IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 24-0371

IN RE THE MARRIAGE OF:

JENNY LYNN CALDWELL,

Petitioner/Appellee,

and

BRANDON JAMES CALDWELL,

Respondent/Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court, Cascade County
Before the Honorable John W. Parker

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STATEMENT OF THE ISSUES

1. Did the District Court err by failing to issue a Final Parenting Plan that complied with the requirements of MCA § 40-4-234?
2. Did the District Court abuse its discretion by granting Appellee's Motion for Additional Appraisal?
3. Did the District Court abuse its discretion when it relied upon and adopted the John Buck appraisal value of $462,000 for the marital home when the appraisal was submitted two weeks after trial without testimony or opportunity for cross-examination?

STATEMENT OF THE CASE

This is an appeal from a marriage dissolution action filed in October 2020 in the Eighth Judicial District Court, Cascade County. After the parties separated in June 2020, Appellee Jenny Caldwell filed for dissolution of marriage. The parties executed a Property Settlement Agreement in April 2021, which the District Court explicitly found binding in its August 6, 2021, Order.

The procedural history spans more than three years and includes multiple "final" hearings on parenting issues between June 2021 and December 2023. Despite numerous hearings and the passage of significant time, the District Court never issued a Final Parenting Plan. Instead, it relied on a series of interim orders and made a cursory reference to an unidentified interim plan in its final Decree.

Nearly a year after executing the Property Settlement Agreement, Jenny moved for an additional appraisal of the marital home, despite having previously agreed to be bound by the parties' chosen appraiser. Over Appellant Brandon Caldwell's objection, the District Court granted the motion in February 2023. After the close of evidence at the December 5, 2023 hearing, Jenny submitted an appraisal by John Buck. Brandon never had the opportunity to cross-examine Mr. Buck nor provide rebuttal evidence. The District Court relied on this untimely appraisal in its March 14, 2024 Decree, which Brandon now appeals.

Brandon filed a Motion to Alter or Amend on April 11, 2024, specifically alerting the District Court to its failure to issue a Parenting Plan. The motion was denied by operation of law 60 days later.

STATEMENT OF THE FACTS

Appellant Brandon James Caldwell (hereinafter "Brandon") and Appellee Jenny Lynn Caldwell (hereinafter "Jenny") were married in Colorado on May 1, 2008. They have two minor children: P.A.C. (born 2011) and A.L.C. (born 2013). A third child, Preston, has reached the age of majority. The parties separated in June 2020, when Jenny moved out of the marital home in Highwood, Montana. Jenny filed for dissolution of the parties' marriage in Cascade County District Court on October 15, 2020. (D.C. Doc. 1.)

This case demonstrates significant procedural complexity in its parenting determinations, spanning from October 2020 through early 2023. What began with an initial Petition for Dissolution with Parenting Plan evolved into a lengthy series of motions, responses, hearings, and orders - with at least 16 distinct parenting-related filings over nearly two and a half years. The court record reflects an intricate back-and-forth between parties, moving from *ex parte* motions to interim orders, then to proposed plans, and additional motions for parenting time modifications.

On December 7, 2020, the District Court issued its first parenting order in its *Ex Parte* Interim Parenting Plan and Order Setting Hearing. *Appendix B*. In that Order, the Court placed the children in Jenny's primary care, with Brandon exercising parenting time on alternating weekends from Friday at 7 pm until Monday at 7 am. *Id.,* ¶ II(2)(a). The District Court set the matter for hearing on December 18, 2020. At the conclusion of the hearing, the District Court ordered the *Ex Parte* Interim Parenting Plan remain in place, but instructed Jenny's counsel to file a proposed order and set an additional hearing on interim parenting for February 1, 2021.

On February 1, 2021, the same day it held a hearing on Interim Parenting, the District Court issued its Findings of Fact, Conclusions of Law and Order Setting Interim Parenting Plan Hearing. *Appendix C*. Three days later, on February 4, 2021, the District Court issued yet another interim plan in its Findings of Fact, Conclusions

of Law and Order on Interim Parenting Plan. *Appendix D*. The District Court kept the residential schedule from its December 7, 2020 Order intact, denied Jenny's motion to appoint a *guardian ad litem,* instructed Brandon to participate in a treatment program with Dr. Robert Page, and set another hearing for Thursday, March 4, 2021 noting that the hearing would "be a status hearing and the Court will also continue taking testimony on this issue, as the Court ran out of time for Brandon to present all of his witnesses at the hearing." *Id.,* pg. 5.

On March 4, 2021, the parties appeared for the status hearing and Brandon presented additional witness testimony. Due to technical issues, the hearing was continued to April 19, 2021. (D.C. Doc. 21.) Despite the District Court's Order setting the additional hearing for April 19th, the hearing was held on March 26, 2021. Again, additional witness testimony was presented. The District Court instructed Jenny's counsel to file a proposed Order and approved the parties' agreed-upon spring break schedule. (D.C. Doc. 22.)

An additional schedule hearing was held on April 19, 2021, although not recorded. Following that hearing, the District Court issued its Scheduling Order on April 23, 2021. (D.C. Doc. 28.)

The parties executed a Property Settlement Agreement on April 28, 2021, which resolved issues related to the disposition of their marital estate. (D.C. Doc. 29.) This agreement provided for the valuation and disposition of two properties:

the marital home at 3199 Burley Hill Road, Highwood, Montana (hereafter "Highwood Property"), and another parcel of real property located at 3034 8th Ave S., Great Falls, Montana.

With regard to the Highwood Property, the parties specifically agreed as follows:

> Within thirty (30) days, the parties will agree on an appraiser for the property located at 3199 Burley Hill Road, Highwood, MT. The parties will equally split the costs associated therewith. After the appraised value is determined: 1) the property will either be sold and the net proceeds equally divided ~~used to balance the marital estate~~, or 2) Brandon will decide whether he wants to buy out Jenny's half of the property. If Brandon wishes to purchase Jenny's half, then he will indicate as much, in writing, within ten (10) days of the appraisal. If Brandon elects to purchase Jenny's half of the property, he shall pay her her share and remove her name from any mortgages, deeds, etc. within sixty (60) days thereafter. The purchase price shall be determined by subtracting the existing mortgage balance and any costs
>
> **Property Settlement Agreement – Page 11 of 13**
>
> and expenses associated with the sale from the appraised value.

Property Settlement Agreement, pg. 11-12.

The parties and the District Court affirmed resolution of their property issues several times thereafter. "At this point, property issues have been settled in the

property settlement agreement executed by the parties and are no longer relevant to this action." *[Jenny's] Response to [Brandon's] Motion to Compel Discovery*, 3:21-23. (D.C. Doc. 37.) On August 6, 2021, the District Court specifically held that "the parties are bound by the Property Settlement Agreement in finality of the distribution of their assets."

7. The parties are bound by the Property Settlement Agreement in finality of the distribution of their assets. Respondent's argument would result in a situation where neither party is afforded any peace via the Property Settlement Agreement. In this matter, the parties contracted for peace and finality.
8. "Where a property settlement provides that it "may not be modified by any court," as does the agreement in this case, the agreement may not be modified by a court." *Bolstad*, 203 Mont. at 135, 660 P.2d at 97.
9. "When the parties have signed and executed a property settlement agreement and conscionability is not raised as an issue, the court need not determine the net worth and 'must conclude' that the parties have determined the value of their assets." *Tanascu*, ¶ 16.
10. There has been no showing that the Property Settlement Agreement is unconscionable.
11. Any additional findings of fact contained in the preceding conclusions of law are hereby adopted as findings of fact.

Order, pg. 3. (D.C. DOC. 40.)

In accordance with the terms of the Property Settlement Agreement, the parties proceeded with appraisals on the real property. Jenny told Brandon to arrange for the appraisals, which he did. Brandon contacted Joe Seipel, a certified appraiser.

Affidavit of Respondent, pg. 2. (D.C. Doc. 78.) Jenny paid half of Mr. Seipel's fee and Brandon scheduled the appraisals for Mr. Seipel's first available opening. *Id.* Jenny specifically acknowledges that she agreed to utilizing Mr. Seipel. "In the summer of 2021, the parties finally agreed to use Joe Seipel ("Seipel") for the appraisal of the Highwood Property." *Brief in Support of Motion for Additional Appraisal of Real Property,* 3:14.

Mr. Seipel valued the property at $245,000. Upon Mr. Seipel's completion of the appraisals, Brandon gave notice of his intent to buy out Jenny's interest in the Highwood Property. *Id.,* at Exhibit A. Thereafter, Brandon provided Jenny with a check in the amount of $12,081.26. *Id.,* at Exhibit B.

On June 24, 2021, the parties appeared for the first of many "Final Hearings." At the outset of the hearing, the District Court advised that he had tried to reach the attorneys by telephone the day before. *06/24/2021 Transcript*, 3:16-18. The record noted that the District Court reached Jenny's counsel by phone but did not reach Brandon's. There is no indication in the record that either phone call was recorded, such that the substance of what was discussed is not entirely clear.

> MR. CARLSON: No, Your Honor. Ms. Birkenbuel e-mailed me yesterday afternoon informing me of your conversation with her. So I was aware that we weren't going to be doing the final hearing today.
>
> THE COURT: All right. And with that, Ms. Birkenbuel, anything else on the procedural outline before we start attending to the discovery matter?

Transcript, 4:17-23.

The District Court noted that there was a discovery dispute, with the result being that the day's hearing would not be a "final" one:

> THE COURT: Well, here's what I'd like to do. I want to handle discovery and then parenting. And I think we'll have time to look at both. But I want to let both counsel know that my practice when there's a discovery dispute is to give the parties one final crack at it. So I want to just take a 10-minute recess, and let me know what you come up with.

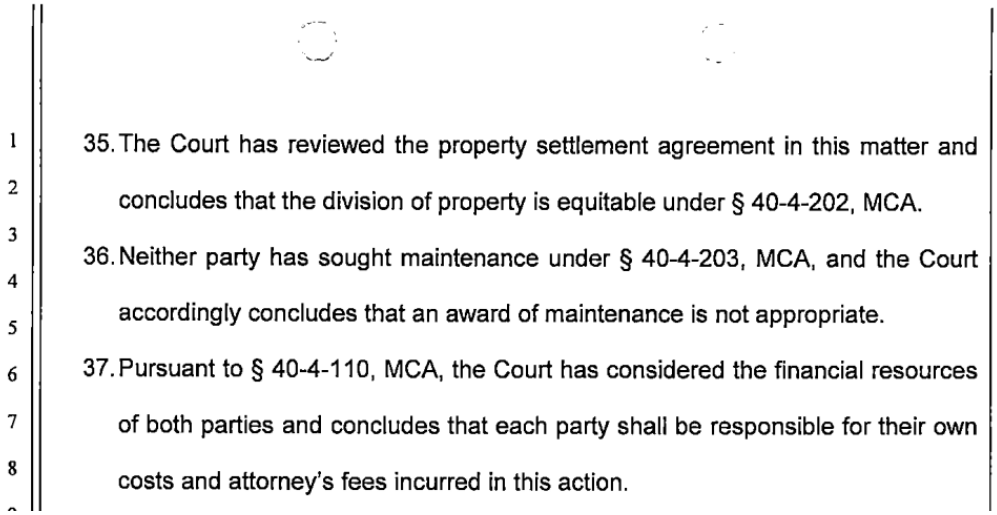
Transcript, 5:5-11.

The District Court heard argument concerning discovery and other issues but declined to address final parenting or property issues.

On August 6, 2021, the District Court issued an Order disposing of the discovery dispute and setting the matter for final hearing on August 9, 2021. (D.C. Doc. 40.) Rather than hold the final hearing on August 9th, the parties convened for an "off-the-record scheduling conference," resulting in an Order setting the final hearing for August 30, 2021. (D.C. Doc. 41.)

When the parties appeared on August 30th for another final hearing, they again presented testimony and evidence. The parties were directed to file proposed Findings of Fact, Conclusions of Law and Decrees, along with and proposed Parenting Plans. (D.C. Doc. 42.) The parties submitted proposed Findings and proposed Parenting Plans within the following week. Both parties' proposed

Decrees reflected that the Property Settlement Agreement should be approved and adopted and was an equitable division of the estate.

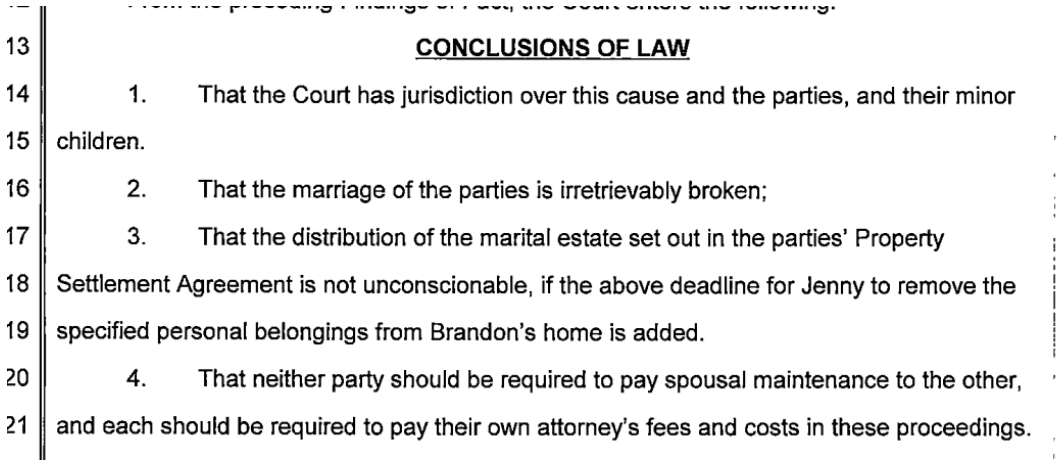


35. The Court has reviewed the property settlement agreement in this matter and concludes that the division of property is equitable under § 40-4-202, MCA.

36. Neither party has sought maintenance under § 40-4-203, MCA, and the Court accordingly concludes that an award of maintenance is not appropriate.

37. Pursuant to § 40-4-110, MCA, the Court has considered the financial resources of both parties and concludes that each party shall be responsible for their own costs and attorney's fees incurred in this action.

[Jenny's] Proposed Findings of Fact, Conclusions of Law and Decree, pg. 7, ¶ 35-37. (D.C. Doc. 46.)



CONCLUSIONS OF LAW

1. That the Court has jurisdiction over this cause and the parties, and their minor children.

2. That the marriage of the parties is irretrievably broken;

3. That the distribution of the marital estate set out in the parties' Property Settlement Agreement is not unconscionable, if the above deadline for Jenny to remove the specified personal belongings from Brandon's home is added.

4. That neither party should be required to pay spousal maintenance to the other, and each should be required to pay their own attorney's fees and costs in these proceedings.

[Brandon's] Amended Proposed Findings of Fact, Conclusions of Law, and Final Decree, pg. 5. (D.C. Doc. 45.)

On November 24, 2021, Jenny filed a Petition for Temporary Order of Protection. The District Court issued a Temporary Order of Protection the same day,

including provisions modifying the Interim Parenting Plan by including provisions related to the location and logistics of parenting exchanges. (D.C. Doc. 50.) The District Court set a hearing for the Order of Protection for hearing on December 14, 2021. That hearing was continued to December 16, 2021, over Brandon's objection. (D.C. Doc. 54.)

After the hearing on December 16, 2021, the District Court issued an Order quashing the Order of Protection. (D.C. Doc. 57.) In January 2022, the parties sold real property in accordance with the Property Settlement Agreement. However, a dispute arose related to the division of the proceeds and the District Court ordered the proceeds be held by the Clerk of Court pending resolution to the issues. (D.C. Doc. 60.)

Months more passed without any final order on parenting. On April 22, 2022, Brandon's counsel filed a Notice and Reminder, alerting the District Court that the parties were still awaiting a decision on parenting. (D.C. Doc. 65.) Additional disputes related to property issues arose in mid-2022.

On July 7, 2022, Brandon's counsel filed another Notice and Reminder, again reminding the District Court that the parties were still awaiting a decision. (D.C. Doc. 73.)

On August 16, 2022, nearly a year after the District Court held its "final hearing" and a full year since the District Court affirmed the parties were held to the

terms of the Property Settlement Agreement, Jenny filed a Motion for Additional Appraisal of Real Property. In her Brief in Support, Jenny acknowledges that she agreed to utilize Mr. Seipel as the appraiser. *Breif in Support of Motion for Additional Appraisal of Real Property,* 3:14. Jenny's motion was set for hearing on October 27, 2022. (D.C. Doc. 79.) The hearing was continued at Jenny's request to December 1, 2022. (D.C. Doc. 82.)

While the dispute over the appraiser brewed, the District Court neglected to address the parenting issues. Given the District Court's failure to issue a final parenting plan, Brandon sought additional time through a motion filed October 17, 2022. (D.C. Doc. 81.) He noted it had been nearly two years since the District Court issued the Interim Parenting Plan and further noted that the Interim Plan had no holiday provisions nor any vacation time. The District Court set Brandon's Motion for Additional Parenting Time and Jenny's Motion for Additional Appraisal for hearing on December 19, 2022. (D.C. Doc. 86.)

The parties appeared before the District Court on December 19, 2022. Brandon's counsel articulated his position at the outset of the hearing.

> COUNSEL: Your Honor, one of the issues before the Court is the property settlement agreement that was negotiated in a mediation. And now the petitioners wanting to change that. The Court has previously ruled that you're not going to change it. So, yeah, I don't know that there's any room for compromise there. The -- the issue of the parenting time has been an ongoing contentious one. Also, my client has, as you know,

> completed several treatment and educational courses that you've asked him to do. He's done so in the hopes that that would mean that he would have some more time with his children. So that's an issue that we -- we believe that needs to be addressed.

12/19/2022 Transcript, at 6:2-16.

At the conclusion of the hearing the District Court indicated it was out of time and needed to set the matter for yet another hearing, which would allow appraiser, Joe Seipel, to testify.

> THE COURT: We're just going to need more time. And we're just going to let the battles take as long as they're going to take. Because there is no other way to go on this case. So we end the day with unilateral stipulation for additional parenting, which I appreciate. Nothing was given in return for it. It honors the spirit of the law and that's really all we have to show for ourselves at the end of this hearing.

Tr., at 96:7-15.

> THE COURT: We'll get a final hearing set in the month of February. And at that point, I'll hear the evidence and things are going to go where they go. So good luck everybody.

Tr., at 97:18-21.

The Court issued an Order on December 22, 2022, setting the matter for another hearing and granting Brandon additional parenting time. *Appendix E.* The parties appeared before the District Court again on February 10, 2023. Real estate appraiser Joe Seipel testified and the parties both presented argument concerning the

need for an additional appraisal. Brandon's counsel made clear that granting a motion for an additional appraisal would amount to a modification of the property settlement agreement.

> COUNSEL: Your Honor, we've got Mr. Seipel, who's the appraiser -- licensed appraiser that the parties agreed upon to perform the appraisal that's at issue before the Court in their motion to require additional appraisal. We believe that the testimony will show that he performed the appraisal. He's a licensed appraiser. The parties agreed upon. He performed the -- the appraisal according to the uniform standards of professional practice for appraisers. And that he utilized comparable properties as required by those standards in arriving at the value that was stated in his appraisal. We do have that written report with us today. And we'll ask that that be submitted as an exhibit. And the relief we're asking is, simply, that the Court deny the motion for an additional appraisal. Basically, because it amounts to a modification of the property settlement agreement that was mediated almost two years ago now. And that has been previously found by this Court to be not unconscionable.

02/10/2023 Transcript, at 5:2-24.

Brandon's counsel also argued that the children have asked for additional parenting time and noted that Brandon had completed all of the requirements. The District Court acknowledge the need to modify the parenting plan given Brandon's completion of requirements and the children's desire:

> THE COURT: I have often said that I won't run a mediation on the record. But I want to repeat what I said, absent some really disturbing new evidence, which I have no reason to believe, is there -- I'm looking at the statutory

language at Section 40-4-212 -- and I've certainly had some concerns in the past that required me to order Mr. Caldwell to complete some programming. Ms. Birkenbuel is an officer of the court, and she told me on the record he did it all. So under section 40-4-212 (1a) the wishes of the child's parent or parents, I know the parents don't agree. No one will ever have to remind me of that on this case.

Wishes of the children, I've heard from the children. They want more time with their dad, so that weighs heavily with me. Ms. Birkenbuel is claiming in her briefs that that's still the situation.

Interaction in a relationship with the children with the parents, okay, Mr. Caldwell is listed as a person who significantly affects their best interests. And, obviously, Ms. Caldwell is too but she's got the bulk of the parenting time now.

Children's adjustment, home, school, and community, these people don't live in different states. The modest amount of local travel that is going to be necessitated by modifying this, we can figure that out. Whether there's a talk about who pays whose gas money or who takes who were at what time, so there's no disruption of sports or activities. These are all solvable problems.

I'm not going to get into the next set of statutory factors. Continuity and stability of care, there's probably going to be a modest adjustment to stability of care but it's manageable. Developmental needs, we'll issue an order that make sure those are attended to. Frequent and continuing contact with both parents, weighs heavily in this analysis. So I'm going to give everyone a chance to negotiate again. But I will just tell you this sometime before noon today I'm going to order a modified interim parenting plan. That's going to give this man at least one week a month, unless there's extraordinary evidence that argues otherwise.

> Here's what I think we need -- and I want to hearken back to something Ms. Birkenbuel said about how long the case is taking -- I have a theory of family law I'd rather leave a case open for a longer time if I think there's some healing and progress underway. Then freeze things in place at a moment in time where more healing could happen. So I could have shut this case six months ago, and this man gets weekends only forever. But I thought progress is possible and I wanted to see if I was right. So I'm letting the case age gracefully, I hope, in the name of some progress and healing for everybody.
>
> But here's what I see for the case, I see a revised interim parenting plan emerging before noon today. I see a status hearing in a month at the most, maybe sooner where I take everyone's pulse on the appraisal process a possible renegotiation of property matters under Funk. And then setting a time for contested hearing on final parenting. We're moving toward a time the case is going to be closed, but I think there's still a window for negotiation. There's still a window for healing and progress before things get frozen in place and everyone's stuck. You know what I'm saying? So I invite you to renegotiate, but we are going to modify the parenting plan today sometime between now and noon. I think you guys know the dynamics of the case. So let's be in recess till 12 min after 11. I'll see you quickly. Let me know what we can do.

Tr., at 62:18-65:22.

The Court took a recess and when it emerged, the parties had not reached an agreement.

> THE COURT: All right. I'm going to tell you where I'm going. Then I'm going to handle everything based on offers of proof given our time limitations. I've already expressed where I think we probably are under the statute. So I'm going to grant Mr. Caldwell on an interim basis one full week per month that will overlap with his weekend to

> help ensure continuity and stability of care. So the week that Mr. Caldwell gets parenting he still gets his weekend. So we're not adding in an extra disruptive transfer in the month.
>
> And inclined to order that Mr. Caldwell -- based on my sense of the parties financial situations -- Mr. Caldwell's going to either need to provide the transportation arrange for it or pay for it if Ms. Caldwell ends up being the one doing the transport.
>
> All other prior orders are going to remain in force. And then when we reach a moment of a final parenting plan, which I hope we're going to do by the end of May at the latest. And, again, I'm going to entertain offers a proof if people want to try to move me from this. But Mr. Caldwell will most likely have this amount of time he might have more time.

Tr., at 66:19-67:18.

On February 16, 2023, the District Court issued an Order Granting Additional Parenting Time, which reflected Brandon would have "parenting time, in addition to his alternating weekends, of one week per month. The additional week shall occur at the end of Brandon's weekend, starting with the weekend of February 10-13, 2023, and Brandon shall keep the children until after school on the following Friday, which is February 17, 2023, for his February week." *Appendix F.*

By April 2023, no Final Parenting Plan had been issued and no additional Interim Parenting Plan had been issued. Brandon filed a Motion to Set Status Hearing and the District Court set the same for May 22, 2023. (D.C. Doc. 99.) The

parties appeared on May 22, 2023 and, again, Brandon asked for more parenting time.

The District Court issued a Scheduling Order pertaining to the "outstanding matters to be resolved" on June 1, 2024. (D.C. Doc. 103.) Pursuant to that Order, another status hearing was to be held on September 5, 2023. When the parties appeared for the September 5th status hearing, the parties discussed the timeline to complete appraisals prior to a final hearing.

On September 12, 2023, the District Court issued an Order requiring the parties to confer with Zachary Gregoire, a local realtor who sold one of the parties' other properties, who would supply a list of proposed appraisers. (D.C. Doc. 105.) If the parties were unable to agree on an appraiser from the list, Mr. Gregoire was tasked with selecting on from the list.

On September 28, 2023, the parties appeared for another "final hearing." The District Court was advised that an appraisal had not been completed. Witness testimony and evidence was presented by both parties and, again, the District Court scheduled an additional hearing to occur on October 10, 2023.

> THE COURT: So regrettably we are just at the limit of what we can with testimony today. We have been going all day long on the case. We blocked out a bunch of additional time. So we are going to close the evidentiary phase of the hearing now. And Ms. Birkenbuel can resume cross examination at the beginning of the next hearing. Now I want to switch to a procedural mode. You can go ahead and rejoin your attorney. First I would like to ask if

> one counsel or the other could get me a proposed order setting the next phase of the hearing. Is anyone willing to volunteer to do that?

09/28/2023 Transcript, at 243:3-16.

On October 2, 2023, the District Court issued an Order setting the "final continuation hearing" for October 10, 2023. (D.C. Doc. 112.) No hearing was held on October 10th. An Order was issued on October 16, 2023, setting the hearing for December 5, 2023. (D.C. Doc. 113.)

The parties appeared for an additional final hearing on December 5, 2023. At the time of the final hearing, the appraisal still was not completed, despite the District Court granting Jenny's motion for an additional appraisal nearly ten months earlier. Additional testimony was offered related to parenting issues, including testimony from Dr. Robert Paige, who testified Brandon had completed the domestic violence intervention program. *12/05/2023 Transcript,* at 10-11.

Brandon's counsel stressed the timeline and delays Brandon experienced in this matter.

> COUNSEL: The other thing I think we have to look at is when is this case gonna be over? We thought we were going to be done today. This Court granted a motion from Jenny that was filed a year after the agreed upon appraisal was done. And that she's had since February to do this, we agreed upon an appraiser to do it back in -- in September. At that point in time he said he couldn't get it done by the September 28th hearing, but here we are two months later, no testimony, no appraisals been done. Is there a point where we have to say we have to just move on and get this

> finalized? Or are we going to be back here with Jenny picking out some other new provision out of the ad –- mediated settlement agreement that says I don't like it anymore, I changed my mind.

Tr., at 150:10-25.

The District Court determined it would require the parties to submit post-hearing information regarding the appraisal, but would not set additional hearings:

> THE COURT: Okay. Here's what we'll do, I'm going to give both the parties a simultaneous deadline that's going to cover the two following items. The simultaneous deadline will be 5 p.m. on Thursday, December 21st for findings of fact and conclusions of law and proposed order on parenting and property issues. And if anybody wants to file a two-to-three page point brief on housing evaluation and any supplemental exhibits, I'll look at it. But we can't give the case anymore court time. And I'm not going to extend filing deadlines. Everyone needs to give me what you got quickly. I'm sure it won't be possible to issue a final order before the end year, but I've got quite a few notes. I'm going to look forward to getting the final submissions from the parties. All prior orders concerning parenting are going to remain enforce until I issue my final order.

Tr., at 152:22-153:16.

Two weeks later, after the close of testimony and evidence, Jenny filed an appraisal completed by John Buck, valuing the Highwood Property at $462,000. (D.C. Doc. 125.)[1] Given the timing of filing, Mr. Buck never testified, was never subject to cross-examination. The Buck appraisal was not even signed under oath.

[1] Mr. Buck was jointly selected by the parties. However, Brandon staunchly objected to a second appraisal of any sort, by any appraiser.

On March 14, 2024, the District Court issued its *Findings of Fact, Conclusions of Law and Decree of Dissolution* (hereinafter "Decree"). Despite the passage of three-and-a-half years and numerous hearings on parenting, the District Court failed to actually issue a Final Parenting Plan. Instead, the Decree states the parties "shall follow the Final Parenting Plan," but none is attached, nor was one issued by the District Court when the Decree was signed. (D.C. Doc. 127.) The Decree further states that "it is in the child's best interest that the Interim Parenting Plan filed herewith be adopted by the Court." *Id.,* pg. 13. Again, no Parenting Plan, interim or otherwise, was filed with the District Court's Decree.

The Decree reflects that the Court found the Seipel appraisal to be "obviously erroneous" due to the rise in prices during the COVID-19 pandemic. *Id.,* ¶ 32. The District Court found that Mr. Buck had completed another appraisal, although made no findings that the valuation was appropriate nor reasonable nor the appropriate valuation under the terms of the Property Settlement Agreement. *Id.,* ¶ 31.

The Court then ordered: "As per the terms of the Property Settlement Agreement, the proceeds of the 3034 8th Ave. S., Great Falls property should be released to the parties. Either Brandon must purchase Jenny's half of the [Highwood Property] from her or the parties must sell the property and divide the proceeds." *Id.,* ¶ 43.

On April 11, 2024, Brandon filed a Motion to Alter or Amend Judgement (sic) and Brief, informing the District Court that it failed to issue a Parenting Plan and requesting it do the same. (D.C. Doc. 128.) The District Court did not act on the Motion and it was denied by operation of law 60 days later.

It is from the District Court's Decree that Brandon now appeals.

SUMMARY OF THE ARGUMENT

This appeal challenges three significant errors by the District Court. First, despite three and a half years of litigation and numerous hearings, the District Court failed to issue a Final Parenting Plan that complies with Montana law. The court's cursory reference to an unidentified "Interim Parenting Plan" fails to address mandatory statutory elements and leaves the parties without clear guidance on fundamental parenting issues. This omission undermines the stability and structure that Montana law requires for children of divorce.

Second, the District Court erred in granting Jenny's Motion for Additional Appraisal, which she filed nearly a year after testifying the Property Settlement Agreement was equitable. This decision disregarded fundamental contract principles, misapplied statutory authority, and undermined the strong public policy favoring finality in divorce proceedings. The court improperly modified an unambiguous agreement based merely on speculation about changed market

conditions, creating dangerous precedent that would allow parties to challenge agreed-upon valuations whenever market prices fluctuate.

Finally, the District Court committed reversible error by relying on an appraisal that was submitted two weeks after the close of evidence. This unsigned appraisal was never subject to cross-examination, lacked proper foundation, and was accepted without any findings regarding its reliability or accuracy. The court's reliance on this procedurally deficient evidence violated Brandon's due process rights and fundamental principles of evidence. These cumulative errors have resulted in substantial prejudice requiring reversal and remand for proceedings that comply with Montana law.

STANDARD OF REVIEW

The Montana Supreme Court reviews a District Court's factual findings to determine if they are clearly erroneous. *In re Marriage of Thorner*, 2008 MT 270, ¶ 20, 345 Mont. 194, 190 P.3d 1063. A finding is clearly erroneous "if it is not supported by substantial evidence, the district court misapprehended the effect of the evidence or our review of the evidence convinces us that the district court made a mistake." *In re Marriage of Crilly*, 2005 MT 311, ¶ 10, 329 Mont. 479, 124 P.3d 1151.

The Court reviews a District Court's conclusions of law to determine whether the conclusions are correct. *In re Marriage of Bartsch*, 2007 MT 136, ¶ 9, 337 Mont.

386, 162 P.3d 72. The test for abuse of discretion is whether the district court acted "arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *In re Marriage of Meeks*, 276 Mont. 237, 242, 915 P.2d 831, 834 (1996).

The construction and interpretation of a written agreement are questions of law. *Orr v. Orr* , 2017 MT 291, ¶ 8, 389 Mont. 400, 410 P.3d 181.

ARGUMENT

I. The District Court Erred by Failing to Issue a Final Parenting Plan.

Montana law explicitly requires that a final parenting plan "must be incorporated into any final decree or amended decree." MCA § 40-4-234(1). The statute further mandates specific elements that must be included in any final parenting plan.

> (2) Based on the best interest of the child, a final parenting plan may include, at a minimum, provisions for:
>
> (a) designation of a parent as custodian of the child, solely for the purposes of all other state and federal statutes that require a designation or determination of custody, but the designation may not affect either parent's rights and responsibilities under the parenting plan;
>
> (b) designation of the legal residence of both parents and the child, except as provided in 40-4-217;
>
> (c) a residential schedule specifying the periods of time during which the child will reside with each parent, including provisions for holidays, birthdays of family members, vacations, and other special occasions;
>
> (d) finances to provide for the child's needs;

> (e) any other factors affecting the physical and emotional health and well-being of the child;
> (f) periodic review of the parenting plan when requested by either parent or the child or when circumstances arise that are foreseen by the parents as triggering a need for review, such as attainment by the child of a certain age or if a change in the child's residence is necessitated;
> (g) sanctions that will apply if a parent fails to follow the terms of the parenting plan, including contempt of court;
> (h) allocation of parental decision making authority regarding the child's:
> (i) education;
> (ii) spiritual development; and
> (iii) health care and physical growth;
> (i) the method by which future disputes concerning the child will be resolved between the parents, other than court action; and
> (j) the unique circumstances of the child or the family situation that the parents agree will facilitate a meaningful, ongoing relationship between the child and parents.

MCA § 40-4-234(2).

Montana law also provides for specific objectives of a final parenting plan pursuant to MCA § 40-4-233:

> The objectives of a final parenting plan are to:
> (1) protect the best interest of the child, consistent with 40-4-212;
> (2) provide for the physical care of the child;
> (3) maintain the child's emotional stability and minimize the child's exposure to parental conflict;
> (4) provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future amendment to the final parenting plan;

> (5) set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in 40-4-234; and
> (6) encourage the parents, when appropriate under 40-4-234, to meet their responsibilities to their minor children through agreements in the parenting plan rather than through judicial intervention.

MCA § 40-4-233.

This Court has made clear that interim or temporary plans are separate and distinct from *final* parenting plans. *In re Marriage of Bessette,* 2019 MT 35, ¶ 16, 394 Mont. 262, 434 P.3d 894. "Upon a motion for temporary custody, [the court] is only determining the best interests of the child with regard to *temporary* custody pending resolution to the action. Temporary child custody is merely an initial determination made to ascertain which of [the] parents will keep children until such time as a full hearing on custody can be made." *In re Marriage of Allen,* 237 Mont. 64, 68, 771 P.2d 578 (citing 27C C.J.S.Divorce, § 642, footnote 30).

In *Marriage of Woerner,* this Court held that "we require that the district court make findings sufficient for this court to determine whether the court considered the statutory factors and made its ruling on the basis of the child's best interests." *In re Marriage of Woerner*, 2014 MT 134, ¶ 15, 375 Mont. 153, 325 P.3d 1244 (citing *Jacobsen v. Thomas,* 2006 MT 212, ¶ 19, 333 Mont. 323, 142 P.3d 859). "The court's findings should, at a minimum, 'express the essential and determining facts upon which it rests its conclusions.'" *Id*. *(*citing *Marriage of Crowley,* 2014

MT 42, ¶ 45, 374 Mont. 48, 318 P.3d 1031). The requirement for specific findings serves multiple purposes. It ensures the District Court has carefully considered all statutory factors, provides a clear record for appellate review, gives the parties concrete guidance for future conduct, and helps prevent future litigation by addressing foreseeable issues.

In this matter, the District Court analyzed the best interest factors codified in MCA § 40-4-212. However, it failed to actually make a final parenting determination. Instead, the Decree merely states that "it is in the child's best interest that the Interim Parenting Plan be adopted by the Court." This cursory adoption of an interim plan fails to satisfy the statutory requirements in several critical ways. For example, the District Court's wholesale adoption of an interim parenting plan without incorporating the mandatory statutory elements renders the Decree legally insufficient.

It is entirely unclear which "interim plan" the Court is even referring to. The District Court has issued not less than five interim orders, none of which constituted a full interim parenting plan, but instead included only summary provisions for a residential schedule, without any reference to decision-making authority or other mandatory provisions.

Regardless of which interim parenting plan the District Court felt it was referencing, all of the interim parenting orders were designed for temporary purposes

during litigation, not as a final resolution. This is evidenced by the fact that the District Court itself characterized earlier hearings as "interim" parenting plan hearings, distinct from the final hearings held in September and December 2023.

The District Court's failure to include a detailed residential schedule and specific allocations of decision-making authority leaves the parties without clear guidance on fundamental parenting issues. The District Court made no provisions for holiday or vacation parenting time, dispute resolution, nor decision-making authority concerning the children's education, health care, and spiritual development.

The consequences of the District Court's failure to issue a proper final parenting plan are both immediate and long-term. The absence of these mandatory elements is not a mere technical oversight. Rather, it undermines the fundamental purpose of the final parenting plan requirement: to provide a clear, comprehensive framework for co-parenting after dissolution. The District Court's failure to issue a proper final parenting plan leaves these children without the stability and structure that Montana law requires.

The matter of establishing a Parenting Plan has been pending before the District Court since June 2021, when the first "final" parenting hearing was held. Despite the significant passage of time - now more than two and a half years - no Parenting Plan has been issued.

Given the extensive delay, a simple remand directing the District Court to issue a Final Parenting Plan would not serve the interests of justice. The significant passage of time necessitates a fresh examination of the circumstances through a new trial. To prevent further prejudice to the parties and their children, this Court should instruct the District Court to conduct a single, consolidated hearing and issue a prompt decision thereafter.

II. The District Court Abused its Discretion by granting Jenny's Motion for Additional Appraisal.

The District Court erred in ordering an additional appraisal and its ruling should be reversed. The District Court's decision disregards fundamental principles of contract law, misapplies statutory authority, and undermines the finality of divorce settlements.

Montana law is clear that property settlement agreements are considered contracts and, therefore, must be construed under the law of contracts. *In re Marriage of Woodford,* 254 Mont. 501, 504, 839 P.2d 574 (1992) (citing *In re Marriage of Quinn,* 191 Mont. 133, 622 P.2d 230 (1981)). "If the language of a property settlement agreement is clear and explicit, it controls the agreement's interpretation." *Id.,* 505.

When parties enter into a settlement agreement, "contract law does not uphold agreements which defeat the object of the parties." *Matter of Platt*, 2018 MT 43, ¶ 23, 390 Mont. 338, 413 P.3d 818 (citing *Keller v. Libery Northwest, Inc.,* 2010 MT

279, ¶ 24, 358 Mont. 448, 246 P.3d 434). Here, the PSA specifically identifies the object of the parties in reaching the agreement.

> 1. **PURPOSE OF AGREEMENT**. This Agreement has been entered into by and between Husband and Wife for the purpose of defining their respective rights and obligations in the event of the entry of a Decree of Dissolution in the action now pending in the above-entitled Court, and on the condition that the provisions hereof are approved by the Court as provided by §§ 40-4-201(4)(a) and (b), MCA, the terms of this Agreement need not be set forth in the Decree of Dissolution. The Decree will identify and incorporate this Agreement by reference and its terms are enforceable by all remedies available for enforcement of a judgment, including specific enforcement and contempt, and are enforceable as contract terms.
>
> **Property Settlement Agreement – Page 1 of 13**

Property Settlement Agreement, ¶ 1.

As set forth in MCA § 28-3-303, "when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however to other provisions of this chapter."

The Montana Supreme Court has consistently held that courts lack authority to modify unambiguous contracts. *In re Marriage of McKeon*, 252 Mont. 15, 19, 826 P.2d 537, 540 (1992). When the language of the contract is plain and unambiguous, "the language alone controls and there is nothing for the Court to interpret or construe." *Id.,* (citing *Payne v. Buechler,* 192 Mont. 311, 317, 628 P.2d 646 (1981)).

"An ambiguity exists when a contract taken as a whole in its wording or phraseology is reasonably subject to two different interpretations." *Doble v.*

Bernhard, 1998 MT 124, ¶ 19, 289 Mont. 80, 959 P.2d 488 (citing *Wray v. State Comp. Ins. Fund,* 266 Mont. 219, 223, 879 P.2d 725 (1994)).

The PSA here contains no ambiguity - it explicitly provides for the parties to select *one* appraiser, which they did when choosing Joe Seipel. The PSA includes no mechanism for the parties to obtain separate or additional appraisals. Because the language of the contract is plain and unambiguous, there was nothing for the District Court to interpret or construe. Instead, the Court's obligation was simply to enforce the PSA it had already approved and adopted.

The District Court's ruling essentially rewrites this unambiguous provision by requiring a second appraisal. This violates the fundamental principle that courts cannot "create a new and different contract or make 'significant additions.'" *Estate of Irvine,* 2013 MT 271, ¶ 14, 372 Mont. 49, 309 P.3d 986. The parties' agreement to be bound by a single agreed-upon appraiser was a material term that cannot be judicially modified absent fraud or mistake.

While MCA § 40-4-202 requires equitable distribution of marital property, this does not override the parties' right to determine property values through agreement. The court's equitable powers do not extend to rewriting valid agreements. Here, both parties agreed to be bound by Seipel's appraisal and specifically asked the court to find the PSA equitable. Jenny's subsequent dissatisfaction with the agreed-upon process does not justify modification. Moreover, the District Court's

ruling ignores this Court's clear holding that a failure to predict the future is not a mistake of fact. *Kruzich v. Old Republic Ins.,* 2008 MT 205, ¶ 25, 344 Mont. 126, 188 P.3d 983. Jenny's speculation about current market value, supported only by a realtor's market analysis rather than a formal appraisal, does not constitute the type of mistake that would justify modifying the PSA.

The District Court's decision undermines the strong public policy favoring finality in divorce proceedings. In *Hadford v. Hadford*, this Court emphasized that property settlement agreements serve important purposes including "provid[ing] finality." *Hadford v. Hadford,* 194 Mont. 518, 524, 633 P.2d 1181, 1184 (1981). "A property settlement agreement would useless if the courts were free to set them aside at any time simply on the motion and allegation of one of the parties that the property settlement agreement merged with the decree is unconscionability." *Id.* This policy is reflected in MCA § 40-4-201(2), which makes settlement agreements binding unless found unconscionable. Agreements are presented to the district court for approval and the court can, on its own motion, determines the agreement's conscionability. *Id.,* at 1185. The District Court had the opportunity to review the conscionability of the PSA and approved the same in its August 2021 Order.

If allowed to stand, the District Court's ruling would create problematic precedent allowing parties to challenge valuations whenever market conditions change. Jenny waited over a year after agreeing the PSA was equitable before

challenging the appraisal value. During this time, she opposed Brandon's discovery requests by citing the PSA's finality. Allowing such delayed challenges based on changed market conditions would defeat the purpose of including specific valuation procedures in settlement agreements.

For these reasons, this Court should reverse the District Court's order requiring an additional appraisal and direct enforcement of the original PSA according to its unambiguous terms. The District Court's ruling constitutes reversible error that, if allowed to stand, would undermine the finality and reliability of property settlement agreements throughout Montana.

III. The District Court Abused its Discretion by Relying on the Buck Appraisal.

The District Court committed reversible error by relying on an appraisal that was submitted after the close of evidence, was never subject to cross-examination, and was not even signed under oath. This procedural irregularity violated fundamental principles of due process, evidence, and Montana law governing property valuation in dissolution proceedings.

In this case, two weeks after the final hearing and the close of evidence, Jenny submitted an appraisal from John Buck valuing the Highwood Property at $462,000. Mr. Buck did not testify and was not subject to cross-examination, as he did not appear at any hearing nor trial.

Requiring witnesses to testify personally at trial serves a number of important purposes. *Bonmarte v. Bonmarte,* 263 Mont. 170, 174, 866 P.2d 1132 (1994).

A witness' personal appearance in court:

> 1. assists the trier of fact in evaluating the witness' credibility by allowing his or her demeanor to be observed firsthand;
> 2. helps establish the identity of the witness;
> 3. impresses upon the witness, the seriousness of the occasion;
> 4. assures that the witness is not being coached or influenced during testimony;
> 5. assures that the witness is not referring to documents improperly; and
> 6. in cases where required, provides for the right of confrontation of witnesses.

Id.

Montana Rule of Evidence 611(e) guarantees parties in civil cases the right to confront and cross-examine witnesses. "The integrity of the fact-finding process at trial is undermined where the parties do not have the opportunity to confront each other or the witnesses, where the finder of fact does not have the opportunity to observe the parties and the witnesses and where the opposing party cannot effectively cross-examine the other party or the witness." *Id.,* at 175.

By accepting and relying on Buck's appraisal after the evidentiary hearing closed, the District Court deprived Brandon of this fundamental right. The timing of the submission is particularly problematic. The inability to cross-examine Buck

about his methodology, comparable properties, or adjustments severely prejudiced Brandon's ability to challenge the valuation.

Even more problematic is the District Court's failure to make any findings regarding the reliability or accuracy of Buck's appraisal. In its Decree, the District Court merely noted that Buck "had completed another appraisal" without making any findings that the valuation was appropriate, reasonable, or compliant with the terms of the Property Settlement Agreement. This Court has consistently held that District Courts must make specific findings to support their valuations. "The factors listed in [§] 40–4–202, MCA, must be considered and referred to in the [district] court's findings and conclusions and there must be competent evidence presented on the values of the property." *Marriage of George and Frank,* 2022 MT 179, ¶ 72, 410 Mont. 73, 517 P.3d 188. (citing *Marriage of Collett,* 190 Mont. 500, 504, 621 P.2d 1093, 1095 (1981)).

As explained in *Marriage of Ash and Elliot*, "the [district] court must provide sufficient evidence from which [the Montana Supreme Court] can ascertain reasonableness…" *In re Marriage of Ash and Elliot,* 2024 MT 273, ¶ 14, 558 P.3d 1169. And while a District Court may "adopt any reasonable valuation of property supported by the record," there must be evidence to support the valuation *in the record. Hutchins v. Hutchins,* 2018 MT 275, ¶ 50, 393 Mont. 283, 430 P.3d 502. The District Court's cursory treatment of Buck's appraisal does not comply with

those requirements. While the District Court found Seipel's appraisal to be "obviously erroneous," it made no corresponding findings about why Buck's valuation should be accepted.

Buck's appraisal was not even signed under oath, raising serious questions about its reliability and admissibility. Montana law requires expert testimony to have proper foundation. While the determination of the qualification of an expert witness is largely within the discretion of the trial court:

> opinion evidence from a qualified expert is admissible if specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. Such expert testimony requires that a proper foundation be established. Expert testimony must also satisfy the relevancy rules set forth in Article IV of the Montana Rules of Evidence. Moreover, full disclosure during discovery under Rule 26, M.R.Civ.P., is designed 'to eliminate surprise and to promote effective cross-examination of expert witnesses.'

Christopherson v. City of Great Falls, 2003 MT 189, ¶ 11, 316 Mont. 469, 74 P.3d 1021 (citing *Hawkins v. Harney,* 2003 MT 58, ¶ 21, 314 Mont. 384, 66 P.3d 305 (citation omitted)).

An unsigned appraisal submitted after the close of evidence, without opportunity for examination about the appraiser's qualifications or methodology, lacks such foundation. Furthermore, this Court has "repeatedly stated that it is 'the parties' responsibility to provide the District Court with competent evidence

regarding property values.'" *Marriage of George and Frank*, ¶ 71 (citing *Marriage of Hutchins,* 2018 MT 275, 393 Mont. 283, 430 P.3d 502).

The lack of foundation is particularly concerning given the disparity between Buck's valuation and Seipel's appraisal. In *Marriage of Crilly,* this Court noted that significant valuation disparities require careful scrutiny and explanation. "Where there is a dispute over property value in a marriage dissolution and the values are widely conflicting, the court must state its reasons for the value it adopts." *Marriage of Crilly,* ¶ 18.

The District Court's failure to examine or explain this disparity, combined with the lack of foundation for Buck's appraisal, renders its reliance on the appraisal arbitrary. The proper course would have been to either exclude Buck's untimely appraisal or reopen the evidence to allow proper foundation and cross-examination. The District Court's failure to do either requires reversal.

CONCLUSION

The District Court committed significant errors that require reversal. Despite extensive litigation spanning more than three years, the court failed to issue a Final Parenting Plan containing the mandatory statutory elements, instead making a cursory reference to an unidentified interim plan. Second, the District Court improperly granted Jenny's Motion for Additional Appraisal, disregarding both fundamental contract principles and its own prior rulings about the Agreement's

binding nature. Finally, the District Court erroneously relied on an appraisal submitted after the close of evidence, depriving Brandon of his right to cross-examination and failing to make any findings about the appraisal's reliability.

These errors are not mere technical oversights but have caused substantial prejudice to Brandon and his children. The lack of a proper Final Parenting Plan leaves the family without clear guidance on fundamental co-parenting issues. The District Court's willingness to modify the Property Settlement Agreement based on speculation about market conditions undermines the finality that such agreements are meant to provide. And the District Court's reliance on an improperly admitted appraisal has materially affected the division of marital assets.

For those reasons, this Court should reverse the District Court's Findings of Fact, Conclusions of Law and Decree of Dissolution, and remand for a new trial on parenting to be held promptly and to consist of a single hearing. Further, this Court should instruct the District Court to enforce the Property Settlement Agreement based upon the Seipel appraisal.

DATED: December 24, 2024.

MEASURE LAW, P.C.

By: /s/ Marybeth M. Sampsel
Marybeth M. Sampsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding the certificate of service and the certificate of compliance.

MEASURE LAW, P.C.

By: /s/ Marybeth M. Sampsel
Marybeth M. Sampsel

APPENDIX

Findings of Fact, Conclusions of Law and Decree of Dissolution ..... App. A

Ex Parte Interim Parenting Plan and Order Setting Hearing ..... App. B

Findings of Fact, Conclusions of Law and
Order Setting Interim Parenting Plan Hearing ..... App. C

Findings of Fact, Conclusions of Law and
Order on Interim Parenting Plan ..... App. D

Order ..... App. E

Order Granting Additional Parenting Time ..... App. F