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STATEMENT OF THE ISSUES

- I. DID THE LOWER COURT ERR WHEN IT CHARACTERIZED FATHER'S STEADY AND PREDICTABLE MONTHLY INCOME AS GIFTS AND EXCLUDED THAT ACTUAL INCOME FROM CHILD SUPPORT CALCULATIONS?**
- II. DID THE LOWER COURT ABUSE ITS DISCRETION IN FAILING TO AWARD AN APPROPRIATE TEMPORARY SUPPORT?**
- III. DID THE LOWER COURT ERR WHEN IT CONCLUDED ORDERING RETROACTIVE CHILD SUPPORT OR OTHER MAINTENANCE WOULD BE A WINDFALL?**
- IV. DID THE LOWER COURT RULING RESULT IN A SUBSTANTIAL INJUSTICE BY FAILING TO MAINTAIN THE STANDARD OF LIVING THE CHILDREN WOULD HAVE ENJOYED HAD THE MARRIAGE NOT BEEN DISSOLVED?**

STATEMENT OF THE CASE

Respondent/Appellant mother (Erin) of the two minor children files this appeal from the Findings of Fact, Conclusions of Law and Final Decree of Dissolution (FOFCOL&DEC) filed April 1, 2021, Doc 183, and associated orders entered by the Fourth Judicial District Court in April 2021.

This was a high-conflict dissolution case with a lengthy and complex procedural history. Erin has been represented throughout by attorneys associated with ASUM Legal Services. Petitioner/Appellee father (Jason) has at various times been represented by three (3) different attorneys, and is currently *pro se*.

Six pre-trial hearings were held where testimony was taken regarding parenting and support issues:

- 1) July 6, 2016 (Doc 26)
- 2) August 1, 2016 (Doc 30)
- 3) September 6, 2016 (Doc 44)
- 4) February 21, 2017 (Doc 53)
- 5) April 16, 2018 (Doc 121)
- 6) April 19, 2021 (Doc 122)

Dr. Sarah Baxter conducted a parenting evaluation, and upon her recommendation, a Guardian *ad Litem* was appointed. Doc 122: Minutes & Note of Ruling, p. 2; Doc 171: Order Appointing Guardian *ad Litem*.

During the course of the proceedings, the District Court issued various restraining orders and no contact orders addressing Jason's noncompliant and obfuscating conduct. E.g., Doc 30: Minutes & Note of Ruling; Doc 126: Order Granting Preliminary Injunction; Doc 183: FOFCOL&DEC, p. 52, ¶11; Doc 194: Order on Post-Judgment Child Support Motions, p. 2, ¶¶ 1-2. Erin has provided all the minor children's daily care, limiting her ability to finish her education or earn income until both children are in school full-time.

Uniquely, two months before the trial and four years after Jason filed his initial Petition for Dissolution in September 2015, the District Court granted a motion by Jason's father Christian Miller (Chris) to intervene. Doc 149: Order Granting Motion to Intervene (Sept. 29, 2019). Chris' involvement as an Intervenor in this case is

unusual because the intervention was for the limited purpose of raising any “claim or defense regarding the nature of Jason Miller’s entitlement, if any, to money or property in the future from Christian Miller.” Doc 149: 2:11-15, Order Granting Motion to Intervene; Doc 183: FOFCOL&DEC, p. 3, ¶ 8, lines 6-8. Chris and his attorneys actively participated in discovery and the final two-day trial held in October 2019.

In April 2021, 17 months after trial, the District Court entered its Findings of Fact, Conclusions of Law and Final Decree of Dissolution (FOFCOL&DEC), as well as a Final Parenting Plan and a Medical and Child Support Order. Docs. 183, 184, 185. Erin’s appeal pertains only to the Court’s rulings regarding child support and other financial matters, not parenting.

STATEMENT OF FACTS

1. Jason and Erin were married in August 2013. There are two children of their marriage, A.T.M., born in December 2013 and, M.K.M., born in October 2016. Doc. 183: FOFCOL&DEC, p. 2:7-21 and p. 3:1-2.

2. From 2013 to 2016, Jason and Erin resided together on Snowdrift Lane in Missoula in a house owned by Chris. That home, valued at \$600,000¹ in the

¹ In 2017, the District Court valued this property at \$740,000. Doc 54: Interim FOFCOL: p.7, ¶ 31. The value of the family home is significant because the District Court used that 2017 value to determine Jason’s child support amount. However,

FOFCOL&DEC, has been continuously provided to Jason at no expense since 2013.

Doc. 183: FOFCOL&DEC, p. 39, ¶ 8.

3. The parties permanently separated in June 2016 when Erin, pregnant with M.K.M. and caring for A.T.M., fled the family home against Jason's wishes after Jason adopted a polygamous lifestyle, moving his pregnant second "wife" into the residence. Doc 54: Interim Findings of Fact and Conclusions of Law and Order Amending Interim Parenting Plan ("Interim FOFCOL") (Feb. 23, 2017), p. 5, lines 14-23, p. 6, lines 1-11; Doc 116: Baxter Parenting Evaluation, p. 7, ¶ 5.

4. A Guardian *ad Litem* (GAL), Simon Fickinger, has been appointed in this matter and continues to serve as the GAL for the minor children upon the recommendation of the parenting evaluator, Dr. Sarah Baxter. Doc 171: Order Appointing GAL; Doc 128: Baxter Parenting Evaluation, p. 20, ¶ 1. Erin does not appeal the extensive and detailed factual findings made in the District Court's Final Parenting Plan. Erin agrees that Dr. Baxter's and Mr. Fickinger's recommendations should be followed regarding parenting of the minor children. Jason has not filed a cross-appeal on parenting issues.

5. The parties entered into a Premarital Agreement in August 2013, shortly before they were married. Jason moved to enforce that Agreement, but the

Zillow now estimates the 2021 value of the home at over \$1.1 million. This is noteworthy because the FOFCOL&DEC was not issued until 17 months after trial.

District Court denied his motion, finding the Agreement unconscionable. Doc 67: Motion to Enforce Premarital Agreement; Doc 79: Order Denying Motion, p. 2, lines 2-6. Jason sought to enforce the Premarital Agreement a second time; the District Court again denied his Motion. Doc 101: Motion to Enforce; Doc 125: Order Denying Renewed Motion.

6. Jason, age 42, currently has seven (7) minor children with five (5) different mothers. Doc 54: Interim FOFCOL, p. 5, ¶ 19 (The seventh child was born after the February 23, 2017 Interim FOFCOL.). Although he has no physical or mental impairments preventing him from working, Jason has no significant work history. *Id.* at p. 7, ¶ 30. He states he works as a filmmaker, but this has never produced any significant or sustained income. *Id.*

7. Erin, age 42, is a single mother and part-time student. Prior to becoming a mother, Erin had been employed most of her adult life at minimum-wage work while pursuing a college degree. Tr. 416:21-25. For the past seven years, Erin has been the sole caregiver for her two minor children and, as able, has continued to further her education through community college classes and remote learning. Erin hoped to complete her degree to obtain better than minimum wage employment when M.K.M. reaches school age in 2022, but accomplishing this goal on schedule has been challenging due to Erin's sole parenting of two young children and lack of financial resources. Tr. 394:24-25, 395:1-16; Doc 183: FOFCOL&DEC, p. 7, ¶ 29.

8. Erin left the family home while pregnant and with no real or personal property for herself, A.T.M., or the parties' unborn child. In her Response to Petition for Dissolution filed June 22, 2016, Erin requested child support in an amount calculated according to the Child Support Guidelines, as well as medical support and maintenance to support the minor children. Doc 17: Response to Petition for Dissolution, p. 2-3.

9. Four months before trial, Jason's father, Chris Miller, moved to intervene because of concerns that his estate might be depleted by the ongoing gifts to support Jason's minor children, including the two children born of the parties' marriage. Doc 183: FOFCOL&DEC, p. 3, lines 4-14; Doc. 140: Aff. Christian Folger Miller, p. 2, ¶ 8. In granting Chris' intervention for the limited purpose of addressing Jason's entitlement to money or property from Chris in the future, the Court specifically ordered Chris did not "have a protectable interest in any money he has given to Jason Miller." Doc. 149: Ord. Granting Mot. to Intervene, p. 2:8-10.

10. Money given to Jason during the parties' marriage included \$140,000-\$160,000 annually, paid in cash and payment of credit card bills²; a \$1.3 million

² Tr. 214:10-15.

investment Chris made in Jason's filmmaking business³; and a partial ownership interest in the Linda Vista Golf Course.⁴

11. The District Court found that Jason, for his entire adult life, consistently received annual tax-free payments from Chris of at least \$60,000,⁵ as well as Chris' payment of Jason's child support and substantial credit card obligations. Doc 54: Interim FOFCOL, p.7, ¶ 29, p. 20, ¶ 123, p. 22, ¶ 142. In 2015, Jason also directly inherited \$130,000 from another family member, which Jason testified he spent on a new truck and "a few stupid things," leaving A.T.M.'s birth costs unpaid and forwarding those bills to Erin. Doc 54: Interim FOFCOL, p. 7, ¶ 38, p. 28, ¶ 13, Tr. 116:14-25, 174:21-23, 177:10-14.

12. Despite the testimony regarding Jason's income and resources presented at the pretrial hearings, on September 6, 2016, the District Court set an

³Although Chris provided Jason with approximately \$1.3 million in 2015 for business purposes, Jason testified that the funds were lost, perhaps as a result of financial exploitation or a fraud. Doc. 183: FOFCOL&DEC, p. 10, ¶ 43.

⁴Chris's estate, estimated by Chris at a \$13 million net worth, is roughly summarized in Intervenor's Trial Exhibit AA. The estate includes the Christian Folger Miller Revocable Trust of which Jason is a beneficiary, the Snowdrift Lane home which Chris testified Jason will inherit upon Chris' death, and the Linda Vista Golf Course of which Jason is a 5% owner. Chris estimated the value of Jason's ownership interest in the Linda Vista Golf Course as \$1.1 million.

⁵ Jason failed to accurately disclose his monthly income to the Court in 2016 but admitted during testimony at trial in 2019 that the amount of cash he received from Chris was actually closer to \$90,000 annually. Tr.127:23 to 128:2. Chris testified that according to Chris' records Jason received total "cash" payments of \$140,000 to \$160,000 during the parties' marriage. Tr. 214:12-15.

initial temporary child support amount of \$280 per month. Doc 44: Minutes and Note of Ruling, p. 2.

13. On October 5, 2016, after Jason failed to timely complete his child support affidavit as ordered by the Court, Erin added a motion for additional temporary family support to her other requests for support, shortly before the birth of M.K.M. in 2016. Doc. 46: Mot. for Temporary Family Support.

14. Over the next four years, Erin renewed her requests for some form of temporary child and/or family support many times, while relying on temporary housing and financial gifts from family members and friends to provide a home for the parties' minor children in the interim.⁶ Tr. 422:13-16.

15. Despite Erin's repeated requests, the District Court left the initial temporary child support of \$280 per month per child in place for four and a half years, until the Final Decree was issued in April 2021. Doc 54: Interim FOFCOL, p. 30, ¶ 3.

⁶ Doc 44: Request made in open court for temporary support (Sept. 16, 2016); Docs 46 & 47: Mot. for Temporary Family Support & Affidavit in Support (Oct. 5, 2016); Doc 76: Renewed Mot. for Temporary Support (Aug. 30, 2017); Docs 87 & 88: Updated Mot. for Temporary Support & Aff. in Support (Dec. 21, 2017); Doc 98: Notice of Issue (Feb. 5, 2018); Doc 123: Notice of Filing Supp. Child Support Calculations (May 3, 2018); Doc 125.1: Status Report re Temporary Support (June 20, 2018); Doc 129: Notice of Issue Re: Temp. Support and Parenting Eval. (Dec. 19, 2018); Doc 132: Notice of Filing of Child Support Fin'l Affs. (Jan. 31, 2019); Doc 182: Notice of Issue and Request for Final Decree or Immediate Modification of Child Support (Aug. 11, 2020).

16. Starting in August of 2016, Chris provided Erin additional payment each month to help Erin with expenses for the minor children, similar to amounts he provides to two other mothers of Jason's minor children. Tr. 33:14-24. Chris originally paid Erin \$700 per month, then reduced the payment to \$500 per month after Chris assisted Erin in obtaining permanent housing in 2018 (addressed in Paragraph 17 below), and discontinued the payments entirely when the \$1,800 monthly child support amount was issued. Tr. 218:4-10.

17. In 2018, Chris contributed \$175,000 to Erin's family to help obtain permanent housing for his grandchildren when their temporary residence was sold. Tr. 21:7-16; Tr. 218:6-10. The District Court ultimately concluded that, since Erin's family received this additional amount while the case was pending, awarding retroactive child support to the children or maintenance to Erin would be a "windfall." Doc 183: FOFCOL&DEC, p. 36, ¶ 164, lines 21-24. However, this contribution toward housing by Chris, while generous, still left Erin with ongoing mortgage and housing expenses she could not afford to pay while caring for two preschool-age children. Tr. 422:13-16.

18. Tensions regarding finances escalated during the dissolution by Jason's repeated publication, in pleadings, emails⁷, and a blog specifically dedicated to the

⁷ E.g., Resp.'s Ex. 5, Hearing Sept. 6, 2016: Email from Jason to Geoff Mahar, claiming a "terrorist plot to destroy my (Jason's) family...[.]"

topic, of allegations regarding Erin's personal and private information which were foreseeably likely to negatively impact Erin's ability to obtain employment. Based on this invasion of privacy, the District Court issued another Order of Protection specifically prohibiting Jason from publicly disseminating such information, making the order permanent in the Final Decree. Doc 126: Order Granting Prelim. Injunct.; Doc 183: FOFCOL&DEC, p. 49, ¶ 57.

19. At the time of trial in 2019, Chris once again admitted that, both before and after Erin and Jason's marriage and continuing to the present, he has regularly provided Jason a monthly income and has no intention of discontinuing that income to Jason into the foreseeable future. Doc 183: FOFCOL&DEC, p. 38 ¶ 7, p. 41, ¶ 21.

20. Chris detailed the amounts he regularly sends Jason as:

- a. \$5,500 every month by check, Tr. 214:2-4;
- b. additional money transfers each month of varying amounts, Tr. 214:5-9; and
- c. continuing to provide Jason free housing. Tr. 213:18-23.

Chris testified that in 2019 Jason was regularly receiving \$9,000-\$11,000 per month, in addition to free housing in a home valued at over one million dollars. Tr. 213:21-23. Chris affirmed these monthly amounts were even higher during Erin and Jason's marriage, when Jason was receiving \$140,000-\$160,000 per year in cash and credit card debt payments. Tr. 214:10-15.

21. The District Court described Jason's situation as a "comfortable upper-middle-income lifestyle," while noting Jason pays no taxes on the income or housing benefits he receives. Doc 183: FOFCOL&DEC, p.7 ¶ 26, p. 8 ¶ 32, p. 9 ¶ 37.

22. Despite his ample resources, Jason does not pay for health insurance for himself or any of his minor children. Tr. 121:2-12; Tr. 394:17-20. In fact, Jason himself has been a Medicaid recipient. Tr. 121:2-7.

23. After issuance of the FOFCOL&DEC in April 2021, Jason filed a pleading in which he called the District Court's rulings "ridiculous" and "not reflective of reality." Doc 193: Resp. to Mot. for Relief and Pet. For Civil Contempt, 2:19-20 (May 17, 2021), attached hereto as Appendix A. At the same time, Jason admits his steady and reliable stream of income continues as Chris provides Jason \$6,000 per month, additional monthly payments of \$1,000-2,000 per month, and Jason's continued use of the Snowdrift home expense-free.⁸ Doc 193: Resp. to Mot. for Relief and Petition for Civil Contempt, 1:20-24 (attached as Appendix A); Doc 194: Ord. on Post-Judgment Child Support Mots., 4:9-23.

⁸ A typical wage earner would need to earn at least \$170,593.71 per year, assuming tax typical deductions for a family of four, to realize the approximately \$90,000 per year of *net* income Jason receives. See <https://www.bankrate.com/calculators/tax-planning/net-to-gross-paycheck-tax-calculator.aspx>. Jason's net actual income is well above the \$57,523 average annual income in Montana. See <https://www.incomebyzipcode.com/montana/59801>. In addition, most wage earners also have to pay housing costs from their net earnings while Jason does not.

24. Assuming Jason pays the court-ordered child support, Erin's current monthly income while she is still caring for one preschool-age child is a mere \$1,800 per month, placing her and the children below the 2021 federal poverty level.⁹

25. The District Court concluded Jason's actual income was gifts from Chris, which the Court found were specifically excluded from consideration. Doc 183: FOFCOL&DEC, p. 34:1-4. As a result, the District Court decided that traditional application of the Montana Child Support Guidelines would result in an inequitable child support calculation. *Id.* at pp. 35-36, ¶ 162.

26. Since the District Court found that the Guidelines did not establish a reasonable child support amount, the Court proceeded to calculate child support based on the fair market rental value of the free house provided by Chris to Jason. The District Court compared that value to the market rental value of the house in which Erin lives and ultimately concluded that \$900 per month per child was "reasonable, adequate and appropriate...[.]" *Id.* at p. 9-10, ¶¶ 36-41.

⁹ The 2021 federal poverty standard for a family of three is \$21,960 per year. <https://www.federalregister.gov/documents/2021/02/01/2021-01969/annual-update-of-the-hhs-poverty-guidelines>.

STANDARD OF REVIEW STATEMENT

This Court reviews a district court's findings of fact in a dissolution proceeding to determine if they are clearly erroneous. *In re Marriage of Crowley*, 2014 MT 42, ¶ 24, 374 Mont. 48, 318 P.3d 1031.

This Court recently summarized:

A finding is clearly erroneous if it is not supported by substantial credible evidence, if the trial court has misapprehended the effect of the evidence, or if a review of the record leaves us with the *definite and firm conviction that a mistake has been committed*. We review a district court's conclusions of law for correctness.

(Emphasis added). *In re Marriage of Edwards*, 2015 MT 9, ¶ 9, 378 Mont. 45, 340 P.3d 1237 (citations omitted).

In reviewing an award of child support, including retroactive support, the Court examines the final child support award to determine whether an abuse of discretion by the District Court has occurred. *In re Marriage of DiPasquale*, 220 Mont. 497, 499, 716 P.2d 223, 255 (1986). If there is a clear abuse of discretion resulting in substantial injustice, the award made by the District Court may be overturned. *Id.* at 501.

While district courts have wide discretion in dividing marital property, the Supreme Court recently stressed:

An abuse of discretion occurs if a court exercises granted discretion based on a clearly erroneous finding of fact, an erroneous conclusion or application of law, or otherwise acts arbitrarily, without employment of

conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice.

(citations omitted.) *In re Marriage of Elder and Mahlum*, 2020 MT 91, ¶ 10, 399 Mont. 532, 462 P.3d 209.

SUMMARY OF THE ARGUMENT

The District Court erred when it (1) misapprehended the effect of the evidence by characterizing Jason’s income as gift income, then misapplied Montana law to exclude that income from calculations under the Montana Child Support Guidelines; (2) awarded only minimal temporary child support to the minor children for over four years, despite an established record regarding the steady and regular income Jason was receiving; (3) counted gifts and financial assistance provided by family members to assist Erin and the minor children after the parties’ separation as a windfall when those contributions were necessitated by the Court’s failure to award an adequate temporary support throughout the lengthy dissolution proceeding; (4) concluded that ordering retroactive child support in an amount commensurate with the parties’ resources would be a financial windfall to Erin instead of lawful support for the minor children or maintenance for the family; and (5) issued a final decree the results of which work a substantial injustice by continuing an economic disparity, allowing Jason to continue to live his “comfortable upper-middle-income lifestyle” while his minor children live on public assistance benefits.

ARGUMENT

I. DID THE LOWER COURT ERR WHEN IT CHARACTERIZED FATHER'S STEADY AND PREDICTABLE MONTHLY INCOME AS GIFTS AND EXCLUDED THAT ACTUAL INCOME FROM CHILD SUPPORT CALCULATIONS?

A. Jason's steady annual income is well-established on the record.

During a pretrial hearing, Chris Miller stated his son Jason is a very expensive child. Tr. 15:4-5. Despite Chris' statements and the District Court's admonition that Jason should get a job, Jason remains unemployed and lives entirely on payments from the interest on the Christian Folger Miller Revocable Trust, a portion of which Jason anticipates inheriting after Chris' death. Tr. 16:10-11; Doc. 194, p. 4, fn. 1; Intervenor's Trial Ex. BB, p. 5, § 5.2(a). Jason has received consistent monthly payments from the trust interest through his father for most of his adult life. Tr. 120:20-25.

Chris testified his accountant sends Jason a monthly check for \$5,000. This amount had increased to \$5,500 each month by the time of trial, and \$6,000 after entry of the Final Decree. Tr. 27:5-9, 214:2-4; Doc. 193: Resp. to Mot. for Relief, 1:25. Chris testified, and Jason confirmed, that Jason then routinely calls Chris each month asking for more money. Tr 31:22-25, 214:5-9; Doc. 193: Resp. to Mot. for Relief. Chris testified at trial he regularly sends Jason \$9,000-\$11,000 per month. Tr. 214:10-11. Chris attested Jason's monthly household income was even higher

when Jason, Erin, and A.T.M. resided together, at which point Jason was receiving \$140,000-\$160,000 per year in cash and credit card payments. Tr. 214:12-15.

B. Jason's inheritance has already been reduced as a result of the regular payments he receives from Chris.

When asked on cross-examination whether Chris considered his payments to Jason a gift or a loan, Chris stated:

Well, there's a couple of different ways to look at that, and I'm not sure. I've initially looked at it as a loan against his inheritance.

Tr. 27:10-14.

Chris also testified that any money Jason borrowed from Chris would be taken away from Jason's portion of Chris' estate when Chris dies.¹⁰ Tr. 31:4-7. Chris' testimony about the nature of the payments is corroborated by the trust documents Chris admitted at trial which show Chris amended his trust in 2013 to reduce Jason's share of his inheritance by \$750,000 "to equalize the combined aggregate lifetime gifts and date of death distribution between his two sons...[.]" Intervenor's Ex. BB, p. 5, § 5.2(a) (sealed).

Of particular significance is this exchange between the District Court and Chris:

¹⁰ Jason testified in 2016 that it was his understanding the payments from Chris "would be deducted" from his future inheritance. Tr. 172:8-11.

Court: You've indicated in your testimony a few times that your intention was, first, to have, essentially, a pre-residually, kind of, draw against Jason's future inheritance.

Chris Miller: Yep.

Court: And then you kind of left hanging whether or not it was a gift or a loan or something like that. So has it always I guess, maybe you could just clarify that for me.

Chris: Well, so I've always considered it to be a loan and I knew the IRS may consider it to be a gift. And so when I – when I gave that money to Jason, it was for his whole family. And so I was hoping the IRS and I don't know how this will be determined in the future would consider it a gift; you know, a certain amount to Jason, a certain amount to Erin, a certain amount to [A.T.M.] because I didn't want to exceed my limits on gifts during the course of the year. As you know, they're – you're taxed above a certain amount.

And then recently I was told that the court – and your court decided to consider my gift as income. Boy, that worried me a lot because I'm thinking if your court decided that that's income, is the IRS going to consider it the same thing? I don't know.

Tr 35:13-25, 36:1-13.

Regardless of whether these payments were "gifted" to Jason for Chris' tax purposes, these amounts were not given to Jason without consideration: Jason's inheritance has been reduced. Further, once those payments were made by Chris to Jason, they were financial resources available for Jason's use to support his children. The District Court itself recognized this when it specifically limited Chris' intervention in this case, concluding that Chris did not "have a protectable interest in any money he has [already] given to Jason Miller." Doc. 149: Ord. Granting Mot. to Intervene, p. 2:8-10.

C. The “label” affixed to Jason’s regularly received income is irrelevant.

Regardless of any label attached to the money Jason receives each month from Chris, Jason’s actual income and financial benefits received are clear on the record and were consistently received throughout the marriage and dissolution proceeding. The District Court erred when it misapprehended the effect of this evidence and misapplied the law in preventing Jason’s actual income from being considered in child support calculations.

In Montana, “it is the first priority of parents to meet the needs of the child according to the financial ability of the parents.” Mont. Admin. R.M. 37.62.101(2). Under Mont. Code Ann. § 40-4-204 (1), “the court shall order either or both parents owing a duty of support to a child to pay an amount reasonable or necessary for the child's support...[.]” In determining a reasonable amount of child support, courts “shall consider” all relevant factors, including, *inter alia*, the financial resources of the parents, the standard of living that the child would have enjoyed had the marriage not been dissolved, and any parenting plan that is ordered. Mont. Code Ann. § 40-4-204(2). The parents’ income includes actual income, imputed income, or any combination thereof that fairly reflects a parent’s resources available for child support. Mont. Admin. R.M. 37.62.105(1); see also *Williams v. Williams*, 2011 MT 63, ¶ 20, 360 Mont. 46, 250 P.3d 850. Actual income includes “economic benefit from whatever source derived.” Mont. Admin. R.M. 37.62.105(2).

The District Court erroneously applied this gift label in a way which effectively shielded the majority of Jason's actual income from child support calculations. The result is a clear legal discrepancy based on form over substance:

- If labeled a loan (or installments) from inheritance, Jason's actual income is available for child support. See *Hoffmaster*, 239 Mont. 84, 91-92, 780 P.2d 177, 181-182 (1989).
- If labeled a gift from inheritance, Jason's actual income is not available for child support. See *Paschen v. Paschen*, 2015 MT 350, ¶ 32-38, 382 Mont. 34, 363 P.3d 444.

The unintended consequence of the mislabeled resource would allow, as here, wealthy parents to evade their legal support obligation and deprive the minor children entitled to that support.

Regardless of Chris' tax label, once payments are given regularly to Jason those unearned, untaxed payments are actual disposable income available to Jason to meet his legal obligation to support his minor children. This income is clearly part of the economic benefit Jason regularly receives each month reflecting his resources available for child support. Mont. Admin. R.M. 37.62.105(2); *Williams*, ¶¶ 20-22.

D. The *Paschen* holding was misapplied in this case.

The District Court relied exclusively on *Paschen* to exclude Jason's substantial income from consideration for child support purposes. Doc 183:

FOFCOL&DEC, p. 41, ¶ 23. In *Paschen*, the Montana Supreme Court held it would be fundamentally unfair to base a parent's future monthly child support obligation on gifts not yet received and which may never be given. *Id.* at ¶ 37. The *Paschen* Court reasoned that the unpredictable largesse or generosity of a third person should not be a basis for determining a parent's ability to provide child support. *Id.*

The facts in *Paschen* are glaringly different from the facts in this case. Gifts had already ceased before the dissolution in *Paschen*; Jason's payments have not ceased. Gifts were unpredictable in *Paschen*; Jason's payments are steady and predictable and have continued for many years. Additionally, Chris specifically testified he does not intend to cease making payments to Jason for the foreseeable future. Doc 183: FOFCOL&DEC, p. 38, ¶ 7. Chris' testimony itself distinguishes the sporadic past gifts made to the parent in *Paschen* from the predictable monthly payments made to Jason here.

Erin did not and does not seek to impute income to Jason based on future unpredictable gifts. Instead, she sought to have child support (and retroactive child support) properly calculated from the date of her request based on the actual funds Jason regularly and consistently receives. *Paschen* simply did not encompass such regular, sustained, and predictable payments. Applying *Paschen* here undermines the entire intent of the laws governing a parent's responsibility to support their children.

Clearly, the District Court strived to harmonize the *Paschen* decision with the facts here. On the one hand, the District Court found “It would be fundamentally unfair to the children in this matter for the [District] Court to base Jason’s child support obligation on an amount that fails to consider the standard of living the children enjoyed while in Jason’s home.” Doc 183: FOFCOL&DEC, p. 40, ¶ 15. On the other hand, the District Court found “It would be fundamentally unfair to base a parent’s future monthly child support obligation on gifts not yet received and which may never be given.”

What is truly fundamentally unfair in this case is to base Jason’s child support obligation on an amount far less than the actual resources available to him to support his minor children. The District Court’s misapplication of *Paschen* effectively shields Jason’s actual disposable income from child support calculations. Once Jason receives his monthly amount, Jason can use those resources to support all his minor children. The money Jason receives each month should be considered unearned and untaxed income for child support purposes, in addition to the significant housing benefit Jason receives.

II. DID THE LOWER COURT ABUSE ITS DISCRETION IN FAILING TO AWARD AN APPROPRIATE TEMPORARY SUPPORT?

In *DiPasquale*, the Supreme Court held a District Court has jurisdiction to award retroactive child support from the time of separation of the parties and is never limited to the child support prayed for or agreed to by the parties. *DiPasquale*, 220

Mont. at 499, 716 P.2d at 225. The District Court was therefore not bound by its initial temporary child support amount of \$280 per month but had continuing jurisdiction to modify that amount at any time, as well as issue a retroactive child support amount after the trial. However, the District Court abused its discretion by failing to award an amount of temporary child support during the proceedings (or retroactive child support at the time of the Final Decree) commensurate with both Erin and Jason's actual financial circumstances.

A. The District Court had a clear record of the financial disparity between Erin's and Jason's households in 2016.

Erin prayed for an appropriate amount of child support according to the Guidelines, requesting the District Court's careful review specifically due to the vastly disparate income of the parties. Doc. 17: Resp. to Pet., p. 3, ¶ 4. Erin also requested medical support and maintenance to help provide ongoing medical care and a home for the minor children. *Id.* at p. 4, ¶ 8.

At the time the District Court issued its Interim Parenting Plan in 2017, the following evidence about the parties' resources was on the record:

Erin, A.T.M. & M.K.M's Resources:

Erin left the polygamous situation in the family home with 2-year-old A.T.M. while Erin was pregnant with M.K.M. Doc 54: Interim FOFCOL, p. 3, ¶ 9, p. 9 ¶¶ 46-47, p. 11, ¶ 60, p. 14-15, ¶¶ 85-86. It was not in the children's best interests for Erin to seek employment while providing primary care for a toddler and

breastfeeding a newborn baby. *Id.* at p. 29, ¶ 17. The District Court had, in fact, already determined Erin was indigent after she left the family home in June 2016. Doc 16: Ord. on Inability to Pay Fees & Other Costs (June 22, 2016).

Jason's Resources:

After Erin's departure, Jason remained living in the family home expense-free. Doc 54: Interim FOFCOL, p. 7, ¶¶ 31-32. For his entire adult life, Jason had been receiving a consistent income from his father Chris of at least \$4,800 per month, tax-free. *Id.* at p. 7 ¶ 29, ¶ 32. Jason received additional funds from Chris each month to cover expenses, pay other child support obligations, and pay Jason's credit card bills. *Id.* at p. 20, ¶ 123, p. 22, ¶ 142. Jason had also inherited roughly \$130,000 in 2015, paid directly to Jason. *Id.* at p. 22, ¶ 144.

Despite this evidence regarding the huge disparity between the parties' financial resources, temporary child support was set at \$280 per month for A.T.M. on September 6, 2016. Doc. 44: Minute Entry, p. 2.

When Jason failed to submit his child support financial affidavit on time as ordered by the District Court, Erin added a motion for temporary family support to her request for child support, as she was 29 weeks pregnant while caring for a toddler. She and the minor children were now dependent on the charity of others for support until the District Court ruled on child support. Doc 46: Mot. for Temp. Family Support (Oct. 5, 2016).

The District Court concluded, in 2017, there was “clear evidence that Jason maintains a lifestyle which enables him to provide ample support for his children should he choose to do so.” Doc 54: Interim FOFCOL, p. 28, ¶ 14. Nevertheless, the Court still failed to adjust the temporary child support amount, instead continuing the \$280 amount, and again promising to “establish an appropriate amount of child support” after submission of affidavits. *Id.* at p. 30: ¶ 3.

B. Lack of adequate temporary support required Erin to accept gifts from others, as well as public assistance benefits for the minor children, while Jason continued his upper-middle income lifestyle.

Over the ensuing four years, Erin renewed her requests for some form of temporary child and/or family support or maintenance multiple times. *See* Footnote 6, *supra*. Left with no other options, Erin continued to rely on temporary housing and financial contributions from Chris and other family members to provide for the minor children, as well as public assistance benefits. During this time, the District Court failed to substantively rule on Erin’s motions for temporary support and maintenance and failed to establish an appropriate amount of child support as previously assured. Doc 54: Interim FOFCOL, p. 30, ¶ 3.

Jason continued to live his “comfortable upper-middle-income lifestyle” uninterrupted¹¹, while Erin struggled to make ends meet and provide a home for the

¹¹ Jason obfuscated further discovery regarding his financial resources, including failure to submit his Child Support Financial Affidavit or Preliminary Disclosure

parties' two young children in her full-time care. In this case, justice delayed was no justice at all for Erin and the minor children.

The substantial injustice of the District Court's temporary support amount is apparent when comparing Jason's annual income during the marriage and dissolution with what Jason actually paid to support the five (5) minor children not in his household:

Table 1: Jason's Annual Income vs. Child Support Paid

Year	Jason's tax-free annual income	Child Support paid by Jason for ATM & MKM	Child Support paid by Jason for 3 other children	Annual disposable income remaining for Jason
2013 (Marriage)	\$140,000 - 160,000	--	\$10,080	\$129,920- 149,920
2014	\$140,000 - 160,000	--	\$10,080	\$129,920- 149,920
2015	\$270,000 - 290,000	--	\$10,080	\$259,920- 279,920
2016 (Separation)	\$140,000 - 160,000	\$2,520	\$10,080	\$127,400- 147,400
2017	\$108,000 - 132,000	\$6,720	\$10,080	\$91,200- 115,200
2018	\$108,000 - 132,000	\$6,720	\$10,080	\$91,200- 115,200

until July 2017. These documents, when submitted, were largely incomplete, requiring a Motion to Compel. Doc. 104: Mot. to Compel Discovery.

2019	\$108,000 - 132,000	\$6,720	\$10,080	\$91,200- 115,200
2020	\$108,000 - 132,000	\$6,720	\$10,320	\$91,200- 115,200
2021 (Final Decree)	\$84,000 - 108,000	\$17,880	\$10,320	\$55,800- 79,800

From separation until the Final Decree, Jason retained at least 84-87% of his annual income while living housing expense-free; the remaining 13-16% was distributed to three other households for the support of five minor children. While Chris' monthly and housing contributions to Erin certainly helped, those contributions did not cover all the family's expenses. Nor did these contributions negate the need for an appropriate child support award from Jason. The result of the District Court's inexplicably low temporary support award was inevitable: Jason's duty to provide for his minor children was transferred unfairly to Erin, Chris, other family members, and the taxpayers. Someone had to help provide A.T.M. and M.K.M. with food, lodging and other necessary expenses, as Erin could not, and Jason failed to do so.

It is clearly erroneous for the District Court to equate the long-term, consistent monthly tax-free payments and free housing Jason has received for all of his adult life with the family assistance Erin received after the parties' separation. This inadequate temporary support amount continued for years when Erin and the young

children most needed it, despite clear evidence that Jason had resources to support his children.

The Supreme Court will not reverse a district court determination regarding retroactive child support when it is plain from the record that both parties experienced significant financial hardship as a result of their separation, an unfortunate but common result of dissolution. See *In re Marriage of Frick and Perina*, 2011 MT 41, ¶ 44, 359 Mont. 296, 249 P.3d 67. In this case, it is painfully clear that only Erin, A.T.M., and M.K.M. experienced significant financial hardship as a result of this dissolution; Jason's lifestyle and regular and consistent flow of tax-free resources continues to the present day.

Jason has a legal responsibility to support his minor children based on his ability to do so. This Court should reverse the District Court's decision and order retroactive child support be calculated from the time of filing of Erin's Response in an amount which includes Jason's actual regular monthly income and housing benefit established on the record.

III. DID THE LOWER COURT ERR WHEN IT CONCLUDED THAT ORDERING RETROACTIVE CHILD SUPPORT OR OTHER MAINTENANCE WOULD BE A WINDFALL?

A. Chris' housing contribution was not a windfall to Erin and the parties' minor children.

When Erin first requested temporary support, A.T.M. was 2 years old and M.K.M. was a few weeks from being born. At trial, M.K.M. was four and a half

years old and A.T.M. was seven. The detrimental delay in establishing an appropriate temporary support for four and a half years was compounded by no retroactive support awarded at the time of the Final Decree.

The District Court rationalized that ordering such retroactive support would result in “another financial windfall to Erin,” based upon the \$175,000 housing contribution and additional monthly payments made to Erin by Chris while the dissolution was pending. Doc 183: FOFCOL&DEC, p. 36, ¶ 164. This conclusion is clearly erroneous as a misapprehension of the facts and a misapplication of the laws regarding parental duties to support minor children. These errors reduce Jason’s child support obligation due to contributions from third parties that were only necessitated because no adequate temporary child support amount was initially established.

Chris gave Erin’s parents \$175,000 in 2018 for a down payment on a house in which Erin and the minor children could live when their temporary home was sold. Tr. 384:5-10. All parties acknowledge the generosity of Chris’ contribution, enabling Erin’s family to obtain a home in which the minor children could reside, but this was not a windfall.

The Montana Supreme Court has explained that a support award may constitute a windfall to one parent if the award provides support in excess of documented expenses for the children. See, e.g., *In re Marriage of Midence*, 2006

MT 294, ¶ 9, 334 Mont. 388, 147 P.3d 227. Chris' contribution was not a windfall to Erin. Erin was not provided with free housing for A.T.M. and M.K.M.; there is still an ongoing mortgage payment of approximately \$886/month as well as other household expenses. Tr. 384:9-10. There was no evidence of intention between the parties that Chris' contribution would count in lieu of Jason's child support obligation; Chris made this contribution to provide permanent housing for his grandchildren. Tr. 21:7-16, 218:6-10.

B. Chris' monthly contributions to Erin's family for expenses were also not a windfall to Erin or the minor children.

Chris, who had never provided support to Erin prior to her marriage to Jason, began contributing \$700 per month to Erin's family to assist with living expenses for the minor children after Erin and Jason's separation, later reduced to \$500 per month following the house contribution. Tr. 21:13-15, 218:6-10. While these contributions should be counted as part of Erin's available resources for child support calculations, the amounts do not constitute a windfall for Erin or the minor children. Even including these monthly gifts, Erin, A.T.M., and M.K.M. had a monthly household income of only \$1,060 to \$1,260, with expenses of \$3,624. During this same time period, Jason enjoyed a tax-free monthly income of \$9,000 to \$11,000 with no housing expense. Tr. 213:21-23, 394:1-20.

It is a misapprehension of the effect of the evidence and a mistake of law to consider Chris' contributions toward expenses and housing a “windfall” to Erin or the minor children that reduces Jason’s child support obligation.

C. An appropriate amount of retroactive child support for A.T.M. and M.K.M. would not constitute “another financial windfall” under Montana law.

To consider a lawful award of a retroactive child support “another financial windfall to Erin” constitutes legal error. Child support based on the parents’ financial resources is owed to the minor children under Montana law. See Mont. Code Ann. § 40-4-204. While friends and family members may assist while waiting for a court to calculate temporary child support, such assistance should not negate the other parent’s continuing child support obligation.

The Montana Supreme Court has provided specific guidance regarding what may be considered a windfall to a parent in regard to retroactive child support. In *Midence*, the Supreme Court affirmed a district court ruling rejecting retroactive modification of child support under the Guidelines as a “windfall” for the mother because the Guidelines amount exceeded the mother’s documented expenses for the children. *Id.* at ¶¶ 9, 16-17. The Supreme Court held the district court did not abuse its discretion in ruling that child support in excess of expenses essentially amounts to a tax-free maintenance award, especially when the mother had dropped her maintenance claim from her pleadings. *Id.*

Applying the rationale of *Midence*, it is clear that:

1. Jason's temporary child support of \$560/month is far below even two-thirds of Erin's documented household expenses of \$3,624;
2. Retroactive child support would not create a windfall amounting to tax-free maintenance in excess of Erin's household expenses. Unlike in *Midence*, Erin did assert a claim for temporary maintenance in her pleadings and renewed the request pretrial via motion.
3. There is ample evidence before the District Court regarding the disparity of the standards of living in Jason and Erin's homes; and
4. Even if credited with additional gifts provided by Chris, Jason has not adequately provided for A.T.M. and M.K.M.'s needs, as the minor children are still reliant on family and public assistance to meet even minimum household expenses.

Child support is for the benefit of the children and should flow toward the children regardless of the diversionary machinations of the parents. *In re Marriage of Ryan*, 239 Mont. 100, 102-103, 778 P.2d 1389, 1390 (1989). Jason has a legal, social, and moral responsibility to support his children which he has avoided for the past five years while the children have been living exclusively with their mother. *Id.* at 103 (holding that retroactive child support was "a simple case of collecting reasonable support based on custody" and, rather than representing a windfall to the

mother, in fact prevented the father from reaping a windfall at the mother's expense). A retroactive child support award simply would not constitute "another financial windfall" to Erin or the minor children, who still receive federal poverty level benefits.

D. Concluding that retroactive child support was a windfall to Erin denied A.T.M. and M.K.M their lawful child support.

Understandably, the District Court wanted to acknowledge Chris' contributions in some fashion, but its rationale that Chris' contributions reduced Jason's child support obligation is flawed. Paradoxically, the District Court did not count Chris' ongoing, regular consistent monthly payments to Jason as a financial resource available for child support, but did count Chris' temporary gifts to Erin's family as an offset to child support for the minor children. Doc. 183: FOFCOL&DEC, p. 36, ¶ 164. The District Court's decision, in effect, credits wealthy Jason with other family members' charity, and penalizes poverty-level A.T.M. and M.K.M. for receiving that charity.

Assuming, *arguendo*, that the District Court's rationale is correct regarding excluding regular gifts from Jason's income, gifts made to Erin should also be excluded. Had Erin been awarded an adequate amount of temporary child support from Jason, she would have been able to pay her own household expenses without the assistance of family members or public assistance. Tr. 422:6-24.

A retroactive award of child support may be made by the Court even if it results in a lump sum being owed by the paying parent. *Welch v. Welch*, 273 Mont. 497, 505, 905 P.2d 132, 137 (1995). As in *Welch*, Erin has needed additional support to meet expenses related to the care of the minor children ever since she left the family home in 2016. If the Court intended to count gifts to Erin to reduce child support owed, it should count gifts to Jason in calculating a reasonable child support amount. The District Court abused its discretion in failing to order retroactive child support.

E. Other Family Support/Maintenance

The District Court concluded that Chris' gifts also precluded Erin's request for temporary maintenance sufficient to establish a home for the minor children and finish her schooling. Doc 183: FOFCOL&DEC, p. 29, ¶ 135, p. 48, ¶¶ 50-51. This conclusion likewise misapplies the applicable Montana laws regarding maintenance.

The District Court may award maintenance once the marital property is equitably divided if, under Mont. Code Ann. § 40-4-203, one spouse (a) lacks sufficient property to provide for that spouse's reasonable needs; and (b) is unable to be self-supporting through appropriate employment or is the custodian of a child whose circumstances make it inappropriate to seek employment outside the home.

In re Marriage of Harris, 2006 MT 63, ¶ 16, 331 Mont. 368, 132 P.3d 502.

Generally, an award of maintenance is appropriate if the spouse seeking maintenance is unable to obtain employment consistent with the standard of living achieved by the parties during the marriage. See, e.g., *In re Eschenbacher*, 253 Mont. 139, 144, 831 P.2d 1353, 1356 (1992) (holding maintenance award was appropriate so wife could finish her education and obtain a reasonable standard of living, even after dissolution of a marriage of relatively short duration with no minor children of the marriage).

In this case, the District Court specifically found that while Erin was providing primary care for a toddler and breastfeeding a newborn baby, it was not in the children's best interests for Erin to seek employment. Doc 54: Interim FOFCOL, p. 29, ¶ 17. The District Court concluded Erin was eligible for maintenance from marital resources until Erin finishes school and the youngest child is enrolled in school full-time. Doc 183: FOFCOL&DEC, p. 48, ¶ 50, citing *Hoffmaster* (district court awarded the wife child support, a property and cash settlement, and monthly maintenance until the minor child reached school age).

Having satisfied the two-part test for maintenance, the District Court nevertheless denied temporary maintenance because "Erin has received significant financial support during these proceedings to assist her in providing for the children." *Id.* at p. 48, ¶ 51. However, the maintenance standard is whether Erin had sufficient property to provide for her reasonable needs and whether Erin is able to

be self-supporting through appropriate employment while caring full-time for preschool-age children.

As a result of the contributions of Chris and other family members, Erin and the minor children reside in a home with an approximately \$900/month mortgage payment. Erin's monthly expenses for a family of three (\$3,624) are double her current child support amount of \$1,800/month.

Had an adequate retroactive and ongoing child support been made, based on Jason's actual income and financial resources, Erin would be better able to provide for the children's needs and may even be able pay the mortgage on their home without the assistance of her parents. Tr. 422:6-24. When Erin and A.T.M. left the family home, with M.K.M. soon to be born, and immediately went from upper-middle-income to indigent status, her family needed some combination of child support and maintenance to be a self-sufficient household.

Ironically, Jason is the one who received sufficient financial support during the dissolution proceedings to provide for his minor children. While the District Court once again disregarded the regular amounts Jason received as a resource for maintenance, the District Court paradoxically counted the financial support Erin received to denying maintenance.

The record reflects that Jason had ample resources during the marriage to pay maintenance, including:

- 1) Steady and predictable tax-free monthly income: Tr. 214:10-15;
- 2) The demonstrated ability to borrow against his inheritance: Tr. 121:21-25; 122:1;
- 3) Housing and transportation with no mortgage or car payments: Tr. 139:19-25; 140:1-6; Doc 183: FOFCOL&DEC, p. 9, ¶¶ 37, 38;
- 4) A \$130,000 inheritance paid directly to him; Doc 54: Interim FOFCOL, p. 22, ¶ 144; and
- 5) 5% ownership in a 50-acre golf course, valued at \$1,100,000. Doc 183: FOFCOL&DEC, p. 10, ¶¶ 44-45.

These resources are sufficient to not only meet Jason's own household needs but also provide temporary maintenance to assist Erin with establishing a home for the minor children. It is an abuse of discretion to preclude a reasonable maintenance award while Jason continues his upper middle-income standard of living and Erin and the children live in a hand-to-mouth fashion dependent on the charity of others. Doc 193: Resp.to Mot. for Relief, p. 1:20-24; Tr. 394:1-6.

Jason received the windfall, not Erin. Jason pays no taxes on his unearned income, pays no mortgage or rent for his housing, and is not required to use a reasonable portion of his actual income for adequate support for his minor children.

IV. DID THE LOWER COURT RULING RESULT IN A SUBSTANTIAL INJUSTICE BY FAILING TO MAINTAIN THE STANDARD OF LIVING THE CHILDREN WOULD HAVE ENJOYED HAD THE MARRIAGE NOT BEEN DISSOLVED?

After multiple hearings, this District Court concluded there was “clear evidence that Jason maintains a lifestyle which enables him to provide ample support for his children should he choose to do so.” Doc 54: Interim FOFCOL, p. 28, ¶ 14. Conversely, Erin’s income required her to rely on SNAP benefits to buy food for the minor children and was insufficient to make a modest house payment each month. Tr. 394:11-20.

The District Court rejected Erin’s proposed child support calculation solely because it labeled Jason’s payments “gift income.” Doc 183: FOFCOL&DEC, p. 31, ¶ 140. While Erin recognizes the lower court’s efforts to harmonize the *Paschen* case with this case, this method still did not produce an equitable child support amount for the minor children reflecting their standard of living had the marriage not been dissolved.

District Court concluded that, if Jason’s regular monthly income is excluded, direct application of the Montana Child Support Guidelines would produce a result that is “inequitable, unjust and unreasonable, and contrary to the best interests of the children.” *Id.* at p. 33, ¶ 152. Conversely, attributing the economic benefit received from the housing provided to both Erin and Jason (*Id.* at p. 34, ¶ 158, lines 20-21)

does not fairly reflect Erin and Jason's actual resources available for child support as required by Montana law.

Erin acknowledges this case certainly presented unique circumstances to the District Court, but the resulting child support award clearly does not equitably meet the needs of the children or reflect the standard of living enjoyed in Jason's home. As illustrated in Table 1, *supra*, p. 25, even with the increased child support for A.T.M. and M.K.M. ordered in the Final Decree, Jason's household enjoys up to \$79,800 in tax-free income while living in an expense-free home. A.T.M. and M.K.M., on the other hand, have a household annual income of \$21,600 and remain below federal poverty level.¹² This continued disparity of resources is a substantial injustice which can only be remedied by a truly equitable child support award reflecting the actual resources Jason has available to support his minor children.

Erin's Current Family Resources:

After the parties' separation, Erin applied for food stamp (SNAP) and Medicaid benefits for the minor children. Tr. 394:1-6, 17-20. Continuing her education while full-time parenting, Erin attended online schooling with help from a scholarship and a grant; however, she still needs loans and gifts from her parents

¹² Erin's income of \$1800 per month equals an annual income of \$21,600. The Montana federal poverty level for Erin and her two children is \$21,960. <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs-poverty-guidelines-federal-register-references/2021-poverty-guidelines>.

to make ends meet. Tr. 417:6-13. These loans and contributions toward housing expenses did not occur before Erin and Jason's separation and are clearly not a continuing "housing benefit" such as Jason enjoys. Tr. 422:6-24.

Even if Erin achieves minimum-wage employment once M.K.M. reaches school age, at the imputed amount used by the District Court of \$11,375 plus Jason's \$1,800/month child support, A.T.M. and M.K.M.'s household income would be \$32,975 annually, still at 150% of the federal poverty standard, a far cry from the children living in Jason's upper-middle-income home.¹³

Jason's Current Family Resources:

Jason has no mortgage payment. Tr. 28:14-16. He does not pay taxes. Tr. 28:17-19. He is a member of the Ranch Club and a five percent owner of the Linda Vista Golf Course. Tr. 28:24-25; 29:1-16. At the same time, Jason still receives regular monthly payments from Chris. Jason stands to inherit up to \$6 million and there is ample evidence of Jason's ability to "borrow" from this anticipated inheritance to maintain his standard of living and invest in filmmaking endeavors that produce no income.¹⁴ Jason's income from Chris is anticipated to continue into the "foreseeable future." Doc 183: FOFCOL&DEC, p. 38, ¶ 7.

¹³ The Montana federal poverty level for Erin and her two children is \$21,960. Footnote 5, *supra*. That amount, multiplied by 150%, equals \$32,940.

¹⁴ Jason's self-identified work as a filmmaker has produced no tangible economic benefits. Doc 183: FOFCOL&DEC, p. 5, ¶ 18. Nonetheless, Jason continues to

In *Hoffmaster*, the Supreme Court was faced with a similar situation. The father had received \$1,750,000 in inheritance installment payments and would likely receive more in the future. *Hoffmaster*, 239 Mont. at 91, 780 P.2d at 181. The mother, on the other hand, received only \$1,200 per month as child support. *Id.* The Court determined that “[t]he amount [of child support] awarded is unreasonable and would result in substantial injustice to [the child] who is entitled to share in the high standard of living achieved by his father.” *Id.* at 91. The Supreme Court concluded the district court child support order should be reversed on appeal as a clear abuse of discretion resulting in substantial injustice. *Id.*

Like the father in *Hoffmaster*, Jason has received regular and substantial sums from Chris, which resulted in a \$750,000 reduction and other changes to Jason’s inheritance. Tr. 243:10-12; Intervenor’s Trial Ex. BB, p. 5, § 5.2(a). Chris testified Jason may also receive the house in which he resides, upon Chris’s demise. Tr. 37:2-3. Twenty months after trial, Jason indicated he continues to receive \$6,000-\$8,000 per month from Chris. Doc 193: Response to Motion for Relief, p. 1:20-24.

Like the father in *Hoffmaster*, Jason is able to access hundreds of thousands of dollars from the family trust when he spends too much or decides to make an

pursue this incomeless occupation while declining to obtain gainful employment. See Doc 193: Resp. to Mot. for Relief.

unwise business investment. As in *Hoffmaster*, the District Court order should be reversed on appeal as a clear abuse of discretion resulting in substantial injustice.

Despite finding there was “clear evidence that Jason maintains a lifestyle which enables him to provide ample support for his children should he choose to do so” (Doc 54: Interim FOFCOL, p. 28, ¶ 14), the District Court ordered a child support amount which leaves these children far below the standard of living of their father’s household. A review of the record leaves a definite and firm conviction that, when A.T.M. and M.K.M. live at poverty level while Jason continues to enjoy an upper-middle-income lifestyle, the trial court has made a mistake resulting in substantial injustice to the children.

CONCLUSION

Erin does not dispute that there was substantial evidence available to the District Court to rule in this matter. However, the District Court misapprehended the effect of that evidence regarding Jason’s income and family contributions, then misapplied applicable laws. The result is a child support order which does not adequately provide for the minor children, much less address the standard of living they would have enjoyed if the marriage had not been dissolved. There were clearly erroneous conclusions and application of law which exceeded the bounds of reason resulting in substantial injustice.

During the interval of almost five years from the time of the parties' separation until the Final Decree was issued, Erin, A.T.M., and M.K.M. did not receive the temporary child support and maintenance the family should have received to provide for their needs. Even with the generous gifts of Chris and other family members, at the time of trial Erin, A.T.M., and M.K.M. had a monthly household income qualifying them for public benefits, while Jason had a consistent, tax-free monthly income of \$9,000 to \$11,000 with no house or vehicle payments. There must be a point in time when regular, consistent, and uninterrupted receipt of unearned income loses its identity as a gift and becomes a resource to the recipient.

This Court should reverse the District Court's Findings of Fact, Conclusions of Law, and Final Decree of Dissolution as it relates to the issues of current and retroactive child support and maintenance, and remand with directions to 1) recalculate child support based on the actual resources available to Jason; 2) award retroactive child support; and 3) award temporary maintenance consistent with Montana law.

Respectfully submitted this 19th day of November 2021.

/s/Klaus D Sitte
Electronically signed

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this brief is printed with proportionally spaced Times New Roman font typeface of 14 points, is double spaced except for issue statements, lengthy footnotes and quotations, and has less than 10,000 words, excluding Table of Contents, Table of Authorities, Certificate of Compliance, Appendix, and Certificate of Service, as calculated by word processing software.

Dated this 19th day of November 2021.

/s/ Klaus D. Sitte

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CERTIFICATE OF SERVICE

I, Klaus D. Sitte, hereby certify that I have served true and accurate copies of the foregoing Appellant's Brief to the following on November 19, 2021:

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