IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 22-0545

LINDSAY B. GOUDREAU
Petitioner and Appellee,

-vs-

JEFFREY A. GOUDREAU
Respondent and Appellant.

On Appeal From The Montana Eleventh Judicial District Court
Flathead County, Cause No: DR-15-2020-064

APPELLANT'S OPENING BRIEF

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2. Did the District Court abuse its discretion in its valuation and division of the marital estate.

3. Did the District Court err in failing to issue an equal shared parenting schedule.

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STATEMENT OF THE CASE

Jeffrey A. Goudreau [hereinafter Jeff] appeals the Eleventh Judicial District Court's June 7, 2022 *Findings of Fact Conclusions of Law and Decree of Dissolution,* and *Final Parenting Plan* submitted as Appendix A and B. The judgments were issued following a two-day trial to dissolve the marriage between Jeff and Lindsay B. Goudreau [hereinafter Lindsay]. Jeff appeals the court's parenting plan, calculation of child support, and the valuation and distribution of the marital estate.

Jeff also appeals the district court's order failing to compel Lindsay to provide responses to discovery requests, submitted as Appendix C.

STATEMENT OF FACTS

1. Lindsay and Jeff were married in 2013. *Trial Transcript [TT],* p. 322, ll. 5-7. They have lived separate and apart since January 10, 2020. *TT,* p. 322, ll. 8-10.

2. The parties have two children, Greta, age 8, and Gus, age 5. *TT,* p. 323, ll. 22-23. Lindsay has an older child from a prior marriage, Cove, age 13. *TT,* p. 337, ll. 6-8.

3. On January 24, 2020, Lindsay filed a petition for dissolution. DOC 1.

4. Jeff is 43 years of age and works as a distribution designer for Flathead Electric Cooperative. *TT,* p. 321, ll. 10-16. His gross income in 2021 was $78,008. *TT,* p. 353, ll. 23-25.

5. Lindsay is 43 years of age and owns and operates Glacier View Studios, providing architectural photography services. DOC 3. Her photos have been published in the New York Times, Home Garden TV, Luxury Home Magazine, Montana Health Journal and other publications. *TT,* p. 178, ll. 6-11. Her clients include HGTV, Wright's Furniture, the Lodge at Whitefish Lake, Going to the Sun Chalet, multiple real estate agencies, and Kalispell Regional Medical Center. *Id.* at ll. 12-17.

6. Lindsay made the following representations regarding her income.

EXHIBIT G, p. 205	4/1/20	$31,932 gross wages working 20-30 hours per week

EXHIBIT C, p. 201	11/4/21	$30,000 annual income
EXHIBIT E, p. 292	December, 2021	$16,604 annual income
EXHIBIT B, p. 201	11/19/21	$3,400 net monthly income
EXHIBIT 38, p. 153	Trial	$1,384 monthly self-employment income

7. When the parties married, Lindsay had a car and student loans. *TT,* p. 183, ll. 16-18. Her net worth was zero. *Id,* at ll. 23-25.

8. Jeff had been investing in real property to build wealth since college. *TT,* p. 393. He had built or improved three houses before acquiring the Oakmont land. *TT,* p. 395. After the parties married, they purchased 10 acres at 1035 Oakmont Drive, Columbia Falls (hereinafter "Oakmont"). *EXHIBIT* 3. Jeff, acting as the general contractor, built a house on the property. *TT,* p. 395. Lindsay contributed no money to the purchase of the land or the house. *Id.* Jeff invested premarital assets totaling $248,000 into Oakmont. *TT*, p. 392, ll. 13-18, and *EXHIBIT QQ.*

9. In her disclosure dated March 3, 2021, Lindsay stated the value of Oakmont was $670,000 per her hired appraiser, Dave Heine. *EXHIBIT F,* p. 6, and *TT,* p. 228, ll. 9-14 and *TT,* p. 15-25.

10. Jeff's expert appraiser Gene Lard testified at trial that the value of Oakmont on January 16, 2020 was $440,000. *EXHIBIT DD*. Mr. Lard testified that the value of Oakmont as of August 22, 2021 was $700,000. *EXHIBIT EE.*

11. At trial, Lindsay called realtor Brian Murphy who performed a comparative market analysis (hereinafter CMA) and testified that the value of Oakmont as of August 6, 2021, was $1,450,000. *EXHIBIT 1.*

12. The court adopted and approved the parties' stipulation concerning interim parenting and financial issues on May 5, 2020. DOC 29, included as APPENDIX D.

13. The Court did not issue a Pretrial Order. A Pretrial Order was submitted by the parties at the Pretrial Conference. *Transcript from Pretrial Conference, 12/15/21,* p. 4, ll. 11-23. Lindsay objected to the Pretrial Order at the pretrial conference. *Id.* at p. 5.

14. The court held trial on March 21-22, 2022 and issued Findings of Fact, Conclusions of Law, and Decree of Dissolution on June 7, 2022. APPENDIX A. The court filed its final parenting plan entitled *Lindsay B. Goudreau's Proposed Final Parenting Plan* on June 7, 2022. APPENDIX B.

15. On June 17, 2022, Jeff filed a *Motion for Relief from Judgment Pursuant to Mont.R.Civ.P. 59 and 60*. DOC 95. Included in the relief sought were corrections of mathematical errors, direction from the court regarding

distribution of proceeds from the sale of Oakmont, and reconsideration of Lindsay's income in light of the newly discovered information that Lindsay had received $33,000 in the months following the entry of the decree from short term rental of 801 Second, the real property awarded to Lindsay. DOC 54 and DOC 66. The court did not rule on the motion within 60 days.

Facts Regarding Discovery

16. The court's Scheduling Order required that discovery be completed by September 17, 2021. DOC 38. "Names and address of expert witnesses, together with the information called for in Rule 26, M.R.Civ.P., must be furnished to all opposing parties." *Id.*

17. On August 23, 2021, Lindsay filed her Expert Witness and 26 (b) disclosure providing only that Brian Murphy, realtor, would testify regarding the value in his CMA. "A copy of Brian Murphy's resume will be supplemented." DOC 40, p. 2.

18. After the parties separated, Lindsay signed a Buy/Sell to purchase real property at 801 Second on March 4, 2020. *EXHIBIT Y*. She did not provide advance notice to Jeff. DOC 47.

19. On October 26, 2021, Jeff filed a motion to compel responses to discovery. DOC 53.

20. In his brief, DOC 54, pp. 2-3, Jeff advised the Court that Lindsay had failed to respond to discovery in three categories: failure to respond; failure to provide legible and complete attachments; and failure to supplement.

21. Lindsay's discovery responses were admitted at trial as Exhibit K. Attached to Jeff's brief in support of his motion to compel as Exhibit A were each of the discovery requests at issue, Lindsay's response, Lindsay's supplemental response where provided, and Jeff's argument and authority supporting an order compelling her to respond. DOC 54. Exhibit A is included as APPENDIX E.

22. As set forth in more detail in Appendix E, Lindsay refused to provide a proposed final parenting schedule, refused to produce the 2020 parenting order and other documents regarding her son Cove, refused to provide mental health diagnoses and current medication for Cove, and refused to state why she could not be self-supporting. She objected to requests regarding her business income and expenses.

23. Lindsay provided one profit and loss statement for January 2021 through October 2021, after the motion to compel was filed. *Jeff's Reply Brief*, DOC 66, p. 3.

24. In her response brief, Lindsay argued that producing her tax returns was a sufficient response to the discovery requests regarding her business. DOC 54, p. 13. She objected to responding to interrogatories and requests for production

regarding her business income and expenses on the grounds of irrelevance, confidential, privileged, and designed to harass and intimidate Lindsay. APPENDIX E.

25. On October 6, 2021, *after discovery had closed*, Lindsay supplemented her response to Request for Production 1 seeking the pleadings in the Missoula custody case for her son Cove by stating that she did not have the documents but Jeff is "free to obtain these old documents from the Missoula County Clerk of Court." APPENDIX E, p. 3.

26. On November 3, 2021, Jeff filed a motion to reopen discovery. He sought the Missoula custody pleadings, to take a deposition, and to obtain information regarding Lindsay's income that she had not produced in discovery. DOC 58.

27. On December 7, 2021, the court denied the motion to reopen discovery. *APPENDIX E.* The motion to compel was granted in part and denied in part. The court ordered Lindsay to supplement her responses to the discovery requests listed in paragraph six of Jeff's Brief [DOC 54, pp. 2-3] no later than December 14, 2021. The court did not compel Lindsay to provide the discovery requested in paragraphs four and five of Jeff's motion to compel. DOC 54, pp. 2-3.

28. The court did not award fees or costs to Jeff incident to his motion to compel. *APPENDIX C.*

29. The court denied the motion to compel as to the Missoula custody documents. *Id*.

30. At the pretrial conference on December 15, 2021, Jeff's counsel advised the court that she did not have Lindsay's business records. *12/15/21 Transcript*, pp. 7-8. Lindsay's counsel responded that the Court did not require her to produce them. *Id. at 8.* Jeff's counsel then asked "for a presumption that Lindsay's testimony regarding her income is not credible, because she hasn't produced the underlying documents." *Id.* at 9. Counsel asked if she should file a motion for sanctions for discovery that was not produced. *Id.* at 12. The Court advised Lindsay to produce whatever she was ordered to produce. *Id.* at 13, ll. 20-23.

31. At trial, Jeff objected to exhibits offered that were not produced in discovery. *TT.,* p. 132, ll. 10-13. The objections were denied. *TT.,* p. 133, ll. 15-17. *See also* objection at TT, p. 134, ll. 10-11.

32. Jeff asked a series of questions regarding Lindsay's objections to discovery requests requesting information regarding her business income and expenses. Lindsay was asked to read her response to Interrogatory No. 27. *TT* p. 195, ll. 12-14. Lindsay's counsel objected to the question at trial stating the

documents had been provided, and it was irrelevant, and harassing. *TT,* p. 195, ll. 15-22. Lindsay had objected to Interrogatory No. 27 which sought information regarding the jobs she completed, the hours it took her to do the job, and the amount received for the job. *EXHIBIT K,* p. 32. Lindsay objected on the grounds that "it is designed to intimidate and harass Lindsay" and that it is confidential and privileged. *Id.*

33. At trial Lindsay admitted that she did not provide proof of her business expenses. *TT,* p. 197, ll. 4-9.

34. Jeff objected at trial to Lindsay's expert rebuttal witness' testimony which included PayPal figures that he had not received in discovery. *TT,* p. 467-468. The objection was overruled. *TT,* p. 468, ll. 13-23.

35. After Lindsay's realtor Brian Murphy testified that he had 110 million in real estate sales the previous year and was asked for his opinion on the general market in the Flathead Valley, Jeff objected to the expert providing testimony that was not included in his expert disclosure. *TT,* p. 256, ll. 3-8. The objection was overruled. *TT,* p. 256, l. 9. Lindsay never produced Mr. Murphy's resume or curriculum vitae which Lindsay said she would supplement in discovery, and that the court compelled her to produce. EXHIBIT K, p. 39, R/P 32; and *APPENDIX* C.

36. Lindsay called Cove's father Ben Crocker as a witness at trial. Ben testified that at a hearing in May of 2020 the Missoula court placed Cove with him. *TT*, p. 43. The court sustained Lindsay's objection to any questions regarding the custody documents. *TT,* p. 44, ll. 7-15.

37. Crystal, Ben's current wife, testified that Lindsay made serious false allegations against her and Ben regarding domestic abuse, child abuse, and that Lindsay had called CPS to investigate Ben's home. *TT,* p. 247. The court sustained Lindsay's objections to questions regarding the GAL's findings. *TT,* p. 247 and p. 250.

STANDARD OF REVIEW

A district court's discovery rulings are reviewed for abuse of discretion. *Richardson v. State,* 2006 MT 43, ¶21, 130 P.3d 634, 331 Mont. 231. "In doing so, we generally defer to the district court because it is in the best position to determine both whether the party in question has disregarded the opponent's rights, and which sanctions are most appropriate." *Id., citing Delaware v. K-Decorators, Inc.,* 1999 MT 13, ¶ 86, 293 Mont. 97, ¶ 86, 973 P.2d 818, ¶ 86. "Imposition of sanctions and awards of costs are reviewed for abuse of discretion." *Walden v. Yellowstone Electric Co.,* 2021 MT 123, ¶10, 487 P.3d 1. The Supreme Court will reverse the trial judge only when their judgment may materially affect the substantial rights of the complaining party and allow the possibility of a

miscarriage of justice. *Anderson v. Werner Enterprises, Inc.,* 1998 MT 333, ¶13, 292 Mont. 284, 972 P.2d 806.

A district court's findings of fact in a division of marital property are reviewed to determine whether they are clearly erroneous. *In re the Marriage of George*, 2022 MT 179, ¶32. A district court's conclusions of law are reviewed for correctness. *Id.* 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 the Supreme Court's review of the record convinces them that the district court made a mistake. *Id.* Each case is examined individually, with an eye to its unique circumstances. *Id.*

The Supreme Court reviews a district court's findings of fact supporting a parenting plan to determine whether they are clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if their review of the record convinces them that the district court made a mistake. *In re Parenting of M.C.,* 2015 MT 57, ¶10, 378 Mont. 305, 343 P.3d 569.

A district court's child support award is reviewed for an abuse of discretion. *Id.* at ¶33.

SUMMARY OF ARGUMENT

The case presents an unusual fact pattern where the mother made no parenting proposal and presented no evidence at trial regarding the best interest of the parties' children. The father presented substantial evidence that an alternating week schedule was best for the children, and yet the court ruled that the mother should have the majority of the parenting days with the children. This Court could simply find that the court's decision was not supported by the evidence, or it could use the unique circumstances presented to provide further clarification regarding the "frequent and continuing contact with both parents" best interest factor in Mont. Code Ann. §40-4-212 (2021) in conjunction with Mont. Code Ann. §40-4-227 recognizing the constitutionally protected rights of parents.

This Court has ruled repeatedly that dilatory discovery practices should not be handled leniently. For practitioners, discovery abuse wastes time, money, makes settlement less likely, and results in chaotic trials such as this one. Neither the courts nor the attorneys enjoy litigating discovery issues, but the facts of this case merit remand to the district court because Jeff was unable to effectively present his case due to the court's discovery rulings.

This Court decided *Marriage of George,* 2022 MT 179, on September 22, 2022, after the Decree of Dissolution was entered in the present case on June 7, 2022. Applying the reasoning and holding of *George* to this case merits reversal

and remand with an instruction that the district court use the date of separation values for all of the parties' assets.

ARGUMENT

I. Jeff was denied a fair trial because the district court abused its discretion on discovery matters.

The district court's failure to require compliance with the rules of civil procedure and with its order to compel, and its admission of evidence that was not produced in discovery contravened the express purpose of discovery and severely undermined the integrity of the litigation.

M.R.Civ.P. 26(b)(1) provides that "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense. . . . . The information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Rule 33, M.R.Civ.P., authorizing the use of interrogatories for pre-trial discovery, "is liberally construed to make *all relevant facts* available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage." *Richardson v. State,* 2006 MT 43, ¶24, 331 Mont. 231, 130 P.3d 634, 641 (emphasis in original). M.R.Civ.P. 34(b) requires that a party served with a request for production must either state that it will accommodate the request or assert and object with the reason therefore stated. "Relevant evidence means evidence having any tendency

to make the existence of any fact that is of consequence to the determination of the action more probably or less probably than it would be without the evidence." M.R.Evid. 401.

Discovery rules impose a broad duty of disclosure and require a good faith effort. *Richardson, supra.,* 2006 MT at ¶52, 130 P.3d at 646. "This Court strictly adheres to the policy that dilatory discovery actions shall not be dealt with leniently." *Id.* at ¶56. "As we have said, the trial courts, and this Court on review, must remain intent upon punishing transgressors rather than patiently encouraging their cooperation." *Id.,* citing *Morris v. Big Sky Thoroughbred Farms,* 1998 MT 229, ¶13, 291 Mont. 32, 965 P.2d 890. *See also Walden v. Yellowstone Elec. Co.,* 2021 MT 123, ¶ 58, 487 P.3d 1, 14 and *Peterman v. Herbalife International, Inc.,* 2010 MT 142, 356 Mont. 542, 234 P.3d 898.

A. The district court's failure to compel Lindsay to respond to discovery regarding her business income and expenses materially affected Jeff's ability to present his case at trial.

The district court abused its discretion in failing to compel Lindsay to respond to Interrogatories 27, 28, 30, 31, and 32 which sought information regarding her business income, and Requests for Production 21 and 23 seeking documents regarding Lindsay's business. *APPENDIX E.* Lindsay's objections that that the requests were irrelevant, harassment, and that providing tax returns was sufficient were without merit.

Determination of Lindsay's gross income less required business expenses is mandatory to the calculation of child support. Income for a self-employed parent is "gross receipts minus reasonable and necessary expenses required for the production of income . . .." A.R.M. 37.62.105(2)(b). Income for child support purposes is different from taxable income in regards to depreciation and "if business expenses include a personal component, such as personal use of business vehicles, only the business component is deductible." *Id.* A court *must* determine whether a parent is under-employed. The guidelines assume that all parents are capable of working at least 40 hours per week. A.R.M. 37-62-106 (1). "It is appropriate to impute income to a parent . . . who is underemployed;" or "fails to produce sufficient proof of income." A.R.M. 37-62-106 (2)(b) and (2)(c).

The court's failure to compel Lindsay to provide discovery substantially affected Jeff's ability to present his case at trial and allowed Lindsay to withhold or produce documents at her discretion. Justice required that Jeff receive information necessary to determine Lindsay's income under the child support guidelines and to rebut Lindsay's multiple conflicting statements regarding her income. Jeff was at a significant disadvantage at trial.

Jeff testified that he had not received documents sufficient to determine Lindsay's income, her business expenses, her hourly rate, and the number of hours she was working. *TT*, p. 377, p. 368. Without adequate responses from Lindsay or

documentation, Jeff created Exhibits CCC and DDD trying to piece together the number of hours Lindsay was working from jobs she posted on social media, invoices, and her bank deposit records received the Friday before trial. *TT,* p. 370 and EXHIBIT A. Jeff calculated that she would earn $98,640 per year as an architectural photographer if she worked full-time. *EXHIBIT DDD.*

The court did not compel Lindsay to provide missing information in her PayPal records, including the dollar amounts of the transfers. Jeff estimated the amount of Lindsay's PayPal deposits in his Exhibits CCC and DDD. Lindsay called an expert witness on rebuttal who had the PayPal figures. Jeff's objection on the grounds that the PayPal exhibits with dollar amounts had not been provided in discovery was overruled. *TT,* pp. 467-468.

B. The district court abused its discretion in allowing Lindsay's expert witness Brian Murphy to testify regarding facts and opinions that were not disclosed.

Jeff was denied a fair trial because the district court failed to enforce its order compelling Lindsay to produce a curriculum vitae for Brian Murphy and allowed Murphy to testify regarding facts and opinions not included in the 26(b) disclosure creating surprise at trial and affecting Jeff's substantial rights. The court compelled Lindsay to supplement her response to Request for Production 32 which sought curriculum vitae or resumes for her expert witnesses. APPENDIX C, item

6(j) at p. 1, ll. 19-21. She failed to do so. The Scheduling Order required the parties to disclose their experts and M.R.Civ.P. 26(b) information.

M.R.Civ.P. 26 (b)(4)(A)(i) provides that a party shall "state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." At trial, Murphy testified that he had about $110,000,000 in sales the previous year. *TT,* p. 255, ll. 19-22. Jeff's counsel objected to the witness testifying to facts that were not previously disclosed in his disclosure. *TT,* p. 256. The objection was overruled. After the objection was overruled, Murphy testified that he was the developer of Mountain Watch, a subdivision near Oakmont. *TT,* p. 267, ll. 16-21. Neither of these facts were disclosed pretrial.

Murphy was asked for his opinion regarding "the primary impetus of sales . . . in the Flathead Valley . . . in the past 24 months." *TT,* p. 255, l. 25- p. 256, ll. 1-2. Jeff objected on the grounds that the opinions were not included in his expert disclosure, including any generalizations about the market. *TT,* p. 256, ll. 3-8. The objection was overruled. After cross-examination, the court engaged in questioning the witness, including asking for his opinion regarding the market in the past seven months, his opinions on the appraisal by Jeff's expert, and whether houses sell close to his listing price. *TT,* pp. 268-271.

Allowing an expert to testify regarding facts and opinions not disclosed is grounds for a new trial. *Perdue v. Gagnon Farms, Inc.*, 2003, MT 47,¶18, 65 P.3d 570, 314 Mont. 303. It materially affects the opposing party's ability to prepare for cross-examination and inserts surprise that the discovery rules are designed to prevent. Having failed to produce a curriculum vitae as ordered, facts regarding his sales and property development were improperly admitted. These undisclosed facts were relevant to the court who stated the amount of Murphy's sales in its ruling from the bench. *TT,* p. 489.

C. The district court's failure to allow discovery regarding Lindsay's recent custody litigation with her ex-husband Ben substantially affected Jeff's ability to cross-examine Ben at trial, prove statements against interest, and develop evidence relevant to Mont. Code Ann. §40-4-212 (c) and (e).

In determining a parenting plan, a district court may consider the interaction of the children with their sibling Cove pursuant to Mont. Code Ann. § 40-4-212(c), and the court may consider the physical and mental health of all individuals involved pursuant to Mont. Code Ann. § 40-4-212(e).

In Interrogatory No. 7, Jeff requested information regarding Cove's mental health and medication. *APPENDIX E,* p. 4. Lindsay objected on the grounds of harassment, intimidation, and relevance. In Request for Production 1, Jeff requested the final parenting order and final parenting plan for Cove. *APPENDIX E,* pp. 2-3. Lindsay objected on the same grounds. On October 6, 2021, Lindsay

supplemented her response, waiving her objection, stating that Jeff was "free to obtain" the documents from Missoula County. *APPENDIX E,* p. 3. Jeff's motion to compel responses was denied by the Court. *APPENDIX C.*

On November 3, 2021, Jeff filed a motion to reopen discovery because Lindsay had waived her objection to the release of the records, but discovery had closed. DOC 58. The court denied the motion. APPENDIX C.

The facts are similar to those presented in *Richardson, supra.* In *Richardson,* this Court directed the district court to enter default judgment against the State on the issue of liability due to its abuse of discovery. The State had failed to produce evidence of other falls in the recreation area where the plaintiff was injured after leaving the pool. After refusing to provide the evidence, the State sought summary judgment on the grounds that plaintiff could not demonstrate that the State should have anticipated her injury. *Id,* 2006 MT 43 at ¶53.

At the trial in this matter, Lindsay called Ben to testify that he and Lindsay have a good relationship. Jeff's ability to cross-examine Ben was substantially impacted by the fact that he did not have even Cove's parenting plan. When Jeff asked Ben about the parenting documents, Lindsay objected. "There is a motion that was filed, the Court ruled upon it months ago, that that document- those documents are off limits." *TT,* p. 44, ll. 7-11. The objection was sustained. It is

egregious to deny discovery and then call a witness at trial that the opposing party cannot impeach because they do not have the documents to do so.

Jeff was entitled to discovery regarding Cove's mental and physical health. Mont. Code Ann. §40-4-212(e). Jeff testified that Cove had had outbursts and was prescribed Prozac at six years of age. *TT,* p. 340. He described a meltdown Cove had where he was hitting himself, flailing, and screaming. *TT,* p. 342. Cove's mental health was relevant to the parenting issues presented. Lindsay stated in the Missoula litigation that Jeff was a good stepparent. *TT,* p. 245, ll. 14-17. Jeff was prejudiced at trial by the court's failure to compel discovery.

D. The district court abused its discretion in failing to award Jeff fees and costs incident to his motion to compel.

The court further erred in failing to award fees and costs to Jeff incident to his motion to compel. *APPENDIX C*. If the motion to compel "is granted or if the requested discovery is provided after the motion was filed -- the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney fees." M.R.Civ.P. 37(a)(5)(A). The court compelled Lindsay to supplement her response to the discovery requests set forth in DOC 54, pp. 2-3, ¶ 6. Lindsay provided some supplemental responses after the motion to compel was

filed on October 26, 2021. *Jeff's Reply Brief,* DOC 66, p. 2, ll. 1-3. *See also Lindsay's Notice of Serving Supplemental Responses,* DOC 60.

An award of Jeff's attorneys' fees and costs was mandatory because it is undisputed that Lindsay was compelled to provide some supplemental responses and she did provide additional discovery after the motion was filed. Lindsay's conduct was not sanctioned and Jeff bore the additional burden of litigating the case through trial and appeal due to the chaos created by the court's failure to ensure compliance with the rules of discovery.

II. The district court's findings of fact regarding the valuation and division of the marital estate were clearly erroneous.

The district court's findings of fact were not supported by substantial evidence, the court misapprehended the effect of the evidence, and the court made mistakes. The decision should be reversed and remanded.

A. The district court abused its discretion in allowing Lindsay's expert witness to testify regarding facts and opinions not disclosed.

As set forth in paragraph I B above, the court erred in allowing Murphy to testify, and indeed asking the witness for facts and opinions, that were not disclosed in discovery or in accordance with M.R.Civ.P. 26(b).

B. The district court erred in giving equal weight to the opinions of the realtor and the appraiser.

The district court's findings contain inconsistent statements that should be corrected on remand. The court found as follows:

> Mr. Lard's testimony and appraisal regarding the value of Oakmont at the time of separation was credible. Based on his testimony, the Court cannot give equal weight to Mr. Murphy's opinion, especially when Lindsay valued the property on her disclosure as $670,000 based on the opinion of her appraiser Dave Heine four months before Mr. Lard's appraisal and Mr. Murphy's CMA. Mr. Murphy's opinion of listing price is an outlier and inconsistent with the opinions of both Mr. Lard and Mr. Heine.

Decree, p. 14, FOF 35. However, the Court then in fact gave exactly equal weight to Murphy's CMA listing suggestion of $1,450,000. The court averaged his $1,450,000 with Lard's appraisal of $700,000 and valued the property at $1,075,000. *Id.,* p. 15, l. 17. Additionally, the Court required the parties to hire Murphy as their agent to sell the property for a six percent commission. *Decree,* p. 15, FOF 39.

Lard provided extensive testimony regarding the many problems with Murphy's CMA and why it should not be given equal weight, *TT,* p. 291-298. The first page of Murphy's CMA proclaims "[t]he report is not an appraisal and is not intended to meet the requirements set out in the uniform standards of an appraisal and the services of this license. The services of a licensed appraiser should be obtained." *TT,* p. 261, ll. 11-16. Murphy's testimony was not supported by his own CMA. In Murphy's CMA for 801 Second he averaged the values of comparable sales to determine his recommended listing price. In his CMA for

Oakmont, Murphy did not use an average. Instead, he placed the value higher than 12 of his 14 comparable sales ($428,914 above the average), including riverfront homes and a home included in the luxury Parade of Homes showing. *TT,* p. 291-298. The court correctly found that Murphy's CMA could not be weighed equally to the appraisals, but then did so anyway, costing Jeff hundreds of thousands of dollars.

C. The district court erred in its calculation of the property settlement payment.

The court intended to give Jeff credit for his premarital contribution to Oakmont, but again made a mathematical error in doing so. In the Decree, p. 15, FOF 37, the Court found as follows:

> Jeff should receive credit for his financial investment in the property with premarital assets that are directly traceable, specifically the proceeds from the sale of Eckleberry to the extent those were contributed, and also the money from his premarital savings.

The Court found that Jeff had received "net proceeds of $199,291" from the sale of his premarital home on Eckleberry Drive. *DECREE,* p. 11, FOF 24. At FOF 25, the court that Oakmont was purchased for $118,500; that the property was purchased with proceeds from the sale of Eckleberry; and that the remainder of the proceeds and over $49,000 from his savings was used to build a house on the property; and that Lindsay made no monetary contributions to Oakmont.

These findings are supported by the evidence at trial.[1]

However, in the calculation of the amount Jeff owed Lindsay, the Court mistakenly used the purchase price of Oakmont instead of the amount of the Eckleberry proceeds. The court used a deduction for pre-marital contribution from the proceeds of sale of Eckleberry in the amount of $*118,*500 rather than the actual proceeds of $*199,291*. *Id.,* p. 15, FOF 38.

The court clearly erred, did not correct the error pursuant to Jeff's Rule 60(b) motion, and the case should be remanded for correction of the error.

D. The district court erred in failing to provide for the disposition of funds upon the sale of Oakmont.

The district also erred when it ordered that Oakmont be listed for sale with Murphy if Jeff elected not to pay $406,900 to Lindsay, but then did not provide for allocation of the sales proceeds. *Decree,* pp. 15-16, FOF 39. The court did not provide clarity pursuant to Jeff's Rule 60(b) motion.

The court was clear at trial and in its calculation of the property settlement payment that it intended to give Jeff credit for his premarital contribution to

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[1] Jeff testified that he invested premarital funds totaling $248,000 in Oakmont. *TT,* p. 392, l. 15. $199,291 was from the sale of his premarital home on Eckleberry Drive, $43,453 was contributed from his Credit Union savings, and $5,610 was contributed from his First Interstate Bank savings. EXHIBIT QQ.

Oakmont. However, Lindsay stated in an Affidavit that she expects her projected net sales proceeds to be $655,730.62. DOC 110, p. 4, ¶14. She expects to receive half of the sales proceeds with no credit to Jeff for his premarital contribution, no reduction for the $23,000 she has already received, and apparently without responsibility for the mortgage or HELOC loan. The court's failure to provide for the distribution of sales proceeds should be corrected on remand.

E. The Court erred in failing to reduce the payment due from Jeff to Lindsay by the amount she already received from Jeff.

The Court erred in not reducing the payment due to Lindsay by the amount she already received from Jeff**.** At trial, Jeff testified that his property settlement payment to Lindsay should be reduced by the $23,000 that he had advanced to her pursuant to their interim agreement. *TT,* p. 418, EXHIBIT QQ, p. 2.

The court at *Decree,* p. 12, FOF 27, found that Jeff had opened a HELOC loan and used the funds to "make a payment of $30,000 to Lindsay" pursuant to the parties' interim financial agreement. The parties' interim agreement, APPENDIX D, p. 5, ¶3 provided as follows.

> The remaining $23,000.00 may or may not be considered an advance or offset toward any future settlement or judicial determination on the issues of property/debt division in this matter, and each party reserves their right to present their position regarding the same in settlement negotiations or any future hearings or trial in this matter.

The court made no additional findings or conclusions regarding the issue of whether the funds advanced should be deducted from the property settlement

payment, and it did not address the question again raised in Jeff's Rule 60(b) motion. The issue should be remanded to the district court for a ruling.

F. The district court erred in concluding that all assets except Oakmont should be valued as of the date of separation.

The district court valued and divided all assets of the parties, including 801 Second, as of the date of the parties' separation on January 10, 2020, except Oakmont. Its conclusion that the parties were engaged in a joint venture or financial partnership was not correct and not supported by substantial evidence. The date of separation was appropriate for all assets because the parties were financially separated, made separate financial decisions, and had an interim financial support agreement in place. Further, in valuing only Oakmont as of the date of trial the court provided a windfall to Lindsay as it allowed her to retain one hundred percent of the appreciation in value of 801 Second acquired during the separation in addition to fifty percent of the appreciation in value of Oakmont.

A district court's conclusions of law are reviewed de novo to determine whether they are correct. *In re the Marriage of George*, *supra.* 2022 MT 179 at ¶34. Mont. Code Ann. §40-4-202(1) states that the Court "shall . . . finally equitably apportion between the parties the property and assets belonging to either or both, however acquired and whether the title to the property and assets is in the name of the husband or wife or both." "[T]he district court's essential mandate,

which is to equitably distribute all assets of the parties, however and whenever acquired." *In re Marriage of Funk,* 212 MT 14, ¶16, 363 Mont. 352, 270 P.3d 39.

"When distributing the marital estate, a district court 'focuses on the overall distribution of the entire marital estate and not an item by item accounting.'"

Marriage of George, supra. at ¶36 (citations omitted).

> Equitable apportionment is more important than 'designating the moment' at which the court should value marital property. *Schwartz,* ¶18. This Court has affirmed a district court's use of the date of separation where the parties 'began managing their finances separately and eventually lived separately from that time.' *Schwartz,* ¶18 (internal quotations omitted); *see also In re Marriage of Tipton*, 2010 MT 144, ¶24, 357 Mont. 1, 239 P.3d 116; *In re Marriage of Williams,* 2011 MT 63, ¶26, 360 Mont. 46, 250 P.3d 850 ("[T]he date of separation can be used as the appraisal date when one spouse accrued significant wealth and the other accrued significant debts after the parties had separated but before formal dissolution.").

Marriage of George, supra. at ¶40.

1. The district court erred in concluding that the parties were operating Oakmont as a joint venture during their separation.

The court made the following finding of fact and conclusion of law, and no others, to support its conclusion that Oakmont should be valued as of the date of trial.

> However, the Court does view the Joint Stipulation of Parties filed May 5, 2020, as an ongoing financial partnership between the parties with respect to treatment of the Oakmont property, leading toward the conclusion that its value should be determined as of the date of decree, not the date of separation. Specifically, same provided for ongoing rental of tent and RV sites, division of income from same, and other provisions relative to the management of the finances of Oakmont.

Decree, FOF 34, p. 14.

> It is fair and equitable to value the Oakmont property at the date of trial or decree for the reason that the Oakmont property remained a financial partnership or joint venture subsequent to separation and continuing until the present time.

Decree, COL 9, p. 23.

Although the interim agreement did provide that *if the parties agreed*, they could develop Oakmont, it is undisputed that they did not do so.[2] *APPENDIX A,* pp. 4-5. The district court understood at trial that the parties had not developed or rented the property during the separation, stating as follows in reference to the provision in the interim agreement.

> They talk about splitting – well, and here's a great line, "if the parties mutually agree", which I think is probably a big disqualifier, I'm not sure why that was put in there, but to rent the remaining vacation and RV sites, then they split the money equally from those rentals. That's how I'm reading it.

TT, p. 190 l. 24- p. 191, l. 5.

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[2] The only income received from the property was the $200 per month rental from the single renter who was on the property at the time the agreement was reached. *TT,* p. 442, ll, 21-22. The property was never developed for short-term rental. *Id.,* p. 443, l. 21. The only renter on the property during separation was the one who was there at the time the interim agreement was made which stated that Jeff would receive the $200 per month rent. *Id.,* p. 189, ll, 1-3.

The court's conclusion that the parties were engaged in a joint venture is also inconsistent with its FOF 43, *Decree,* p. 17.

> It is fair and equitable to value the [401(k)] account as of the date of separation because the parties had financially separated and an interim family support agreement was in place. . . . Jeff has been paying $900 per month in temporary family support to Lindsay . . . during the two year separation.

The court's conclusion that the parties had an ongoing financial partnership or joint venture in Oakmont based on the interim agreement providing that they would share income *if* they mutually agreed to develop the property is incorrect because it is undisputed that they did not develop the property.

2. The district court erred in failing to value all of the parties' assets at the time of separation.

The district court's finding that the parties had financially separated as of the date of separation is correct, supported by the evidence, and should govern the distribution of all of the parties' assets. In this case, as in *Tipton*, *supra.,* using the date of separation values is appropriate because the parties were neither living together nor comingling their assets after separation. In *Marriage of George*, *supra.* at ¶43*,* the Court found that the date of separation values were not appropriate in part because husband continued to manage the parties' joint finances, they jointly purchased a home and sold a home during separation, and they maintained comingled finances.

In the present case, the parties never comingled financial accounts. *Decree,* p. 17, FOF 46. They made separate financial decisions.[3] They entered into an interim financial agreement whereby Jeff paid to Lindsay $900 per month. *APPENDIX D.*

Unlike in *George, supra*, Lindsay signed a Buy/Sell for real property at 801 Second on March 4, 2020 for $350,000 and incurred debt thereon without even advising Jeff in advance. *See Jeff's Motion for Injunction,* DOC 47, EXHIBIT Y, and TT, pp. 388 and 391. Jeff was oblivious to the fact that Lindsay had signed the Buy/Sell and purchased 801 Second in her sole name for more than a year before her former counsel filed a supplemental disclosure in March 2021. Thus, it is fair and equitable pursuant to Mont. Code Ann. §40-4-202 to divide all of the parties' assets as of the date of separation. Lindsay would retain 801 Second and the parties would each retain all of their assets and liabilities post-separation based on their separate financial decisions.

Moreover, the district court's decision to include only the value of Oakmont as of the date of trial causes an unjust and inequitable result because the equity of

[3] Jeff did not know that Lindsay received "Covid" payments. *TT,* p. 388. Jeff did not know that Lindsay had sold a camper. *Id.* Neither reported to the other about financial decisions. *TT,* p. 389. Lindsay testified that in the two years of separation she made her own financial decisions. *TT,* p. 184. Jeff did not share a fire cleanup payment with Lindsay. *TT,* p. 44, ll. 2-4.

$244,814 awarded to Lindsay in 801 Second is not included in the calculation of the property settlement payment due from Jeff to Lindsay. Decree, FOF 21, p. 10.

The court failed to consider the overall distribution when it ordered Jeff to pay to Lindsay over $400,000 as a property settlement payment without any consideration of the $244,814 in equity she held in 801 Second. The record is clear and the district court found that the marriage effectively ended and the parties had financially separated as of January 10, 2020. Therefore, it is equitable to divide all assets as of this date. Lard testified that Oakmont had a value of $440,000 at that time. EXHIBIT DD. Lindsay chose not to offer her expert's valuation of the property as of separation. Thus, $440,000 should be used as the value of Oakmont in the calculation of the property settlement payment due to Lindsay. This determination would allow Lindsay to retain 801 Second and all other assets she acquired based on her own financial decisions after separation.

III. The District Court's findings of fact regarding parenting were clearly erroneous.

The district court's findings of fact supporting its final parenting order were not supported by substantial evidence, the district court misapprehended the effect of the evidence, and the district court stated that it would not start with the assumption that the children were entitled to equal time with their parents. At the conclusion of the trial the court ruled from the bench that it would adopt that interim plan as the final plan, despite the fact that no evidence was presented in

support of that plan and Jeff presented uncontested evidence in support of his request for equal shared parenting. The district court found that Jeff should have 156 days with the children and Lindsay 209 days. *TT,* p. 491.

A. The district court erred in refusing to compel Lindsay to provide responses to discovery.

As set forth above, the district court erred in failing to compel Lindsay to provide discovery regarding the parenting issues.

B. The district court erred in failing to enforce Mont. Code Ann. § 40-4-234 requiring Lindsay to propose a final parenting plan.

Lindsay took no position regarding the parenting plan prior to or during trial in direct violation of Mont. Code Ann. §40-4-234 which requires a party to submit a proposed final parenting plan. The court stated at the end of the trial that it does not require proposed orders in advance of trial and no pretrial order was issued by the court. *TT,* p. 483, l. 9-14. The problem with the court's failure to comply with the statute is that Jeff had no ability to prepare his case for trial when Lindsay never provided a position regarding the final parenting plan.

Lindsay refused to provide a proposed parenting plan even in discovery. In response to Jeff's Interrogatory No. 2 requesting such, she responded that a parenting evaluation should be undertaken. Exhibit K, pp. 2-3. The court denied Jeff's motion to compel a response. Lindsay filed a motion for a parenting

evaluation which was denied by the Court on October 25, 2021, because it was untimely. DOC 52.

Lindsay's only position on the parenting plan revealed on cross-examination at trial was that a parental evaluation needed to be done "in order to decide what's best for the kids." *TT,* p. 215, ll. 5-9. Immediately before issuing decision from the bench at the conclusion of the trial, the court stated that "I don't really have a current proposal from Lindsay. Although I suppose, Mr. Stufft, you were maybe going to submit one." *TT,* p. 484, l. 23- p. 455, l. 1. "Well, you can [submit one], but I'm going to tell you I've decided that issue." *TT,* p. 485, ll. 3-4.

C. <u>The district court's finding of fact regarding the wishes of the parents is erroneous.</u>

The court's FOF 14a, *Decree,* p. 3, is erroneous and not supported by the evidence. The court found: the parties differed on the time the children should spend with each parent; that Lindsay suggested that the children should spend more time with her than with Jeff; and that Lindsay proposed an alternating weekend schedule for Jeff. As set forth above, Lindsay offered no testimony or evidence regarding the best interest of the children at the trial. Lindsay offered no parenting proposal at trial except to insist that a parenting evaluation occur. The court's finding of fact is clearly erroneous.

D. The district court erred in finding that the parties should continue the interim parenting schedule for the children's continuity and stability of care.

The court's findings at *Decree,* p. 6, ¶h, regarding continuity and stability of care for the children were not supported by the evidence. Although the interim agreement provided that the children would have six overnights with Jeff and eight with Lindsay every two weeks, it was undisputed that the children had been spending more time with Jeff than with Lindsay in the months prior to the trial.

The court acknowledges in *Decree,* p. 6, ¶h(ii) that the interim schedule was "best for the children at the time to accommodate the youngest child's preschool schedule which is now not a concern as the child is in school." However, in ¶h(iii), the court found that the interim schedule "remains an appropriate schedule, factually and because it is the schedule the children and parties have adapted and grown accustomed to."

After the district court gave its ruling from the bench, Jeff's counsel inquired "[i]s it the Court's opinion that one parent should have more parenting days than the other, or was it more just keeping with the schedule that's been in effect?" *TT,* p. 493, ll. 12-15. The district court responded that "[i]t was continuity of care." *Id.* at l. 16. However, the undisputed testimony at trial was that the children had spent more time with Jeff than with Lindsay in the two months preceding trial. *TT,* p. 331-332, and pp. 99, l. 21- 100, l. 3.

The district court also stated that "I didn't hear any testimony that compelled me to think that the plan wasn't a fine and workable plan and would be in their best interest." *TT,* p. 485, ll. 15-18. When the evidence to the contrary was pointed out, the court responded "[w]ell, if they want to reshuffle – you know, any parenting plan that I sign, if the parties want to deviate from it by mutual agreement never hurts my feelings." *TT,* p. 493, ll. 8-11.

The court misapprehended the evidence presented at trial. While Lindsay offered no testimony regarding the present or future parenting schedule for the children, Jeff provided a proposed parenting plan to Lindsay and the court, and then provided detailed testimony regarding the children, their school, and their needs (*TT,* p. 323-325); Jeff's involvement in their education and their personalities (*TT,* p. 325-327); and his testimony regarding every Mont. Code Ann. §40-4-212 factor (*TT,* p. 327-352). Jeff presented the testimony of two witnesses who testified that the children should have at least half of the time with their devoted father.

Jeff also testified regarding the problems with the out-of-date plan. Jeff was not getting day to day materials in backpacks (*TT,* p. 325); the numerous pick-ups and drop-offs were disruptive compared to the consistency the kids would have alternating week on / week off with exchanges only on Mondays (*TT,* p. 327); it was important for both parents and kids to have school days and full weekends

(*TT,* p. 335); and alternating weeks minimizes contact and maybe in time will help to repair the co-parenting relationship (*TT,* p. 348).

The district court inserted facts into it findings that did not exist and failed to rule according to the evidence presented at trial. There was literally no evidence adduced in support of the interim plan and substantial evidence adduced against it.

E. The district court's findings were clearly erroneous because they failed to recognize the constitutional presumption of equal parenting rights.

The court found that the children maintain health and appropriate relationships with both parents. *Decree,* p. 4, ¶c. The court found that both parents reside in Columbia Falls. *Id,* at p. 5, ¶d. The court found that it "must assume that frequent and continuing contact with both parents is in the children's best interest." *Id. at* p. 7, ¶l. The court had not previously had a parenting hearing as the parties had agreed on interim parenting. At trial, the court had only one parenting proposal and evidence thereon to weigh.

Nevertheless, the court stated that Jeff could have a good relationship with the children even if he only had weekends with them. The district court stated from the bench that it does not consider 50/50 parenting a default. *TT,* p. 484, ll. 20-22. "But parenting time is not about body time, it's about quality time. And I don't think you have to have 50/50 in order to have a quality relationship with your

kids. I think you could have every other weekend and have a quality relationship with your kids." *TT,* p. 494, ll. 11-17.

This Court has explicitly rejected the tender years presumption favoring the mother. *Czapranski v. Czapranski,* 2003 MT 14 ¶26, 63 P.3d 499, 314 Mont. 55, *citing Markegard,* 189 Mont. 374, 377, 616 P.2d 323, 325; *Bier v. Sherrard,* 191 Mont. 215, 220, 623 P.2d 550, 553. Parents have a constitutionally protected right to parent. *See* Mont. Code Ann. §40-4-227. A father has a right to regular and ongoing parental contact with his child and the child has a right to a relationship with her father. *Northcutt v. McLaughlin (In re G.M.N.)*, 394 Mont. 112, 433 P.3d 715, 2019 MT 18. This Court stated the following in *Solem v. Solem*, 400 Mont. 186, 192, 464 P.3d 981, 984-985, 2020 MT 141, ¶ 10:

> Both parents generally have co-equal fundamental constitutional rights to co-parent their children to the extent reasonably possible under the circumstances. *Troxel v. Granville*, 530 U.S. 57, 65-67, 120 S. Ct. 2054, 2059-61, 147 L.Ed.2d 49 (2000); (additional citations omitted). Sections 40-4-212, -217, and -219(1), MCA, collectively embody and effect Montana's compelling interest in furthering and protecting the best interests of children by facilitating "the maximum opportunit[y] for the love, guidance[,] and support of both" parents to the extent reasonably possible under the circumstances. *In re M.C.*, 2015 MT 57, ¶ 13, 378 Mont. 305, 343 P.3d, 569 (additional citations omitted).

A parent comes to court trusting that they have parenting rights equal to the other parent. If a parent is not granted an equal parenting schedule for his kids after a trial in which he is the only party who proposes a schedule and presents evidence regarding the children's best interest, it is difficult to not conclude that

the district court was predetermined to favor the mother. When a court states that 50/50 parenting is not the default, it appears that each party does not start the trial in the position of having parenting rights equal to the other parent.

The evidence at trial proved that the children should have an alternating week schedule and equal time with parents who live in the same town. A court cannot expect the other parent to view a parent as an equal co-parent when the court fails to do so. The district court should be directed to approve and adopt Jeff's parenting plan on the grounds that it is the only plan offered and it was supported at trial by substantial evidence.

IV. The District Court abused its discretion in determining that Lindsay's income for the calculation of child support was $32,000 and in failing to address newly discovered evidence in Jeff's Rule 60(b) motion.

A. The district court's finding was based on speculation and should be reversed.

As set forth hereinabove, the district court abused its discretion in denying Jeff's motion to compel and failing to enforce its order requiring supplementation of some discovery requests.

The only finding made by the court in the Decree was that "Lindsay's income from her self-employment in 2021 was $32,000." *Decree,* p. 8, FOF 16a. Both Jeff and Lindsay's expert rebuttal witness determined that her gross income was $52,000 to $55,000 per year. *TT,* p. 486, ll. 6-9. The district court stated that

it "looks to me like she had gross income in the way of deposits of about 52- to $55,000 for each of those three years [2019, 2020, 2021]." *TT,* p. 373, ll. 11-18.

The court admitted that its determination of Lindsay's net income was speculative. The district court stated that her income "is sort of speculative and maybe hopefully prospective in nature, I imagine she has car expense, travel expense and the like." *TT,* p. 487, ll. 20-23. When Jeff's counsel pointed out that Lindsay's work was digital, the district court made statements about the IRS having some kind of a book that says a typical attorney has expenses of 50/50 and they have guidelines. *TT,* p. 486-487. The court was not inclined to determine her expenses. "I'm not going to allow one party in a dissolution to micromanage how the other party operates their business." *TT,* p. 487, l. 4- p. 4.

Income for child support purposes need not be determined by speculation. The court stated from the bench that "I also think that Lindsay probably works, I'm going to guess, close to as much as she can." *TT,* p. 487, ll. 16-17. Lindsay testified that she had a health issue that prevented her from working "at Walmart or Target or something like that" in that she needed a knee replacement because her knee was bone on bone. *TT,* p. 97, ll. 13-20. Lindsay had denied in discovery having any health issue that prevented her from working.

It should not be sufficient to assume Lindsay is working as much as she can when she admitted to working full time only in the summer and she was not

compelled to respond to discovery. It is public record that Lindsay has 17,362 vertical miles skiing at Whitefish Mountain as a season pass holder as of February 5, 2023. https://skiwhitefish.com/vertical-tracker/.

B. The district court erred in failing to consider newly discovered evidence regarding Lindsay's income presented by Jeff in his Rule 60(b) motion.

In his post-trial motion, Jeff presented evidence that Lindsay made an additional $33,000 just from the rental on Airbnb of 801 Second. DOC 101, Exhibit B. The court erred in failing to consider this new evidence regarding Lindsay's income pursuant to Jeff's Rule 60(b) motion.

CONCLUSION

Jeff respectfully requests that this Court order as follows:

1. Remand the parenting issues with instructions to the district court to approve and issue Jeff's proposed parenting plan for the children;

2. Remand the child support issue to the district court with the instruction to compel Lindsay to provide information sufficient to determine her income from all sources, her actual business expenses, and the number of hours she worked to acquire said income;

3. Remand the calculation of the property settlement payment to the district court with an instruction to use the date of separation values for all assets;

4. Remand to the district court for determination of the distribution of the sales proceeds from the sale of Oakmont if Jeff cannot timely make the property settlement payment to Lindsay; and

5. Remand to the district court for entry of an award of attorneys' fees and costs in Jeff's favor incident to his motion to compel.

Respectfully submitted this 14th day of February, 2023.

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By: 

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CERTIFICATE OF COMPLIANCE

I, Penni L. Chisholm of CHISHOLM & CHISHOLM, P.C., hereby certify that, pursuant to Rule 27 of the Montana Rules of Appellate Procedure, this brief is printed with a proportionately spaced typeface of Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Mac Version 16.68, is 10,790 words, not averaging more than 280 words per page, and **9,751** words after excluding certificate of compliance (121 words), table of authority (334 words), table of contents (521 words), and appendix (63 words).

Respectfully submitted this 14th day of February, 2023.

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APPENDIX

(Filed Separately)

CERTIFICATE OF SERVICE

I, Penni L. Chisholm, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-14-2023:

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