

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Supreme Court Cause No. DA-22-0671

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IN RE THE MARRIAGE OF:

SHERRI L. FROST,

Petitioner/Appellant

v.

KEVIN ROY FROST

Respondent/Appellee/Cross-Appellant

v.

FROST LIMITED PARTNERSHIP,

Respondent/Appellee/Cross-Appellant

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On appeal from the Montana Twenty-First Judicial District Court, Ravalli County  
Cause No. DR-15-165; Honorable Howard F. Recht, Presiding

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**APPELLEE/CROSS-APPELLANT'S RESPONSE TO OPENING BRIEF**

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## **APPENDIX**

- A. Findings of Fact, Conclusions of Law and Final Decree
- B. Demonstrative Exhibit – Distribution Using Court Numbers
- C. Demonstrative Exhibit – Distribution Excluding gifted assets

## **I. STATEMENT OF ISSUES**

- I. Whether the district court abused its discretion in valuing gifted assets.
- II. Whether the district court abused its discretion when it failed to account for growth of the gifted assets.
- III. Whether the district court erred regarding sale of marital property.
- IV. Whether the district court erred in denying maintenance.
- V. Did the District Court abuse its discretion regarding the division of property.

## **II. STATEMENT OF CASE**

This is a proceeding to equitably distribute marital property and allocate debt. Sherri filed a Petition for Dissolution of Marriage on June 17, 2015, in Missoula County. (Doc. 2). The parties stipulated a change of venue to Ravalli County. (Doc.2). Kevin filed his Verified Response on August 3, 2015. (Doc. 5). The parties participated in two settlement conferences on September 16, 2015, and September 23, 2015. (Docs. 11 and 14).

On February 12, 2016, Sherri filed her motion to join Frost Limited Partnership (“FLP”) as an additional party. (Doc. 28). FLP made a special appearance to object. Kevin opposed the addition of FLP. (Docs. 29 and 32). The District Court denied the motion to join without prejudice. ( Doc. 40). On November 14, 2016, the parties executed a Marital and Property Settlement Agreement

(“MPSA”), which was filed with the District Court on April 19, 2017. (Doc. 61). Sherri filed a motion to set aside a portion of the MPSA or alternatively to set aside the whole agreement. (Doc. 64). Kevin consented to set aside the MPSA on August 28, 2017. (Doc. 78).

On April 2, 2018, the proceedings were stayed while Kevin was incarcerated. (Docs. 105 and 115). On May 13, 2019, the District Court issued its Interlocutory Findings of Fact, Conclusions of Law, and Decree of Dissolution. (Doc. 141). This order dissolved the marriage and bifurcated the property issues and allowed for “pre-trial litigation practices” while ordering a trial in the matter would not occur until at least one month after Kevin’s next parole hearing in July of 2020. (Doc. 141).

On August 23, 2019, Sherri filed a motion for Temporary Family Support. (Doc. 143.) Kevin stipulated to some of the requests and opposed others. (Doc. 148). Kevin filed a motion seeking an advance of professional fees on September 23, 2019. (Doc. 149). On October 2, 2019, the District Court granted in part Sherri’s motion for temporary support. (Doc. 153). Following a hearing on November 4, 2019, the District Court further granted Sherri’s motion. (Docs. 157, 162, and 165).

On January 3, 2020, Kevin filed a motion to disqualify Judge Recht. (Doc. 170). The matter was referred to this Court which denied the request on January 9, 2020. (Doc. 179).

On January 10, 2020, Sherri again sought to join FLP. (Doc. 181). Kevin and FLP opposed the motion. (Docs. 188-189). On February 19, 2020, the District Court granted the motion to join. (Doc. 197).

On December 17, 2020, Kevin filed a motion to bifurcate the dissolution proceedings from the tort claims. (Doc. 227). The District Court denied the motion. (Doc. 261). On August 26, 2021, Kevin filed a motion for summary judgment asserting that his 40% interest in FLP was gifted to him and it was not a marital asset. (Doc. 280). The motion was denied on January 5, 2022. (Doc. 334).

On May 20, 2022, Kevin sought to vacate the trial in order to conduct additional discovery. Sherri had previously failed to disclose she was seeking social security disability benefits, which would be an offset against maintenance. (D.C. Doc. 350). The district court denied the request on June 1, 2022.

Trial in this matter took place on June 13, 14, and 23, 2022. On October 21, 2022, Kevin filed a Motion Requesting the District Court take Judicial Notice. (Doc. 394). In the civil action, Judge Marks found that Kevin was a limited partner of FLP. Sherri opposed the motion. The district court never ruled on the motion, instead issuing its Findings of Fact, Conclusions of Law, and Final Decree of Dissolution of Marriage on October 31, 2022. (Doc. 397).

On December 15, 2022, Kevin filed a Motion to Stay Pending Appeal. (Doc. 407). The district court denied the stay on January 5, 2023. (Doc 414). Sherri filed a

Motion and Request for the district court to issue a Qualified Domestic Relations Order related to Kevin's 401(k) with Farmer's Group, Inc. (Doc. 415).

### **III. STATEMENT OF FACTS**

The parties were married on September 17, 1988, in Hamilton, Montana. (Tr. Tran 17:10-11, Sherri). Kevin was 22 and Sherri was 19. There were two children born of the marriage, Katelyn Frost ("Katelyn") and Treyden Frost ("Treyden"), both of whom are now adults. (Tr. Tran. 17:24-24;18:1-3); Finding # 12, Findings of Fact, Conclusions of Law, and Final Decree, attached as Appx. "A." Sherri filed a Petition for Dissolution of Marriage on June 17, 2015. (Doc. 2.). Trial for this dissolution occurred seven (7) years later, in June 2022.

Kevin began a career with Farmer's Group Insurance in September 1990 in the Seattle, Washington area. At the time of the dissolution filing, Kevin was employed as a General Adjuster handling liability claims. (Tr. Tran. 395:1, Kevin), Appx. "A" Finding #14. In 1995 Sherri graduated with an associate degree in dental hygiene science from Pierce Community College in Tacoma, Washington. (Tr. Tran. 395:17-25, Kevin). Sherri worked as a dental hygienist throughout the marriage earning on average \$54.00/hour. (Tr. Tran. 42:22-24, Sherri). Appx. "A" Finding #35.

During the marriage, Sherri and Kevin equally shared homemaker type tasks. While Sherri did most of the shopping and cooking, Kevin completed much of the

housework. Kevin performed all the outdoor maintenance. Sherri and Kevin shared equally in caring for and raising their children, including driving them to school activities and sporting events. (Tr. Tran. 400:4-17, Kevin). Likewise, during the marriage Sherri and Kevin both contributed to the marital expenses and the accumulation of marital assets. (Tr. Tran. 561:6-17-24, Kevin).

#### **A. FROST LIMITED PARTNERSHIP**

Kevin's parents, Marilyn Frost ("Marilyn") and George ("George") Frost owned a small ranch. George's father, Albert Frost ("Albert"), was the original owner of the Frost Family Ranch. During their marriage, George inherited a portion of the Frost Family Ranch, and George and Marilyn eventually bought out George's siblings' interest in the ranch to become the sole owners. (Tr. Tran. 344:1-6, Marilyn). Marilyn testified that the real property that comprises the Frost Family Ranch was purchased over several years by George's father, Albert. He was able to create the ranch by purchasing different parcels after coming to the Bitterroot Valley at the age of 14. (Tr. Tran. 342:13-25, Marilyn). It was important for George and Marilyn to keep the ranch in the family and to not lose the ranch to estate taxes. (Tr. Tran. 347:11-12, Marilyn). Appx. "A" Finding #21.

Based on their desire to keep the ranch in the family, Marilyn and George, on the advice of attorney Harry Haines, created the Frost Limited Partnership ("FLP"). George and Marilyn were advised it was the best way they could protect

the ranch from estate and inheritance tax, while reaching their goal of keeping the ranch in the family. (Tr. Tran. 347:6-12, Marilynn). George and Marilynn were advised to gift a limited partnership interest in FLP to Kevin and Randy Frost (“Randy”), Kevin’s brother, to in part, avoid estate taxes. (Tr. Tran. 348:15-25;349:1, Marilynn).

FLP was created on December 23, 1998. George and Marilynn were listed as limited partners, with Frost Ranching Corporation (“FRC”) listed as the General Partner. Exhibit I-1. 51. Since George’s passing, FRC is 100% solely owned by Marilynn Frost. Exhibit P-Q and P-LL. Appx. “A” Finding #23.

On or about December 7, 1999, George and Marilynn gifted Kevin and Randy a forty percent (40%) limited partnership interest in FLP. George and Marilynn each retained a nine and one-half percent (9.5%) limited partnership interest in FLP. Exhibits P-G through P-J. Appx. “A” Finding #22.

At no time was Kevin required to pay money for his interest in FLP. The transfer was a gift. (Tr. Tran. 350:4-14, Marilynn; Tr. Tran. 425:23-25, Wade Weber; Tr. Tran. 529:13-16, 530:12-16, Kevin). In 1999 Marilynn and George filed gift tax returns which reflect that no money was paid by Kevin for his forty percent (40%) limited partnership interest. (Tr. Tran. 426:3-5, Wade Weber) (Tr. Tran 529:13-19, Kevin), Exhibits P-C through P-F.

At the time of the gift, Kevin and Sherri were married. Pursuant to the terms

of the Limited Partnership Agreement, Sherri had to execute a consent before Kevin could be admitted as a Partner in the Partnership (Tr. Tran. 353:1-15, Marilynn). Exhibit P-GG. Sherri was not threatened or coerced into signing. (Tr. Tran. 353:22-25; 354:1-4, Marilynn). The Consent of Spouse states as follows:

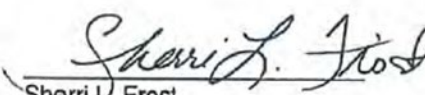
EXHIBIT B

CONSENT OF SPOUSE

I, the undersigned, certify and agree that:

1. Kevin Roy Frost, who signed the foregoing Limited Partnership Agreement of Frost Limited Partnership by and between Frost Ranching Corporation as General Partner, and the Limited Partners shown on Exhibit A, dated July 1, 1999 ("Agreement"), and I are husband and wife.
2. I have read all of such Agreement and agree to be bound by all of its provisions, and we agree to be bound thereby in lieu of any and all other rights and interests we may have in any ownership interests affected by the Agreement.

Dated: \_\_\_\_ July 1, 1999

  
\_\_\_\_\_  
Sherri L. Frost

Sherri signed the Consent of Spouse on July 1, 1999. Exhibit P-GG.

Following George's death in August of 2015, his limited partnership interest passed to Marilynn. (Tr. Tran. 344:12-18, Marilynn). Exhibit P-FF. Additionally, Marilynn received 7,250 common shares in FRC. (Tr. Tran. 345:5-7, Marilynn), Exhibit P-LL. 87. As provided in Article 6.01 of the Limited Partnership Agreement of FLP ("Limited Partnership Agreement"), General Partners have the sole and exclusive right to manage FLP. Exhibit P-GG.



The current ownership of the FLP is as follows:

Frost Ranching Corporation:	1% General Partner's Interest
Marilynn Frost:	19% Limited Partner's Interest
Kevin Frost:	40% Limited Partner's Interest
Randy Frost:	40% Limited Partner's Interest

The General Partner of the FLP is FRC and in accordance with the Limited Partnership Agreement, the authority to direct the management or operation of the FLP is vested with the FRC. Exhibit P-GG.

#### **B. THE “BUTTE” PROPERTY**

Kevin was gifted 40.19 acres (“the “Butte” property”) by Marilyn in January 1999 as part of her estate planning. (Tr. Tran. 531:210, Kevin). Marilyn filed gift tax returns and the reflect Kevin did not financially contribute to the “Butte” property. Exhibit A-3 and P-C; (Tr. Tran. 17-20, Kevin). There are no improvements to the property, it lacks power, and there is no road access to the property. (Tr. Tran. 450:20-25; 451:1-11, Larry Lund). There were no financial contributions made to the property during the marriage from Kevin or Sherri. Further, Sherri made no non-financial contributions to this property.

#### **C. FEBRUARY 9, 2016, EPISODE**

On February 9, 2016, an event occurred (“February 9, 2016, episode”) between Sherri and Kevin wherein Kevin was charged with aggravated kidnapping.

On June 9, 2017, Kevin pled guilty to Aggravated Kidnapping and Partner Family Member Assault. Kevin received a thirty-year sentence with twenty-five years suspended. Kevin spent over three years in prison because of his guilty plea.

#### **D. DISSOLUTION FOLLOWING FEBRUARY 9, 2016, EPISODE**

On February 12, 2016, Sherri filed a motion to join FLP as an additional party. (Doc. 28.) The district court denied the motion to join without prejudice on March 30, 2016. (Doc. 40.) The parties originally reached a settlement in this matter on November 14, 2016, that was later rescinded. (Doc. 78).

On February 2, 2018, Sherri filed a civil complaint against Kevin and others because of the February 9, 2016, episode. Exhibit K-14. Sherri seeks compensation in the civil case against Kevin for the same injuries she alleges entitles her to maintenance or, in lieu of maintenance, 100% of Kevin's pension, 100% of his 401(K), and 100% of the equity in the marital home. (Tr. Tran.91:9-16, 98:2-6, Sherri). Exhibit K-14.

Sherri filed a second motion to join FLP as a party on January 10, 2020. (Doc. 181.) On February 19, 2020, the District Court granted the motion to join. (Doc. 197.)

On December 17, 2020, Kevin filed a motion to bifurcate the dissolution proceedings from the tort claims asserting the district court in the dissolution matter should not consider Sherri's expenses, counseling expenses, her alleged inability to

because of the February 9, 2016, episode because she would be awarded a double recovery which is barred by Montana law (Doc. 227.) The District Court denied the motion. (Doc. 261.) On August 26, 2021, Kevin filed a motion for summary judgment asserting his Kevin's 40% interest in FLP was gifted to him and it was not a marital asset. (Doc. 280.) The motion was denied on January 5, 2022. (Doc. 334).

Trial in this matter took place on June 13, 14, and 23, 2022. On October 21, 2022, Kevin filed a Motion Requesting the District Court take Judicial Notice. (Doc. 394). In the civil action, Judge Marks found that Kevin was a limited partner of FLP. Sherri opposed the motion. The district court never ruled on the motion, instead issuing its Findings of Fact, Conclusions of Law, and Final Decree of Dissolution of Marriage on October 31, 2022. (Doc. 397).

On December 15, 2022, Kevin filed a Motion to Stay Pending Appeal. (Doc. 407). The district court denied the stay on January 5, 2023. (Doc 414). Sherri began executing on the October 31, 2022, Judgment. Sherri obtained all the funds remaining in the escrow account awarded to her. Appx. "A" Finding #49(f). Likewise, Sherri filed a Motion and Request for the district court to issue a Qualified Domestic Relations Order related to Kevin's 401(k) with Farmer's Group, Inc. (Doc. 415).

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#### IV. STANDARD OF REVIEW

A district court's findings of fact are reviewed for clear error and its conclusions of law for correctness. *In re Marriage of Funk*, 2012 MT 14, ¶ 6, 363 Mont. 352, 270 P.3d 39; *Estes v. Estes*, 2017 MT 67, ¶ 12, 387 Mont. 113, 391 P.2d 752. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of evidence, or if upon reviewing the record, the court is left with the definite and firm conviction that the district court made a mistake. *In re L.H.*, 2007 MT 70, ¶ 13, 336 Mont. 405, 154 P.3d 622. Absent clearly erroneous findings, the district court's property division must be affirmed. *Estes*, ¶¶ 12-13.

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

The division of marital property and award of maintenance is reviewed to determine if there was an abuse of discretion. *In re Marriage of Thorner*, 2008 MT 270, ¶ 21, 345 Mont. 194, 190 P.3d 1063. The test for abuse of discretion is whether the district court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *Thorner*, ¶ 21.

## **V. SUMMARY OF ARGUMENT**

### **A. ANSWER BRIEF**

Judge Recht properly valued the assets. Sherri's argument that the district court committed reversible error is without merit. She complains that her evidence and argument were rejected. This rejection may have occurred but is not a reversible error.

The district court was presented here with a long-term marriage, an alleged disabled wife, and a desire of both parties to craft a plan to achieve the goal of receiving their equitable share of the marital estate, acquired over a nearly 30 years, while ensuring the parties were no longer connected to one another. The district court was acting well within its wide equitable discretion when it valued the marital estate and distributed it accordingly.

### **B. CROSS-APPEAL**

The district court, in including gifted assets to which no contribution was made, distributed the estate in an egregiously inequitable manner to Kevin's detriment. Sherri made no financial or non-financial contribution to Kevin's gifted assets. Despite this, the district court gave Sherri over half the estate, which resulted in Kevin receiving 18.49% of the parties' marital assets. The district court's flawed distribution was not supported by substantial credible evidence and the district court

failed to correctly apply Montana dissolution law. The Court's errors must be corrected.

## **VI. ARGUMENT**

### **A. KEVIN'S INTEREST IN FLP WAS PROPERLY VALUED <sup>1,2</sup>**

Sherri argues the court should have adopted her expert's valuation. Sherri cites no legal authority but asks this Court to reweigh expert evidence in her favor. Doing so is improper. The district court, as fact-finder, is given prerogative to weigh conflicting evidence and choose what evidence to accept or reject.

Conflicting evidence does not preclude a District Court's determination that substantial evidence exists to support a finding of fact. *In re A.K.*, 2015 MT 116, ¶ 31, 379 Mont. 41, 347 P.3d 711. "The credibility of witnesses and the weight to be given their testimony are matters for the District Court's determination in a non-jury case. Thus, in examining the sufficiency of evidence, we must view the same in a

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<sup>1</sup> By asserting this argument, Kevin is not waiving his contention that FLP was a gifted asset that should have been excluded from the value of the marital estate. Sherri provided no substantial evidence that she made any monetary or non-monetary contributions to FLP.

<sup>2</sup> The value of Kevin's interest in FLP is speculative, as beyond a right to receive distributions, Kevin has no other rights to FLP property. Kevin, as a limited partner does have any ownership in the real property owned by FLP. § 35-10-101, et. seq. provides that individual partners in a partnership do not own the partnership's property and that the partnership's property cannot be involuntarily transferred to a third party for the benefit of one partner. Kevin's limited partnership interest only gives him a right to receive distributions, subject to the control of the general partner, FRC. (Tr. Tran. 303:19-25, 304:1-4, Marilyn). Kevin would only realize the value of the real property if at some point the general partner, FRC, makes the decision to sell the real property. Article 5.08 of the Limited Partnership Agreement provides,

Other than as stated in [Section] 3.04 of this Agreement, cash available for distribution shall be distributed among the Partners in amounts and at such times as may be determined by the General Partner, in the General Partner's sole discretion, in proportion to the interests of the Partners in the Partnership.

Exhibit P-GG.

light most favorable to the prevailing party, and we will presume the findings and judgment by the District Court are correct.” *Fairview v. Deming*, 238 Mont. 496, 498, 778 P.2d 876 (1989).

In *Meeks v. Meeks*, 276 Mont. 237, 915 P.2d 831 (1996), the husband offered a valuation of a farm from Wicks. The wife called her own appraiser, Anderson. *Meeks*, 276 Mont. at 247. The District Court rejected Anderson’s appraisal and adopted Wicks’. *Id.* The wife alleged the District Court ignored assumptions underlying Wicks’ appraisal while adopting contrary assumptions underlying Anderson’s. *Id.* She argued with Wicks’ methodology and conclusions. *Id.*, 276 Mont. at 248. This Court said it would “not substitute its judgment for that of the trial court regarding the credibility of witnesses or the weight to be given to their testimony.” *Id.*, 276 Mont. at 247-48 (citing *In re the Seizure of \$23,691 in U.S. Currency*, 840 P.2d 148, 155, 52 Mont. St. Rep. 1063, 1065 (1995); *Matter of B.T.B.*, 254 Mont. 449, 840 P.2d 558 (1992); *Trustees of Washington-Idaho-Montana Carpenters-Employers Retirement Trust Fund v. Galleria Partnership*, 250 Mont. 175, 184, 819 P.2d 158, 163 (1991)).

In *Marriage of Lewis*, 2020 MT 44, 399 Mont. 58, 458 P.3d 1009, experts testified about the ability of a ranch to service a loan. *Id.*, ¶ 11. The husband challenged the District Court’s reliance on the wife’s expert. *Id.* This Court rejected his argument, explaining he asked it to improperly reweigh expert testimony. “It is

the province of the district court to weigh evidence and witness credibility. The district court was free to weigh one expert's testimony over another to determine whether the ranch could service a \$1 million loan. There was no clear error." *Lewis*, ¶ 12. *See also Marriage of Edwards*, 2015 MT 9, 378 Mont. 45, 340 P.3d 1237 (affirming District Court's adoption of one expert's testimony over the other's regarding a divisive reorganization); *Marriage of Tummarello*, 2012 MT 18, ¶ 34, 363 Mont. 387, 270 P.3d 28 ("[J]udgments regarding the credibility of witnesses and the weight to be given their testimony are within the province of the District Court and [this Court] will not substitute [its] judgment for [the District Court's] determinations."); *Marriage of Watson*, 227 Mont. 383, 739 P.2d 951, 954 (1987) ("The trier of fact has the discretion to give whatever weight he sees fit to the testimony of an expert.").

**i. Ben Yonce's Valuation of Kevin's 40% Limited Interest in FLP was Proper.**

Sherri alleges errors in the value of Kevin's ownership in FLP. First, it must be clarified that a valuation of Kevin's 40% limited interest in FLP was prepared by Ben Yonce, CPA, CVA, not Larry Lund. In preparing his analysis of the value of Kevin's interest, Mr. Yonce thoroughly reviewed the Partnership Agreement, Mr. Lund's appraisal, and the prior five years of tax returns for FLP. (Tr. Tran. 472:21-25,473:1, Ben Yonce). Mr. Yonce is a Certified Public Accountant and has a certification from the National Association of Certified Valuators and Analyst. (Tr.



Tran. 470:15:18; 24-25; 471:1-23, Ben Yonce). The valuation standards required Mr. Yonce to address three different methodologies, comparable sales method, income method, and asset method. (Tr. Tran. 473:22-25, Ben Yonce).

Mr. Yonce analyzed the discounts to be utilized for the valuation of Kevin's minority and limited interest. He considered numerous factors including the lack of control. Because he was analyzing a limited partnership interest, which has no control over management of the company and cannot compel transactions or distribution, Mr. Yonce ultimately reached the conclusion that he should utilize a lack of control discount of twelve- and one-half percent (12.5%). (Tr. Tran. 481:11-18, 482:9-15, Ben Yonce). Mr. Yonce also analyzed the discount to be utilized for lack of marketability and noted there are restrictions with respect to limited partners in selling the property and the difficulty associated with trying to locate a buyer.

Beyond providing testimony from Julie Fillingham, a real estate agent, as to the value of FLP's real property, Sherri provided no expert testimony on the value of Kevin's forty percent (40%) limited interest in FLP.

Valuing Kevin's 40% limited interest in FLP was a factual issue within the district court's province and this Court cannot substitute its judgment for his or set aside his findings because they are not "clearly erroneous." *Meeks*, 276 Mont. at 247-48. Judge Recht was free to adopt Yonce's testimony, especially as there was no other opinion provided.

**ii. Larry Lund's Appraisal of FLP Property was Proper.**

*Meeks* is on all fours. Sherri argues that Kevin's expert, Larry Lund, erred in his appraisal of FLP's real property. Lund evaluated FLP as an operational ranch, rather than several small parcels of land, which Sherri claims would have yielded a higher valuation. As a result, Sherri asserts her share of the marital estate was reduced. Like *Meeks*, Sherri quarrels with Lund's methodology and conclusions. She argues that valuing the real property as a ranch rather than valuing the separate parcels was an egregious legal error. Sherri is neither an expert nor the finder of fact. Applying her desired standard of review would leave the district court with no meaningful role in litigation. This Court would constantly be second-guessing discretionary rulings and serving as a second trial court.

Lund is a Certified General Appraiser, Real Estate Broker, and Real Estate Agent with over 50 years of experience. (Tr. Tran. 432:8-12, Larry Lund). Lund considered the different terrain and historical use of the property and determined the highest and best use of the property is as a ranchette, with some recreational improved development. (Tr. Tran. 437:2-17, Larry Lund), Exhibit G-2. 133. Based on his visit to the property Lund determined there was a variety of topography he would have to take into consideration when determining the value in value per acre of the property. Lund noted the majority of the property was bare land, with only

about 117 acres having improvements on it. (Tr. Tran. 438:6-8, 441:18-22, Larry Lund).

Here, the District Court utilized its broad discretion in determining the value of FLP and chose to rely on Lund's expert testimony. Lund's testimony carried the day because: "The Court finds the opinion of value of Mr. Lund to more accurately reflect the probable fair market value of the real estate, which he valued at \$4,590,000." Appx. "A" Finding #49(b). To reverse the district court in its exercise of its fact-finding responsibility would be a deviation from this Court's bright-line rule that it is not the province of an appellate court to weigh testimony. ("The trier of fact is free to disregard the expert testimony of one party and adopt the testimony of the other party as long as the other party's evidence is credible and substantial." *Rose v. Rose* 201 Mont. 86, 651 P.2d 1018, 1020, (1982); *In re Marriage of Williams*, 220 Mont. 232, 239-240, 714 P.2d 548, 552, (1986)).

**iii. The Court Cannot Consider New Arguments on Appeal; However, even if it did, Sherri's Argument that she is a Disassociated Partner Fails.**

Sherri argues that she is a dissociated partner of FLP and therefore she is entitled to a valuation of FLP based on its fair market value. Sherri did not raise this argument before the district court. The argument was not presented to, developed before, or addressed by the district court. A party may not raise a new issue or change its theory on appeal. *Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶ 28, 289 Mont.

255, 961 P.2d 100 (citation omitted). It would be “fundamentally unfair” to fault the district court in not ruling on an issue not previously presented. *Dayberry v. City of E. Helena*, 2003 MT 321, ¶ 24, 318 Mont. 301, 80 P.3d 1218. Accordingly, This Court should not consider Sherri’s dissociated partner argument for the first time on appeal.

However, even if the Court were to consider Sherri’s new argument, it would still fail. Sherri’s counsel cites *In re Estate of Bolinger*, 1998 MT 303, 292 Mont. 97, 971 P.2d 767. Her reliance is misplaced. Unlike *Bolinger*, where the parties were actual partners, Sherri was not a partner with FLP. Sherri had to execute a consent before Kevin could be admitted as a limited partner in the Partnership (Tr. Tran. 353:1-15, Marilyn). Exhibit P-GG.

The Consent of Spouse states as follows:

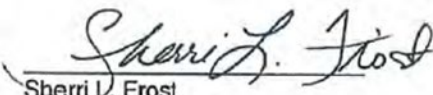
EXHIBIT B

CONSENT OF SPOUSE

I, the undersigned, certify and agree that:

1. Kevin Roy Frost, who signed the foregoing Limited Partnership Agreement of Frost Limited Partnership by and between Frost Ranching Corporation as General Partner, and the Limited Partners shown on Exhibit A, dated July 1, 1999 ("Agreement"), and I are husband and wife.
2. I have read all of such Agreement and agree to be bound by all of its provisions, and we agree to be bound thereby in lieu of any and all other rights and interests we may have in any ownership interests affected by the Agreement.

Dated: \_\_\_\_ July 1, 1999

  
\_\_\_\_\_  
Sherri L. Frost

By signing the Consent of Spouse, Sherri agreed to be bound by the Partnership Agreement, and agreed that she had no rights outside of the Agreement. Sherri also agreed that by being bound by the Partnership Agreement would be “in lieu of” any other claim to ownership in the Partnership. Exhibit P-GG. Sherri was never a partner and in signing the consent, waived any claims she was a partner.

**B. THE DISTRICT COURT DECLINED TO CONSIDER GROWTH BECAUSE THE ASSET WAS PROPERLY VALUED.**

“A district court has far-reaching discretionary powers to determine the value of property in a dissolution action. Its valuation can be premised on expert testimony, lay testimony, documentary evidence, or any combination thereof.” *In re Marriage of Milesnick*, 235 Mont. 88, 94, 765 P.2d 751, 755 (1988) citing *In Re the Marriage of Reich*, 222 Mont. 192, 720 P.2d 286, 287-88, (1986); *In Re the Marriage of Garst*, 206 Mont. 89, 94-95, 669 P.2d 1063, 1066 (1983). So long as a valuation is reasonable in light of the evidence, this Court will not disturb that finding on appeal. *In re Marriage of Frank*, 2022 MT 179, ¶ 39, 410 Mont. 73, 517 P.3d 188. Equitable apportionment is more important than “designating the moment” at which the court should value marital property.” *Frank*, ¶ 40, citing *Schwartz v. Harris*, 2013 MT 145, ¶ 18, 370 Mont. 294, 308 P.3d 949. “When conflicting valuation evidence is presented the district court must indicate the basis for its determination. If no explanation is made then it has abused its discretion” *Frank*, ¶ 39, citing *In re Marriage of Rolfe*, 216 Mont. 39, 46, 699 P.2d 79, 83 (1985) (“*Rolfe I*”).

The case law is clear; this Court leaves the work of fact-finding to the district court and will only be reversed if the district court's findings are not supported by the record. The record developed at trial fully supports the factual determinations made regarding the value assigned to FLP. While there has been an increase in property values in the residential market in the recent year, the market for ranchettes, like FLP property, has generally not changed and there were no recent "comps" or comparison properties available for a property in similar size as FLP. (Tr. Tran. 448:13-25, 449:18-22, Larry Lund). While Lund had an opinion that an adjustment might be appropriate, he did not know what it would be based on the lack of comparable properties. (Tr. Tran. 450:1-5, Larry Lund).

Moreover, unlike Sherri's expert, Lund performed a complete site inspection of the property. (Tr. Tran. 439:11-23, Larry Lund.). Lund inspected the FLP Property on March 4, 2021, and observed steep terrain where utilities are limited, timbered land, grazing land, and irrigated hay land. Lund also observed several improvements to the property, which include a large shop, attached living quarters, a hay shed, and a loafing shed. (Tr. Tran. 440:4-25; 441:1-11, Larry Lund). The fact that Lund visited the property, analyzed the different types of property encompassing the land owned by the FLP, provided comps, and valued the property as an operating ranch, as opposed to parcels chosen at random, with no consideration to ranch operation, is

the basis for Lund's opinion being accepted by the Court in Appx. "A" Finding #49(b):

Kevin's 40% interest in Frost Limited Partnership (FLP). Both parties submitted evidence concerning the value of the real estate owned by FLP, which is the principal asset of the limited partnership. Sherri retained Julie Fillingham, a licensed real estate agent, and Kevin retained Larry Lund, a certified general appraiser. The Court finds the opinion of value of Mr. Lund to more accurately reflect the probable fair market value of the real estate, which he valued at \$4,590,000.

Here, the district court utilized its broad discretion in relying on Lund's expert testimony to determine the value of FLP's land holdings. Clearly, there is evidence in the record supporting the district court's determination of value for FLP. Again, the district court, as factfinder, is given the right to weigh the conflicting evidence and has broad discretion in determining the value of property.

Sherri's argument that the district court rejected the fact that both experts believed that the property had increased "substantially" in value is not accurate. Lund had no opinion as to what an adjustment would look like for a parcel of land that size because there were no recent comparison properties available for a property in similar size as FLP. Fillingham gave no opinion of what the increased value of FLP would be, only that "it's increased." (Tr. Tran. 221: 4-7). Thus, there was no evidence in the record to support an upward adjustment.

Findings of Fact must be based on substantial credible evidence. Given the fact that Lund testified he could find no comparable properties and that Fillingham

provided no testimony regarding value of an increase, assigning an upward adjustment would have been purely speculative on the part of the district court.

The district court heard competing evidence and elected to accept Lund's value. The district court received no substantial evidence regarding the value of an upward adjustment of the property. It is not a reversible error for the district court to accept the analysis of one expert witness as compared to another expert witness. Nor is it an error for the district court to not assign an upward adjustment based when there is no substantial evidence in the record to support an adjustment.

**C. THE DISTRICT COURT DID NOT COMMIT AN ABUSE OF DISCRETION REGARDING THE SALE OF THE HOME.**

Kevin wholly rejects the argument that Sherri will be forced to negotiate with him over the sale of the marital home and that he should not receive 10% of the equity in the marital home. The legislature has made certain that marital misconduct is not to be considered for the purpose of paying maintenance or for property distribution. Specifically, § 40-4-202 provides that in dividing the property “the court, without regard to marital misconduct, shall...equitably apportion between the parties the property and assets belonging to either or both...” Moreover, the Commissioners' comments are clear. “The court is expressly admonished not to consider the misconduct of a spouse during the marriage. Because marital misconduct cannot be considered by the court, “apportionment of a marital estate is based on equitable principles and whether parties are at ‘fault’ should not affect the



court's division of assets.” *In re Fenzau*, 2002 MT 197, ¶ 24, 311 Mont. 163,54 P.3d 43.

In requesting Kevin not to receive any share of the marital home, Sherri seeks to have this Court inject fault into this proceeding for the February 9, 2016, event. The law is clear that dissolutions in Montana are “no fault,” and any transgressions during the marriage cannot be prosecuted in a court of equity. Moreover, Kevin has been punished criminally as he spent several years in prison. Civilly, Kevin is a defendant in a multi-million-dollar lawsuit filed against him by Sherri, which is the appropriate recourse Sherri has to pursue her claims.

Sherri’s assertions that she will be forced to negotiate with Kevin, and he will be abusive are pure speculation. Frankly, this dissolution has been proceeding since June 2015 (eight years), and Kevin is eager to put this matter behind him. Kevin does not intend to participate in the sale of the marital residence, other than to sign whatever documents are requested by the real estate agent or closing agent. Kevin wishes to be free of any connection to Sherri.

At trial, Sherri testified that she would be willing to sell the house if she had the right to override what Kevin wanted to sell the house for. (Tr. Tran. 127:11-12, Sherri). The district court granted Sherri’s wish, and the house will be sold by a licensed realtor selected by Sherri at a value acceptable to Sherri. Appx. “A” Finding # 49(a). Thus, Sherri has complete control over the sale of the house. The court did

not commit an error in granting Sherri what she wanted, control over the sale and price of the marital home.

Even if, hypothetically, Kevin was to interfere with the sale of the property, which he will not, Sherri has recourse against Kevin, including filing a contempt motion.

The district court fashioned a property division that meets the parties' objectives and is both achievable and fair. It would be a wholesale deviation of this Court's prior decisions to find an abuse of discretion here.

**D. THE DISTRICT COURT CORRECTLY DETERMINED SHERRI IS NOT ENTITLED TO MAINTENANCE.**

A District Court does not err when it awards property in lieu of maintenance. *In re Marriage of Rolf*, 2003 MT 194, ¶ 22, 316 Mont. 517, 75 P.3d 770; *In re Marriage of Williams*, 2009 MT 282, ¶ 23, 352 Mont. 198, 217 P.3d 67. The district court must clearly state its intent to award the property in lieu of maintenance and make necessary findings to support an award of maintenance. *Rolf*, ¶ 22; *Williams*, ¶ 23. There is a “clear preference for awarding property first.” *Rolf*, ¶ 25. 12. 49. Further, §§ 40-4-202 and 203 governing distribution of property and maintenance, “must be considered together.” *Rolf*, ¶ 25, citing *In re Marriage of Hilt*, 209 Mont. 140, 146, 679 P.2d 783, 786 (1984). “As indicated in the Commissioners’ Note to these statutes, the “dual intention [of the maintenance and

property sections] is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance.” *Rolf*, ¶ 25, citing *Hilt*, 209 Mont. at 145, 679 P.2d at 786.

§ 40-4-203, governs maintenance awards in a dissolution proceeding, and it provides, in pertinent part, as follows: “(1) In a proceeding for dissolution of marriage..., the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance: (a) lacks sufficient property to provide for her reasonable needs; and (b) is unable to support herself through appropriate employment....” Although the district court must consider each of the statutory factors, “it need not make a specific finding relating to each, provided that [the Montana Supreme] Court can determine the trial judge actually considered each factor.” *In re Marriage of Haines*, ¶ 18, 311 Mont. 70, 53 P.3d 378 (2002). “These factors must be considered by the district court as a whole in the determination of a final maintenance award.” *In re Marriage of Rudolf*, ¶ 27, 338 Mont. 226, 164 P.3d 907 (2007).

Where a spouse receives liquid assets in a distribution, maintenance is not required. *See In re Marriage of Tummarello*, 2012 MT 18, ¶28, 363 Mont. 387, 270 P.3d 28 (“the court denied Valerie's request for maintenance, in part, because she would receive liquid assets of one-half the remaining proceeds from the properties to pay her reasonable living expenses”); *In re Marriage of Axelberg*, 2015 MT 110,

¶ 15, 378 Mont. 528, 532, 347 P.3d 1225, 1230 (district court did not abuse discretion in denying maintenance when based on the apportionment of the property, wife did not lack sufficient property to provide for her reasonable needs).

The legislature has made certain that marital misconduct is not to be considered for the purpose of paying maintenance or for property distribution. § 40-4-202(1) indicates that in dividing the property “the court, without regard to marital misconduct, shall...equitably apportion between the parties the property and assets belonging to either or both...” Thus, § 40-4-202 (1), bars the Court from considering marital misconduct in apportioning a marital estate.

However, “The statutory prohibition [in Mont. Code Ann. § 40-4-202(1)] against considering marital misconduct does not foreclose the district court from considering the medical and financial needs of a spouse which result from the other spouse's physical, mental, or emotional abuse during the marriage. Consideration of the economic effects of abuse, such as medical expenses and a person's ability to work and earn an income, is not an interjection of fault or an assignment of blame which is contemplated by the statutory prohibition of judicial consideration of marital misconduct.” *In re Petition of Fenzau*, 2002 MT 197, ¶ 29, 311 Mont. 163, 54 P.3d 43.

Sherri’s argument on this issue ignores entirely the Findings and Conclusions made by the district court on this issue. It is clear the district court was mindful of

the issues in this matter. The district court concluded Sherri did not have an ability to earn sufficient income to maintain a standard of living and found that Kevin's abuse impacted Sherri's ability to work and earn income. Appx. "A" Conclusions #11 and #13. But, in acknowledging the impact of abuse, the district court found Sherri received sufficient property to provide for her reasonable needs. Appx. "A" Finding #51.

The district court correctly determined that Sherri was not entitled to maintenance. Its reasons for doing so are documented in the record. Here, as seen in Appx. "B" Demonstrative Exhibit 1, Sherri will receive nearly \$2.7 million dollars in liquid assets from the estate. Thus, like *Tummarello* and *Axelberg*, Sherri is receiving sufficient property to pay her reasonable living expenses and needs. There is no reversible error, the district court was mindful in its determination to follow the statutory and case law requirements surrounding maintenance. Findings must be upheld if supported by substantial credible evidence. *See, Carrocia v. Todd*, 189 Mont. 172, 615 P.2d 225, 227 (1980).

Sherri's arguments focus on repeating her quarrel regarding the value given to FLP and asserting that it was an abuse of discretion because the district court made Kevin "judgment proof." Again, it is not the province of a court sitting in equity to assign fault. The district court received evidence on Sherri's alleged inability to

support herself and fashioned a distribution that accounts for her alleged disability and provides liquid assets for her support.

Sherri's argument that the district court protected Kevin from a tort judgment ignores the public policy in Montana that fault is not determined in a dissolution matter. It would have been an abuse of discretion for the district court to have awarded Sherri 100% of the retirement accounts, as she argues for, because the district court would have been assigning fault to Kevin for the alleged injury to Sherri.

"A distinction exists between awarding a larger portion of the marital estate in order to penalize marital misconduct, and, on the other hand, considering the medical and financial consequences of marital abuse in the allocation of the marital estate." *Patton v. Patton*, 2015 MT 7, ¶ 58, 378 Mont. 22, 36-37, 340 P.3d 1242, 1253.

Here, as discussed above, the district court considered the consequences of Sherri's alleged abuse and provided reasoning in its findings and conclusions with regard to its allocation of the estate and reasoning for not awarding maintenance. It would have been an abuse of discretion to penalize Kevin for the February 9, 2016, event by awarding Sherri 100% of the retirement accounts. Sherri has appropriate recourse, her civil tort suit. To reverse the district court in its exercise of its fact-finding responsibility and to re-determine facts would be a remarkable deviation

from this Court's repeated holding-that it is not the province of an appellate court to weigh testimony.

Concerning the value of FLP, the district court is the trier of fact. Here, experts Ben Yonce and Larry Lund made an analysis on the value of Kevin's 40% limited interest in FLP. Sherri chose to not rebut Kevin's value of his limited partnership interest and Sherri's expert offered different testimony on the value of FLP land. This factual decision is left to the fact-finder to weigh. It did. It is not a reversible error for the district Court to accept the analysis of one expert witness as compared to another expert witness. As stated and supported under Argument I (a) and (b), this election of testimony, of record, is not error.

**E. THE DISTRICT COURT'S PROPERTY DIVISION IS BASED ON CLEARLY ERRONEOUS FINDINGS OF FACT AND IT ABUSED ITS DISCRETION WITH REGARD TO THE DIVISION OF PROPERTY.**

**i. The court abused its discretion when it included a gifted asset in the marital estate which resulted in an inequitable distribution of the marital estate in favor of Sherri.**

Using the court's valuations, the court awarded Sherri 55.17% of the estate. However, the court included gifted assets, to which Sherri made no monetary or non-monetary contributions during the marriage. When the gifted assets are excluded from the total value of the marital estate, the distribution is 81.51% to Sherri and 18.49% to Kevin. Compare Demonstrative Schedule 1, attached as Appx. "B"

(Distribution using Court's numbers) with Demonstrative Schedule 2, attached as Appx. "C" (Distribution excluding gifted assets).<sup>3</sup> §40-4-202, MCA gives courts discretion to order equitable, not equal, distributions. *In re Marriage of Garner*, 239 Mont. 485, 781 P.2d 1125, 1127 (1989) ("[e]quity, not equality, guides a court's discretion in dividing the marital estate"); *Collins v. Collins*, 324 Mont. 500, 104 P.3d 1059 (2004); *In re Marriage of Pospisil*, 299 Mont. 527, 1 P.3d 364 (2000). "An equitable division does not require that every marital asset or liability be split evenly." *In re Marriage of Parker*, 2013 MT 194, ¶47, 371 Mont. 74, 305 P.3d 816.

A property division should reflect the parties' relative contributions. *Lawrence v. Harvey*, Mont. 607 P.2d 551 (1980); *In re Marriage of Bartsch*, 2007 MT 136, ¶ 20, 337 Mont. 386, 162 P.3d 72. The spouse claiming ownership of gifted property is entitled to argue that it would be equitable to award him the entirety of such property. *Funk*, ¶ 19. Moreover, this Court determined that excluding the value of separate property from the final value of estate available for distribution is not an abuse of discretion. *Frank v. Frank*, 2019 MT 130, ¶ 21, 396 Mont. 123, 443 P.3d 527,

When distributing gifted assets, the court must not only consider the contributions of the other spouse to the marriage but must take into account the three

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<sup>3</sup> These schedules are not part of the record, but based on values in the record, and provided for demonstrative purposes.



factors set forth at § 40-4-202(1)(a)-(c), MCA. The court's decision with respect to distribution of property must affirmatively reflect that each of these factors was considered and analyzed and must be based on substantial evidence. *Funk*, ¶19; *Estes v. Estes*, 2017 MT 67, ¶ 16, 387 Mont. 113, 391 P.3d 752.

Here, the court committed error because it failed to properly analyze the factors of § 40-4-202(1)(a)-(c) and included FLP and the “Butte” property as assets in the marital estate. The district court found that Sherri contributed to FLP by providing labor and assisting with ranch operations. Appx. “A” Findings #18 and #31. But the ranch is operated by FRC not FLP. At trial the court recognized FRC is not a marital asset. (Tr. Tran. 519:2-3, Judge Recht). Yet, despite this recognition, the district court found work for a nonmarital asset entitled Sherri to receive credit for a gifted asset. The substantial evidence presented at trial provides for only one conclusion: FLP and the “Butte” property were gifted.

**ii. The Court’s findings regarding Sherri’s contributions to gifted assets are not supported by substantial evidence.**

With no analysis of Sherri’s contribution to FLP, the Court included Kevin’s limited interest in FLP in the value of the marital estate. Appx. “A” Finding #49(b). The court offers no reasoning as to why the value of FLP is included in the total value of the marital estate. Likewise, the court found that the “Butte” property was part of the marital estate. Appx. “A” Finding #49(c).

An analysis of the §40-4-202(1)(a)-(c), MCA factors based on the record establishes the following:

- **Nonmonetary Homemaker Contribution:** To be entitled to a homemaker contribution, “the homemaking efforts must substantially aid in the accumulation and/or maintenance of the marital estate.” *In re Marriage of Smith*, 270 Mont. 263, 891 P.2d 522, 525 (1995). *Smith* held “during the marriage, the parties hired childcare help, house cleaning help, and lawn maintenance help, . . . [the homemaker] failed to demonstrate that these efforts substantially aided in the accumulation or maintenance of [the other spouse’s] pre-marital assets,” and therefore, the “court did not abuse its discretion by not awarding [the homemaker] any of the [other spouse’s] pre-marital assets.” *Id.*

Sherri worked outside the home as a dental hygienist during the entirety of the marriage. (Tr. Tran. 42:22-24, Sherri). Kevin worked from home. (Tr. Tran. 560:13-15, Kevin). Kevin and Sherri equally shared home maintenance tasks. (Tr. Tran. 560:6-10, Kevin.) While Sherri did most of the shopping and cooking, Kevin completed most of the housework and did his own laundry. (Tr. Tran. 559:17-19; 560:1-10, Kevin). Kevin performed all the outdoor yard and garden care. (Tr. Trn.166:1-25;167:1-3, Sherri.); (Tr. Tran, 560:2-4, Kevin). Sherri and Kevin shared equally in caring for their children including driving them to school activities and sporting events. (Tr. Tran. 560:11-18, Kevin). As their kids aged, the children

assisted in maintaining the home. (Tr. Tran. 559:20-25, 560:110, Kevin).

Given that both Sherri and Kevin worked outside the home and equally shared homemaker duties, including child rearing, it was an abuse of discretion for the court to find that Sherri had a homemaker contribution entitling her to gifted assets.

- **Financial Contributions:** In December 1999 Kevin was gifted a forty percent (40%) limited partnership interest in FLP. Exhibits P-G through P-J. Tax returns were filed with the Internal Revenue Service to reflect the gift to Kevin. (Tr. Tran, 350:5-14, Marilynn; Exhibits P-C through P-F). Kevin did not make any capital contributions and he did not use any marital funds to acquire the interest. Subsequent to the 1998 gift, Kevin never contributed cash to FLP. (Tr. Tran. 532:1-3, Kevin). Similarly, Sherri never contributed financially to FLP. (Tr. Tran. 532:12-17, Kevin).

Likewise, Kevin was gifted the “Butte” property by his mother, Marilynn, in January 1999 as part of her estate planning as envisioned by Harry Haines. (Tr. Tran. 531:210, Kevin), Exhibit A-3 and P-F. In 1999 Marilynn filed gift tax returns. They are evidence that supports the gifting, and that no financial contribution was made by Kevin. Exhibit A-3 and P-C; (Tr. Tran. 531:17-20, Kevin).

The court provided no analysis as to any financial contribution Sherri made that assisted in maintaining the gifted properties. As Kevin contributed no money to the gifted assets, it follows no marital funds would have been contributed to the

assets, thus Sherri made no financial contribution to the gifted assets.

○ **Non-Financial Contributions:** The court found that Sherri participated in activities associated with a cattle ranch and because of those efforts the assets should be deemed of equal value. Finding #31. However, the court conflated FRC with FLP. Importantly, FLP does not operate the ranch, it only leases land and is a passive asset. (Tr. Tran. 355:22-25, 356:1-4, Marilynn). All the ranch type work is through FRC. (Tr. Tran. 356:5-7, Marilynn). If Sherri did perform any activities, it was on behalf of FRC, not FLP. (Tr. Tran. 533:2-6, 537:22-25, 538:1-3, Kevin). Moreover, FRC is 100% solely owned by Marilynn Frost. Exhibit P-Q and P-LL. Kevin has no interest in FRC. (Tr. Tran. 365:314, Marilynn).

Moreover, the district court erred when it found that Kevin will inherit FRC at Marilynn's death, which entitled Sherri to receive credit for the value of FLP. Appx. "A" Finding #49(b). Whether or not Kevin may inherit a portion of FRC is immaterial to a district court's distribution of the marital estate. This Court has been clear that a possible inheritance by a spouse at some future point is not included in the marital estate. A "spouse's possible inheritance is never properly included in the marital estate nor considered in dividing the marital estate[.]" *In re Marriage of Beadle*, 1998 MT 225, ¶¶ 37-38 and 43, 291 Mont. 1, 968 P.2d 698 (upholding the exclusion of a husband's interest in his parent's trust because his mother as life beneficiary had the power to appoint by will the remainder of the trust among the

parents' descendants and as such the husband's interest remained contingent until her death).

Moreover, it is disputed whether Sherri performed any “ranch wife” work. Kathryn Cook, Sherri’s mother, who lived near Sherri and Kevin, never observed Sherri performing work such as looking for missing calves or participating in slash burning. (Tr. Tran. 279:7-16, Kathryn Cook). Leah Capko testified that she never observed Sherri herding cows or assisting with the branding. (Tr. Tran. 263:6-15, Leah Capko). Sherri never assisted with haying, feeding the livestock, providing vaccinations to the cows, fencing, or searching for lost calves. (Tr. Tran. 533:7-25, 534:1-25, Kevin).

Sherri was given credit for assets that were gifted, for which no marital funds were given, and for which no effort is required in maintaining. In sum, the only possible finding is that FLP and the “Butte” property were gifted to Kevin, making the court’s findings clearly erroneous.

**iii. The district court inequitably distributed the estate in favor of Sherri.**

The court made an inequitable distribution when it found that Sherri contributed to FLP. It would be unjust to allow Sherri to receive an equal or disproportionately favorable distribution where she has not assisted in the growth, management, maintenance, or made any financial contributions to Kevin’s gifted assets.

Since *Funk*, this Court has upheld rulings that “apportion to each party the value of his or her pre-acquired assets.” *In re Marriage of Axelberg*, 2015 MT 110, ¶15, 378 Mont. 528, 347 P.3d 1225. *In Estes v. Estes*, 2017 MT 67, ¶ 16, 387 Mont. 113, 391 P.3d 752, the district court excluded premarital assets from the estate, which was affirmed by this Court. This Court stated, “[w]e held in *Funk* that when distributing pre-acquired property the court must consider the contributions of the other spouse to the marriage and take into consideration the factors set forth at §40-4-202(1)(a)-(c)”; *Funk*, ¶ 19.

This Court has determined that excluding the value of a premarital portion from the final value of estate available for distribution is not an abuse of discretion. In *Frank v. Frank*, 2019 MT 130, ¶ 21, 396 Mont. 123, 443 P.3d 527, the district court found a premarital credit in one asset, Hammer Nutrition. This premarital credit decreased the portion of Hammer Nutrition available for division between the parties, which in turn, decreased the value of the equivalent estate distribution. On appeal, this Court found it was not an abuse of discretion to exclude the premarital credit from the total value of the estate because the exclusion was based upon the statute governing the consideration of premarital property as applied in *Funk*. *Frank*, ¶ 21.

These decisions, while referring to pre-acquired property, are applicable to gifted assets like Kevin’s interest in FLP and the “Butte” property. The court abused

its discretion by finding Kevin's interest in those properties was an asset subject to distribution, and effectively awarding Sherri 50% of such value. The law is well-settled in Montana. Assets belonging to a spouse acquired by gift during the marriage are not a part of the marital estate unless the non-acquiring spouse contributed to the preservation, maintenance, or increase in value of that property. *In re Marriage of Lewis*, 2020 MT 44, ¶ 2, 399 Mont. 58, P.3d 1009.

Here, all of Kevin's interest in the "Butte" property was acquired through gifts. Exhibits P-C through P-G. At no time was Kevin required to pay money and Kevin did not use marital funds to acquire his interest in the "Butte" property. (Tr.Tran:532:1-17, Kevin). Sherri's testified no Kevin paid no money for the property. (Tr.Tran:162:21-25;163:1, Sherri).

Likewise, Kevin's interest in FLP was acquired through gifting with no financial contribution of marital funds from Kevin or Sherri. Exhibits P-G and P-J. (Tr. Tran.: 532:1-3, Kevin). Sherri's testimony also supports this evidence. (Tr. Tran. 150:16-21; 163:25, Sherri);

Despite the undisputed evidence that Sherri contributed nothing to FLP or the "Butte" property, the court included 100% of Kevin's interest in the properties as a marital asset. Kevin's interest in FLP and the "Butte" property was a family gift. Sherri made no contribution financially or non-financially to those properties. By including the value FLP and the "Butte" property, Kevin receives only 18.50% of

the marital estate. To include the value of the assets in the marital estate was an abuse of discretion.

**F. THE DISTRICT COURT ERRED BY EXCLUDING WITNESS TESTIMONY.**

Montana Rule of Evidence 103(a)(2) provides that error may not be predicated upon a ruling which excludes evidence, unless a substantial right of the party is affected, and in case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Mont. R. Evidence 103(a)(2). Here, an offer of proof was provided to the court, and the court refused relevant testimonies of Grout, Reynolds, and Meyer. In doing so, the court abused its discretion. It was highly prejudicial to Kevin and allowed Sherri to put in “uncontradicted testimony” regarding FLP and her contributions to the gifted assets.

**i. The testimony of the witnesses would have provided evidence Sherri did not contribute to FLP.**

The only evidence that Sherri contributed to FLP was Sherri’s own testimony. Sherri testified she that participated heavily in ranching activities, which the court, despite recognizing FRC as a non-marital asset, found entitled FLP, a gifted asset, to be included as a marital asset. Appx. “A” Findings #18, 31, 49(b). Rae Grout, a neighbor of Kevin’s and Sherri’s for 20 years, was prepared to testify she never observed Sherri assisting with any ranch work. (Tr. Tran. 494:1-17, Offer of Proof).



Similarly, Jason Meyer never observed Sherri assisting with any land improvements, maintenance, and other than one appearance at a branding, never assisted with ranch operations. (Tr. Tran. 492:16-25; 493:1-18, Offer of Proof).

Next, Sherri testified that because two quit claim deeds relating to purchases of land had “return to Kevin Frost” on them, somehow those documents made FLP a marital asset. (Tr. Tran. 68:2-11;69:16-25, Sherri). Sherri also asserted Kevin participated in the property transactions which makes FLP a marital asset. (Tr. Tran. 70:3-5; 70:25; 71:1-5, Sherri).

Grout’s and Judith Reynolds’ testimonies would have refuted Sherri’s assertions. Grout was prepared to testify that she and her husband only ever negotiated with Marilyn and George Frost. (Tr. Tran. 494: 18-21, Offer of Proof). Likewise, Reynolds was prepared to testify that Marilyn Frost was involved in negotiations related to FLP purchasing land, not just Kevin. (Tr. Tran. 495:9-22, Offer of Proof).

After the offer of proof was made, the court refused the testimony of Grout, Reynolds, and Meyer, finding it would be cumulative. (Tr. Tran. 497:15-18, Judge Recht). The court erred when it found the evidence cumulative. Under § 26-1-102(4), MCA, evidence is “cumulative” when there is “additional evidence of the same character to the same point.” *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶ 33, 350 Mont. 538, 548, 208 P.3d 836, 845.

Here, the evidence was not cumulative but was presented to rebut testimony made by Sherri that she assisted in ranch work and contributed to FLP.<sup>4</sup> When analyzing whether to include a gifted asset in the marital estate, the court is to thoroughly examine the contributions of the non-inheriting spouse and to weigh the credibility of all witnesses. The court, by refusing testimony from neutral third-party witnesses, committed an error. Grout, Reynolds, and Meyer would all provide different testimony on different points as to how they observed Sherri's lack of support to FLP.

In refusing to allow the testimony, the court relied on "unrefuted" testimony. The testimony the court received was incomplete. The uncontradicted testimony of Sherri clearly made a consequential impact, because the court found that Sherri credibly testified that she assisted with activities associated with ranching while noting Kevin's minimized Sherri's assistance with ranch operations. Appx. "A" Finding #31. The court then went on to include FLP in the value of the marital estate, despite no substantial evidence that Sherri made any contribution to the asset.

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<sup>4</sup> Sherri, like the district court, continues to conflate FRC with FLP. As previously stated, FLP is a passive asset, all work on the land for the land is done by FRC in furtherance of its ranching operations. FRC is a corporation, with one shareholder, Marilyn Frost. "A corporation has a separate and distinct entity from its stockholders." *Cleveland v. Ward*, 2016 MT 10, ¶ 31, 382 Mont. 118, 127, 364 P.3d 1250, 1257. Any alleged work Sherri may have done was for a corporation that neither Sherri nor Kevin has an interest in and does not entitle her to receive credit for a marital asset.

## VII. CONCLUSION

The Court inequitably divided the estate. The district court erred in including gifted assets, to which no financial or nonfinancial contribution was made. This resulted in Sherri receiving over 80% of the marital estate. There is no factual, equitable, or legal basis to overturn or modify Judge Recht's decision as to values of the gifted property, his denial of maintenance, and his granting of Sherri's wishes regarding sale of the marital residence. Kevin respectfully asks this Court to uphold and affirm as to valuations and maintenance, but to reverse and remand with regard to the gifted assets and order a reallocation of the estate based on marital assets, not gifted assets.

DATED this 17<sup>th</sup> day of July 2023.

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing brief is proportionately spaced typeface of 14 points and does not exceed 10,000 words.



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Natalie A. Hammond