IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA 23-0156

IN THE MATTER OF THE ESTATE OF RONALD GLEN KEMMER

Appeal from the Thirteenth Judicial District Court, Yellowstone County
Cause No. DP-19-197
The Honorable Donald L. Harris, Presiding.

TRAVIS KEMMER'S RESPONSE BRIEF IN HIS INDIVIDUAL CAPACITY

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STATEMENT OF THE CASE

Ronald G. Kemmer died intestate on May 20, 2019. He had four children entitled to share equally in his estate: Travis Kemmer, Becky (Kemmer) Mastley, Collette Cole and Ronda Gilge.

Ronald owned a 1978 Ford pickup at the time of his death. The Personal Representative auctioned the truck off between Becky and Collette. On November 3, 2020, the PR notified the heirs that Collette had won the auction with a bid of $21,020 and Becky had come in second with a bid of $21,000. (Mastley Appx., p. 144.) On November 6, 2020, however, Collette filed a pro se "Petition for Intervention" seeking to enforce an alleged "verbal agreement" for her to get the truck for just $10,000. (Mastley Appx., pp. 5-7.)

Collette retained counsel shortly thereafter and the Petition and distribution of the truck was discussed amongst counsel. (*See* Hearing Exhibits 37-45.) The District Court then set a deadline of November 2, 2021, to close the Estate. (Dkt. 34.) After Collette refused to confirm her commitment to purchase the Truck for $21,020, the

PR sold the truck to Becky as the second highest bidder for $21,000, and then moved to close the Estate within the stated deadline. (Hearing Exhibits 46-49.)

On October 27, 2021, Collette filed a Petition to remove the personal representative and void the sale of the truck. (Dkt. 39.) On March 25 and 29, 2022, the district court conducted evidentiary hearings on this Petition. On February 9, 2023, the district court issued Findings of Fact and Conclusions of Law enforcing the alleged oral agreement and ordering Becky and the PR to deliver the truck to Collette. (Mastley Appx., pp. 1-4, referred to hereafter as "Order") Becky timely appealed the Order.

STATEMENT OF FACTS

On July 15, 2019, Becky, Collette, and Ronda consented to the appointment of Travis to serve as the Personal Representative of Ronald's Estate. (Dkt. 1-4.) Travis did not immediately retain an attorney to represent him as Personal Representative.

On August 10, 2019, Travis, Becky, and Collette were present in person at their father's home to go through his things. At this time, they discussed the disposition of his 1978 Ford pickup (the "Truck"). Ronda was not present for the interactions that weekend.

The heirs' respective testimony at the March 25 and 29, 2022, Hearing confirms no agreement to distribute the Truck was ever reached on August 10, 2019.

While Travis and Becky agreed to offer the Truck to Collette, there was never a final agreement about the terms of her purchasing it from the Estate.

Instead, Travis and Becky felt like Collette should buy the Truck from the Estate for $10,000 based on their estimates of its value. Collette, who had been lobbying her father to give her the Truck prior to his death[1], challenged the $10,000 price because apparently Ronald had agreed to sell it to her for substantially less. As a result, no agreement, verbal or otherwise, was ever finalized on August 10, 2019.

Becky testified:

> [Travis] told Collette that he and I had an interest in the truck, but we were willing to not take an interest and offer it to her and, you know, for a brief second she had a smile; but then she went into arguing about not wanting to pay the 10,000 and where this price came up with, and that dad had told her she could have it for $2,300.
>
> (Hearing Transcript, Day 2, pp. 94:23-95:4)
>
> Well, we never came to a clear understanding other than that [Travis, as PR] was going to figure out how everything needed to be done, because he was not certain if she had to pay money up front, if she could use it from her closing, the estate money; and we kind of just left it at that. I mean there was never a clear price of what she was willing to accept it for. There was the agreement we would give up as an heir, but there was never -- there was never an understanding on a price.
>
> (Hearing Transcript, Day 2, p. 95:14-22)

Travis testified:

> Well, it's $10,000. And I'm not sure if [Collette] was thinking that, when I said we would like to give you the truck, or offer the truck, or whatever

[1] *See* Hearing Exhibit 51.

she heard, or whatever the words came out of my mouth; but as soon as we said well, it's $10,000 is what we valued it at, and -- and she just could see just the energy just come right out of her, like the excitement was gone.

(Hearing Transcript, Day 1, p. 127:2-9)

Q: …when you left that day, was it agreed upon that Collette was going to buy the truck for 10,000; that she said yes, I will buy it for 10,000?
A. No. It was not clear. It was not clear.

(Hearing Transcript, Day 1, p. 128:7-11)

Ronda, who has aligned herself with Collette in these proceedings, testified:

…when [Collette] was on her way home, I talked to her and said, you know, how did it go, what happened with the truck, and that's how I found out that she was awarded the truck…

My only question was -- was that the price was $2,600 that my dad and Collette had agreed upon; but somehow the price became 10,000 when they were out there.

(Hearing Transcript, Day 1, pp. 19:22-25 and 20:8-11.)

Even Collette herself struggled to present testimony that an actual agreement was reached that day. On direct examination, she stopped short of testifying to that fact:

Travis said: Ronda doesn't want the truck, I don't want the truck, and Becky doesn't want the truck; so you can have the truck for $10,000.

(Hearing Transcript, Day 1, p. 59:2-4) Accordingly, on cross-examination she first indicated she did not verbalize her consent to an agreement before testifying that maybe she did:

> Q. Isn't it true that on Saturday, August 10th of 2019, you never said: I will pay $10,000 for the truck; you never said that?
> A. That's what the price was on it. Why would I have to say it?
> Q. And you never wrote that down?
> A. I never wrote that down.
>
> (Hearing Transcript, Day 1, p. 78:1-7)

> Q. Okay. And you never said: I will, without any condition whatsoever, agree to pay $10,000 for the truck. You never said that that day. Right?
> A. Um, I believe I said I will pay the $10,000.
>
> (Hearing Transcript, Day 1, p. 78:20-23)

Within just days of this interaction at Ronald's home, on August 24, 2019, Travis texted Collette to inform her she could not take possession of the Truck:

> Big problem with the truck leaving this weekend, we need to talk before you leave Bemidji…I'm hiring an attorney who will be paid by the estate, to protect the estate, your still getting the truck when I have discussed the situation with an attorney that knows the legal process.

(Dkt. 39, Exhibit C.) Shortly thereafter, Travis indicated he also had an interest in purchasing the Truck from the Estate, but explained:

> One other thing I would like to address or clear up if possible, Dads 1978 Ford F150, I said I was interested in it, that does not mean I am taking it, so Collette and I share an interest in it, and until we all agree, it will not change owners.

(Dkt. 39, October 10, 2019 email, Exhibit D.)

In response, Collette hired a lawyer, Scott Farago of Garlington Lohn Robinson. On October 29, 2019, Mr. Farago sent Travis a letter stating:

> It is my understanding no separate agreement has been reached as to the dispositions of estate personal property…I suggest all beneficiaries of the estate work to implement a written agreement as to how the personal property will be divided.

(Mastley Appx, pp. 54-55.) The letter made absolutely no mention of Collette's current position that there was an agreement already in place for her to purchase the Truck for $10,000. Put bluntly, had Collette and her lawyer simply disclosed this position back in October 2019, this entire dispute would have been avoided.

Following the Farago letter, Travis retained Crowley Fleck to represent him in his capacity as the Personal Representative of the Estate of Ronald G. Kemmer (the "PR").

On January 23, 2020, counsel for the PR sent a letter to all heirs requesting information, including a specific request for them to disclose their position on any piece of Estate property:

> It is our understanding that prior to our representation of the Personal Representative in this administration of the Estate, the heirs…may have also agreed on certain distributions of such tangible personal property owned by the Decedent and the Personal Representative of the Estate….
>
> If you have any issues or dispute any distribution of item of tangible personal property that is currently in the possession of any heir, or if you would like to take possession of any item of tangible personal property that has not yet been distributed please provide us written notice of the same.

(Mastley Appx, pp. 57-58.) Neither Collette nor her attorney Mr. Farago responded to this request by stating Collette was entitled to purchase the Truck. Again, had

Collette or her attorney simply disclosed her position that there was an agreement in place for her to purchase Truck for $10,000 this entire litigation could have been avoided.

Four months later, on May 31, 2020, counsel for the PR emailed all heirs to state he was still waiting on Collette to respond with the information he had requested in his original January, 2020 letter. (Mastley Appx, p. 70.) On June 1, 2020, Collette (no longer represented by Mr. Farago) responded by suddenly disclosing an interest in the Truck.

> Not sure what the confusion is on 1978 Ford truck, back in August 2019, all heirs agreed that the truck was going Collette Cole.

(Mastley Appx, p. 75.) But, just like the discussions at Ronald's home on August 10, 2019, Collette's email did not say anything about the terms of the agreement or how much she was willing to pay for the Truck. As a result, counsel for the PR promptly responded in no uncertain terms trying to clear up this fundamental loose end:

> …if you are willing to purchase such 1978 Ford truck at $10,000.00…Travis would be willing to remove his name as an Interested person in such 1978 Ford truck…

(Mastley Appx, p. 74.) Collette did not respond by stating she would purchase the Truck for $10,000. Once again, had Collette simply responded with an email confirming her current position that she would purchase the Truck for $10,000, this dispute would have been avoided.

Instead, over the next several months, more and more dialogue about resolving the Estate amongst the heirs continued but by August 13, 2020, the administration of the Estate was still being frustrated by Collette's failure to simply confirm whether she would pay $10,000 for the Truck or not. (*See e.g.* Mastley Appx, p. 79-80.)

More time passed, and on September 16, 2020, Becky emailed the group to ask more directly whether Collette was still interested in the Truck. (Mastley Appx, p. 82.) On September 17, 2020, counsel for the PR emailed all heirs again to confirm it was still "unclear" what the terms of Collette's offer to purchase the Truck were. (Mastley Appx, p. 82 and 86.) Collette received all of these emails but did not respond. These emails presented yet another golden opportunity for Collette to disclose her position on the Truck and put the issue to bed without any further dispute.

Given Collette's continued refusal to confirm she would purchase the truck for $10,000 or not, on October 6, 2020, Becky decided enough was enough and offered $10,000 on the Truck herself. (Mastley Appx, p. 92.)

Only then, on October 7, 2020, did Collette finally reveal her intention to purchase the truck for $10,000 "as agreed upon in August 2019." (Mastley Appx, p. 99.) This email was over one-year after the supposed agreement occurred, almost one-year since her own attorney took the position no such agreement existed, and

months after counsel for the PR had sent numerous letters and emails requesting her to disclose that very information.

Immediately upon receiving confirmation that two of his sisters were willing to pay $10,000 for the Truck, Travis removed himself from consideration for the Truck and it was then auctioned off between Collette and Becky by counsel for the PR. (Mastley Appx, p. 102.)

On November 3, 2020, the PR notified the heirs that Collette had won the auction. (Mastley Appx., p. 144.) On November 6, 2020, however, Collette filed a *pro se* "Petition for Intervention" alleging there was a prior "verbal agreement" for her to get the truck for less than half of the amount she offered in the auction. (Mastley Appx., pp. 5-7.) After Collette refused to confirm her commitment to purchase the Truck for $21,020, the PR sold the truck to Becky as the second highest bidder for $21,000. (Hearing Exhibits 46-49.) On October 27, 2021, Collette filed a Petition to remove the personal representative and void the sale of the truck to Becky. (Dkt. 39.)

STANDARD OF REVIEW

This Court reviews a district court's findings of fact for clear error. *Roland v. Davis*, 2013 MT 148, ¶ 21, 370 Mont. 327, 302 P.3d 91. Clear error exists if there is not substantial evidence to support the findings of fact, if the district court misapprehended the evidence, or if we have a definite and firm conviction that the district court made a mistake. *Roland*, ¶ 21. The Court then reviews a district court's conclusions of law for correctness. *Kenyon-Noble Lumber Co. v. Dependant Founds., Inc*., 2018 MT 308, ¶ 10.

SUMMARY OF ARGUMENT

The district court, sitting in probate, did not have subject matter jurisdiction to order the specific performance of an oral contract. Even if it did, the evidence was not sufficient to support the existence of an oral contract. Even if there was an oral agreement, the district court erred by failing to apply Mont. Code Ann. § 72–3–915(1) which requires distribution agreements amongst heirs be in writing. Finally, Collette waived her oral agreement claim by failing to raise it for over a year despite repeated and specific requests for her to come forward with that very information.

ARGUMENT

I. The district court did not have subject matter jurisdiction.

The issue of subject matter jurisdiction was not raised in the lower court. But, "[l]ack of subject matter jurisdiction cannot be waived" and may be reviewed for the first time on appeal. *State v. Osborne*, 2005 MT 264, ¶ 15.

This Court has recently decided two cases, including one on May 23, 2023, which appear to indicate the district court, sitting in probate, did not have subject matter jurisdiction over Collette's equitable claim for specific performance of an alleged oral contract. *See In re Estate of Cooney*, 2019 MT 293; *see also In re Estate of Scott*, 2023 MT 97.

In *Cooney*, a decedent had entered into a divorce settlement agreeing to distribute the remainder of his real property to his daughters at the time of his death. *Id*., at ¶ 2. His will, however, left the land to his son. *Id*., at ¶ 3. The daughters filed a motion to invalidate those portions of the will with the probate court. The district court, sitting in probate, determined it did not have subject matter jurisdiction. The daughters appealed, arguing the probate court had jurisdiction to enforce the divorce agreement. *Id*. This Court disagreed and affirmed for lack of subject matter jurisdiction.

In doing so, the *Cooney* Court explained that courts sitting in probate only have the "special and limited powers expressly conferred by statute" and the

administration of an estate is "neither an action at law nor a suit in equity[;] it is a special proceeding." *Id*., at ¶ 7, *citing State ex rel. Reid v. Fifth Judicial Dist. Court*, 126 Mont. 586, 591, 256 P.2d 546, 549 (1953). Therefore, probate courts do "not have jurisdiction to consider matters equitable in nature." *Cooney,* at ¶ 7, *citing In re Day's Estate*, 119 Mont. 547, 553, 177 P.2d 862, 866 (1947). Most notably, this Court noted that this restriction means "a probate court does not have jurisdiction to decree specific performance of an oral contract." *Cooney,* at ¶ 7 (emphasis added).

In issuing these statements of law, this Court relied on several secondary sources to explain the distinction between direct proceedings in probate court and those which must be resolved separately:

> "The remedy of beneficiaries [in a breach of contract to devise property] is not a proceeding in the probate court . . . but an action in equity in a court of general jurisdiction." 79 Am. Jur. 2d *Wills* § 343 (2003). The equitable remedy of specific performance thus must be sought in a court of equity; it may not be administered by the probate court in a direct proceeding for that purpose. *See 1 Page on the Law of Wills §* 10.37, 537 (Rev. Ed. 2003).

Id., ¶ 11. Accordingly, the *Cooney* Court determined a "probate court has authority to settle claims against the estate, such as creditor claims…[but] [e]nforcement of a contract to devise property is not a claim against the estate." *Id*., ¶ 12.

Since the *Cooney* daughters were seeking specific performance of the divorce settlement, this Court rejected the existence of subject matter jurisdiction because a

"probate court's limited jurisdiction does not extend to adjudicating a breach of contract claim." *Id*., at ¶ 13.

Just the other day, on May 23, 2023, this Court issued another opinion in *Scott* which endorsed the holding in *Cooney* in a dispute regarding personal property held by an estate.

In *Scott*, another decedent agreed to distribute equity in a ranch to his sons as part of a divorce. *Id*., ¶ 3. But, he never paid his sons the value of the equity in the ranch during his life and his will left his entire estate to another beneficiary. *Id*., ¶ 5. The sons filed a creditor's claim in probate court seeking to enforce the divorce settlement. *Id*., ¶ 6. Relying on *Cooney*, the Estate moved to disallow the claim for lack of subject matter jurisdiction but the district court, sitting in probate, allowed the claim to proceed. *Id*., ¶ 7.

On appeal, the sons tried to differentiate *Cooney* by arguing they were "not seeking specific performance of a contract" but rather seeking payment of an obligation the decedent incurred during his life. *Id*., ¶ 15. This Court was not convinced. It determined the brothers sought "specific performance" of a contract to pay them money which "is a prototypical case of an equitable claim, and the District Court, while sitting in probate, does not have subject matter jurisdiction." *Id*., ¶ 16.

In so holding, the *Scott* Court stated that the key issue in resolving jurisdictional issues in probate court was whether "equitable claims" were being

asserted because "[e]quitable claims—seeking enforcement of a contract right—are outside a probate court's limited subject matter jurisdiction." *Id*., ¶ 17.

Of course, Appellant Becky Mastley is appealing from that part of the district court's Order which required her and the PR to specifically perform the alleged August 10, 2019, oral agreement by delivering the Truck to Collette. According to *Cooney* and *Scott*, it would appear the district court, while sitting in probate, did not have jurisdiction over Collette's claim for specific performance of an oral contract. *See also Boyne USA, Inc. v. Spanish Peaks Dev., LLC,* 2013 MT 1, ¶ 32 (holding "specific performance" is an "equitable claim".)[2]

In her original Petition seeking to retrieve the Truck from Becky, Collette framed the dispute as a request to "void" the distribution of the truck to Becky under the Uniform Probate Code ("UPC"), specifically Mont. Code Ann. § 72-3-614. That statute, though, only authorizes the PR to recover estate property for the protection of "the decedent's creditors." *Id*. Of course, that was the principal distinction made in *Cooney*, that "a contract to devise property" to an heir is distinguishable from a creditor's claim and will not be given subject matter jurisdiction in the probate court. *Id*., ¶¶ 11-12. Therefore, Collette's Petition was not really one to void the distribution

[2] Becky and Travis, individually, both defended against Collette's Petition by asserting the defense of waiver since Collette had waited so long to disclose her claim that she was entitled to purchase the Truck for $10,000. Waiver is also an equitable claim. *See e.g. Peeler v. Rocky Mt. Log Homes Can., Inc.*, 2018 MT 297, ¶ 23.

of the Truck under Mont. Code Ann. § 72-3-614 but rather one to specifically perform an alleged oral agreement to distribute Estate property.

Presumably, a probate court would have the jurisdiction to enforce a distribution agreement that complies with the UPC, Section 72-3-915. As argued below, however, there was no "written contract executed by all" heirs for Collette to buy the truck for $10,000 sufficient to satisfy the UPC's requirement in Mont. Code Ann. § 72-3-915 (emphasis added). That is why Collette sought to enforce the verbal agreement under non-probate law. (*See e.g.* Dkt. 52, Collette's Reply in Support of Petition to Void Distribution, pp. 3-5.)

Similarly, the district court did not reference Mont. Code Ann. § 72-3-915 or the UPC in ordering Becky and the PR to specifically perform the terms of the alleged oral agreement. (Mastley Appx., pp. 1-4.) As a result, the district court's order appears to be directly contrary to the jurisdictional limits set forth in *Cooney* and *Scott* which expressly reject a probate court's jurisdiction "to decree specific performance of an oral contract." *Cooney,* at ¶ 7.

Therefore, this Court should vacate the district court's order because it lacked subject matter jurisdiction.

II. The Findings of Fact were not supported by substantial evidence.

There was not sufficient evidence to support a factual finding that the heirs entered into an oral agreement for the disposition of the Truck.

This Court reviews findings of fact for "clear error" which exists "[1] if there is not substantial evidence to support the findings of fact, [2] if the district court misapprehended the evidence, or [3] if [the Supreme Court has] a definite and firm conviction that the district court made a mistake." *Roland, supra,* ¶ 21. "Substantial evidence is something more than a scintilla of evidence, but less than a preponderance of the evidence." *Johnson v. W. Transp., LLC,* 2011 MT 13, ¶ 17.

In this case, the evidence admittedly showed that Becky and Travis offered the Truck to Collette during the August 10, 2019, weekend but there was never enough evidence to support the existence of an enforceable oral agreement amongst all heirs for Collette to purchase the Truck for $10,000.

Under Montana law, a "contract requires (1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration." *Kluver v. PPL Montana, LLC*, 2012 MT 321, ¶ 31, 368 Mont. 101, 293 P.3d 817. "A contract must contain all its essential terms in order to be binding." *Id*.

The evidence submitted to the district court was insufficient to support a finding that there was consent by all heirs to all essential elements of the alleged contract. Therefore, the following finding of fact was made in error:

> 4. The Court finds by a preponderance of the evidence that Travis, as PR, breached his fiduciary duty to Collette by failing to honor the agreement made between Travis and all of the heirs on August 10, 2019 that Collette would receive the 1978 Ford pickup for $10,000 to be paid from Collette's share of the Estate.

(Mastley Appx., p. 2.)

First, the finding that there was an "agreement made between Travis and all of the heirs on August 10, 2019" was unsupported since Ronda was not present that weekend. (Mastley Appx., p. 2, emphasis added.) Ronda plainly testified that she learned of the alleged agreement from Collette by telephone *after* Collette had already left Ronald's home on the 10th:

> Well, Travis had sent me a text, I believe it was on that -- that Saturday or Sunday, and told me that there had been -- there was a miracle in Montana. So I was like well, good, everything must be going well; but I didn't talk to Collette again when she was out there because I was afraid that it was making things worse for her. And so when she was on her way home, I talked to her and said, you know, how did it go, what happened with the truck, and that's how I found out that she was awarded the truck, or they agreed to let her buy the truck.

(Hearing Transcript, Day 1, pp. 19:16-20:1.) While Ronda may not be contesting Collette's receipt of the Truck now, there was no evidence Ronda voiced her consent to the agreement on August 10, 2019, verbally or in writing.

Second, the finding that the contract was "for $10,000" was also unsupported. (Mastley Appx., p. 2.) Even if Ronda had expressed her consent to the alleged agreement on August 10th, she plainly testified "My only question was -- was that the price was $2,600 that my dad and Collette had agreed upon; but somehow the price became 10,000 when they were out there." (Hearing Transcript, Day 1, p. 20:8-11.) As a result, there was no evidence Ronda consented to the $10,000 price tag and actually "question[ed]" whether the price should have been less.

Moreover, Collette's own testimony was not substantial enough to prove she consented to the $10,000 price tag. On direct examination she testified that Travis and Becky offered the Truck to her for $10,000 but did not testify that she accepted that offer. (Hearing Transcript, Day 1, p. 59:2-4) On cross-examination, Collette first argued with the PR's counsel about the need for her to verbalize her consent before speculating that she "believe[s]" she consented verbally:

> Q. Isn't it true that on Saturday, August 10th of 2019, you never said: I will pay $10,000 for the truck; you never said that?
> A. That's what the price was on it. Why would I have to say it?
> Q. And you never wrote that down?
> A. I never wrote that down.
>
> (Hearing Transcript, Day 1, p. 78:1-7)
>
> Q. Okay. And you never said: I will, without any condition whatsoever, agree to pay $10,000 for the truck. You never said that that day. Right?
> A. Um, I believe I said I will pay the $10,000.
>
> (Hearing Transcript, Day 1, p. 78:20-23)

Third, there was not sufficient evidence for the Court to find the $10,000 was "to be paid from Collette's share of the Estate." Collette's Petition to void the sale of the Truck to Becky repeatedly argued there was an agreement for her to "buy" the Truck. (*See e.g.* Dkt. 39, p. 2 and Dkt. 52, p. 5.) It was always vague, however, whether that meant the $10,000 would be paid in cash up front or as a deduction from Collette's cash distribution upon the closing of the Estate. In reality, this issue about the method of payment was never resolved because the heirs were not yet represented in August 2019 and did not yet appreciate how payment was supposed to be made on estate property.

On direct examination, Collette did not specify what the heirs agreed to concerning how she would pay for the Truck. On cross examination, she alleged she "was told that it would come out of the end of the estate, out of my proceeds." (Hearing Transcript, Day 1, p. 78:18-19.) But, it is not clear who said this, who was present when it was said, or whether anyone consented to that arrangement.[3]

In other words, the district court found an enforceable oral agreement was entered into on August 10, 2019, amongst all heirs for Collette to get the Truck in

[3] This is not a trivial detail as the Estate was illiquid in August 2019 so the means of purchasing a substantial estate asset was practically significant. *See e.g.* Hearing Transcript, Day 1, pp. 108-109 (Travis testifying that he had to pay Estate expenses out of his own pocket for a year and a half.)

return for a $10,000 credit against her portion of the Estate's final cash distribution, despite:

- Ronda not being present during the oral agreement and being uncertain what the price for the truck was supposed to be;
- Collette being unable to confirm that she consented to pay $10,000; and
- Nothing more than a casual statement from Collette that she was at one point told the $10,000 payment could be withheld until the Estate was fully administered.

The finding that all heirs agreed to these terms is especially faulty since the other two heirs present that day, Travis and Becky, strongly testified no such agreement occurred because Collette challenged the $10,000 price tag. (*See e.g.* Hearing Transcript, Day 1, p. 127:2-9; Hearing Transcript, Day 2, pp. 94:23-95:22.) Critically, Travis and Becky's testimony, that Collette withheld her consent to pay $10,000, was corroborated in several ways:

- Collette had lobbied her father to gift her the Truck or sell it for a reduced amount during his life. (*See e.g.* Hearing Exhibit 51.)
- Ronda testified that she thought Collette and Ronald had agreed the truck should be sold for $2,600. (Hearing Transcript, Day 1, pp. 19:16-20:1.) Becky also testified that Collette asserted Ronald had already agreed to sell Collette the truck for $2,300. (Hearing Transcript, Day 2, pp. 94:23-95:22.)
- Collette retained a lawyer in October 2019 (just weeks after the alleged agreement was consummated) to write the PR a letter. In it, Collette's counsel did not mention the alleged agreement and, in fact, expressly stated no agreement to distribute estate property amongst the heirs existed. (Mastley Appx., pp. 54-55.)

- Collette repeatedly failed to confirm she would pay $10,000 for the Truck, despite numerous opportunities to do so and specific requests for her to confirm that very fact. (*See* Statement of Facts, *supra*.)

Put together, this evidence plainly shows that there was not an enforceable oral agreement containing all "essential terms" entered into on August 10, 2019. *Kluver*, ¶ 31.

This Court can reverse a factual finding if there is not substantial evidence to support it, if the district court misapprehended the evidence, or if it has a definite and firm conviction that the district court made a mistake. *See Roland*, ¶ 21; *see also In re G. M.,* 2008 MT 200.

Though uncommon, the *In re G.M.* case presents an example when reversing a district court's findings of fact is appropriate. There, the Montana Department of Public Health and Human Services filed a petition to involuntarily recommit an individual to the Montana Development Center. *Id*., ¶¶ 1-4. The issue went before the district court in a contested hearing. The DPHHS presented evidence from one of its employees in support of the petition while the individual presented testimony from his legal guardian and an expert witness with medical training that he was not a threat to himself or others. The district court sided with the DPHHS by issuing a factual finding that the individual posed an "imminent risk of serious harm to himself or others." *Id*., ¶ 50.

In coming to that conclusion, however, the district court made "no comment on the credibility of the witnesses and gave no indication of why it resolved the conflicting evidence in this case the way it did." *Id*., ¶ 38. After a thorough review of the record, this Court was "firmly convinced" that a mistake had been made and reversed under a clear error standard. *Id*., ¶ 50.

This case is analogous to *In re. G.M.* Just like that case, the findings of fact here do not comment or explain why the conflicting evidence was resolved in Collette's favor. The parties had stipulated to the admission of over seventy (70) exhibits and spent two days interrogating six (6) different witnesses. As set forth above, there was overwhelming testimony and documented evidence that no agreement was ever consummated for Collette to buy the Truck for $10,000.

Nevertheless, the district court cast that evidence aside and, in summary fashion, decided it did "not find credible Travis' testimony that no agreement was ever reached in August 2019 between the PR and the heirs that Collette was to receive the 1978 Ford pickup for $10,000." (Mastley Appx., p. 2.) But, there "was no indication" in the Order "why it resolved the conflicting evidence in this case the way it did." *See In re. G.M.,* ¶ 50. Accordingly, Travis respectfully believes the showing above is sufficient for this Court to reverse the district court's factual finding of an August 10, 2019, oral agreement.

III. The Findings of Fact do not support the Conclusions of Law.

Even if an oral agreement was entered into on August 10, 2019, such a finding does not support the district court's conclusions of law. Under Mont. Code Ann. § 72–3–915(1), heirs may only enter into an agreement to alter their entitlements in an intestate estate through a "written contract." This Court has plainly interpreted this statute to mean:

> Distribution agreements are required, pursuant to § 72–3–915(1), MCA, to be in writing.

In re Est. of Goick, 275 Mont. 13, 23, 909 P.2d 1165, 1171 (1996) (emphasis added, overruled on other grounds.)

In *Estate of Goick*, interested parties to an estate "reached an oral settlement agreement on the telephone [but] [t]hat agreement was never written or signed by the parties." *Id*., at 1167. One of the parties moved to compel the oral agreement which was denied by the district court. *Id*. On appeal, this Court confirmed the oral telephone agreement could not be enforced. While an attorney involved in the telephone conference had attempted to memorialize the agreement in a subsequent letter, the Court determined one of the other parties "did not consent" to additional terms included in the letter. *Id*., at 1171. As a result, there was no written agreement complying with Mont. Code Ann. § 72–3–915(1) and the oral telephone agreement was unenforceable.

The same result is proper here. The district court's findings of fact did not find a "written contract" amongst all heirs for the distribution of the Truck to Collette in return for a $10,000 deduction from her share of the Estate's proceeds. (*See e.g.* Findings of Fact Nos. 4-7.) According to this Court's opinion in *Estate of Goick*, a written contract is "required" for distribution agreements amongst heirs. Therefore, the alleged August 10, 2019, verbal agreement cannot be enforced.

In its Order, the district court did not reference Mont. Code Ann. § 72–3–915(1) or *Estate of Goick.* Instead, it stated that Travis, as PR, "was obligated to promptly draft a formal written agreement to distribute the pickup to Collette if he thought a written agreement was necessary." (Mastley Appx., p. 2.) Imposing such a requirement on the PR is not contemplated in either Mont. Code Ann. § 72–3–915(1) or *Estate of Goick.* Indeed, preparing a subsequent letter to memorialize a prior oral agreement appears to have been what the attorney in *Goick* attempted but this Court rejected as insufficient to satisfy the writing requirement in the statute. Moreover, the "written contract" requirement in *Goick* and § 72–3–915(1), MCA, would be completely illusory if an oral agreement could be enforced by simply finding one of the parties should have reduced it to writing.

This Court reviews conclusions of law for correctness. The district court's Order enforcing an oral distribution agreement, despite Mont. Code Ann. § 72–3–

915(1) and *Estate of Goick* requiring such agreement be "written", was incorrect. Therefore, the order should be reversed.

IV. Collette waived her oral distribution agreement claim.

As a final matter, Travis' Response to Collette's Petition argued she had waived her right to assert an enforceable oral agreement was entered into on August 10, 2019, for her to purchase the Truck for $10,000. (Dkt. 48, pp. 3-4.) The district court did not address this argument in its Order.

"Waiver is a voluntary and intentional relinquishment of a known right, claim or privilege, which may be proved by express declarations or by a course of acts and conduct which induces the belief that the intent and purpose was waiver." *VanDyke Const. Co. v. Stillwater Mining Co.,* 2003 MT 279, ¶ 15, 317 Mont. 519, 78 P.3d 844. "To establish a knowing waiver, the party asserting waiver must demonstrate the other party's knowledge of the existing right, acts inconsistent with that right, and resulting prejudice to the party asserting waiver." *Id*. The evidence received by the district court easily satisfied these elements.

Collette is alleging there was an enforceable oral agreement entered into on August 10, 2019, for her to purchase the Truck for $10,000. On August 24, 2019, however, the PR informed her that she could not take possession of the Truck because he needed to discuss the process with an attorney. (*See* Hearing Exhibit C.) Collette was plainly aware of her rights as she immediately objected to the PR's

decision not to let her take possession of the truck but, at the same time, did not assert her right to purchase the Truck for $10,000. (*Id*.)

Travis then expressed interest in buying the Truck for $10,000 himself, but explained that would not happen until everyone agreed on a plan. (*See* Hearing Exhibit D.) Again, Collette was not ignorant to her rights as she retained a lawyer, Scott Farago, to represent her as an heir. What followed was a series of acts inconsistent with Collette's rights under the alleged oral agreement:

- On October 29, 2019, Collette's lawyer sent a letter stating "no separate agreement has been reached as to the dispositions of estate personal property." The letter made no reference to Collette's current position that there was an oral agreement already in place. (Mastley Appx, pp. 54-55.)

- Following the direction of Collette's lawyer, counsel for the PR set out to develop a written agreement amongst all heirs for the distribution of the Estate property. On January 23, 2020, counsel for the PR sent a letter to all heirs specifically requesting information concerning "any issues or dispute" with any piece of estate property. (Mastley Appx, pp. 57-58.) Neither Collette nor her attorney responded by raising the issue of the alleged August 10, 2019, oral agreement for the Truck.

- On June 1, 2020, Collette finally disclosed her position that "back in August 2019, all heirs agreed that the truck was going Collette Cole." (Mastley Appx, p. 75.) But, she did not state the agreed upon price. As a result, counsel for the PR expressly asked if she was "willing to purchase such 1978 Ford truck at $10,000.00" or not. (Mastley Appx, p. 74.) Collette did not respond.

- In August 2020, Becky asked for a status update on the Truck and at what point could she "make an offer" on the Truck. (*See e.g.* Mastley Appx, p. 79-80.) Counsel for the PR responded: "any heir can make an offer to the 1978 Ford truck or any property of the Decedent/Estate at any time. To date, we have still not heard back from Collette regarding our request on the 1978 Ford truck." (*Id*.) Collette was copied to these emails but did not respond.

- On September 16, 2020, Becky emailed the group to ask directly whether Collette was still interested in the Truck. (Mastley Appx, p. 82.) On September 17, 2020, counsel for the PR emailed all heirs again to confirm it was still "unclear" what the terms of Collette's offer to purchase the Truck were. (Mastley Appx, p. 82 and 86.) Collette did not respond.

- October 6, 2020, Becky offered to buy the Truck herself for $10,000. (Mastley Appx, p. 92.) On October 7, 2020, over one year after the alleged oral agreement, Collette finally revealed her intention to purchase the truck for $10,000 "as agreed upon in August 2019." (Mastley Appx, p. 99.)

After Collette sent out her email on October 7, 2020, Becky responded by explaining the prejudice caused by Collette's dilatory tactics:

> Collette-I have sent emails out that nobody responded to regarding many issues, one of them being the 78 Ford which you had plenty of time to respond that you had an interest in but chose not to. Many attempts by [counsel for the PR] dating back to 1/23/2020 that you have not responded to incurring more expense to the Estate. We were going to work through Estate without Attorneys and Expense and distribute items amongst ourselves and you stated you were interested in the Ford in August which I was willing to not have an interest in. You knew the price then at $10,000 and complained rather than be grateful. Since then the Estate has had to hire an Attorney to respond to your First attempted Attorney which ended up costing the Estate Correspondence time with no end results. Now we go by Montana Probate Code and I as an heir have the right to be an interested party and put my bid in. I am bidding $11,000. To say that it is an unfair process, lacks credibility and promotes further mistrusts should be something you strongly point back to yourself.

(Mastley Appx., p. 100.)

Collette's delay in asserting her oral contract rights put the PR in an impossible situation. The PR had been asking for almost a year for Collette to confirm whether she would pay $10,000 for the Truck or not. Had she simply done

so in a timely manner, this dispute would have been avoided. On October 7, 2020, though, the PR was suddenly confronted with one heir (Becky) bidding $11,000 for the truck and another heir (Collette) suddenly asserting the right to purchase the Truck for $10,000 pursuant to a prior oral agreement (which was seemingly unenforceable under the UPC, § 72–3–915(1)).

The PR's response to this dilemma was sensible. First, Travis removed himself as an interested party in the Truck (as prior to that date he was the only one to confirm in writing he would pay $10,000 for the Truck). Then, the PR allowed both Becky and Collette to bid on the Truck, a process that allowed each the same opportunity to purchase the Truck and also maximized its value for the four heirs.

Only after Collette won this bidding process with a bid of $21,020 did she set out to enforce the alleged August 19, 2019, verbal agreement for her to get the Truck for $10,000. In doing so, Collette delayed the administration of the Estate by filing a *pro se* Petition to intervene, retaining a second attorney, terminating her relationship with her second attorney, retaining a third set of attorneys, refusing to confirm her willingness to honor her $21,020 bid, and finally filing a Petition to void the sale of the Truck to Becky.

Again, the delay and expense of these events would have been avoided had Collette simply disclosed her position in the Fall of 2019 when she hired her first lawyer, or in the Spring of 2020 when counsel for the PR expressly asked her if she

would pay $10,000 for the Truck. Instead, she was aware of her rights, took acts inconsistent with them, and everyone was prejudiced as a result. *VanDyke Const. Co.,* at ¶ 15.

The district court's Order did not reference Travis and Becky's waiver argument in its findings of fact or conclusions of law. "Waiver is a question of fact, depending upon the circumstances of each case." *Mitchell v. Carlson*, 132 Mont. 1, 8 (1957). Therefore, the Court can reverse the absence of a factual finding on the waiver question if it determines the district court misapprehended the evidence, or if it has a definite and firm conviction that the district court made a mistake. *See Roland*, ¶ 21. In addition, "where the evidence admits of only one reasonable conclusion, the issue becomes one of law." *Konitz v. Claver*, 1998 MT 27, ¶ 22.

Respectfully, Travis contends that the facts presented here are clear enough to merit reversal on the issue of waiver. A similar set of facts was considered by this Court in *In re Estate of Pelzman*, 261 Mont. 461 (1993). In that case, a decedent had entered into a right of first refusal with a buyer for the sale of a ranch. *Id*., at 462. The personal representative and the buyer agreed on the terms of a sale and scheduled a closing. The buyer failed to show up to the closing, requested extensions, and then failed to show up to the rescheduled closings. *Id*., at 463. As a result, the personal representative eventually sold the ranch to someone else. The buyer challenged the sale but the district court determined they had waived their

contract rights by failing to show up to the closings. On appeal, this Court "conclude[d] that such conduct on the part of the [buyer] constitutes an intentional relinquishment of their right of first refusal and constitutes a waiver of that right." *Id*., at 465.

The present facts are substantively similar. Collette alleges she had the right to purchase the Truck for $10,000, just like the buyer in *Pelzman* alleged they had a contract right to buy the ranch. But, just like the buyer in *Pelzman*, Collette refused to take steps to consummate the transaction. First, she led the PR and other heirs astray by retaining a lawyer whose express direction was for the heirs to work towards a written distribution agreement because none was in place. (Mastley Appx, pp. 54-55.) Then, she waited months to disclose an interest in the Truck before repeatedly refusing to confirm she would pay $10,000 for it. (Mastley Appx, p. 75.) This is analogous to the buyer in *Pelzman* asking for extensions and skipping closings. At some point, a seller is entitled to the buyer's performance. If they just keep kicking the can down the road, eventually their contract rights will be waived.

In this case, Collette's actions prevented the performance of her alleged agreement with the PR, not the other way around. The PR was unable to perform the terms of Collette's alleged oral agreement because she first took the position in the Farago Letter that the agreement did not exist and then repeatedly refused to respond to the PR's express request for her to commit to paying the $10,000 price tag. By the

time she eventually asserted her alleged rights and agreed to pay $10,000, another heir had come forward and offered more for the Truck. At that point, the PR was being asked to enforce Collette's alleged oral agreement which did not adhere to the UPC's writing requirement (and was disputed by 50% of the heirs) while other more valuable written offers for the truck were in place. Since it was Collette's actions that were inconsistent with her alleged contract right that led to this dilemma, it is fair to apply the doctrine of waiver to defeat Collette's oral agreement claim.

CONCLUSION

The Court should reverse and vacate and district court's order. First, the court, sitting in probate, did not have subject matter jurisdiction to order the specific performance of an oral agreement. Second, the district courts' findings of fact and conclusions of law erred by enforcing an oral agreement which lacked evidentiary support and eschewed the express writing requirement in the UPC. Finally, Collette waived her oral agreement claim by refusing to assert it for over a year despite specific discussion on that very topic.

DATED this 9th day of June, 2023.

By: */s/ Adam Tunning*
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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P.11, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, with left, right, top, and bottom margins of one inch; and that the word count calculated by Microsoft Word is 7,877 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

/s/ Adam Tunning
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CERTIFICATE OF SERVICE

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