FILED
02/01/2023
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 22-0521

Gregory M. Worcester
Attorney for Appellant Andrea Okland
Aspen Law P.L.L.C.
120 Meadow Drive
Helena, MT 59601-0146
(406) 422-0719
AspenLawMT@gmail.com

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 22-0521

In re the Marriage of: Andrea Okland, Petitioner and Appellant, v. Christopher Okland, Respondent and Appellee.	**APPELLANT'S OPENING BRIEF**

Appealed from the Twentieth Judicial District Court, Lake County

Cause No. DR-2020-42

Honorable James A. Manley and Honorable Molly Owen Presiding

Appearances:

Petitioner/Appellant:
Gregory M. Worcester
Aspen Law, PLLC
120 Meadow Drive
Helena, MT 59601-0146
(406) 422-0719
AspenLawMT@gmail.com

Respondent/Appellee:
Paula M. Johnson-Gilchrist
Johnson-Gilchrist Law Firm
6336 Highway 93 South
Whitefish, MT 59937-8458
(406) 862-3920
paula@whitefishlegal.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. STATEMENT OF THE ISSUES

1. Whether the District Court was clearly erroneous and abused its discretion in the adoption of the Stipulated Final Parenting Plan:

   A. when it permitted mediation to take place when Andrea had made plausible sworn accusations of emotional abuse against herself and the minor child; and

   B. when it proceeded to adopt the product of that mediation as a Final Parenting Plan.

2. Whether the District Court was clearly erroneous and abused its discretion with regard to the division of property:

   A. when it included anticipated future Social Security benefits as part of the marital estate;

   B. when it excluded Chris's ownership interest in Okland, Inc. and Okland Family Partnership from the marital estate;

   C. when it "split the difference" between two possible values of the marital home rather than choosing a date of valuation;

   D. when it misconstrued James Whaley's testimony and written valuation of Okland, Inc. and Okland Family Partnership;

   E. when it included Andrea's inherited coin collection as part of the marital estate;

   F. when it twice deducted from Chris's share of the marital estate amounts he allegedly paid from inherited funds during the marriage; and

   G. when it failed to value various marital assets as of the day of dissolution.

3. Whether the district court committed plain error and abused its discretion it its evaluation of witness credibility:

A. when it failed to make a credibility determination regarding Andrea's expert witness David McGinnis;

B. when it made no findings of fact regarding Andrea's testimony and so did not make a credibility determination; and

C. when it recited in its findings of fact a number of statements from Chris's testimony that Chris did not support with documentary evidence as unrefuted and irrefutable fact.

4. Whether the near verbatim adoption of Chris's proposed Findings of Fact and Conclusions of Law was an abuse of discretion as they misrepresent the evidence, the law, and equity.

II. STATEMENT OF THE CASE

This is a proceeding to dissolve the parties' marriage and distribute property, allocate debt, and adopt a parenting plan.

Andrea Okland ("Andrea") filed a Petition for Dissolution of Marriage on May 19, 2020. Christopher Okland ("Chris") filed an Answer to Petition for Dissolution of Marriage on June 9, 2020. The parties signed a *Stipulated Final Parenting Plan* ("*SPFF*") on October 29, 2020. The district court never issued an order explicitly adopting the *SFPP* as a final parenting plan; though in a July 7, 2021 *Order* the district court stated that it had previously adopted the *SFPP*, no date of adoption was offered by the court. Just over a month after signing the *SFPP*, Andrea filed to withdraw the *SFPP* due to the unlawful way she alleges it was negotiated and because it was not in the child's best interest.

Trial on the property distribution and setting aside of the *SFPP* took place on February 17, 2021 and March 30, 2021. Counsel for the parties were directed to submit a brief to the Court following the March 30, 2021 hearing on what point in time a district court should value a marital estate as part of a dissolution action. Andrea's brief was submitted April 2, 2021 and Chris's brief was submitted April 14, 2021. Chris's Proposed Findings of Fact, Conclusions of Law, and Decree of Dissolution were submitted to the district court on May 3, 2021, and Andrea's proposed Findings of Fact, Conclusions of Law, and Decree of Dissolution were submitted to the district court on May 6, 2021. The district court entered its Findings of Fact, Conclusions of Law, and Decree of Dissolution on May 24, 2022. After attempting to amend the Decree through Rule 52 and Rule 59 motions, Andrea filed her Notice of Appeal on September 12, 2022.

III. STATEMENT OF FACTS

Andrea and Chris were married on August 1, 1998, and their marriage was registered in Lake County, MT. Andrea and Chris were both 28 years old, and it was the first marriage for both. Andrea and Chris resided in Alaska at the time of their marriage, and lived there until 2018. Hr'g Tr. 23:3-9, Feb. 17, 2021. For most of the marriage, Chris worked in an office management role and as a mud engineer for three different employers including Halliburton Energy. Hr'g Tr.

24:6-21, Feb. 17, 2021. Andrea earned a master's degree in education, and taught middle school in Anchorage, Alaska for 16 years. Hr'g Tr. 23:21-24:4, Feb. 17, 2021. Andrea and Chris moved to Polson, Montana in August of 2018 and purchased a home. Hr'g Tr. 25:18-26:2, Feb. 17, 2021. Chris continued his employment in Alaska with Halliburton on a two-week-on, two-week-off schedule until he was laid off in April of 2020. Hr'g Tr. 26:3-7, Feb. 17, 2021. Andrea worked as a substitute teacher for Polson schools while she sought to transfer her teaching license to Montana. Hr'g Tr. 94:12-96:22, Mar. 30, 2021. Chris and Andrea have one child, J.M.O., currently age 14. Hr'g Tr. 28:18-21, Feb. 17, 2021.

On an early morning in late April of 2021, Andrea fled the marital home with J.M.O. after Chris had made drunken threats of gun violence against Andrea and her family who had been residing with them. *Aff. in Support of Emergency Mot. For Interim Parenting Plan, Interim Child and Family Support, Time Set to Retrieve Personal Property from Residence and Order to Show Cause*, ¶¶ 13, 15-16, Doc. Seq. 5 in case Register of Actions ("ROA"), May 19, 2020. Through attorney Darin K. Westover, Andrea filed for dissolution and an interim parenting plan ("IPP") on May 19, 2020. Doc. Seq. 1-5 in case ROA. The next day the district court issued an Order to Show Cause, setting a hearing for July 17, 2020. *Order to Show Cause*, ¶1, Doc. Seq. 6 in case ROA, May 20, 2020. The day prior

to this hearing, Andrea went to Mr. Westover's office where she believed they would be discussing what would happen at the hearing and to ensure that they were prepared. Hr'g Tr. Excerpt 15:3-6, March 30, 2021. Mr. Westover had instead arranged a negotiation session with Chris and his attorney Paula Johnson-Gilchrist, who referred to what took place as "an informal mediation" (Hr'g Tr. Excerpt 7:9-10, March 30, 2021); after five hours, the parties had arrived at an IPP. Hr'g Tr. Excerpt 15:6-19, March 30, 2021. A number of documents were filed on the day the show cause hearing was to take place, including Chris's response to Andrea's motion for an IPP with affidavit in support, a notice to attend the hearing electronically, the stipulated IPP and request to vacate the show cause hearing, and an order adopting the stipulated IPP and vacating the show cause hearing. Doc. Seq. 10-14 in case ROA. Two weeks later, Mr. Westover opted to withdraw as Andrea's attorney. Doc. Seq. 17-18 in case ROA.

Andrea then hired attorney Edward G. Miller to represent her. Pursuant to the district court's September 21, 2020 *Dissolution Pre-Trial Order and Order Setting Final Hearing* (Doc. Seq. 22 in case ROA) the parties participated in a 13-hour mediation session on October 29, 2020, which resulted in a Stipulated Final Parenting Plan ("SFPP"). Doc. Seq. 24 in case ROA. Neither Mr. Miller or Mr. Westover had ever made Andrea aware of the requirements of Mont. Code Ann.

§40-4-301(2); specifically, "Unless each of the parties provides written, informed consent, the court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party," and Andrea never provided such written, informed consent to mediate. Hr'g Tr. Excerpt 13:14-24, March 30, 2021.

The district court never issued an order adopting the SFPP; though Judge Manley stated at the March 30, 2021 hearing that he thought he had done so (Hr'g Tr. Excerpt 6:6-10, March 30, 2021), the first document issued by the district court that mentions adoption of the SFPP is an *Order* from July 8, 2021. Doc. Seq. 104 in case ROA. This *Order* states that the district court had previously ordered that the SFPP be entered and followed, but does not say when.

The parties arranged to mediate the property issues in the dissolution on December 1, 2020. The day before the mediation was to take place, Mr. Miller informed Andrea that he was withdrawing as her attorney. Doc. Seq. 28, 30, and 33 in case ROA. On December 7, 2020 Andrea filed a *pro se* motion seeking to withdraw from the SFPP. Doc. Seq. 35 in case ROA. On January 7, 2021, Andrea hired attorney Marybeth M. Sampsel to represent her. Doc. Seq. 43 in case ROA. Ms. Sampsel filed an ex parte motion to amend the SFPP on Andrea's behalf, and

then withdrew as Andrea's attorney a week later. Doc. Seq. 43-44, 49-50 in case ROA. Andrea again proceeded *pro se* until she hired her current attorney Gregory M. Worcester on February 12, 2021. Doc. Seq. 68 in case ROA.

The final hearing in the dissolution began on February 17, 2021. On the same day he filed his Notice of Appearance, Mr. Worcester filed a motion to continue this hearing for at least 60 days so he could have time to familiarize himself with the details of the matter. Doc. Seq. 69 in case ROA. The District Court denied this motion at the hearing. Hr'g Tr. 8:4-10, February 17, 2021. The final hearing in this matter was concluded on March 30, 2021 and the District Court issued a Final Decree 420 days later.

IV. SUMMARY OF ARGUMENT

The Stipulated Final Parenting Plan in this matter should not have been adopted by the District Court, because it was arrived at through mediation that was in violation of Mont. Code Ann. § 40-4-301(2). Further, the District Court was clearly erroneous and abused its discretion with regard to the division of property when it included anticipated future Social Security benefits as part of the marital estate, when it excluded Chris's ownership interest in Okland, Inc. and Okland Family Partnership from the marital estate, when it "split the difference" between two possible values of the marital home rather than choosing a date of valuation,

when it misconstrued James Whaley's testimony and written valuation of Okland, Inc. and Okland Family Partnership, when it included Andrea's inherited coin collection as part of the marital estate, when it twice deducted from Chris's share of the marital estate amounts he allegedly paid from inherited funds during the marriage, and when it failed to value various marital assets as of the day of dissolution. The District Court also committed plain error and abused its discretion it its evaluation of witness credibility when it failed to make a credibility determination regarding Andrea's expert witness David McGinnis, when it made no findings of fact regarding Andrea's testimony and so did not make a credibility determination, and when it recited in its findings of fact as unrefuted and irrefutable fact a number of statements from Chris's testimony that Chris did not support with documentary evidence. Additionally, the District Court's near verbatim adoption of Chris's proposed Findings of Fact and Conclusions of Law was an abuse of discretion as they misrepresent the evidence, the law, and equity.

V. STANDARD OF REVIEW

A district court's findings of fact in a division of marital property are reviewed to determine whether they are clearly erroneous. *In re Marriage of Kesler*, 2018 MT 231, ¶ 15, 392 Mont. 540, 427 P.3d 77. "A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court

misapprehended the effect of the evidence or if, upon reviewing the record, this Court is left with the definite and firm conviction that the district court made a mistake." *In re S.T.*, 2008 MT 19, ¶8, 341 Mont. 176, 176 P.3d 1054.

If the findings are not clearly erroneous, then the court's division of property will be affirmed unless there is an abuse of discretion. *In re Marriage of Payer*, 2005 MT 89, ¶ 9, 326 Mont. 459, 110 P.3d 460. A district court abuses its discretion if it acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *In re Marriage of Alexander*, 2011 MT 1, ¶ 11, 359 Mont. 89, 246 P.3d 712.

A district court's conclusions of law are reviewed de novo to determine whether they are correct. *Giambra v. Kelsey*, 2007 MT 158, ¶ 28, 338 Mont. 19, 162 P.3d 134 (internal citations omitted).

VI. ARGUMENT

1. The District Court was clearly erroneous and abused its discretion in the adoption of the Stipulated Final Parenting Plan:

   A. The District Court abused its discretion when it permitted mediation to take place when Andrea had made plausible sworn accusations of emotional abuse against herself and the minor child.

Per Mont. Code Ann. § 40-4-301(2), (2021), "Unless each of the parties provides written, informed consent, the court may not authorize or permit

continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party."

In her *Affidavit in Support of: Emergency Motion for Interim Parenting Plan, Interim Child and Family Support, Time Set to Retrieve Personal Property from Residence and Order to Show Cause,* Andrea states that Chris made threats of gun violence against her and her family while he was drunk, causing the parties' minor child to hide under her bed. ¶¶ 15-18, Doc. Seq. 5 in case ROA. Such behavior is indisputably emotionally abusive toward Andrea and J.M.O., and this affidavit gave the district court notice that there was reason to suspect abuse. Though Mont. Code Ann. § 40-4-301(2) directs that the court neither authorize nor permit mediation to take place in such a situation, in this case the district court instead ordered that mediation take place. This was so clearly in error that Judge Manley attempted to deny that mediation was ordered but was corrected by Chris's attorney. Hr'g Tr. Excerpt 13:25-14:7, March 30, 2021.

B. The district court abused its discretion when it proceeded to adopt the product of that mediation as a Final Parenting Plan.

Andrea pointed out the statute cited above to the district court. Rather than address the requirements of the statute, the district court issued an order denying Andrea's motion to withdraw from the SFPP based on contract law including

statutes on fraud, force, duress, and undue influence. *Order on Petitioner's Motions to Withdraw from Mediation Agreement, and Motion to Amend Final Parenting Plan*, Doc. Seq. 81 in case ROA, April 22, 2021. Though the intent of Mont. Code Ann. § 40-4-301(2) may be to prevent situations where force, duress, or undue influence may occur, the statute doesn't require any of these things to occur for the statute to have effect and be enforceable. Though the district court's order states that Andrea waived objection to mediation under Mont. Code Ann. § 40-4-301(2) by her actions and failure by herself or her counsel to cite the statute, the statute itself clearly states that it can only be waived through informed, written consent.

2. The District Court was clearly erroneous and abused its discretion with regard to the division of property:

A. The District Court was clearly erroneous when it included anticipated future Social Security benefits as part of the marital estate.

On September 1, 2015, this Court issued a unanimous ruling that reversed and remanded an order from the Honorable James A. Manley. *Smith v. Smith*, 2015 MT 256, 381 Mont. 1, 358 P.3d 171. The decree Judge Manley issued was reversed because it distributed Social Security benefits as part of the equitable distribution of the marital property. In this matter, Judge Manley has done this again, in a decree issued only a few days prior to his retirement.

Andrea pointed this out to Judge Manley's successor, Judge Molly Owen, in a motion under Rule 59, M. R. Civ. P. Judge Owen inserted several findings of fact that attempt to explain that the court did not distribute Social Security. *Order on Rule 52 and 59 Motions*, Doc. Seq. 158 in case ROA, August 10, 2022. Despite Judge Owen's explanatory findings, projected Social Security benefits are still calculated into the distribution of the marital estate, dollar-for-dollar, and directly impact the amount of the equalization payment ordered by the District Court.

B. The district court was clearly erroneous when it excluded Chris's ownership interest in Okland, Inc. and Okland Family Partnership from the marital estate.

In 2012, this Court announced a clarification of Mont. Code Ann. § 40-4-202.

> Section 40-4-202, MCA, obligates a court to equitably apportion between the parties all assets and property of either or both spouses, regardless of by whom and when acquired. This directive applies to all assets, including pre-acquired property and assets acquired by gift, bequest, devise or descent. The party claiming ownership of the pre-acquired, bequested or gifted property is entitled to argue that it would be equitable to award him or her the entirety of such property. Accordingly, when distributing pre-acquired property or assets acquired by gift, bequest, devise or descent, the court must also consider the contributions of the other spouse to the marriage, and take account of the three factors set forth at § 40-4-202(1)(a)-(c), MCA. The court's decision with respect to this category of property must affirmatively reflect that each of these factors was considered and analyzed, and must be based on substantial evidence. However, we stress that while the factors set forth in § 40-4-202(1)(a)-(c), MCA, must be considered by the court, they are not limitations on the

> court's obligation and authority to equitably apportion all assets and property of either or both spouses, based upon the unique factors of each case.

In re Marriage of Funk, 2012 MT 14, ¶ 19, 363 Mont. 352, 270 P.3d 39.

In the present case, the District Court addressed assets of Chris's that it described as "premarital, gifted and inherited"—namely, Okland Family Partnership and Okland, Inc ("The Okland entities"). *Findings of Fact, Conclusions of Law, and Decree of Dissolution*, Doc. Seq. 140 in case ROA, May 24, 2022. One quarter of all the Findings of Fact in the final decree (Findings of Fact 15 through 28) are dedicated to the disposition of these assets. Though the District Court describes the rule established by the Supreme Court in *Funk* in Findings of Fact 24 and 25, none of the Findings of Fact apply the factors of Mont. Code Ann. § 40-4-202(1)(a)-(c) to the Okland entities. Specifically, the Findings of Fact do not address the nonmonetary contribution of Andrea (and are silent about whether the District Court considers her to have been a homemaker), if such contributions (if they exist) have facilitated the maintenance of the Okland entities, or if the District Court's distribution of the Okland entities serves as an alternative to spousal maintenance.

There are a number of statements in the Findings of Fact that are apparently intended to justify the District Court's disposition of the Okland entities, including:

"Both of these interests are minority interests, over which Chris, as minority owner, has no control or ability to sell or market" (Finding of Fact 15); "Both of these entities have restrictions on ownership, as the interests can only pass to Chris's 'blood relatives'" (Finding of Fact 15); "Chris would have inherited these assets whether or not he had married Andrea" (Finding of Fact 19); "Andrea is not entitled to own an interest in either of these entities due to [the blood relative] restriction" (Finding of Fact 20); "[N]either Chris nor Andrea contributed to the acquisition, maintenance, or enhancement of value of either of these . . . assets. The assets are passive assets. Chris has no management rights in either entity. Neither of these assets were commingled in ownership during the marriage" (Finding of Fact 21). The problem is that none of these statements speak to the factors of Mont. Code Ann. § 40-4-202(1)(a)-(c). In *Rintoul v. Rintoul* (also cited by the District Court in Finding of Fact 25), the Supreme Court stated, "We remanded the [Funk] case to the district court because the decision to distribute a portion of inherited property to the other spouse did not reflect specific consideration of any of [the] factors [listed in §40-4-202(1), MCA]." 2014 MT 210, ¶ 10, 376 Mont. 167, 330 P.3d 1203. With Finding of Fact 20, the District Court made the decision to not distribute a portion of inherited property to the other spouse without specific consideration of any of the statutory factors.

C. The District Court was clearly erroneous when it "split the difference" between two possible values of the marital home rather than choosing a date of valuation.

"Generally, the value of the marital estate is ascertained **at the time of dissolution** (emphasis added)." *In re Marriage of Tipton*, 2010 MT 144, ¶ 23, 357 Mont. 1, 239 P.3d 116, citing *In re Marriage of Swanson*, 220 Mont. 490, 495, 716 P.2d 219 (1986).

"However, **unique circumstances** permit deviation from the general rule and allow a district court to value a marital estate at the time of separation (emphasis added)." *Hutchins v. Hutchins*, 2018 MT 275, ¶ 58, 393 Mont. 283, 430 P.3d 502, citing *Tipton*, ¶ 23.

"Where a husband and wife live separately, **financially** and otherwise, ending their marital relationship for all practical purposes, the relevant time for valuation of the marital estate may be the date of their separation rather than the date of their dissolution (emphasis added)." *In re Marriage of Thorner*, 2008 MT 270, ¶ 36, 345 Mont. 194, 190 P.3d 1063, citing *In re Marriage of Hochhalter*, 2001 MT 268, ¶ 17, 307 Mont. 261, 37 P.3d 665.

"We recently identified some characteristics of a marriage which constituted unique circumstances rendering it appropriate to value marital assets at the time of separation. In *Marriage of Geror* . . . while living apart, [the parties] maintained

separate financial and retirement accounts, made separate financial decisions, and contributed neither monetary nor nonmonetary resources to each other. *Marriage of Geror*, 15-16. We concluded . . . the district court did not abuse its discretion in valuing the marital assets at the time of separation rather than at the time of dissolution. *Marriage of Geror*, 11, 16." *Hochhalter*, ¶ 18, citing *In re Marriage of Geror*, 2000 MT 60, 299 Mont. 33, 996 P.2d 381.

In this case, there are no unique circumstances that would permit deviation from the general rule of valuing a marital estate as of the date of dissolution. The parties continue to have comingled assets, which they intend to keep comingled until after the decree in this matter is final. At the time of the final hearing they had at least five joint deposit accounts and five joint credit cards. As shown by an email the Respondent sent in February of 2022, the parties continued to use their joint accounts in a joint fashion after their physical separation; the Respondent continued to pay the Petitioner's auto insurance premiums and NEA insurance premiums. Though the parties doubtlessly separated physically, it is equally doubtless that they did not separate financially.

Finding of Fact 14 in the Final Decree misstates the dispute between the parties. Chris contends the house should be valued at the time of separation, and Andrea asserts that the house (indeed, the whole of the marital estate) should be

valued at the time of dissolution. Andrea has never contended that any part of the marital estate should be valued as of the time of the final hearing; this is a straw man argument created by Chris's counsel.

"A district court's valuation of a marital estate is a discretionary ruling that we review for an **abuse of discretion**. [Citation omitted.] The test for an abuse of discretion is whether the district court acted **arbitrarily** without employment of conscientious judgment . . . resulting in substantial injustice." (Emphasis added.) *Hutchins*, ¶ 8. There is hardly anything more arbitrary than haphazardly selecting a value simply because it is halfway between two potentially reasonable valuations. It should also be noted that the Court did not in fact find a valuation date for the marital home at all; rather, the Court selected a random figure that is entirely untethered to any specific valuation date.

D. The District Court was clearly erroneous when it misconstrued James Whaley's testimony and written valuation of Okland, Inc. and Okland Family Partnership.

At the portion of the final hearing that took place on February 17, 2021, Chris's counsel entered into evidence Exhibit C-2.4, CPA James Whaley's written valuation of the Okland entities. Hr'g Tr. 23:3-9, Feb. 17, 2021. Mr. Whaley testified about his valuation later that day. Hr'g Tr. 66:9-80:20, Feb. 17, 2021. Mr. Whaley's testimony was identical to his written report: Chris's share of the surface

rights for the properties owned by the Okland entities was worth $71,601.00 and his share of the mineral rights for the properties owned by the Okland entities was worth $4,735.00. Hr'g Tr. 71:5-11, Feb. 17, 2021.

Finding of Fact 26 in the Final Decree states that Mr. Whaley valued Chris's ownership share of the Okland Family Partnership at $4,735. Finding of Fact 27 states that Mr. Whaley valued Chris's ownership share of the Okland Family Partnership at $71,601. Both of these Findings are incorrect, and are based on distorted proposed Findings of Fact offered by Chris's counsel. *Notice of Filing and Service of Respondent's Proposed Findings of Fact, Conclusions of Law, and Decree of Dissolution and Spreadsheet*, Doc. Seq. 70 in case ROA, Feb. 16, 2021. Chris's first set of proposed findings matched up with the final decree. His second set of proposed findings corrected the repetition of "Okland Family Partnership" and stated that Chris's share of the Okland Family Partnership was valued by Mr. Whaley at $71,601, and Chris's share of Okland, Inc. was valued by Mr. Whaley at $4,735. *Notice of Filing and Service of Respondent's Revised Proposed Findings of Fact, Conclusions of Law, and Decree of Dissolution and Spreadsheet*, Doc. Seq. 82 in case ROA, May 3, 2021.

The detailing of these factual errors in the District Court's Findings of Fact could perhaps seem a bit obscure and tedious. However, it goes to show how

careless and arbitrary the District Court was in its handling of this matter. The District Court repeated two Findings of Fact from Chris's first proposed findings that contained both an obvious typographical error and clearly misconstrued Mr. Whaley's written report and testimony. Further evidence of this carelessness is that between Chris's counsel's *Rule 60 Motion to Correct Clerical Error in Judgment with Brief Incorporated* and Andrea's counsel's *Petitioner's Response to Respondent's Motion to Correct Error in Judgment*, the parties identified at least 13 separate clerical errors in the Final Decree. Doc. Seq. 142 in case ROA, June 6, 2022; Doc. Seq. 143 in case ROA, June 21, 2022. Additionally, Andrea's counsel filed motions under Mont. R. Civ. P. 52 and 59(e) to amend the Final Decree, and Chris's counsel conceded to five substantive, material errors that Andrea's counsel identified. *Petitioner's Opposed Rule 52 Motion to Amend Findings and Judgment and Brief in Support*, Doc. Seq. 144 in case ROA, June 24, 2022; *Petitioner's Opposed Rule 59(e) Motion to Amend Judgment and Brief in Support*, Doc. Seq. 145 in case ROA, June 24, 2022; *Respondent's Combined Response to Petitioner's Rule 52 and 59 Motions with Brief Incorporated*, Doc. Seq. 151 in case ROA, July 11, 2022.

E. The District Court was clearly erroneous when it included Andrea's inherited coin collection as part of the marital estate.

"The party claiming ownership of the pre-acquired, bequested or gifted

property is entitled to argue that it would be equitable to award him or her the entirety of such property." *Funk*, ¶ 19. At the February 17, 2021 portion of the final hearing, Chris testified about a coin collection that consisted of coins collected by him and Andrea's late father John. Hr'g Tr. 59:2-60:16, Feb. 17, 2021. Chris gave no indication what portion of the coins had been collected by him and what portion had been collected by John. Chris testified during the March 30, 2021 portion of the final hearing that John intended for John's children to inherit the coins that John had collected. Hr'g Tr. 71:20-25, March 30, 2021. At the close of Andrea's counsel's direct examination of Andrea, Judge Manley called a recess so that the parties' attorneys could try to work out an agreement on dividing the personal property of the parties. Hr'g Tr. 100:4-119:23, March 30, 2021. During this recess, the parties agreed that Chris would keep his own portion of the coins and Andrea would keep the coins that had been collected by her father. In the days after the March 30, 2021 hearing the agreement the parties reached during this recess fell apart, with fingers pointed by both sides. The coins were distributed in the Final Decree by Finding of Fact 34, which tasked Andrea to divide the coins into two groups of approximately equal value and then had Chris choose which group he wanted to keep.

Andrea's father was a numismatist; Andrea is not. She would not know where

to begin in determining how to divide the coins into two equal groups. The fact is that every way that the District Court described the Okland entities in its Findings of Fact is also true of Andrea's father's coin collection. It was largely premarital, and fully gifted and inherited. Neither she nor Chris contributed to its maintenance or value. If the Okland entities were properly excluded from the marital estate, then John's coin collection should be as well.

F. The District Court was clearly erroneous when it twice deducted from Chris's share of the marital estate amounts he allegedly paid from inherited funds during the marriage.

At the February 17, 2021 hearing Chris testified that he had paid off his and Andrea's credit card debts at the time he and Andrea purchased the marital home in 2019. Hr'g Tr. 30:22-31:2, Feb. 17, 2021. He claimed that $30,000 used for this purpose came from an Edward Jones account he had inherited from his mother, but he provided no documentary evidence to support his claim. Hr'g Tr. 31:3-7, Feb. 17, 2021. He also testified that he used inherited funds to pay federal and state tax debts in 2019, but again offered no corroborating documentary evidence. Hr'g Tr. 96:14-97:10.

The Final Decree notes the $30,000 expenditure in Finding of Fact 13, and deducts it from Chris's share of the marital estate twice, once in Exhibit A of the Final Decree, and again in Exhibit E. Though Andrea's counsel sought to fix this

error via his response to Chris's Rule 60 motion, the District Court's *Order Correcting Clerical Error in Findings of Fact, Conclusions of Law and Decree of Dissolution Judgment* repeated the error. Doc. Seq. 154 in case ROA, Jul. 15, 2022.

Findings of Fact 36 and 37 of the Final Decree address the tax debts that Chris allegedly paid with inherited funds, stating that Chris paid $7,000 of a federal tax debt and $8,000 of a state tax debt. Exhibit C of the Final Decree shows a distribution of state tax debt to Chris in the amount of $9,000, even though Chris's testimony and the District Court's own Finding of Fact state the amount paid was $8,000. Further, the debt should not be listed on Exhibit C, and so deducted from Chris's share of the marital estate, because the debt had already been paid off. Notably, only $10,000 of federal tax debt is listed on Exhibit C, even though the alleged but unproven original amount was $17,000. It is clear that $7,000 was subtracted from that original amount because Chris allegedly paid $7,000 in inherited funds toward the debt. If the amount Chris had already paid in federal tax debt had been deducted, then the amount he had already paid toward state tax debt should have been deducted too. Additionally, the amount that Chris allegedly paid in inherited funds toward the parties' tax debt is deducted again in Exhibit E. Andrea's counsel also tried to resolve these errors in his response to Chris's Rule

60 motion, but the District Court declined to do so in its Order. Doc. Seq. 154 in case ROA, Jul. 15, 2022. The state tax amount in Corrected Exhibit C is corrected to $8,000, but the amount deducted from his share of the marital estate on Corrected Exhibit E was increased to $15,000—presumably, $7,000 for the federal tax payment and $8,000 for state tax payment. The problem is that Corrected Exhibit C already gave Chris credit for his state tax payment, and so he receives this $8,000 credit twice.

G. The District Court was clearly erroneous when it failed to value various marital assets as of the day of dissolution.

This is an issue of first impression for this Court. In most dissolution cases, district courts and this Court conflate "date of dissolution" with "date of final hearing." However, those two dates are too far removed in this matter for such conflation. The Court's undue delay in issuing a final decree in this matter (420 days after the final hearing and 173 days after either party's last filing) makes the date of the final hearing far too remote from the date of dissolution. Additionally, the parties are still not fully financially separated. A number of Andrea's assets are still in the marital home, the parties still have open joint credit accounts, joint tax debts, joint utilities and homeowner's insurance, and as recently as his July 2021 hit-and-run crash Chris's truck was still on Andrea's insurance.

It is confounding that this Court, despite the general rule announced by the

Supreme Court, has declined to use any single discernable standard to determine when the assets of the marital estate should be valued. In many instances the Court apparently (but not explicitly) uses the date of the final hearing, but with the marital home the Court decided to "split the difference" between two arbitrary dates and values.

3. The District Court committed plain error and abused its discretion it its evaluation of witness credibility:

A. The District Court committed plain error when it failed to make a credibility determination regarding Andrea's expert witness David McGinnis.

It is impossible to tell by reading the District Court's Final Decree, but Andrea had an expert witness testify on her behalf regarding James Whaley's valuation of the Okland entities. Hr'g Tr. 14:17-36:18, March 30, 2021. Of course, "A district court is in the best position to judge the credibility of the testimony proffered by parties and witnesses. . .." *Schwartz v. Harris*, 2013 MT 145, ¶ 24, 370 Mont. 294, 308 P.3d 949 (internal citation omitted). However, the District Court in this case failed to evaluate the credibility of Mr. McGinnis's testimony at all. This is an issue of first impression for this Court, but the United States Court of Appeals for the District of Columbia Circuit offers some persuasive precedent. In *Latif v. Obama*, a district court referred to a witness's testimony as "plausible" but otherwise did not make a credibility determination. The Appeals Court stated,

"Because the district court only found Latif's story "plausible," not credible, the court merely established the possibility, not the probability, that Latif's story was true. And without a 'comparative judgment about the evidence,' there is no finding of fact for this court to review." *Latif v. Obama* (2011), 399 U.S. App. D.C. 1, 13, 666 F.3d 746. The Court went on to state, "In other words, the district court took on the role of a reviewing court, assuming in effect that Latif already had been found credible and then applying a deferential standard of review to that imaginary finding. . . .. We cannot allow the district court to bypass its factfinding role in favor of an appellate standard of review." *Id* (internal citation omitted).

This finding should rightly be adopted by this Court. This Court has found, regarding findings of fact, "[W]e have long adhered to the doctrine of implied findings[,] which states that where a court's findings are general in terms, any findings not specifically made, but necessary to the judgment, are deemed to have been implied, if supported by the evidence. To make an implied finding determination, this Court will consult both hearing transcripts and written findings." *Truss Works v. Oswood Constr. Co.*, 2022 MT 42, ¶ 27, 408 Mont. 27, 504 P.3d 1116. In this case, however, no findings regarding Mr. McGinnis's testimony were even implied by the District Court. This case is more akin to *Snavely v. St. John*, where this Court held

> . . . [I]t is impossible for this Court to evaluate the parties' arguments on appeal in the absence of the trial court's findings of fact and the court's exposition of which facts and arguments it found persuasive and why. The District Court's legal conclusions must likewise be articulated and be in accordance with the governing statutes and interpretive case law. In short, it is not enough that the trial court simply regurgitate the contentions of the parties and then reach a conclusion. The court must also make factual findings and combine those with a logical, reasoned analysis and application of the law to the facts.

2006 MT 175, ¶ 18, 333 Mont. 16, 140 P.3d 492.

B. The District Court committed plain error when it made no findings of fact regarding Andrea's testimony and so did not make a credibility determination.

The arguments from the previous section regarding Mr. McGinnis's testimony also apply to Andrea's testimony. Nowhere in the Findings of Fact did the District Court mention anything that Andrea testified to, and there was also no credibility determination offered regarding Andrea.

C. The District Court committed plain error when it recited in its findings of fact a number of statements from Chris's testimony that Chris did not support with documentary evidence as unrefuted and irrefutable fact.

This Court's precedent from *Snavely v. St. John*, as well as the rule espoused by the appeals court in *Latif v. Obama* applies to the District Court's treatment of Chris's testimony. Every bit of Chris's testimony that is regurgitated in the District Court's Findings of Fact is offered as incontrovertible fact. The District Court declines to even preface any findings with "Chris testified credibly," or

"According to Chris's testimony . . .". This is despite having clear evidence on the record in this matter that Chris lied to the District Court in sworn affidavits about material facts.

In July of 2021, Chris perpetrated a hit-and-run in a grocery store parking lot. In a sworn affidavit addressing this collision, Chris stated, ". . . I had to swerve to avoid being hit by a truck that was driving right at me. I barely scraped the parked car. When this happened, I stopped and got out to check for any damage. . .. I wrote down my contact information, left it on the parked vehicle and J.M.O. and I left." *Affidavit of Christopher Okland in Reply to Petitioner's New Allegations Set Forth in Petitioner's Reply Regarding Ex Parte Motion for Interim Parenting Plan*, Doc. Seq. 110 in case ROA, Aug. 17, 2021.

In response, Andrea's counsel obtained an affidavit from Jeremy Eugene Lee, an eyewitness to the hit-and-run crash. *Petitioner's Reply to Respondent's Response to Petitioner's Motion to Amend Parenting Plan*, Doc. Seq. 138 in case ROA, Dec. 2, 2021. Mr. Lee, who had recently retired from the Montana Highway Patrol after over 22 years of service, stated in his affidavit that (1) there was no vehicle that Chris was swerving to avoid; (2) Chris's vehicle crumpled up the bumper of the car he hit; and (3) Chris did not leave his information on the car he hit. The only reason the authorities were able to hold Chris responsible for his

actions was that Mr. Lee took down Chris's license plate and reported the crash to the Polson Police Department.

In October of 2021, Chris was charged with DUI and felony criminal endangerment of the parties' minor child J.M.O. Chris picked up J.M.O. from school and took her to an appointment while his blood alcohol content was nearly three times the legal limit. He lied to the police during this incident, in that he denied that he had been consuming alcohol. *Id*. Despite this record of lying to the District Court and law enforcement, the District Court still chose to treat Chris's testimony as gospel. His veracity was not even questioned when he testified to matters for which he had no corroborating evidence, such as paying tax debts with inherited funds or the existence of certain credit cards he claimed Andrea possessed.

4. The near verbatim adoption of Chris's proposed Findings of Fact and Conclusions of Law was an abuse of discretion as they misrepresent the evidence, the law, and equity.

This Court recently held, "While we discourage district courts from adopting a party's proposed findings and conclusions verbatim, such an action is not per se error. This Court has approved the verbatim adoption of findings and conclusions where they are comprehensive and detailed and supported by the evidence." *In re Marriage of Frank*, 2022 MT 179, ¶ 84, 410 Mont. 73, 517 P.3d 188 (quotations

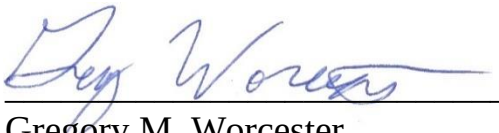
and internal citations omitted). This Court went on to say, "To determine if a district court's use of proposed findings of fact and conclusions of law was proper, we ask whether the proposed findings are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence presented." *Id* (internal citations omitted). For the purpose of not exceeding the length limits of this brief, Andrea's counsel would like to incorporate by reference *Petitioner's Opposed Rule 52 Motion to Amend Findings and Judgment and Brief in Support* and *Petitioner's Opposed Rule 59(e) Motion to Amend Judgment and Brief in Support*. Doc Seq. 144 and 145 in case ROA, June 24, 2022. The District Court's findings are insufficiently comprehensive and not supported by the evidence presented.

VII. CONCLUSION

The Findings of Fact, Conclusions of Law, and Final Decree of Dissolution in this matter is deeply, fatally flawed. By adopting nearly all of Chris's proposed findings and conclusions and none of Andrea's, the District Court abdicated its duty to exercise its own discretion and conscientious judgment. The undersigned requests that this Court reverse the District Court's adoption of the Stipulated Final Parenting Plan; find that the District Court's division of assets and debts is not

equitable; direct that the District Court remedy the many defects contained in its Findings of Fact, Conclusions of Law, and Final Decree of Dissolution; and, if necessary, remand the case for a new trial.

Dated this 1st day of February 2023.

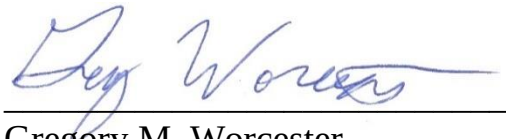


Gregory M. Worcester
Attorney for Appellant

Certificate of Service

I hereby certify that I have filed a true and accurate copy of the foregoing OPENING BRIEF with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing OPENING BRIEF upon each attorney of record in the above-referenced District Court action, as follows:

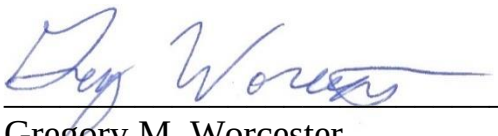
Paula M. Johnson-Gilchrist
Counsel for Respondent/Appellee
Johnson-Gilchrist Law Firm, P.C.
6336 Highway 93 South
Whitefish, MT 59937-8458



Gregory M. Worcester
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, and the word count, calculated by Microsoft Office Word is 7,655, excluding certificate of service and certificate of compliance.



Gregory M. Worcester
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Gregory Micheal Worcester, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-01-2023:

Paula M. Johnson-Gilchrist (Attorney)
6336 HWY 93 South
Whitefish MT 59937
Representing: Christopher Okland
Service Method: eService

Electronically Signed By: Gregory Micheal Worcester
Dated: 02-01-2023