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STATE OF MONTANA
Case Number: DA 21-0343

No. DA 21-0343

IN THE

Supreme Court of the State of Montana

IN RE THE MATTER OF THE ESTATE OF ADA E. ELLIOT,

DECEASED.

ON APPEAL FROM THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY, HON. MARY JANE KNISELY
CASE NO. DP 17-036

SPECIAL ADMINISTRATOR AND LIQUIDATING PARTNER'S ANSWER BRIEF

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SPECIAL NOTICE TO THE COURT

As this brief was being finalized for filing, Appellee Joseph Womack learned that *pro se* Appellant Ian Elliot passed away unexpectedly on December 19, 2020. No disrespect is intended by any portion of this brief referring to Ian or his arguments in the present tense. At this time, Womack does not know whether Ian's personal representative will continue prosecuting this appeal on behalf of Ian's estate.

STATEMENT OF THE ISSUES

Although Appellant Ian Elliot frames them somewhat differently—and in a different order—there are only two fundamental issues in this appeal:

1. Whether the district court abused its discretion by denying Ian's petition to remove Appellee Joseph Womack from his court-appointed positions as the special administrator of the Estate of Ada E. Elliot and the liquidating partner of Starfire, LP, where all the record evidence supports the court's findings that Womack has faithfully and appropriately performed his fiduciaries duties and that removal would not be in the Estate's best interest.

2. Whether the district court abused its discretion by authorizing Womack to sell two parcels of real property owned by Starfire to fund expenses related to Starfire's liquidation and the Estate's administration, including a forensic accounting necessitated by claims of financial wrongdoing made by Ian against his co-heir and sister, Cindy Elliot.

STATEMENT OF THE CASE

A. Nature of the Case

This is an otherwise straightforward estate case that has spiraled into years of unnecessary litigation. When Ada Elliot died nearly five years ago, she left her estate to her children Ian and Cindy in equal shares.[1] The Estate itself is relatively simple; it consists primarily of Ada's 96.34% interest in Starfire, LP, a limited partnership organized for holding and managing valuable Gallatin Valley real estate.

Unfortunately, administering the Estate has been a quagmire. The principal reason for the difficulty is Ian's seemingly endless efforts to prevent the Estate's court-appointed special administrator, Joseph Womack, from doing his job. Ian's opening brief is emblematic of his

[1] Ada, Ian, and Cindy are referred to by their first names to avoid confusion.

approach. Trying to paint Womack, Cindy, and the district court as conspirators out to get him, he characterizes every decision with which he disagrees as an underhanded attempt to benefit from the Estate at his expense. To be sure, both the district court and this Court have repeatedly rejected Ian's arguments, which either ignore or misapply facts and law he does not like. But he has been successful in one sense—by challenging every action Womack takes, Ian has significantly delayed administration of the Estate.

This iteration of Ian's roadblock strategy involves a challenge to a series of rulings by the district court following a full-day evidentiary hearing. Although Ian attacks the court's orders on nearly twenty separate grounds, there are really only two underlying issues. First, Ian believes that the court should have removed Womack as the Estate's special administrator and Starfire's liquidating partner. Second, Ian contests the court's decision to allow Womack to sell two parcels of real property to pay for a forensic accounting of Starfire necessitated largely by Ian's claims of financial wrongdoing against Cindy. Both issues were squarely within the district court's discretion and the court's rulings are well-supported by the record.

B. Course of Proceedings and Disposition Below

Evidentiary Hearing. The district court held an evidentiary hearing on April 22, 2021 (the April Hearing) on four pending motions—two filed by Ian and two filed by Womack. *See generally* Apr. 22, 2021 Hearing Trans. (Apr. Trans.).

Ian's motions both took issue with Womack's performance. His first motion argued that Womack should be held in contempt for engaging and paying Wipfli LLC to perform a forensic accounting of Starfire and should also be enjoined from further using Estate or Starfire funds without the agreement of Starfire's partners or a court order. *See generally* Dkt. 95.[2] His second motion sought to remove Womack as the Estate's special administrator and Starfire's liquidating partner.[3] *See generally* Dkt. 131.

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[2] Many of the district court pleadings have either lengthy or generic titles. For ease of identification, citations to entries in the district court's docket use the docket number, with pinpoint citations where appropriate.

[3] Although only two of Ian's motions were set for hearing, he filed serial, repetitive motions on these issues over the course of about six months. They included a motion to stay, *see* Dkt. 110, a motion to disqualify or suspend Womack as Starfire's liquidating partner, *see* Dkt. 115, and two motions to supplement his motion for an injunction and sanctions, *see* Dkt. 118, 120. He also regularly used response briefs regarding straightforward issues like a hearing request to seek affirmative relief and supplement his briefing on other issues. *See, e.g.*, Dkt. 146.

Womack's motions, on the other hand, related to his authority to carry out his court-appointed duties. His first motion sought permission to sell two of Starfire's tracts of real property—known as the Farmhouse and the Modular Home—because additional funds were necessary to administer the Estate and pay anticipated claims. *See generally* Dkt. 92. Due to Ian's repeated interference with his work to liquidate Starfire and administer the Estate, Womack's second motion asked the court to clarify previous orders regarding his authority. *See generally* Dkt. 100.

At the April Hearing, Womack called two witnesses—himself and a forensic accountant—and introduced 17 exhibits. Ian cross-examined Womack's witnesses but called no witnesses and introduced no exhibits of his own. Based on the evidence, the district court found that Womack had "acted diligently," "hired appropriate professionals," and "more than substantially complied with his duties as [the Estate's] special administrator and as Starfire's liquidating partner." *See* Apr. Trans., 152:2-153:16.

Consequently, the court orally denied Ian's motion to remove Womack, instructing that "the roadblocks in this estate are going to come to an end." *Id*. at 153:13-18. The court also denied Ian's motion

for an injunction and contempt sanctions and ruled that the forensic accounting Womack had initiated was necessary and should move forward. *Id*. at 154:2-155:17. The court then granted Womack's motion to sell the Farmhouse and Modular Home to pay necessary administrative costs. *Id*. at 155:18-156:17. Finally, the court agreed to reiterate the scope of Womack's authority even though the court believed its initial orders were abundantly clear. *Id*. at 156:18-159:17. In closing, the court admonished Ian that it did not intend to entertain him running back into court to challenge "everything Mr. Womack is trying to do to operate Starfire, to liquidate Starfire and manage the day-to-day operations, which I guarantee are taking up a significant portion of his practice." *Id*. at 159:1-11.

Ian's Post-Hearing Conduct. Despite the district court's frank warnings at the hearing, Ian forged ahead with his attempts to frustrate Womack's work. First, Ian filed an emergency motion for clarification, complaining that Womack was inappropriately taking action to sell the Farmhouse and Modular Home, ignoring that the court had expressly given Womack permission to do so. *See generally* Dkt. 154. Next, Ian filed a lengthy motion asking the court to stop the process of liquidating Starfire, require in-kind distribution of the

Estate, hold a trial or new hearing, and stay its oral rulings from the April Hearing (the Reconsideration Motion). *See generally* Dkt. 155. Then, Ian twice contacted the real estate agent listing the Farmhouse and Modular Home, claiming that Womack was not authorized to sell the properties and implying that he would sue the real estate agent. *See* Dkt. 159, ¶¶ 11-15. Not surprisingly, those actions caused the real estate agent to cease working on the sales and necessitated Womack's filing of a motion for a show cause order. *Id*., ¶¶ 14-17.

Additional District Court Orders and Proceedings. On June 10, 2021, the district court issued a written order with detailed findings of fact and conclusions of law, all confirming its oral rulings at the April Hearing. *See generally* Dkt. 160. Four days later, the court issued another order denying Ian's Reconsideration Motion because it contained "nothing more than frivolous arguments to again delay the process of this 2017 Estate proceeding to closure." *See* Dkt. 161, at 4. In doing so, the court explained that Ian "continues to frustrate the Court's Orders and cause great difficulty and financial expense for the other parties." *Id*. For the same reason, the court also granted Womack's motion for a show cause order, requiring Ian to appear at a

hearing to show cause as to why he should not be held in contempt for violating the court's orders. *See* Dkt. 162.

Again, Ian doubled down by reiterating the same meritless arguments the court had already rejected. Nearly immediately, he filed a notice arguing that he had newly discovered evidence that Womack colluded with Cindy's counsel to have himself appointed as Starfire's liquidating partner. *See generally* Dkt. 163. He followed that up by filing two additional pleadings, both objecting to any effort to hold him in contempt. *See generally* Dkts. 164-65.

The district court held a show cause hearing on July 8, 2021, and issued an order on August 10, 2021 finding Ian in contempt. *See* Dkt. 175. The court, however, allowed Ian an opportunity to purge his contempt by refraining "from obstructing in any manner Womack's work with professionals retained to assist in closing the Estate of Ada Elliot and in liquidating Starfire LP." *Id.* at 3 (emphasis omitted).

Ian's Appeal and Stay Attempts. On July 14, 2021, Ian filed his notice of appeal. Meanwhile, he unsuccessfully sought to stay the district court's June 10 and June 14 orders. *See* Dkts. 171, 174. When his efforts to obtain a stay in the district court failed, Ian also made two attempts in this Court. First, he filed an original proceeding asking the

Court to issue an injunction or exercise supervisory control, which was denied and dismissed on September 21, 2021. *See Elliot v. Womack*, OP 21-0473, Ord. (Sept. 21, 2021). Second, while the original proceeding was still pending, Ian filed an emergency motion for injunctive relief or a stay in this case, which the Court denied on October 5, 2021. *See In re Elliot*, DA 21-0343, Ord. (Oct. 5, 2021).

STATEMENT OF THE FACTS

A. The Estate

Ada died on January 28, 2017, leaving her estate to her only children, Ian and Cindy, in equal shares. *See* Dkts. 1, 3. The Estate's primary asset is Ada's majority interest in Starfire, a limited partnership that owns valuable real estate in Gallatin County. *See* Dkt. 160, ¶ 5; Apr. Trans., 15:15-21. The Estate has a 96.34% interest in Starfire, with Ian and Cindy each owning a 1.83% interest. *Id*. All the Estate's other assets—which include some personal property, bank accounts, life insurance and annuities—have relatively little value. *See* Apr. Trans., 15:22-16:2.

B. Conflict Between Ian and Cindy

In Ada's final years, significant conflict arose between Ian and Cindy regarding Ada's care and management of Starfire. Indeed, when

Ada died, Ian and Cindy were already embroiled in two pending lawsuits against each other.

In October 2014, Cindy filed a dissociation action on Starfire's behalf in state court in Gallatin County seeking to remove Ian as a general partner (the Gallatin County Litigation). *See, e.g.*, Dkt. 6, ¶ 2. Ian countered in October 2015, filing suit in federal court against Cindy seeking $4.3 million in damages for Cindy's alleged mismanagement of Starfire (the Federal Litigation). *Id.*, ¶ 3. There is no doubt whatsoever that Ian and Cindy cannot cooperate to administer the Estate. *See, e.g.*, Apr. Trans., 152:16-22.

C. Womack's Appointments as the Estate's Special Administrator and Starfire's Liquidating Partner

Early on, the district court denied Ian's application to be appointed as the Estate's personal representative due to concern that he would let his conflict with Cindy impair his decision making. *See* Dkt. 29, at 3. Instead, the court found that it was in Estate's best interest to appoint a special administrator. *Id.* In response, Ian both appealed and filed a Rule 59(e) motion, "essentially ask[ing] the court to re-evaluate the evidence and reach a different conclusion." *See In re Est. of Elliot*, 2018 MT 171N, 393 Mont. 538, 421 P.3d 795 (Table) (*Elliot I*). This Court affirmed in all respects. *Id.*

On remand, after the first court-appointed special administrator resigned due to a conflict, the district court appointed Womack in May 2019. *See* Dkt. 60. The court granted Womack the powers of a general personal representative except that Womack could not do any of the following without a court order: (1) withdraw or terminate the Gallatin County Litigation; (2) withdraw or terminate the Federal Litigation; (3) commence litigation on the Estate's behalf; or (4) pay or compromise creditor claims having a direct nexus to Ian, Cindy, or Starfire. *Id.*

Once he began administering the Estate, Womack determined that it was necessary to liquidate Starfire so its assets could be conveyed to the Estate and distributions could be made to the heirs. *See* Apr. Trans., 16:3-17. Accordingly, he petitioned the district court to be appointed Starfire's liquidating partner, which the court granted on July 8, 2019. *Id.*; *see also* Dkt. 69.

In doing so, the district court modified Womack's powers as special administrator somewhat. First, it granted Womack authority to commence litigation on the Estate's behalf for the purpose of judicially dissolving Starfire. *Id.* Second, it allowed Womack to seek dismissal of the Gallatin County Litigation. *Id.* Third, it gave Womack discretion whether to withdraw from or prosecute the Federal Litigation. *Id.*

Finally, the court gave Womack, as Starfire's liquidating partner, the authority to carry on Starfire's business, to wind up its affairs, and to obtain a complete accounting of Starfire since its formation. *Id*. The court required Womack to obtain the written agreement of all of Starfire's partners or a court order only to: (1) sell Starfire's assets; or (2) pay or compromise creditor claims having a direct nexus to Ian, Cindy, or Starfire. *Id*. At no point did the court enjoin Womack from exercising any of his authority, despite Ian's contrary representations to third parties. *See* Dkt. 160, ¶ 9.

D. Womack's Performance of His Duties

On August 13, 2019, the court held a hearing on Womack's request to judicially dissolve Starfire. *See generally* Aug. 13, 2019 Hearing Trans. Following the hearing, the court found that dissolution was necessary for two reasons: (1) all Starfire's partners had agreed to dissolution at a special meeting on July 8, 2019, even though Ian subsequently refused to sign the appropriate pleading; and (2) good cause for judicial dissolution existed under § 35-12-1205(4)(b) because of Ian's and Cindy's ongoing disputes, and their inability to agree on the sale of real property to obtain funds for winding up Starfire's affairs, "including conducting an accounting going back to Starfire's inception

in 2006." *See* Dkt. 79, ¶¶ 1-11. Most of Ian's current arguments appear to stem from two specific actions Womack took following that order—obtaining a forensic accounting and seeking to sell the Farmhouse and Modular Home.

1. The Forensic Accounting

In accordance with the district court's order authorizing him to obtain an accounting of Starfire since its formation, *see* Dkt. 69, Womack engaged Marc Courey, a certified public accountant and the Director of Forensic and Litigation Services at the firm Wipfli LLC, to conduct a forensic accounting. *See* Apr. Trans., 25:24-26:3; 101:17-103:10; Apr. Ex. 6.[4] Womack employed Wipfli for two interrelated reasons. The first was to investigate claims of financial wrongdoing made by Ian against Cindy, which impact Cindy's potential liability to Starfire and, ultimately, allocation of Starfire's assets. *See* Apr. Trans., 31:7-33:1; Apr. Ex. 1A. The second was to obtain an accurate statement of each limited partner's—including the Estate's—interest in Starfire. *See* Apr. Trans., 26:4-27:16.

[4] Citations to "Apr. Ex." refer to exhibits admitted at the April Hearing.

The need for a forensic accounting is also tied to Womack's settlement of the Federal Litigation, which the district court authorized him to handle at his discretion. *Id*; *see also* Dkt. 69. Womack determined that continuing to prosecute the Federal Litigation was not in the Estate's best interest for multiple reasons, among them that the cost of pursuing the litigation would far outweigh the potential benefit to the heirs, given serious uncertainty about both prevailing and collecting. *See* Apr. Trans., 33:2-38:1: *see also* Dkt. 160, ¶¶ 18-25. But that is not to say that Womack simply dismissed the Federal Litigation and foreclosed any further consideration of Ian's allegations of financial misconduct against Cindy. Rather, he entered a settlement agreement with Cindy that provided for a forensic accounting of Starfire and preserved the Estate's right to collect from Cindy's share of Starfire if the accounting ultimately determined it appropriate. *See* Apr. Trans., 37:8-38:6.

At base, the forensic accounting will reconcile Starfire's finances, resulting in each Starfire partner being allocated a net payable to the company or a net receivable from the company. *Id*. at 120:17-121:22. There is no way to determine such allocations without a full forensic accounting, *id*. at 121:13-122:5, and there is no way to obtain a forensic

accounting for significantly less than Wipfli is charging, *id*. at 117:22-118:3. Likewise, there is no way to circumvent the process by using a previous accounting performed by Eide Bailly at Ian's request. Not only was the Eide Bailly accounting extremely limited in scope, Ian never paid Eide Bailly's $20,000 invoice. *Id*. at 34:9-22, 108:3-109:3. Simply put, Wipfli's forensic accounting is necessary to liquidate Starfire, distribute the Estate's assets, and ultimately conclude this case. *Id*. at 41:24-42:3.

When Wipfli began the accounting, it had 34 large boxes of files, along with electronic records, most of which were unorganized and mislabeled. *See* Apr. Trans., 104:3-111:19; Apr. Ex. 13, ¶ 5. Wipfli determined that Starfire was not auditable based on the current state of the records, so Courey suggested starting the forensic accounting by using 2010 as a test year. *See* Apr. Trans., 112:13-113:6. Womack agreed and, after completing the accounting for 2010, Wipfli performed the same analysis for 2014, ultimately determining that Starfire had a net receivable from Ian of $13,209 for those two years and a net receivable from Cindy of $76,848.93. *Id*. at 113:7-115:9; *see also* Apr. Ex. 11. In other words, the result of the two test years strongly favored Ian.

Based on the test years, Wipfli believed it possible to conduct the accounting for the entire relevant period (2006 to 2019) and agreed to cap its fees at $87,000 for the rest of the work. *See* Apr. Trans., 115:20-117:10; Apr. Ex. 9. At that point, however, Ian threw a wrench in the process. In July 2020, he e-mailed Courey, falsely representing that Womack lacked the authority to pay Wipfli on Starfire's behalf and asking him not to perform the remaining $87,000 of work. *See* Apr. Ex. 12. Ian's interference had the intended consequence; Wipfli ceased work on the forensic accounting as a result. *See* Apr. Trans., 118:4-119:6.

As of the April Hearing, Wipfli was willing to perform the remaining work, although additional ramp up time necessitated by the nearly year-long hiatus may increase the cost beyond the original $87,000 cap. *Id*. at 119:17-120:6. Courey estimated that the accounting will take at least 350 additional hours of work to complete. *Id*. at 120:17-121:22.

2. Sale of the Farmhouse and Modular Home

From the outset, Ian has expressed a desire to receive his ultimate distribution from the Estate in real property. *Id*. at 45:3-9. When Womack was appointed special administrator and liquidating partner,

however, Starfire's real estate was not platted in a way that would have permitted such a distribution. *Id*. at 45:9-13. Accordingly, with Ian and Cindy's consent, Womack obtained a boundary line adjustment that created six lots, which both maximized the value of Starfire's property and allowed for the possibility of distributing real property to the heirs. *Id*. at 45:14-46:12; *see also* Apr. Ex. 16.

Because Starfire did not have the money to pay for the necessary forensic accounting, Womack proposed to sell two of those six lots—the Farmhouse and Modular Home. *See* Apr. Trans., 42:4-43:5. In Womack's professional opinion, there is no way to retain all of Starfire's real property while simultaneously paying for the forensic accounting and other liquidation expenses. *Id*. at 50:24-51:8. Accordingly, he obtained appraisals on both properties, *see* Apr. Exs. 17-18, and engaged a real estate professional who advised that selling in the current market was the most likely way to maximize the properties' value, *see* Apr. Trans., 47:1-50:23.

Although the sales took some time given Ian's continued interference after the April Hearing, Womack was eventually able to complete the sales in the fall of 2021. On September 21, 2021, Womack sold the Modular Home for $775,000, netting Starfire $607,096.58 after

payment of realtor commissions, closing costs and a first mortgage. *See* Dkt. 182. That amount was significantly higher than the initial appraisal of $500,000. *See* Apr. Ex. 18. On October 12, 2021, Womack sold the Farmhouse for $720,000, netting Starfire $674,440 after payment of realtor commissions and closing costs. *See* Dkt. 183. Again, the sale amount far exceeded the appraisal range of $380,000 to $410,00. *See* Apr. Ex. 17.

E. Womack's Compensation

To date, Womack has not been paid anything for his work. Nor has he been reimbursed for his costs. In fact, he has suffered financial hardship by working unpaid on the case for two and a half years. *See* Dkt. 187, ¶ 14. Accordingly, he moved on November 29, 2021 for interim payment of his fees and costs. *See generally* Dkt. 187. In response, Ian objected and also filed a motion and affidavit under § 3-1-805, MCA to disqualify Judge Knisely for purported favoritism toward Womack. *See* Dkt. 188. The result is yet another frivolous roadblock which will result in Womack continuing to work uncompensated, at least until Ian's meritless disqualification motion is resolved.

STATEMENT OF THE STANDARD OF REVIEW

"[T]he [d]istrict court" has broad discretion in probate matters." *In re Est. of Robbin*, 230 Mont. 30, 33-34, 747 P.2d 869, 871 (1987). Thus, this Court reviews the district court's refusal to remove Womack from his court-appointed positions for clear abuse of discretion. *In re Est. of Mattila*, 221 Mont. 262, 266, 718 P.2d 343, 346 (1986) ("The determination of questions regarding the appointment of a special administrator is a matter of discretion with the trial court."); *see also In re Est. of Anderson-Feely*, 2007 MT 354, ¶ 9, 340 Mont. 352, 174 P.3d 512 ("Removal of a personal representative for cause pursuant to § 72-3-526, MCA is within the sound discretion of the district court."). Likewise, this Court may not reverse the district court's order allowing Womack to sell real property to fund the Estate's administration absent clear error or an abuse of discretion. *In re Est. of Barber*, 216 Mont. 26, 27-28, 699 P.2d 90, 91 (1985). If Ian is challenging other aspects of the district court's orders relating to the Estate's administration, "[t]his Court reviews a district court's equitable decisions to determine whether the findings of fact are clearly erroneous and whether the conclusions of law are correct." *In re Est. of Afrank*, 2012 MT 289, ¶ 7, 367 Mont. 334, 291 P.3d 576.

SUMMARY OF THE ARGUMENT

Throughout his opening brief, Ian employs a scattershot approach, complaining about dozens of perceived slights stemming from Womack's performance as the Estate's special administrator and Starfire's liquidating partner. Boiled down, however, there are only two issues, and the district court got both right.

Removal of Womack. The district court correctly exercised its discretion in finding a complete absence of cause to remove Womack from either of his court-appointed fiduciary roles. Ian did not come close to meeting his burden under the for-cause removal statute, § 72-3-526, MCA, and the court's finding that Womack has consistently acted in the best interest of the Estate is firmly supported by the record. All of Ian's specific arguments are meritless.

First, there is not a shred of evidence that Womack inappropriately colluded with Cindy or her counsel to obtain his appointments. This Court previously affirmed the need for a special administrator, Womack is well-qualified, and the district court appointed Womack as Starfire's liquidating partner for good cause after a hearing detailing precisely why judicial dissolution is necessary. Similarly, it stretches credulity to suggest that Womack colluded with

Cindy to dismiss the Federal Litigation. After all, the settlement agreement preserved Womack's right to adjust Cindy's interest in Starfire downward based on the results of an independent forensic accounting and, to date, the accounting has significantly favored Ian.

Second, Womack does not have a conflict of interest. The authority on which Ian relies relates to potential conflicts created by a lawyer's service as a personal representative after having also *previously* represented the decedent in some capacity, including by drafting his or her will. Here, Womack never previously represented Ada or her heirs. Nor can Ian manufacture a conflict by initiating separate lawsuits against Womack complaining about his performance in *this* case. Moreover, even if Womack had a potential conflict—which he does not—case law still grants the district court broad discretion with respect to removal and Ian cannot overcome the critical reality that all the court's findings have abundant factual and legal support.

Third, Ian's argument that he was entitled to a jury trial on his petition for removal fails for multiple reasons. Not only did Ian waive the argument by failing to develop it below, this is not a testacy proceeding and Ian has no separate constitutional right to a jury trial on this issue. Indeed, it is black letter Montana law that a party has no

right to a jury trial on purely equitable issues and both the removal statute itself and a host of cases leave removal of a personal representative for cause to the sound discretion of the district court.

Fourth, Ian's claims that the district court has been inappropriately biased in Womack's favor are groundless. Setting hearings and controlling the scope of witness testimony at those hearings are both docket-control issues entirely within the court's discretion, not to mention that the court acted appropriately in every respect. While Ian may not like that administrative costs have increased, the truth is that any increase is almost entirely his own fault and Womack has not yet been paid for *any* of his work. And no matter how loudly Ian complains that the court has consistently ruled in Womack's favor, adverse rulings do not constitute bias, particularly when those rulings are correct.

Womack's Sale of Property. The district court also acted well-within its discretion by allowing Womack to sell two parcels of Starfire's real property. Again, the record strongly supports the court's rationale—namely, that the sales were necessary to pay for the expenses of liquidating Starfire and administering the Estate, including the forensic accounting necessitated by Ian's allegations against Cindy.

Ian's argument regarding Montana's preference for in-kind distributions is misplaced. Montana law unambiguously allows personal representatives to sell estate property when necessary for the estate's administration and the preference does not even apply to the Farmhouse or Modular Home, which were owned by Starfire, not the Estate. Finally, by Ian's own admission, his argument about the Uniform Partition of Heirs Property Act is fundamentally flawed because neither the Farmhouse nor the Modular Home was held in tenancy in common, meaning that they cannot be "heirs property" as a matter of law. The argument is also waived because Ian raised it for the first time in a Rule 59(e) motion for reconsideration.

ARGUMENT

I. The District Court Correctly Refused to Remove Womack as the Estate's Special Administrator and Starfire's Liquidating Partner.

Ian's attacks on Womack and his performance—which are scattered throughout his opening brief—all relate to a single issue: whether the district court abused its discretion by refusing to remove Womack for cause as the Estate's special administrator and Starfire's liquidating partner. It is not a close call.

Under § 72-3-526, MCA, a personal representative may be removed for cause in five circumstances. First, when removal would be in the best interests of the estate. § 72-3-526(2)(a), MCA. Second, when the personal representative or a person seeking his appointment misrepresented material facts in the proceedings leading to the appointment. § 72-3-526(2)(b), MCA. Third, when the personal representative has disregarded an order of the court. *Id.* Fourth, when the personal representative has become incapable of discharging the duties of the office. *Id.* And, fifth, when the personal representative has mismanaged the estate or failed to perform his duties. *Id.* Because "an order of removal is considered harsh and severe . . . irregularities not directly harmful [should] be overlooked, with the further limitation that if the court can remedy a matter readily, no removal [should] be ordered." *In re Est. of Townsend*, 243 Mont. 185, 189, 793 P.2d 818, 820 (1990) (citing *Est. of Robbin*, 230 Mont. 30, 747 P.2d 869 (1987)).

Here, the district court made multiple findings that no cause for removing Womack existed under § 72-3-526. Big picture, the court found that Womack's removal "is absolutely not in the best interests of the Estate." *See* Dkt. 160, ¶ 76. More specifically, the court found that Womack did not make intentional misrepresentations leading to his

appointment and did not violate court orders. *Id.*, ¶¶ 77-78. Rather, he "has faithfully and to the best of his ability carried out the orders of the Court and his responsibility as a fiduciary in this case" and "has managed the Estate properly and has performed his duties of the office." *Id.*, ¶¶ 79-80.

Frankly, Ian's arguments to the contrary are somewhat difficult to decipher. Although he complains bitterly about everything related to Starfire's judicial dissolution, he does not expressly identify the factual findings or legal conclusions he is challenging, much less provide justification for reversing under the appropriate standards of review. His theories all appear to fall into one of four categories: (1) Womack inappropriately colluded with Cindy's counsel to obtain his appointments as special administrator and liquidating partner; (2) Womack has a conflict of interest; (3) Ian was entitled to a jury trial on Womack's removal; and (4) the district court improperly favored Womack to Ian's detriment. *See* Open. Br., 20-43. Each is equally meritless.

A. Womack Was Appointed by the Court, Not Via Collusion with Cindy or Her Counsel.

In most respects, Ian is foreclosed from challenging Womack's appointment as the Estate's special administrator. This Court affirmed

the need for a special administrator in *Elliot I*, and the record reflects that Womack is extremely well-qualified—he has spent more than a decade serving as a court-appointed fiduciary in various capacities. *See Elliot I*, ¶ 9; Apr. Trans., 12:5-18. Thus, Ian has concocted a wholly unsupported theory that Womack inappropriately colluded with Cindy or her counsel to obtain his appointment as Starfire's liquidating partner. *See* Open Br., 21-24.

Simply put, Ian's position is baseless. Indeed, he admits that he has no evidence of collusion, suggesting instead that this Court should heed the "warning sign" of Womack's fees. *Id*. at 22. But if the fact that a court-appointed fiduciary will be compensated for his work signals potential misconduct, cause for removal would *always* exist. The Court should also flatly reject Ian's attempt to equate this case to a class action where the plaintiff's attorney receives a large fee while the class members recover very little. *See id*. at 22-23. It is the other way around. In all likelihood, the heirs will eventually be distributed millions in cash or property from the Estate.[5] *See* Dkt. 187, ¶¶ 11-13.

[5] The amount eventually distributed will depend in substantial part on whether Ian and Cindy continue to litigate against each other and whether Ian continues to interfere with the court-ordered liquidation of Starfire and Womack's administration of the Estate.

Meanwhile, Womack has billed at a reasonable hourly rate and has worked for more than two years without being paid *anything*, to his own financial detriment. *See* Dkt. 187, ¶¶ 7-14. And the amount of time Womack has been forced to spend on this case is directly correlated to Ian's objection to nearly every action he takes.

Beyond his "warning sign" argument, Ian's collusion allegations rest solely on generic assertions that Womack and Cindy have often agreed about substantive issues in this litigation. *Id*. But whether Cindy has agreed with Womack's position on certain issues after his appointment is entirely irrelevant. As the district court recognized, Womack has also made multiple decisions in his role as a fiduciary with which Cindy disagrees. *See* Apr. Trans., 66:20-67:20; *see also* Dkt. 160, ¶¶ 56-59.

Moreover, it is hardly surprising that Cindy agrees that dissolving Starfire is necessary. *See, e.g.*, Dkt. 70, at Exs. A, B. In countless places, the record details that Ian and Cindy simply cannot agree about how to operate Starfire and, because they are Starfire's only general partners, operating the partnership without their agreement is impossible. *See, e.g.*, Dkt. 61, ¶¶ 5-18.

Additionally, there is no question the district court had authority to appoint Womack as Starfire's liquidating partner. *See* § 35-12-1205(4), MCA; *see also* Dkt. 79. On that topic, Ian asserts that the court erred by finding that Starfire's partners agreed during a special meeting on July 8, 2019 that judicial dissolution was appropriate. *See* Open Br., 26-29. Although the record plainly supports the court's finding, *see* Dkt. 70, at Exs. A, B, Ian's argument is a red herring. The court held a hearing regarding the necessity of judicial dissolution, *see* Aug. 13, 2019 Hearing Trans., and found that dissolution was appropriate for two independent reasons—because the partners had agreed to dissolution *and* because good cause existed under § 35-12-1205(4)(b) due to Ian and Cindy's ongoing conflicts. *See* Dkt. 79, ¶¶ 7-11. Tellingly, Ian does not argue that good cause for dissolving Starfire is lacking, he merely advances an unsupported conspiracy theory that Cindy must have received assurances of favorable treatment from Womack. *See* Open. Br., 21-22.

Similarly, Ian references the Federal Litigation, suggesting that Womack and Cindy conspired to use Starfire's liquidation to moot Ian's allegations of financial impropriety by Cindy. *Id*. at 22-24. Nothing could be further from the truth. When Womack was appointed

Starfire's liquidating partner, Starfire had $600 in its account. *See* Apr. Trans., 36:3-38:6. Because no attorney would take the Federal Litigation on a contingency, Womack estimated that fees would easily exceed $100,000, on top of approximately $150,000 for the forensic accounting necessary to prosecute the case. *Id*. Thus, rather than spending hundreds of thousands of dollars pursuing complex litigation with no guarantee of success, Womack entered a settlement agreement that preserved his right to collect from Cindy's share of Starfire depending on the results of the forensic accounting. *Id*.

Said differently, Womack did precisely the opposite of what Ian now argues. Rather than colluding with Cindy to Ian's detriment, Womack ensured that it remains possible to adjust Ian's ultimate distribution upward if the forensic accounting determines that Cindy's allocation of Starfire's assets should be adjusted downward. The accounting itself bears this out. Although only two test years have been completed to date, the adjustments from those years favor Ian by more than $60,000. *Id*. at 113:7-115:9; *see also* Apr. Ex. 11.

The bottom line is that Ian's collusion arguments are fantasy. There is nothing in the record that even approaches a reason to reverse the district court's appointment of Womack or its failure to remove him.

To the contrary, all the evidence firmly supports the court's findings that Womack has acted professionally and impartially as a court-appointed fiduciary.

B. Womack Does Not Have a Conflict of Interest that Warrants Removal.

Next, Ian misconstrues an ABA ethics opinion and *In re Est. of Peterson*, 265 Mont. 104, 874 P.2d 1230 (1994) to argue that Womack should have been removed due to a conflict of interest or that the court needed Ian's informed consent to appoint Womack Starfire's liquidating partner. *See* Open Br., 24-25. Again, he is well off the mark.

First, the ethics opinion Ian cites discusses when a lawyer may accept appointment as a personal representative or trustee "named in a will or trust *the lawyer is preparing for a client*." *See* ABA Formal Opinion 02-426 (May 31, 2002) (emphasis added). Here, Womack did not separately represent Ada or prepare her will. For that matter, Womack did not separately represent Ian or Cindy either. He is an independent third party who was appointed to his fiduciary positions by the court, rendering the ABA opinion inapposite here.

Second, *Peterson* is nothing like this case. There, an attorney representing a personal injury victim entered a contingency fee agreement which increased the fee from one-third of any recovery to

40% if the case was either set for trial or tried. 265 Mont. at 106, 874 P.2d at 1231. After filing suit, the lawyer repeatedly requested that a trial date be set, and the district court eventually obliged. *Id*. at 106-07, 874 P.2d at 1231. Only then did the lawyer negotiate a settlement, taking a 40% fee. *Id*. at 107, 874 P.2d at 1231-32. Following the settlement, the lawyer drafted a will for the client, naming himself the personal representative. *Id*. When the client died, the sole beneficiary of his estate petitioned to remove the lawyer as the personal representative, arguing that the estate had a claim against the lawyer stemming from the fee agreement and the lawyer could not reasonably be expected to pursue the claim against himself. *Id*. The district court agreed, and this Court affirmed the district court's exercise of its discretion. *Id*. at 107-09, 874 P.2d at 1232-33.

In contrast, Womack did not have any prior dealings with Ada or the heirs that could theoretically give rise to a claim by the Estate against him. So, unlike the personal representative in *Peterson*, he will never have to decide whether to bring a claim against himself based on his earlier representation of the decedent. In short, *Peterson* is just as inapplicable as ABA Formal Opinion 02-426.

To avoid that result, Ian contends that Womack also has conflicts of interest due to two other cases in which Ian has sued Womack. *See* Open. Br., 26. Ian offers no details about the other litigation other than case numbers but insists that because the district court did not permit him to serve as personal representative due to his conflicts with Cindy, "equal justice" demands that Womack be removed due to an "antagonistic" conflict with Ian. *Id*. Again, he is wrong.

Both the cases Ian references are just more of the same in his litigation-by-attrition strategy. Just a few months before filing his motions in this case complaining about Womack's performance, Ian sued Womack in a separate proceeding in the Montana Thirteenth Judicial District Court alleging breach of fiduciary duty, negligence and abuse of discretion. *See Elliot v. Womack*, No. DV 20-0244, Montana Thirteenth Judicial District Court; *see also* Dkt. 136, at 7. Ian's claims were derivative on behalf of Starfire, arguing that Womack has failed to pursue claims against Cindy—the same argument he has made here with respect to the Federal Litigation. *Id*. That case has since been dismissed by the court. Ian's response to the dismissal was "to re-write and re-file" the same basic allegations in a new action, No. DV 21-811,

filed in front of a different district court judge in the same district. *See, e.g.*, Dkt. 188, ¶ 34.

In short, both the additional cases Ian relies on for a purported conflict are cases he initiated because he disagrees with some of Womack's decisions as a fiduciary. Again, however, he fails to explain how the existence of those cases could possibly equate to an abuse of discretion by the district court in refusing to remove Womack. There is certainly no bright-line rule like the one Ian seems to want. Under Ian's reasoning, any time an heir disagreed with a special administrator over an estate-related issue, the heir could simply file suit for breach of fiduciary duty and thereby manufacture grounds for the special administrator's removal.

That kind of nonsensical result is precisely why district courts are afforded broad discretion over these issues. For example, in *In re Est. of Haagenson*, a decedent's children petitioned for removal of their stepmother as personal representative, arguing that she had a conflict of interest due to a host of estate administration decisions with which they disagreed. 286 Mont. 34, 37-39, 952 P.2d 1385, 1387-89 (1997). As Ian does here, the children attacked the personal representative's performance with little or no support. *Id.* But if anything, they had an

even stronger case for a conflict of interest because they alleged that their stepmother was liable to the estate for her actions in an earlier medical malpractice suit, somewhat like the conflict in *Peterson*. *Id*. Still, this Court had little difficulty affirming that the district court did not abuse its discretion by refusing to remove the personal representative based on the actual evidence—not allegations—related to her performance. *Id*.

The same result follows here. The district court made detailed findings about the impartiality of Womack's performance, based on witness testimony and exhibits. *See generally* Dkt. 160. Ian cannot demonstrate that the court abused its discretion by hurling unfounded allegations about conflicts of interest simply because he disagrees with Womack's administration of the Estate.

C. Ian Did Not Have a Right to a Jury Trial Regarding Womack's Removal.

Ian next argues that § 72-1-208, MCA entitled him to a jury trial regarding Womack's removal. Although the district court never directly opined on the propriety of a jury trial, the court correctly opted to hold an evidentiary hearing and to decide the removal issue in its discretion.

The Uniform Probate Code entitles a party to a jury trial in two circumstances: (1) in a formal testacy proceeding; and (2) in "any

proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury." § 72-1-208(1), MCA. Because this case has nothing to do with the validity of Ada's will, the only question is whether Ian has a constitutional right to a jury trial regarding the removal of a personal representative. The answer is no.

To start, Ian has waived this argument. Although his motion to remove Womack included a jury demand in the caption, *see* Dkt. 131, at 1, he never argued to the district court that he had a constitutional right to a jury trial and it is well established "that this Court will not address either an issue raised for the first time on appeal or a party's change in legal theory." *Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶ 15, 289 Mont. 255, 961 P.2d 100.

But even ignoring waiver, Ian's argument is incorrect. "There is not, and never has been, a right to a jury trial in purely equitable actions in Montana." *Supola v. Mont. Dep't of Justice*, 278 Mont. 421, 424-25, 925 P.2d 480, 481-82 (1996). For instance, *Supola* held that there is no right to a jury trial on a petition challenging an automatic suspension of a driver's license where the relevant statute "presume[d]

a jury will *not* be present and assign[ed] to the court the task of determining both facts and law." *Id*. (emphasis in original).

Here, the relevant statute is § 72-3-526, which expressly provides that, upon the filing of a petition to remove a personal representative for cause, the court shall "fix a time and place for *hearing*." § 72-3-526(1), MCA (emphasis added). Thus, like the driver's license statute in *Supola*, the statute assigns the court the task of deciding the issue, not a jury. That result is consistent with the plethora of Montana cases holding that removal of a personal representative for cause is a discretionary decision for the district court. *See, e.g.*, *Anderson-Feely*, ¶ 9. It is also consistent with other jurisdictions that have addressed the issue more directly. *See, e.g.*, *In re Est. of Newman*, 196 P.3d 863, 876-77 (Ariz. Ct. App. 2008) (no right to jury trial for breach of fiduciary duty claim or claim to remove personal representative because both claims are purely equitable).

In short, Ian has no right to a jury trial on an issue that a statute, case law, and equity all leave to the sound discretion of the district court. He waived his incorrect jury trial argument by not raising it below and has no support for it in any event.

D. The District Court Was Not Improperly Biased Against Ian.

The last twelve pages of Ian's opening brief allege a litany of complaints about the district court's handling of the case, ranging from the frequency with which the court set hearings to the court's agreement with Womack's position on certain factual issues. *See* Open. Br., 31-43. Some of Ian's arguments are extremely difficult to follow, but Womack attempts to address each in turn.

First, Ian complains that he was prejudiced because the district court did not allow him to conduct formal discovery. But there is no requirement for formal discovery related to a petition to remove a personal representative for cause. Rather, the statute requires a hearing, *see* § 72-3-526(1), MCA, and Ian appeared at the hearing. That he did not offer any witnesses or exhibits was his own choice. Additionally, there was no reason for the district court to let Ian go on an unfounded fishing expedition. Ian's approach throughout has been to challenge and complain about any aspect of the case he does not control. His desire to conduct formal discovery about every action taken by the court-appointed special administrator so that he can then challenge those actions amply demonstrates why a special administrator is necessary in the first place.

Second, Ian contends that the district court was biased in the frequency with which it set hearings and because the court interceded at times during Ian's examination of Womack at the April Hearing. *See* Open. Br., 32-36. This argument is utterly meritless. With respect to hearings, the district court undoubtedly had discretion to administer its docket in the manner it found most efficient, *see, e.g.*, *Burley v. BNSF Ry. Co.*, 2012 MT 28, ¶ 95, 364 Mont. 77, 273 P.3d 825, and Ian cannot point to any instance in which the court was statutorily required to hold a hearing, but did not. The same is true of the court's decisions regarding the relevancy of some of Ian's questioning of Womack, particularly because the court was the fact finder. *See, e.g.*, *United Tool Rental, Inc. v. Riverside Contracting, Inc.*, 2011 MT 213, ¶ 23, 361 Mont. 493, 260 P.3d 156 ("The district court retains broad discretion regarding the scope of cross-examination."). There is nothing in the transcript of the April Hearing that even hints that the court interceded to inappropriately "protect" Womack, as Ian alleges. *See* Open. Br., 36.

Third, Ian includes a subheading stating that the district court's insertion of its own answers or objections at the April Hearing impacted the court's findings of fact and witness credibility determinations. *Id.* at 37. But very little of his argument is actually devoted to that topic;

he instead spends multiple pages arguing that the court should have adopted his view of the evidence rather than Womack's. *Id.* at 37-41.

One example is sufficiently illustrative. Ian argues that although Womack's testified that he did not pay Cindy $3,000 every month for Starfire management expenses, his reports misled the court regarding Cindy's payment of $3,000 to herself for the last few months of 2019. With no justification whatsoever, Ian wrongly claims that Womack's testimony on this point confirmed that he has padded his expenses by $14,000. Under Ian's theory, the district court evidenced bias by interceding during one of his questions about this issue, causing him to become distracted and thus unable to demonstrate an inconsistency between Womack's testimony and his reports. *Id.* at 37.

In truth, Womack testified that he did not pay Cindy $3,000 per month and, when Ian followed up by asking Womack about an entry in a profit-loss report, the district court attempted to help Ian find the correct exhibit. *See* Apr. Trans., 85:1-86:8. During the discussion about the exhibit, Womack clarified that he understood what Ian was asking and that the entry in the report reflected that Cindy paid herself management expenses *before* Womack was appointed. *Id.* at 86:9-13. The court interjected only when Ian's subsequent questions ignored

Womack's clarification. *Id.* at 86:14-87:14. Following that interjection—which also included further clarification from Cindy's counsel that the management expenses were back due and were paid for prior years—the court gave Ian an open invitation to continue questioning Womack, which Ian declined. *Id.*

From that colloquy, there is no basis whatsoever to conclude that the district court was inappropriately biased against Ian. Nor can the court be faulted for concluding that Womack's testimony and report regarding management expenses were consistent. This issue and most of Ian's other complaints fall in the same category—Ian is making unfounded, unsupported accusations that Womack is inappropriately inflating costs in a case where has not yet been paid a single dollar and then falsely accusing the court of bias when it disagrees. The reason for any increase in administrative costs is abundantly clear from the record—Ian has been doggedly pursuing claims of financial wrongdoing by Cindy for years and objecting to every action Womack takes, including those expressly permitted by the court and those in furtherance of an investigation into Ian's accusations against Cindy.

Finally, Ian makes an illogical argument that the district court demonstrated bias by concluding that Womack has not violated court

orders while also issuing a contempt order against Ian. *See* Open. Br., 41-43. As a threshold issue, the district court's August 2021 order holding Ian in contempt is not appropriately part of this appeal. Not only has Ian never amended his July 14, 2021 notice of appeal to include it, contempt orders are not appealable and become reviewable only via a petition for a writ of certiorari, which Ian did not file. *See, e.g., Schaefer v. Egeland*, 2004 MT 199, ¶ 10, 322 Mont. 274, 95 P.3d 724.

Regardless, Ian's argument is specious. The contempt order does not indicate bias on the court's part in any way. It is simply reflective of the fact that Ian refuses to stop interfering in Womack's ability to perform his court-appointed duties, even in the face of court orders sanctioning Womack's performance and expressly granting him permission to act.

* * *

In sum, this Court should reject each of Ian's arguments regarding the district court's refusal to remove Womack as the Estate's special administrator and Starfire's liquidating partner. They ignore the standard of review, have no support in the record and misunderstand the law. Under the correct analysis, the district court did not come

close to abusing its discretion. Its factual findings are consistent with the evidence and its legal conclusions are correct. Simply put, Womack has been acting in the best interests of the Estate throughout and it remains in the Estate's best interest to have him continue serving in his fiduciary capacities.

II. The District Court Did Not Abuse Its Discretion by Allowing Womack to Sell the Farmhouse and Modular Home.

Ian's other principal argument is that the district court violated Montana law regarding in-kind distributions by allowing Womack to sell the Farmhouse and Modular Home. His reasoning is fundamentally flawed on this issue too.

Foremost, Ian's challenge to the district court's order allowing the sale of the properties is moot. "[A]n issue is moot when a court cannot grant effective relief or restore the parties to their original position." *Billings High Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 239, ¶ 12, 335 Mont. 94, 149 P.3d 565. *Turner v. Mountain Engineering and Construction, Inc.* is directly analogous. 276 Mont. 55, 63, 915 P.2d 799, 804 (1996). There, construction lien creditors appealed a foreclosure judgment in a case where the property had been sold to a third party at a sheriff's sale, the lien creditors did not post a supersedeas bond or

obtain a stay, and no surplus was recovered at the sale. *Id*. Given those facts, *Turner* held that the appeal was moot because it was impossible for the Court to grant effective relief or return the parties to the status quo. *Id*.

The same is true here. Although Ian sought a stay in both the district court and this Court, he was unsuccessful and never posted a supersedeas bond under Mont. R. App. P. 22. Consequently, both properties have now been sold to a third party. *See* Dkts. 182-83. Thus, even if Ian's arguments regarding in-kind property distribution were correct—and they are not—there is no way for this Court to return the parties to the status quo.

Mootness aside though, Ian is simply wrong about the law. While it is true that § 72-3-902, MCA requires in-kind distributions "to the extent possible," the statute does not create an absolute rule prohibiting property sales. Rather, "[e]state devisees take devised property 'subject to' the estate's administration, § 72-3-101(2), MCA, and a personal representative has the power to sell estate property if necessary for the estate's administration." *Northland Royalty Corp. v. Engel*, 2014 MT 295, ¶ 11, 377 Mont. 11, 339 P.3d 699 (citing §§ 72-3-606(1), 613(6), MCA).

Ian also received an additional layer of protection to which most devisees are not entitled—Womack's sale of property was subject to court approval. And the necessity of selling some of Starfire's property—which itself is not actually an Estate asset subject to § 72-3-902—for the Estate's administration was one of the primary subjects of the April Hearing. The record is replete with support for the district court's conclusion that selling the properties was appropriate "to pay liquidation and operating expenses of Starfire and the Estate." *See* Dkt. 160, ¶ 87.

In short, selling the properties was necessary to fund the forensic accounting required by Ian's desire to pursue Cindy for alleged financial wrongdoing. *See* Apr. Trans., 40:15-68:3. The sales also created sufficient funds to pay other Estate expenses and will likely allow Womack to advance cash to Ian and Cindy in the form of a loan against their eventual distributive share. Nothing about the fact that there is a statutory preference for in-kind distributions comes close to warranting reversal of the district court's finding about the necessity of selling property owned by a limited partnership, not by the Estate.

Ian's argument about the Uniform Partition of Heirs Property Act (UPHPA), § 70-29-401, MCA *et seq*., is also a nonstarter. First, this

argument is waived. Ian did not raise it in his objection to Womack's motion to sell the property, his supplemental objection, or at the hearing. *See* Dkts. 97-98; *see generally* Apr. Trans. Instead, he raised it for the first time in his Reconsideration Motion following the court's oral rulings at the April Hearing. *See* Dkt. 155, ¶¶ 47-58. The Reconsideration Motion is most accurately characterized as a Rule 59(e) motion, which "may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation. *See, e.g.*, *Kona Enters., Inc. v. Est. of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (applying the identical federal rule).

Second, even if Ian somehow preserved the argument, it is far off base. For the UPHPA to apply, the property at issue must be "heirs property," which means "real property held in tenancy in common" that satisfies each of a number of prerequisites, including that "one or more of the cotenants acquired title from a relative, whether living or deceased." *See* §§ 70-29-402(5), 70-29-403(2) MCA.

The property here, however, was wholly owned by Starfire. It was not held in co-tenancy by Ian, Cindy, or anyone else. *See*, *e.g.*, Dkt. 182, Ex. A; Dkt. 183, Ex. A. In fact, Ian admits as much. *See* Open Br., 19. So, although the UPHPA could theoretically become applicable in the

future if any of Starfire's real property is eventually distributed through the Estate to Ian and Cindy as co-tenants, applying it to the Farmhouse and Modular Home would be entirely inappropriate.

In sum, Ian has no plausible grounds for attacking the district court's order permitting Womack to sell the Farmhouse and Modular Home. The court's reasoning is supported by the evidence and Ian's legal arguments are inapposite.

CONCLUSION

For the foregoing reasons, Womack respectfully requests that the Court affirm the district court's orders in all respects.

Dated: December 21, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Mont. R. App. P. 11(4), this response brief is proportionately spaced, has a typeface of 14 points or more, and contains 9,413 words, as determined by the undersigned's word processing program.

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