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Attorney for Third Party Defendant/Appellant Jill Brenden

IN THE SUPREME COURT OF THE STATE OF MONTANA

JILL BRENDEN,	)	Case No. _____
Third Party Defendant/Appellant,	)	
	)	NOTICE OF
-vs-	)	APPEAL
	)	
ESTATE OF BARBARA JENSEN,	)	
Third Party Plaintiff/Appellee,	)	
	)	
IN THE MATTER OF THE ESTATE	)	
OF: ROBERT BRENDEN,	)	
	)	
ROD BRENDEN,	)	
Personal Representative.	)	
_____	)	

NOTICE is given that Jill Brenden, the Appellant above-named and who is the Third Party Defendant in that cause of action filed in the Eighteenth Judicial District, in and for County of Gallatin, as Cause No. DP-17-69C, hereby appeals to the Supreme Court of the State of Montana from Amended Findings of Fact, Conclusions of Law, and Order entered in such action on January 11, 2024. Ex. A.

THE APPELLANT further certifies:

1. That this appeal is subject to the mediation process required by M. R. App. P. 7. If subject to mediation, the money judgment being sought is not less than \$5,000.00.

2. That this appeal is not an appeal from an order certified as final under M. R. Civ. P. 54(b).

3. Appellant is not aware of any challenge to the constitutionality of any act of the Montana Legislature in this matter, therefor no notice is required pursuant to M. R. App. P. 27.

4. That all available transcripts of the proceedings in this cause have been ordered from the court reporter contemporaneously with the filing of this notice of appeal. If all available transcripts have not been ordered, that Appellants have complied with the provisions of M. R. App. P. 8(3) contemporaneously with the filing of this notice of appeal.

5. That included herewith is the filing fee prescribed by statute, or the affidavit to proceed without payment of the required filing fee prescribed in the Appendix of Forms as Form 3.

RESPECTFULLY SUBMITTED this 8th day of February, 2024.

OGBURN LAW FIRM, PLLC

By: Margot B. Ogburn

Margot B. Ogburn
Attorney for Third Party
Defendant/Appellant Jill Brenden

CERTIFICATE OF SERVICE

I hereby certify I have filed a true and accurate copy of the foregoing NOTICE OF APPEAL with the Clerk of the Montana Supreme Court and that I have served true and accurate copies of the foregoing NOTICE OF APPEAL upon the Clerk of the District Court, each attorney of record, each court reporter from whom a transcript will be ordered, and each party not represented by an attorney in the above-referenced District Court action, as follows:

Todd R. Hillier Schraudner & Hillier, PLLC 280 West Kagy Blvd., Ste. D, #323 Bozeman, MT 59718	X First-class mail, postage prepaid ☐ FedEx ☐ Hand delivery ☐ Fax: ☐ Email to thillier@bridgeband.com
Clerk of District Court Eighteenth Judicial District Court Law & Justice Center 615 S. 16 th Ave., Room 312 Bozeman, MT 59715	X First-class mail, postage prepaid ☐ FedEx ☐ Hand delivery ☐ Fax: ☐ Email to GallatinDCFilings@mt.gov
Debbie Rafferty Official Reporter Eighteenth Judicial District Court Law & Justice Center 615 S. 16 th Ave., Room 202 Bozeman, MT 59715	X First-class mail, postage prepaid ☐ FedEx ☐ Hand delivery ☐ Fax: ☐ Email to Debra.Rafferty@mt.gov

Dated this 8th day of February, 2024.

By: 
Margot B. Ogburn

EXHIBIT A

**MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY**

2024 JAN 11 PM 4:01

IN RE THE ESTATE OF ROBERT BRENDEN,

ROD BRENDEN,

Personal Representative,

BARBARA JENSEN,

Third Party Plaintiff,

vs.

JILL BRENDEN, an individual, GLACIER BANK
d/b/a BIG SKY WESTERN BANK,

Third Party Defendants.

CAUSE NO. DP-17-69C

FILED

BY



DEPUTY

**AMENDED FINDINGS OF
FACT, CONCLUSIONS OF
LAW, AND ORDER**

INTRODUCTION

On May 5, 2017, an Application for Informal Probate of Will and Appointment of Personal Representative was filed with the Court in regard to the Estate of Robert Brenden ("estate"). Robert's son Rodney Brenden ("Rodney") was named the Personal Representative of the estate. The Application named Jill Brenden ("Jill," Robert's spouse), Scott Brenden ("Scott," Robert's son), and Rodney as the estate's beneficiaries.

Jill subsequently filed a claim against the estate regarding certain expenses for which she had requested reimbursement. She also objected to the proposed distribution of the estate regarding the valuation of certain property, certain property she claimed as separate marital property, and certain property she claimed still needed to be included in the estate. Ultimately, the estate and Jill resolved their differences. On February 14, 2020, the Court entered its Order Approving Revised Proposed Distribution and Terms of Settlement. As ordered by the Court on pp. 1-2, "The personal representative shall distribute the estate property between successors and beneficiaries as specified in the Revised Proposed Distribution of Estate Property and the parties shall adhere to and abide

by the terms of their Settlement Agreement filed with the Court. The distributions can be made now as they do not involve or impact the property at issue between the remaining litigants, Jill Brenden and Barbara Jensen.”

On July 10, 2018, the Court issued its Order Granting Motion to Intervene to Third Party Plaintiff Barbara Jensen (“Barbara”). The Order permitted Barbara to intervene in the above-captioned matter in order to bring claims against Jill and Third-Party Defendant Glacier Bank d/b/a Big Sky Western Bank (“BSWB”). BSWB was later dismissed from the action. The Third-Party Complaint by Barbara against Jill asserted claims against Jill for conversion, deceit, and breach of constructive trust and unjust enrichment.

On August 23, 2018, Jill filed her Answer to Third Party Complaint (“Answer”) denying the allegations against her and asserting the following affirmative defenses: failure to state a claim, waiver and estoppel, and unjust enrichment.

Thereafter, on October 2, 2018, Barbara filed a Motion for Temporary Restraining Order, Application for Temporary Injunction, and Brief In Support. The Court granted a Temporary Restraining Order and ordered Jill to deposit \$254,000.00 with the Court to be placed in an escrow account. On November 27, 2018 the Court issued its Findings of Fact, Conclusions of Law, and Order Granting Preliminary Injunction. Jill deposited \$254,000.00 with the Court, which the Court continues to hold in an escrow account.

Jill subsequently filed a motion to amend her Answer, which was granted. Jill’s Amended Answer was deemed filed on January 8, 2019. The Amended Answer added a counterclaim against Barbara for unjust enrichment.

On August 26, 2019, the Court issued its Pretrial Conference Order and Report and Pre-Trial Order, which supersede the pleadings.

Over Jill's objection, Barbara was ultimately allowed to include additional contentions, witnesses, exhibits, and issues of fact and law related to her affirmative defenses.

Beginning May 18, 2020, Barbara and Jill's claims, counterclaims, and affirmative defenses were tried before the Court in a bench trial. Susan Swimley and Alison Garab represented the Third-Party Plaintiff Barbara Jensen. Margot Barg Ogburn represented Third-Party Defendant Jill Brenden. The following persons testified at trial: Kimberly Daly, Chanelle Sanders, Candace Lucht, Jill Brenden, Rodney Brenden, Scott Brenden, Todd Hillier, and Terry Jensen. The following exhibits were admitted into evidence at trial: Exhibits 2, 5, 9H1, 10, 14, 12C, 12I, 12J, 12K, 12L, 12S, and 12T; Exhibits B, B1, M, O, P, Q, R, S, T, CC, and MM; and Court Exhibit 1.

From the testimony and evidence presented, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT¹

A. Background Information Regarding the Parties and the Decedent.

1. Robert Brenden ("Robert") was a 71-year old man who resided in Gallatin County, Montana. (AF No. 4) Robert passed away on March 25, 2017, at approximately 9:35 p.m. (AF No. 5) He was one of seven siblings. At the time that he passed away four of his sisters and one of his brothers were still alive. (TT1 Jill Brenden 141:13-20)
2. Jill Brenden ("Jill") is an individual residing in Gallatin County, Montana. (AF No. 2) Jill was Robert's wife and they were married at the time of his death.
3. Scott Brenden ("Scott") is Robert's oldest son from Robert's first marriage.

¹ All references to facts agreed to in the Pretrial Order are referred to herein as "Agreed Fact" or "AF". All reference to the Trial Transcript, Day 1 on May 18, 2020, are referred to "TT1". All references to the Trial Transcript, Day 2 on May 19, 2020, are referred to herein as "TT2".

4. Rodney Brenden (“Rodney”) is Robert’s youngest son from Robert’s first marriage. Rodney is the Personal Representative of Robert’s estate.
5. Barbara Jensen (“Barbara”) is an individual residing in Gallatin County, Montana. (AF No. 1) Barbara is an 89-year old woman with dementia. She is represented in this matter by her son and power of attorney, Terry Jensen (“Terry”). Barbara is one of Robert’s older sisters. (AF No. 7)

B. Robert and Jill and Their Homes.

6. Robert and Jill first met in 1991 and began dating in the fall of 2000. (TT1 Jill Brenden 139:20-25) They moved in together in Jill’s apartment in 2002. (TT1 Jill Brenden 140:21-141:10) They married on December 24, 2010. (TT1 Jill Brenden 141:11-12)
7. According to Jill’s testimony, Robert and Jill bought their first home together in 2006, located at 1057 New Holland Drive (the “New Holland Home”). (TT1 Jill Brenden 157:17-158:6) They held the New Holland Home as joint tenants with right of survivorship. (TT1 Jill Brenden 158:7-14, 159:1-18, Exh. P)
8. Jill testified that she was involved in the decision to sell the house, meeting the realtor, determining the sale price, and staging the home. (TT1 Jill Brenden 161:12-19)
9. In late 2014, Robert quitclaimed a piece of property that he had inherited and subdivided, to himself and Jill, as joint tenants with right of survivorship. (TT1 Jill Brenden 167:9-168:5; Exh. T) This is referred to as the “Red Rock Home”. Robert and Jill took out a joint construction loan and began construction on their home. The construction loan was later converted to a joint mortgage. Jill was involved in the design and construction process and she contributed to the Red Rock Home in the same manner as the New Holland Home. Since Robert’s death she has continued to pay the

mortgage and all expenses related to the Red Rock Home. (TT1 Jill Brenden 168:6-170:4)

10. On March 9, 2017, Robert and Jill sold their New Holland Home via a Warranty Deed listing them as joint tenants. (TT1 Jill Brenden 161:20-162:8; Exh. Q)
11. Robert and Jill did not instruct the title company to write the check for the proceeds to either Robert or Jill, or to split the proceeds and write a separate check to Robert and a separate check to Jill. (TT1 Jill Brenden 162:21-163:3) Rather, the check was written out to "Robert Brenden and Jill Brenden". (Exh. 10, p. 25; Exh. R)
12. Pursuant to the authorization signed by Robert and Jill (Exh. S), on March 13, 2017 Jill picked up the check for the proceeds of the sale in the amount of \$206,099.23 from American Land Title Company. (TT Jill Brenden 94:13-17, 163:4-164:21)
13. Jill testified that when she picked up the check she went straight to the bank to deposit it because she did not want to carry such a large check around. The check was made out to both her and Robert. They did not have a joint checking account. She testified that she could have deposited the check into her own account, but she did want to have to drive home to obtain Robert's signature. The most convenient option for her at the time was to deposit the check into Robert's Account because then only her signature would be required. She testified that she endorsed the check to Robert only because that was her understanding of how to deposit a check made out to two people into a single-party bank account. She testified that by endorsing the check over to him she did not intend to make a gift to him. (TT1 Jill Brenden 95:7-22, 165:23-167:5, 208:19-23, 210:10-13) Rather, she intended the proceeds to be used to pay down the joint mortgage on the Red Rock Home and to pay for living expenses. (TT1 Jill Brenden 167:5-8)

14. Barbara contends that Jill could have deposited the home sale proceeds into a joint line of credit account she and Robert had. Jill testified that in June 2016, she and Robert opened a \$50,000 joint line of credit account with BSWB for the purpose of purchasing a skid steer. They withdrew \$34,700 to purchase the skid steer, and then paid the line of credit off one month later in July 2016. Jill testified that she would not have deposited the proceeds from the sale of the New Holland Home into the line of credit account because there was no debt owed on the line of credit. She really did not even consider whether she could otherwise deposit money into the line of credit account because she had never come across that before and that was not the purpose of the joint line of credit. (TT1 Brenden 96:7-12, 97:16-99:10, 170:5-171:2)

C. Robert's Cancer.

15. In November of 2014, Robert was diagnosed with Non-Hodgkin's Lymphoma. After receiving stem cell treatment in Seattle over a lengthy period of time, he went into remission and was able to come back to Montana.

16. Rodney recalled learning that he was named as the Personal Representative of Robert's estate while Robert and Jill were driving to Seattle for Robert's stem cell treatment. (TT2 Rodney Brenden 12:4-7) He did not really know what a personal representative did and he never discussed with Robert what this meant. (TT2 Rodney Brenden 12:18-22, 13:10-19)

17. In December 2016, Robert learned that his cancer had returned. In January 2017 he started testing different chemotherapy treatments. He went to the doctor, he tried different pills, and he received in-patient treatments in the hospital. (TT1 Brenden 171:3-173:15) He was in and out of the hospital all of March. (TT2 Scott Brenden

114:9-19) The treatments made him tired and weak. Except for multiple hospital visits he generally stayed home because his immune system was compromised. (TT1 Brenden 171:3-173:15)

Robert died March 25, 2017. Barbara Jensen, his sister, was the named as the “payable on death” beneficiary on his bank account. The parties testified that this was not known at Robert’s death. Robert had opened the account in 2006. At that time, he designated Barbara as POD beneficiary. The account was never modified. Either shortly before or shortly after Robert’s death, Jill had electronically transferred all funds from Robert’s bank account to hers. The Court heard testimony the circumstances of those transfers.

Third Party Plaintiff Barbara Jensen (“Barbara”) filed a complaint initiating this action against Third party Defendant Jill Brenden (“Jill”) on July 9, 2018. Jill answered the complaint. On Barbara’s motion, the Court entered a temporary restraining order (“TRO”) on October 2, 2018 requiring Jill to deposit the sum of \$254,000.00 which Jill removed from Robert Brenden’s Big Sky Western Bank (“BSWB”) account number 3255204 (“the Account”) with the Court to be placed in an escrow account. The Court set a show cause hearing for November 9, 2018.

Jill filed a response to Barbara’s Application for Preliminary Injunction on October 18, 2018. In her response, Jill admitted she had been using the funds removed from the Account to cover legal expenses, utilities, mortgage, and other living expenses prior to the TRO. Barbara filed a reply claiming Jill was dissipating the asset on November 2, 2018. That same day, a month after Jill was personally served with the TRO.

On November 5, 2018, the Court vacated the show cause hearing and reset it for November 20, 2018. On November 7, 2018 Barbara filed a response to Jill’s emergency motion to dissolve the TRO. The same day, the Court entered an order denying Jill’s motion. The order

required Jill to deposit the sum of \$254,000.00 with the Court to be placed in an escrow account no later than Tuesday November 13, 2018. The existing TRO would remain in full force and effect until the show cause hearing was held. On November 14, 2018, Jill deposited \$226,000.00 with the Court. Jill deposited an additional \$28,000.00 with the Court on November 15, 2018. The Court held the show cause hearing on November 20, 2018.

Based on the evidence presented at the hearing, the Court entered an order granting Barbara's application for a preliminary injunction on November 27, 2018. The Court concluded that Barbara made a "prima facie showing and that she is likely to succeed on the merits of her claim that she is entitled to the Account funds totaling \$254,000.00 that Jill transferred to herself after Robert's death." The Court ordered that the sums Jill eventually deposited with the Court totaling \$254,000.00 would remain in an escrow account pending trial on the merits of the claims raised in Barbara's Complaint. *Id.*, p. 8.

On November 30, 2018, Jill filed an amended answer and counterclaim against Barbara for unjust enrichment on November 30, 2018. Barbara filed a motion to dismiss Jill's counterclaim on January 17, 2019. Barbara subsequently filed a motion for partial summary judgment on May 28, 2019 and motions in limine on June 20, 2019. On October 7, 2019, the Court entered an order denying all of Barbara's pending motions. Or. Re: Pending Mots. (Oct. 7, 2019). Based on the Court's order denying Barbara's motion to dismiss Jill's counterclaim, Barbara answered Jill's counterclaim on November 7, 2019 and sought to amend the pre-trial order ("PTO") accordingly. The Court granted Barbara's motion to amend the PTO on February 10, 2020. Jill served additional discovery requests on Barbara on March 3, 2020. Barbara answered Jill's additional discovery requests on April 1, 2020.

A trial was held before this Court on May 18-19, 2020. Barbara did not personally appear. Barbara granted her son, Terry Jensen, power of attorney to pursue the claims at issue herein on her behalf. Barbara was represented at trial by Susan Swimley and Alison Garab. Jill personally appeared with her counsel, Margot Ogburn. Based upon the testimony and evidence offered at trial, the Court makes the following:

FINDINGS OF FACT

1. Barbara is an individual residing in Gallatin County, Montana.
2. Jill is an individual residing in Gallatin County, Montana.
3. Robert Brenden ("Robert") is a deceased individual who resided in Gallatin County, Montana until his death on March 25, 2017 at approximately 9:35 p.m.
4. Robert is Barbara's brother and Robert was married to Jill at the time of his death.
5. Rodney Brenden ("Rodney") is the duly appointed personal representative for Robert's estate in Cause Number DP-17-69C.
6. Rodney and Scott Brenden ("Scott") are the sons of Robert. Tr. Transcr. vol. 2, 7:20-21;90:23-24.
7. Todd Hillier ("Hillier") is the attorney for the Estate of Robert Brenden.
8. Kimberly Daly ("Daly") is the medical records supervisor at Bozeman Health Deaconess Hospital located at 915 Highland Avenue, Bozeman, Montana. Tr. Transcr. vol. 1, 24:1-7. Part of Daly's job as medical records supervisor is to have control and custody over patient medical records. *Id.* 24:14-17. Daly identified Barbara's Exhibit 14 as a collection of medical records, pages 154-186, from Robert's inpatient stay in March 2017, consisting of provider's notes, nursing documentation, and laboratory data. *Id.* 24:22-25:5. Prior to trial, Daly had an opportunity to compare Barbara's Exhibit 14 to the original records in her custody and control.

Id. 25:6-16. Daly testified that Barbara's Exhibit 14 was a true and accurate copy of pages 154-186 of Robert's medical records. *Id.* Exhibit 14 was admitted. *Id.* 26:23-25.

9. Daly testified that, while she was not able to compare Jill's Exhibit MM with Robert's original medical records prior to trial, Daly had no reason to believe pages 404-408 dated March 24, 2017 were not records from Bozeman Deaconess Hospital. Tr. Transcr. vol. 1, 27:19-28:15. Exhibit MM was admitted. *Id.* 29:14-15.

10. Daly testified that she had not been able to compare Jill's Exhibit CC with Robert's original medical records prior to trial and had not seen those records before they were presented to her at trial. Tr. Transcr. vol. 1, 31:14-32:9. Exhibit CC was admitted. *Id.* 32:13-17.

11. Chanelle Sanders ("Sanders") manages the electronic banking department and customer support center at First Security Bank, formerly known as BSWB. Tr. Transcr. vol. 1, 35:3-10. Sanders has held that same position for twelve years. *Id.* Sanders identified Barbara's Exhibit 10 as true and accurate copies of the following records made in the regular course of BSWB's business:

- a. Jill's bank statement dated April 10, 2017 (pages 1-2);
 - b. signature card for Robert's account at issue in this case (pages 3-4);
 - c. checks written on Robert's account from January 2016 through June 2017 (pages 5-11);
 - d. deposits made to Robert's account from January 2016 through July 2017 (pages 12- 26); and
 - e. Robert's account statements from January 2016 through July 2017 (pages 27-61).
- Id.* 36:16-38:20.

Sanders further identified the remaining pages of Exhibit 10 as true and accurate copies of the bank's consumer terms and conditions, a letter from Todd Hillier ("Hillier") to the bank dated October 27, 2017, emails between Hillier, Sanders, and another employee of the bank, Candace Lucht, and the subscriber notes for the electronic activity on Robert's account from March 25, 2017 through March 27, 2017. *Id.* 39:16-41:7. Exhibit 10 was admitted in its entirety. *Id.* 42:2-4.

12. According to the bank records, Robert opened the Account with BSWB on August 23, 2005, as a single-party checking account with pay on death instructions. Robert named Barbara the pay-on-death ("POD") beneficiary of the Account. Ex. 10, pp. 3-4; Tr. Transcr. vol. 1, 42:11-43:14.

13. The Account terms allowed Robert to name one or more POD beneficiaries on the Account. Ex. 10, p. 3. Sanders testified that, to her knowledge, Robert never changed the POD beneficiary and never added any additional POD beneficiaries on the Account. Tr. Transcr. vol. 1, 43:15-44:14.

14. The Account terms allow a designated agent or an individual with power of attorney to make transactions on Robert's behalf, but such individuals "have no ownership or rights at death unless named as Pay-On-Death beneficiaries." Ex. 10, p. 4. BSWB never received notice from Robert that Jill was authorized to access or conduct transactions using the Account. Tr. Transcr. vol. 1, 43:15-44:14.

15. According to the Account's terms and conditions, upon Robert's death, ownership of the Account passes to Barbara and the Account is not part of Robert's estate. Ex. 10, p. 4. Sanders testified that, to her knowledge, Robert never expressed to BSWB any intention to gift the funds in the Account to Jill. Tr. Transcr. vol. 1, 43:15-44:14.

16. At or about the time of Robert's death on March 25, 2017, the balance of the Account was \$255,564.43, which included the proceeds from the sale of the house as deposited by Jill. Ex. 10, pp. 29-30. The Account statement for March 6, 2017 through April 5, 2017 lists five separate bill pay transfers from the Account to Jill on March 27, 2017. Tr. Transcr. vol. 1, 44:15-45:9; Ex. 10, pp. 29-30. The transfers totaled \$254,000.00: four transfers of \$50,000.00 and one transfer of \$54,000.00. *Id.* According to Jill's checking account statement for March 15, 2017 through April 10, 2017, the five transfers were deposited on March 28, 2017. Tr. Transcr. vol. 1, 45:10-46:6, Ex. 10, pp. 1-2.

17. Robert's Account statement for April 6, 2017 through May 2017 lists a bill pay transfer to Jill for \$424.88 on April 20, 2017, nearly a month after Robert's death. Tr. Transcr. vol. 1, 46:7-23; Ex. 10, p. 28.

18. As part of Sanders' regular duties as the electronic banking manager, she collects and interprets subscriber notes to research online bill pay transactions. Tr. Transcr. vol. 1, 47:15-48:16. BSWB's subscriber notes show a history of what an online banking user has done with their bill pay, including the specific time and date the user performed each action using online bill pay. *Id.*

19. BSWB's subscriber notes for the Account do not show any attempt to initiate a transfer of funds using online bill pay on March 25, 2017. Tr. Transcr. vol. 1, 47:15-50:20; Ex. 10, pp. 66-67. The only three actions on BSWB's subscriber notes for the Account on March 25, 2017 were: (1) Changed Enrollment Disclosure from July 2, 2015 to March 25, 2017; (2) Terms and Conditions Version 1.5 accepted; and (3) Subscriber requested a new activation code for payee 5. *Id.*

20. The “Changed Enrollment Disclosure” and “Terms and Conditions Version 1.5 accepted” actions both occurred at 2:40 p.m. on March 25, 2017. Tr. Transcr. vol. 1, 48:17-49:8; Ex. 10, pp. 66-67. Sanders (“Sanders”) explained that the Changed Enrollment Disclosure action shows that if BSWB has updated their terms and conditions since the online banking user’s last activity, the user would have to accept the new terms and conditions. *Id.* Prior to March 25, 2017, the last time that Robert accepted updated terms and conditions using the Account’s online bill pay was July 2, 2015. *Id.*

21. The “Subscriber requested a new activation code for payee 5” action occurred at 2:47 p.m. on March 25, 2017. Tr. Transcr. vol. 1, 49:18-50:20; Ex. 10, pp. 66-67. Sanders explained that when a payee is set up in online bill pay, the user must “receive an activation code and input that code for a payee to become active.” *Id.* The activation code is sent directly to the Account owner. *Id.* Once the Account owner enters the code in the online banking system, it activates the new payee. *Id.* An account owner cannot initiate a funds transfer to a new payee at the same time an activation code is requested. *Id.* Transfers to a payee cannot occur at the same time as the request for an activation code. *Id.*

22. BSWB’s subscriber notes for the Account recorded five actions on March 26, 2017 all of which occurred between 1:29 a.m. and 1:31 a.m. Tr. Transcr. vol. 1, 50:21-52:2; Ex. 10, pp. 66-67. All five of those actions were the same: “Risk Authentication: Secret Question Challenge Success.” *Id.* Depo. Sanders 20:8-14. Sanders explained that challenge questions can be generated when a transfer is initiated using online bill pay. *Id.* Challenge questions could also be generated when a customer logs on to their online banking account, initiates a bill pay transaction or transfer, or for any type of activity on a customer’s online banking. Tr. Transcr. vol. 1, 63:13-64:3. Challenge questions are not generated when a bill pay transfer amount

exceeds BSWB's limits. *Id.* 66:2-23. An account owner would need to contact BSWB to raise the transfer limit. *Id.*

23. BSWB's subscriber notes for the Account on March 27, 2017 recorded five funds verification actions for the bill pay transfers to Jill. Tr. Transcr. vol. 1, 52:3-15; Ex. 10, p. 67.

Sanders explained that these notes show when BSWB processed the payments to Jill. *Id.*

24. Candace Lucht ("Lucht") is the security officer at First Interstate Bank, formerly BSWB, and she has worked there for 21 years. Tr. Transcr. 74:20-75:3. Lucht identified Barbara's Exhibit 2 as a letter Lucht wrote to Todd Hillier on November 1, 2017 responding to Hillier's request to BSWB seeking information about the Account. *Id.* 72:22-74:5. Exhibit 2 was admitted. *Id.*

25. According to Lucht's letter, Robert was the only owner of the Account and BSWB did not have any records showing Jill was authorized to withdraw funds from the Account. Tr. Transcr. vol. 1, 74:6-15; Ex. 2. Jill testified however, that she frequently accessed the account to pay household bills.

26. Lucht identified Barbara's Exhibit 5 as true and accurate copies of emails between Lucht and Hillier on January 22-24, 2018. Tr. Transcr. vol. 1, 75:20-77:8. Exhibit 5 was admitted. *Id.* The emails reflect the electronic activity on the Account from March 25, 2017 through March 27, 2017. Ex. 5.

27. Jill testified that she read Robert's Will for the first time when she delivered the original Will to Todd Hillier's office on April 14, 2017. Tr. Transcr. vol. 1, 119:16-120:4. As of April 14, 2017, Jill knew that Robert wanted Rodney appointed as the personal representative. *Id.*

28. On February 14, 2020, the Court entered an order approving the revised proposed distribution and the settlement agreement between Jill and Robert's estate. Tr. Transcr. vol. 1, 87:8-22; Or. (Feb. 14, 2020).

29. Under the revised proposed distribution, Robert's estate paid Jill \$48,000 on October 25, 2019 for her statutory homestead, exempt property, and family allowances. Tr. Transcr. vol. 1, 85:11-86:3. Jill received a one-third ownership interest in Robert's 50 percent membership interest in RBS, LLC. *Id.* 86:4-7. During probate of Robert's estate, Gooch Hill West, LLC made payments to the estate totaling \$401,903.61 on the promissory note held by Robert at the time of his death. *Id.* 86:8-89:20. These payments were deposited in the estate checking account. *Id.* Jill received one-third of the remainder of that estate checking account. *Id.* Gooch Hill West, LLC still owes over half a million dollars on the promissory note and Jill received a one-third share of all future payments from Gooch Hill West, LLC to Robert's estate. *Id.*

30. Under the revised proposed distribution, Jill also received a one-third interest in the farmhouse and 8.01-acre parcel. *Id.* 89:21-90:4. Rodney and Scott will each be required to pay Jill \$102,873.50 (totaling \$205,747.00) as the Buyout Amount for Jill's 1/3 interest in the farmhouse and 8.01-acre parcel. *Id.*

31. Under the revised proposed distribution, Jill retained the money from the sale of the 2013 Can Am and the 2002 Triumph motorcycle. *Id.* 90:7-17. Jill kept the 2006 Chrysler auto and the 2005 Dodge Ram. *Id.* 91:1-9. Jill also kept the skid steer and associated accessories purchased in June 2016 for \$34,720.00 along with the art, furniture, and other personal property in the Red Rock Court house. *Id.* 91:10-24.

32. Jill testified that Barbara was not named in Robert's Will and Barbara did not receive anything in the probate of Robert's estate. *Id.* 91:25-92:5. Neither did Robert's other siblings.

33. Jill agreed that even though she and Robert had been living together for three years, Robert named Barbara as the POD beneficiary on the Account when he opened it in 2005. *Id.* 92:6-21.
34. Robert never named Jill as a party on the Account. *Id.* 92:22-94:12. The only POD beneficiary named on the Account when Robert died was Barbara. *Id.*
35. Jill's only checking account is a single-party checking account at BSWB which she opened in 1997. Tr. Transcr. vol. 1, 95:23-96:6.
36. Jill and Robert also had a joint line of credit account *Id.* 96:7-99:13.
37. On March 13, 2017, Jill retrieved the proceeds from the sale of Jill and Robert's jointly-owned home from First American Title. Tr. Transcr. vol. 1, 94:13-95:22; Ex. 10, p. 25. Jill deposited the check from First American Title for \$206,099.23 made out to both her and Robert into the Account the same day. *Id.* Jill endorsed the check with instructions to "Pay to the order of Robert Brenden." *Id.*
38. Jill regularly deposited checks made out to Robert into the Account using both remote deposit and traditional deposit. Prior to March 13, 2017, however, the BSWB records for the Account do not show that any checks written to both Robert and Jill were deposited in the Account by either Robert or Jill. Ex. 10, pp. 13-26.
39. In prior declarations filed with the Court, Jill stated that Robert held a meeting at the house with Jill, Rodney, and Scott "a few days after" Jill deposited the home sale proceeds check into the Account. Tr. Transcr. vol. 1, 99:15-102:6. In fact, Robert held the meeting the day after the deposit, on March 14, 2017. *Id.*
40. Jill admits that Robert did not say anything specifically about the Account or the home sale proceeds at the March 14, 2017 meeting. Tr. Transcr. vol. 1, 102:7-23. Instead, Robert stated

that Jill should receive the “cash” for transition and continuation of her lifestyle. *Id.* Jill believed that the cash Robert was referring to was the Account because, to her knowledge, Robert did not have any other accounts or cash. *Id.* 180:20-181:16.

41. In Exhibit O, dated November 8, 2017, Jill Brenden relied upon the March 14, 2017 meeting as Robert’s instruction that Jill should have the “cash”.

42. On March 25, 2017, the day Robert died, Jill arrived at the hospital between 8:00 a.m. and 9:00 a.m. Tr. Transcr. vol. 1, 104:12-105:20. Jill recalls that Robert was awake when she arrived and he ate breakfast that morning. *Id.* Jill could not remember if Rodney or Scott were at the hospital when she arrived the morning of March 25, 2017. *Id.* 104:12-105:20; 187:4-8.

According to Jill’s knowledge, Robert was able to get up and go to the bathroom that morning and he was able to communicate with Jill, the doctors, and the nurses. *Id.* 188:11-14; 188:24-189:15. Jill later denied that Robert got up to go to the bathroom in the morning on March 25, 2017 and the hospital records indicate that Robert had a catheter placed the night before. *Id.* 208:24-209:13; Ex. 14, p. 172.

43. That morning, Robert had complained to the nursing staff that he was in pain. Tr. Transcr. vol. 1, 105:21-106:9; Ex. 14, pp. 171-173. The hospital had been treating Robert’s pain with Dilaudid, but on the morning of March 25, 2017, Jill asked the nurse not to give Robert any narcotic pain medication. *Id.* Jill made this request despite knowing the only medication that was working to relieve Robert’s pain was Dilaudid and that Robert had given healthcare power of attorney to Rodney to make such decisions. Tr. Transcr. vol. 1, 195:17-196:2; 205:19-206:3; 209:14-17; Ex. 14, pp. 171-173.

44. Jill cannot recall exactly when Robert purportedly instructed her to transfer the funds in the Account to herself, but she says it was after breakfast, before lunch, in the late morning on

March 25, 2017. Tr. Transcr. vol. 1, 106:10-14; 190:8-191:13. Jill testified that Robert was conscious and able to think rationally when he told Jill to make the transfers to herself. *Id.* Jill remembered Dr. Brown coming in to see Robert around 10:40 a.m., but she could not remember whether Robert instructed her to transfer the funds before or after Dr. Brown visited Robert's hospital room. *Id.* 106:15-107:15; Ex. 14, p. 173.

45. At some point on March 25, 2017, Jill logged into Robert's online bill pay for the Account using their shared laptop that she brought with her to the hospital every day. Tr. Transcr. vol. 1, 110:18-111:9; 206:13-15. Jill had never transferred money from the Account to her checking account prior to March 25, 2017. *Id.* Jill explained that there was never any reason to do so because, "We didn't have much money between us so there wasn't a need for it." *Id.*

46. Since Jill had never transferred funds from the Account to her checking account before, she had to set herself up as a new payee in Robert's online bill pay on March 25, 2017. Tr. Transcr. vol. 1, 111:10-113:10; Ex. 10, pp. 66-67. Jill does not recall exactly what time she accessed Robert's online bill pay for the Account to set herself up as a new payee, but she has no reason to think that the 2:47 p.m. time listed for this action in BSWB's subscriber notes is wrong. *Id.* Jill claims she initiated the transfer of funds from the Account to herself at this same time and she does not recall receiving or entering an activation code for the new payee. *Id.*

47. Jill could not remember whether the payee activation code was sent to Robert via text or e-mail. Tr. Transcr. vol. 1, 113:16-114:16. Jill admitted that she would not have deleted the text or email to Robert containing the activation code, but she did not produce any evidence related to the activation code. *Id.* Jill acknowledged that she was still in possession of Robert's phone after his death. *Id.* 122:5-8.

48. Jill could not say for sure how many times she logged into Robert's online bill pay for the Account on March 25, 2017, "but it would have been once." Tr. Transcr. vol. 1, 114:21-116:11. Jill claims that initially she attempted to transfer the full \$254,000.00 in one transfer. *Id.* This initial transfer got rejected, so Jill had to pick "a dollar amount that would allow the transfers to go through," and Jill eventually settled on four transfers of \$50,000.00 and one transfer of \$54,000.00. *Id.* Jill did not remember answering secret questions to complete the transfers. *Id.* Jill testified that the time between when she logged on to Robert's online bill pay for the Account and actually initiated the transfers was about 15 or 20 minutes. *Id.* 194:19-24.

49. Jill's testimony of Robert's "gift" to her on March 25, 2017 is contradicted by the statements made to Todd Hillier that the gift was actually given on March 14, 2017 in the form of cash. Ex. O.

50. Jill testified that Robert took a turn for the worse in the early evening of March 25, 2017. Tr. Transcr. vol. 1, 107:16-108:20. Jill testified that, to the best of her recollection, she called Rodney around about 5:30-5:45 p.m. so Rodney and Scott could come to the hospital. *Id.* Jill testified that Rodney and Scott got to the hospital about a half hour or 45 minutes after she called, between 6-7 p.m. *Id.* Jill remembers that, by that point, Robert had already instructed Jill to transfer the funds in the Account to herself. *Id.*

51. The hospital records indicate that Drs. Brown and Thomas had a conversation with Jill, Scott, and Rodney about Robert's declining condition at about 6:15 p.m. that evening. Tr. Transcr. vol. 1, 108:2-110:17; Ex. 14, pp. 181-183. Jill testified that the doctors may have been attempting to ask Robert questions at this meeting. *Id.* During this meeting, everyone agreed to stop Robert's chemotherapy and pursue palliative therapy using morphine. *Id.* By 8:00 p.m., Robert was unresponsive and he passed away at 9:35 p.m. *Id.*

52. After Robert's death, Jill continued to deposit checks in the Account. Tr. Transcr. vol. 1, 116:12-118:3; Ex. 10, p. 26. On April 20, 2017, Jill deposited a check from Gooch Hill West, LLC made payable to Robert for \$455.00 into the Account. *Id.* On May 8, 2017, Jill deposited a check from Travel Related Services made payable to the Estate of Robert Brenden for \$23.12 into the Account. *Id.* On June 14, 2017, Jill deposited a check from AMCO Insurance made out to her and Robert for \$15.36 into the Account. *Id.* Jill endorsed that check with her signature and wrote "pay to the order of Robert Brenden." *Id.* Jill did not inform the Estate of these deposits. *Id.* Jill later transferred these funds from Robert's Account to herself electronically. Ex. 10; p. 28.

53. Jill initially did not remember going into Robert's online bill pay for the Account after his death. Tr. Transcr. vol. 1, 118:4-119:20; Ex. 10, pp. 28-30. According to BSWB's records, Jill accessed Robert's online bill pay for the Account on April 20, 2017 and transferred an additional \$424.88 to herself. *Id.* Jill testified that this money was used to pay the NorthWestern Energy power bill at the shop. *Id.*

54. When Jill met with Hillier, Rodney, and Scott on April 14, 2017 for the reading of Robert's Will, Jill did not tell Hillier or Rodney about the Account or that she had transferred \$254,000.00 to herself the day Robert died. Tr. Transcr. vol. 1, 120:2-121:6. Despite knowing for nearly a month that Rodney was the personal representative of Robert's estate, Jill did not tell Hillier or Rodney about the check she deposited into the Account on May 8, 2017 which was made out to the Estate of Robert Brenden. *Id.* Jill did not believe she was required to tell Hillier or Rodney about the Account, the transfer of \$254,000.00 to herself, the check made out to the estate, or the transfers Jill made to herself after Robert's death. *Id.*; Ex. 10, p. 28.

55. Jill identified Barbara's Exhibit 12T as true and accurate copies of emails between herself and Todd Hillier dated between April 18, 2017 through April 23, 2017. Tr. Transcr. vol. 1, 122:9-23. Exhibit 12T was admitted. *Id.*

56. In an email to Hillier on April 18, 2017, Jill listed several assets titled solely in Robert's name including: the 2013 Can Am, a 2002 Triumph motorcycle, and the 2005 Dodge Ram. Ex. 12T, p. 4. Jill admitted that she knew on April 18, 2017 that those vehicles were titled solely in Robert's name. Tr. Transcr. vol. 1, 123:12-15. On May 8, 2017, Jill filed three separate title applications with the State of Montana seeking to transfer title for these three vehicles titled solely in Robert's name at the time of his death to Jill's name. Tr. Transcr. vol. 1, 128:10-139:10; Exs. 12I, 12K, 12L. Jill testified that she filed these title applications because she believed these vehicles to be marital assets. Tr. Transcr. vol. 1, 203:8-15. Jill admitted that she never asked Hillier and he never confirmed that the vehicles were marital assets. *Id.* 204:5-205:18; Ex. M.

57. The title application forms Jill signed clearly state that the form is used when no executor or administrator is appointed, provided the value of the decedent's entire estate, including the vehicle that is the subject of the application, less liens and encumbrances, does not exceed \$50,000. Exs. 12I, 12K, 12L. Jill admitted she knew when she submitted all three title applications that Rodney was the appointed personal representative for Robert's estate and the value of Robert's entire estate exceeded \$50,000. Tr. Transcr. vol. 1, 129:21-130:2; 134:8-13; 137:14-20.

58. Jill signed all three title applications under penalty of law certifying that Robert left no estate necessitating administration, that no letters of administration or letters testamentary had been issued to any other person, and the vehicles had not been bequeathed by Will to anyone other than Jill. Tr. Transcr. vol. 1, 130:3-131:21; 134:14-135:15; 137:21-138:22.

59. Jill admits that her certifications on all three title applications were false. *Id.*

60. Based on her false certifications, Jill obtained new titles placing title to all three vehicles solely in her name. Tr. Transcr. vol. 1, 131:17-132:8; 135:16-136:4; 138:23-139:10. Jill sold the Can Am for \$10,000 and the Triumph motorcycle for \$4,000 and kept the money for herself. *Id.* Jill kept the 2005 Dodge Ram for her personal use. *Id.* Jill did not notify Hillier or Rodney that she had the vehicle titles transferred to her name and she did not inform them about the sale of the Can Am or the Triumph motorcycle. *Id.*

61. Jill identified Barbara's Exhibit 12J as true and accurate copies of emails between herself and Hillier dated May 16-17, 2017. Tr. Transcr. vol. 1, 126:12-24. Exhibit 12J was admitted. *Id.*

62. On May 17, 2017, Jill emailed Hillier asking questions concerning the tangible personal property included in Robert's estate. Ex. 12J. Hillier responded explaining that, "Regarding personal property, if it was acquired by you and Bob during the marriage and is untitled, then it's likely to be deemed marital property and should go to you unless Bob said something specific about it towards the end of his and life and you all agree to honor his spoken wishes." *Id.* Jill did not inform Hillier that she had already applied to transfer title to the three vehicles titled solely in Robert's name to herself. Tr. Transcr. vol. 1, 128:6-9.

63. Jill testified that Robert never mentioned to her that he felt like he needed to take care of any of his siblings when he passed away. Tr. Transcr. vol. 1, 141:21-24. Before Robert died, Jill testified that she had a very close relationship with Barbara. *Id.* 142:4-17. Jill says she noticed Barbara was exhibiting signs of dementia anywhere from a year to 18 months before Robert died. *Id.* After Robert died, Jill testified that she continued to visit Barbara on a weekly basis. *Id.* 144:24-145:3. Jill stopped visiting Barbara in January 2018 after Jill received a demand letter from Barbara's attorney regarding the Account. *Id.* 145:19-146:1.

64. Jill testified that Barbara continued to reach out to her by phone even after Jill stopped visiting on a weekly basis. *Id.* 146:18-23.

65. Jill testified that she began reconciling Robert's bank accounts early in their relationship. *Id.* 147:9-148:6. Jill could not remember exact balances of Robert's accounts, but she says there was never much money in the Account because Robert had a lot of expenses. *Id.* 151:1-8.

66. Jill testified that she set up Robert's online banking for the Account and had the log in information for the Account from the beginning. Tr. Transcr. vol. 1, 153:22-154:13. Jill testified that she would set up automatic payments for utilities and other bills from the Account. *Id.*

67. Jill testified that while Robert would use online banking for the Account, to Jill's knowledge he never set up an automatic payment or created a new payee. *Id.* 156:16-157:5.

68. According to the warranty deed, Robert and Jill acquired the New Holland home in November 2006 as joint tenants with a right of survivorship. Ex. P. Robert and Jill sold the New Holland home in March 2017. Ex. Q. According to Jill, the New Holland home sold for \$378,000 and Robert and Jill's net proceeds from the sale were approximately \$206,000. Tr. Transcr. vol. 1, 162:17-20.

69. Robert paid the mortgage payments on the New Holland home from Robert's Account. Tr. Transcr. vol. 1, 160: 23-25, 161: 1-3.

70. Jill testified that she retrieved the check for the net proceeds of the sale of the New Holland home and took it directly to BSWB to deposit into the Account because she did not want to carry around a check of that sum. Tr. Transcr. vol. 1, 165:23-166:3. Jill testified she did not intend to gift Robert the proceeds from the sale of the home when she deposited the check in the Account. *Id.* 167:1-4. Jill chose not to deposit the home sale proceeds in the joint line of credit

she shared with Robert at BSWB because the credit line was only for the purchase of the skid steer in June 2016 and it was paid off in July 2016. *Id.* 170:5-171:2.

71. Robert was, originally, the sole owner of the real property at 83 Red Rock Court where the Red Rock home was eventually constructed. Tr. Transcr. vol. 1, 208:4-18; Ex. T. Robert began construction on the Red Rock home in November 2014. *Id.* On December 10, 2014, Robert executed a quit claim deed to himself and Jill as joint tenants. Ex. T. Jill testified that the property at 83 Red Rock Court was a vacant lot when she became an owner and construction of the Red Rock home was funded through a joint construction loan from BSWB in both her and Robert's name. Tr. Transcr. vol. 1, 168:6-169:5.

72. Rodney testified that he had a very close relationship with his father, Robert. Tr. Transcr. vol. 2, 7:20-8:19. They always lived close to one another and celebrated holidays together. *Id.*

73. Rodney also has a very close relationship with his Aunt Barbara, Robert's sister. Tr. Transcr. vol. 2, 8:20-10:4.

74. Rodney testified that Jill was Robert's third wife and Rodney's relationship with Jill was a little "strange" in the beginning, but he never really had a problem with Jill until recently when Jill disputed the distribution of Robert's estate. Tr. Transcr. vol. 2, 10:5-11:14. Despite the recent conflict with Jill, Rodney testified that he had no feelings that would cause him to be untruthful in his testimony. *Id.*

75. Robert named Rodney the personal representative for his estate in his 2014 Will. Tr. Transc. vol. 2, 11:25-12:17. In 2015, Robert called Rodney to tell Rodney that he would be the personal representative when Robert and Jill were driving to Seattle for cancer treatment of Robert's stem cell treatment. *Id.*

76. In February 2017, Robert could not remember the combination to his safe so he contacted Rodney. Tr. Transcr. vol. 2, 14:22-15:5. Rodney went over to Robert's home the next day to work through opening the safe. *Id.* During this visit, Robert reminded Rodney that Rodney was the personal representative of his estate and told Rodney that everything that he would need was on the top shelf of Robert's safe. *Id.* 28:9-13. That day, Rodney was able to open the Browning gun safe for Robert and learned the combination. *Id.* 16:7-19:8. Rodney testified that Robert's safe contained rifles, pistols, important documents, and possibly any junk gold and silver, gold certificates, gold coins, or gold bars that Robert had purchased. *Id.*

77. Rodney testified that he went to see Robert on March 14, 2017. Tr. Transcr. vol. 2, 19:9-20:24. Rodney initially went over just to chat with Robert, but eventually Robert began telling Rodney, Jill, and Scott what to do with his estate. *Id.* Rodney remembered that Robert was not very cheery at this meeting. *Id.* 22:20-23:9. Although Robert was slow, weak, worn down, and tired from his cancer treatment, Robert was still able to move around at that time and he did not appear confused on March 14, 2017. *Id.*

78. According to Rodney, Robert did not have much money until the latter part of his life when he developed a subdivision which substantially increased his income. Tr. Transcr. vol. 2, 22:4-13.

79. Rodney identified Barbara's Exhibit 12S as a proposal he wrote, after Robert died, to hopefully settle Robert's estate. Tr. Transcr. vol. 2, 21:2-23; Ex. 12S. Exhibit 12S was admitted. *Id.* Under the proposal Jill would retain possession of the 2013 Can Am, the 2002 Triumph motorcycle, and the 2005 Dodge Ram. Ex. 12S. When Rodney wrote the proposal on May 21, 2017, he did not know that Jill had already transferred the titles for those vehicles into her name. Tr. Transcr. vol. 2, 79:19-81:12. Rodney only discovered that Jill had transferred the titles when

he called the DMV and got copies of the title work Jill had completed on the estate vehicles. *Id.* Rodney subsequently learned that Jill sold the Can Am and the Triumph motorcycle, but Jill unwilling to disclose those amounts. *Id.*

80. With respect to the cash Robert said Jill should receive for transition and continuation of lifestyle, Rodney assumed it would have been in Robert's safe. Tr. Transcr. vol. 2, 23:22-25:11; Ex. 12S. Rodney testified that Robert did not specifically say what or where the cash was, but if Robert was referring to the funds in the Account he would have said so. *Id.* Robert did not mention a bank account or discuss the sale, or the resulting proceeds from the sale of, the jointly-owned home on New Holland. *Id.* Robert's renters at the bunkhouse always paid Robert in cash. Tr. Transcr. vol. 2, 25:25-26:14.

81. When Rodney went to Robert's house to retrieve some items of personal property shortly after Robert's death, Robert's safe was already open. Tr. Transcr. vol. 2, 26:15-29:14. Even though Robert told Rodney that Rodney was the only other person with the combination, Jill had opened the safe. *Id.* Rodney did not find any important documents on the top shelf where Robert said they would be. *Id.* Rodney was surprised he did not find any paperwork, cash, gold, or currency in the safe other than a small thing of silver quarters. *Id.* Because Robert's Will referenced a letter bequeathing his personal property, Rodney believed such a letter existed and would have been in the safe but it was never located. *Id.* 48:16-21; 49:6-21.

82. About a week after this visit, Rodney questioned where all of Robert's antique silver dollars were because they were not in the safe. Tr. Transcr. vol. 2, 29:25-30:19. Jill eventually produced the antique silver dollars. *Id.*

83. Rodney held medical power of attorney for Robert. Tr. Transcr. vol. 2, 30:20-32:3.

During Robert's last hospital stay prior to his death, Rodney ultimately had to make the decision to pursue palliative therapy to put Robert out of his misery. *Id.*

84. When Rodney went to visit Robert in the hospital on March 23, 2017, two days before his death, Robert was unable to talk and his legs were very swollen. Tr. Transcr. vol. 2, 32:21-34:11. Rodney observed that Robert's speech was very mumbled and weak and he was struggling to talk, breath, move, or do anything. *Id.* Rodney did get a couple thumbs up from Robert and a fist bump before he left the hospital on March 23, 2017. *Id.*

85. Rodney testified that he received a call from Scott who was at the hospital with Robert very early in the morning on March 25, 2017. Tr. Transcr. vol. 2, 34:15-37:22. Based on Scott's report about Robert's condition, Rodney went to the hospital to see Robert that morning around 8:30-9:00 a.m. *Id.* When he arrived, Rodney noticed that Robert's breathing was very labored, Robert was unable to communicate, and the swelling in his legs was worse than before. *Id.* Rodney described Robert's breathing at this point as panting and explained that Robert was not saying much and what he was saying was unintelligible. *Id.* Rodney testified that Jill was also in Robert's hospital room that morning. *Id.* Rodney spoke to her about the work he and Scott were doing at the farm. *Id.* Rodney stayed for about 20-30 minutes and Robert did not acknowledge Rodney's presence. *Id.*

86. When Rodney's mother visited Robert later that morning, Robert's condition had significantly deteriorated and they discovered he had pneumonia around noon on March 25, 2017. Tr. Transcr. vol. 2, 38:1-40:18. Around 2:30 or 3 p.m., Scott received a call from Jill that they needed to get to the hospital because Robert was getting much worse. *Id.* Scott and Rodney left the farm out on Huffine around 2:30 or 3 p.m. and arrived at the hospital about 15-20

minutes later. *Id.* When Rodney got to Robert's ICU room that afternoon, Robert's breathing had become more labored, he was writhing in pain, and he was non-communicative. *Id.*

87. Other family members started showing up to see Robert between 3:00 p.m. and 4:00 p.m., including Barbara. Tr. Transcr. vol. 2, 40:19-42:1. Barbara was already at the hospital having a procedure done and she came to visit Robert's room from her own room in patient care. *Id.*

88. Rodney remembers talking with Robert's doctors around 5:00 or 6:00 p.m. that evening because it was dark outside. Tr. Transcr. vol. 2, 42:3-21. Robert's condition never improved and he passed away a little after 9:30 p.m. that night. *Id.*

89. Rodney did not learn about the Account until early on in the probate of Robert's estate. Tr. Transcr. vol. 2, 42:25-44:2. Jill sought reimbursement for some expenses and Rodney asked her to provide bank records and receipts. *Id.* Jill then provided statements from the Account at BSWB that showed the transfers to Jill. *Id.* At this time, Rodney discovered that Barbara was named as the POD beneficiary on the Account. *Id.* Rodney called BSWB to figure out what happened with the money transferred out of the Account. *Id.* During his lifetime, Robert never asked Rodney to transfer money out of the Account to Jill. *Id.* 45:14-18.

90. Rodney had no personal knowledge that Robert had done anything to take care of Barbara after his death until Rodney discovered Robert named Barbara as the POD beneficiary for the Account. Tr. Transcr. vol. 2, 59:20-60:2.

91. When asked whether he had any personal knowledge of whether Robert instructed Jill to transfer the funds in the Account to herself the day Robert died, Rodney testified that Robert was not able to speak on March 25, 2017. Tr. Transcr. vol. 2, 61:3-62:6.

92. Rodney acknowledged that the Northwestern Energy bill for Robert's shop was an estate expense for which the estate reimbursed Jill. Tr. Transcr. vol. 2, 70:4-7.

93. Rodney testified that he figured since Jill stole the 2002 Triumph motorcycle and 2013 Can Am, she might as well keep the proceeds from the sale of those vehicles in settling Robert's estate. Tr. Transcr. vol. 2, 70:19-25.

94. As personal representative, Rodney, through counsel, filed an inventory and appraisal of the estate property in February 2018. Ex. 12C. Under section 3, line 3 the inventory and appraisal lists zero gold and silver bars or coins with two asterisks. *Id.* The asterisks are explained as items that are missing but known to have been purchased. *Id.* Rodney explained that Robert's bank statements indicated that he made several purchases from a coin shop for a couple hundred dollars at a time. Tr. Transcr. vol. 2, 85:3-86:4.

95. Scott testified that he had a very close relationship with his father, Robert, and that Robert was his best friend. Tr. Transcr. vol. 2, 90:23-92:14. Scott regularly confided in Robert, saw Robert as much as he could, and spoke to Robert on a daily basis. *Id.* There was a brief period in 2013 where Scott was unable to communicate as frequently with Robert because Jill was in a "tiff" with Scott's family. *Id.* Scott knew Jill was important to Robert, so Scott just "swallowed everything to go be with my dad." *Id.*

96. Scott testified he had a very close relationship with his Aunt Barbara and Scott observed that Robert and Barbara also had a very close relationship. Tr. Transcr. vol. 2, 93:7-94:6. Scott testified that Robert and Barbara always confided in one another and they spent a lot of time together. *Id.*

97. Scott testified that his relationship with Jill was not bad until 2013. Tr. Transcr. vol. 2, 95:12-96:10. At that time, Jill did not want Scott anywhere near Robert, but Robert would still

meet Scott at the shop or go over to Scott's house so he could see Scott and his family. *Id.* Scott testified that he tells the truth and nothing about his feelings towards Jill would impact the truthfulness of his testimony. *Id.*

98. Scott testified that in 2008, Robert started "prepping for the revolution" by buying ammo, gold, and silver. Robert was still "prepping" up until his death in March 2017. Tr. Transcr. vol. 2, 96:21-97:2; 98:23-99:25.

99. According to Scott, Robert did all kinds of stuff for income including driving truck, partnering in a development, and renting the bunkhouse. Tr. Transcr. vol. 2, 100:1-101:20. The tenants in the bunkhouse always paid the rent to Robert in cash. *Id.*

100. As Barbara was getting older, Robert expressed to Scott that Robert intended to take care of Barbara so that she could either stay in her own home or go to an assisted living facility. Tr. Transcr. vol. 2, 101:21-103:14. Robert did not want Barbara to end up in the county rest home. *Id.*

101. With respect to Robert's safe, Scott testified that Robert always kept it locked and Scott knew the contents of the safe because Scott would borrow a gun from Robert every hunting season. Tr. Transcr. vol. 2, 103:19-105:9. Scott noted that Robert's safe was full with guns and ammo and the top shelf of the safe had papers on it. *Id.*

102. Scott testified that Robert did not think it was fair that when Robert's parents died, Robert and his two brothers received the ranch property out on Huffine while Robert's four sisters ended up splitting money that was in a safety deposit box. Tr. Transcr. vol. 2, 106:24-108:10.

103. In early March 2017, Robert explained to Scott that the doctors said that he had no more than three months left to live. Tr. Transcr. vol. 2, 105:10-19; 110:18-112:12. Robert called Scott

to come to the house for a meeting on March 14, 2017. *Id.* Scott testified that, on March 14, 2017, Robert appeared physically worn down and he was preparing for the end of his life. *Id.* Scott testified that the cash Robert referred to at the meeting on March 14, 2017 was the cash rent payments from the bunkhouse tenants. *Id.* 112:13-114:3. Robert did not mention the Account and Scott testified that Robert would say what he meant so if “cash” referred to a bank account Robert would have said so. *Id.*

104. When Scott visited Robert in the hospital on March 22, 2017, Scott noticed Robert was having difficulty getting out of bed and walking. Tr. Transcr. vol. 2, 115:13-117:3. That evening, Scott helped Robert out of bed, held the pee bottle for him, and got Robert back into bed at 9:41 p.m. *Id.* When Robert got back in bed, he asked Scott what was on the clock and when Scott explained it was just a clock, Robert said it looked like feathers. *Id.* Scott knew at this point that Robert was slipping. *Id.*

105. When Scott visited Robert on March 23, 2017, Robert’s condition had deteriorated from the prior day. Tr. Transcr. vol. 2, 117:23-118:5. Scott noted that Robert was mumbling and his legs were more swollen which indicated that Robert’s kidneys were shutting down. *Id.*

106. Robert had continued to deteriorate when Scott visited him on March 24, 2017. Tr. Transcr. vol. 2, 118:11-120:8. Scott tried conversing with Robert, but that visit was the last time Scott was able to have a conversation with Robert. *Id.*

107. Scott went back to the hospital to visit Robert around 7:30 or 8:00 a.m. on March 25, 2017. Tr. Transcr. vol. 2, 120:11-121:9. Scott observed that Robert was lying in bed comatose, his breathing was labored, and he was panting and grimacing in obvious pain. *Id.* Robert did not acknowledge that Scott was in the room and Robert was making mumbling noises but he was unable to speak any clear words. *Id.* 123:1-25.

108. Scott testified that Jill was also in Robert's hospital room in the morning on March 25, 2017. Tr. Transcr. vol. 2, 124:1-126:12. Scott told Jill that Robert needed pain medication and Jill did not want Robert to have narcotics because he could not function. *Id.* Scott explained to Jill that Robert could not function now anyway. *Id.* Scott testified that this conversation with Jill was actually a big argument, it was yelling and cussing, and Scott was wound up because his father was dying. *Id.* Scott insisted that Robert needed pain medicine, he needed to be made comfortable and he should have some dignity. *Id.* Scott said this argument with Jill took place around 8:30 or 9:00 a.m. on March 25, 2017. *Id.* After the argument with Jill, Scott left and called Rodney to tell him he should get to the hospital because it was not looking good. *Id.* 126:16-21.

109. Scott's mother and Barbara visited Robert later in the morning on March 25, 2017 around 10:00-11:00 a.m. and Jill told Scott's mother that Robert had pneumonia. Tr. Transcr. vol. 2, 127:10-128:4. Jill did not want to tell Scott and Rodney that Robert had pneumonia, but Scott's mother and Barbara told Jill she needed to tell them. *Id.*

110. Scott testified that he received a call from Jill later that day around 3:00-4:00 p.m. and she said that Scott and Rodney should get up to the hospital. Tr. Transcr. vol. 2, 128:23-129:11. Scott and Rodney left the property on Huffine immediately after Jill's call. *Id.*

111. When Scott and Rodney got to the hospital, Robert was worse than he had been that morning and was gasping for air. Tr. Transcr. vol. 2, 129:12-130:24. Barbara was also there to see Robert and when Scott walked her back to her hospital room she indicated that she did not think Robert was going to make it. *Id.* Robert died around 9:30 p.m. that evening. *Id.*

112. When asked whether he had any personal knowledge of whether Robert instructed Jill to transfer funds from the Account to herself on the day he died, Scott testified that there was no possible way since Robert could not speak. Tr. Transcr. vol. 2, 135:6-11.

113. Hillier has been an attorney in Bozeman for 32 years. Tr. Transcr. vol. 2, 143:8-144:17. Hillier testified that he first met Robert in the 1990s and he represented Robert in his divorce from his second spouse. *Id.* Hillier continued to represent Robert and in 2006, Hillier did some estate planning work and drafted a Will for Robert. *Id.* Robert named Barbara as the personal representative for his estate in the 2006 Will Hillier drafted. *Id.*

114. Hillier observed that Robert's financial condition substantially improved later in life when Robert developed the property on Huffine he inherited from his family. Tr. Transcr. vol. 2, 145:6-17.

115. Hillier drafted a new Will for Robert in 2014 naming Rodney as the personal representative instead of Barbara. Tr. Transcr. vol. 2, 145:18-146:15. Hillier got the impression after discussions with Robert that Robert had taken care of Barbara elsewhere since she was not named as a beneficiary in Robert's Will. *Id.*

116. Hillier explained that Rodney's proposal letter dated May 21, 2017 would only work to probate Robert's estate if Jill, Rodney, and Scott all agreed. Tr. Transcr. vol. 2, 148:14-150:12; Ex. 12S. Hillier also explained this to Jill in the emails they exchanged in April and May 2017. *Id.*

117. Sometime after May 21, 2017, Hillier learned that Jill had transferred title to the three vehicles titled solely in Robert's name to herself. Tr. Transcr. vol. 2, 150:13-152:16. Hillier requested information from Jill and her counsel regarding these vehicles, but Hillier ultimately learned Jill had transferred the titles when Rodney produced the information he obtained from

the State. *Id.* Hillier testified that he learned Jill had sold the vehicles when he took her deposition on May 23, 2019. *Id.* Hillier learned that Jill had sold the 2002 Triumph motorcycle from the individual who purchased after Hillier contacted the buyer directly. *Id.* 153:1-10. Hillier's recollection was refreshed and he acknowledged that he learned Jill sold the vehicles at the November 20, 2018 preliminary injunction hearing. *Id.* 165:19-166:23.

118. Hillier learned of the Account after receiving BSWB statements from Jill's counsel within six months of Robert's death. Tr. Transcr. vol. 2, 153:13-24. Hillier later acknowledged that the Account records were provided on June 29, 2017. *Id.* 162:22-24.

119. Hillier identified Barbara's Exhibit 9H1 as the letter he sent to Barbara on January 3, 2018 with the Account records attached. Tr. Transcr. vol. 2, 155:3-156:3; Ex. 9H1. Exhibit 9H1 was admitted. *Id.* Hillier explained that he wrote this letter to Barbara because she was the named POD beneficiary on the Account. Tr. Transcr. vol. 2, 156:7-23. Hillier testified that the Account was a nonprobate asset because the payable on death designation means that the funds in the Account go to the named beneficiary on Robert's death. *Id.*

120. When Hillier revised Robert's Will in 2014, Hillier also did a new power of attorney for Robert naming Rodney as the healthcare power of attorney. Tr. Transcr. vol. 2, 157:25-158:9.

121. Hillier was not surprised Robert had named Barbara the POD beneficiary on the Account, but he was surprised that he had not learned of it earlier since there was a substantial amount of money in the Account, over a quarter of a million dollars. Tr. Transcr. vol. 2, 158:10-159:14. Based on his discussions with Robert and the work he did for Robert, Hillier believed that Robert felt Barbara got the short end of the stick with respect to the family property and so Robert told Hillier he took care of Barbara elsewhere. *Id.*

122. Terry Jensen (“Terry”) testified that his mother, Barbara, named him as her power of attorney and he filed this lawsuit on Barbara’s behalf. Tr. Transcr. vol. 2, 174:4-9. Terry testified that to his knowledge Robert did not give Barbara any cash gifts of more than \$500 and Barbara did not expect to receive any money from Robert when he died. *Id.* 177:23-178:3. Terry testified that Barbara was very surprised to learn she was named the POD beneficiary on the Account. *Id.* 179:3-5.

123. Terry described the relationship between Robert and Barbara as very close. Tr. Transcr. vol. 2, 185:11-186:12. Barbara and Robert talked daily and Robert would often come pick Barbara up to take a ride in his truck and visit various places in Montana together. *Id.* Robert’s relationship with Barbara was different than Robert’s relationship with his other siblings because the other siblings grew up and moved away from Bozeman. *Id.* Robert and Barbara were closer than the other siblings. *Id.*

124. In 2017, Terry began noticing that Barbara was unable to keep track of Terry’s bills while he was away for work and Barbara started to need help with her balancing her own checkbook. Tr. Transcr. vol. 2, 187:4-188:3. Barbara’s mental condition has continued to decline to date. *Id.*

125. Barbara asserts that, upon Robert’s death, Barbara as the named POD beneficiary for the Account had a right of ownership and possession to the funds in the Account. Barbara asserts that Jill exerted unauthorized control of the funds in the Account when Jill electronically accessed the Account and transferred money to herself after Robert’s death. Barbara alleges that she suffered damages as a result of Jill’s actions.

126. Barbara further asserts that Jill has repeatedly claimed that she had authority and approval from Robert to access the Account and transfer \$254,000.00 to herself. Barbara asserts that Jill made these representations to induce Barbara to alter her position to her detriment or

injury. Jill had not reasonable basis to believe she had authority or approval to transfer funds from the Account to herself. Barbara asserts that she relied on Jill's representations and suffered damage as a result.

127. In response to Barbara, Jill asserts that the majority of the assets in the Account were from the sale of the jointly held marital home and that Robert held the proceeds from the sale of the home (approximately \$206,000) in trust for Jill in the Account. Jill asserts she had Robert's authority and approval to access the Account to complete the transfers totaling \$254,000.00

128. Alternatively, Jill asserts Robert gifted the funds in the Account to Jill before his death and Barbara would be unjustly enriched if the funds were distributed to Barbara.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Any Conclusions of Law contained in the foregoing Findings of Fact are incorporated herein by reference.
2. Pursuant to Mont. Code Ann. § 3-5-302(1)(b), this Court has jurisdiction over this matter. Pursuant to Mont. Code Ann. §§ 25-2-121 and 122, the Eighteenth Judicial District Court is the proper venue for this matter.
3. A party claiming conversion must establish four elements: (1) property ownership by the claiming party; (2) the claiming party's right of possession of the property; (3) defendant's unauthorized control over the property; and (4) damages. *Feller v. First Interstate Bancsystem, Inc.*, 2013 MT 90, ¶ 26, 369 Mont. 444, 299 P.3d 338.
4. For purposes of a conversion claim, "property ownership" does not mean the claiming party must have absolute or unqualified title to the property, but that the party has an interest in

the property and the right to possess the property at the time of conversion. *St. Peter & Warren, P.C. v. Purdom*, 2006 MT 172, ¶ 19, 333 Mont. 9, 140 P.3d 478.

5. “A distinct act of dominion exerted over one’s property in denial of, or inconsistent with, the owner’s right” is conversion. *Feller*, ¶ 26.

6. The Account at issue in this case is a single-party checking account with a pay-on-death (“POD”) designation and is governed by Title 72, Chapter 6, Part 2 of the Mont. Code Ann. Mont. Code Ann. § 72-6-203(2).

7. The Account is a contract of deposit between Robert, as the Account owner, and BSWB, as the financial institution. Mont. Code Ann. § 72-6-201.

8. The Account contained a POD designation naming Barbara as the sole beneficiary. This POD designation on the Account is a nontestamentary transfer that is not subject to probate. Mont. Code Ann. § 72-6-111. The sole purpose of Mont. Code Ann. § 72-6-111 is to prevent the described transfers from being treated as testamentary. *Darty v. Grauman*, 2018 MT 129, ¶ 9, 391 Mont. 393, 419 P.3d 116; *In the Estate of Lahren*, 268 Mont. 284, 290, 886 P.2d 412, 416 (1994).

9. Valid nontestamentary transfers are unaffected by testamentary documents. *Darty*, ¶ 9.

10. When an account contains a POD designation, the sums on deposit in the account belong to the surviving beneficiary on the account owner’s death. Mont. Code Ann. § 72-6-212(2). A right of survivorship arising from a POD designation may not be altered by Will. Mont. Code Ann. § 72-6-213(4).

11. An account owner can only stop or vary payment of a POD designation by providing the bank with a signed, written notice during the account owner’s lifetime. Mont. Code Ann. § 72-6-

213(2). Robert did not provide any written notice to BSWB changing the POD beneficiary for the Account during his lifetime.

12. An account owner may designate, in writing, an agent or individual with power of attorney to make transactions on the account owner's behalf, but such individuals have no ownership or rights at death unless named as a POD beneficiary. Mont. Code Ann. § 72-6-205(1); Ex. 10, p. 4. An agent has no beneficial right to the sums on deposit in an account. Mont. Code Ann. § 72-6-211(4). Robert did not designate, in writing, an agent or individual with power of attorney to make transactions on his behalf. To the extent Jill was authorized to electronically access the Account, such authorization did not give Jill any beneficial right to the sums on deposit and terminated on Robert's death between 9:00 p.m. and 10:00 p.m. on March 25, 2017. *Id.*

13. A joint interest or joint tenancy is one owned by several persons in equal shares by a title created by a single Will or transfer, when expressly declared in the Will or transfer to be a joint tenancy or when granted or devised to executors or trustees as joint tenants. Mont. Code Ann. § 70-1-307. In the absence of an express and unambiguous declaration, no joint tenancy or joint interest was created in the sums on deposit in the Account. *Estate of Lahren*, 268 Mont. at 287, 886 P.2d at 414.

14. Although the proceeds from the sale of Robert and Jill's jointly-owned New Holland home are held in joint tenancy pursuant to a contract, Robert and Jill were not limited in the manner in which they dispose of the proceeds. *Estate of Lettengarver*, 249 Mont. 92, 96, 813 P.2d 468, 471 (1991). Jill could have deposited the home sale proceeds into the joint line of credit she shared with Robert at BSWB. Instead, Jill chose to deposit the home sale proceeds into Robert's single-party checking account. Jill signed the check and wrote "Pay to the order of

Robert Brenden” below her endorsement. On deposit, the contract between Robert and BSWB for the Account severed Jill’s interest in the funds.

15. Where ownership of an asset is held by one party but funds are contributed by the owner’s spouse, there is no resulting trust in favor of the spouse. Mont. Code Ann. § 72-38-122. In such cases, the funds deposited are presumed to be a gift to the sole owner and that presumption can only be overcome by clear and convincing evidence. *Estate of Lettengarver*, 249 Mont. at 96, 813 P.2d at 471.

16. To establish a trust in favor of the surviving spouse and overcome the presumption of a gift, the evidence must be “satisfactory and practically free from doubt.” *Lewis v. Bowman*, 113 Mont. 168, 77-78, 121 P.2d 162, 176 (1942). This requirement is particularly applicable where the surviving spouse’s claim relies largely on her own testimony about her conversations with her deceased husband who can no longer speak for himself. *Id.*

17. In *Lettengarver*, the surviving spouse failed to present the required clear and convincing evidence necessary to rebut the presumption of a gift. *Estate of Lettengarver*, 249 Mont. at 96, 813 P. 2d at 471. The surviving spouse testified that he allowed the decedent to put title to the home in her name to avoid a fight. He further testified that the decedent agreed to grant him a life estate in the home and both spouses had contributed to the utilities, bills and household repairs. *Id.*

18. Montana law presumes that Jill gave Robert her portion of the home sale proceeds as a gift when she deposited the funds in Robert’s Account. Jill has not presented clear and convincing evidence to rebut this presumption. Jill’s testimony is not satisfactory or free from doubt. Jill’s memory was vague as to facts, timing and recall of persons on the day Robert died. Jill chose to not present evidence on the facts and timing of her transfer from Robert’s Account

to herself. Exhibit O demonstrates that death day “gift” was not a litigation theory until after November of 2017. Barbara presented her demand letter in January of 2018.

19. At any time before an account owner’s death, the account owner can change the POD beneficiary or withdraw or use the funds for any reason. *Estate of Lahren*, 268 Mont. at 288, 886 P.2d at 414.

20. Before his death, Robert took no action to change the POD beneficiary for the Account and did not withdraw or transfer the funds in the Account to Jill. Jill’s testimony about her oral conversations with Robert on the day he died is the only evidence supporting Jill’s contention that Robert intended to transfer the funds in the Account to Jill. Jill’s testimony is directly contradicted by the Account’s POD designation, BSWB’s electronic banking records for the Account, the inventory of the estate assets, the hospital records, and the testimony of Hillier, Scott, and Rodney.

21. Before the day of his death, Robert never authorized Jill to take funds from his Account and transfer them to herself. Jill may have been authorized to set up automatic payments or authorized other vendors to the Account. Jill was never a vendor on the Account before the day Robert died. Jill alleges Robert issued that authorization on the day of his death. The Court does not conclude from the evidence that Robert was physically able to make such an authorization on the day of his death in light of the witness testimony about his condition and the hospital records.

22. Jill claims that the Account was the only source of cash Robert possessed and she was entitled to it based on Robert’s verbal wishes expressed at the meeting on March 14, 2017. The Court does not conclude from the evidence that Robert authorized that transfer. Robert did not specifically reference the Account at the meeting on March 14, 2017. Robert did not state that Jill should receive the sums in the Account as a gift, that he intended to transfer any of the funds

in the Account to Jill, Robert did not mention the proceeds from the sale of the New Holland home to anyone, including Jill. Robert did not inform Barbara, as the POD beneficiary, that Jill should receive the funds in the Account on his death. Directly contradicting Jill's testimony, Rodney, Scott and Hillier testified that the funds in the Account were not the only cash that Robert possessed when died. Hillier further testified that Robert intended Barbara to receive the funds in the Account because Barbara had been left out of their parents' Will and Robert wanted to take care of her.

23. Despite having over two weeks to do so, Robert did not transfer any part of the home sale proceeds in the Account to Jill. Even if Robert authorized Jill to access the Account and transfer \$254,000.00 to herself, the transfers were not initiated until after Robert's death according to the records from BSWB. The amount of \$254,000 exceeds the total home sale proceeds of \$206,000. Jill electronically accessed the Account and initiated another transfer to herself nearly a month after Robert's death. Any authorization Jill had to access the Account terminated on Robert's death.

24. Jill's testimony that Robert was able to communicate on March 25, 2017 and authorize Jill to remove funds from the Account is directly contradicted by the testimony of Rodney and Scott. Rodney and Scott have nothing to gain from the present litigation. The Court concludes Rodney and Scott are more credible in describing Robert's ability to communicate on the day of his death.

25. In addition to testimony from Rodney and Scott, the hospital records directly contradict Jill's testimony that Robert was able to communicate on March 25, 2017. Exhibit 14 first page numbered 154 shows Robert was falling asleep during a conversation with the doctor on March 24, 2017, the day before his death. The conflicting evidence demonstrates that Robert was unable

to communicate on March 25, 2017. Exhibit 14 page number 173 shows that during the morning of March 25, 2017, Robert was oriented by 2: he knew who he was and where he was (person and place). The record specifically excludes the other two orientations of time and situation. This evidence supports the conclusion that Robert was unable to grant Jill authority to take funds from the Account on March 25, 2017.

26. Barbara's ownership right to the sums in the Account as the POD beneficiary is subject to requests for payment by a party only where such request is made before the account owner's death. Mont. Code Ann. § 72-6-212(4). The bank records show the five secret challenge questions were answered hours after Robert's death.

27. Even where there is evidence that an account owner intended to transfer the proceeds of an account elsewhere, the sums on deposit in a POD account must be transferred to the designated beneficiary on the account owner's death. *Darty*, ¶ 13.

28. Jill was not a valid vendor entitled to payment from the Account. The uncontradicted evidence showed that Jill had never transferred funds from Robert's Account to Jill prior to the day Robert died. The banking records showed the five security questions were not answered until after Robert died. The bank official testified that without the entry of those security questions, a transfer would not proceed. Jill could not remember when or how many times she logged into Robert's Account before the transfers went through. Jill was in possession of Robert's phone, if the authorization codes were sent by text, and Jill was in possession of the joint computer if the authorization codes were sent by email. Jill chose not to secure and produce that information in this action. Jill chose not to testify as to when she learned the Account was pay on death to Barbara. Jill's account of Robert's health on the day of his death is suspect.

29. The Court concludes that Barbara established the elements of her conversion claim. On Robert's death, the sums on deposit in the Account (\$255,564.43) belonged to Barbara and Barbara had a right to possess the same. Jill exerted unauthorized control over the sums on deposit in the Account when she electronically accessed the Account hours after Robert's death and transferred \$254,000.00 to herself. Jill again exerted unauthorized control over the sums on deposit in the Account when she electronically accessed the Account on April 20, 2017 and transferred \$424.88 to herself. As a result of Jill's conduct, Barbara suffered damage in the amount of \$254,424.88.

30. Barbara agrees that she is seeking the funds held by the Court and not the amount that she was damaged by Jill's taking of funds from the Account.

31. The Court further concludes that Jill severed her joint interest in the New Holland home sale proceeds by signing the check over to Robert when she wrote "pay to the order of Robert Brenden" and deposited the check in Robert's Account. Jill has not presented clear and convincing evidence establishing that the home sale proceeds were held in trust in the Account. Robert had days after the deposit, in which he was able to transfer the funds to Jill. Robert paid the mortgage on the New Holland home and he chose not to transfer the Account funds or any portion of the home sale proceeds to Jill during his life time. On March 14, 2017, when Jill, Rodney and Scott were present with Robert, Robert chose not to speak of the Account or direct his Power of Attorney Rodney to transfer the funds to Jill. Furthermore, Jill received substantially more than the value of her share of the home sale proceeds from Robert's estate.

32. The doctrine of unjust enrichment only applies where no express contract determines ownership of the property at issue. *Welu v. Twin Hearts Smiling Horses, Inc.*, 2016 MT 347, ¶¶ 33, 36-44, 386 Mont. 98, 386 P.3d 937. When an express contract exists, a party claiming unjust

enrichment may seek reimbursement for a benefit the claiming party conferred only if the other party has breached the contract. *Id.*

33. By law, Robert's designation of Barbara as the POD beneficiary on the Account constitutes an express contract which precludes Jill's claim for unjust enrichment against Barbara. Both Mont. Code Ann. § 72-6-212(2)(b) and the terms of the Account expressly state that the POD beneficiary, Barbara, owns the sums on deposit in the Account on Robert's death. Jill was not a party on the Account and any benefit Jill conferred under the facts and circumstances here was conferred to Robert when Jill deposited the home sale proceeds in the Account. Given the existence of an express contract and the lack of any benefit which Jill conferred to Barbara, Jill's unjust enrichment claim against Barbara lacks merit.

34. Pursuant to Mont. Code Ann. § 72-6-212(4), a POD beneficiary is only liable to a payee of an unpaid request for payment where the account owner requests such payment prior to the account owner's death. Robert did not make any request to pay Jill and it was Jill, not Robert, who accessed the Account to transfer funds to herself. Regardless of the source of the funds in the Account, any claims Jill may have relating to her share of the home sale proceeds are against Robert, not Barbara.

35. "A gift is a transfer of personal property made voluntarily and without consideration." Mont. Code Ann. § 70-3-101. A gift inter vivos requires (1) donative intent, (2) delivery, and (3) acceptance. *Larson v. Larson*, 2017 MT 299, ¶ 31, 389 Mont. 458, 406 P.3d 925. The elements of a gift must be demonstrated by clear and convincing evidence. *Id.* ¶ 32. "A verbal gift is not valid unless the means of obtaining possession and control of the thing are given or, if it is capable of delivery, unless there is an actual or symbolic delivery of the thing to the donee." Mont. Code Ann. § 70-3-102.

36. The true expert on donative intent for purposes of a gift is the donor. *Delaney v. Delaney*, 195 Mont. 259, 261, 635 P.2d 1306, 1307 (1981). Here, the only evidence of donative intent is Jill's testimony about her oral conversations with Robert on the day he died. Jill's testimony is contradicted by an express contract, the POD designation on the Account. Robert did not make any statements regarding the funds in the Account at the meeting on March 14, 2017 and Robert did not inform anyone else of his intent to gift the funds in the Account to Jill. Even if, as Jill claims, Robert's oral wishes for her to receive cash at the March 14, 2017 meeting referred to the Account, Robert took no further action before his death to transfer the funds in the Account to Jill. Jill has failed to establish donative intent by clear and convincing evidence.

37. The Court concludes that Exhibit 12S, dated May 21, 2017, containing a proposed letter of settlement by Rod to Jill, should be considered in light of the testimony presented. Exhibit 12S was a summary of the March 14, 2017 meeting and the Estate was closed by settlement of the heirs. To the extent Exhibit 12S is relied upon to interpret the term "cash", this Court does not conclude "cash" as described in witness testimony is the same as the "Account". The Court finds credible the testimony that at the time of his death Robert had possession of junk gold and silver, gold certificates, gold coins, or gold bars even though not accounted for within the settlement of the Estate.

38. "Delivery, which manifests the intent of the giver, must turn over dominion and control of the property to the recipient." *Larson*, ¶ 32. The only evidence of delivery is Jill's testimony about Robert's nonverbal conduct providing Jill with the login credentials to electronically access the Account. Jill's testimony is directly contradicted by the fact that Robert had the ability to write a check or otherwise complete delivery of any purported gift of the funds in the Account to Jill prior to his death, but he did not do so.

39. Robert never changed or added Jill as a POD beneficiary on the Account. It was Jill who electronically accessed the Account and BSWB's electronic banking records for the Account show that the transfers to Jill were initiated after Robert's death. Jill has failed to establish delivery by clear and convincing evidence.

40. While Jill certainly accepted the funds from the Account which she transferred to herself, Jill has failed to establish the elements required to constitute a gift by clear and convincing evidence.

41. The law presumes that Jill gifted the home sale proceeds to Robert prior to Robert's death.

42. Jill did not overcome that presumption with clear and convincing evidence and thus, no trust of the funds was created by Robert.

43. Robert did not transfer the home sale funds to Jill prior to his death.

44. Robert did not gift or authorize transfer the funds in the Account to Jill.

45. The law requires the pay on death directive of the Account funds held by the Court to be delivered to Barbara.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court enters the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Judgment is GRANTED in favor of Barbara on her conversion claim against Jill;
2. Judgment is GRANTED in favor of Barbara on her deceit claim against Jill;
3. Jill's unjust enrichment and constructive trust claims against Barbara are DENIED;

4. Jill's affirmative defenses do not bar or limit Barbara's right to recover her damages resulting from the conversion and deceit claims against Jill;
5. Barbara is hereby awarded damages in the amount of \$254,000.00.
6. The Court vacates the preliminary injunction issued herein on November 27, 2018 and direct the Clerk to immediately release the total \$254,000.00 held in the escrow account to Barbara;
7. As the Court is aware that Barbara Jensen has passed away, the Clerk of the Court is hereby directed to disburse said funds to the Estate of Barbara Jensen.
8. For other relief as the Court deems just and proper.

IT IS SO ORDERED.

DATED THIS 11TH DAY OF JANUARY 2024.



Honorable John C. Brown
District Court Judge

CERTIFICATE OF SERVICE

I, Margot Barg Ogburn, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appeal to the following on 02-08-2024:

Todd Robert Hillier (Attorney)
280 W. Kagy Blvd.
Suite D-323
Bozeman MT 59715
Representing: Estate of Barbara Jensen
Service Method: eService

Electronically Signed By: Margot Barg Ogburn
Dated: 02-08-2024