

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

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

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

APPELLEE/CROSS-APPELLANT'S REPLY BRIEF

Marybeth M. Sampsel
MEASURE LAW, P.C.
128 2ND STREET EAST
Kalispell, MT 59903-0918
(406) 752-6373
mbs@measurelaw.com

*Attorneys for Petitioner/Appellant
Sherri Frost*

David B. Cotner
Natalie Hammond
COTNER RYAN LAW, PLLC
321 W. Broadway, Suite 500
Missoula, MT 59802
Telephone: (406) 541-1111
Email: dcotner@cotnerlaw.com
nhammond@cotnerlaw.com

*Attorneys for Respondent/Appellee
Kevin Frost*

Reid J. Perkins
WORDEN THANE P.C.
321 W. Broadway St., Ste. 300
Missoula, MT 59802
(406) 721-3400
rperkins@wordenthane.com

*Attorneys for Respondent/Appellee
Frost Limited Partnership*

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INTRODUCTION

On July 17, 2023, Respondent/Appellee/Cross-Appellant Kevin Frost (“Kevin”) filed his opening cross-appellant brief. Petitioner/Appellant/Cross-Appellee Sherri Frost (“Sherri”) filed her response on October 16, 2023. Kevin now files this reply brief in response to the issues on cross-appeal.

During the marriage, Kevin was gifted an interest in the Frost Limited Partnership (“FLP”) and title to the “Butte” property (collectively “gifted assets”). Kevin consistently maintained and established at trial that Sherri’s contributions (or lack thereof) during the marriage do not entitle her to receive an equitable distribution of his gifted assets, and the district court’s findings to the contrary were not supported by substantial evidence. Sherri did not contribute to the gifted assets- as a homemaker, financially, or otherwise- and it is inequitable for the district court to include those assets in the total value of the marital estate. As a result of the district court’s error, Kevin only receives 18.49% of the marital estate Sherri and Kevin acquired during their 30-year marriage.

The district court’s distribution of the marital estate was clearly erroneous because it implemented findings and conclusions contrary to well-established law in Montana regarding gifted assets. Despite Sherri’s self-serving testimony she participated in business activities for FLP, Kevin was improperly prohibited from providing additional testimony that would rebut Sherri’s claims. Assuming

arguendo Sherri did participate in such activities, the district court improperly characterized those contributions as contributions to FLP, when they were contributions to a completely separate entity. Sherri made no contribution to Kevin's interest in FLP and the "Butte" property, and the district court acted arbitrarily in including the gifted assets in the marital estate.

ARGUMENT

I. Sherri made no contribution to the gifted assets and the district court created an inequitable division of the marital estate.

Montana Code Annotated § 40-4-202, vests the district courts with discretion to apportion the marital estate in a manner equitable to each party. This does not require the court to split the estate down the middle, but the division must "equitably apportion all property belonging to either or both parties however and whenever acquired, without regard to title, and without regard to marital misconduct." *In re Funk*, 2012 MT 14, 363 Mont. 352, 270 P.3d 39. This directive applies to all assets, including assets acquired by gift and must be supported by substantial evidence. *Funk*, ¶ 19.

Sherri is critical of Kevin's interpretation of *In re Marriage of Lewis*, 2020 MT 44, 399 Mont. 58, 458 P.3d 1009 to say gifted assets acquired by a spouse are excluded unless the other spouse contributed to the preservation, maintenance, or increase in value. There, unlike Sherri, the wife made contributions to the gifted assets. In *Lewis* the wife worked, but later was a stay-at home mom and homemaker

and the district court determined she made contributions to an inherited asset by caring for the children while husband worked, by preparing meals, completing small projects, being at the ranch during brandings, and managing the family home in Billings when husband was at the ranch. *Lewis*, ¶ 22. While the district court found that wife made contributions to the gifted asset, ultimately the district court determined, that other than the limited contributions discussed above, wife did not have a role in maintaining the inherited property. *Lewis*, ¶ 22. Based on the determination that wife only made a limited contribution to the gifted assets as a homemaker, which made up most of the marital estate, the district court awarded approximately three-quarters of the marital estate to husband and approximately one-quarter to wife. In affirming the district court in *Marriage of Lewis* “correctly included the value of Craig’s inheritance from his father as part of the total value of the marital estate under our precedent in *In re Marriage of Funk*.” *Marriage of Lewis*, ¶ 22.

The facts in this case are distinct from those in *Lewis*. *Lewis* is consistent with Kevin’s assertion that the value of his gifted assets should be excluded from the total value of the marital estate. The wife in *Lewis* was awarded one-quarter of the value of the gifted asset because the district court determined she made contributions as a homemaker and stay-at-mom, but those contributions were limited and did not maintain the gifted asset. Unlike the wife in *Lewis*, Sherri worked outside the home

during the entirety of the marriage and shared homemaker duties with Kevin. Finding of Fact No. 31. Like the wife in *Lewis*, Sherri did not have a role in maintaining the gifted property. Sherri presented no evidence at trial of how she assisted in maintaining or growing FLP and the “Butte” property. Because Sherri did not contribute to or maintain the gifted assets, they should be excluded from the marital estate, and the value should not be included in the total value of the marital estate.

Time and again this Court has upheld rulings wherein a spouse’s separate assets are excluded from the total value of the marital estate when there is no contribution to the maintenance, improvement, or accumulation of the separate assets, which is consistent with § 40-4-202(1), MCA. In *Estes v. Estes*, 2017 MT 67, 387 Mont. 113, 391 P.3d 752, the district court excluded premarital assets from the estate because there was little to no contribution to the separate assets by the spouse claiming a right to the separate assets and that the husband had made no contribution towards the maintenance of the premarital assets. This Court affirmed and stated the factors set forth at § 40-4-202(1)(a)-(c) must be considered with respect to premarital assets. *Estes*, ¶ 16.

Likewise, in *Frank v. Frank*, 2019 MT 130, 396 Mont. 123, 443 P.3d 527, this Court affirmed a district court that excluded a portion of premarital assets from the total value of the marital estate. In *Frank*, the district court ordered the husband

to pay wife an equalization payment of \$2,088,717. This payment was calculated to offset the value of Hammer Nutrition, which the court awarded to the husband. The value of Hammer Nutrition utilized to calculate the equalization payment was determined after the district court, in accordance with *Funk*, determined a ten-percent interest in the company was the husband's sole and separate property inherited prior to the marriage and should not be included in the total value of the marital estate. On appeal this Court determined the district court's findings were not an abuse of discretion. *Frank*, ¶ 21.

As Sherri points out, “[a] District Court’s decision with respect to gifted assets ‘must affirmatively reflect that each of these factors was considered and analyzed and must be based on substantial evidence.’” Sherri’s Response Brief at 12 (quoting *Funk*, ¶ 19). In *Funk*, a portion of the matter was remanded because it did not indicate what contributions were made to the preservation of real property that was gifted. *Funk*, ¶ 24. Here, the district court failed to identify any contributions Sherri made to the gifted assets. Rather, the district court erroneously attributed the ranch-type work Sherri testified she performed for Frost Ranch Corporation, an entity that neither Sherri nor Kevin owns an interest in, as contributions to preservation of the gifted assets.

A. No substantial evidence was presented that Sherri made a financial or non-financial contribution to FLP.

A district court's factual findings in support of marital distribution can be reversed if clearly erroneous. *Smith v. Smith*, 2015 MT 256, ¶ 10. “A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if our review of the record convinces us that the district court made a mistake.” *Smith*, ¶ 10

The “substantial evidence” standard was discussed in *Gypsy Highview Gathering System, Inc. v. Stokes*, 221 Mont. 11, 716 P.2d 620 (1986), as follows: “Substantial evidence is something more than a scintilla of evidence but may be less than a preponderance of the evidence. In fact, we held in *Jordon v. Craighead*, 114 Mont. at 343, 136 P.2d at 528: “Thus the sole question for the court with relation to the evidence is one of law, namely, whether the findings are supported by substantial evidence, regardless of whether there is also substantial evidence or even a preponderance of evidence to the contrary.” *Gypsy Highview*, 221 Mont. at 15.

Sherri points to the Court’s Findings of Fact Nos.13, 16 and 18 to support her contention that the district court was correct to include the gifted assets in the total value of the marital estate. Finding of Fact No. 13, was copied verbatim from Sherri’s proposed Findings of Fact and provides:

Kevin and Sherri were married when they were both attending college in Seattle. Following the parties’ marriage, Kevin worked as a claims adjuster with Farmer’s Group, Inc. and Sherri worked outside of the home, mostly as

a dental hygienist. Sherri was also the primary caregiver for the parties' children.

Finding of Fact No. 16 provides:

Although both parties had opportunities to develop their individual careers in Seattle, Kevin persuaded Sherri to relocate back to Montana so they could help Kevin's parents establish and grow the family ranch operation. The Frost family anticipated that ranch would be inherited by their children, Kevin and Randy Frost.

Finding of Fact No. 18 provides:

In addition, Kevin and Sherri both provided labor for FLP and the Frost Ranching Corporation (FRC).

The district court erred in finding Sherri provided labor for FLP, and there was no evidence presented in support of that finding. Instead, the work referenced by the court that Sherri alleged she completed was done on behalf of Frost Ranching Corporation, which is not an asset of the marital estate and owned by a third-party.

Finding of Fact No. 23. The district court conflated Frost Ranch Corporation with FLP. The relationship between FLP and Frost Ranch Corporation is limited to Frost Ranch Corporation leasing land from FLP and being a 1% General Partner in FLP. Exhibit I-1.

Pursuant to *Funk* and § 40-4-202(1)(a)-(c), the district court must also consider "those contributions of the other spouse to the marriage, including: (a) the nonmonetary contribution of a homemaker; (b) the extent to which the contributions have facilitated the maintenance of the property; and (c) whether or not the property division serves as an alternative to maintenance arrangements." The district court

must adequately consider all the facts and statutory factors in each case when equitably apportioning a marital estate. *Funk*, ¶ 15. Here, the district court failed to adequately consider the gifted property because it did not make any findings relative to FLP or the “Butte” property, and where it did (Finding of Fact No. 18), it was an error because no testimony supported it. The district court’s finding regarding any contributions alleged by Sherri to the gifted assets, all relate to Frost Ranch Corporation, and not FLP.

The testimony in the record support does not support what Sherri claims. On cross-exam, 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 as alleged by Sherri. Appendix A to Appellee/Cross-Appellant’s Response Brief (“Tr. Tran). (Tr. Tran. 279:7-16, Kathryn Cook). Kevin testified that his involvement with the ranching operations was limited until about 2011, the time his father George started to become ill. If Kevin helped with the ranch, it was done sparingly and was not to the detriment to his duties at the family home. Kevin, like any child of a ranch family, would help with spring branding, fall roundup, and occasionally with haying. Kevin described his dad, George, as an old school rancher who did everything himself and did not ask for help. (Tr. Tran. 538:10-23, Kevin). On cross-exam, Leah Capko, Sherri’s close friend, testified that she never observed Sherri herding cows or assisting with the branding. (Tr. Tran. 263:6-15, Leah

Capko). Contrary to Sherri's testimony, Kevin testified Sherri provided no physical or financial support to Frost Ranching Corporation as she 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).

Now that the errors with Finding of Fact No. 18 have been addressed, Finding of Fact No. 30 is the only reference to any contribution Sherri made to gifted assets. Notably Finding of Fact No. 30 is copied verbatim from Sherri's proposed findings. Moreover, contrary to the district court's findings, no evidence was put in the record regarding Sherri's contribution to FLP. In her Response Brief, Sherri asserts the district court found that Sherri participated in negotiating land swaps in 2007 and 2015 to support the district court's findings that she contributed to FLP. Sherri's Response Brief at 15. However, at trial Sherri introduced no evidence regarding her contribution to any land swaps, nor provided any testimony regarding her involvement in the negotiations. Rather her testimony was that only Kevin participated in those negotiations. (Tr. Tran, 67:9-25; 68:1-22, Sherri). Moreover, these limited negotiations that Sherri admitted only involved Kevin, are not evidence of Kevin devoting himself to FLP in a way that forced Sherri to take on more work and duties at home. Rather, there are only two examples, during a 30-year marriage, of Kevin assisting with FLP. This restricted engagement with FLP cannot be enough to transform the gifted asset into a marital asset.

While Sherri may have contributed to the marriage by taking care of the children and the home, none of the work Sherri performed at home facilitated Kevin devoting time to maintaining, increasing, and growing the gifted assets. Besides, the district court noted that Kevin and Sherri equally shared domestic duties. Finding of Fact No. 31. Kevin's occasional involvement in two land swaps, years apart, where Sherri was not involved, does not justify the district court's inclusion and distribution of the gifted assets in the total value of the marital estate.

Sherri then argues that she contributed to gifted assets because she assisted in activities associated with a cattle ranch. Sherri's Response Brief at 15. FLP does not operate a cattle ranch, it only leases land and is a passive asset to Frost Ranch Corporation. (Tr. Tran. 355:22-25, 356:1-4, Marilynn). Any activities associated with ranch work are performed by Frost Ranch Corporation. (Tr. Tran. 356:5-7, Marilynn). Frost Ranch Corporation is solely owned by Marilynn Frost. Finding of Fact No. 23. Assuming Sherri actually did this work, which is negated by the testimony of Marilyn, Kevin, Kathryn Cook, and Leah Capko, none of the activities Sherri allegedly performed were on behalf of FLP.

While Sherri claims that she helped with the cows, checked on fencing, and assisted with branding, that work, done on behalf of Frost Ranch Corporation, does not yield an interest in FLP that results in any contribution to FLP property. Work that Sherri voluntarily performed for Frost Ranch Corporation cannot translate into

work on behalf of FLP. Especially as the work Sherri alleges to have performed was nothing more than helping her in-laws with their home and property as they aged and began facing health issues. There is no case law in Montana stating that during a marriage assisting relatives with their sole and separate property transforms that property into a marital asset upon dissolution of marriage.

Sherri provides no evidence as to how her bringing water and food to Kevin, checking on water and fencing, monitoring the property, checking on cows and feeding hay, facilitated Kevin's interest FLP or the "Butte" property. Rather, in bringing Kevin water and food, it appears that Sherri was simply supporting her spouse as any spouse would.

Finally, no evidence was presented at trial of any financial contribution by Sherri to the gifted assets and no evidence was presented that marital funds were used towards the gifted assets. Simply stated, there is no substantial evidence that Sherri performed any function that enabled Kevin to cultivate and nurture his gifted assets entitling Sherri to a marital portion of those assets. Rather, Sherri provided generalized statements of ranch type work she allegedly performed. Sherri failed to provide any evidence of how that work, on behalf of Frost Ranch Corporation, converted into an interest in FLP. Moreover, there was no active management by Kevin in the gifted assets that forced Sherri to assume more production in the family home. Any value in the FLP property and the "Butte" exists simply by the natural

appreciation of the value of the assets and was not the result of efforts of Kevin or Sherri.

B. The district court erred in including the value of the gifted assets when considering the property distribution as an alternative to maintenance.

The district court determined that its property distribution was in lieu of maintenance. Finding of Fact No. 51. Kevin disputes that Sherri is entitled to maintenance. Even if she is entitled to maintenance, the marital estate, exclusive of the gifted assets, was sufficient to provide a distribution of property in lieu of maintenance.

The marital estate, without including Kevin's value in FLP was valued at approximately \$3,000,000. Demonstrative Ex. 1 to Appellee/Cross-Appellant's Response Brief. There were more than enough marital assets available to distribute between Sherri and Kevin without looking to his gifted assets. Moreover, Sherri's lack of contribution to Kevin's gifted assets does not warrant their inclusion in the total value of the marital estate.

The district court's error in including the value of the gifted assets in the marital estate is compounded by its assumption that Kevin will inherit Frost Ranch Corporation at Marilyn's death. Finding of Fact No.49(b). 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. The reason for the exclusion of any possible inheritance is simple, any interest is speculative because it is contingent upon the testator’s intentions and a will can be revoked at any time, not taking effect until the death of the testator.

At present, Kevin will never inherit any of Frost Ranching Corporation. Marilynn’s shares will be held in Trust for Kevin, with Katelynn Frost as the Trustee. (Tr. Tran. Marilynn 365:6-14); Exhibit K-4. While alive, Marilynn has the option of changing her estate plan. However, it is only pure speculation that Kevin may someday have an interest in Frost Ranch Corporation. Especially given how important it is to keep the ranch in the Frost family. (Tr. Tran. 347:6-12, Marilynn).

Finally, the value of Kevin’s interest in FLP is speculative and the district court’s distribution of the asset is contrary to Montana law. Kevin, as a limited partner, does have any ownership of the real property owned by FLP. Mont. Code. Ann. § 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, Marilynn). 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.

Unlike retirement accounts and the marital home, where the value can be realized, it is likely that Kevin will never realize the value assigned to FLP's real property and the district court's stretch to reach this conclusion is a clear error. Essentially, the value assigned to FLP is illusory, and in giving credit to Kevin for this asset, while distributing the cash assets to Sherri, the district court has given Sherri exponentially more of the marital estate.

Sherri made no financial or non-financial contribution to Kevin's gifted assets as required by § 40-4-202(1). 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 evidence and the district court failed to correctly apply Montana dissolution law.

II. The District Court's Failure to Include Witness Testimony was Erroneous.

Sherri advances the argument that it was appropriate to exclude Kevin's witnesses because they would have given cumulative testimony. Sherri's argument ignores the fact that she presented eight witnesses at trial and six of Sherri's

witnesses, including Sherri, testified repeatedly on the same topics-their observations of Sherri's contributions to Frost Ranch Corporation and the impact the February 9, 2016, incident had on Sherri. None testified to gifted assets. Despite the fact that Sherri presented six witnesses that testified multiples times to the same topics, the district court raised no issue with cumulative testimony as to Sherri's witnesses and did not prevent any of her witnesses from testifying.

Kevin on the other hand was barred from presenting witnesses that would rebut Sherri's contentions she contributed to gifted assets. When Kevin was finally able to begin his case in chief, late on the second day, it was relayed to the district court that Kevin was concerned about not being able to present his entire case:

MR. COTNER: And the second comment, which probably now becomes even more important to make, is my sense is we will not have the case in by 4:00 today. There's numerous witnesses that are yet to be called, and I want to advise the Court of that just so you know of my concern with respect to the schedule today. It was a concern when it was 5:00, so it's not because of the 4:00 p.m. issue. I want to be clear.

THE COURT: So what do you expect not to be accomplished today?

MR. COTNER: Most likely, the only thing that would not be completed by then is Kevin's testimony will not be completed. We are hoping to have all the expert testimony in, and then there is four or five other witnesses that will just testify with respect to their observations on contribution.

THE COURT: So contributions, you are going

to have four or five witnesses get up here and say, well, Sherri never did anything on the ranch?

MR. COTNER: Yes.

THE COURT: All right. So I've heard that. That's just cumulative.

(Tr. Tran. 388:22-25; 389:1-18, Dave Cotner and Judge Recht).

Despite the fact that Kevin had offered no testimony, and only one of Kevin's proposed witnesses, Marilynn Frost, had testified Sherri regarding Sherri's non-contributions to FLP, the district court denied Kevin the right to call witnesses to the stand because their testimony would be cumulative.

From a fairness perspective, Sherri was allowed to put on all her evidence to support her contention that the gifted assets should be included in the value of the marital estate. In comparison, Kevin's case was undermined because he was not able to present all his evidence and he was denied the right to defend against Sherri's contentions. In limiting Kevin's ability to put on evidence, the district court undercut the principles of a fair trial, which is the right to call witnesses.

Sherri argues the district court properly analyzed the potential evidence and decided to exclude it. Sherri's Response Brief at 19. In support of this notion, Sherri points to the district court's comments made about Sherri's contributions to the ranch. However, without hearing from all the available witnesses, the district court formed an incorrect judgment regarding the gifted assets based on limited witnesses. (Tr. Tran. 505:10-12, Judge Recht). The district court went on to state: "I've given

you two witnesses, two very good witnesses, as far as being able to observe those facts and testify about it. I don't need another five to tell me that.” (Tr. Tran 505:18-21, Judge Recht). While Sherri had the opportunity to present six witnesses to support her contentions, the district court refused to give Kevin the opportunity to present witnesses that Sherri never contributed to FLP. Sherri’s witnesses exclusively testified about her work for Frost Ranch Corporation, a nonmarital asset, and none testified regarding FLP and the “Butte” property.

In comparison, Kevin’s excluded witnesses were prepared to provide testimony related to FLP, the relevant and pertinent asset at issue in this dissolution. Kevin’s proposed witnesses had dealings with FLP and had direct knowledge that Sherri never contributed to FLP. When the district court makes an incorrect judgment, based on limited evidence it chose to hear, it is difficult to believe that the district court properly analyzed the potential evidence.

Because Kevin was prohibited from calling witnesses, the district court was without all the admissible evidence and rendered a decision that was not based on all available facts. The district court determined, without hearing from Kevin’s witnesses, that Sherri contributed to Frost Ranch Corporation that somehow converted into an interest in the gifted assets.

The district court, in failing to give Kevin the opportunity to present evidence, penalized him. The district court's job is to hear all available evidence. The district court refused to do this, and in doing so, committed a reversible error.

CONCLUSION

Contrary § 40-4-202(1), the district court erred in including gifted assets in distribution of the marital estate, to which no financial or nonfinancial contribution was made by Sherri. There is no factual basis to support Judge Recht's decision that Sherri made contributions to Kevin's gifted assets, entitling her to a portion of the same. The district court, by failing to hear all evidence, inequitably divided the estate. Kevin respectfully asks this Court to reverse and remand this case, requiring the district court to exclude the gifted assets from the marital estate and equitably redistribute the marital assets.

DATED this 29th day of November 2023.

COTNER RYAN LAW, PLLC



Natalie A. Hammond

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word is 4,344 words, excluding certificate of service and certificate of compliance.



Natalie A. Hammond

CERTIFICATE OF SERVICE

I, Natalie Anna Hammond, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee and Cross to the following on 11-29-2023:

Reid J. Perkins (Attorney)
321 W. Broadway St., Ste. 300
Missoula MT 59802
Representing: Frost Limited Partnership
Service Method: eService

David Brian Cotner (Attorney)
321 W. Broadway
Suite 500
Missoula MT 59802
Representing: Kevin R. Frost
Service Method: eService

Mary-Elizabeth Marguerite Sampsel (Attorney)
128 2ND STREET EAST
KALISPELL MT 59901
Representing: Sherri Frost
Service Method: eService

Electronically Signed By: Natalie Anna Hammond
Dated: 11-29-2023