

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.

BRIEF OF INTERVENOR
TRAVIS KEMMER AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF RONALD GLEN KEMMER, DECEASED

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I. STATEMENT OF THE ISSUES

The District Court erred in ordering re-distribution of the 1978 Ford pickup to Collette Cole.

II. STATEMENT OF THE CASE

Appellees Collette Cole (“Collette”) and Ronda Gilge (“Ronda”), as children and heirs of Ronald Glen Kemmer (“Decedent”), filed the Petition for Removal of Personal Representative, to Void Recent Distribution of Specific Estate Property and to Stay Further Proceedings by Personal Representative (“the Petition to Void Distribution”), requesting that the District Court, among other things, “[v]oid the PR’s purported revocation of an agreement the heirs made in writing for Collette to buy her father’s truck.” See Petition 1, 10–13 (Doc. No. 39). The Petition to Void Distribution was opposed by (a) Intervenor Travis Kemmer, the duly appointed, qualified and acting Personal Representative (“the PR”) of the Estate of Ronald Glen Kemmer, deceased (“the Estate”), (b) Intervenor Travis Kemmer (“Travis”), in his individual capacity, and (c) Appellant Becky Kemmer Mastley, formerly known as Becky Jo Kemmer (“Becky”), in her individual capacity.

An evidentiary hearing on the Petition to Void Distribution was held before the Honorable Donald L. Harris in March 2022. The District Court received exhibits and heard testimony from each of (1) Ronda, (2) Lee Gelhert (“Lee”), the father of Becky’s eldest son who is in a relationship with Collette (Tr. 47:13–23 (Mar. 25,

2022) (hereinafter, “Tr.1”), (3) Collette, (4) Travis, (5) Torrey Darkenwald (“Torrey”), Travis’s spouse, and (6) Becky.

On February 9, 2023, the District Court entered its Findings of Fact, Conclusions of Law, and Order (“the Order”). Appellant Mastley’s Appendix 1–4 (hereinafter “MastleyApp.”). On March 9, 2023, Becky timely appealed the Order. See Mont.R.App.P. 6(4).

III. STATEMENT OF FACTS

A. Probate Proceedings Commenced

On May 20, 2019, Decedent died intestate in Billings, Montana, and was survived by his four children (Collette, Ronda, Becky, and Travis). Tr.1 10:25–11:3. On July 15, 2019, the PR was appointed and issued Letters. Decedent owned certain real property in Billings, Montana (“the House”), along with tangible personal property, including, but not limited to, a 1978 Ford F150 truck (“the Truck”). Upon commencement of Estate proceedings, neither the PR, nor any of the heirs, were represented by legal counsel. Rather, the siblings were attempting to use their best efforts to work things out informally (without fighting and without attorneys). Tr.1 12:23–13:4, 104:10–105:21.

B. Before the Weekend of August 10, 2019

Collette, Ronda, Becky, and Travis agreed that they would plan to meet at the House the weekend of August 10, 2019. Tr.1 15:2–4. It was the parties’ understanding that the purpose for the meeting was to start itemizing Decedent’s

property and work to clean up the House. Tr.1 14:4–16, 112:5–114:6; Tr. 67:11–20 (Mar. 29, 2022) (hereinafter “Tr.2”). Before the meeting, the PR extensively photographed Decedent’s property as it existed in the House (over 150 photographs) and started drafting a Microsoft Excel worksheet which described and identified the items of tangible personal property of the Decedent/Estate (“the Excel Sheet”). Tr.1 110:1–111:8; Tr.2 64:13–65:8. For items of personal property that held a physical title referenced on the Excel Sheet, the PR included rough estimated “fair market value” numbers based on the PR’s research. Tr.2 65:22–67:4. As it related to the Truck, the initial draft sum of \$10,000 was included because the PR knew that Decedent had listed the Truck for sale shortly before his death for \$12,000, and similar vehicles were listed online for sale for a like sum. Tr.1 125:20–126:19; Tr.2 69:20–23. All photographs and the Excel Sheet were made available to Collette, Ronda, and Becky before the weekend of August 10, 2019, for the purpose of giving them an idea of what items were part of the Estate and to solicit feedback on who may ultimately be interested in receiving each item. Tr.1 25:21–24, 77:23–25, 111:9–10; Tr.2 29:21–24, 81:6–82:1.

C. The Weekend of August 10, 2019

When the weekend of August 10, 2019, arrived, Ronda stayed home in Minnesota. Tr.1 15:4. Collette and Lee drove together from Minnesota. Tr.1, 38:20–39:6. Becky, her husband, and her son drove together from Minnesota, separately from Collette and Lee. Tr.1 100:16–17. The PR drove from his home in

Colstrip, Montana. Tr.1 116:10–14. The PR was at the House when Becky arrived with her husband and son. Becky had pulled an enclosed trailer to help transport items to goodwill and/or otherwise assist in moving items. Tr.1 116:15–18; Tr.2 29:1–5, 84:21–85:8. When Collette and Lee arrived, the PR and Becky were working through garbage in the garage and yard. Tr.1 116:11–118:14; Tr.2 85:13–18. Collette was upset that work had appeared to have been started without her, blaming Becky for having an open enclosed trailer in the driveway and accusing her siblings of doing something secret. Tr.1 39:10–21, 56:13–57:7; Tr.2 85:23–87:1. There is no evidence that there was anything in the enclosed trailer or that any property of Decedent left in the enclosed trailer that was not by agreement. Collette, Becky, Travis, and even Ronda (via telephone) exchanged words regarding the situation. Tr.1 17:3; Tr.2 85:23–87:1. Ultimately, the parties were able to come together and move forward with going through the House, though tensions remained. Tr.1 118:25–119:6; Hr’g Ex. 54.

A printed copy of the Excel Sheet was on the breakfast bar of the House that weekend of August 10, 2019. Tr.1 119:21–120:2; Tr.2 67:23–24, 87:22–25. Over the weekend, names were added in handwriting to the Excel Sheet to indicate who may have interest in particular items or who may be considered in potential distribution (i.e. identification of grandchildren or other extended family members). MastleyApp.59–61; Tr.1 111:14–20, 119:24–120:25; Tr.2 82:10, 87:22–89:23. Collette, Becky, or Travis kept Ronda generally apprised by telephone (periodic text

messages or calls), including asking Ronda about her interest, if any, in certain items.

Tr.1 15:19–16:2, 122:2–16.

The testimony made clear that Collette, Becky, and Travis all had initial interest in the Truck. They all had sentimental attachment because of their memories with Decedent and the Truck. Tr.2 90:6–95:22. Collette testified that, prior to Decedent’s passing, he communicated with Collette about the Truck on at least two occasions. Tr.1 52:16–53:13. Collette testified that Decedent promised, in a text message, that the Truck should be Collette’s for less than \$3,000; however, Collette never provided a copy of the text message. Tr.1 31:22–32:4, 77:5–15. Travis and Torrey testified that Decedent called Travis on more than one occasion during his lifetime, requesting Travis to take the Truck. Tr.1 123:10–124:7; Tr.2 68:9–20. Travis testified Decedent told him that he was concerned about Collette and/or Becky just coming to take the Truck. Tr.1 124:8–19. Becky testified that, approximately one year before Decedent’s passing, Decedent was upset with Collette and Collette’s belief that she was entitled to the Truck. Decedent told Becky that Collette had borrowed money from Decedent, and when Collette paid it back to Decedent, Collette stated to the Decedent “let’s call it good and I’ll take the Truck.” According to Becky, Decedent told Collette he was unwilling to give Collette the Truck, which precipitated her getting upset, leaving, and then sending an e-mail to Decedent. Tr.2 90:6–95:22; Hr’g Ex. 50 p. 2. Becky testified that the Truck is worth

\$21,000 as “you can’t put a price tag on things that mean the world to you.” Tr.2 128:3–4.

At some point on the final day of that weekend, Becky approached Travis about the Truck. In an effort to keep the peace with Collette, Becky indicated to Travis it may make sense to give Collette the first opportunity at the Truck. The PR testified that this conversation took him off guard, but that he recognized an interest in attempting to keep peace with Collette. Tr.1 122:24–123:9; Tr.2 24:2–6, 21, 69:7–10, 91:9–92:5.

When wrapping up on the final day, Collette, Lee, Travis, Torrey, Becky, and Becky’s husband were in the kitchen in the House. Tr.1 125:12–16; Tr.2 90:23–91:4. Ronda was not present in person or by telephone.

a. According to Collette, the PR told her that she could have the Truck for \$10,000. Tr.1 58:14–59:25. Collette admitted in her testimony, however, that during the weekend of August 10, 2019, she never actually said or wrote down that she would pay \$10,000 for the Truck. Tr.1 78:1–18.

b. According to Lee, the PR told Collette that she got the truck for \$10,000 out of her share of the Estate. Tr.1 43:16–25.

c. According to the PR, he told Collette that she would have the first opportunity to purchase the Truck. Tr.1 125:12–126:19. When he relayed the value for the Truck should be \$10,000, Collette

challenged it, pointing to the need for new paint, engine work, and the purported promise by Decedent to give it to Collette for less than half that sum. Tr.1 126:20–128:11. According to Travis, when everyone went their separate ways after that weekend, he did not believe there was an agreement regarding price, payment/set-off, or ultimate distribution of the Truck, particularly because he, as PR, had communicated that day that nothing could be finalized with the Truck until he had the opportunity to speak with a lawyer and determine, at minimum, how a distribution of the Truck could be made from the Estate. Tr.1 129:3–18; Tr.2 24:7–18, 71:4–19. Torrey’s testimony confirms the PR’s recollection. Tr.2 69:7–70:17.

d. According to Becky, the PR made clear to Collette that, if there would be no fighting among the heirs, Becky and Travis would not take an interest in the Truck and offer it to her for \$10,000. Tr.2 94:17–95:2. Collette and Lee took issue with that price, citing work needed. Tr.2 90:6–95:22. There was discussion about whether or how it should be sold or credited against an interest in the Estate, and the PR was going to figure out how everything needed to be done. According to Becky, when everyone went their separate ways, there was never an understanding regarding the price of the Truck; there was not a full agreement. Tr.2 95:14–22, 96:24–97:3.

e. Ronda was not present during and did not take part in any of the foregoing Truck discussions. Tr.1 19:22–20:11, 26:18–27:1, 78:24–79:1; Tr.2 69:2–6.

After such discussions, Collette and Lee took the keys and went out to look at the Truck. Tr.1 59:15–25. As work for such weekend was complete, Becky took some old beer from Decedent’s fridge, and Becky and Travis joined Collette and Lee to look at the Truck. Tr.1 128:12–23; Tr.2 96:4–19. Photographs and a video were taken of Collette, Becky, and Travis toasting their dad before everyone left. Tr.1 44:16–22, 49:15–18.

When Collette, Becky, and Travis left the House the weekend of August 10, 2019, certain agreed to property left with each of them. Tr.1 130:7–12; Tr.2 21:23–25. Becky also took and delivered certain items to Ronda. Tr.1 27:2–5, 30:14–18. All items were logged and signed off on in Receipts of Distribution executed by Collette, Becky, and Travis (collectively, “the Receipts of Distribution”). MastleyApp.62–64; Tr.1 130:7–12. The Truck was not referenced on any of the Receipts of Distribution. There were no hard feelings when everyone departed from the House. Tr.1 48:22–49:1, 96:5–9. Torrey, at some point later, wrote Collette’s name next to the Truck on the printed copy of the Excel Sheet to signify Collette may have interest in the Truck or would be considered in a potential distribution thereof. Tr.1 67:23–68:8, 129:19–24.

D. After the Weekend of August 10, 2019

Though Collette knew Travis was on a vacation to Canada, on August 23, 2019—the night before her intended arrival—Collette informed the PR that she was planning to pick up the Truck. Tr.1 131:13–134:21. According to Collette’s and Ronda’s testimony, they had been planning this trip for weeks, but they did not share the details on the group text messages regarding Estate matters among all four siblings. MastleyApp.209–235; Tr.1 27:6–28:8, 79:18–80:12. Upon learning of Collette’s plan—which, at minimum, Becky (an heir) was not aware of or in agreement with—the PR was surprised and concerned, given, among other things, there was no legal authority for Collette to take the Truck and no complete agreement by the heirs about the Truck. Tr.1 131:24–134:21; Tr.2 98:16–99:16.

The PR notified the neighbors and law enforcement that no one should be at the House and took measures to protect Estate property. Tr.2 6:15–8:1, 72:8–14. The PR, likewise, informed his siblings that arrangements could be made for certain additional non-titled and non-disputed items to be picked up, but the details regarding the Truck and other titled Estate property would not be dealt with until an attorney could advise on any potential transfers. Hr’g Ex. C p. 3; MastleyApp.229–235. Ultimately, Collette did not come to Montana that weekend. Tr.1 22:20–21.

In September 2019, Travis—recognizing that he did not want to forego his interest in or claim to the Truck—indicated that he, as an heir, was still interested in

the Truck. MastleyApp.240; Tr.2 10:10–21. Travis clarified that his expressing interest in the Truck did not mean it would necessarily be his. MastleyApp.241.

E. Collette Gets Legal Counsel Involved

Despite prior understandings between the heirs and to his surprise, the PR received a letter dated October 29, 2019, from Attorney Scott Farago, indicating that he represented Collette. MastleyApp.54–55; Tr.1 82:2–4. The letter, among other things, indicated:

In regard to items of estate personal property, unless otherwise agreed, the four children of the deceased have equal right to share in the value of such items. It is my understanding no separate agreement has been reached as to the disposition of the items of estate personal property. Please

It is my understanding no separate agreement has been reached as to the disposition of the items of estate personal property.

...

I suggest all the beneficiaries of the estate work to implement a written agreement as to how the personal property will be divided. Absent an agreement, all four beneficiaries have equal right to share in the value of all items of personal property.

MastleyApp.54–55. Reviewing the letter from Collette’s attorney, the PR felt he had done the right thing on not distributing the Truck because a written agreement among all four heirs was never obtained. Tr.2 72:20–73:2.

As a result of Attorney Farago’s letter, newly retained counsel for the PR responded in writing on January 23, 2020, enclosing the Excel Sheet and the Receipts of Distribution indicating, in part:

Pursuant to the Personal Representative's duty to prepare the Inventory and Appraisement, the Personal Representative will consider all such written information, including such estimate of fair market values of any tangible personal property of the Decedent provided by an heir. If there is any disagreement between any of the heirs and the Personal Representative regarding the fair market value of any property of the Estate that can not be resolved by the parties, the Personal Representative will work to obtain an independent appraisal for such property.

It is also our understanding that there may be certain dispute(s) between certain heirs of the Decedent on the potential distribution of certain tangible personal property of the Decedent and the Estate. If you have any issues or dispute any distribution of any 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.

We are hopeful to resolve all potential issues and dispute(s) in connection with the administration of the Estate informally. Given our understanding of the potential issues and potential dispute(s) of certain tangible personal property of the Decedent and the Estate, we believe we may be able to have the heirs resolve such matters by a written property distribution agreement that would be executed by and among the heirs of the Decedent. If an agreement can not be reached through a written property distribution agreement, the Personal Representative may have no other option than to exercise his fiduciary power to take possession or control of any of the Decedent's property (pursuant to Montana Code Annotated Section 72-3-606) which may currently be in the possession of any heir, and request certain Court guidance prior to making any distribution of Estate property. We are hopeful to avoid exercising such fiduciary power and hopeful to resolve all matters informally with all parties.

MastleyApp.56–67. The PR's counsel, like Collette's counsel, recommended that the heirs attempt to enter into a written property agreement relating to disputed tangible personal property. MastleyApp.58.

F. Collette Refuses to Provide Details Regarding the Truck and Hinders Distribution of the Truck

By April 15, 2020, neither Collette nor her legal counsel had provided any response to the PR's request of January 23, 2020, so PR's counsel wrote again. Hr'g Ex. 3. By May 31, 2020, still no response from Collette, and she terminated her retention of Attorney Farago. MastleyApp.68–71. On June 1, 2020, the PR's counsel indicated that the Truck had not been distributed and that, to his understanding, both Collette and Travis were interested in purchasing it. MastleyApp.72.

Later that same day, Collette e-mailed:

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

MastleyApp.76. Collette's e-mail provided no mention of any monetary value nor whether "all heirs agreed" on payment for the Truck or a distribution in-kind from the Estate. The PR's counsel responded:

Collette,

Thank you for the email. It is our understanding that there is currently interest in the 1978 Ford truck by both you and Travis. We will await to see if there is any other interest from Ronda and/or Becky. Would you please provide details regarding the terms of your offer in connection with the 1978 Ford truck?

Pursuant to the previously circulated Inventory Appraisal, the 1978 Ford truck was valued at \$10,000.00, whereby Travis has offered \$10,000.00 to purchase the 1978 Ford truck. Please provide us details regarding the terms of your offer. Generally, such personal property of the Decedent/Estate would be distributed to the heir with the highest offer. However, it is our understanding that if you are willing to purchase such 1978 Ford truck at \$10,000.00 and in an effort to amicably resolve any potential issue regarding such distribution from the Estate, Travis would be willing to remove his name as an interested person in such 1978 Ford truck. We will also let you and Travis know whether any other heir is interested in the 1978 Ford truck.

MastleyApp.75. Then, Collette wrote:

Justin,

I will respond to your email you sent me yesterday at a later time.

Just wondering if there is another picture of the guns? There seems to be some missing.

Thank you,

Collette

Hr'g Ex. 9, p. 2.

After still no substantive response from Collette, the PR's counsel again reached out on June 10, 2020. Hr'g Ex. 9 p. 1. Collette did not respond, even after another e-mail of June 24, 2020. Hr'g Ex. 12 p. 1. Collette continued to not respond about the Truck, instead, now making a new objection to the House being listed and sold. Hr'g Ex. 12 p. 1.

In the midst of the foregoing e-mail exchanges, Becky wrote:

Hello, I will wait for Ronda to decide on the escape first as she had interest initially and confusion on the larger assets how to go about doing the sale and then transfer. The 78 Ford has already been agreed upon in August for \$10,000 to Collette. We just wanted something assuring heirlooms would stay in the family. Thank you!!

MastleyApp. 245. Becky testified that the second sentence was supposed to be a question: “The 78 Ford has already been agreed upon in August for \$10,000 to Collette?” because Becky was attempting to assist all heirs in moving this matter along. Tr.2 106:1–14. Specifically, Becky was attempting to have Collette actually commit to a price for the Truck. Tr.2 129:17–130:4. Becky testified that no price was ever committed to by Collette in August of 2019 or even June of 2020. Tr.2 105:25–108:6. About 10 days after sending the prior e-mail, Becky wrote another e-mail, including:

The Truck that was dad's most held heirloom was decided Collette was to get in August and I don't care what has happened from the time we parted in August to now OUR word should stand as dad is a man of his word and would not want any of us representing him this way.

MastleyApp.247. Becky testified that “OUR word should stand” was meant to indicate that she would hold up her end of the bargain if Travis and Collette did the same. Tr.2 106:15–108:6. Specifically, if there would be no more fighting among the heirs, Becky would agree to Collette having the Truck for \$10,000. Collette still never expressed that she was willing to pay \$10,000 for the Truck or accept a distribution of the Truck from the Estate for \$10,000. Tr.2 126:13–127:4.

Over one month later, on July 31, 2020, without any explanation, Collette forwarded a copy of the “Receipt of Distribution” that she signed on August 10, 2019, making certain changes/additions in blue ink, including a new reference to the Truck:

Item	Fair Market Value	Amount Paid	Comments
Craftsman Push Mower			Does not work & I did not want it!
Snow blower	200.00		
roboteller (small)	—		Does not work.
Electric Chain Saw	20.00		
Weather station	5.00		
Floor lamp	2.00		
Violin	10.00		
harmonica	5.00		
Wooden rocking Chair	10.00		
Flat screen tv	100.00		
tv stand	—		Given to Tranny
Misc items	20.00		
TRUCK (78 Ford)			Have keys, no title or possession

Becky had all last summer

Hr'g Ex. 13 p. 3; compare MastleyApp.64. There was still no mention of any monetary value for the Truck or whether a sum would be paid for or a distribution in-kind made from the Estate.

G. PR Institutes Equitable Bidding Process to Effect Distribution of the Truck

By August 13, 2020, Becky requested a status update on the administration of the Estate, particularly relating to the Truck; the PR's counsel responded the same day. MastleyApp.79–81. When Collette and Ronda still failed to substantively respond to questions of the PR's counsel, Becky kept on them via e-mail of September 16, 2020. MastleyApp.82–83. By response e-mail, the PR's counsel expressly identified what was still missing from Collette:

Becky,

Good morning. Thank you for the email and confirming that you are not interested in the Ford Escape. We will await Ronda and Collette's responses regarding the same to determine next steps with respect to the Ford Escape.

Based on prior communications from Collette, it remains unclear (1) the terms of Collette's offer on the 1978 Ford truck and (2) whether Collette is still objecting to the listing and selling of the Estate's personal residence. We will plan to follow-up here shortly with Collette regarding the same.

MastleyApp.82. The PR's counsel sent another e-mail directly to Collette:

Collette,

Good morning. Would you please provide us the following information in connection with the administration of the Estate of Ronald G. Kemmer, deceased (the "Estate"):

- 1) Whether you have any interest in the 2014 Ford Escape? If so, please provide us the terms of your offer.
- 2) It is our understanding that you have interest in the 1978 Ford Truck, as the following was provided on your Receipt of Distribution sent to the Personal Representative of the Estate on July 31, 2020:

TRUCK (78 Ford)	
-----------------	--

We have still not received the details regarding the terms of your offer regarding the 1978 Ford Truck. Please provide us the same as soon as possible.

MastleyApp.86. Collette did not respond. Ronda sent a number of questions on September 18, 2020, regarding the administration, including questions about the Truck. Hr'g Ex. 17 pp. 2–5. A detailed response from the PR's counsel of September 22, 2020, provided, in part:

that is what she desires)? [CF – To date, we have not received any communications from Collette that she is willing to purchase or be distributed the 1978 Ford truck for a value of \$10,000. As previously stated, we need to confirm such information with Collette. If Collette in fact is willing to purchase or be distributed the 1978 Ford truck for \$10,000 as you have indicated above, then we simply need to have her share such instruction and information to us. To date, the only information that we have received from Collette regarding her interest in the 1978 Ford truck is her reference to such in her Receipt of Distribution sent to the Personal Representative of the Estate on July 31, 2020 as follows:

TRUCK (78 Ford)

To be clear, the only offer to purchase presented to date (and such offer has previously been discussed to all interested persons) is from Travis who has offered to purchase or have the 1978 Ford truck distributed to him for \$10,000. As previously discussed and as you have indicated above, it is our understanding that if Collette is willing to purchase such 1978 Ford truck at \$10,000.00 (same offer as Travis presented), Travis is willing to remove his name as an interested person in such 1978 Ford truck (or not increase any other offer) in an effort to amicably resolve this issue and move the administration of the Estate forward.]

MastleyApp.92–98. Neither Collette nor Ronda responded.

On October 7, 2020, Becky indicated that she would like to make an offer on the Truck for \$10,000 “cash or when the Estate is settled.” MastleyApp.92. After approximately nine months of no responses from Collette, within two hours of receipt of Becky’s e-mail, Collette wrote:

As requested, please be advised that I would like to purchase the 1978 Ford Pickup for \$10,000, as agreed upon in August of 2019. However, I am willing pay \$10,005 in cash upfront, if necessary in order to close this deal. I would prefer the funding come from my proceeds of the estate if you are agreeable to that, but I am requesting that I be allowed to take possession of the vehicle within 21 days. I will keep my Dad's truck in the family. I trust that this is the information needed to move this forward without further bidding or negotiations by any of the other heirs. If not, it is an unfair process, lacks credibility, and promotes further mistrust.

MastleyApp.99. Becky responded shortly thereafter, including

Collette- I have sent emails out that nobody has 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 Justin dating back to 1/23/2020 that you have not responded to incurring more expense to the Estate. We were going to work through the 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 mistrust should be something you strongly point back to yourself.

MastleyApp.100–101.

Based on the e-mails from Becky and Collette, the PR’s counsel sent a comprehensive e-mail to all heirs on October 23, 2020, setting forth an equitable and reasonable bidding process for the Truck. MastleyApp.102–104. In response, Becky submitted a bid of \$11,000, escalating by \$100 to a cap of \$21,000. Hr’g Ex. 23. Collette sent an objection to the PR (Hr’g Ex. 24), followed by submission of a bid of \$11,500, escalating by \$20 to a cap of \$25,000 (Hr’g Exs. 25, P). On November 3, 2020, Collette was awarded the purchase of the Truck for a cash offer of \$21,020. MastleyApp.144–145.

On November 5, 2020, Collette raised objections to her offered purchase price and concerns about timely delivering the cash. Hr’g Ex. 27 p. 2. The PR’s counsel responded. Hr’g Ex. 27 pp. 1–2. On November 9, 2020, Collette wired \$21,020 to the Estate account, and Collette was assured that the PR would arrange a time for Collette to take the Truck. Hr’g Exs. 29–30. Collette requested that the Truck’s title be mailed no later than November 12, 2020. Hr’g Ex. 31.

H. Collette’s and Ronda’s Ultimately Withdrawn Petition for Intervention Hinders Distribution of the Truck

On November 12, 2020, the PR’s counsel received a copy of Collette’s and Ronda’s Petition for Intervention dated November 6, 2020 (“the Petition for Intervention”), wherein Collette and Ronda took issue with, among other things, the purchase price of \$21,020 for the Truck and the distribution of the Truck, believing

there to have been a legally-binding verbal agreement regarding the Truck in August of 2019 or an undocumented promise by Decedent to Collette to purchase the Truck at some value under its fair market value. MastleyApp.5–12.

Upon review, the PR's counsel asked for clarification from Collette. Hr'g Ex. 33 p. 1. Though repeatedly requested, no direct response was ever provided by (a) Collette, (b) Attorney Ann Davey (Collette's new counsel from November 2020 to March 2021), or (c) Attorneys Tom Singer and Brent Brooks (Collette's and Ronda's current counsel, who were retained in April 2021). Instead, the Petition for Intervention was withdrawn on June 2, 2021, a few days before the hearing.

I. PR Serves Proposed Distribution

On July 30, 2021, the PR circulated the Estate's Proposal for Distribution, which included a detailed explanation regarding the Truck. MastleyApp.148–203. In the proposed distribution, the PR explained the Truck would be distributed to Collette for the \$21,020, as paid by Collette and held in the Estate's account and noted:

Please also be aware, based on the Personal Representative's information and belief after discussions with Ms. Becky Kemmer, in the event Ms. Cole wishes to now rescind her offer and have such payment and funds from the previously accepted offer transferred back to her from the Estate, Ms. Becky Kemmer is still willing to stand by her previous offer of \$21,000.00 for the 1978 Ford Truck.

MastleyApp.150. Neither Travis nor Becky objected. On August 25, 2021, Collette's and Ronda's counsel provided a letter to the PR's counsel, objecting to the proposed distribution, particularly regarding the Truck. Hr'g Ex. 44. In a

response, the PR's counsel reiterated the outstanding request for a substantive response from Collette:

In the interest of attempting to bring this matter to a conclusion in the best interest of all interested persons of the Estate, and in connection with this Court's Order to close the administration of the Estate by November 2, 2021, we request that you provide us Ms. Cole's instruction by September 30th, 2021. If the Personal Representative is not provided the again requested information and instruction from Ms. Cole by September 30th, 2021, and in light of all of Ms. Cole's continued objections raised regarding such previously accepted offer and payment of \$21,020.00, the Personal Representative will return such \$21,020.00 to Ms. Cole and sell the 1978 Ford truck to the second highest bidder, Ms. Becky Kemmer.

Hr'g Ex. 45 p. 3. No substantive response was timely provided by Collette. MastleyApp.204–206. The PR attempted to return Collette's payment of \$21,020. MastleyApp.204; Tr.2 34:18–25. Becky then paid \$21,000 to the Estate for the Truck as the next highest bidder. Tr.2 35:1–9. The PR accepted the \$21,000 payment, and consistent with his fiduciary duties under the Montana Uniform Probate Code ("MUPC"), maximized value of Estate property in the best interest of the successors of the Estate given funds would ultimately be distributed equally among all heirs. On October 12, 2021, the Truck was distributed to Becky. MastleyApp.207–208.

J. Collette's and Ronda's Petition to Void Distribution Hinders Distribution of the Truck

Pursuant to the District Court's order to close the Estate (Doc. No. 31), on October 15, 2021, the PR filed a Verified Petition to Close the Estate formally (Doc. No. 36). A hearing is required and has yet to be set on the Verified Petition to Close. No response or objection was ever filed by anyone. Rather, on October 27, 2021, Collette and Ronda filed the Petition to Void Distribution. The District Court held

an evidentiary hearing on the Petition to Void Distribution, whereafter, as pertinent to this appeal, the District Court made the following Findings of Fact:

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 \$10,000.00 to be paid from Collette's share of the Estate.

5. The Court does not find credible Travis' testimony that no agreement was ever reached in August 2019 between the PR and heirs that Collette was to receive the 1978 Ford pickup for \$10,000.00. The Court further finds that, as PR, Travis was obligated to promptly draft a formal written agreement to distribute the pickup to Collette if he thought a written agreement was necessary. It is undisputed that the PR permitted many other items of Estate property to be distributed to heirs by verbal agreement without requiring written distribution agreements.

6. The Court finds that the PR's distribution of the 1978 Ford pickup to Becky was improper and a breach of the PR's fiduciary duty owed to Collette.

7. The Court finds that the agreement between the PR and heirs that Collette was to receive the 1978 Ford pickup was a valid, binding agreement that should be enforced.

and entered the following Conclusions of Law:

1. The distribution of the 1978 pickup to Becky was an improper distribution and a violation of the PR's fiduciary duty to distribute the 1978 pickup to Collette as agreed upon by the PR and heirs in August 2019. The Court should enforce the August 2019 agreement.

in ultimately ordering:

2. That the Petition to Void Recent Distribution of Specific Estate Property, the 1978 Ford pickup, is **GRANTED**. The PR and Becky Mastley shall arrange to have the 1978 Ford pickup delivered to Collette Cole within 30 days of the date of this Order. Delivery expenses shall be paid by the Estate. Ms. Cole shall designate the place where the 1978 Ford pickup shall be delivered;

MastleyApp.2–3.

IV. STANDARD OF REVIEW

“The interpretation of a statute is a matter of law that [this Court] review[s] de novo.” *In re Estate of Harris*, 2015 MT 182, ¶ 9, 352 P.3d 20, 23.

[This Court] review[s] a district court's findings of fact to determine whether they are clearly erroneous. A district court's findings are clearly erroneous if they are not supported by substantial credible evidence, if the court has misapprehended the effect of the evidence, or if a review of the record leaves us with the definite and firm conviction that a mistake has been made. [This Court] review[s] a district court's conclusions of law to determine whether the court's interpretation of the law is correct.

Matter of Est. of Williams, 2023 MT 72, ¶ 16.

V. SUMMARY OF THE ARGUMENT

This Court should grant the relief requested by Becky by reversing the Order insofar as it requires recovery of the Truck from Becky for re-distribution to Collette. The District Court concluded, as a matter of law, that the verbal “agreement [it found was] made between [the PR] and all of the heirs on August 10, 2019, that Collette would receive the [Truck] for \$10,000 to be paid from Collette’s share of the Estate [(“the Verbal Agreement”)]” “should [be] enforce[d].” See MastleyApp.2–3. In

making that conclusion, the District Court, without citation to or reliance upon any legal authority, found that, “if [the PR] thought a written agreement was necessary” in order to make the Verbal Agreement “a valid, binding agreement that should be enforced,” “[the PR] was obligated to promptly draft [it].” See MastleyApp.2.

The District Court disregarded the MUPC and the express statutory language of section 72-3-915(1), MCA, in making the foregoing erroneous findings of fact and incorrect conclusions of law. Section 72-3-915(1), MCA—a long-standing, clear, unambiguous provision of the MUPC—allows heirs “[by] agree[ment] among themselves to alter the interests, shares, or amounts to which they are entitled . . . in any way that they provide in a written contract executed by all who are affected by its provisions.” MCA § 72-3-915(1) (emphasis added). And only after a written contract is executed by all successors, “[t]he personal representative shall abide by the terms of the agreement subject to” his other legal obligations and responsibilities. Id.

The Verbal Agreement, to the extent it could even be considered a valid or binding oral agreement under Montana law, does not meet the writing requirement of section 72-3-915(1), MCA, under the MUPC (the governing law in this matter). As these requirements under the MUPC were not satisfied, the successors did not “alter the interests, shares, or amounts to which they [we]re entitled” as it related to the Truck, and the PR was not bound by any so-called Verbal Agreement. No Montana statute or case from this Court imposes an affirmative fiduciary duty on the

PR to draft a “private agreement[] among successors as to a distribution” envisioned by section 72-3-915(1), MCA, particularly where no agreement among heirs was ever reached or even believed to be reached by the PR.

In the absence of an agreement among successors executed in writing as required by section 72-3-915(1), MCA, the PR may generally use his broad authority under the MUPC to complete the settlement of the Estate in the best interests of the Estate. Accordingly, the PR’s sale and distribution of the Truck to Becky was not improper. For the foregoing reasons, this Court should grant the relief requested by Becky by reversing the Order insofar as it requires recovery of the Truck from Becky for re-distribution to Collette.

VI. ARGUMENT

A. The District Court erred in ordering re-distribution of the Truck to Collette.

This matter is much more than the mere distribution of a truck: this appeal turns on the proper application of the MUPC and the plain language of section 72-3-915(1), MCA. Notably, this Court has a long-history of upholding the plain language and application of the MUPC to govern the administrations of every decedent’s estate in the State of Montana. With this case, this Court must determine whether the express, plain language of the MUPC should, as intended by the Montana Legislature, continue to govern the administrations of every decedent’s estate in the State of Montana.

i. The District Court erred in concluding, as a matter of law, that “[it] should enforce” the Verbal Agreement in the Estate proceeding.

Montana adopted the MUPC in 1947. See MCA § 72-1-101, et seq. (formerly R.C.M., 91A-1-101(1947)). The MUPC governs the affairs and estates of decedents in this state and all matters in this Estate administration. MCA §§ 72-1-201, 72-3-101. The MUPC is the culmination of exhaustive study of the common law and implementation of working procedures for modern administration and commercial realities. The Montana Legislature rightfully adopted the lion’s share of the uniform law’s uniform probate code in the form of the MUPC, thereby adopting and relying on the collective wisdom from the Uniform Law Commissioners and creating clarity and consistency for every estate administration. The MUPC’s underlying purposes and policies are to, in part: “simplify and clarify the law concerning the affairs of decedent,” “discover and make effective the intent of a decedent in distribution of the decedent’s property,” and “promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the decedent’s successors.” MCA § 72-1-101. Accordingly, the MUPC provides specific rules and timelines to facilitate its purposes/policies and to provide a personal representative and all interested persons a prompt final settlement of Montana estate administrations. MCA § 72-3-101.

Specifically, a personal representative shall use the authority conferred upon the personal representative by the MUPC for the best interests of the successors to

the estate. MCA § 72-3-610. The MUPC generally provides broad authority to a personal representative, which, in part, may take the form of a personal representative acting reasonably for the benefit of the interested persons to: (a) dispose of any estate asset for cash (MCA § 72-3-613(6), (23)); (b) satisfy and settle claims and distribute the estate in accord with the MUPC (MCA § 72-3-613(26)); (c) distribute the residuary estate in any fair and equitable manner (MCA § 72-3-902(4)); (d) invoke the jurisdiction of the court, in proceedings authorized by the MUPC, to resolve questions concerning the estate or its administration (MCA § 72-3-605); and (e) petition for an order of complete settlement (approval of the full process of administration, distribution and closing) of the estate (MCA § 72-3-1001).

Given that Decedent died intestate, each of his children is equally entitled to the property of the Estate, including the Truck. MCA § 72-2-113. It is difficult, if not impossible, for a personal representative to equally divide certain tangible personal property like the Truck. As a result, a personal representative may generally attempt to distribute that property in any fair and equitable manner (see MCA § 72-3-902(4)), or the successors can come to an agreement themselves and direct the personal representative on how they have agreed to alter their interests, shares, or amounts to which they are entitled in accordance with section 72-3-915(1), MCA.

Section 72-3-915(1), MCA, entitled, in pertinent part, “[p]rivate agreements among successors as to distribution” provides:

(1) Subject to the rights of creditors and taxing authorities, competent **successors** may agree among themselves to alter the interests, shares, or amounts to which they are entitled . . . under the laws of intestacy **in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement** subject to the obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of the personal representative's office for the benefit of any successors of the decedent who are not parties.

MCA § 72-3-915(1) (emphasis added). The MUPC generally favors and encourages the settlement of an estate by agreement among successors because it promotes prompt settlement (without dispute and litigation) and distribution of an estate in the best interests of the successors. Importantly, those written contracts are subject to the plain language and interpretation of section 72-3-915(1), MCA, and the MUPC, in addition to the basic requirements regarding contract formation.

Thus, this appeal should be decided and turns on the plain language and interpretation of MCA § 72-3-915(1) and the MUPC. Montana law, as it relates to statutory interpretation, makes clear that,

When we interpret a statute, this Court's purpose is to implement the objective the Legislature sought to achieve. The court's role is to ascertain and declare what is in “terms or in substance contained” in a statute, and not to insert what is omitted or omit what is inserted. The intent of a statute must be ascertained from a holistic survey of the statute's text, language, and structure. Legislative intent must first be determined from the plain words used in the statute, and when that is

possible, no other means of interpretation are proper. Courts may not disregard the plain language of a statute.

Matter of Est. of Erickson, 2017 MT 260, ¶ 24, 406 P.3d 1, 5 (internal citations omitted).

In interpreting statutes, [the courts] first look to the plain meaning of the words used. **When the language of a statute is plain, unambiguous, direct and certain, the statute speaks for itself and no further interpretation is required.**

Matter of Est. of Langendorf, 863 P.2d 434, 436 (Mont. 1993) (emphasis added).

The “plain, unambiguous, direct, and certain” language of this legislatively-enacted statute in the MUPC expressly requires a writing that is executed by all affected: “the statute speaks for itself and no further interpretation is required.” See *Langendorf*, 863 P.2d at 436; *Erickson*, ¶ 24. On top of that, this Court has already upheld the signed writing requirement expressly set forth in section 72-3-915(1), MCA: **“Distribution agreements are required, pursuant to § 72–3–915(1), MCA, to be in writing.”** *In re Est. of Goick*, 909 P.2d 1165, 1171 (Mont. 1996) (emphasis added) (concluding an “oral agreement” regarding distribution of an estate “was not binding on the parties”).

Under Montana law, where a contract, required to be in writing, was never signed by the party to be bound, it was not consented to and was not enforceable. See *Hillstrom v. O'Neill*, 736 P.2d 126, 129 (Mont. 1987) (citing MCA § 28-2-102). In the absence of a note or memorandum of an alleged oral agreement being

subscribed by all necessary parties, the writing requirement is not met. See *Daley v. Daley*, 436 P.2d 88, 89–90 (Mont. 1968).

By and through the District Court’s Order and findings, the District Court did not find any “written agreement” regarding the Truck by and between Decedent’s successors. This makes sense as there is no dispute that, as of August 10, 2019, when Becky, Collette, and Travis left the House, there was no written agreement executed by all successors (Collette, Travis, Becky and Ronda) as it related to the Truck. Ronda was not even present or part of the conversations regarding the Truck at the House, so she certainly could not have executed a written agreement for the Truck. It is further evidenced that no “written agreement” existed regarding the Truck where (1) Collette, by and through her attorney, represented that “no separate agreement has been reached as to the disposition of the items of estate personal property,” including the Truck, and (2) Collette testified and admitted that she did not write out or sign anything in August of 2019, indicating, at minimum, that she would pay \$10,000 for the Truck. Importantly, there is no evidence in the record—and the District Court did not find—any written contract executed by all heirs/successors regarding the Truck.

Without a signed writing, the Verbal Agreement “was not consented to and was not enforceable.” See *O’Neill*, 736 P.2d at 129; *Goick*, 909 P.2d at 1171. The District Court failed to apply and/or incorrectly interpreted section 72-3-915(1), MCA. Such failure requires reversal of the Order based on the District Court’s

incorrect conclusion of law: no legally binding or enforceable written contract regarding the Truck was reached by and between all of Decedent's children (his successors), as a matter of law, on August 10, 2019.

- ii. **The District Court erred in finding that “if [the PR] thought a written agreement was necessary” in order to make the Verbal Agreement “a valid, binding agreement that should be enforced,” “[the PR] was obligated to promptly draft [it].”**

Without citation to any legal authority, the District Court found and imposed an affirmative fiduciary duty on the PR “to promptly draft a formal written agreement to distribute the [Truck] to Collette” if he believed it was needed under section 72-3-915(1), MCA. MastleyApp.2. The affirmative fiduciary duty imposed by the District Court is not provided for under the MUPC, the governing and controlling law in these probate proceedings. First, no such obligation is set forth in the defined “duties” of a personal representative under the MUPC. See generally MCA 72-3-601, et seq. Second, the plain language of section 72-3-915(1), MCA, does not create an obligation or fiduciary duty on the personal representative to “draft” the “written contract” envisioned by that statute. Rather, the exact opposite. A straight forward reading of “the plain meaning of the words used”¹ in section 72-3-915(1), MCA, is that a personal representative is only obligated to “abide” by the terms **“that [the successors] provide** in a written contract executed by all who are affected by its provisions,” and, then, only to “abide” insofar as it does not impede,

¹ See Langedorf, 863 P.2d at 436.

infringe upon, or contradict the personal representative's other legal obligations and responsibilities. See MCA § 72-3-915(1) ("The personal representative shall abide by the terms of the agreement subject to the obligation to administer the estate . . . [and] the responsibilities of the personal representative's office for the benefit of any successors of the decedent who are not parties.").

The affirmative fiduciary duty imposed by the District Court, which is clearly contrary to the MUPC, particularly on these facts, would actually be in derogation of applicable law. "[T]he personal representative [has a] responsibility to manage, protect and preserve the estate," (see *Matter of Est. of Barber*, 699 P.2d 90, 91 (Mont. 1985)), and "a 'duty to settle and distribute the estate of the decedent in accordance with . . . the [MUPC,] as expeditiously and efficiently as is consistent with the best interests of the estate'" (see *Hanson v. Est. of Bjerke*, 2004 MT 200, ¶ 14, 95 P.3d 704, 708). The personal representative shall prudently administer the estate, incurring only reasonable costs and shall use his authority to act solely in the best interests of all successors to the estate, giving due regard to each of the successors' respective interests. See MCA §§ 72-3-610, 72-38-802, 803, 804, 805.

Any written agreement drawn up by the PR would be at the expense of the Estate. Where, as in this matter, the evidence makes clear that the PR would not have been able to put into a writing the allegedly-agreed-upon terms of the Verbal Agreement and his efforts to "draft a formal written agreement to distribute the [Truck] to Collette" would not have been prudent or a protection of Estate assets.

This is because, if the PR would have undertaken drafting (likely through counsel), it would have come at the expense of the other successors' respective interests. Based on the evidence, such actions may not have been acting solely in the best interest of all successors.

This newly created affirmative fiduciary duty imposed by the District Court in this case would wreak havoc on all estate administrations governed by the MUPC. From a reading of the Order, it requires a personal representative, when he "believes" an agreement among successors is reached, to expend time, money, and resources in drafting said agreement. Then, a personal representative would be required to attempt to get all parties to sign it. This newly created fiduciary duty will unwisely and unnecessarily open the floodgates for new challenges to the personal representative's "reasonable belief" as to whether or when an agreement among successors is reached and a personal representative's subsequent actions related to such "reasonable belief." In turn, such "reasonable belief" may then come at the cost of another successor asserting a breach of fiduciary duty based on the "reasonableness" of the personal representative's belief and related work.

A personal representative is supposed to be able to utilize the express language of the MUPC to expeditiously and efficiently settle and distribute an estate. The newly created affirmative fiduciary duty imposed by the District Court in this matter is contrary to the plain language of the MUPC, would impede estate administrations, and undermine the purposes and policies of the MUPC. It also raises serious policy

concerns regarding the well-conceived and well-drafted legislation providing uniformity in administrations of decedent's estate, including, without limitation, judicial efficiencies, finality in probate proceedings with potential lurking verbal agreements, greater potential for disputes over alleged verbal agreements to distribute probate property, more stress on the judicial system with the need for more formal probate proceedings requesting the court system to resolve any and all factual disputes over alleged verbal agreements, and inconsistencies with the centuries-old Statute of Frauds as intertwined in the MUPC from the collective wisdom of the Uniform Law Commissioners. It is important not to deviate from the MUPC and the plain language of section 72-3-915, MCA, so that everyone (including this Court) may rely on the well-conceived and well-drafted statutory framework. Absent that reliance, the bar and the courts (including this Court) will see a substantial and unnecessary uptick in probate related litigation.

The District Court failed to apply and/or incorrectly interpreted Montana law in finding and imposing an affirmative fiduciary duty on the part of the PR "to promptly draft a formal written agreement to distribute the [Truck] to Collette." Such application and interpretation contradicts the plain language of the MUPC. "[A] review of the record leaves [one] with the definite and firm conviction that a mistake has been made" by the District Court. See Williams ¶ 16. Thus, reversal of the Order based on the District Court's erroneous findings of fact and incorrect conclusions of law is required.

iii. The District Court erred in finding the Verbal Agreement “was a valid, binding agreement.”

Without reference or citation to any specific “evidence” in the record, the District Court found the existence of the Verbal Agreement (a verbal “agreement made between [the PR] and all of the heirs on August 10, 2019, that Collette would receive the [Truck] for \$10,000 to be paid from Collette’s share of the Estate” that “was a valid, binding agreement”). These findings do not comport with the MUPC, the governing and controlling law in this matter.

Under Montana law, “[i]t is essential to the existence of a contract [oral or written] that there be: (1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration.” MCA § 28-2-102. “The consent of the parties to a contract must be: (1) free; (2) mutual; and (3) communicated by each to the other.” MCA § 28-2-301. “Consent is not mutual unless the parties all agree upon the same thing in the same sense” MCA § 28-2-303; see also *Zier v. Lewis*, 2009 MT 266, ¶ 22, 218 P.3d 465, 469 (parties need to agree on the same terms in the same sense) and *Steen v. Rustad*, 313 P.2d 1014 (Mont. 1957) (no consent when left to conjecture or surmise).

“A contract must contain all its essential terms in order to be binding.” *Hurly v. Lake Cabin Dev., LLC*, 2012 MT 77, ¶ 17, 276 P.3d 854, 858.

“It is a well-established rule that there must be mutual assent or a meeting of the minds on all essential elements or terms to form a binding contract.” “. . . [T]his Court has stated that in order to effectuate a contract there must be not only a valid offer by one party, but also an

unconditional acceptance, according to its terms, by the other.” *Keesun Partners v. Ferdig Oil Co.*, 816 P.2d 417, 421 (Mont. 1991) (holding that “the purported contract fails for lack of consent” because “although some of the terms of the [contract] may have been agreed upon,” the record indicated that “the parties were involved in an ongoing negotiation process regarding many essential terms of the contract and no finalized agreement was ever reached”).

Jarussi v. Sandra L. Farber Tr., 2019 MT 181, ¶ 17, 445 P.3d 1226, 1232 (explaining that where matters “central to the very performance of the contract” were “still at issue,” “there was no meeting of the minds”); see also *Anderson v. Anderson*, 2003 MT 9N, ¶ 49, 66 P.3d 322 (citing *Goick* for the proposition that “[t]he parties must consent to all terms before a settlement agreement becomes binding”).

Consideration requires a “prejudice suffered or agreed to be suffered by the person, other than prejudice that the person is at the time of consent lawfully bound to suffer, as an inducement to the promisor.” MCA § 28-2-801. “Without consideration, there can be no oral contract.” *Hanson v. Water Ski Mania Ests.*, 2005 MT 47, ¶ 20, 108 P.3d 481, 485.

A mere oral promise to pay . . . is not sufficient consideration to support a contractual obligation Such a promise must be binding and impose some legal obligation on the one making it. A contract is not made so long as, in the contemplation of both parties thereto, something remains to be done in order to establish contract relations.

Schwedes v. Romain, 587 P.2d 388, 390 (Mont. 1978).

No legally binding or enforceable agreement (verbal or otherwise) regarding the Truck was ever reached, as a matter of law, on August 10, 2019, based on, at minimum, each of the following independent reasons:

- a. Ronda was not present or part of the alleged contract negotiations on August 10, 2019, so all required parties under section 72-3-915(1), MCA, were not involved with, let alone in agreement, regarding distribution of the Truck.
- b. Each of Ronda, Collette, Becky, and Travis had separate and distinctly different understandings of what, if anything, was “agreed” to that day: these four clearly did not agree on the same thing in the same sense.
- c. Without Collette actually communicating and committing to a price (regardless of whether it would be paid in cash for the Truck or the Truck distributed in-kind from the Estate as a set-off to her ultimate equal share of the Estate), the required consideration for existence of a contract failed.
- d. Collette’s acts subsequent to August 10, 2019, make clear that she knew no agreement was reached for purchasing the Truck for \$10,000 from her share of the Estate, including, but not limited to: (i) Collette excluded the Truck (including the price) from her original Receipt of Distribution dated August 10, 2019; (ii) as early as October 29, 2019, Attorney Farago (Collette’s first legal counsel) acknowledged and represented, on behalf of Collette, that no agreement regarding tangible personal property of Decedent (including the Truck) existed;

(iii) such representation was never corrected, amended, or withdrawn by Collette, Collette's second counsel, or Collette's current counsel (see Tr.1 93:6–20); (iv) Collette failed to provide any value or price for the Truck in her amended Receipt of Distribution sent July 31, 2020; (v) Collette engaged in the Estate's fair and equitable bidding process for the Truck; and (vi) Collette transferred \$21,020 to the Estate to purchase the Truck.

Given the absence of legally required elements, no contract was formed. The District Court's finding that a "valid, binding agreement" was "made between [the PR] and all of the heirs on August 10, 2019" is clearly erroneous; "a review of the record leaves [one] with the definite and firm conviction that a mistake has been made" by the District Court. See Williams ¶ 16. Thus, reversal of the Order based on the District Court's erroneous findings of fact is required.

VII. CONCLUSION

Because the plain, unambiguous, direct and certain language of the well-established MUPC expressly requires "a written contract executed by all who are affected by its provisions" in order for "successors . . . to alter the interests, shares, or amounts to which they are entitled" and before "[t]he [P]ersonal [R]epresentative shall abide by [it]," the Verbal Agreement, if it even existed, (1) should have no effect on the distribution of Estate property, which is solely governed by the MUPC, and (2) cannot and should not impose any additional fiduciary duties on the PR other

than those fiduciary duties expressly and clearly imposed by the MUPC. As such, the PR's sale and distribution of the Truck to Becky was not improper

THEREFORE, this Court should GRANT the relief requested by Becky by reversing the Order insofar as it requires recovery of the Truck from Becky for re-distribution to Collette.

DATED this 9th day of June, 2023.

CROWLEY FLECK PLLP

/s/ Leonard H. Smith

LEONARD H. SMITH

VIII. CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a), Mont.R.App.P., I hereby certify that the foregoing brief is printed with a proportionately-spaced Times New Roman text typeface of 14 points, is double-spaced, and the word count (from the Statement of the Issues through the Conclusion above) as calculated by Microsoft Word, is 7,927 words including footnotes – this principal brief does not exceed 10,000 words.

CROWLEY FLECK PLLP

/s/ *Leonard H. Smith*

LEONARD H. SMITH

IX. CERTIFICATE OF SERVICE

I, one of the attorneys of the law firm of Crowley Fleck PLLP, hereby certify that on this 9th day of June, 2023, a true and correct copy of the foregoing Brief was served by E-Service (where available) and E-mail on all of the following:

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