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IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA-23-0647

Lisa L. Swift,

Petitioner/Appellee

vs.

Matthew T. Swift,

Respondent/Appellant

On Appeal from the Eighteenth Judicial District Court, Gallatin County, Cause No. DR-2023-177D, Hon. Judge Andrew Breuner

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Appellant's Reply Brief

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I. THE COURT SHOULD NOT CHANGE THE APPLICABLE STANDARD OF REVIEW.

Appellee Lisa Swift ("Lisa") urges a change in the standard of review, in spite of not even listing that as an issue on appeal. Lisa' Br. 1, 8-24. Some of the argument is difficult to follow. Appellant Matthew Swift ("Matthew") replies as best he can.

A. The parties agree on the actual standard of review.

Lisa devotes many words to the standard of review. At bottom, however, she agrees with Matthew that, under present law, this Court reviews:

- Factual findings of the district court for substantial evidence. *See* Matthew's Br. 13 (*citing Lee v. Lee*, 2000 MT 67, ¶ 20, 299 Mont. 78, 996 P.2d 389); Lisa's Br. 6-7 (*citing Lee*), 17.
- Legal conclusions de novo. *See* Matthew's Br. 13 (*citing Lutes v. Lutes*, 2005 MT 242, ¶ 7, 328 Mont. 490, 121 P.3d 561, which cited *Marriage of Strong*, 2000 MT 178, ¶ 11, 300 Mont. 331, 8 P.3d 763); Lisa's Br. 7 (citing *Marriage of Strong*), 17.

B. Lisa's argument about changing the standard.

Matthew does not fully understand Lisa's argument about the standard of review. With no citation to authority, she states that ancillary orders—those beyond the "lone contempt" ruling and affecting the substantial rights of the

parties—are "used discretionarily to protect the estate." Lisa's Br. 13. She also claims that such ancillary orders "involve a unique and intense blend of both factual elements and legal principles," thus explaining "their tailor-made, coercive sanctions." *Id*. Such decisions, Lisa continues, "rest[] on a razor-thin edge." *Id*. Because, according to Lisa, this "ancillary power" is "necessary to ensure 'respect for the law,'" courts may be "compelled to overlook certain, known facts" and may "[i]nadvertently … compromise" on justice. *Id*. at 14. Lisa expresses concern that the current standard might encourage a litigant to "throw some mud at the wall in hopes some will stick," before unveiling her ask: adoption of the abuse of discretion standard. Lisa's Br. 18-19.

Ultimately, it appears Lisa argues that the policy underlying the contempt power—protecting the district court's authority—requires giving the district court more leeway even on "ancillary orders" than the "substantial evidence" standard allows. She thus advocates in favor of an abuse of discretion standard.

1. *Lisa muddles the standards of review.*

Lisa's entire argument appears to be built upon a fundamental misunderstanding of the applicable standards. It is true that this Court reviews a lower court's distribution of marital property, for instance, for an abuse of discretion. *Richards v. Trusler*, 2015 MT 314, ¶ 12, 381 Mont. 357, 360 P.3d 1126.

But, regarding the underlying factual determinations, the standard is "clearly erroneous," which subsumes within it a "substantial evidence" prong.

> We also review a district court's findings of fact regarding division of marital property, child support, and maintenance awards to ascertain whether they are ***clearly erroneous***. We apply a three-part test to determine if a finding is ***clearly erroneous***. First, the Court will review the record to see if the findings are supported by ***substantial evidence***. Second, if the findings are supported by ***substantial evidence*** we will determine if the trial court has misapprehended the effect of evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended the Court may still find that "A finding is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the [C]ourt with the definite and firm conviction that a mistake has been committed."

Id. (emphasis added, internal citations omitted). Moreover, *Richards* came full circle, concluding the foregoing discussion by explaining that, "If the findings are not clearly erroneous, we will affirm the distribution of property unless the trial court abused its discretion." *Id.*

As can be seen, these standards are not mutually exclusive, but different parts of the whole analysis. Lisa, however, distinguishes between them to set up a straw man that she would knock down and replace with her new standard. Thus, she distinguishes between the "substantial evidence" and "clearly erroneous" standards. *See, e.g.,* Lisa's Br. 7 (contrasting *Lee*, which invoked the "substantial

evidence" test, with *Fouts v. Mont. Eighth Jud. Dist. Ct.*, 2022 MT 9, ¶ 15, 470 Mont. 166, 502 P.3d 689, which mentioned the "clearly erroneous" standard). Lisa thus distinguishes the contempt context "substantial evidence" standard with the "clearly erroneous" standard generally applicable in divorce cases. Lisa's Br. 7. And she continues to treat them as two different standards. *See, e.g.,* Lisa's Br. 14. Yet, she also claims they are nearly indistinguishable. *See, e.g., id.*, at 5 (the standards are "effectively no different," citing *Dickinson v. Zurko*, 527 U.S. 150, 162-163 (1999)), 40 (the two standards are "practically synonymous," citing *Dickinson*).

Likewise, Lisa treats the "abuse of discretion" standard as so incompatible with the "substantial evidence" test that one must yield to the other. *See, e.g.,* Lisa's Br. 4 (abuse of discretion standard applies to review of contempt order on supervisory control), 5 (contrasting that standard with the substantial evidence standard).

In fact, in the dissolution context generally, the trial court's ultimate decision is subject to the abuse of discretion standard while the factual findings are subject to the clearly erroneous standard which, as explained above, includes the substantial evidence test. *See Richards*, *supra*. At times, Lisa's brief seems to recognize that the one standard applies to the decision while the other applies to the underlying factual

findings. *See, e.g.,* Lisa's Br. 15 (stating that the abuse of discretion standard applies to the trial court's ***decision***). And, seemingly as part of her effort to discredit the present analysis, she correctly describes it thus:

> Similarly, this Court may review a contempt order for an abuse of discretion, it may review the facts under the substantial evidence standard, or it may review the legal conclusions de novo should the appeal stem from a denial of contempt.

Lisa's Br. 17.

This Court has not articulated a different standard for direct appeals involving ancillary orders. Thus, *Lee* stated that, on direct appeal of a contempt order in a family law matter, the Court examines "whether the evidence supports the ***findings*** of the court." *Id.*, ¶ 19 (emphasis added). That "substantial evidence" standard applies to the factual findings of the district court on a direct appeal, just as it does on review via certiorari. *Lee*, ¶ 19. This does not conflict with the deference afforded the overall ***decision*** under the abuse of discretion standard.

The problem Lisa perceives, the "pitfall" and "cloudy, unclear road," Lisa's Br. 19, 21, is a made-up problem. No revision to the standard of review is necessary or appropriate.

2. *Lisa's discussion of the standards of other jurisdictions.*

The point of Lisa's discussion of other states' law is unclear. She seems to concede that law is similar to Montana's. Lisa's Br. 19 ("sister states have fallen into the same pitfall, developing jurisprudence closely aligned with Montana's"), 21 (other states' standards of review are "almost synonymous with" *Lee*, yet are "not impervious to imperfection"), 21 (cautioning against "continu[ing] down a cloudy, unclear road like other sister states have").

Regardless, Lisa has stated no compelling reason to undo years of precedent about the relevant standard of review. *See Certain v. Tonn*, 2009 MT 330, ¶ 19, 353 Mont. 21, 220 P.3d 384 ("cardinal doctrine of *stare decisis*" rests on "weighty considerations" dictating that "courts should not lightly overrule past decisions").

3. *Lisa's argument is inconsistent about the distinction between contempt and ancillary orders.*

Lisa seems to suggest that ancillary orders serve a different function than contempt orders and should therefore have a different standard of review. Lisa's Br. 9-12. On the other hand, she also argues that the district court must have the option to resort to ancillary orders to further its contempt powers to enforce compliance with its orders. *See, e.g.,* Lisa's Br. 13 (saying that ancillary orders are not only "used discretionarily to protect the estate," but also that they constitute "tailor-made coercive sanctions"). In fact, she concludes that:

> This unique discretion and ancillary power are necessary to ensure "respect for the law and the orderly progress of relations between family members split by dissolution."

Lisa's Br. 14 (citing *Milanovich v. Milanovich*, 201 Mont. 332, 336, 655 P.2d 963, 965 (1982)). Lisa continues to blend the functions of contempt and ancillary orders, claiming that, "[t]o kill two birds with one stone, the [district] Court used Matthew's discretionary punishment to coordinate the ancillary issues each party was experiencing." Lisa's Br. 4; *see also id.*, at 23 (the "ancillary order itself may be the punishment"), 45 (the district court "used its discretionary punishment to rectify other matters before the court").

At the end of the day, Lisa's argument is unclear. She seems to argue that the ancillary orders are different than the contempt order and so should have a different standard of review. But, she also seems to argue that they are so closely related as to be just different arrows in the same quiver. It is difficult to respond to such an ambiguous argument.

Regardless, nothing about Lisa's argument compels a more deferential standard of review. The "substantial evidence" standard is already very deferential, asking whether "a reasonable mind might accept [the evidence] as adequate." *Lee*, ¶ 20. And that is but part of the very deferential clearly erroneous standard. *See Richards, supra*. That is the appropriate standard under which to

review the district court's factual findings.

4. *Lisa misunderstands the significance of Lee.*

Lisa quotes *Lee*'s "once and for all" language and references its "failure to correct" the standard of review. Lisa's Br. 11-12. The implication is that *Lee* represents some frustration with the standard of review which it then failed to remedy.

In fact, *Lee's* observation that it was time to "properly narrow[]" the "'family law' direct appeal exception … once and for all," *id*, ¶ 34, concerns the situations in which a direct appeal will be allowed, not the standard to be applied once before this Court. *Id*. It was necessary to tightly define the exception because the other avenues for Supreme Court review (certiorari and supervisory control) are "far more efficient" in effectuating the policy expressed in *Milanovich* to "insure respect for the law" in the marital dissolution context.

Nothing about *Lee*, or any other case Lisa cites, suggests that this Court has identified a defect in the standard of review that it must now remedy.

II. MATTHEW AGREES WITH LISA THAT THE DISTRICT COURT ACTED WITHIN ITS JURISDICTION.

Lisa argues extensively that the lower court acted within its jurisdiction. Lisa's Br. 24-39. Matthew agrees. That is not to say, however, that the lower court acted correctly. And it seems that Lisa misunderstands the significance of this part

of the appellate inquiry.

A. Lisa incorrectly attributes to Matthew an argument that the lower court lacked jurisdiction.

Lisa makes an extended effort to convince this Court that the district court acted within its jurisdiction, as if that were contested. In fact, she claims that "Matthew … alleges the court is without jurisdiction …." Lisa's Br. 35. She cites nothing to support that.

Matthew does not argue that the district court acted beyond its jurisdiction. The word "jurisdiction" appears only twice in Matthew's brief; once in the standard of review discussion and once in his argument that the appeal is proper under the "family law exception." Matthew's Br. 13, 16. Nowhere does Matthew argue that the district court acted outside of its jurisdiction.

B. The Court inquires about the lower court's jurisdiction to see if direct appeal—instead of certiorari—is the appropriate avenue for appellate review.

Lisa's brief seems to assume that she must establish that the district court acted within its jurisdiction to convince this Court to affirm. But that is not the relevance of that inquiry. Instead, this Court examines whether the district court acted within its jurisdiction to see whether the case is properly within the family law exception.

This Court may exercise its discretion to review a contempt order via

certiorari. *See Lee*, ¶ 23. But an "indispensable" prerequisite to such review is an "excess of jurisdiction." *Id.* Thus, this Court might be unable to review a "tyrannical" order that, although "arbitrary and unlawful," is within the lower court's jurisdiction. *Lee*, ¶¶ 36-37; *see also In re Marriage of Grounds v. Coward*, 2000 MT 128, ¶¶ 4-6, 300 Mont. 1, 2 P.3d 822 (2000) ("Since a writ of certiorari cannot be used to correct errors within a lower court's jurisdiction, we explained [in *Lee*] that where a court … acts within its jurisdiction in adjudicating ancillary matters between the parties vis-à-vis the contemptuous conduct … the judgment … may not be attacked by writ of certiorari. A writ of certiorari would be barred, under such circumstances, because the lower court did not exceed its jurisdiction in issuing the ancillary order," explaining that the family law exception applies only in this gap); *In re Marriage of Harms*, 2022 MT 41, ¶ 17, 408 Mont. 15, 504 P.3d 1108.

C. That the lower court had jurisdiction merely establishes one element for direct appeal, not that the court did not err.

Acting within its jurisdiction simply means the court had authority to rule on the issue, not that it ruled correctly:

> [T]he lack of jurisdiction must be distinguished from an erroneous decision made by a court in exercising the jurisdiction it possessed. If a court is acting within its jurisdiction, it has the power to decide erroneously as well as correctly.

Lee, ¶ 36 (quoting *Buffalo v. Thiel*, 213 Mont. 280, 284, 691 P.2d 1343, 1345 (1984)).

That the lower court acted within its jurisdiction means only that this case is a candidate for direct appeal, the other condition being that the Order also contained "ancillary orders"—a proposition that Lisa does not dispute. It does not mean that the lower court was correct.

III. ONE CANNOT BE HELD IN CONTEMPT UNLESS THE ORDER IS CLEAR, THE ALLEGED CONTEMNOR KNOWS OF THE ORDER, AND THE STATEMENT OF THE CHARGE GIVES NOTICE OF THE PARTICULAR CONDUCT ALLEGED TO BE CONTEMPTUOUS.

A. The order must be clear.

Matthew argued that he could "not be held in contempt of court for violating an order, unless the terms of the order are definite, certain, and specific." *See* Matthew's Br. 16-18 (quoting *Sanders v. State*). Lisa does not refute this.

B. The contemnor must know of the order.

The AERO statutes provides that the AERO is "binding on the petitioner on filing of the petition" but not on the respondent until "service of the petition." M.C.A. § 40-4-126(8). And, while the court may consider certain pre-filing conduct, that is only conduct of the petitioner, and only "[i]n issuing any temporary orders or in a final decree…," not in contempt. *See* M.C.A. § 40-4-126(9).

Matthew argued that, per those statutory terms, and the law generally, he could not be held in contempt of an order for conduct prior to having been served

with that order. *See* Matthew's Br. 18. Lisa counters that the district court could hold Matthew in contempt for his conduct which predated issuance of the AERO or its service upon him. *See* Lisa's Br. 35–37. She reasons that the legislature specifically allowed the court to consider pre-filing conduct by the petitioner, and that the decision not to provide likewise regarding the respondent was a "drafting error" that "results inequitable abuse [sic]." *Id.*, 36.

Of course, "[i]f the plain language of the statute is clear and unambiguous, no further interpretation is required." *Micone v. Dep't of Pub. Health & Hum. Servs.*, 2011 MT 178, ¶ 12, 361 Mont. 258, 258 P.3d 403. This Court will "construe statutes as they are written…." *Turner v. City of Dillon*, 2020 MT 83, ¶ 15, 461 P.3d 122 (quoting *Montanans v. State*, 2006 MT 277, ¶ 53, 334 Mont. 237, 146 P.3d 759). It will not add what has been omitted or omit what has been added. M.C.A. § 1-2-101.

The legislature had valid reason to anticipate that a petitioner—who intends to file the petition and therefore knows the AERO will be issued—might act badly just before filing. The would-be respondent, on the other hand, may not possess that foreknowledge. It is not drafting error, but the legislature's reasoned distinction between differently situated parties.

C. **The Statement of the Charge must inform the contemnor of the alleged violation.**

By statute and prior opinions of this Court—founded on principles of due process—Matthew is entitled to a specific accusation of the conduct for which he might be held in contempt. *See* Matthew's Br. 19. Lisa does not directly challenge the statute or the cases but attempts to blur the distinction between the official charging document—the Statement of Charge—and other documents such as her motion, Matthew's motion, or generally what was discussed at the hearing.

1. *Blurring the lines.*

Lisa discusses the court's jurisdiction in terms of "Lisa's pleadings," "Matthew's Injunctive relief pleading," and, confusingly, "the hearing's jurisdiction" and the "Orders's jurisdiction." *See* Lisa's Br. 24–35. Lisa confuses the court's jurisdiction—what the court had the power to hear—with the specific Statement of Charge—what the court accused Matthew of so that he could prepare to defend against the contempt charge. *See, e.g.*, Lisa's Br. 24 (arguing that it is "unclear whether a court's jurisdiction is limited to the issues labeled in a warrant or order to show cause, or if its jurisdiction extends to all issues alleged in pleadings and supporting affidavits."). This demonstrates Lisa's basic error, conflating the court's jurisdiction (the court has plenary jurisdiction over the parties, their marriage, and the marital estate) with the charges for which the court gave notice

that it might hold Matthew in contempt (which, by law, must be very specific). To say that the court had jurisdiction over an issue is not the same as saying the court adequately notified an alleged contemnor of a charge against him.

No doubt, the court had the power to hear the dissolution action generally, including the motion for contempt and Matthew's motion for injunctive relief. No one quarrels with that proposition. That does not mean, however, that the court adequately notified Matthew of the bases upon which it contemplated holding him in contempt. If this Court were to approve Lisa's construct, *i.e.*, that knowledge that an issue is in play on some other motion is a sufficient basis upon which to hold him in contempt on that issue, then the statute requiring a Statement of Charge and this Court's insistence upon due process protections become meaningless. Alleged contempt committed outside the presence of a court requires a specific charge. *See* M.C.A. § 3-1-513. Specific notice of the charge is required to afford due process.

Matthew agrees that Lisa's motion, his own motion, and Lisa's response to Matthew's motion, all raised various issues. Moreover, he agrees that, at the hearing, various issues were brought up, including by the court itself (such as Matthew's decision to do just as Lisa was doing and deposit his paycheck into a separate account given the parties' pending divorce and his need to pay separate living expenses). That is not the same as saying that Matthew had notice that he

might be held in contempt for conduct that was clearly outside of Lisa's motion for contempt and the Statement of Charge. This would be akin to allowing a defendant to be convicted of a crime with which he was not charged because it was sort of like the conduct mentioned in the charging document.

2. *Motion for injunctive relief.*

Throughout her brief, Lisa tries to equate her motion for contempt with Matthew's motion for injunctive relief, suggesting that, because Lisa could have sought injunctive relief, the court should overlook the glaring procedural irregularities in the contempt proceedings. *See, e.g.*, Lisa's Br. 29 (suggesting injunctive relief does not require a warrant or charging statement allowing the court to rule based on the pleadings and evidence presented); 30 (claiming that the "hearing's purpose was to solve each party's respective issue," such that the motions should be read together to decide whether Matthew had sufficient notice); 31 ("if" Lisa had sought injunctive relief, Matthew would have had sufficient notice); 34-35 (injunctive relief does not require a Statement of Charge, somehow ameliorating any procedural irregularities). This argument is wrong on many levels.

First, Lisa moved for contempt, not an injunction. She obtained an order of contempt, not an injunction. The due process protections afforded in the contempt context cannot be avoided simply by saying that if you had filed some other motion,

you would not have had to meet the contempt requirements. That would make a mockery of those requirements.

Second, Lisa's suggestion that the "hearing's purpose was to solve each party's respective issue" is meaningless. Under the contempt statute, the purpose of the hearing concerned "any answer that the person arrested may make ***to the charge***…." M.C.A. § 3 –1–518 (emphasis added). Clearly, the hearing on the contempt motion was confined to Matthew's answer to the Statement of Charge. The court's decision to combine hearings could not—consistent with Due Process requirements—put Matthew at risk to be held in contempt for an issue raised by other motions heard that day but not included in the Statement of Charge.

IV. THE ORDER IS ERRONEOUS BOTH IN THE CONDUCT IT FOUND CONTEMPTUOUS AND IN THE ACTIONS IT REQUIRED OF MATTHEW TO CLEAR THE CONTEMPT.

Matthew's brief argued that the lower court erred because it held him in contempt for matters not alleged in Lisa's motion, not stated in the Statement of Charge, and not proven at the hearing, and because the remedial measures it ordered were, in some cases, unconnected to the contempt motion and/or impossible for him to perform. *Id.*, pp. 20-45. Lisa does not begin to address the sufficiency of the evidence to support the district court's findings until page 39 of her brief although, to be fair, she addresses some of the procedural issues beginning

on page 24, while discussing jurisdiction.

Matthew addresses the bases for the district court's contempt order and the remedial measures in the same sequence as he did in his opening brief.

A. Bank accounts.

Lisa's motion and affidavit ambiguously talk about various accounts to which Lisa had access,[1] but the actual accusation in her motion pertained to removal from certain accounts on April 14 (before the AERO was served) and on May 10 (after the AERO was served). *Id.*, pp. 20–21. The Statement of Charge, however, accused him only of removing Lisa from three accounts on May 10. Matthew's Br. 21.

The uncontroverted evidence showed that Matthew did not intentionally remove Lisa from any account after being served with the AERO but that he only sought to add his bookkeeper. *See* Matthew's Br. 23–25. Nonetheless, the Order held Matthew in contempt for supposedly blocking Lisa's access to unspecified accounts on unspecified dates. It required Matthew to restore her to accounts to avoid jail time. Matthew's Br. 25–26.

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[1] Lisa's motion claimed she had had access to certain accounts, incorrectly suggesting that her access had been removed to all such accounts. Matthew's Br. 20. Lisa counters that Matthew had ***threatened*** to remove her access to all accounts, calling that "opposite Matthew's assertion…." Lisa's Br. 26 (emphasis added). That does not contradict. Spouses approaching divorce may threaten to disentangle the parties' finances. That does not mean that, after the AERO, Matthew violated it by actually removing access to a particular account. He did not.

Lisa does not refute that the Statement of Charge mentioned only the May 10 alleged removals. Yet she focuses on the April 13 events by which she was removed from some accounts. *See* Lisa's Br. 40–41. The cited evidence consists of testimony from banker Adams and Matthew, as well as various exhibits. *Id.*, p. 41. All of that, however, has to do with the April 13 events, prior to issuance or service of the AERO—events not in the Statement of Charge.

Lisa has provided not a scintilla of evidence to support a conclusion that, after being served with the AERO, Matthew caused Lisa to be removed from any bank account.

B. Adventure Bound.

Matthew's brief established that Lisa's motion accused Matthew of telling Fleet Shop employees not to cooperate with her, and that the Statement of Charge accused him only of directing his mechanics not to work on Adventure Bound vehicles. Matthew's Br. 27. It also established that no evidence was introduced to support that accusation but that, instead, at the hearing discussion was held about a change of locks (which Matthew refuted) and dissolution of Adventure Bound. Matthew's Br. 27–30. Nonetheless, the order held Matthew in contempt for having interfered with Adventure Bound and required Matthew to refrain from interfering with Lisa's dismantling of this once-profitable business. Matthew's Br. 30–31.

Lisa mentions other evidence relating to Adventure Bound but cites no evidence to support a finding that, as the Statement of Charge alleged, Matthew had told his mechanics not to work on the vehicles. *See* Lisa's Br. 41–42. Nor does she refute Matthew's observation that such conduct was not prohibited in the AERO anyway. *Id.*

C. Payments to Consider It Done.

Matthew established it had been Lisa, not he, who had written the checks to Consider It Done. *See* Matthew's Br. 31. While Matthew had demanded—pre-divorce—that these payments cease, Lisa kept making those payments. *Id.*, pp. 32–33.

And although the court's Statement of Charge accused Matthew of failing to make these payments, *id.* at 32, as of the time of Lisa's motion and the Statement of Charge, ***there had been no missed payments***. Even Lisa now concedes that. *See* Lisa's Br. 43 ("Lisa corroborated that the last payment received was in June 2023."). In fact, Lisa continued to have access to the account to make those payments moving forward. *See* Matthew's Br. 33.

Lisa does not refute that she had been the one making payments and she continued to have the ability to make those payments. Nor did she respond to Matthew's observation that this would not be a violation of the AERO anyway.

Lisa's Br. 42–43. Her sole substantive response is to claim that, because the payments ceased thereafter, Matthew's conduct is contemptuous because it occurred after being served with the AERO. *See* Lisa's Br. 43.

This does not salvage the Order. Although Lisa cites the Order (Lisa's Br. 43, n. 55.), that only contains a conclusory allegation that Matthew stopped making monthly payments. In fact, the undisputed evidence showed that Lisa had been making, but then ceased, the payments. Matthew asked for them to stop prior to the divorce and AERO, but ***he had never been actually making the payments and he never ceased making them***. Matthew had never done what he was held in contempt for ceasing. The Order is entirely unfounded.

D. Deposits into the joint account.

Lisa's motion mentioned that Matthew had started putting his paycheck into a separate account, although the Statement of Charge did not accuse Matthew of contempt in that regard. Matthew's Br. 36. At the hearing, it was established that both Matthew and Lisa had established separate accounts in which they were depositing their respective paychecks. *Id.* The court then picked up upon on this, questioning Matthew and seeming to adopt this as a proxy for a spousal support order. *Id.*, pp. 36–38.

Thus, in spite of not having been mentioned in the Statement of Charge, and

in spite of Lisa doing the exact same thing, the district court held Matthew in contempt for this, requiring a $10,000 payment to Lisa. *Id.*, pp. 38-39. Neither Lisa nor the district court have ever offered any rationale for this $10,000 amount other than that was a figure Lisa mentioned that she wanted for attorney's fees. *Id.* The court did not engage in the analysis required for an award of fees. *See* M.C.A. § 40-4-110. We are left to guess whether the $10,000 amount was a fee award, an arbitrary fine, or something else.

Lisa has not responded to this issue at all. *See* Lisa's Br. 39–44. She makes no attempt to establish that this was a violation of the AERO, that it was in the Statement of Charge, or that this finding of contempt was proper.

E. Equipment removed from the marital residence.

Matthew's brief described the convoluted path between the Statement of Charge and the finding of contempt. Lisa's motion mentioned two specific vehicles, a Corvette and a Trailblazer. Matthew's Br. 40. The Statement of Charge was imprecise, accusing Matthew of moving and hiding unspecified business assets. *Id.*, pp. 40–41. At the hearing, there was absolutely no proof about the supposed impropriety that Lisa mentioned in her motion which, presumably, formed the basis for the Statement of Charge. Instead, the evidence established that ***Lisa*** had affirmatively moved some equipment, supposedly preemptively, and hidden them

at an undisclosed location. *Id.*, pp. 41–42. The only evidence at the hearing was that Lisa, not Matthew, had hidden business assets.

Nonetheless, the court held Matthew in contempt and, to avoid jail time, required him to return the equipment ***that Lisa had hidden at an undisclosed location***. *Id.*, 42–43. A court cannot require a party to perform an impossibility. *See* M.C.A. § 3-1-520; *VanSkyock v. Twentieth Jud. Dist. Ct.*, 2017 MT 99, ¶ 13, 387 Mont. 307, 393 P.3d 1068

This was not a violation of the AERO—at least on Matthew's part. There is no evidence to support a finding that Matthew had concealed business assets. And the equipment that the court ordered Matthew to return—although unspecified—could only refer to the equipment that was the subject of proof at the hearing, *i.e.*, the equipment that Lisa had hidden. *See generally* Matthew's Br. 44–45.

Lisa makes no attempt to refute any of this.

CONCLUSION

The Order must be reversed because of the procedural errors and the lack of evidentiary support.

May 1, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 11(4), M. R. App. P., that the foregoing brief is proportionally spaced, printed in a 14-point Equity Text A (a Roman-style, non script) type-face, is double spaced, and is not more than 5,000 words excluding the Caption, Table of Contents, Table of Authorities, and this Certificate of Compliance.

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I, Robert K. Baldwin, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-01-2024:

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