IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 22-0055

DENNIS DEE MCDONALD as a general
Partner, managing partner and limited
Partner of the OPEN SPEAR RANCH FAMILY
LIMITED PARTNERSHIP,

Counter-Defendant and Appellant

v.

SHARON MCDONALD, as a general partner,
Managing partner and limited partner,
KELLY MCDONALD FRASER, as a limited partner,
COURTNEY MCDONALD, as a limited partner,
And CASEY MCDONALD, as limited partner,
OPEN SPEAR RANCH FAMILY LIMITED
PARTNERSHIP,

Counterclaimants and Appellee's.

APPELLANT'S OPENING BRIEF

On Appeal from the Sixth Judicial District Court, Sweet Grass County, Cause No. DV 2014-19
Honorable Brenda R. Gilbert

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TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

INTRODUCTION

Dennis and Sharon McDonald had a common law marriage and together with their children created Open Spear Ranch Family Limited Partnership ("OSR"). Dennis and Sharon are the general partners; their 3 living children, all adults, are the limited partners. Dennis and Sharon created OSR in 1997 to pass on their assets to their children with the least tax consequences possible and as a means to keep ownership of assets within the family. Dennis funded the partnership with capital contributions; Sharon made no financial contribution. At the time of the creation of OSR, neither Dennis nor Sharon intended to ever convert OSR assets into personal cash.

In 2014, Sharon filed for a dissolution of her and Dennis' common law marriage. They entered into a separate Property Settlement Agreement ("Property Settlement"), Supplemental Appendix, Ex. 1. The judge presiding in this case also reviewed and approved the Property Settlement and entered a Decree of Dissolution in the divorce case. Decree, Supplemental Appendix, Ex. 2. Both documents acknowledge the existence of the limited partnership and provide that the future of OSR would be decided according to partnership law and is outside the marital dissolution.

This limited partnership case, herein being appealed, is entirely separate from Sharon's action for marital dissolution.

Sharon, Dennis and their children executed a detailed thirty-four page written Limited Partnership Agreement when the entity was formed. Cert. and Agreement ("Agreement"), Supplemental Appendix, Ex. 3. The Agreement specifically provides the methods of accounting for contributions and for terminating the partnership. As a matter of law, the court must apply the Agreement as written and may not instead substitute its own view of what would be equitable.

Instead of following the plain language of the governing Agreement, the court has continued acting in equity as it did in the divorce proceeding. This is an error of law.

ISSUES PRESENTED FOR REVIEW

1. Did the court err as a matter of law when it failed to apply the clear language of the Agreement?

2. Did the court err as a matter of law when it appointed the special masters?

3. Did the court err as a matter of law in entering summary judgment when there were genuine issues of material fact?

4. Did the court err as a matter of law when it determined all the equipment, art, and cash belonged to the partnership?

5. Did the court err as a matter of law when finding it was not reasonably practicable to carry on the Partnership?

STATEMENT OF THE CASE

Dennis initially filed this case and shortly thereafter his contested Motion to

dismiss his Complaint was granted. Sharon and the McDonald children, Kelly, Courtney and Casey counterclaimed asking the court to dissolve OSR.

This appeal is solely about whether there was cause for the court to dissolve the limited partnership and the process the court used to allocate the partnership assets. Dennis' position is that he was growing the assets and pursuant to the plain language of the Agreement, the court did not find cause for judicial dissolution. Further, the Court failed to follow this Court's previous holdings that the Agreement is to be interpreted and followed in any dissolution proceedings. The court failed to interpret and apply the Agreement.

STATEMENT OF THE FACTS

Dennis and Sharon moved from California to Hot Springs, Montana in 1989 and then to Melville, Montana in 1994. Sharon and Dennis had four children, three of whom are living. Sharon filed for a dissolution of their common law marriage on July 14, 2014, Cause No. DR 14-12.

In 1994, Dennis and Sharon had Kalispell attorney, Lee Kaufman, draft the Agreement to form the limited partnership as a means to keep the land Dennis purchased in the family and minimize tax liability. Agreement, Ex. 3. Therein, Dennis and Sharon were named as General Partners and their four children were named as limited Partners.

Through a series of IRC Section 1031 like-kind exchanges, in 1994, Dennis

acquired the Melville ranch, the subject matter of this involuntary judicial dissolution. Tr. 350:12-351:23, Sept. 1-2, 2020. Admitted Exhibits 8-17.

Even though the Agreement was signed by Dennis and Sharon in 1994, it laid dormant for seventeen years. Shortly after Sharon and Dennis' youngest son, Clay, tragically passed away in 2011, Dennis agreed to Sharon's request to transfer the ranch real property from himself, individually, to OSR. *Id* 357:3-21. The Agreement comes into effect as of 2011, the date of Dennis' transfer of the real property to the OSR. Tr. 186:1-6, June 20-22, 2018.

Dennis and Sharon separated on Nov. 1, 2011 and have been living apart since. Property Settlement, p. 2, Ex. 1.

In 2011, Jack Wicks appraised the OSR real estate for $8.5 million. This appraisal was required by Laura Turner, the accountant for the OSR taxes, because Dennis transferred the real property to OSR for his Capital Account contribution. Tr. 375:10-21, September 1-2, 2020. In 2016, Wicks was disclosed as an expert witness by Sharon and the children and was twice appointed as the special master at Sharon's request. *See* Def. Expert Witness Disclosure [Doc. 121], Or. Granting Def. Mot. To Appoint Wicks [Doc. 161], Or. Appointing Special Master [Doc. 190].

After a fight started by a hired hand, Tyler Walker, landed Dennis in the hospital, Dennis initially filed the Complaint because Sharon sided with the hired

hand. Tyler, Sharon and the children were all named as Defendants in Dennis' 2014 Complaint. *See* Compl. [Doc. 1]. On August 14, 2014, Sharon and the children answered Dennis' Complaint, and each filed their Counterclaim against Dennis for a judicial dissolution of OSR pursuant to the Uniform Limited Partnership Act, § 35-12-501, M.C.A. Def. Sharon's Answer, [Doc. 2], p. 5; Def. Courtney's Answer[Doc. 3], p. 4; Def. Kelly's Answer [Doc. 4], p. 4, and Def. Casey's Answer, p. 5.

In 2014, while Dennis was away rehabilitating from being beaten, Tyler left OSR, and Sharon and son, Casey, abandoned the ranch. Upon Dennis' return on Sept. 1, 2014, he found the OSR bank account had been depleted from $183,148.48 to $8,508, in a period of sixty (60) days, the hay wasn't cut, and livestock not attended to. Hrg. Tr. 292:4-294:5, June 20-22, 2018. Dennis then re-assumed responsibility for the ranch's day-to-day operations as he always had and continues to do. Sharon and the children never returned. Dennis' Obj. to Special Master's Report [Doc. 231], p. 2. At Dennis' request, the Court entered an Order that he remain responsible for the ranch's operation, which he has profitably done, increasing the OSR bank account from $8,508. to $1,035,662.81, doubling the livestock value with the improved real estate now worth nearly $21 million. *See* Or. Ruling on Mot. For Exclusive Control [Doc. 107]; 2011-2018 Tax Returns, Tr. Ex. B; OSR Appraisal [Doc. 434].

On April 3, 2015, Dennis filed his Motion for dismissal of his Complaint. *See* Dennis' Mot. For Or. Of Dismissal [Doc. 25]. Sharon and the children objected to Dennis' dismissal Motion. *See* Obj. to Mot. To Dismiss [Doc. 26], Sharon's Obj. to Mot. To Dismiss [Doc. 27]. On May 1, 2015, the Court entered its Order Granting Dennis' Motion, stating:

> The language of rule 41(a)(2) M.R.Civ.P. is plain and clear. The motion for dismissal of Complaint is granted and the counterclaims may be adjudicated independently.
>
> For public policy reasons, a party should be permitted to change his position and retreat from litigation, particularly where the legal rights of other parties will not be prejudiced.

Or. Granting Mot. For Or. Of Dismissal [Doc. 29], p. 3. Thereafter, Dennis sought to amend the pleadings to assert a claim for rescission of the percentage gifts of OSR to the surviving children, on grounds of mistake. *See* Dennis' Mot. To Leave to Amend [Doc. 78], Br. in Supp. Of Mot. To Leave [Doc. 79], Decl. of Dennis [Doc. 80], and Decl. of Winchell [Doc. 81]. Individually, Sharon and the children objected to Dennis' rescission Motion. *See* Br. in Resp. to Mot. [Doc. 84], Br. in Opp. To Mot. To Amend [Doc. 85], Aff. Of Sharon [Doc. 86], Aff. Of Laura Turner [Doc. 87]. On March 16, 2016, the court entered an Order denying Dennis' Motion to assert a claim for rescission stating it was "procedurally defective" as Dennis' Complaint had previously been dismissed at his request. Decision and Or. Ruling on Pl. Mot. To Amend [Doc. 106], p. 4.

On May 27, 2016, Sharon disclosed Wicks as her expert. *See* Def. Expert. Witness Disclosure [Doc. 121]. The following day, Sharon moved for an order to appoint Wicks as the special master pursuant to M.R.Civ.P. 53, to make an in-kind distribution of OSR assets. In her Motion, Sharon quotes the exact language of paragraph 10.2 of the Agreement indicating Wicks should be tasked first with determining the Parties' Capital Accounts. Mot. To Appoint Wicks as Special Master [Doc. 120], p. 3. Dennis objected to Wicks being appointed as the special master because he had a conflict in his two separate and distinct roles in this litigation, both as Sharon's disclosed valuation expert, and as the special master to divide up OSR assets. Resp. Br. in Opp. To Mot. To Appoint [Doc. 127], p. 2.

Dennis moved for summary judgment because OSR was being operated successfully per the Agreement and for the children's benefit. Dennis' Br. in Supp. Of Mot. For Summary Judgment [Doc. 125]. The Order denying this Motion held that the test for dissolution of a limited partnership is whether it is reasonably practical to carry on the business of a limited partnership, citing *McCormick v. Brevig*, 2004 MT 179, ¶ 25, 322 Mont. 112, 96 P.3d 697. Or. Denying Mot. for Summary Judgment [Doc. 162]. The Order was based on Dennis having originally filed this case and that, "[t]here are clearly facts to support dissolution of the partnership, the Court is issuing a separate order regarding the same…" *Id,* p. 7.

The Order granting Defendant's Motion for partial summary judgment

decided the issue as follows:

> The Defendants filed the instant motion for partial summary judgment alleging that there is no genuine issue of material fact regarding the 2014 gift from Dennis and Sharon to Defendants and that Defendants are entitled to judgment on that issue in their favor as a matter of law.

Or. Granting Def. Mot. For Partial Summary Judgment [Doc. 159], p. 2. However, this Order did more than determine whether the 2014 gift to the children was legally effective. It went on to determine Dennis and Sharon made similar gifts to the children from 2011-2013. The court reached this conclusion by reference to Dennis' Complaint, which the court had previously dismissed stating, "[f]or public policy reasons, a party should be permitted to change his position and retreat from litigation …." Or. Granting Mot. For Dismissal [Doc. 29], p. 4. Therefore, although the court initially determined Dennis could change his position, it used his change of positions against him to reach the conclusion that the children were entitled to summary judgment on the issue of their percentages of OSR ownership. Dennis' Complaint was no longer part of the record as the court had previously dismissed it. *See* Or. Granting Def. Mot. For Partial Summary Judgment [Doc. 159].

The first Order appointing Wicks as special master was upon Sharon's Motion where she asked that Wicks be instructed to first consider the Partners' Capital Accounts. The court's rationale was based solely upon the Agreement.

Although they did not participate in Sharon's Motion, the court*, sua sponte*, ordered the children's attorney to "prepare a proposed Order appointing Special Master …" Or. Granting Def. Mot. To Appoint [Doc. 161], p. 2. This Order stated:

> Dennis attempted to procedurally change the case. Dennis' attempt to amend the Complaint failed, so he moved to dismiss the Complaint.

Id., p. 3. The court was incorrect. Dennis' dismissal of his Complaint was filed April 3, 2015. *See* Mot. For Or. Of Dismissal [Doc. 25]. His Motion to Amend was filed nearly eight months later on November 25, 2015. *See* Mot. To Leave to Amend [Doc. 78].

The children's attorneys prepared a proposed order appointing Wicks and filed their supporting brief. *See* Def. Prop. Or. [Doc. 166], Def. Br. in Supp. Of Prop. Or. [Doc.167]. The Proposed Order states:

> By order dated November 29, 2016, the Court ordered the dissolution of the Open Spear Ranch Family Limited Partnership. The Court has previously determined that Plaintiff owns 26% of the partnership interests and Defendants own 74% of the partnership interests.

Def. Prop. Or. [Doc. 166], p. 1. Dennis objected to this proposed order because it did not first require Wicks to consider Capital Accounts as Sharon's Motion requested, citing Section 10.2 of the Agreement.

At the time of granting Defendant's partial summary judgment, Sharon's Motion to appoint Wicks as special master and Dennis's opposition to Wick's appointment, the court entered its *sua sponte* Judicial Determination Regarding

Propriety of Dissolution. Therein, the court again improperly relied upon Dennis' dismissed Complaint, stating: "Significantly, there can be no dispute that Dennis did originally file a Complaint for dissolution of the partnership." Judicial Determination [Doc. 160], p. 3. This Determination also states:

> [I]t is not reasonably practicable for the Open Spear Ranch Family Limited Partnership, a Montana Limited Partnership, to carry on the activities of the Partnership in conformity with the Partnership Agreement within the meaning of §35-12-1201, M.C.A. and Section 10.1 of the Partnership Agreement of the Open Spear Ranch Family Limited Partnership. Accordingly, the Partnership must be dissolved.

Id., p. 2.

On May 19, 2017, the Property Settlement was filed in Sharon and Dennis' divorce action. Property Settlement, Ex. 1. That Settlement is significant herein because it specifically states that all OSR assets will be dealt with in the OSR dissolution case, stating it, "Shall not include any item of property, whether real or personal, tangible or intangible, titled in the name of the Open Spear Ranch Limited Partnership." *Id*, p. 4.

None of the ranch equipment, artwork, blood line cattle, or miscellaneous personal property listed on Sharon's Notice dated April 20, 2017, was transferred from Dennis to OSR. *See* Not. To the Court [Doc. 193]. The January 5, 2017, first special master's report did not include any equipment. *See* Special Master's Rep. [Doc. 225]. After Sharon complained, Wicks filed his revised report distributing all the equipment, horses, and hay to Dennis, thereby deducting the value assigned to

these items, from the amount of land awarded to him. *See* Revised Report [Doc. 226].

Dennis timely objected to Wicks' revised report because the court *sua sponte* granted Defendants' summary judgment. Obj. to Master's Report [Doc. 231], p. 6. Dennis objected under the authority of *McCormick*, ¶ 25, cited by the court in its Order denying partial summary judgment because the special master was not ordered to determine the Parties' respective Capital Accounts. *Id.,* p. 6. Dennis also objected because it does not consider set-offs or tax ramifications, and distributes property purchased by Dennis that doesn't belong to OSR. *Id,* pp. 9 & 11. It also did not consider the difference in valuation of portions of OSR property as some areas are more valuable than others. *Id,* p. 8.

The court initially acknowledged there would be tax consequences to a division of OSR. On June 20-22, 2018, the court held a hearing on Dennis' objections. Therein, Wicks confirmed he did not take into consideration the tax ramifications of a division and that it was necessary to do so. Tr*.,* 48:1-13, June 20-22, 2018. Wicks also admitted he had not read the Agreement and did not know anything about capital contributions made by the Parties. *Id.,* p. 19-24. However, the court did not issue a ruling on Dennis' objections until March 26, 2020, more than 21 months later. *See* Findings of Fact, Concl. Of Law Re: Rule 53 Obj. [Doc. 344].

Even though Dennis' expert witness, Jim Winchell, CPA, testified an unequal in-kind division of various classes of property would create tax consequences, the court nonetheless adopted the special master's reports without consideration of, nor adjustment for, the tax consequences and Dennis' contributions to OSR for an adjustment to his Capital Account. *See* Special Master's Report [Doc. 225], Revised Report [Doc. 226], Special Master's Report [Doc. 433], #1 Revised Report [Doc. 459], #2 Revised Report [Doc. 460].

On October 1, 2018, the court held a hearing regarding the propriety of dissolving the partnership, even though 23 months earlier the court had decided dissolution was appropriate. *See* Or. Scheduling Hrg. [Doc. 244], Judicial Determination [Doc. 160]. On Jan 23, 2019 the court entered its Order confirming its prior Order that it was proper to dissolve OSR based on citation to the Agreement. Findings of Fact, Concl. Of Law Re: Practicability of Cont. Operations [Doc. 265], p. 2.

In May of 2016, Sharon first brought up the fact that the Agreement required the Capital Accounts be first reimbursed before a division of OSR assets. *See* Mot. To Appoint Wicks as Special Master [Doc. 120]. In direct conflict with Sharon's "Capital Accounts" statement, on Feb 4, 2020, the children filed their Motion in Limine and supporting Brief to exclude Dennis from bringing up the issue of his Capital Account. Therein complaining Dennis was bringing up a new issue, the

Capital Account provisions of the Agreement "five years into this litigation." *See* Def. First Mot. In Limine [Doc. 309], Br. in Supp. [Doc. 310], p. 10. The court granted this Motion precluding Dennis from offering evidence and/or testifying about his entitlement to reimbursement of his Capital Account in accordance with the Agreement. *See* Or. Granting Def. First Mot. In Limine [Doc. 345].

Expert CPA Winchell opined mistakes were made regarding OSR's 2011-2018 tax returns that would create tax liability for the Parties if not corrected. On Feb. 24, 2020, Dennis filed his Motion and Brief to amend the income and gift tax returns, which was denied. *See* Opp. Mot. & Br. for Or. Of Amendment of Tax Returns [Doc. 315], Or. Re: Mot. For Amendment of Tax Returns [Doc. 346], p. 6.

Sharon provided the information for the returns to CPA Laura Turner who in turn prepared the tax returns. These returns show one-half of the cash on hand being personally owned by Dennis and Sharon respectively. Dennis has been paying the taxes on his half, but Sharon has not. Tr. 447:15-21, 449:18-20 June 20-22, 2018, admitted Exhibit K.

On Nov. 16, 2020, the court entered an Interim Order not allowing Dennis a Capital Account reimbursement based upon the tax returns and that Dennis did not disclose those assets in the marriage dissolution. Findings of Fact, Concl. Of Law & Interim Or. [Doc. 383], p. 11. This finding was made even though the Property Settlement states the Parties waived disclosure. Property Settlement, p. 2, Ex. 1.

The Interim Order appointed Wicks to do another report. Wicks declined but offered his associate, Scott Crosby, to do another special master report. Crosby made his report on July 13, 2021. *See* Special Master's Rep. [Doc. 433]. It was a mirror of the prior Wicks report with some revised valuations and numbers. Dennis immediately filed his objections to the Crosby report, similar in nature to his previous objections but with more detail. *See* Obj. to Rep. [Doc. 431], Appl. To the Court for Action Upon Rep. [Doc. 436], Renewed Obj. to Report [Doc. 448]. On Jan 28, 2022, the court denied Dennis' objections to Crosby's report. Findings of Fact, Concl. Of Law Re: Rule 53 Obj. [Doc. 486], p. 18.

On October 29, 2021, the court again granted Counterclaimant's Motion in Limine precluding Dennis from "offering testimony evidence that would . . . ask the Court to reconsider Dennis' claim he personally owns partnership property, and his capital account is $8.5 million funded by pre-marital assets." Decision & Or. Re: Mot. In Limine [Doc. 469], p.3. After the hearing, the court adopted Crosby's report and made final the judicial dissolution of OSR and disbursement of its assets. Findings of Fact, Concl. Of Law re Rule 53 [Doc. 486].

STANDARD OF REVIEW

"A District Court's conclusions of law are reviewed on appeal for correctness." *Ballou v. Walker*, 2017 MT 197, ¶ 11, 388 Mont. 283, 400 P.3d 234. "A District Court's interpretation of a contract is a question of law that we also

review for correctness." *Id*. The standard of review for a district court's ruling on a motion in limine or admissibility of evidence, including oral testimony, is whether the district court abused its discretion. *Jacobsen v. Allstate Ins. Co*., 2009 MT 248, ¶ 26, 351 Mont. 464, 215 P.3d 649; *Wenger v. State Farm Mut. Auto. Ins. Co.*, 2021 MT 37, ¶ 5, 403 Mont. 210, 483 P.3d 480. "However, to the extent the district court's discretionary ruling is based upon a conclusion of law, our review is plenary." *Jacobsen*, ¶ 26.

In addition, this Court reviews summary judgment rulings de novo. *Krajacich v. Great Falls Clinic, LLP*, 2012 MT 82, ¶ 8, 364 Mont. 455, 276 P.3d 922. Summary judgment is only appropriate when there is no genuine issue of material fact. *Id*. Moreover, summary judgment is an extreme remedy that should not substitute for a trial on the merits; thus, all reasonable evidentiary inferences are in favor of the nonmoving party. *Jobe v. City of Polson*, 2004 MT 183, ¶ 10, 322 Mont. 157, 94 P.3d 743.

SUMMARY OF ARGUMENT

This case involves only one of two separate and distinct contracts between the Parties. In the previous marriage dissolution, Dennis and Sharon entered into a settlement after extensive negotiations, which provided in part:

> The parties acknowledge and agree that there is a Partnership dissolution case also filed and pending in the above entitled Court, under Case No. DV-14-19. **This Property Settlement Agreement Shall not include any item of property, whether real or personal,**

> **tangible or intangible, titled in the name of the Open Spear Ranch Limited Partnership.** (Emphasis added)

Property Settlement, p. 4, Ex. 1. The Property Settlement acknowledged that the Parties' interests in OSR were to be dealt with separately, applying partnership law, and OSR was outside the scope of the divorce. The court approved the Property Settlement and entered their Divorce Decree on July 25, 2017. *See* Decree, Ex. 2.

The marital dissolution is over and done, a thing of history. The present case is simply a business case, involving a business entity, not marital property. The outstanding affirmative claims (in the Defendants' Counterclaims) call for winding up/dissolution of the limited partnership. As this Court has made clear, the district court is required to follow the Agreement and partnership law in deciding whether, and if so, how to terminate the partnership. While perhaps simpler and more familiar to the trial judge, the looser "equitable division" standard that applies in divorce cases does not apply here. The Agreement governs and must be followed.

When the Agreement provides that the first step is to determine and reimburse for each partner's capital contributions, the court must do so. Sharon recognized this early on when she quoted the Capital Account provisions of the Agreement on May 27, 2016 in her Motion to appoint Wicks as Special Master. Mot. To Appoint Wicks [Doc. 120], p. 3.

If the court requires the assistance of a special master for this task, that

special master should have the necessary accounting skills to investigate and ascertain the capital contributions. Experience solely in property valuations does not suffice. Only after the capital contributions are determined and repaid can the next step occur: allocation of the Parties' partnership interests. If there are genuine issues of fact material to this step, the court must hold a trial to resolve those issues before deciding allocations. The Montana Rules of Civil Procedure preclude decreeing percentages via summary judgment in this circumstance, no matter how much easier that may be for the judge.

Rather than following the process agreed upon in the governing Agreement, the court exercised its own discretion in both the process it used and the result it reached in decreeing termination of the partnership and division of its assets. The court's ignorance of and refusal to interpret and apply the Agreement violates the Agreement, governing statutes, and this Court's previous caselaw. Furthermore, the court violated the Montana Rules of Civil Procedure when it entered summary judgment despite significant issues of material fact. For all these reasons, the court's judgment should be reversed and remanded with directions to either overturn the court's determination to judicially dissolve OSR or to conduct the partnership dissolution in compliance with the Agreement.

ARGUMENT

This Court recently held that "[a]n existing partnership agreement controls

the rights and the duties of the partners." *Ballou*, ¶ 15, (citing *In re Estate of Bolinger*, 1998 MT 303, ¶ 50). Any statutory rules are merely default rules that apply "only in the absence of a partnership agreement to the contrary." *McCormick v. Brevig*, 2004 MT 179, ¶ 35, 322 Mont. 112, 121, 96 P.3d 697, 703. "A partnership agreement is essentially a contract between the partners … to be interpreted and applied in accordance with principles of contract law." *Ballou*, ¶ 15. The plain language of the contract governs its interpretation. *Id*.

Written partnership agreements are contracts and are to be interpreted under the principles of the contract law. *Krajacich*, ¶ 12. Construction and interpretation of a contract is a question of law. *Ophus v. Fritz*, 2000 MT 251, ¶ 19, 301 Mont. 447, 11 P.3d 1192. "When a contract is in writing, the parties' intentions are to be determined from the writing alone, if possible." *Krajacich*, ¶ 13. "When the language of a contract is clear and unambiguous and, as a result, susceptible to only one interpretation, the duty of the court is to apply the language as written." *Ophus,* ¶ 23*; Peters v. Hubbard*, 2020 MT 282, ¶ 15, 402 Mont. 71, 475 P.3d 730.

Thus, as a matter of law, in a limited partnership, the partnership agreement governs the relations among the partners and the partnership. § 35-12-515, MCA; *see also Ballou*, ¶ 15; *McCormick*, ¶ 35. Where, as here, there is a written partnership agreement, the district court's only role is to apply its provisions, not substitute its own opinion.

There is only one case in Montana in which the Supreme Court addressed the judicial dissolution of a limited partnership. *Ballou*, ¶ 19. In that case, the Court found that the existing partnership agreement controlled the rights and duties of the partners. *Id*, ¶ 15 (*citing Bolinger*, ¶ 50). Therefore, in a limited partnership, the Agreement governs the relations among the partners and the partnership. § 35-12-515, MCA; *see also McCormick,* ¶ 35.

Here, there is a written Agreement, executed by all Parties after legal advice. Some parts of that Agreement differ from the default statutory rules; the cases cited above clearly recognize that the Agreement, not the statutory rules, apply. § 35-12-515, MCA; *McCormick*, ¶ 35. By contrast, in the *McCormick* case there was no language contrary to the governing statute for judicial dissolution, § 35-10-624(5), MCA. *McCormick*, ¶ 39. Therefore, the *McCormick* Court determined that the statute controlled liquidation and distribution of the Partnerships' assets.

Dissimilar to *McCormick*, this Agreement has very clear and specific language, which binds the court on how to pursue liquidating distributions. Specifically, Article VII provides, "[u]pon the winding up of the Partnership, the assets of the Partnership available for distribution to the Parties shall be distributed as provided in Article X." Agreement, p. 14, Ex. 3. Further, the Agreement states that if there is a judicial dissolution, dissolution and liquidation must follow the Agreement. *Id,* p. 25.

In turn, Article X provides "a proper accounting shall be made of all assets, liabilities and operations of the Partnership." *Id*, p. 26. Further, the Agreement requires the court first determine the Capital Accounts and reimburse them before calculating liquidating distributions. *Id*. In *McCormick,* this Court held that each partner is "entitled to have an accounting of the partnership's affairs." *McCormick*, 48. The Court stated:

> The purpose of an accounting is to determine the rights and liabilities of the partners, and to ascertain the value of the partners' interests in the partnership as of a particular date . . . In rendering the accounting, mere summaries or lump listings of types of items, or schedules of cash to be distributed without detailing the firm's transactions, are generally insufficient, as are mere tax returns.

Id, ¶ 49 (*citations omitted*). There, recognizing the complexity of the necessary determination, the district court appointed a CPA as special master. The CPA "was vested with the authority to inquire into all pertinent matters of record and charged with determining the amount, if any, of Joan's excess capital contributions to the Partnership. . ." *McCormick*, ¶ 26. The Court remanded and directed the district court to provide a detailed accounting "of all the Partnership's assets and liabilities, as well as distributions of assets and liabilities to the partners in accordance with their respective interests in the Partnership." *Id*, ¶ 51.

1. **The Court Erred as a Matter of Law When it Failed to Follow the Agreement**

   A. The Court Failed to Follow the Agreement When It Decided to Split the Property

In this case, the Parties executed a written and specific Agreement which controls. The Agreement laid out its overall purpose:

> To consolidate the management of certain of the real and personal property of the McDonald Family**; to avoid the division of certain of the property of the McDonald Family**; to avoid potential expensive litigation and disputes over certain of the property of the McDonald Family by providing a means of resolving disputes over the ownership and operation of certain of the property of the McDonald Family; **to promote the retention of certain of the property** of the McDonald Family within the McDonald Family by restricting the transfer of Partnership Interests to non-family members. (Emphasis added)

Agreement, p. 4, Ex. 3. Article 10.1 lists the events of dissolution and includes judicial dissolution in accordance with the "Uniform Limited Partnership Act." *Id,* p. 25. Under Article 10, in the event of a judicial dissolution, the partnership must be liquidated and wound up in accordance with the Agreement.

Section 10.2 provides very specific detailed instructions regarding what must be done to liquidate OSR. Agreement, p. 26, Ex. 3. To follow the contract's specific directions, the court had a duty to perform a proper accounting of all assets, liabilities, and operations. *Id*. Next, the court had a duty to determine the Partners' Capital Accounts. Only then, according to the Agreement, should the court have ordered a distribution. *Id*.

Instead, the court simply jumped to the bottom line, decreeing percentages, and ordering a division without an accounting or determination of the Capital Accounts. Under Montana divorce law, unless the Property Settlement was

unconscionable, the court was bound by it. The court found that the Property Settlement was not unconscionable, and thus was bound by its agreement to deal with the OSR issues in the separate partnership lawsuit. Decree, p. 2, Ex. 2. In turn, under Montana partnership law, the court was bound by the Agreement.

B. The Court Failed to Properly Account & Reimburse Each Partner for Their Capital Contribution, Before Any Division of Partnership Property

The Agreement clearly provides that each Partner is entitled to reimbursement of their capital contribution. In Article I, the Agreement provides that each Partner has the right to receive "distributions of Partnership assets, as represented by his, her or its Capital Account." Agreement, p. 3, Ex. 3. Additionally, Article IV explicitly establishes that each Partner has a right to the return of their capital contributions. *Id,* p. 8.

The Agreement provides that upon winding up, the assets "shall be distributed as provided in Article X." *Id,* p. 14. Specifically, Article 10.2 provides that "[l]iquidating distributions shall be made to the Partners in accordance with their positive Capital Accounts as provided in §1.704-1(b)(2)(ii)(b)(2) of the [IRS] Regulations." *Id,* p. 26. In May 2016, Sharon and the children quoted this section asking the court to comply with Section 10.2, including the Capital Account determination. Def. Br. in Supp. of Mot. For Partial Summary Judgment [Doc. 118], p. 2, Mot. To Appoint Wicks as Special Master [Doc. 120], pp. 2-3.

i. Sharon First Acknowledged Capital Accounts and Dennis Did Provide Evidence Regarding the Capital Accounts

At the Rule 53 hearing, much later than Sharon requested the Court to follow paragraph 10.2 of the Agreement, Jim Winchell, a CPA and Certified Valuation Analyst, testified as an expert witness on behalf of Dennis. Tr., 182-239, June 20-22, 2018. Winchell testified, "upon liquidation, according to the Partnership Agreement, capital accounts are, first, to be considered before the ownership interests." *Id,* 186:14-15. Further, he testified, "[u]pon liquidation, the agreement states that, first of all, the capital accounts – liquidation is to be according to the balances in the capital accounts." *Id,* 186:22-25.

The court refused to let Winchell further testify about following the Agreement in determining the Capital Accounts because it determined that its previous Order requiring a distribution in-kind negated following the Agreement. *Id*, 191:17-23. Dennis provided an offer of proof that Winchell's testimony, if allowed, would change the ownership interests because that is what the Agreement provides. *Id*, 192:11-17. Dennis testified that he made a capital contribution of $8.5 million dollars. *Id*, 390-391. Sharon failed to provide any expert to rebut Winchell's testimony or any evidence that she had made any capital contributions.

ii. The Court Erred When It Refused to Hear Evidence Regarding the Capital Accounts Because It Ruled Dennis Had Not Disclosed Them in the Marriage Dissolution

The court justified its refusal to consider the Capital Accounts when it found

that Dennis never disclosed these assets in the marriage dissolution. Or. Granting Mot. In Limine [Doc. 345], p. 4; *see also* Or. Regarding Pending Motions, [Doc. 365]. The court's ruling that Dennis was to be penalized in the partnership case for allegedly failing to disclose his partnership interests in the divorce is a true catch-22 situation. At the time of the divorce, both spouses were partners in OSR, both knew of potential partnership issues—indeed the partnership lawsuit was pending—both spouses agreed to separate the partnership assets from the divorce, and both waived any declaration of disclosure in their Property Settlement. Property Settlement, p. 2, Ex. 1.

In the divorce, the court approved this arrangement in its Decree, ordering that OSR's assets be handled in the partnership case. The court itself stated that the "parties agreed that division of Partnership assets would be handled in this case." Findings of Fact, Concl. of Law [Doc. 383], p. 2. Because of this, it is a legal error for the court to rule against Dennis for following the court's previous ruling.

iii. The Court's Estoppel Holding Does Not Allow It To Disregard the Agreement

The court also erred in holding that judicial estoppel prevents Dennis from claiming rights to his Capital Account pursuant to the Agreement. Or. Granting Def. First Mot. in Limine [Doc. 345], p. 6. Judicial estoppel does not apply here, and even if it did, nothing allows the Parties or the court to violate the plain language of the Agreement. Also, estoppel does not relieve the court from its

obligation to provide a full accounting to determine the partnership interests. *McCormick*, ¶ 49.

Judicial estoppel is when a party takes an inconsistent position in a subsequent proceeding. *McCormick,* ¶ 43. The elements of judicial estoppel are:

1. The estopped party must have knowledge of the facts at the time the original position is taken;
2. The party must have succeeded in maintaining the original position;
3. The position presently taken must be actually inconsistent with the original position; and
4. The original position must have misled the adverse party so that allowing the stopped party to change its position would injuriously affect the adverse party.

Fiedler v. Fiedler, 266 Mont. 133, 140, 879 P.2d 675, 679-680 (1994). Dennis has not taken an inconsistent position. Rather, since dismissal of his Complaint Dennis has first and foremost taken the position that the partnership is operating as the Agreement intends and there is no basis for its dissolution.

Importantly, judicial estoppel is only concerned with factual assertions made in a court proceeding. Judicial estoppel binds a party to his or her declarations in court and precludes a party from contradicting those declarations in a subsequent action or proceeding. *Traders State Bank v. Mann*, 258 Mont. 226, 242, 852 P.2d 604, 614 (1993); *see also Rowland v. Klies,* 223 Mont. 360, 368, 726 P.2d 310, 315 (1986). "[T]he rule of judicial estoppel does not apply to a change of position regarding matters of law, nor does it apply where the knowledge or means of

knowledge of both parties is equal." *DeMers v. Roncor, Inc*., 249 Mont. 176, 180, 814 P.2d 999, 1002 (1991); *Minervino v. Univ. of Mont*., 258 Mont. 493, 497, 853 P.2d 1242, 1245 (1993) ("estoppel theories -- both judicial and equitable -- rest on representations of fact.").

The question of what the plain language of the contract requires is a question of law and estoppel does not apply. *Ballou*, ¶ 15. This Court has held:

> [W]here a position taken in a judicial proceeding is found to be the expression of an opinion as to the law of a contract, and not a declaration or admission of a fact, a party is not estopped from subsequently taking a different position as to the true interpretation of the written instrument.

Demers, 249 Mont. at 181. Therefore, judicial estoppel does not apply to any change in Dennis' legal position on what the Agreement requires the court to do in resolving the issues between the partners.

Once the court ruled in favor of dissolution, Dennis was fully within his rights to make the legal argument that the Agreement requires the accounting of Capital Accounts prior to liquidation. Agreement, p. 26, Ex. 3; *McCormick*, ¶ 49. Dennis' legal arguments as to the legal requirements of the Agreement cannot be grounds for judicial estoppel. *Demers*, 249 Mont. at 181. Therefore, the court made an error of law when it applied judicial estoppel as a reason to disregard the requirements of the Agreement in winding up the partnership. *Id*, at 180.

In addition, judicial estoppel does not apply when "the knowledge or means

of knowledge of both parties is equal." *Id.* Here, all Parties were equally aware of the existence and terms of the Agreement when they signed it in 1997, when the partnership case began. Therefore, the court erred as a matter of law in applying judicial estoppel when the Parties' knowledge of the provisions of the Agreement was equal.

None of the elements of judicial estoppel are met here. Therefore, Dennis should not be precluded from arguing, either at the trial or appellate level, that the court has a legal duty to interpret and apply the Agreement.

iv. The Court Erred When It Refused to Hear Evidence Regarding the Partners' Capital Contributions

Dennis was improperly denied the full opportunity to argue that the determination of the Capital Accounts should be the first order of business, once the court determined to dissolve OSR over Dennis' objection. The record clearly shows that Dennis tried to steer the court in the correct direction numerous times over several years but was refused at every turn.

The court first ordered the dissolution of the partnership on summary judgment in November 2016. Dennis then filed a Rule 60(b) Motion on February 6, 2017, expressing concern that the Agreement was not being followed, including Article 10.2 concerning distribution. *See* Br. in Supp. of Mot. for Relief [Doc. 181]. The court reheard the issue of whether to dissolve the partnership in an evidentiary hearing on October 1, 2018. The court issued a revised Findings of

Fact and Conclusions of Law, again holding that the partnership should be dissolved, on January 23, 2019. Findings of Fact, Concl. Of Law [Doc. 265].

Significantly, in the interim, at Sharon's request the court had appointed and instructed the first special master but failed to direct him to follow Section 10.2 of the Agreement. *See* Or. Appointing Special Master [Doc. 190]. As discussed *supra*, Dennis again tried to raise the Agreement's requirement to first determine and reimburse the Capital Accounts during the June 20, 2018 Rule 53 hearing; this also was to no avail. On June 10, 2019, Dennis moved to reopen discovery to inquire about the Parties' capital contributions as required by the Agreement. *See* Pl. Resp. to Mot. For Protective Or. & Mot. To Reopen Disc. [Doc. 270]. However, the court denied that Motion and then, on March 26, 2020, granted an opposed Motion in Limine precluding Dennis from ever introducing evidence on the Capital Accounts. *See* Or. Granting Def. First Mot. In Limine [Doc. 345]. On October 29, 2021, at the second Rule 53 hearing, the court ruled again that Dennis could not raise issues related to the Capital Accounts. Decision and Or. Re: Def. Mot. in Limine, [Doc. 469], p. 3.

Finally, at trial Dennis' counsel made an offer of proof after the court ruled against hearing evidence regarding the amount of the Capital Accounts for the third time. "I believe that if I would have been able to ask Dennis and Sharon, Jim Winchell and Laura Turner questions under oath, their responses would have

provided proof that only Dennis made capital contributions to the partnership." Tr. 354:11-13, September 1-2, 2020 . Counsel also argued that because the precluded evidence would show that Dennis was the only capital contributor, application of the Agreement would have substantially changed the court's distribution of OSR's property. *Id*, 355-356. Dennis' attorney also made an offer of proof that if Dennis had been allowed to call Laura Turner as a witness, Turner would have testified that she had failed to read or comply with the Agreement when doing the OSR's taxes and further that Dennis never asked her to allocate the Capital Account 50/50 between Dennis and Sharon. *Id*, 356:1-11.

While a district court's evidentiary rulings are discretionary, if the evidentiary ruling is based on a conclusion of law, then this Court's review is plenary. *Jacobsen*, ¶ 26. Here, the court's refusal to hear evidence on capital contributions was based on a legal conclusion that Dennis was judicially estopped from introducing evidence on his capital contributions. However, as discussed *supra*, judicial estoppel does not apply. No evidence could be more relevant to the proper accounting and winding up of the partnership; without it, the court could not (and did not) comply with Montana law and the Agreement.

The court erred in refusing to allow Dennis to present evidence regarding the Capital Accounts. This is a clear legal error which requires reversing the court's Orders and remanding this manner back to the district court.

2. The Court Erred in Appointing Sharon's Experts, Real Estate Appraisers Without Training or Experience in Accounting, and Who Had Been Retained by Sharon, as Special Masters.

Wicks was the first special master in this case. Originally, Wicks served to provide valuation of the land that Dennis had transferred to OSR. Tr. 375:10-21, June 20-22, 2018. In the case at bar, Sharon and the children named Wicks as their expert witness. *See* Expert Witness Disclosure [Doc. 121]. Then one day later, Sharon moved for appointment of Wicks as special master to recommend an in-kind distribution. *See* Mot. To Appoint Wicks as Special Master [Doc. 120]. Even though Wicks had been on Sharon's payroll as an expert, the court appointed Wicks as the special master. *See* Or. Granting Mot. To Appoint Wicks [Doc. 161]. Later, the Court appointed J. Scott Crosby, who also worked for Sharon as an associate in Wick's office, as a second special master to update Wicks' prior work. *See* Or. Appointing Special Master [Doc. 385].

Both appointees are appraisers, not accountants. Neither has the requisite professional skills to do an accounting and determine the Capital Accounts, as required in the Agreement. In *McCormick,* by contrast, the court appointed a CPA as a special master to do an accounting and determine the partners' capital contributions. *McCormick,* ¶ 55. The court in that case ordered the special master to determine what personal property was or was not obtained and maintained by partnership assets and what could be considered individual property. *Id*. Further,

the court ordered the special master to "conduct necessary hearings with all necessary parties and their attorneys as may be practicable," and to "review the necessary law and thereafter render a report." *Id*. The special master held hearings with the parties, their attorneys and accountants before issuing a report for the court. *Id*.

In this case, the court did not direct the special masters to determine the capital contributions of the partners, even though the Agreement clearly required this be done before any division of assets occurred. Agreement, p. 26, Ex. 3. (Clearly, they could not have performed such a task even if it had been assigned, their expertise being only in valuation of property rather than forensic accounting). Instead, the court ordered the appraiser special masters only to determine whether it was practicable to divide the ranches into two properties its previously determined percentages. Or. Appointing Special Master [Doc. 190], p. 2. The court also asked the special master to value and propose distribution of the partnership's personal property. *Id*. The court never asked for an accounting or a determination of the Partners' Capital Accounts. *Id*.

Similar to Wicks, Crosby also did not review the Agreement. Tr. 551:25; 552:1-2, November 23, 2021. Crosby testified that he did not consider the tax consequences of his suggested distribution of assets. *Id,* 569:18-25. He also testified that he had never served as a special master prior to this case. *Id,* 549:16-

17.

Dennis provided expert guidance to the court on the proper role and process to be followed here. In contrast to Crosby, Dennis' expert, George Luther, who has been a special master before and helped split up properties in the past, said he would have reviewed the Agreement. *Id,* 584:13-21; 589:1-5. He said the Agreement addressed the question of how to split the assets. *Id,* 590:2-4. Similarly, the only CPA to testify multiple times in this case, Winchell, testified that the Agreement upon dissolution called for splitting property according to Capital Accounts. Tr. 201:8-10, October 24, 2017. He also testified that the Agreement called for the capital contributions to be returned first, before any other allocation of assets upon dissolution. *Id*, 209:5-6.

In *McCormick,* the court eventually did appoint a real estate appraiser to assist; significantly, that occurred only after the CPA special master held hearings and followed the correct process to determine the partners' capital accounts. *McCormick,* ¶ 30. That is what the Agreement required here, too, but the court ignored both the Agreement and the precedent set by *McCormick*.

Dennis unsuccessfully objected to the appointment of both special masters. Dennis argued that Wicks was not suitable to serve and had a conflict of interest because he had been disclosed as Sharon's expert witness. *See* Resp. Br. in Opp. to Mot. to Appoint Wicks [Doc. 127]. Dennis also objected to the court's Order

directing the special master to allocate the partnership assets with percentages instead of following the Agreement. Resp. to Or. Appointing Special Master [Doc. 190], p. 2.

When Wicks issued his report, Dennis objected to it for multiple reasons, including the failure to determine what property was owned by OSR and what property still belonged to Dennis or Sharon individually. Reply Br. Re: Obj. to Master's Report [Doc. 235], pp. 9-11. Further, Dennis argued that Wicks failed to determine Dennis' claimed offsets. *Id,* p. 7.

When the court later appointed Crosby as a special master, Dennis again objected. "Dennis objects to the Appointment of J. Scott Crosby for lack of qualification to carry out the Court's reference per M.R.Civ.P. 53(b)(1)(B) and as having a conflict of interest." Obj. to Appointment of Crosby [Doc. 387], p. 2. For the second time, the court appointed a real estate appraiser to serve as a special master.

The court also repeated its mistake in appointing a special master who lacked the accounting skills made necessary by the express terms of the Agreement. "Even if a special master were appropriate for this purpose, Crosby is not a qualified Special Master to give accurate appraisals for all of the partnership assets . . . Rule 53 is not supposed to be used as a means for the Court to assign its own experts to a case," Dennis argued. *Id*, p. 4. Further, Dennis argued that the

special master is supposed to have expertise to hear evidence and develop a report. *Id*. Lastly, Dennis argued that Crosby was not qualified even for some of the valuations the court ordered him to provide. *Id*, p. 8. Despite the fact that Crosby was not a CPA, like the special master in *McCormick,* the court in this case appointed Crosby, dooming him to failure. Or. Denying Obj. to Appointment [Doc. 391], p. 3. Also, the court did not direct Crosby to hold a hearing, which Dennis argued was also a violation of Rule 53. *See* Or. Appointing Special Master [Doc. 385].

Based on the plain reading of the Agreement and *McCormick*, the court erred in its appointments of appraisers as special masters because neither was qualified to review and implement the Agreement, including the determination of the Partners' Capital Accounts which the Agreement mandated. The court's directions to the special masters further derailed the process, perhaps recognizing the inability of the special masters to do that accounting. The court's directions ignored the initial requirement of determination of the Capital Accounts, simply decreeing percentages of interest, and restricting the special masters to what should have been a final step of the process.

The conflicts of interest of the special masters are a separate basis of error. Even if they had been qualified, both Wicks and Crosby were tainted by their prior employment by Sharon. Wicks was listed by Sharon as an expert witness against

Dennis. This created a clear conflict of interest which Dennis did not waive and expressly asserted in his objection to the appointment. The same is true for Crosby, who had served as an associate in Wicks' office during the expert witness tenure. The court should have appointed an appraiser with no prior affiliation with one of the adverse Parties.

3. **The Court Erred When It Determined the Partnership Interest Percentage on Summary Judgment in the Face of Genuinely Disputed Material Facts**

The court also violated the Montana Rules of Civil Procedure by deciding the respective partnership interests of the Parties on a summary judgment Motion. *See* Or. Granting Mot. For Partial Summary Judgment [Doc. 159]. Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Lee v. Great Divide Ins. Co.,* 2008 MT 80, ¶ 10, 342 Mont. 147, 182 P.3d 41 (*citing* M.R.Civ.P. 56(c)). "A material fact is a fact that involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact." *Schweitzer v. City of Whitefish*, 2016 MT 254, ¶ 9, 385 Mont. 142, 383 P.3d 735. Summary judgment is an extreme remedy that should not substitute for a trial on the merits; thus, the court must draw all reasonable evidentiary inferences in favor of the nonmoving

party. *Jobe,* ¶ 10. Therefore, if a factual controversy exists, summary judgment is improper, and a trial is necessary. *Id*; *Mont. Metal Bldgs. v. Shapiro*, 283 Mont. 471, 474, 942 P.2d 694, 696 (1997).

In the case at bar, the Court's own Order stated that the issue of percentages of partnership were in dispute. In that Order, the court stated Dennis and Sharon disagree on whether and how much the children had been gifted. Or. Granting Mot. For Partial Summary Judgment [Doc. 159], pp. 4-5. Note, Defendants' Motion for summary judgment was focused on whether Sharon and Dennis had gifted partnership interests to the children. *See* Br. in Supp. of Def. Mot. for Partial Summary Judgment [Doc. 118]. There was no summary judgment motion filed requesting the court determine the partnership interests for allocation of assets per a judicial dissolution.

The fact that the Parties disputed the facts necessary to ascertain their partnership interests itself demonstrates the necessity of a trial on this issue. It was improper for the court to determine this issue based on summary judgment and disputed facts. *Jobe*, ¶ 10; *Mont. Metal Bldgs*, 283 Mont. at 474.

4. The Court Erred In Ruling that All the Equipment, Art, and Cash Belonged to the Partnership

Dennis objected to the original Special Master's Report dated January 5, 2018 and provided evidence that he personally had purchased property prior to OSR being activated in 2011. *See* Obj. to Special Master's Report [Doc. 231].

Specifically, Dennis stated, "Dennis objects to the Wicks Report as equipment never belonging to the partnership has been treated as partnership property, which was purchased prior to 2011 by Dennis. . ." *Id*, p. 9.

The special master's reports allocated to Dennis equipment and tools that already belonged to him personally, and that he had not transferred to OSR. More specifically, the Crosby report allocated $625,000 worth of equipment to Dennis, which effectively deleted $625,000 worth of real property or cash from Dennis' side of the distribution. Special Masters Report [Doc. 433], p. 2. Early in the process, Wicks said he assumed that all the equipment was owned by OSR. Rule. Tr., 47:22-23, June 20-22, 2018. He also testified that he never looked at the titles to the equipment to determine ownership. *Id*, 48:15. Wicks further testified that if the property is not owned by OSR, his calculations are wrong. *Id*, 50:2.

During that hearing, Dennis testified that the equipment was old and that the numbers used to assign many of the values was the original acquisition cost. *Id*, 260:2-3. Dennis further testified that much of the equipment belonged to him personally and was not owned by OSR. *Id*, 260-276. There was no contradictory testimony provided.

In *McCormick*, this Court interpreted the governing statute to provide that partnership property is either property acquired by the partnership or property that is transferred to the partnership. *McCormick,* ¶ 68. The Court held that cattle were

not partnership assets because those cattle were not purchased with partnership assets. *Id*, ¶ 69.

Here, instead of following *McCormick*, and delving into the origin and subsequent history of the personal property, the court made no findings on whether the equipment had been purchased or transferred to OSR, or by whom. *See* Findings of Fact & Concl. Of Law Re: Rule 53 [Doc. 344]. The court simply found, without actual supporting evidence, that all the equipment belonged to OSR and upheld the special master "giving" all the equipment to Dennis and then cutting his receipt of other assets by that amount. *Id.* In making this determination without any evidence as to how or from whom OSR had acquired the equipment, the court erred. This error caused Dennis to lose $625,000 in the allocation and is grounds for reversal and remand.

5. The Partnership is Operating as Intended and the Court Violated the Agreement When it Ordered Dissolution of the Partnership

The Agreement provides the purposes of OSR are to "consolidate the management of certain of the real and personal property of the McDonald Family." Agreement, p. 4, Ex. 3. Further, the Agreement provides the purposes are to:

- Avoid the division of certain of the property. . . ;
- Avoid potential expensive litigation by providing a means of resolving disputes. . . , and;
- Restrict[] the transfer of Partnership Interests to non-family members.

Id. During the October 2018 hearing, the Parties agreed that the Partnership was

created to pass on assets to the children without incurring unnecessary tax consequences. Tr. 175:18-25, October 1, 2018. There was no contravening evidence provided at the hearing. Dissolution of OSR directly contravenes this purpose.

From the beginning of this long ordeal, Dennis has strived to keep the partnership intact specifically to increase the assets passed on to the children and to do so with minimum adverse tax consequences. At the second Rule 53 hearing, the Court was presented evidence that since Dennis took over managing the day-to-day operations of OSR, the ranch's real estate value has increased $8,508 to $1,035,662.81, doubled the livestock value with the improved real estate now worth nearly $21 million. Admitted Exhibit B, OSR Appraisal [Doc. 434]. These facts, in conjunction with Sharon and the children's abandonment of the ranch after draining the OSR bank account from $183,148.48 to $8,508, demonstrate that the continued existence of the limited partnership is the best way to fulfill its objectives. Tr. 292:4-25; 294:1-5, June 20-22. However, early on and without any hearing, the court found that "it is clear that the Ranch Partnership must be dissolved." Or. Granting Mot. to Appoint Wicks [Doc. 161], p.3.

The court further erred, inexplicably, when it stated that the Agreement allows two possibilities: "1) all assets of the partnership are liquidated and the proceeds divided according to the partnership percentages; or 2) an in kind

distribution of the partnership assets." *Id*. This holding is in direct contradiction to the Agreement. Agreement, p. 26, Ex. 3. The Agreement does not provide for liquidation of assets, and specifically provides that accounting of the Partners' Capital Accounts must precede any other step, including in-kind distribution of assets. *Id*.

In an effort to evade the clear terms of the Agreement, Sharon and the children may argue that Dennis waived the Agreement. Again, the terms of the Agreement govern and are explicit: there can be no waiver, except in writing "signed by the party to be charged with such modifications, termination, or waiver." *Id,* p. 31. There is no written document waiving any of terms of the Agreement. The Agreement stands. The Parties agreed to its terms when they signed it, as was their right to enter into binding contracts. The fact that some of them may now wish to change or ignore its terms, or that the court may wish that it had dealt with the partnership in its marital dissolution applying divorce principles, do not change the law or the facts.

The court had a duty to read, interpret, and follow the Agreement. The court failed on multiple grounds regarding this duty, including the finding that the partnership could not practicably continue on managing property by following the express plain language of the Agreement.

This Court should reverse the district court's finding that it was not

reasonably practicable to carry on the activities of OSR as well as its Order that OSR should be dissolved.

CONCLUSION

The court erred when it failed to follow the plain language of the Agreement. Further, the court erred when it *sue sponte* decided an issue on summary judgment when the court itself stated there were disputed material facts.

Based on the foregoing, Dennis respectfully requests the Court overturn the district court's holding to dissolve OSR. If the Court does not overturn, then Dennis respectfully requests that the Court remand this case back to the district court with specific instructions to follow the plain language of the Agreement in conducting the judicial dissolution. These instructions should include appointment of a special master who is qualified in the accounting necessary to understand and apply the Agreement, beginning with accounting for the partners' Capital Accounts, and who is not previously affiliated with any of the Parties.

DATED this 8th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word calculated by Microsoft Word, is not more than 10,000 words, excluding the table of contents, table of citations and certificate of compliance.

DATED this 8th day of July, 2022.

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CERTIFICATE OF SERVICE

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