IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 24-0354

IN RE THE MARRIAGE OF:

KIRSTEN ANN MARTIN,

Petitioner and Appellee,

v.

BRIAN ARTHUR MARTIN,

Respondent and Appellant.

Appeal from the Second Judicial District Court, Silver Bow County
Cause No. DR-21-196
The Honorable Robert J. Whelan, Presiding

APPELLEE'S BRIEF

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ISSUES PRESENTED FOR REVIEW

I. Did the district court err in its findings of fact regarding the valuation of the businesses owned by each party?

II. Did the district court adequately determine the value of the marital estate and equitably distribute the marital estate?

III. Did the district court abuse its discretion in the magnitude of sanctions it imposed on Appellant?

IV. Did the district court err in formulating the parenting plan by disregarding the guardian ad litem's suggested parenting schedule for the parties' minor children?

STATEMENT OF THE CASE

This is a dissolution matter, with a Parenting Plan for the two children born during the marriage. A final hearing was held March 22, 2024.

This matter comes on for appeal of the Second Judicial District Court's Findings of Fact, Conclusions of Law and Final Decree of Dissolution, and Final Parenting Plan entered in Cause No. DR-21-196, both dated April 26, 2024, and Notice of Entry of Judgment dated May 10, 2024. Appellant Brian Martin further appeals from the trial court's September 5, 2023 Order Concerning Rule 37 Motion and Contempt.

STATEMENT OF THE FACTS

1. Brian Martin and Kirsten Martin were married on July 28, 2010 in Pocatello, Idaho. Dkt. 80, ¶ 1.
2. There were two children born during the marriage: R.A.M., born 2012, and R.A.M., born 2015. Dkt. 80, ¶ 6.
3. The children have primarily resided with Kirsten[1] since the parties separated in 2018. Dkt. 80, ¶ 6.
4. The children are home schooled through Digital Academy. Dkt. 80, ¶ 6.
5. Kirsten has resided in Three Forks, Montana since December of 2018. Dkt. 80, ¶ 8.
6. Kirsten owns and operates R & R Pet Resort in Butte since 2018. Dkt. 80, ¶ 8.
7. R & R Pet Resort has six employees who handle the day-to-day operations of the business. Tr., pg. 64, lns 20-23.
8. Brian has resided in a travel trailer in Pocatello since the parties separated in 2018. Dkt. 80, ¶ 9.

[1] First names are used throughout this brief to avoid confusion because the parties shared the same last name prior to completion of the dissolution. No disrespect is intended.

9. Brian is a framing subcontractor who operates under the business name Martin Enterprises, LLC. Dkt. 80, ¶ 9.

10. In 2018, the parties purchased a residence at 9 Christopher in Three Forks for $550,000. Dkt. 80, ¶ 11(A).

11. In June of 2018, the parties purchased a commercial property at 40 Sportsman Way in Butte $480,000, to operate R & R Pet Resort. Dkt. 80, ¶ 11(B).

12. While separated, Brian purchased a lot at 2522 West Street, Inkom, Idaho and built a spec home. Dkt. 80, ¶ 11(C).

STANDARDS OF REVIEW

Findings in a dissolution proceeding are reviewed for clear error. *In re Marriage of Crilly*, 2005 MT 311, ¶ 10, 329 Mont. 479, 124 P.2d 1151. Findings are clearly erroneous if not supported by substantial evidence, if the effect of the evidence is misapprehended by the district court, or if a review of the record reveals a mistake by the district court. *Bock v. Smith*, 2005 MT 40, ¶ 14, 326 Mont. 123, 107 P.3d 488. A district court abuses its discretion when it acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *In re Marriage of Kotecki*, 2000 MT 254, ¶ 9, 301 Mont. 460, 10 P.3d 838. With respect to parenting issues,

abuse of discretion is considered in light of the best interest of the child. See *In re Marriage of Williams*, 2018 MT 221, 392 Mont. 484, 425 P.3d 1277.

SUMMARY OF ARGUMENT

There is no question that dissolution matters are among the most difficult cases a district court judge must deal with. The issues are often complex and multilayered. Add in the important decisions that must be resolved in cases, such as this one which involve children, as well as the emotions of the parties to the dissolution and it is easy to see how errors can occur.

It has been said by this Court that "district courts face a considerable task in determining property valuation." *Collins v. Collins*, 2004 MT 365, ¶ 26, 324 Mont. 500, 104 P.3d 1059. Unfortunately, the district court in this matter failed to properly determine the value of the marital estate, in particular the value of businesses owned by the parties. This led to an unbalanced distribution, rather than an equitable one.

Additionally, perhaps as a sign of the frustration the trial court felt toward Brian Martin for failure to disclose financial information adequately, a Parenting Plan was entered by the Court which was not in the best interest of the children and went against the guardian ad litem's report by granting

Brian very little parenting time.

ARGUMENT

"It takes 20 years to build a reputation and five minutes to ruin it."

- Warren Buffett

Brian Martin and his prior counsel made decisions throughout his dissolution matter with Kirsten Martin which cast him in a negative light with the district court. "[I]t is exclusively within the province of the trier of fact, and not this Court, to weigh evidence, including conflicting evidence, and judge the credibility of the witnesses." *In re Marriage of Edwards*, 2015 MT 9, ¶ 18, 378 Mont. 45, 50, 340 P.3d 1237, 1241 (quoting *Owen v. Skramovsky*, 2013 MT 348, ¶ 22, 372 Mont. 531, 313 P.3d 205).

In this particular case, once the district court had determined that Brian's credibility was low, Kirsten's credibility appears to have become unimpeachable. The trial court erred in not determining each area of dispute between the parties based on the facts and circumstances of that particular issue, rather than relying on its overall belief that Kirsten was the more credible party.

A. The district court erred in valuation of the businesses owned by each party.

The process of determining the value of a business can be difficult. That difficulty is amplified when the businesses are closely held. As discussed in a trade publication article titled *What is Invisible Income?*, "[a] spouse who has control of a closely-held business may manipulate how much money is left in or taken out of the business. Deferring compensation is a common tactic." William E. Mullin, Alyn Bedford, *What Is Invisible Income?*, Fam. Advoc., Fall 2003, at 12.

The article goes on to explain the difficulties in valuing a business for which no immediate market to sell exists and for which no stock is issued. *Id.* The article explains that some of the factors that should be considered in valuing a business are "recent sale value, asset value, and liquidation value" and "its history and financial condition, its earning potential, any goodwill the business may possess, the size of the block of stock to be valued, and the market price of the stock of publicly-held companies engaged in a similar business." *Id.*

To establish the value of R & R Pet Resort, Kirsten only provided her testimony that she "takes $60-65,000 per year" out of the business and that

"people say you should multiply that by three to determine value." Tr., pg. 64, lns 9-10; and pg. 65, lns. 2-9. Kirsten did not explain who the people are that say a multiple of three is applicable to the pet care industry, nor did she explain what method of business valuation relies on the amount an owner receives as a salary, dividend, or distribution as an appropriate metric. Kirsten did not call an expert witness to substantiate her valuation of the business at $180,000, yet the trial court used that figure. Dkt. 89, ¶ 13.

This Court has stated "[w]e have recognized district courts face a considerable task in determining property valuation. In the final analysis, it is not a question of whether we would be persuaded to reach a different conclusion after considering the same evidence. Rather, the test is whether the district court had adequate evidence to support its conclusions. *In re Marriage of Haines*, 2002 MT 182, ¶ 23, 311 Mont. 70, ¶ 23, 53 P.3d 378, ¶ 23.

A district court may adopt any reasonable valuation of property supported by the record. *In re Marriage of Haberkern*, 2004 MT 29, ¶ 13, 319 Mont. 393, 85 P.3d 743. To assist the court in making an equitable apportionment of the property, parties must provide "competent evidence ... on the values of the property." *In re Marriage of Funk*, 2012 MT 14, ¶ 7, 363 Mont. 352, 355, 270 P.3d 39, 41 (internal citations omitted).

Kirsten did not provide competent evidence of the value of R & R Pet Resort. She did not enter any tax returns or profit and loss statements from R & R Pet Resort into evidence. She did not provide a balance sheet for the business so the trial court could determine if, for example, the business had $500,000 in retained earnings that Kirsten had elected to not distribute until after the dissolution with Brian was finalized.

Brian recognizes, as this Court has said previously, that there are limitations to a trial court's ability to determine the value of property without sufficient information. "We do not feel that the trial judge must become an appraiser, an accountant, a computer, and an all-around genius to appropriately decide the facts as established by the documentation given at trial. It is the parties' duties to assist the trial court in getting this information so a proper judgment is made as to their marital assets." *Downs v. Downs* (1979), Mont., 592 P.2d 938, 939, 36 St.Rep. 577, 579.

That said, there are acceptable methods of valuing a business, all of which require expert testimony that Kirsten failed to provide to the court. In *Collins v. Collins*, Gail and Lonnie each owned their own antique businesses which had to be valued as part of their dissolution. 2004 MT 365, ¶ 8, 324 Mont. 500, 104 P.3d 1059. Lonnie provided no expert testimony, but rather

relied on his own testimony of what he believed the business were worth. *Id.* at ¶ 25. Gail provided expert witness testimony from James Connors, an expert in the field of business valuation. *Id.* Connors explained to the court that there were three methods of valuing a business, all of which he provided calculations and a final value for. *Id.* Ultimately, because the antique businesses were no longer operating, the trial court "adopted the asset-based approach, which provides a liquidation value of all assets and liabilities of the business to arrive at a business valuation. *Id.*

In *In re Marriage of DeCosse*, the other primary methods of business valuation were addressed: fair market value and income-based approach. 282 Mont. 212, 216, 936 P.2d 821, 823 (1997). The trial court in *DeCosse* described fair market value as the price a buyer would be willing to pay for the business, while the income-based approach relies on the revenue produced by the business as a means of valuing it. *Id.*

A district court has broad discretion in determining the value of property in a dissolution. Its valuation can be premised on expert testimony, lay testimony, documentary evidence, or any combination thereof. The court is free to adopt any reasonable valuation of marital property which is supported by the record as long as it is reasonable in light of the evidence

submitted. *In re Marriage of Meeks* (1996), 276 Mont. 237, 242–43, 915 P.2d 831, 834–35. In the instant matter, the trial court relied upon Kirsten's testimony that she takes "$60-65,000" per year in distributions, and that "they say" to multiply that by three, in order to determine the value of the business. Tr., pg. 64, lns 9-10; and pg. 65, lns. 2-9. Brian testified that based on the assets of the business and the income he saw coming into the bank account prior to having his access removed by Kirsten, he believed that R & R Pet Resort was worth $500,000. Tr., pg 154, lns 18-19.

Based on Kirsten's testimony, the trial court determined that R & R Pet Resort was worth $180,000. Dkt. 89, ¶ 13. There is no accepted valuation method that relies on the annual dividend or distribution amount withdrawn from a business by its owner as the basis for determining the value of that business. That method of business valuation ignores the simple premise that a single-member LLC, such as Kirsten's, can leave profit in the business as retained earnings, which would show on a balance sheet (which she did not offer into evidence). That method of business valuation also ignores the concept of goodwill. This Court defined the concept of goodwill in *In re Marriage of Arrotta*:

> Goodwill is property of an intangible nature and is commonly defined as the expectation of continued patronage. Among the elements which engender goodwill are continuity of name, location, reputation for honest and fair dealing, and individual talent and ability.... The determination of its value can be reached with the aid of expert testimony and by consideration of such factors as the practitioner's age, health, past earning power, reputation in the community for judgment, skill, and knowledge, and his comparative professional success.... In view of exigencies that are ordinarily attendant upon a marriage dissolution the amount obtainable in the marketplace might well be less than the true value of the goodwill.
>
> Goodwill is not applicable only to professional practices. It may also exist in a business founded on personal skill or reputation.

244 Mont. 508, 511, 797 P.2d 940, 942 (1990)(internal citations omitted).

R & R Pet Resort is a successful business which is run mostly by six employees. Tr., pg. 64, lns. 3-23. It has built a reputation in the community, and it can be marketed as a turn-key operation for a new owner. Therefore, the district court erred in not considering goodwill and other data that is important to a proper valuation of R & R Pet Resort and instead only relying on Kirsten's testimony regarding how much of an income she chooses to take out of the business each year. A finding of fact is clearly erroneous if it is not supported by **substantial credible evidence**, if the court misapprehended the effect of the evidence, or if a review of the record leaves us with the definite and firm conviction that the court committed a mistake. *In re Marriage of*

Edwards, 2015 MT 9, ¶ 9, 378 Mont. 45, 340 P.3d 1237 (emphasis added). Kirsten's testimony by itself did not constitute substantial credible evidence, therefore the trial court's finding as to the value of her business was clearly erroneous.

1. Brian's business has a much lower value than the court determined.

Brian works as a subcontractor framing houses in the Pocatello area. His business relies solely on his ability to swing a hammer and operate a framing nail gun or circular saw. He is 51 years old. He has one customer, Lyle Murray. Tr., pg. 176, lns. 6-8. The business has no value above what he receives as a regular income. He cannot sell the business because there is no goodwill associated with it, nor can any buyer rely on Lyle Murray to continue to employ a new owner as his subcontractor.

Brian valued his business at $40,700. Dkt. 80, ¶ 14. The Court noted that "no support for this opinion was given." *Id.* He provided 1099s from 2018, 2019, and 2020, which should respective incomes of $40,000; $40,000; and $62,524. Dkt. 89, ¶ 13. Kirsten testified that Brian's business brought in $60,000 a year and should be multiplied by three to determine the value. Tr., pg. 66, lns 1-8. In reliance on Brian's highest income year and Kirsten's testimony, the trial court improperly determined that Brian's business is worth

$180,000. In other words, while the trial court was critical of Brian for not providing adequate support for his valuation of the business, other than his testimony, the court found Kirsten's testimony only to be sufficient to establish the value of her business. What was good for the goose was not good for the gander, apparently.

A district court must base its decision on the evidence before it; "speculation, conjecture, inference, or guess do not constitute credible factual evidence." *In re Marriage of Bartsch*, 2007 MT 136, ¶ 28, 337 Mont. 386, 162 P.3d 72 (quoting *In re Marriage of Harper*, 1999 MT 321, ¶ 35, 297 Mont. 290, 994 P.2d 1). Kirsten's testimony regarding the value of Brian's business which the court relied on, did not constitute credible factual evidence.

B. The district court failed to adequately determine the value of the marital estate and equitably distribute the marital estate.

It is unknown to Appellant how many dissolution cases are heard by district courts annually, or how many of those cases end up before the Montana Supreme Court. For anyone who has viewed a civil docket in district court or performed a search in Westlaw or LexisNexis for appellate decisions on dissolution issues, it is clear the answer is a lot. One of the benefits of

ample case law, though, is that there are very few mysteries as to how this Court will review a case.

The first step is to see if the district court got a clear picture of the overall magnitude of the marital estate before it began trying to divide it.

"[T]he true net worth of the marital estate must be accurately determined before the issues of equitable apportionment and maintenance can be resolved. *In re Marriage of Hanni*, 2000 MT 59, ¶ 37, 299 Mont. 20, ¶ 37, 997 P.2d 760, ¶ 37 (citing *In re Marriage of Lundvall*, 241 Mont. 172, 175, 786 P.2d 10, 12 (1990)). Put another way, "this Court has consistently held that this apportionment must be predicated upon a finding of the net worth of the marital estate. . . . The District Court must make complete findings of fact, including assets and liabilities, from which can be established a net worth of the parties." *In re Marriage of Dirnberger*, 237 Mont. 398, 401, 773 P.2d 330, 332 (1989).

A review of the Findings of Fact and Conclusions of Law [Dkt. 80] does not show that the district court determined the net worth of the marital estate prior to apportioning the property. Certainly, the court analyzed two of the properties at length and addressed why it was not determining the actual value of the third property that was part of the marital estate (more on that in

Section C, *infra*). But the Findings of Fact and Conclusions of Law [Dkt. 80] apportion a significant number of items of personal property without any analysis of the value of the properties. That, combined with the absence of a valuation of 2522 West Street, Inkom, Idaho, led to an inequitable distribution of the marital estate.

Pursuant to M.C.A. § 40-4-202(1), a court's findings of fact must allow for a reviewing court to determine the reasonableness of the court's apportionment without having to speculate as to the appropriate net worth of the marital estate. *In re Marriage of Crowley*, 2014 MT 42, ¶¶ 26, 32, 374 Mont. 48, 318 P.3d 1031 (internal citations omitted). "While § 40-4-202, MCA, does not require a strict, itemized accounting and valuation of every marital asset and liability in every case, district courts must at least make findings of fact that are sufficient as a whole to manifest an equitable distribution of the marital estate." *In re Marriage of Elder and Mahlum*, 2020 MT 91, ¶ 9, 399 Mont. 532, 462 P.3d 209 (citations omitted); *see also In re Marriage of Lewton*, 2012 MT 114, ¶ 15, 365 Mont. 152, 281 P.3d 181; *Larson v. Larson*, 200 Mont. 134, 139, 649 P.2d 1351, 1354 (1982) ("Item-by-item findings are not required in property division cases, but findings nevertheless must be sufficiently adequate to ensure that this Court need not

succumb to speculation while assessing the conscientiousness or reasonableness of the District Court's judgment." (citation omitted).

The Findings of Fact and Conclusions of Law [Dkt. 80] make no attempt to address the value of any personal property. While Kirsten may argue that Brian received the greater portion of the personal property, that can only be evaluated by the number of items received, since no values are attached to any of the personal property.

1. Valuations of real property were unacceptably low.

Kirsten and her two children from her marriage with Brian have resided at 9 Christopher in Three Forks since December 2018. Dkt. 80, ¶ 7. The home was purchased while Brian and Kirsten were still married, but they separated without Brian ever moving in. *Id.*

The parties each provided a Comparative Market Analysis ("CMA") from their chosen realtors. Kirsten relied on reports and testimony from Gary Shea of Butte. He provided an October 2022 report which put the value of the home at $880,000. After the final dissolution hearing was delayed multiple times, he re-evaluated the home and determined that by January 2024 the value of the home had dropped to $825,000.

Brian retained Tamara Williams, a Bozeman realtor with significant experience in the Three Forks market. She provided a broader range of values in her August 2023 CMA, putting the value at $770,000-$850,000 based on comparable sold property, but due to the limited number of comparables and the broad range of listing and sales price, relied on her experience in Three Forks to provide a valuation of $822,000-$924,000.

Brian concedes that the value of the home the court ultimately arrived at is slightly above the low end of values provided by his expert. A district court may adopt any reasonable valuation of property supported by the record. *In re Marriage of Haberkern*, 2004 MT 29, ¶ 13, 319 Mont. 393, 85 P.3d 743. A district court may assign any value to an item of property that is within the range of values offered into evidence. *In re Marriage of Hochhalter*, 2001 MT 268, ¶ 33, 307 Mont. 261, 37 P.3d 665. The concern for Brian is that the court relied on Mr. Shea's testimony that the value of the property should be reduced by $55,000 based on increased interest rates and lower buying power for homeowners, which has reduced sales prices in Three Forks. Tr, pg. 20, lns 3-17.

Generally, valuation of assets should be made at or near the time of the dissolution hearing. *In re the Marriage of Hammill* (Mont.1987), 732 P.2d

403, 406, 44 St.Rep. 220, 223. This rule, however, is not hard and fast. The choice of time for valuation is within the broad discretion of the district court. *In re the Marriage of Krause* (1982), 200 Mont. 368, 379, 654 P.2d 963, 968; *In re the Marriage of Krum* (1980), 188 Mont. 498, 503, 614 P.2d 525, 527. If a single valuation date would lead to an inequitable distribution of property, the District Court may choose several different times for valuation. *See, In re the Marriage of Halverson* (Mont.1988), 749 P.2d 518, 45 St.Rep. 162; *In re the Marriage of Hurley* (Mont.1986), 721 P.2d 1279, 1286, 43 St.Rep. 1271, 1278.

Given that Kirsten has no intention of selling the home, it is inequitable that she receive the benefit of market conditions shifting during the pendency of the dissolution. Instead of receiving an asset with $446,146 in equity, Kirsten appears to have received an asset with only $391,146 in equity, thereby artificially reducing by $55,000 the amount the court would need to award to Brian to balance out the equation.

The second property awarded to Kirsten is 40 Sportsman Way in Butte, which is a commercial building used to operate her business, R & R Pet Resort. The court accepted the valuation provided by Kirsten's expert, Mike McLeod, of $670,000. Both Mr. McLeod and Brian's expert, Dennis

Erickson, relied on cost and income valuations. Mr. Erickson's cost valuation relied on a greater cost to build the property and came up with a valuation of $1,100,000.

The court held that the price to build based on hearsay conversations Mr. McLeod had with Butte contractors was given greater weight than Mr. Erickson's estimate because he was from Bozeman. Though anecdotal, there are plenty of Bozeman commercial contractors doing work in Butte. The mere fact a Butte contractor said he would do a job for $125 per square foot does not mean he is actually ready, willing, and able to provide those services. By selecting the lower of the two values provided by experts, the court awarded Kirsten a property with $157,148 in equity, rather than $587,148 at the higher valuation. As with the residence awarded to Kirsten, the difference in valuations led to Kirsten receiving an asset with a reduced valuation that then reduced the necessity of a comparable apportionment to Brian to balance the ledger.

Of greater concern to Brian than the court's acceptance of Mr. McLeod and Mr. Shea's valuations of the properties is that those are part of a larger pattern of findings of fact. As will be discussed more *infra*, in levying

sanctions and in the Parenting Plan, the district court did not merely rule more often than not against Brian, but uniformly its rulings went in favor of Kirsten.

This case is comparable to *In re Marriage of Rolfe*, 216 Mont. 39, 699 P.2d 79, (1985). In *Rolfe*, the court awarded the equity in the family home to the wife, partial equity in rental properties, and items of personal property that the appellate court considered to be inflated value wise. *Id.* at 45. On the other hand, the husband received a greater portion of the equity in rental properties, his retirement fund, stocks, and annuities. *Id.* This Court noted that "[i]n dividing property in a marriage dissolution the district court has far reaching discretion and its judgment will not be altered without a showing of clear abuse of discretion. The test of abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *Id.*

The Court then went on to find there was an abuse of discretion:

> Applying this standard, the District Court abused its discretion and we find four substantial injustices: the husband's values, while not adopted absolutely verbatim, were almost always accepted without explanation even though the record indicates some of the husband's values are questionable; as her share of the marital estate the wife received household goods with inflated values while the husband received income producing property such as stocks and an annuity; non-income producing property brought into the marriage 15 years ago was "deducted

> from the division of property" resulting in an inequitable and unworkable property division; and, various "credits"—payments on real property, withdrawals from checking accounts, child support—appeared as distributions of property but it is unclear what a "credit" is in this context.

In re Marriage of Rolfe, 216 Mont. 39, 699 P.2d 79, (1985).

While Kirsten's valuation in the two properties was substantiated, similar to the husband in *Rolfe,* Kirsten received the benefit of virtually every ruling. The total equity she received in those two properties was $548,294 based on the lower values the Court relied upon. Had the Court used the valuations from Brian's experts, the total equity would have exceeded $1 million. Kirsten also received R & R Pet Resort, a business with six employees that she does not participate in the day-to-day operations of, with a value of at least $180,000 (though likely worth much more, as discussed in Section A, *supra*). Like in *Rolfe,* the trial court accepted a valuation of the business based only on Kirsten's testimony and not on a proper valuation by an expert.

On the other hand, Brian received a spec home and his construction "business," which is him working as a subcontractor, by himself, framing houses. Both were assigned inflated values by the Court that made the distribution of the marital estate appear, on paper, to be equitable. However, Kirsten's apportionment included a residence which had already appreciated

by $275,000 in five years and will likely continue to grow as people are priced out of Bozeman and forced to find bedroom communities like Three Forks to buy in. Kirsten also received a self-sustaining, income producing business. Brian received a home that sold for a minor profit and a business that is non-transferable and dissolves as soon as his body can no longer handle swinging a hammer for 40+ hours per week.

M.C.A. § 40-4-202, "vests the district court with broad discretion to apportion the marital estate in a manner equitable to each party under the circumstances." *Funk*, ¶ 6. The statute requires an equitable, not necessarily equal, division of the marital estate. *Spawn*, ¶ 9. The court is "not required to award the parties property of precisely equal value." *In re Marriage of David*, 2009 MT 422, ¶ 21, 354 Mont. 44, 221 P.3d 1209 (citing *In re Marriage of Payer*, 2005 MT 89, ¶ 14, 326 Mont. 459, 110 P.3d 460).

In this case, however, the value of the portion each spouse received from the marital estate is so inequitable that it constitutes an abuse of discretion and substantial injustice to Brian.

C. The district court abused its discretion in the magnitude of sanctions it imposed on Appellant.

While separated from Kirsten, but before the dissolution was completed, Brian purchased a lot at 2522 West Street, Inkom, Idaho. For reasons not important to this argument, Brian did not provide the trial court with disclosures regarding the Inkom property, nor did he provide documentation to Kirsten in response to discovery responses about the Inkom property. Kirsten filed a Rule 37 Motion for Sanctions on May 3, 2023 [Dkt. 37]. Following a hearing, the district court entered an order granting the following sanctions against Brian:

- The Inkom property was determined to be a marital asset with a value of $630,000, which was the amount Brian had agreed to sell the property for under a pending Buy-Sell Agreement.
- Brian was awarded the Inkom property as a portion of his share of the marital estate, at the value of $630,000.
- Brian was prohibited from providing evidence at trial regarding "any costs or fees associated with the purchase, ownership, construction, or sale" of the Inkom property.

Dkt. 53, pg. 2.

This Court reviews a district court's imposition of sanctions for an abuse of discretion. *Stevenson v. Felco Industries, Inc.*, 2009 MT 299, ¶ 17, 352 Mont. 303, 216 P.3d 763. M.R. Civ. P. 37(b)(2) allows the court to impose sanctions for failure to comply with an order to compel discovery responses. A district court abuses its discretion when it acts "arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice." *Orcutt v. Orcutt*, 2011 MT 107, ¶ 6, 360 Mont. 353, 253 P.3d 884 (citing *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007 MT 202, ¶ 19, 338 Mont. 423, 166 P.3d 451).

This Court reviews the following three criteria to determine whether a sanction imposed pursuant to M.R. Civ. P. 37(b) is an abuse of discretion: (1) whether the consequences imposed by the sanctions relate to the extent and nature of the actual discovery abuse; (2) the extent of the prejudice to the opposing party which resulted from the discovery abuse; and (3) whether the court expressly warned the abusing party of the consequences. *Kraft v. High Country Motors, Inc.*, 2012 MT 83, ¶ 28, 364 Mont. 465, 472, 276 P.3d 908, 914 (internal citations omitted).

In this case, both Kirsten and the district court were aware that there were various costs and expenses associated with the Inkom property. For

example, the purchase of the lot and the materials to build the home were bought by Brian was known to Kirsten, who called construction supply companies in an effort to determine how much Brian spent. While the net result of the sale of the Inkom property is not in the record, due to the court's ruling, Brian clearly did not walk away from that sale with $630,000. The issue is that the trial court is unaware of the magnitude of the sanction, whether it be $500,000 after costs, or zero dollars due to cost overruns.

This Court reviews sanctions imposed by a district court to determine if they are roughly proportionate to the gravity of the abuse and the inconvenience visited upon other parties and the district court. *See Culbertson–Froid–Bainville Health Care Corp. v. JP Stevens & Co.*, 2005 MT 254, ¶¶ 14–15, 329 Mont. 38, 122 P.3d 431; *McKenzie v. Scheeler,* 285 Mont. 500, 516, 949 P.2d 1168, 1177–78 (1997); *Smith,* 276 Mont. at 339–40, 916 P.2d at 97. This Court will reverse a trial court's refusal to invoke Rule 37, M.R.Civ.P., sanctions only when the court's judgment materially affected the substantial rights of the parties or allowed a possible miscarriage of justice. See *Wolf v. Northern Pac. Ry. Co.* (1966), 147 Mont. 29, 409 P.2d 528.

Here, the sanction levied against Brian was too harsh for the inconvenience it caused Kirsten. Courts are obligated to rely on reasonable judgment and common sense in ensuring a fair distribution of marital property. *In re Marriage of Kimm* (1993), 260 Mont. 479, 483, 861 P.2d 165, 168 (citing *In re Marriage of Danelson* (1992), 253 Mont. 310, 833 P.2d 215). It is not common sense to ignore the land and construction costs involved in building a spec home. Even without specific documentation regarding those costs, Brian should have been allowed to testify as to those expenses and then the district court could consider that testimony and give it the appropriate weight. In a similar situation, the district court determined that it could decide the value of R &R Pet Resort based only on the testimony of Kirsten, without the need for financial statements or tax returns. Kirsten will likely argue that she was not asked for financial statements or tax returns in discovery, but the point of the analogy is that the trial court could have fashioned a sanction less dramatic than the $630,000 imposed.

Nonetheless, the imposition of sanctions does not negate the requirement of M.R. Civ. P. 52(a) to enter specific findings of fact justifying the distribution of a marital estate. Nor does the imposition of sanctions relieve a district court of its obligation to comply with the requirements of

M.C.A. § 40–4–202 to equitably apportion between the parties the property and assets belonging to either or both and to consider several factors in distributing a marital estate equitably. A district court must make findings of fact and enter conclusions of law which reflect why it distributed a marital estate in a certain manner and these findings must not be clearly erroneous. *See In re Marriage of Swanner–Renner,* 2009 MT 186, ¶ 36, 351 Mont. 62, 209 P.3d 238.

The overall effect of the district court's decision to sanction Brian as it did, was that he received an asset with a designated value of $630,000, which makes it appear on paper as if Kirsten received an equitable distribution of approximately that same amount in equity in two other properties.

D. The district court erred in formulating the parenting plan by disregarding the guardian ad litem's suggested parenting schedule for the parties' minor children.

The district court appointed Susan Callaghan to serve as guardian ad litem, but then failed to give sufficient weight to her report. The district court determined that:

- The children are not old enough to make an informed decision on which parent they want to reside with.

- The children have developed bonds with both parents and with the adults and children at each parent's location.
- The children are well-adjusted in both parties' residences. The children are home schooled and have friends in Montana and Idaho.
- Both parents are able to meet their children's health needs; both parents are mentally and physically fit to parent their children.
- No physical abuse was documented by the evidence.

Dkt. 80, pgs 2-3.

M.C.A. § 40–4–212 provides that the court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community; and

(5) the mental and physical health of all individuals involved.

Kirsten requested to be the children's primary residential parent. Brian wanted the parties to split parenting time on a two week on, two weeks off basis.

The guardian ad litem recommended that Kirsten have primary residential custody during the school year. Dkt. 41, pg. 8. Ms. Callaghan recommended that Brian have the children for most of the summer, with Kirsten getting a week at the beginning of the summer, a week before the school year begins, and a week somewhere in the middle. Dkt. 41, pg. 9. She also recommended that Brian have a week with the kids at the end of March or beginning of April each year and additional parenting time for special events such as hunting camp. Dkt. 41, pg. 9.

Very little testimony regarding parenting was provided by the parties in the final dissolution hearing. Each parent provided their own biased testimony as to the quality and regularity of their parenting, but the only neutral evidence the court could rely upon was the guardian ad litem's report.

The district court, without explanation, instead only gave Brian two weeks each month in June, July, and August with the children; a week every spring, and "occasional parenting in Montana on weekends . . . with 7 days' notice to Kirsten." Dkt. 78, pg. 2. The Court did not explain why it deviated

from the guardian ad litem's report and recommendations, nor did it provide a basis for providing Brian with so little parenting time.

Inadequate findings to support a parenting schedule justify remand for consideration of parenting criteria. See *In re Marriage of Markegard*, 189 Mont. 374, 616 P.2d 323 (1980). Here, the district court failed to provide adequate support for its findings and conclusions regarding parenting time.

CONCLUSION

Based on the foregoing facts and arguments, Brian Martin respectfully requests this Court vacate the Findings of Fact and Conclusions of Law entered by the Court [Dkt. 80], as well as the Parenting Plan [Dkt. 78], and remand for a new trial.

RESPECTFULLY SUBMITTED this 6th day of January, 2025.

/s/ David L. Vicevich
David L. Vicevich
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate procedure, I certify that this brief is printed with a proportionately spaced Times New Roman non-script text typeface of 14 points; is double spaced except for quoted and indented material; and the word count calculated by Microsoft Word totals 6,520 words, excluding table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this this 6th day of January, 2025.

/s/ David L. Vicevich
David L. Vicevich
Attorney for Appellant

Appendix

Exhibit 1: Findings of Fact and Conclusions of Law, Dkt. 80

Exhibit 2: Final Parenting Plan, Dkt. 78

CERTIFICATE OF SERVICE

I, David L. Vicevich, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-06-2025:

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Electronically Signed By: David L. Vicevich
Dated: 01-06-2025