IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 22-0206

IN THE MATTER OF THE ESTATE OF GERRY WILLIAMS, same person as GERALD MARCUS WILLIAMS, same person as GERRY M. WILLIAMS,

Deceased.

On Appeal from the Seventeenth Judicial District
Phillips County, Cause No. DP-2020-18, Honorable Yvonne Laird

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APPELLEES' RESPONSE BRIEF

Oliver J. Urick
URICK LAW FIRM, PLLC
224 W. Main St., Ste 305
Lewistown, MT 59457
Telephone: (406) 538-3181
ourick@uricklawfirm.com

John R. Christensen
Joseph L. Breitenbach
CHRISTENSEN FULTON & FILZ, PLLC
19 36th St. West, Suite 3
Billings, MT 59102
Telephone: (406) 248-3100
christensen@cfflawfirm.net
jlb@cfflawfirm.net

Attorneys for Appellees Lorri Williams and Williams Land and Cattle Company

William M. Solem
BURNS SOLEM & MACKENZIE
P.O. Box 248
Chinook, MT 59523
Telephone: (406) 357-2217
william@cpalaw-chinook.com

Rachel H. Parkin, Esq.
MILODRAGOVICH, DALE & STEINBRENNER, P.C.
P.O. Box 4947
Missoula, MT 59806-4947
Telephone: (406) 728-1455
rparkin@bigskylawyers.com

Dylan McFarland, Esq.
KNIGHT NICASTRO MACKAY, LLC
283 W. Front Street, Suite 203
Missoula, MT 59802
Telephone: (816) 396-0161
mcfarland@kightnicastro.com

Attorneys for Appellant Vicki Hofeldt

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Did the District Court correctly determine the *Marital Property Settlement Agreement* was submitted to the Court as a testamentary instrument over which the District Court, sitting in probate, had jurisdiction?

2) Did the District Court correctly conclude the *Marital Property Settlement Agreement* was a binding judgment and contract the Personal Representative was obligated to follow?

3) Did the District Court correctly rule that Vicki Hofeldt was not acting in the best interests of the Estate and other heirs, and her conflict of interest could only be cured by her removal as Personal Representative?

4) Was the District Court correct to only allow Vicki Hofeldt to use estate funds to pay attorney's fees associated with filing the opening documents?

II. STATEMENT OF THE CASE

This case stands before the Court for one simple reason: the Personal Representative ("PR") chose to advance her own interests instead of acting in the Estate's best interest. Gerry Williams ("GERRY") passed away on September 7th, 2020 at the age of 60. Gerry's *Last Will and Testament* devised everything to Lorri Williams ("LORRI"), his wife at the time, and names her as PR. Gerry left behind two adult children, Vicki Hofeldt ("VICKI") and Brittany Bratlien ("BRITTANY").

Just over one month prior to his passing, on July 31st, 2020, Gerry and Lorri

divorced after 42 years. Gerry left behind a sizeable estate, which includes substantial real property interests in Phillips County that he co-owned with Lorri. In finalizing the divorce, Gerry and Lorri executed a *Marital Property Settlement Agreement* ("*MPSA*"). The *MPSA* contemplates the distribution of all Gerry and Lorri's assets in a fair and equitable manner, and more importantly, exactly as they wanted. Gerry and Lorri wanted each other to receive the majority of the marital assets upon the death of the other.

Gerry passed away while on vacation with Lorri in Salmon, Idaho. Without giving any notice to Lorri, Vicki applied informally to Phillips County District Court to be appointed as PR on October 21st, 2020. The *Will* was admitted into probate with the *Findings of Fact, Conclusions of Law, and Entry of Decree of Dissolution ("Decree of Dissolution")* and *MPSA* attached. Lorri was not identified as an interested person or heir in the *Application for Informal Probate of Will*, nor as a devisee in the *Notice and Information to Heirs and Devisees*.

On February 19th, 2021, Lorri filed a *Petition for Formal Probate* whereby the *MPSA* was submitted to the Court as a testamentary instrument to be probated in tandem with the *Will*, and a hearing was set. Prior to the hearing, Lorri also filed a *Petition for Removal of Personal Representative and Appointment of Special Administrator*. After briefing on both Petitions but prior to the hearing, Vicki countered by filing a *Complaint and Request for Declaratory Judgment* in Hill

County District Court, asking the Court to interpret the *MPSA* in favor of Vicki.

The Phillips County District Court granted both of Lorri's petitions from the bench following the October 27th, 2021 hearing. In the Court's *Findings of Fact, Conclusions of Law, and Order Granting Lorri William's Petition for Removal of Personal Representative and Appointment of Special Administrator,* Judge Laird correctly asserted jurisdiction over the *MPSA*, determined that the *MPSA* must be probated in tandem with the *Will*, and its terms followed as a judgment binding on Gerry's PR. Judge Laird also correctly determined Vicki was not performing her duties as PR, had a conflict of interest, and should be removed. Judge Laird determined Vicki was only entitled to use Estate funds to pay those fees and costs related to filing the opening estate documents. Additionally, the Court appointed Bruce Bekkedahl as the Special Administrator.

III. STATEMENT OF FACTS

A. Gerry's and Lorri's 41 Years of Marriage.

Gerry and Lorri Williams married on December 22nd, 1978, and remained married nearly 42 years, working together to build a valuable ranch in Phillips County, the majority of which they owned jointly as tenants in common, with a small portion held in an Estate for years held by Williams Land & Cattle Co. ("WLCC"). (Tr. 53:3; Appx. A.) To put the value of the ranch in perspective, Lorri and Gerry had an offer to sell the land for $10 million in 2001. (Tr. 68:15-21) Along with the

real property, Lorri and Gerry acquired extensive equipment held by the corporation, financial assets, and a house in Lewistown. *First Amended Inventory & Appraisement*. (Appx. B.) Gerry and Lorri divorced on July 31st, 2020. See *Decree of Dissolution*; (C.R. 40 at Ex. D.) Both Gerry and Lorri continued to live together after the divorce and were together 25 of 31 days that August. (Tr. 54:5-14; 70:17-25.) The two were on a vacation in Idaho together when Gerry passed on September 7th, 2020. (C.R. 40 at Ex. A.); (Tr. 54:15-23.)

After the divorce, Gerry and Lorri met with Mark Handley to discuss building a house together. (Tr. 55:10-25 & 91:22-25.) Mr. Handley perceived the two of them to still be married. (TR. 8:15-21.) Although they divorced on paper, Gerry and Lorri still very much loved each other. (Tr. 53:14-21)

B. The Divorce.

Gerry and Lorri divorced a little more than one month prior to Gerry's passing. (C.R. 40 at Ex. D.) Prior to commencing divorce proceedings, Lorri met with one female attorney in Great Falls. (Tr. 99:19-25; 100:1-7.) Then, after discussion with Gerry, they decided Lorri would use Brad Dugdale's firm, Bosch, Kuhr, Dugdale & Brown, in order to save money. (Tr. 100:9-19; 53:6-12; 144:13-14.) Gerry and Lorri had used Dugdale as their attorney since 1984, so they were comfortable with his firm. (Tr. 93:9-10; 100-9-19) Dugdale didn't handle divorces, so he suggested Jamie Vines in his office to handle it. (*Id.*) Jamie made it clear that she represented Lorri

in the divorce proceedings and not Gerry. (Tr. 30:4-13) Gerry was informed of his right to seek independent counsel, and he refused to do so, instead signing a Waiver of Conflict on March 22nd, 2020. (Tr.31:13-17; Hrg. Ex. 2.) The Waiver stated:

> I write to seek your written, informed consent allowing Bosch, Kuhr, Dugdale, Martin & Kaze, PLLP to represent Lorri Williams in connection with the dissolution of your marriage. As you will recall, we represented you in connection with your estate planning and corporation matters. Your interests are considered directly adverse to Lorri's interests in the dissolution action.

(*Id.*, emphasis added.) Although Ms. Vines was working under the premise she represented just Lorri, she met with both Lorri and Gerry multiple times, and worked "extensively" to determine what both wanted. (Tr. 30:5-8; 33:6-14.) Gerry was very much aware of what was going on and was asking appropriate questions about the process. (Tr. 36:3-8.)

C. The Marital Property Settlement Agreement.

On July 24th, 2020, Gerry and Lorri executed the *MPSA* under each party's own free will, and with both parties having full mental capacity. *See MPSA at ¶19.* Gerry and Lorri agreed the *MPSA* would be an enforceable judgment. (Appx. B, *MPSA* at ¶2.) The *MPSA* was adopted in full by the *Decree of Dissolution*, and is "binding upon the heirs, devisees, personal representatives, successors and assigns of the parties." (Id. at ¶ 23.) The *MPSA* was a "full and final settlement of all property and maintenance rights between the parties" and the terms "shall be final and binding

and may not be modified or revoked by the Court or any other authority." (*Id.* at ¶ 20; emphasis added.)

Ms. Vines used the information provided by both Gerry and Lorri to draft the *MPSA* in a way that both deemed fair and equitable. (Tr. 33:6-14.) Gerry wanted the property to go to Lorri in the event something happened to him. (Tr. 27:17-25.) Ms. Vines testified that Gerry said his daughters had been provided plenty to sustain them through their lives and that on Lorri's death they could receive the balance of the property. (*Id*.) Gerry actually wanted Lorri to take more of the cash assets than she got, but Lorri thought it needed to be split equally. (Tr. 47:20-25; 48:1-5.) Attorney Vines witnessed Lorri instructing Gerry to keep more property than he wanted to keep. (Tr. 47:5-12.)

1. Real Property

To effectively accomplish Gerry and Lorri's goal of ensuring the survivor got the other's property, the parties agreed in the *MPSA* to put all real property into joint tenancy with rights of survivorship:

> . . . each party agrees to execute documents or deeds sufficient to ensure that joint tenancy with rights of survivorship continue on each and every piece of real property which is jointly owned as of the date of dissolution in this matter.

See *MPSA at ¶ 5.* The intent was to capture all property, both property they held in joint tenancy already and property they held as tenants in common. (Tr. 17:2-11; 18:1-4.) Gerry and Lorri also own a piece of real property over which WLCC holds

an Estate for Years that is to expire on October 31st, 2024, and the two had the foresight to put that property into joint tenancy when it came out of the Estate for Years. They agreed to execute deeds to properly transfer that Estate for Years property into joint tenancy with rights of survivorship when it came out. (Id. at ¶ 8; Tr. 26:2-8.)

The deeds to effectuate the transfer of the real property into joint tenancy with right of survivorship were not ready to be signed when the divorce was finalized. (Tr. 27:19-23.) Ms. Vines office contacted Gerry and Lorri about signing the deeds the day they left together for their Idaho vacation. (Tr. 26:1-10.) Gerry and Lorri decided they would sign the deeds when they returned. (Tr. 55:1-9; 56:9-19.)

2. Williams Land & Cattle Co.

Gerry and Lorri remained the sole shareholders in WLCC throughout their marriage. Within the *MPSA*, Gerry and Lorri wanted to ensure the shares in WLCC remained owned by them after the divorce, and if one of them became deceased, those shares would pass to the survivor. When the *MPSA* was drafted, attorney Vines committed a scrivener's error. The *MPSA* states in pertinent part "upon one parties [*sic*] death, the other party's shares shall be ceded to the corporation, without payment, immediately upon death." *See MPSA* at ¶ 7. If the language as written is followed literally, upon a party's death, the survivor would cede their shares to the corporation, meaning the first deceased party's estate would own all shares in

WLCC. Ms. Vines confirmed in her testimony this was in fact an error, and it actually should read the deceased party's shares would cede to the corporation. (Tr. 23:1-17; emphasis added.) It was their intent the survivor be the sole shareholder upon the first party's death. (*Id.*)

3. Lease with Hofeldts

On January 21st, 2015, Gerry and Lorri executed a *Lease Agreement With Option to Purchase* ("LEASE") with their daughter Vicki and her husband Dustin Hofeldt ("HOFELDTS"). (Appx. C.) The Lease agreement covered all real property owned by Gerry and Lorri as well as the property WLCC held the Estate for Years over. (*Id.*) Hofeldts' payments are $150,000.00, payable 60% to Gerry and Lorri and 40% to WLCC. (*Id*. at ¶ 2.) After the Estate for Years expires on October 31st, 2024, the payments go 100% to Gerry and Lorri. (*Id.*) The *Lease* contains an Option to Purchase the property for $5,000,000. (*Id*. at ¶¶ 23-28.) Gerry wanted to sell it to them for $6,500,000, but Lorri felt they needed to give Hofeldts a "better deal." (Tr. 67:22-25; 68:1-3.)

In the *MPSA*, the *Lease* proceeds are to be split 40% ($60,000) to WLCC, and the other 60% ($90,000) split equally between Gerry and Lorri. (*Id.* at ¶4.) Lorri is now the sole shareholder of WLCC pursuant to the *MPSA*, and is entitled to WLCC's $60,000 share. (*See MPSA* at ¶7*;* Hrg. Ex's. G & H.) Pursuant to the terms of the *MPSA*, Lorri will become the sole owner of all real property, and as the successor to

Gerry's interest, will likewise be the successor to Gerry's share of the *Lease* payment. Ms. Vines testified that Gerry wanted Lorri to get the entire lease payment. (Tr. 47:8-12.)

4. Remaining Assets

Aside from the ranch real property, WLCC shares, and lease payments being split equally, Gerry and Lorri essentially split financial and personal assets equally. Paragraph 3 of the MPSA provides (inter alia) that each party would keep their own personal property, bank accounts, investment accounts, retirement accounts and life insurance. (See *MPSA* at ¶ 3.) Lorri got a bank account at Bank of Harlem. Gerry got a bank account at First State Bank of Malta. They split the other account and split the Personal Certificate. Gerry got more equipment and the boat. (*Id.*) Vicki argues that Lorri got more than Gerry based on one item, the house in Lewistown that Lorri received. (See *MPSA* at ¶ 3(e)(i); Appellant's Br., III(D).) However, Gerry received mineral rights in Phillips County which Lorri did not. (*Id.*)

D. The Probate.

Gerry's *Will* was dated October 18th, 2001. (C.R. 3.) Vicki applied to be appointed PR on October 21st, 2020 in an *Application for Informal Probate* ("APPLICATION") in Phillips County. (*C.R. 1*) The *Decree of Dissolution* along with the *MPSA* were attached to the *Application*. (*Id.*) The Court appointed Vicki and admitted the *Will* into probate in its *Order of Informal Probate of Will and*

Appointment of Estate Representative dated October 21st, 2020 and issued Letters to Vicki. (*C.R. 2; C.R. 4*)

Lorri called Vicki on October 20th, 2020 to ask about the probate and being Personal Representative. (Tr. 75:23-24.) Vicki told Lorri that there were no plans as her attorney, William "Bill" Solem's partner died, and he was too busy. (*Id*.) Vicki filed the *Application* the very next day. (C.R. 1.) Lorri was not identified as a devisee or interested person in the *Application* or *Notice and Information to Heirs and Devisees.* (C.R. 5.)

Furthermore, Lorri paid all funeral expenses and related costs of death for Gerry. (C.R. 6.) Vicki was aware that Lorri paid these expenses. Lorri filed a Creditor Claim in the probate on February 12th, 2020. (C.R. 13.) The Creditor Claim was not denied.

1. Petition For Formal Probate of *MPSA*

Vicki refused to follow the terms of the *MPSA* aside from using it to cash out the bank account at First State Bank of Malta Gerry was entitled to receive thereunder. Lorri, on behalf of herself and WLCC, filed a *Petition for Formal Probate* on February 19th, 2021. (C.R. 14.) In that Petition, Lorri submitted the *MPSA* to the Court as a testamentary instrument to be probated in a formal testacy procedure in tandem with the *Will* pursuant to MCA § 72-3-314. (*Id., emphasis added.*) Lorri also requested that the Court order the informal probate to be put on

hold, and Vicki, as the PR, be restrained from making any further distributions during the pendency of the formal proceeding. (*Id.*) The Court granted the *Petition for Formal Probate* and set a scheduling order. (C.R. 17.)

2. Personal Representative's Response & Hill County Declaratory Action.

On July 16th, 2021, the PR filed her *Response to Petition for Formal Probate*. (C.R. 40.) She simultaneously filed a *Complaint & Request for Declaratory Relief* in Hill County under Cause No. DV-21-73 ("HILL COUNTY CASE"). In her Complaint, Vicki asked the Hill County District Court to interpret the *MPSA* in her favor, to declare the real property held as tenants in common between Lorri and the Estate instead of joint tenancy, and to disregard attorney Vine's testimony and read the provision related to the WLCC shares literally, thereby forcing Lorri to cede her shares back to the corporation, thus allowing the Estate to become the sole shareholder of WLCC. (*Id.*) She also asked the Court to split the *Lease* payment, so the Estate would get ½ of the payments going to WLCC and all of Gerry's interest in the payments. (*Id.*)

3. Lorri's Petition for Removal of Vicki as Personal Representative

Lorri filed an *Answer* in the Hill County Case and a *Motion to Transfer Venue* requesting the Hill County Case be transferred to Phillips County where venue is proper. Simultaneously, Lorri filed a *Petition for Removal of Personal Representative and for Appointment of a Special Administrator* in the Phillips

County formal probate case. (C.R. 65.) Lorri asserted six counts which supported the removal of Vicki as PR, including: 1) misrepresentations of law that the Will was not revoked or superseded in part by the *MPSA*; 2) intentionally failing to provide notice to Lorri as an interested party regarding the informal probate proceedings; 3) acting solely out of her own interests and not the best interests of the Estate; 4) not performing her duties as PR with ordinary skill and prudence; 5) failing to provide notice to a known creditor; and 6) failing to provide a signed and completed Inventory & Appraisement as required by MCA § 72-3-610.

4. Court's Decision

The Phillips County District Court held a hearing on October 27th, 2021 on both of Lorri's *Petitions*. At the conclusion of the hearing, the Court ruling from the bench granted both. (Tr.156:5-17.) Judge Laird ruled 1) the *MPSA* is a judgement that the PR is obligated to stand in Decedent's shoes and enforce; 2) Vicki stood to gain too much and had too big a conflict to remain the PR; 3) a Special Administrator should be appointed; and 4) the Special Administrator would determine if the Hill County Case was appropriate, and if any action needed to be taken against Vicki to recover estate funds. (Tr. 156:9-25; 157:1-16.)

On March 24th, 2022, the Phillips County District Court issued its *Findings of Fact, Conclusions of Law, and Order of Formal Probate, Order Removing Personal Representative, and Order Appointing Special Administrator*. (C.R. 91.) The Court

recognized it had jurisdiction over the *MPSA* within the probate action (*Id*. at C.O.L. ¶ 3)[1]; that the *MPSA* was a binding and governing instrument that became a valid judgment upon the issuance of the *Decree of Dissolution* (*Id.* at ¶10); and that Gerry and Lorri intended the WLCC shares of a deceased shareholder to be ceded to the corporation, thereby making the surviving shareholder the sole shareholder. (*Id.* at F.O.F. ¶ 30.)[2]

The Court further held Vicki failed to separate her personal desires from her fiduciary duties (*Id.* at ¶ 34); and Vicki failed to provide Lorri with proper notice as required by statute, resulting in Vicki's removal as PR for cause. (*Id. at C.O.L. p. 8*) The Court stated Vicki was not to receive any fees beyond those necessary to file the opening documents, and any further expense reimbursement would have to be approved by the Special Administrator. (*Id.; emphasis added*) Bruce O. Bekkedahl of Patten, Peterman, Bekkedahl & Green, PLLC was appointed as the Special Administrator. (*Id.* at p. 9; C.R. 88.)

IV. STANDARD OF REVIEW

A court's determination as to its jurisdiction is a conclusion of law, which is reviewed de novo to determine whether the court's interpretation of the law is correct. *Bunch v. Lancair Int'l, Inc.,* 2009 MT 29, ¶ 15, 349 Mont. 144, 202 P.3d

[1] C.O.L. is the abbreviated version of "Conclusions of Law."
[2] F.O.F. is the abbreviated version of "Findings of Fact."

784. The applicable standard of review for a trial court's removal of a personal representative is whether the District Court has abused its discretion. *In re Estate of Boland*, 2019 MT 236, ¶ 55, 397 Mont. 319, 450 P.3d 849. Whether a party is entitled to recover attorneys' fees is a question of law. *Houden v. Todd,* 2014 MT 113, ¶ 19, 375 Mont. 1, 324 P.3d 1157. This Court reviews a District Court's conclusions of law pertaining to the recovery of attorney fees to determine whether those conclusions are correct. *Id.* The review of fees paid or taken by a personal representative is left to the sound discretion of the District Court. *In re Estate of Stone*, 236 Mont. 1, 4, 768 P.2d 334, 336 (1989). This Court will not overturn that decision absent a showing of abuse of discretion, and the court's findings of fact will be upheld unless clearly erroneous. *Id.*

V. SUMMARY OF ARGUMENT

The District Court's Order should be affirmed in its entirety. First and most importantly, the District Court correctly admitted the MPSA to probate as a governing instrument in tandem with Gerry's Last Will and Testament. Pursuant to the explicit exceptions set forth in Montana's revocation upon divorce statute, the District Court had no choice but to admit the MPSA to probate in order to make effective Gerry's true testamentary intent.

Second, the District Court correctly found that the Vicki was obligated to follow the terms of the MPSA. Because the MPSA was correctly admitted as a

testamentary instrument, the Court was well within its jurisdictional authority to interpret and enforce the same. The Court did not err in refusing admittance of the MPSA on grounds of fraud, mistake, duress or undue influence. Not only was this argument not properly raised or developed at the District Court level, substantial evidence was presented proving that Gerry Williams knew exactly what he was doing. Equally unavailing is Vicki's argument that the District Court lacked the authority to reform certain provisions of the MPSA consistent with Gerry's true intent. Substantial evidence was submitted to the District Court which proved that scrivener's errors inconsistent with Gerry and Lorri's intent were contained in the document and that reformation was appropriate.

Third, the District Court acted within its discretion when it removed Vicki as PR of Gerry's Estate. Vicki's act of relying on the MPSA when it financially benefitted her while ignoring the provisions that benefitted Lorri constituted a clear conflict of interest and breach of her fiduciary duties. Moreover, Vicki misled Lorri and intentionally failed to provide her statutory notice on two separate occasions to Vicki's own personal benefit.

Finally, the District Court did not err in disallowing Vicki compensation for attorneys' fees and costs incurred after October 21, 2021. Vicki's actions in refusing to accept and comply with the terms of the MPSA in administering Gerry's Estate were taken for her own personal benefit and not in good faith. To the extent Vicki

believes additional expenses were necessary to the administration of the Estate, the District Court has provided her the opportunity to submit those expenses to the Special Administrator.

VI. ARGUMENT AND CITATION TO AUTHORITY

A. The District Court had the jurisdictional authority to admit the *MPSA* to probate.

The arguments set forth in Vicki's Opening Brief evidence her fundamental misunderstanding of the District Court's acceptance, interpretation and enforcement of the Marital Property Settlement Agreement ("*MPSA*"). Vicki argues that the Court, sitting in probate, lacked jurisdiction to "consider a claim on a contract." *See* Opening Br. at 21. However, under the circumstances of this case, the MPSA is not simply a "contract" that affects the interested parties outside of and apart from the probate proceedings. Rather, it is a testamentary governing instrument subject to the jurisdiction of the probate court.

One of the underlying purposes of Montana's probate code is to discover and make effective the intent of a decedent in distribution of his property. Mont. Code Ann. § 72-1-101(2)(b)(ii). The code must be liberally construed and applied to promote and achieve that underlying purpose. Mont. Code Ann. § 72-1-101(2)(a). Despite Vicki's attempt to ignore the obvious, it is an inescapable fact that the *MPSA*, when read in conjunction with Gerry's Last Will and Testament, clearly and accurately establishes Gerry's intent as to the distribution of his estate.

i. The MPSA is a testamentary governing instrument subject to probate.

Whether purposeful or not, Vicki's brief doesn't even acknowledge the fact that the District Court admitted the MPSA to probate as a testamentary instrument. Rather, she errantly equates the MPSA to a "contract to make a will," over which the probate Court admittedly would have lacked the jurisdictional authority to enforce. Vicki's implication that a marital property settlement agreement cannot be a governing instrument subject to probate under Montana law is incorrect.

The Legislature's definition of what constitutes a governing instrument is quite broad. Mont. Code Ann. § 72-1-103(20) defines a "governing instrument" as a "deed, will, trust, insurance or annuity policy, … or dispositive, appointive, or nominative instrument of any similar type." (Emphasis added.)

This Court has liberally interpreted the definition of a "governing instrument" to include instruments that are not explicitly identified in the aforementioned statute. For example, in *Reader v. Kelly*, 2014 MT 254, ¶ 19, 376 Mont. 361, 334 P.3d 911, this Court held that a Family Limited Partnership Agreement (FLPA) was a governing instrument subject to the jurisdiction of Montana's probate courts. Similarly, in *In re Estate of Kuralt,* 2000 MT 359, ¶ 18, 303 Mont. 335, 15 P.3d 931, this Court held that a letter drafted by the late Charles Kuralt expressing his intent to effect a posthumous transfer to his girlfriend was properly admitted to probate in tandem with his will that devised his estate to his wife. In so holding, the Court

recognized that Montana's courts "are guided by the bedrock principle of honoring the intent of the testator." *Id.,* ¶ 17. There exists no precedent which would suggest that a marital property settlement agreement would not be included in the broad definition of a governing instrument.

Contrary to what Vicki would have this Court believe, Montana's probate code does not limit the District Court to acceptance of only a single testamentary instrument in the form of a will. Mont. Code Ann. § 72-3-314(1) provides that "if two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication."

Neither the *MPSA* nor Gerry's Will expressly revoke one another, nor do the instruments contain provisions which work a total revocation of the other by implication. Accordingly, it was not only appropriate for the District Court to admit the MPSA to probate in tandem with Gerry's Last Will and Testament, it was absolutely necessary. For the purpose of triggering the application of Mont. Code Ann. § 72-2-814, Montana's statute governing the revocation of probate transfers upon divorce, Vicki attached a copy of the *MPSA* to her *Application*. She did so for the purpose of disqualifying Lorri as PR of Gerry's Estate, and in doing so implicitly acknowledged that neither she nor the District Court could accurately administer the

estate without acknowledging and interpreting the terms of the *MPSA*.

A cursory reading of Montana's revocation upon divorce statute makes clear that it was necessary for the District Court to admit the MPSA to probate. Mont. Code Ann. § 72-2-814(2)(a) states in pertinent part that "**Except as to … the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment**, the divorce or annulment of a marriage revokes any revocable: (i) disposition or appointment of property made by a divorced individual to the individual's former spouse in a governing instrument … and (iii) nomination in a governing instrument that nominates a divorced individual's former spouse ... to serve in a fiduciary or representative capacity, including personal representative." (Emphasis added.)

Vicki's interpretation of the revocation statute would allow her to inappropriately "have her cake and eat it too." Vicki asked the District Court, and now asks this Court, to recognize and enforce the general revocation provisions in the statute while simultaneously ignoring the very specific exceptions relating to court orders and marital property settlement contracts. However, neither the district court, nor this court, can simply ignore the practical effect of the statutory exceptions. Mont. Code Ann. § 1-2-101 provides that "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or

in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

Interpreting the revocation upon divorce statute as a whole rather than piecemeal, it was proper for the District Court to admit the *MPSA* to probate to determine Gerry's testamentary intent. It should not be lost on the Court that the primary beneficiary of Gerry's entire estate under his Will is Lorri. Vicki and her sister are mere contingent beneficiaries. Accordingly, the District Court was required to admit both the *MPSA* and Will to aid the court and the PR in determining which devises to Lorri under the Will were revoked pursuant to the revocation statute, and likewise which devises to Lorri survived pursuant to the statutory exceptions. That task could not be otherwise accomplished absent the two instruments being admitted to probate in tandem.

Equally important is the fact that the revocation statute is located within Montana's intestacy statutes set forth in the probate code. Mont. Code Ann. § 72-1-103(22) defines an "heir" as "persons, including the surviving spouse and the state, who are entitled under the statutes of intestate succession to the property of a decedent." This Court has recognized that an "heir-at-law is "someone who, under the laws of intestacy, is entitled to receive an intestate decedent's property." *Reader,* ¶ 18. Because Lorri is entitled to Gerry's real property under Montana's intestacy

laws (the revocation statute), she is, by definition, an heir. *See Id.* ¶ 21 ("Notwithstanding the fact that Laura had a will, the status of the FLPA as a 'governing instrument' under Montana probate law dictates that Laura's interest in the family partnership passes under the intestate succession law of Montana.").

Similarly, the probate code defines a "successor" as "persons, other than creditors, who are entitled to the property of a decedent under the decedent's will or chapters 1-5" of the code. Mont. Code Ann. § 72-1-103(50). The revocation statute is set forth in chapter 2 of the probate code. Accordingly, Lorri is also considered a "successor" under Montana law.

Pursuant to Mont. Code Ann. § 72-1-202, the district court had "jurisdiction over all subject matter relating to: (a) estates of decedents, including construction of wills and determination of **heirs** and **successors** of decedents . . . and (2) the … full power to make orders, judgments, and decrees and take all other action necessary and proper to administer justice in the matters which come before it." Lorri is Gerry's heir and successor under Montana law. (Emphasis added). Accordingly, the District Court clearly possessed the subject matter jurisdiction to accept the MPSA to probate.

ii. *Cooney* is inapplicable.

In support of her argument that the District Court lacked jurisdictional authority to admit and consider the MPSA, Vicki relies heavily on *In re Estate of*

Cooney, 2019 MT 293, 398 Mont. 166. While Lorri concedes that the *Cooney* decision involves a probate case where the District Court was presented with a marital property settlement agreement, that is where the similarities between *Cooney* and the case *sub judice* end.

The facts and relevant legal issues relied upon by the Court in *Cooney* are distinct from those involved in this case. In *Cooney,* the decedent entered into a property settlement agreement with his wife when they divorced in 1980. *Id.,* ¶ 2. At the time of his divorce, the decedent had two daughters. As an essential term of the agreement, he agreed to devise his ranch upon his death by will to his two daughters and "any other children born to [decedent], in equal shares to share and share alike." *Id.* The Court referred to the agreement as a "succession contract," or a "contract to dispose of property by will." *Id.,* ¶ 8.

The property settlement agreement was incorporated into the final decree. *Id.,* ¶ 2. The decedent thereafter had a son and another daughter. *Id.* In 2011, thirty-one years after his divorce, the decedent executed his last will and testament. *Id.* He died on April 27, 2015. Contrary to his promise set forth in the property settlement agreement, he devised all of his real property to only his son. *Id.* No real property was left to his three daughters. The will was admitted to probate, and the decedent's daughters filed a motion within the probate proceedings for equitable relief to enforce the terms of the settlement agreement. The district court ruled that it lacked

the jurisdiction to grant the requested relief. *Id.* ¶ 3.

In contrast to the facts of this case, the *MPSA* is not a succession contract. In fact, Gerry executed his last will on October 18, 2001, more than 18 years before he entered into the *MPSA*. A succession contract in Montana may be established only by (a) provisions of a will stating material provisions of the contract, (b) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (c) a writing signed by the decedent evidencing the contract. Mont. Code Ann. § 72-2-534; *Cooney,* ¶ 9. None of those scenarios are present here.

Moreover, unlike the will in *Cooney,* the will admitted to probate in this case named Gerry's ex-spouse Lorri as his primary heir. Accordingly, no conflict exists between the distribution of assets under the *MPSA* and Gerry's Will. That is a very important distinction. Vicki has availed herself of the revocation upon divorce statute to modify the terms of Gerry's Will, a process that is specifically provided for under Montana's probate code. Because Cooney's will devised all of his real property to his son and not his ex-wife, the *Cooney* daughters were required to bring equitable claims for specific performance of a contract. *Id.,* ¶ 10. They could not avail themselves of the revocation upon divorce statute for relief.

The *Cooney* Court affirmed the District Court, but on legal grounds that are narrow and distinguishable from this case. The *Cooney* Court held that a probate court lacks jurisdiction to enforce a "succession contract.". *Id.*, ¶ 16. Relying on

Erwin v. Mark, 105 Mont. 361, 73 P.2d 537 (1937), the *Cooney* Court recognized that "if a party to a succession contract fails to carry out the promise to make a valid will, courts of equity will grant relief in the nature of specific performance by compelling the personal representative, heirs, devisees or legatees to hold the property as trustees for the benefit of the promise." *Cooney,* ¶ 10.

For these reasons, the *Cooney* decision is inapplicable. The *Cooney* daughters did not attempt to admit the settlement agreement to probate as a testamentary instrument, and the revocation upon divorce statute played absolutely no role in the arguments of the parties or the decision of the Court. Lorri is not attempting to circumvent the terms of Gerry's Will. Rather, it is Vicki who is attempting to circumvent the terms of the Will through her reliance on the revocation statute. This is not an equitable matter or a breach of contract action.

B. The district court correctly concluded the PR was obligated to follow the *MPSA*.

The District Court did not err when it concluded the MPSA was binding judgment the PR was obligated to follow, nor did it err in interpreting, enforcing, and modifying the MPSA consistent with Gerry's intent. It is well within the jurisdictional authority of a probate court to interpret and enforce testamentary instruments. *See Snyder v. Snyder*, 2000 MT 113, ¶ 10, 299 Mont. 421, 2 P.3d 238; Mont. Code Ann. § 72-2-711.

i. Real property owned jointly by Lorri and Gerry.

The MPSA makes clear Gerry's and Lorri's intention that "each party agrees to execute documents or deeds sufficient to ensure that joint tenancy with rights of survivorship continue on each and every piece of real property which is jointly owned as of the date of dissolution in this matter and which is not otherwise distributed herein." (*MPSA* at ¶ 5.) Vicki obviously did not want to follow that explicit instruction in her role as PR and now takes issue with the District Court's recognition that the PR of Gerry's Estate must "step into Gerry's shoes with respect to Gerry's legal obligations" under the MPSA, arguing that the Court made its determination without any supporting authority. See Appellant's Br. at 26.

The District Court indeed provided the basis for its recognition of this general principle, citing in her Conclusions of Law the case of *Baker v. Berger*, 265 Mont. 21, 873 P.2d 940 (1994). In *Baker,* this Court recognized that "generally, contracts made by a decedent are specifically enforceable against the decedent's personal representatives," and that a PR "steps into [the decedent's] shoes with respect to [the decedent's] legal obligations." *Id.* at 27; citing Mont. Code Ann. § 72-3-316(3).

Vicki further argues that Gerry's wishes should no longer be considered nor the *MPSA* enforced because Gerry did not execute deeds prepared by Lorri's attorneys to effectuate the transfer of the real property into joint tenancy prior to his untimely death. The fact that Gerry met an untimely death prior to executing the

deeds does not invalidate the *MPSA* or the PR's duty to perform Gerry's obligations thereunder. Vicki cites no authority for her assertion that a five-week delay in executing the deeds somehow renders the *MPSA* unenforceable. To the contrary, Montana contract law provides that if no time is specified for the performance of an act required to be performed, a reasonable time is allowed. Mont. Code Ann. § 28-3-601. Time is never considered as of the essence of a contract unless by its terms expressly so provided. Mont. Code Ann. § 28-3-602. Waiting mere weeks to execute deeds was not unreasonable, and certainly not evidence of an intent on the part of Gerry to abandon his obligations under the contract.

Vicki next argues that the Court failed to acknowledge "serious questions" as to whether the MPSA should be rescinded in the event Gerry's signature on the MPSA "was given by mistake or through duress, menace, fraud, or undue influence exercised by or with the connivance of the other party." She argues that the evidence she presented established confusion as to Gerry's intent and whether his interests were represented by counsel.

Vicki argues that she did not get the chance to provide the Court with adequate briefing on these issues, but that is a problem of her own making. She had the ability to challenge Lorri's Petition to probate the MPSA on any grounds she chose. It is not the fault of the District Court or Lorri that Vicki failed to make these arguments

against the MPSA in her briefing leading up to the hearing.[3] In fact, Mont. Code Ann. § 72-3-308 provides that "any party to a formal proceeding who opposes the probate of a will for any reason **shall** state in the pleadings the party's objection to the probate of the will." (Emphasis added). These issues were not even on the District Court's radar prior to the hearing. Vicki's failure to object to the formal probate on grounds of fraud, mistake, and undue influence is certainly fatal to her argument that she should have been afforded additional briefing, and is also fatal to her overall appeal on these issues. An appellate court will not consider issues raised for the first time on appeal. *In re T.E.*, 2002 MT 195, ¶ 1, 311 Mont. 148, 54 P.3d 38.

Assuming *arguendo* that the District Court was required to consider these arguments at hearing, Vicki concedes that she was allowed to offer substantial testimony and evidence at the hearing. Despite Vicki's evidence, most of which was the self-serving testimony by Brittany, the District Court found that the MPSA constituted a valid judgment and validly executed instrument that should be admitted to probate.

This Court reviews a District Court's findings of fact to determine whether they are clearly erroneous. *Williams v. Schwager*, 2002 MT 107, ¶ 22, 309 Mont.

[3] Importantly, the Petition for Formal Probate was filed on February 19, 2021, and Vicki didn't bother to lodge her objections until five months before filing her Response on July 16, 2021, leaving her plenty of time to carefully craft her objections.

455, 47 P.3d 839. A finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been committed. *In re Estate of Flynn*, 274 Mont. 199, 908 P.2d 661, 663 (1995). Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting. *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist*., 2020 MT 80, ¶ 12, 399 Mont. 431, 435, 461 P.3d 91, 94. The evidence need not amount to a preponderance of the evidence, but it must be more than a scintilla. This Court reviews such evidence in a light most favorable to the prevailing party and leaves the district court to determine the credibility of witnesses and the weight assigned to their testimony. *Id.*

That Vicki presented evidence at hearing which she believes conflicts with the evidence relied upon by the District Court is of no consequence. Evidence relied on by a district court in its findings of fact may be inherently weak and still be deemed "substantial," and substantial evidence may conflict with other evidence presented. *Cameron v. Cameron*, 179 Mont. 219, 228, 587 P.2d 939, 945 (1978), citing *Campeau v. Lewis*, 144 Mont. 543, 398 P.2d 960, 962 (1965). The District Court weighed all of the testimony provided at hearing and made its ruling accordingly.

The District Court was not convinced that Gerry was confused about the

divorce proceedings or whom Jamie Vines was representing. The District Court was provided with substantial evidence that Gerry was fully aware Jamie Vines was representing Lorri, that he "was very much aware of" what was occurring in the divorce proceedings and that Gerry wanted to take care of Lorri after he passed. Vines testified that she made it clear to Gerry she represented Lorri in the divorce proceedings. She also informed Gerry of his right to obtain independent counsel, but he chose not to do so. Gerry also signed a Waiver of Conflict wherein he explicitly acknowledged that Vines was representing Lorri adverse to his interests. The Court's admission of the MPSA to probate was supported by substantial, credible evidence and should be affirmed.

ii. Interest in Williams Land and Cattle Co.

The Court did not err in reforming the portion of the *MPSA* related to Gerry and Lorri's interest in Williams Land and Cattle Company ("WLCC"). The testimony elicited from Lorri and Jamie Vines at the hearing made clear that it was the intent of Gerry and Lorri that the WLCC shares of the first of Gerry or Lorri to die were to be ceded back to the corporation, with the survivor of the two continuing on with full ownership of the corporation. Ms. Vines testified that she committed a scrivener's error when she drafted the provision to read that the survivor of the two must cede their shares back to the corporation. Consistent with that expressed intent, this Court has recognized that "[a] woman does not work all her life next to her

husband [and] transfer her shares of that estate to a corporation …with no guarantee of any future financial security." *Conitz v. Walker*, 168 Mont. 238, 245, 541 P.2d 1028 (1975).

Mont. Code Ann. § 28-3-202 states, "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other." "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Mont. Code Ann. § 28-3-301. If possible, the parties' intention should be determined from the writing alone. Mont. Code Ann. § 28-3-303. "Particular clauses of a contract are subordinate to its general intent." Mont. Code Ann. § 28-3-307. "When interpreting written documents, the cardinal rule of construction is to glean the intent of the parties from the four corners of the document and not to focus on isolated tracts, clauses and words." *Richman v. Gehring Ranch Corp*., 2001 MT 293, ¶ 18, 307 Mont. 443, 37 P.3d 732.

In light of the clear intent of the parties and the aforementioned statutory guidance regarding the interpretation of contracts, it was entirely appropriate for the District Court to reform the *MPSA* consistent with Gerry and Lorri's true intent. The terms of a contract may be reformed when, "through fraud or a mutual mistake of the parties or a mistake of one party while the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised

on the application of a party aggrieved so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons in good faith and for value." Mont. Code Ann. § 28-2-1611.

While a non-party's scrivener's error "does not present a technical mutual mistake, it does present a mistake which a court of equity will not hesitate to correct to the end that the writing may express the agreement of the parties. *Parchen v. Chessman*, 53 Mont. 430, 437, 164 P. 531, 533 (1917). Lorri recognizes that this Court subsequently held "the mistake of the scrivener or draftsperson who prepared the instrument alone is insufficient grounds for reformation." *Goodman Realty v. Monson*, 267 Mont. 228, 232, 883 P.2d 121, 123 (1994). However, *Goodman* is inapplicable here. First, Lorri presented substantial evidence in addition to the scrivener's error as proof that reformation was appropriate. Not only did Ms. Vines testify as to Gerry's true intent, so did Lorri. None of this testimony was contested. A mistake was clearly made.

Conversely, the *Goodman* Court found that reformation was not appropriate in that case because the party seeking reformation was aware of the scrivener's error at the time of execution. *Id.,* 267 Mont. at 234, 883 P.2d at 124. Mutual mistake is not applicable where the plaintiff knew of the mistake. *Id.* That is not the case here. That also was not the case in *Parchen,* where the Court recognized that both parties were likely unaware of the error at the time of execution. *Parchen,* 53 Mont. at 437,

164 P. at 533. Moreover, the fact that the *MPSA* is a testamentary instrument makes it all the more worthy of reformation, whether the mistake was mutual or unilateral. *See Estate of Irvine v. Oaas*, 2013 MT 271, ¶ 15, 372 Mont. 49, 53, 309 P.3d 986, 990 ("While the mutual intent of the parties is the appropriate standard by which a contract may be reformed, a donative instrument is by its nature unilateral, and its terms depend only on the intent of the donor.") *Estate of Irvine v. Oaas*, 2013 MT 271, ¶ 15, 372 Mont. 49, 53, 309 P.3d 986, 990. In this case, Lorri presented substantial evidence through her and Ms. Vine's testimony that a mistake was made and that neither Gerry nor Lorri were aware of the consequences of that mistake at the time the MPSA was executed.

The District Court was not required to conduct an analysis into whether reformation prejudiced Vicki. Mont. Code Ann. § 28-2-1611 only requires that analysis when the rights of a third-party are acquired in good faith and "for value." Vicki is an heir, and this is a probate matter. Vicki claims her interest in Gerry's assets pursuant to his will and the revocation upon divorce statute. She acquired nothing for value.

C. Vicki's removal as PR was appropriate.

Any interested person may petition for the removal of a PR for cause. Mont. Code Ann. § 72-3-526. District courts are given broad authority to remove Personal Representatives so long as the grounds are valid and supported by the record.

Boland, ¶ 55. A PR is a fiduciary who has a duty to "settle and distribute the estate of the decedent . . . as expeditiously and efficiently as is consistent with the best interests of the estate." *Id;* Mont. Code Ann. § 72-3-610. A PR must exercise its authority in the best interests of the successors to the estate. *Id.* Cause for removal exists when removal would be in the best interests of the estate or when the PR has disregarded an order of the court, has mismanaged the estate, or failed to perform any duty pertaining to the office. *Boland,* ¶ 55*;* Mont. Code Ann. ¶ § 72-3-526(2).

The factual record makes clear that Vicki did not prosecute her duties as PR in good faith or for the benefit of Lorri in her capacity as one of Gerry's successors. Much like her jurisdictional arguments, Vicki takes the position she was not required to provide notice of the probate proceedings to the Appellees or that she owed Appellees any fiduciary duty because they were not "an heir or devisee of the Estate, and thus were not entitled to notice as such." Appellant's Br. at 32. However, for all the reasons previously discussed, Lorri is an "heir" and "interested person" concerning Gerry's Estate.

Vicki's assertion that the *MPSA* did not obligate her to provide Lorri with notice of the probate proceedings or treat her with the duty of loyalty required of every PR is disingenuous in light of her own reliance on the *MPSA* in the probate proceedings, and is evidence alone of her lack of fitness to serve in that fiduciary capacity. For example, Gerry and Lorri owned a checking account with First State

Bank of Malta as tenants in common that had in excess of $63,000. Gerry and Lorri agreed in the *MPSA* that Gerry would receive that account. Had the probate court agreed with Vicki's position that Lorri's interest in the Will should be revoked without exception and disregarded the *MPSA* in its entirety, one-half of that account would have belonged to the Estate pursuant to Gerry's will and the other half would have remained owned by Lorri. But because that outcome did not benefit Vicki, that is not how she treated the issue. Rather, in her capacity as PR and in reliance on the *MPSA*, Vicki cashed out the entirety of the Bank of Malta account and claimed it as property of the Estate.

What is good for the goose is good for the gander. If Vicki gets to rely on the *MPSA* to cash out bank accounts to her benefit, she certainly must provide notice of the probate proceedings to Lorri as an heir of Gerry's estate pursuant to Gerry's will (as partially revoked by the divorce decree and revocation statute). Vicki simply did not act in good faith or in compliance with the law in administering Gerry's Estate.

i. Notice of Probate Proceedings

Lorri was clearly entitled to formal notice of the probate proceedings. Mont. Code Ann. § 72-3-603 requires a PR to provide notice to the "heirs" and "devisees" of an estate. As discussed above, Montana law makes clear that Lorri is an "heir" under Montana law. Mont. Code Ann. § 72-1-103(22); *Reader,* ¶ 18. Because Lorri is entitled to Gerry's real property under Montana's intestacy laws (the revocation

statute) and also pursuant to Gerry's Will (as partially revoked), she is, by definition, an heir and entitled to notice.

It was wholly improper for Vicki not to provide Lorri with notice of her appointment as PR. But Vicki already knows this. Why else would she have acted so coyly when Lorri inquired as to when an estate would be opened? Rather than be up front and inform Lorri that probate would be opened the following day, she feigned ignorance. This was for one reason only: to administer the estate without Lorri's knowledge so as utilize only the portions of the *MPSA* that were beneficial to Vicki without objection. This alone warrants removal.

It was for these same nefarious reasons that Vicki improperly refrained from providing notice to Lorri as a known creditor of Gerry's Estate. It is undisputed that Vicki was aware Lorri had paid several expenses for which the Estate was obligated to pay, including the funeral, Gerry's autopsy, and the cost to transport Gerry's ashes back to Montana. Mont. Code Ann. § 72-3-801 requires published notice to creditors for three consecutive weeks in a local county newspaper. However, notice to creditors by mere publication "is insufficient to protect a creditor's property interest where the identity of a creditor is known or 'reasonably ascertainable': instead, a creditor must be given 'notice by mail or other means as certain to ensure actual notice.'" *Wood v. Anderson*, 2017 MT 180, ¶ 17, 388 Mont. 166, 172, 399 P.3d 304, 310; citing *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988). Vicki

was fully aware of Lorri's claim and failed to provide her with formal notice thereof.

The aforementioned precedent was readily available to Vicki and her attorney, and it could have been easily identified with less than a half hour of research. That research certainly would have been warranted and prudent in light of their knowledge that Lorri was inquiring into the status of the Estate. Vicki and her attorney either weren't aware of the aforementioned precedent or willfully chose to ignore it. Either way, that is no excuse. Knowledge of laws is imputed to all Montanans. *Wolfe v. Flathead Elec. Coop., Inc.,* 2018 MT 276, ¶ 14, 393 Mont. 312, 431 P.3d 327. "Every man is to be charged at his peril with a knowledge of the law." "Ignorance of the law is no excuse." *Id.*

Vicki's refusal to twice provide Lorri with required notice, and the hostility in which she went about doing so, was sufficient to warrant her removal as PR. In *In re Estate of Greenheck*, 2001 MT 114, ¶ 20, 305 Mont. 308, 27 P.3d 42, this Court affirmed the removal of a PR for a failure to provide information and for acting with significant hostility and alienation toward the beneficiaries, all of which are present in this case. *See also* the removal case of *In re Estate of Hannum*, 2012 MT 171, ¶ 30, 366 Mont. 1, 285 P.3d 463 ("Louis Jr. also failed to administer the estate in accordance with the probate code. … There is no evidence that Louis Jr. or his counsel sent the required notice… to at least three devisees…."). The *Hannum* Court also noted that failure to abide by a testamentary document is grounds for removal.

Id., ¶ 29. The District Court did not abuse its discretion in removing Vicki. The irregularities associated with her actions were harmful, intentional, should not be overlooked, and cannot be easily remedied by any action of the District Court.

ii. Conflict of Interest

A conflict of interest is sufficient for removal of a PR for cause. *In re Estate of Zempel*, 2000 MT 283, ¶ 18, 302 Mont. 183, 14 P.3d 441. Setting aside the fact that Vicki willfully ignored and refused to acknowledge a valid testamentary instrument, she has exhibited a conflict in this case as a result of her applying the terms of *MPSA* in these probate proceedings when they benefit her, but completely ignoring the existence of the *MPSA* when the terms thereof benefit Lorri. Vicki's reliance on *Zempfel* and *Kuralt* is misplaced. As articulated in Vicki's brief, this Court's refusal to justify removal in those two cases was premised not on actions of the PR, but upon concerns that the PR may act in a certain way. In *Kuralt,* the beneficiary was concerned that the PR might attempt to shift a tax burden onto her. In *Zempfel,* the Court refused to recognize a conflict of interest because the PR acted in accordance with the testamentary document or the terms of the option agreement at issue. In contrast, Vicki has exhibited inconsistent behavior with regard to the *MPSA* to her sole benefit.

Moreover, while the district court characterized Vicki's actions as a conflict, they also sound in a breach of her fiduciary duties, including her duty of loyalty to

Lorri. It is appropriate to remove a PR if he or she breaches their fiduciary duties to the beneficiaries of an estate. Importantly, a PR may be removed for failure to perform *any* duty pertaining to the office. *Hannum*, ¶ 30 (emphasis in original). Whether framed as a conflict of interest or a breach of her fiduciary duties, Vicki's actions warranted removal.

D. The District Court properly disallowed the PR compensation for attorneys' fees.

If a Personal Representative … defends or prosecutes a proceeding in good faith, whether successful or not, the Personal Representative is entitled to receive from the estate the Personal Representative's necessary expenses and disbursements, including reasonable attorney fees incurred. Mont. Code Ann. § 72-3-632. While Vicki cites the statute relevant to this issue, she fails to address the most important part: that the PR must proceed in good faith. Indeed, the first sentence of the Official Comments for the statute provide that "litigation prosecuted by a Personal Representative for the primary purpose of enhancing her prospects for compensation would not be in good faith." *Id.* That is exactly what Vicki has done in this case.

In the case of *In re Estate of Evans*, 217 Mont. 89, 94, 704 P.2d 35, 39 (1985), a co-Personal Representative was found not to have acted in good faith when she retained separate counsel to ask for a "strained construction of the will" to benefit her own two children to the detriment of her sister's six children. Specifically, despite the fact that the testator bypassed her two daughters and specifically devised

her estate "in equal shares" to her eight grandchildren "per stirpes," the PR argued that half of the estate should go to her children, with her sister's six children receiving the other half of the estate. *Id.* This Court held that the PR's strained interpretation of the will was contrary to established law and was not made in good faith, and thus affirmed the district court's denial of fees. *Id.*

To call Vicki's interpretation of the revocation upon divorce statute (and the probate code in general) strained would be an understatement. Even in her briefing to this Court, she has consciously chosen to ignore the statutory exceptions that require the *MPSA* to be admitted to probate as a testamentary instrument. Not only did she use this strained interpretation to deny Lorri her status as an heir and devisee of Gerry's estate, she utilized estate funds to initiate separate litigation for her own personal benefit in Hill County to modify the *MPSA*. While the District Court did not utilize the word "bad faith" in its findings, it certainly made clear that Vicki's actions were not taken in good faith, finding that Vicki "has failed to separate her personal desires and opinions regarding what should have happened in Gerry's dissolution proceeding from what did happen and what is statutorily and fiduciarily required of her as PR." (*F.O.F.* ¶ 34.) The District Court recognized that primary purpose of Vicki's actions was to enhance her own prospects for compensation. This is the epitome of bad faith as contemplated by the Legislature.

Finally, Vicki argues that the District Court should be overturned because

there were other fees not considered by the Court that warrant compensation, including the preparation and filing of taxes and completion of the inventory and appraisement. She argues that the District Court erred in foreclosing compensation for these tasks. But that is simply untrue. The District Court specifically provided in its order that Vicki could seek additional reimbursement from the Special Administrator for any legitimate estate expense. This is an adequate remedy, and the District Court did not abuse its discretion in fashioning the same.

E. CONCLUSION

For the reasons set forth herein, Appellee's respectfully request that the Court affirm the district court in all respects.

DATED this 28th day of September, 2022.

CHRISTENSEN, FULTON & FILZ, PLLC

By /s/ Joseph L. Breitenbach
Attorney for Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that Appellees' Response Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word, is fewer than 10,000 words.

DATED this 28th day of September, 2022.

CHRISTENSEN, FULTON & FILZ, PLLC

By /s/ Joseph L. Breitenbach
Attorney for Appellees

CERTIFICATE OF SERVICE

I, Joseph Loren Breitenbach, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-28-2022:

Oliver Joseph Urick (Attorney)
PO Box 556
Urick Law Firm, PLLC
Stanford MT 59479
Representing: Williams Land & Cattle Co., Lorri Williams
Service Method: eService

Rachel Hendershot Parkin (Attorney)
620 High Park Way
P.O. Box 4947
Missoula MT 59806-4947
Representing: Hofeldt Vicki
Service Method: eService

Dylan McFarland (Attorney)
283 W. Front Street
Suite 203
Missoula MT 59802-4328
Representing: Hofeldt Vicki
Service Method: eService

John R. Christensen (Attorney)
19 36th Street West, Suite 3
Billings MT 59102
Representing: Williams Land & Cattle Co., Lorri Williams
Service Method: eService

William M. Solem (Attorney)
411 Ohio St.
P.O. Box 248
Chinook MT 59523
Representing: Hofeldt Vicki
Service Method: Conventional

Electronically Signed By: Joseph Loren Breitenbach
Dated: 09-28-2022