IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 22-0754

JOHN P. RHODES,
Appellant/Cross-Appellee,

vs.

TRACY LABIN RHODES,
Appellee/Cross-Appellant.

APPELLANT'S REPLY AND RESPONSE TO CROSS-APPEAL BRIEF

On Appeal from the District Court of the Fourth Judicial District
of the State of Montana, In and for the County of Missoula,
Before the Honorable Rienne H. McElyea

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I. Undisputed facts establish the district court abused its discretion in ordering 50/50 custody.

In Tracy's 3/4 of the school year half-time custody, in 2021-2022, the children had 71 absences. T-200-202, Exs. 142-145. John assures attendance. *Id*.

In 2020-2021, they had 89 absences with Tracy. T-198, Ex. 140. John assures attendance. *Id.*

In Tracy's custody, the children had close to 60 unexcused absences during those years. T-87, Ex. 9, T-199-200, Ex. 141. Twenty of the absences from 2021-2022 remain unexcused. T-200-202, Exs. 142-145. Tracy is not aware of the unexcused absences and does not know what an unexcused absence is. T-424.

A principal was "highly concerned." T-79-80, Ex. 4.

Six days after the MPSA, Tracy demanded more money, or she would pursue full custody and "it will get ugly for [John]". T-74. Within weeks, CFS formally investigated John. T-251. In between, Tracy manipulated appointments with a mandatory reporter, then repeatedly lied about it. T-250-254. Tracy initially denied involvement in the second child abuse report of John, but admitted she called CFS the Saturday morning of the report. T-232-233, 256-257, 462-464.

Tracy stated she wanted to stab John and shoot Judge Halligan. Tracy's Brief ("TB") 23. That night, she entered John's house, where the children were sleeping, and left a bloody hand-print-smear near John's doorbell. TB 22; Ex. 14. That began

nearly four months of in-patient and out-patient mental health and substance abuse treatment. TB 22. Two months later, minutes after school drop-off, Tracy rear-ended another vehicle and was cited for DUI, negligent vehicular assault, and careless driving. T-340-355.

Tracy made parental alienation statements to the children. T-210-213, 214, 217, 317-318, 419-421.

Tracy excluded John from Youth Court proceedings. T-179-180.

Tracy refuses to co-parent. T-204, 207-210, Exs. 148, 162-167.

John handles the children's medical appointments and communicates with medical providers and counselors. T-57-58, 84-168, T-172-186, 205-06, Exs. 7-13, 15-106. 110-128, 131, 155. John pays Tracy's portions of the resulting bills to continue services. T-58.

John communicates with teacher and attends parent-teacher conferences. T-84-168, T-172-86, T-205-07, Exs. 7-13, 15-106. 110-128, 131, 155.

Tracy does not attend parent-teacher conferences nor use the school email system. T-444.

A. The children are chronically absent from school in Tracy's care.

In the first school week, after the court immediately returned the children to Tracy's custody upon her return from out-of-state treatment, the children had three absences and one tardy. T-80, 200-202, Exs. 5, 142-145.

During the last two (on-the-record) school years, the children had 160 absences with Tracy. In the last-school year, 20 absences remain unexcused. Tracy is unaware of the unexcused absences and does not know what an unexcused absence is.

B. Tracy testified she did not think about the status of the child abuse investigations when she petitioned for *ex parte* emergency full custody.

"I've made more serious allegations against Mr. Rhodes . . . of possible abuse." T-380-381.

After Tracy tried to extort money for custody six days after agreeing to the MPSA in late December 2018, threatening it would otherwise "get ugly", CFS investigated John in early January 2019.

Tracy took the children to a mandatory reporter, M.C.A. § 41-3-201(2)(b), the day before the January 2019 investigation opened. T-322-323. She then repeatedly lied to John about it, first stating the children had not seen that counselor since November, T-253-254, and then changed it to 8-days before the investigation. T-323-323.

Tracy testified she "played no part in" the second, March 2020 investigation of John, but then immediately testified therapy disclosures "required ***us*** to call CFS". Doc. 185, Ex. I at 3 (bold added). She separately attested: "I was not the only person to file a report against John that day", doc. 173 at 6, and identified herself as "the reporter". T-239. She later testified, "I called CFS. . . . I called CFS." T-463; *see also* T-464 (again admitting she called CFS).

First denying any involvement in 10-and-12-year-old children writing affidavits for the March 2020 investigation, T-458, Tracy then said, "All right", and admitted her involvement. *Id*.

In May 2022, when Tracy moved *ex parte* for emergency full custody, she claimed she did not know, or even think, about the status of the January 2019 and March 2020 investigations. T-433-435. *Contrast* M.C.A. § 41-3-202(1)(c) (child protective specialist must promptly conduct thorough investigation); M.C.A. § 41-3-202(5) (emergency protective services if reasonable cause to suspect neglect); M.C.A. § 41-3-202(5)(a)(ii) and (6) (safety and risk assessment available to family); M.C.A. § 41-3-301 (emergency protective service procedure); M.C.A. § 41-3-302 (written prevention plan); M.C.A. § 41-3-422 (abuse and neglect petition). Yet, Tracy admitted she requested a voluntary service protection agreement. T-433.

Tracy acknowledged she would have been informed "if [CFS] had taken action." *Id*. Nonetheless, years later, and despite her unfulfilled request for a service

protection agreement, Tracy had "no idea that the first two investigations were unsubstantiated." *Id*. She thus testified she did not include that status in her ex parte emergency full custody motion; she didn't even think about it. T-433-435.

C. Tracy stated she wanted to stab John and shoot Judge Halligan.

Tracy stated she wanted to stab John and shoot Judge Halligan. TB 24. The court concluded Tracy has not "threatened to be physically violent." Doc. 211 at 11. *Contrast* Doc. 154 (judicial recusal).

Tracy does not deny the threatening statements; instead, she asserts the Providence Center, her attorney, and John violated her HIPPA rights. T-454. Tracy testified the Providence Center did not decide there were safety concerns. T-453-454; *contrast* M.C.A. § 27-1-1102 (duty to warn of violent behavior).

Tracy denied threatening to harm John or anyone. "I've never made a threat to John, I am not a threat to John, and I don't make physically threatening statements." T-386. *Contrast* T-413-414 (admitting she stated she wanted to shoot Judge Halligan); doc. 154 (judicial recusal).

D. Tracy used narcotics after in-patient drug and alcohol treatment and Drove Under the Influence minutes after dropping off children at school.

Tracy has stated: "I don't have substance abuse issues." T-403.

Tracy attended in-patient drug and alcohol treatment, Appendix C at 3-4, and then was cited for, and pled guilty to, Driving Under the Influence. Appendix D.

Contrast T-357 ("prescription drugs are not my problem"). The DUI is judicially noticeable under Rule 201(b), (d), and (e), M.R. Evid. *See State v. Rensvold,* 2006 MT 146, n.2.

Tracy did not think it was in the children's best interest to inform the court of her DUI when she moved for ex party emergency full custody. T-430. Narcotics, specifically Ambien, should not be used during recovery, especially just months after in-patient treatment. *See, e.g.,* https://journeypureriver.com/medications-recovered-addicts-should-avoid/.

The court opined: "Tracy is appropriately addressing the factors that lead to the DUI." Doc. 211 at 12. It did not opine about the DUI accident occurring minutes after school drop-offs.

E. Tracy attacks John, alienates, and communicates through the children.

Tracy substitutes attacks for co-parenting.

As the trial approached, Tracy agreed she messaged John: "Subject: Your narcissistic abuse." The message read: "You are completely devoid of any actual human emotion, compassion, or empathy, and you always will be." T-456, Ex. 150. *See also* T-457 (calling John "a weak, pussy butch victim" and "Bye-bye little insignificant man"); T-456, Ex. 149 (John "ruined [her] and ruined [her] life"); T-209, Ex. 165 (John's "cheap-ass, un-manly hoarding position"), Ex. 166 (John

"prefer[s] to keep the kids gaslit, voiceless, and under [his] thumb and control"); T-457-58 (John is a "selfish money-hungry piece of shit").

Tracy did not deny parental alienation comments to the children or talking about the divorce in the children's presence. T-61, 210-214, 217, 311, 317-318. In front of the children, she routinely said John ruined their lives. T-210-212. She then changed her mantra to the children that they were better off without John. T-213.

She continues to champion communicating through the children. T-203, Ex. 147-B.

F. Tracy's constitutional argument omits that she hid her DUI.

Four months after her DUI, Tracy moved *ex parte* for emergency full custody. Doc. 173. She did not consider it in the children's best interest to disclose her DUI. T-429-430.

John did not learn of Tracy's DUI until the month of the trial. He submitted the citations almost immediately after he obtained them, and it was a "game changer". T-70-71. The cumulative absences and the DUI compelled John's custody request. *Id*. Tracy's unclean hands defeat her constitutional claim.

Steab v. Luna, 2010 MT 125, is inapposite. The prehearing filings endorsed the status quo. *Id.* at P10. Parenting modification was not noticed. *Id.* at P11. The motion to modify custody was made at the hearing. *Id.*at P12. Here, in contrast, Tracy hid her DUI, John complied with the court's exhibit and witness lists deadline,

he filed his proposed parenting plan before trial, doc. 193, and Tracy filed her proposed parenting plan the next day. Doc. 194.

G. John does the parenting.

John assures school attendance, handles private tuition for C.C.R, handles the children's medical appointments, and pays the medical bills, including Tracy's obligations, to assure continued medical services.

Missoula Catholic Schools consider C.C.R. to be from a single-parent family. T-64-65, 132, Ex. 50.

John attends parent-teacher conferences, and routinely communicates with the children's doctors and counselors, teachers, and activity leaders. T-84-168, 172-186, 205, Exs. 7-13, 15-106, 110-128, 131, 155.

Tracy does not attend parent-teacher conferences. She does not use the school email system.

She demands that John be responsible for the children's medical care. Doc. 185, Ex. H.

H. The parenting evaluator is unaware of Tracy's mental break, DUI, and school attendance.

The parenting evaluator filed her report in April 2021, before Tracy's mental break, hospitalization for mental health and chemical dependency treatment, and DUI. It did not consider post-COVID school attendance. It did not consider Tracy's

CFS manipulation. It did not consider Tracy's under-oath testimony. Self-discrediting, it did recommend the equalization payment Tracy now seeks. Doc. 181 at 16-17; TB 44.

I. The district court abused its discretion.

As Chief Justice Marshal explained, discretionary decisions are not subject to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States v. Burr*, 25 F. Cas. 30, 35 (CC Va. 1807). Here, that sound legal principle is the children's best interest. M.C.A. § 40-4-212.

This Court's review is not perfunctory. The legislature enacted meaningful standards for substantive review. M.C.A. § 40-4-212(1).

The above-recited and undisputed facts are frequently relied on by the Court to adjudicate custody.

- *Libra v. Libra*, 157 Mont. 252, 260 (1971) (non-custodial parent's emotional instability).
- *Anderson v. Deafenbaugh In re G.J.A.)*, 2014 MT 215, P26 (custody favors stability).
- *In re Marriage of Hogstad*, 914 P.2d 584, 588 (1996) (custody based on other parent having "shown little interest in [] school activities" and primary parent "would be better able to provide for [child] during the school year").
- *In re Marriage of Epperson*, 2005 MT 46, P32-33 (importance of school attendance and preventing parental alienation).
- *Maxwell v. Maxwell*, 248 Mont. 189, 192 (1981) (reversing custody where court "overlooked 'the mental and physical health of all individuals involved'

and 'physical abuse or threat of physical abuse by one parent against the other parent or the child'" (citing M.C.A. § 40-4-212(e) and (f))).

- *In re Marriage of Nies*, 2003 MT 100, P22, P24 (manipulation of abuse investigation; serious unaddressed psychological issues).

- *Kulstad v. Maniaci*, 2010 MT 248, P37 (considering role of parent in unsubstantiated child abuse allegations).

- *Czapranski v. Czapranski*, 2003 MT 14, P8, P52 (emphasizing stability in school year custody; further considering mother's mental health hospitalization and inpatient chemical dependency treatment).

- *In re Marriage of Ereth*, 232 Mont. 492, 494 (1988) (mother's poor emotional control, deterioration with stress, and proneness to overreacting, anger, and poor judgment warranted full custody with father).

50/50 custody clearly abuses discretion. It perpetuates chronic, excessive absenteeism. That alone exceeds the bounds of reason. Copious, undisputed facts further expose reversible error. Full custody with John, including school-night custody, and 50/50 parenting time otherwise is the conscientious judgment.

Split custody is an abuse of discretion. *See In re Marriage of Cole*, 729 P.2d 1276, 1279 (1986) (equal physical custody not warranted if not in the best interest of children). It endorses absenteeism, disregards the significance of school relationships, ignores Tracy's chemical dependency and mental health issues, ignores Tracy's never-ending attacks against John, ignores Tracy's parental alienation, disregards continuity and stable care, ignores John's handling of school, medical, counseling, and extra-curricular activities, ignores Tracy's abandonment of those responsibilities, subverts those and school relationships, retards the children's

developmental needs, and endorses Tracy's manipulation of child abuse investigations, on which she tried to capitalize by petitioning for emergency, ex parte full custody. M.C.A. § 40-4-212(1)(c, d, e, f, g, h, and l).

II. Tracy fails to explain how the language of the contracts supports her "understanding" that the MPSA Agreement "to include recognition of the" PMPSA "partial distribution" means that partial distribution is not included, nor recognized, in the MPSA transfer.

The Court reviews the district court's PMPSA and MPSA interpretation for correctness. *In re Harms,* 2022 MT 41, P12.

Tracy begins her argument with narrative facts not part of the contracts, with no cite to the record. TB 34.

She does not argue the PMPSA/MPSA are ambiguous.

Tracy ignores their controlling language and doesn't try to explain how that language supports her "understanding". This Court enforces the principle of party representation. *Snow v. Snow,* 2002 MT 143, P28 (quotations and citations omitted) (Court does not develop arguments).

Tracy doesn't acknowledge all of the contract language. She ignores the PMPSA agreement that its $100,000+ transfer was a twice-stated "partial distribution". Doc. 10 at 2-3. She ignores the MPSA's plain language that its DRIPS transfer included recognition of the PMPSA partial distribution. Doc. 17, Exs. A and B.

Instead, she presents her uncited narrative that the PMPSA transfer, although twice stated a "partial distribution" to be included and recognized in the MPSA transfer, was actually a "financial cushion" and "stop-gap" transfer. TB 33-34. Tracy ignores that her threatening text completely aligns with her post-hoc legal argument that "to include recognition of" the $100,000+ PMPSA transfer does not recognize that transfer is included in the MPSA's 30 % DRIP transfer. Instead of responding to the documented fact that her threat later crystalized into legal argument, she tries to insert new facts into this Court's decision.

Tracy asserts that because the parties intended to accomplish a "just settlement," her understanding of the contract is correct. TB 36. That general recital does not override the specific contract terms at issue. "Under well-settled contract principles, specific provisions control over more general terms." *Feibusch v. Integrated Device Tech. Inc*., 463 F.3d 880, 885 (9th Cir. 2006).

Tracy fails to offer legal support for her argument that her intent and understanding govern contract interpretation, nor does she explain how those subjective self-serving beliefs override the contracts' plain language.

The contracts' language must be given effect and made operative. *Guidici v. Minerals Eng'g Co*. 136 Mont. 389, 401 (1960). That operative language is nullified by, unnecessary to, and reduced to surplusage by Tracy's intent and understanding argument, which disregards that the MPSA transfer "include[s] recognition of" the

PMPSA "partial distribution". *Corwin v. Bd. of Pub. Educ.*, 272 Mont. 14, 20 (1995) (cannot discard contract provision as surplusage).

Tracy ignores the controlling statutes. Implicitly she encourages what the court below did explicitly, invoke the inapplicable M.C.A. § 40-4-202, which Tracy does not try to expressly defend. Instead, without legally justifying or explicitly denoting it, Tracy doubles-down on that equitable authority to adjudicate a "just settlement." Relatedly, she ignores that, under M.C.A. §40-4-201(2), separation agreements bind courts.

Tracy abandons plain language and ambiguity arguments. She ignores contract law and the controlling statutes, which her "intent" and "understanding", TB 36, cannot override.

III. The MPSA contracts the Effective Date for valuing the QDRO transfer.

MPSAs are interpreted as contracts. *In re Marriage of McKeon*, 252 Mont. 15, 18-19 (1992). Tracy ignores the governing statutes requiring courts to enforce the MPSA terms, M.C.A. § 40-4-201(2), thereby prohibiting modification, M.C.A. § 40-4-201(6), as contracted here. Doc. 17 at 5.

The MPSA repeats its effective date three times. Doc. 17 at 1, 5, and 6. Read wholistically, the MPSA provides: Effective December 20, 2018, Tracy receives 33.33 % of John's 401(k) pursuant to a QDRO. *Id*. Ex. B.

Tracy ignores this plain language. She fails to explain what an effective date means if it does not mean the contract is effective that date. She diverts to red herrings about MPSA performance dates, completely ignoring the MPSA's language requiring the court "to order the parties to implement the terms of this Agreement," Doc. 17 at 6, and completely ignoring that a 401(k) transfer requires a QDRO. 26 U.S.C. § 414(p)(1). Those terms require a court-ordered QDRO transfer effective December 20, 2018.

"The contract must be viewed from beginning to end." *Stowers v. Cmty. Med. Ctr., Inc.*, 2007 MT 309, P18. Its effective date controls. https://thelawdictionary.org/?s=effective+date (defining "Effective Date" as "documented date when something is due . . . or when something is applicable or effective, like . . . a sale price"); https://www.law.cornell.edu/wex/effective_date ("The effective date is the date on which a statute, contract, or other such legally binding instrument takes effect or becomes operative and enforceable.").

The MPSA must be interpreted wholistically. *Felska v. Goulding*, 238 Mont. 224, 230 (1989) ("required to read entire contract together and give effect to every part") (citing M.C.A. § 28-3-202). Read as a whole, the contract agreed: with an "Effective Date" of "December 20, 2018", Tracy receives "Husband's FDOM 401(k) -- 33.33% from Qualified Domestic Relations Order." Doc. 17 at 1, 5, 6, Ex. B. That plain language controls. *Tureman v. Tureman*, 190 Mont. 267, 271-272 (1980)

(wife not entitled to husband's assets accumulated eight years after separation agreement).

Tracy elects to ignore her contract. She doesn't bother explaining what its effective date means, if it doesn't mean its court-ordered-terms are effective that date. *See Snow,* P28 (court will not consider or develop arguments unmade arguments).

Abandoning contract argument, Tracy invokes judicial equity and equitable caselaw. TB at 32-33. *Schwartz v. Harris*, 2013 MT 145, P1, did not include a MPSA. With no agreement, the property division trial involved accountant testimony and expert appraisals of multiple businesses and real property. *Id.* at P10-11. Reviewing the property division, the Court emphasized "equitable apportionment", and the district court's "discretion to adopt any reasonable valuation of marital property that is supported by the evidence." *Id.* at P16, 23 (citation omitted). This Court expressly considered "the equitable division of the marital estate as required by M.C.A. § 40-4-202(1)." *Id.* at P35 (citation omitted). Section 40-4-202(1) only applies where there is no MPSA. *In re Marriage of Caras,* 263 Mont. 377, 381 (1994).

Because there was no MPSA, *Schwartz* did not consider the controlling statutes here. And it did not review a contract agreeing to a QDRO division with an express effective date.

In re Marriage of Hochhalter, 2001 MT 268, P9, did not have a MPSA, but "agreed to value their real property assets as of 1995", while other assets remained unvalued. Husband "acknowledged he agreed to value the real property as of 1995". *Id.* at P15. Tracy does not acknowledge the controlling contract provisions and does not even attempt to argue against their plain language, taken as a whole, requirement that she receive 33.33% of John's 401(k) effective December 20, 2018. Doc, 17 at 1, 5, 6 and Ex. B.

Tracy contracted an effective QDRO transfer date of December 20, 2018. She now wants an effective QDRO valuation date at the discretion of the judge -- here, almost four years later, November 28, 2022.

Tracy could have contracted for that date. *Cadena v. Fries,* 2015 MT 90, P10 (settlement agreement property division contracted "as of entry of a final decree of dissolution of marriage").

Here "the court failed to comply with M.C.A. § 40-4-201(4)(a)-(b), which requires the decree to include the terms for settlement of property". *Wagenman v. Wagenman,* 2016 MT 176, P16. "[A]bsent a finding of unconcscionability it was legal error for the District Court to substitute its own property settlement in place of the parties' agreement." *Id*. at P18.

Tracy fails to respond to the MPSA language, the controlling statutes, and the authoritative precedent of this Court. She fails to explain how the Effective Date of a financial settlement agreement does not determine its effective date.

IV. The MPSA establishes a meeting of the minds.

A contract dispute does not negate the contract.

Tracy maintains that consent, one of the four essential elements to form a contract, is missing. *See Kortum-Managhan v. Herbergers NBGL,* 2009 MT 79, P18 (citing M.C.A. § 28-2-102). The MPSA defeats that argument. Doc. 17 at 2 (parties "entered into negotiation and preparation of this Agreement with full knowledge and understanding of its consequences"). *Contrast Keesun Partners v. Ferdig Oil* Co., 249 Mont. 331, 336 (1991) ("No evidence exists in the record of a signed written contract between the parties.").

The execution of the MPSA establishes consent – *see Patton v. Madison Cty.,* 265 Mont. 362, 267 (1994) (settlement documents not effective until signed) – as does Tracy's threat six days later to cancel the MPSA if she didn't get the same $100,000 she now seeks. *Id.* (examining parties' actions following asserted oral agreement).

Tracy invokes cases that undermine her argument. In *Murphy v. Home Depot*, the parties expressly disagreed on which claims to settle. *Murphy v. Home Depot*, 2012 MT 23, P11. Here, the MPSA expressly settled all property distribution and

acknowledged consent. Doc. 17 at 1-2. Conversely, in *Jarussi v. Sandra L. Farber Tr.,* 2019 MT 181, P23 (quoting *Patton*, 265 Mont. at 367), the conditioned agreement expressly did not resolve "matters 'central to the very performance of the contract.'"

Tracy alleges no mistake of fact, omissions, or misrepresentation that would prevent a meeting of the minds. Unilateral mistake is not alleged. Bilateral mistake is not alleged. Undue influence, duress, or menace are not alleged (now). *Contrast* Doc. 135 at 21.

The MSPA itself objectively manifests consent. The settlement conference that produced the MPSA further cements it. Doc. 181 at 10, 11, 14. The district court did not clearly err in determining consent and a contract exist. *See Jarussi*, P13 (clear error standard of review).

V. The district court did not abuse its discretion in ruling the MPSA is not unconscionable.

Unconscionability determinations are reviewed for an abuse of discretion. *In re Marriage of Simpson*, 2018 MT 281, P10.

Tracy's unconscionability argument omits critical procedure. TB 40. After filing her motion, Tracy's mental breakdown recessed proceedings. Upon her return, the court ordered a briefing schedule, which John honored. Doc. 163, 164. Tracy omits that she did not file a reply brief by the deadline. Tracy omits that she later moved to file a reply brief, which the court rejected. Doc. 169. She then filed her unsolicited "status report". Doc. 174.

That procedure defeats Tracy's argument. *See generally State v. Makarchuk,* 2009 MT 82, P19. A party cannot back-door a "status report" with facts to support a motion after a missed deadline and the briefing closes. *See* Mont. R. Civ. P. 2(e); *see generally* Mont. R. Civ. P. 56. After glossing over that procedural history, Tracy footnotes finances not detailed in the record. TB 41, n.4.

Tracy omits the PMPSA/MPSA resulted from hours and hours of mediated settlement. Doc. 181 at 14. She omits her representation by an experienced, well-respected attorney. *Id*. She omits that an experienced, well-respected settlement master mediated the PMPSA/MPSA. *Id.* Tracy described the MPSA mediation as lasting "more than ten hours", during which the mediator "bounced between rooms

taking notes with him, orally relating the offers, counter-offers, rejections of offers, and acceptance of offers regarding various assets". Doc. 62 at 2.

Tracy misrepresents the ruling below. Tracy claims "the court found that John and Tracy were similarly situated (May Order at 15-16)." TB 42. *Contrast* Doc. 181 at 15 ("The court does not find the assets distributed to the parties are sufficiently dissimilar to determine the market changes have unfairly advantaged/disadvantaged a party.").

Tracy claims "the court failed to consider the economic circumstances of the parties". TB 43. *Contrast* Doc. 181 at 13 (comparing each parties' MPSA distributions); at 14 (Tracy received the marital home); at 15 (considering each parties' MPSA distributions); at 15-16 (considering parties' employment).

Self-defeating, Tracy acknowledges the court considered the "disproportionate distribution". TB 41. *See Harms* at P23 (disproportionate distribution not necessarily inequitable if due to premarital assets). She also acknowledges the court found the parties "similarly situated", TB 42, when the court considered pandemic school stressors on the parties. Doc. 181 at 15-16.

Tracy omits that she received the marital home, on 21+ Missoula acres, worth nearly a million dollars, with a 2.75 % mortgage, and only a few pay-off years. Doc. 164 at 9, Affidavit at 5. She omits that she received over $1.3/$1.4 million, including almost $1/ $1.1 million of the assets gained during the marriage, after

Tracy entered the marriage with $396,885, while John received only $650,000/$750,000 of marriage-accumulated assets. Doc. 30, Exs. A and B.

The court denied Tracy's unconscionability motion. Doc. 181. At the conclusion of the case, with all of the facts before it, as part of the dissolution decree, the court approved the MPSA, found it to be conscionable, and ordered it implemented. Doc. 211 at 14.

"The test for unconscionability involves a two-step inquiry: whether the contract qualifies as a contract of adhesion, and whether the contract unreasonably favored the drafter." *Kelker v. Geneva-Roth Ventures, Inc.*, 2013 MT 62, P20 (citation omitted). This test applies to "unconscionability of contracts generally". *Id*. The parties negotiated the MPSA; that's not adhesion.

"The factors that we consider in evaluating a claim of unconscionability for an arbitration clause reflect the contract law of unconscionability generally." *Kelker*, P22 (citations omitted). None of those factors – "a lack of meaningful choice, a contract offered on a take it or leave it basis, and a party that lacks sophistication", i*d.* (citation omitted) – exist here. Other elements "that may indicate unconscionability . . . include unequal bargaining power of the parties, lack of meaningful choice, oppression, and exploitation of the weaker's party's vulnerability or lack of sophistication." *Id*. at P24 (citations omitted). *Contrast*

MPSA, Doc. 17, at 2 and 5 (voluntary settlement, knowing and understanding consequences).

Simpson is inapposite, with "very unique" facts. P19, 32. "[B]oth parties' estimated net worth of $13,000,000 was greatly exaggerated, and most assets were completely lost with the 2008 economic decline. . . . [And the parties] did not actually possess some of those assets when the parties entered the Agreement." *Id*. at P30.

Here, the retirement and stock accounts had documented, market-specified value, and Tracy benefits from an appreciating stock market and (she-claims-mortgage-free) ownership of a nearly-one-million-dollar property. *Hadford v. Hadford,* 194 Mont. 518, 1184 (1981) (M.C.A. § 40-4-201 requires courts to abide by MPSA to promote settlement and finality).

The district court did not abuse its discretion when it ordered the MPSA as part of the decree. Doc. 211 at 14.

VI. The district court did not abuse its discretion in denying Tracy's attorney's fees.

Tracy's attorney's fees argument ignores the MPSA's controlling language, ignores the controlling statute, omits a judicial estoppel analysis, and skips right over her discovery tactics, for which John sought a protective order and sanction.

After moving for summary judgment, doc. 50, and gaining an unopposed extension to file her reply brief, docs. 57-58, Tracy served discovery requests, doc. 60, and then filed her reply brief late. Docs. 62, 64. John moved for a discovery protective order and Rule 37 sanctions. Doc. 60. The court granted the protective order and denied Rule 37 sanctions for "attorney's fees or costs incurred in making the Motion." Doc. 77 at 2.

"A court may award attorney's fees only where a statute or contract provides for their recovery." *Mandell v. Ward*, 2016 MT 205, P27 (citations omitted).

Tracy does not statutorily seek attorney's fees, and the MPSA obligates Tracy to pay her own attorney's fees. Doc. 17 at 4. "Attorney fees provisions contained in marital settlement agreements are enforceable agreements and the district court is bound by the agreement's terms if they are clear." *Hart v. Hart*, 2011 MT 102, P28 (citations omitted). *See also* M.C.A. § 40-4-201(2) (separation agreements bind courts). Not only did each party agree to pay their own attorney's fees, they indemnified each other against extant and future obligations. Doc. 17 at 4.

None of the judicial estoppel factors exist here. *See Kauffman-Harmon v. Kauffman,* 2001 MT 238, P16. First, the earlier request for attorney's fees arose from discovery abuse when Tracy demanded discovery in the midst of summary judgment proceedings and thus was a Rule 37 sanction request. *See Morris v. Big Sky Thoroughbred Farms, Inc.,* 1998 MT 229, P10. Second, no party has succeeded in obtaining attorney's fees, thus no party "succeeded in maintaining the original position." *Kauffman-Harmon,* P16. Third, objecting to attorney's fee prohibited by the MPSA is not inconsistent with Rule 37 sanctions. And fourth, Tracy has not been misled, let alone injuriously affected. *Id*.

CONCLUSION

The Court should order full and school night custody to John, and 50/50 parenting time otherwise.

The Court should vacate the MPSA rulings and order the MPSA 30% DRIP transfer recognizes and includes the earlier $100,000+ PMPSA transfer and order the effective date of the QDRO transfer to be December 20, 2018.

The Court should affirm the district court's meeting of the minds, unconscionability, and attorney's fees rulings and deny Tracy's appellate costs, attorney's fees and post-judgment interest.

Costs are awarded to the prevailing party and do not include attorney's fees. Mont. R. App. 19(3)(a). Regarding post-judgment interest, although not in the

MPSA, John has committed to transferring QDRO and DRIP shares effective December 18, 2020, so Tracy already benefits from market appreciation of those shares.

DATED this 26th day of July, 2023.

JOHN RHODES, Pro Se

/s/ *John Rhodes*
John Rhodes
Attorney for Appellant/Cross-Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I, the undersigned, hereby certify that the foregoing Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted, and indented material; and that the word count calculated by Microsoft Word is 4,976 words, excluding the Caption, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

DATED this 26th day of July, 2023.

JOHN RHODES, Pro Se

/s/ *John Rhodes*
John Rhodes
Attorney for Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, in accordance with Rule 10(2) of the Montana Rules of Appellate Procedure, on the 26th day of July, 2023, I served a true and correct copy of the foregoing document on the following party via electronic filing:

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DATED this 26th day of July, 2023.

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/s/ *John Rhodes*
John Rhodes
Attorney for Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I, John P. Rhodes, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant Reply and Answer to Cross Appeal to the following on 07-26-2023:

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Electronically Signed By: John P. Rhodes
Dated: 07-26-2023