsey is the President of George's. She earns a good base wage and receives bonuses and distributions. She also receives fringe benefits which significantly bolster her compensation package. She retained her full interest in George's, a valuable asset with more future growth potential. (*Tr.* 460:5-7). Chelsey is nine years younger than Mike, so her work life expectancy is longer. (*Tr.* 456:25 – 457:1). George's sales more than doubled during the marriage and Chelsey's share value skyrocketed. Chelsey admitted she can acquire assets in the future. (*Tr.* 459:18-25). She also admitted she can grow the money she will receive from Mike's equalization payment. (*Tr.* 460:1-4). Chelsey is bound by her judicial admissions. *See, e.g., Bilesky v. Shopko Stores Operating Co., LLC*, ¶ 12, 377 Mont. 58, 338 P.3d 76 (2014). Chelsey will one day own all of George's. (*Tr.* 90:14 – 92:20).

Chelsey's own expert's testimony undermines her argument. Copley's charge was not to say if the parties could acquire future capital, but to try to show Mike may have more money than Chelsey in the future. (*Tr.* 183:5-12). For example, his analysis depends on what Chelsey's liabilities will be going forward. (*Tr.* 185:11-14). Judge Menahan apportioned all marital liabilities to Mike, with none to Chelsey. (Doc. 261, pp. 38-42).

Copley's testimony was replete with speculation and conjecture. Judge Menahan correctly applied the rule against apportioning based upon what the District Court anticipates the marital estate may be in the future. Including potential

future values of assets when assessing the estate turns the valuation process on its head. The marital estate is valued on separation or date of dissolution depending on the facts of each case. *Beck v. Beck*, 203 Mont. 455, 458, 661 P.2d 1282, 1284 (1983).

F. Judge Menahan properly considered tax liabilities.

Chelsey and her expert, Copley, admitted there will be tax consequences whenever Mike receives a distribution from the Plan. (*Tr.* 172:7-17). Copley took "no exception to the account balances or tax rates utilized in the Yonce [tax] report [Exhibit GGGGG]." (Doc. 234, p. 4). Copley recognized Mike will be taxed at the highest rate under the I.R.C. given his base pay. (*Tr.* 172:18-21). Given Mike's income level, Yonce calculated the current estimated value net of tax of the Plan as of November 1, 2018, by applying the maximum federal income tax rate of thirty-seven percent (37%) and the maximum Montana income tax rate of six and 9/10 percent (6.9%) to the account balance. (Exhibit GGGGG). Yonce did the same calculation as of April 30, 2020, which was closer to dissolution, but Judge Menahan chose to value the Plan net of certain tax as of the date of separation.

A District Court has discretion to adopt any reasonable valuation of property supported by the record. *Marriage of Haberkern*, ¶ 13, 319 Mont. 393, 85 P.3d 743 (2004). In a final distribution, a court must consider tax liabilities which are reasonably concrete and imminent. *Id.*, ¶ 17. To determine whether the tax

consequences are concrete and imminent, the district court must consider the context around the distribution order. *Id.*

Judge Menahan considered the context. The Plan is a unique, non-transferrable, non-assignable asset. It had to remain with Mike intact. The Plan language reveals a concrete and imminent tax liability. (Exhibit BB). Mike is 54 years old. (*Tr.* 662:22-25). Distributions from the Plan will begin upon separation from service. (Exhibit WWWW, p. 12, § 3.2). Tax liabilities are unavoidable. The Plan is explicit in that all deferrals and returns are subject to income tax upon distribution. (Exhibit CC) (citing I.R.C. § 409A).

Mike cannot liquidate the Plan now. He will incur concrete tax liability upon separation from employment. Given Mike's age, distributions will trigger a concrete taxable event. The parties' experts agreed taxes are a certainty at the highest tax rates. Awarding this asset to Mike but failing to account for concrete and imminent taxes creates a windfall to Chelsey and an inequity to Mike. Judge Menahan properly considered concrete tax consequences associated with this asset.

G. Judge Menahan correctly determined child support.

When faced with child support issues, District Courts are governed by a detailed body of statutory and regulatory law. *Marriage of Albinger*, ¶ 11, 309 Mont. 437, 47 P.3d 820 (2002). § 40-4-204(3), M.C.A. 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 that is inappropriate in that case. *Id.*

"[E]very case must be determined on its own merits and circumstances and the presumption may be rebutted by evidence that a child's needs are or are not being met." A.R.M. 37.62.102(1). Based upon consideration of the factors set out in the guidelines and in §§ 40-4-204, 40-4-208, and 40-6-116, M.C.A., the outcome of the guideline calculation, or "bottom line," may be rebutted and a variance from the guidelines final amount may be granted. A.R.M. 37.62.102(2). A variance must account for the best interest of the child. *Id.*

A District Court does not err in its award of child support where it hears evidence concerning the income of the parties, the standard of living before separation, and other relevant factors in determining child support. *Grenfell v. Grenfell*, 182 Mont. 229, 232, 596 P.2d 205, 207 (1979).

An issue in *Adami v. Nelson*, ¶ 45, 398 Mont. 72, 454 P.3d 642 (2019), was whether the District Court erred in granting a variance from the guidelines. Specifically, it found the guidelines support allowance was too low given the resources of the parties and their standard of living prior to separation, and that reducing support by Adami's spousal maintenance amount would not have been in the best interest of the children. This Court affirmed, explaining the District Court

first weighed the evidence and computed support using the guidelines before concluding a variance was necessary to ensure the children maintained their pre-separation standard of living. *Id.*, ¶ 18.

Judge Menahan correctly determined child support using base pay figures of $520,000.00 and $63,000.00 for Mike and Chelsey, respectively. His reasons for doing so are documented in the record. The parties had a clear pattern of living on base salaries and occasional bonuses. Thus, like *Adami*, E.F. will maintain the pre-separation standard of living as evidenced by the number of trips he took with Chelsey post-separation. Child support of $1,629.00 per month is appropriate given the pattern of living and Mike's obligation to pay 100% of E.F.'s uncovered medical, ocular, dental, and orthodontia bills, as well as 100% of E.F.'s health insurance premiums. Judge Menahan made specific findings to support a variance from the guidelines. He found that E.F.'s needs are being and will continue to be met with a $1,629.00 per month support obligation. He chose not to impute income to either party after considering Mike's deferred compensation as retirement savings, Kerins' undisputed testimony, and the parties' established lifestyle.

Judge Menahan considered "all relevant factors," including "the financial resources of the parents." *See, e.g.*, *Marriage of Pesanti*, ¶ 19, 377 Mont. 256, 342 P.3d 679 (2014). Evidence was presented regarding the parties' income and their standard of living. The relevant factors considered also included E.F.'s best interest

and his interest in George's, as well as Chelsey's self-determined compensation and fringe benefits and in-kind remuneration received from George's, which considerably reduce her personal living expenses. This was factored into Judge Menahan's overall analysis. A variance was necessary to accurately reflect the parties' financial status and their standard of living. E.F.'s lifestyle will not change. If anything, it improved post-separation as evidenced by his many trips with Chelsey.

The presumption created by the guidelines of the adequacy and reasonableness of a child support award was rebutted in this case by the parties' testimony that E.F.'s needs will be met without extraordinary contribution by Mike. Judge Menahan determined by clear and convincing evidence as contemplated in § 40-4-204(3), M.C.A., that following the guidelines would be unjust to Mike and would result in a windfall to Chelsey. He correctly interpreted legal matters controlled by settled Montana law and did not abuse his discretion with respect to the issue of support. He made specific findings in writing to explain his calculation of support and deviation from the guidelines. Child support is not intended to be a substitute for maintenance, but that is what Chelsey asks for it to be. (*Tr.* 345:25 – 346:6).

H. Judge Menahan's findings are supported by substantial credible evidence.

Chelsey's entire appeal rests on her argument that Judge Menahan's "nearly verbatim" adoption of Mike's proposed findings was an abuse of discretion. Chelsey's argument is unavailing and every issue on appeal was clearly addressed before, during, and after the trial. Chelsey's argument has been repeatedly rejected by this Court in strikingly similar cases. Long-standing precedent requires this Court to affirm Judge Menahan's findings as adequate.

In *Marriage of Bolt*, 259 Mont. 54, 854 P.2d 322 (1993), this Court explained "there is no problem" with a District Court "set[ting] out findings of fact similar or verbatim to those proposed" by one party so long as "substantial credible evidence exists to support such findings." *Marriage of Bolt*, 259 Mont. at 57-58 (applying the test set out in *Marriage of Hurley*, 222 Mont. 287, 296, 721 P.2d 1279, 1285 (1986)). *Marriage of Bolt* held the District Court's findings satisfied the *Hurley* test. *Id.* Judge Menahan applied long-standing law and credible evidence to support his findings.

In *Marriage of Watson*, 227 Mont. at 387, this Court explained "[t]he danger in verbatim adoption of proposed findings from one party is that the [District] [C]ourt does not show itself to be exercising independent judgment…Nonetheless we have said that our ultimate test for the adequacy of findings of fact is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for

decision and whether they are supported by the evidence presented." The record should reflect conscientious concern and participation by the District Court. *Id.* (citing *Goodmundson v. Goodmundson*, 201 Mont. 535, 538, 655 P.2d 509, 511 (1982)). Judge Menahan took copious notes, asked many questions about the evidence during trial and even made some initial pronouncements from the bench. (*Tr.* 823:19 – 831:20). *Marriage of Watson* concluded "the findings and conclusions [were] sufficiently comprehensive, pertinent to the issues, and supported by the evidence presented." *Marriage of Watson*, 227 Mont. at 388.

In *Marriage of Craib*, 266 Mont. 483, 880 P.2d 1379 (1994), the District Court adopted the wife's findings "with very little change." *Id.*, 266 Mont. at 500. This Court still affirmed the findings as adequate, applying the *Hurley* test. *Id.* (citing *Marriage of Bolt*, 259 Mont. at 57-58). This Court explained that, "Kenneth does not point to findings which are inaccurate; rather, he claims there are numerous factual findings which can be made from the evidence which were not listed in the District Court's order." *Id. See also Parenteau v. Parenteau*, 204 Mont. 239, 664 P.2d 900 (1983) ("This Court has repeatedly stated its position that findings and conclusions which are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and which are supported by the evidence, i.e., are not 'clearly erroneous' in light of the evidence, will not be overturned simply because the trial court relied upon proposed findings and conclusions submitted by

counsel."); *Marriage of Kowis*, 202 Mont. 371, 658 P.2d 1084 (1983) (affirming District Court's "wholesale adoption" of one party's proposed findings); *Marriage of Hunter*, 196 Mont. 235, 639 P.2d 489 (1982) (affirming District Court's reliance on wife's proposed findings); *Marriage of Le Prowse*, 198 Mont. 357, 646 P.2d 526 (1982) ("Although the practice is disapproved, the fact that the District Court substantially adopted the findings proposed by respondent's counsel does not change the standard of review by this Court.").

Like *Marriage of Craib*, Chelsey fails to identify specific findings which are allegedly unsupported. She argues Judge Menahan's "nearly verbatim" adoption of Mike's proposed findings somehow automatically means he abused his discretion. Chelsey resorts to accusing Mike and his counsel of submitting allegedly "unsupported" findings, putting a "spin" on the evidence, and other nefarious conduct. The record tells a very different story. The transcript is 832 pages from a three-day trial. 260 exhibits were admitted into evidence. Judge Menahan's findings are lengthy and detailed, consisting of 70 pages. It is not this Honorable Court's job to retry the case on appeal.

Curiously absent from Chelsey's argument is reference to specific findings she takes issue with. The reason for her omission is that Judge Menahan's findings are supported by the evidence. Had Chelsey identified findings she baldly claims are unsupported, this Court could readily identify record-based evidence correlating

with each one as it can with this brief. Chelsey's argument is non-specific because the overwhelming evidence belies it.

A party not liking a District Court's findings is not the standard. If it were, every District Court decision would be reversed on appeal by the unhappy litigant. There would be no deference to District Courts. Deference plays a critical role in the development and application of judge-made law. We apply high appellate standards of review in recognition of this. Deference is accorded to the decision under review, so it will not be disturbed because this Court might have decided the matter differently. Chelsey's subjective disagreements do not mean findings are unsupported.

Like *Marriage of Craib*, Chelsey contends Judge Menahan should have made findings more favorable to her. That Judge Menahan could have made different findings does not change the standard of review. There is no basis for a reversal, a new trial, or an award of attorney's fees to Chelsey. This Court is required to presume Judge Menahan carefully considered the evidence and made the correct decision.

The cases Chelsey cites are distinguishable. Judge Menahan gave consideration of the facts and employed independent judgment. The record speaks for itself. *See, e.g.*, *First Nat'l Mont. Bank v. McGuinnes*, 217 Mont. 409, 418, 705 P.2d 579, 584 (1985).

Chelsey cites *Marriage of Jensen*, 193 Mont. 247, 631 P.2d 700 (1981), and Justice Shea's concurring opinion therein. Her reliance is misplaced. The wife in *Marriage of Jensen* argued the District Court erred in adopting the husband's findings. This Court rejected her argument, explaining that District Courts can ask for counsel's assistance in drafting findings:

> Whatever may be the most commendable method of preparing findings – whether by a judge alone, or with the assistance of his court reporter, his law clerk and his secretary, or from a draft submitted by counsel – may well depend upon the case, the judge, and facilities available to him. If inadequate findings result from improper reliance upon drafts prepared by counsel – or from any other cause – it is the result and not the source that is objectionable. It is no more appropriate to tell a trial judge he must refrain from using or requiring the assistance of able counsel, in preparing his findings, than it would be to tell an appellate judge he must write his opinions without the aid of briefs and oral argument.

Marriage of Jensen, 193 Mont. at 252-53 (quoting *Schilling v. Schwitzer-Cummins Co.*, 142 F.2d 82 (D.C. Cir. 1944)).

Marriage of Jensen applied "[o]ur ultimate test for adequacy of findings of fact [which] is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence presented." *Marriage of Jensen,* 193 Mont. at 253. This Court recognized once findings are adopted, Rule 52(a), M.R.Civ.P., applies to support them on appeal, and there is no reason to give adopted findings less weight, since once signed by the district judge they bear the imprimatur of the Court. *Id.*

Marriage of Jensen supports Mike's position. Judge Menahan's findings are supported by the evidence. They contain no clear error. Judge Menahan indicated the reasons for his action and showed he did not overlook arguments of counsel. He showed a full understanding of the case and did not reach arbitrary conclusions. There is no credible basis to question Judge Menahan's intellectual integrity or ethics. Justice Shea's concurring opinion does not change the "ultimate test" for the adequacy of findings which has been consistently applied since *Marriage of Jensen* was decided 40 years ago. Judge Menahan's findings satisfy that test.

The record reflects conscientious concern and participation by Judge Menahan. The findings consist of 70 well-reasoned pages. The findings are pertinent to the issues to provide a basis for decision. The findings are supported by substantial evidence as reflected by the 832-page trial transcript. Any notion Judge Menahan blindly adopted Mike's proposed findings to the exclusion of his own consideration of the facts is foreclosed by record. Judge Menahan explained at trial:

> You know, sometimes I do make pronouncements from the bench that I later modify. I'll get to sometimes the end of a hearing and say this is how I'm looking at something. And, as I go back, and *I do my own findings*, and *I'm looking at all of the exhibits*, sometimes I change my mind. *I typically do my own findings even in cases like this. I take the parties' findings, but I go through – if you noticed, I take a lot of notes – so my findings sometimes just reflect what I hear during the course* [of the trial]…

(*Tr*. 826:11-21).

Judge Menahan listened carefully to the evidence and considered post-trial briefs on important issues, including tracing, the inclusion of George's in the estate, and the date of valuation. The post-trial briefs contained counsel's arguments and were considered before findings were entered. That is not the work of a District Court judge being unduly influenced by one party and his attorneys or being asleep at the wheel. That is the work of an intelligent and well-informed judge exercising independent judgment.

The findings thoroughly reflect party and witness testimony, as well as the plethora of exhibits admitted at trial. Every page of the findings reflects consideration of the facts presented and the areas of dispute. Countless briefs and legal arguments were also given due consideration. Because Judge Menahan's findings are supported by the evidence, they are not clearly erroneous. The findings cannot be overturned because he relied in part upon proposed findings submitted by Mike. The findings are based upon Judge Menahan's own recollection, credibility determinations, notes, and an independent review of the evidence.

VI. CONCLUSION

There is no factual, equitable, or legal basis to overturn or modify any portion of Judge Menahan's decision. Chelsey is not entitled to a new trial or any other relief on appeal. Chelsey received, *inter alia*, a six-bedroom home free and clear of debt, no responsibility for marital liabilities, a cash equalization payment of

$1,234,758.75, her entire valuable interest in George's, child support of $1,629.00 a month, and part of Mike's pension. Chelsey can hardly be heard to argue she was treated unfairly when she will have assets totaling nearly $5 million and no debt to speak of after 11 years of marriage. Mike respectfully asks this Court to uphold and affirm the decision *in toto*.

DATED this 5th day of November, 2021.

DATSOPOULOS, MacDONALD & LIND, P.C.
Attorneys for Respondent/Appellee

By: /s/ *Molly K. Howard*
Molly K. Howard

DATED this 5th day of November, 2021.

DATSOPOULOS, MacDONALD & LIND, P.C.
Attorneys for Respondent/Appellee

By: /s/ *J.R. Casillas*
J.R. Casillas

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, except for quoted and indented material; and, the word count calculated by Microsoft Word for Windows is 9,990 words, excluding Table of Contents, Certificate of Service and Certificate of Compliance.

DATED this 5th day of November, 2021.

DATSOPOULOS, MacDONALD & LIND, P.C.
Attorneys for Respondent/Appellee

By: /s/ *Molly K. Howard*
Molly K. Howard

DATED this 5th day of November, 2021.

DATSOPOULOS, MacDONALD & LIND, P.C.
Attorneys for Respondent/Appellee

By: /s/ *J.R. Casillas*
J.R. Casillas

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Datsopoulos, MacDonald & Lind, P.C., hereby certify that I have filed a true and accurate copy of the foregoing with the Clerk of the Montana Supreme Court, and that true and accurate copies of the foregoing were served upon each attorney of record, as follows:

David B. Cotner
COTNER LAW, PLLC
2700 Radio Way
Missoula, Montana 59808
Telephone: (406) 541-1111
Facsimile: (406) 541-1122
Email: dcotner@cotnerlaw.com

DATED this 5th day of November, 2021.

By: /s/ *Amanda Reiber*
Amanda Reiber
Paralegal, DM&L, P.C.

CERTIFICATE OF SERVICE

I, Joseph Ray Casillas, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-05-2021:

Molly K. Howard (Attorney)
201 W Main, Ste 201
Missoula MT 59802
Representing: Michael E. Frank
Service Method: eService

David Brian Cotner (Attorney)
2700 Radio Way
Missoula MT 59808
Representing: Chelsey E. George
Service Method: eService

Electronically signed by Amanda C. Reiber on behalf of Joseph Ray Casillas
Dated: 11-05-2021