

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Supreme Court Cause No. DA 24-0645

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IN THE MATTER OF THE ESTATE  
OF CAROL A. HUDSON, a/k/a  
CAROL ANN KELLER, Deceased.

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ALAN LEE JOHNSON,

Appellant,

v.

DOUGLAS J. NAIL,

Appellee.

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On appeal from the Montana Eighteenth Judicial District Court,  
Gallatin County Cause No. DP-19-10 & DV-412C  
The Honorable Judge John C. Brown, Presiding

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## **STATEMENT OF ISSUES**

1. Whether the District Court's finding that Doug Nail and Carol Hudson mutually consented to a common law marriage is clearly erroneous.
2. Whether the District Court's finding that Doug Nail and Carol Hudson confirmed their marriage by cohabitation and public repute is clearly erroneous.

## **STATEMENT OF THE CASE**

This matter began as a probate case in January of 2019 after Carol Hudson ("Carol") died suddenly at the age of 69. *In the Matter of the Estate of Carol A. Hudson* (Cause No. DP-19-10C). Carol had been sharing her life with her husband Doug Nail ("Doug") for over a decade, living in a house they built together near Bozeman, Montana.

Thomas Mercer, an old friend of Carol's who resides in California, was appointed as personal representative of the Estate of Carol Hudson ("Estate") based on a will Carol executed in 2002. *Order Appointing Thomas Mercer as Personal Representative* (February 20, 2019).

Appellant Alan Johnson ("Appellant") filed a lawsuit against Doug in April of 2019 seeking declaratory relief and purporting to assert claims for damages on behalf of the Estate. *Alan Lee Johnson v. Douglas J. Nail* (Cause No. DV-19-412C). The Court consolidated the

two cases because they shared a common question of fact, namely, whether Doug and Carol entered a common law marriage. *Order for Consolidation* (June 12, 2019) (Dkt. 18).

After Appellant became displeased with the course of the probate case, Appellant filed a new lawsuit against Mr. Mercer, his brother Jeff Johnson and Doug in California.<sup>1</sup> Appellant filed yet another lawsuit in 2021 against Freedom Pass Partners, LLC, a company in which Doug owns a 1/3 interest, to interfere with the sale of property owned by Freedom Pass under contract for \$7.5 million. *Id.*

The District Court held a four-day bench trial on June 3-6, 2024, on common law marriage. After hearing testimony and reviewing the evidence, Judge John Brown found that Doug and Carol had a common law marriage as of May 17, 2010. *Findings of Fact, Conclusions of Law and Order*, FOF ¶ 1 (October 22, 2024) (“*Order*”). Appellant appeals from that decision pursuant to M.R.App.P. 6(4)(c) & (e). *Amended Notice of Appeal* (Nov. 14, 2024).

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<sup>1</sup> See *Motion Disqualify Johnson as Personal Representative, Petition for Appointment of Neutral Personal Representative, and Motion to Designate Johnson a Vexatious Litigant* (December 27, 2021) (Dkt. 167). The Estate did not participate at trial and is not participating in this appeal.

## **STATEMENT OF FACTS**

### **I. BRIEF OVERVIEW**

Doug and Carol were soulmates who met in California. Tr. Trans. 2-50:24-25. They moved to Montana in 2008 to live together for the rest of their lives. *Order*, FOF, ¶ 6. They specifically agreed to a common law marriage and held themselves out as a married couple. *Id.*, FOF ¶¶ 8-15. The people who knew Doug and Carol in Montana considered them husband and wife. *Id.*

Doug and Carol lived together, built a house together, shared finances, supported one another, told friends and family they were married, shared a bank account and credit cards, entered contracts together, spent nearly all their time together, and generally lived as married couples do. *Id.*, FOF ¶¶ 16-26. Tragically, Carol died of a stroke caused by pulmonary embolism on October 7, 2018. *Id.*, FOF ¶ 27.

Carol had two sons from her first marriage, Appellant and Jeff Johnson. Pursuant to a trust, they inherited real estate worth millions that generates \$63,000 in income each month. Tr. Trans. 1-157:13-16; Ex. 63. In this matter, Appellant contends he owns all of Doug's assets as well. *See Complaint and Jury Demand* (April 18, 2019).



Appellant has been “out for blood” against Doug since his mother’s death. Ex. 76; *see also* Dkt 167. According to Jeff, Appellant is “not trustworthy” and has “a proven record of lying and cheating.” Ex. 78; Tr. Trans. 2-209:9-18. Based upon the evidence in the record and *Order*, the District Court agreed. Among other things, Appellant filed a lawsuit against Jeff Johnson to coerce him into opposing Doug’s claim of common law marriage. Ex. 246; Tr. Trans. 2-218, 219.

Appellant provides an inaccurate picture of evidence in the record. *See generally* Appellant’s Opening Brief (Appellant’s Br.). Doug presents this factual background and briefly describes the complicated procedural history of this case (and others filed by Appellant) to provide context.

## **II. THE FACTS FOUND BY THE DISTRICT COURT.**

### **A. DOUG AND CAROL MET IN CALIFORNIA AND BEGAN A COMMITTED, EXCLUSIVE RELATIONSHIP.**

Doug and Carol entered a serious, committed relationship in California around 2006 or 2007. FOF, ¶¶ 2,3; Tr. Trans 1-44:18-25. They lived together at Doug’s house most of the time. FOF, ¶ 3; Tr. Trans. 1-45:12-16. Doug’s daughter Kaitlyn resided with them. *Id.*; 1-

45:17-25. She referred to Carol as her stepmom and Carol referred to Kaitlyn as her daughter.<sup>2</sup> *Id.*; Tr. Trans. 1-46:7-11; Tr. Trans 3-24:4-19.

Carol and Doug spent most of their time sharing their lives together, spent time with family and friends, vacationed together and intended to remain together. FOF, ¶ 4; Tr. Trans. 1-44 to 48. They discussed marriage. *Id.* Carol hired an architect to remodel Doug's house. *Id.*; Tr. Trans. 1-47:5-14.

**B. THEY MOVED TO MONTANA AND ENTERED A COMMON LAW MARRIAGE.**

Doug and Carol moved to Montana to get away from Southern California and spend the rest of their lives together in 2008. FOF, ¶ 6; Tr. Trans. 1-48:11 to 49:25. Carol found a house near Bridger Bowl and Doug negotiated a lease purchase option. Tr. Trans. 1-50. Doug and Carol were both on the lease. *Id.*

They spent their time together skiing, hiking, and camping. Tr. Trans. 1-51. They did everything together. *Id.* They spent some time with family. Kaitlyn moved to Bozeman and Jeff and Appellant would

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<sup>2</sup> Carol helped Kaitlyn plan her wedding in 2011 and participated in the ceremony. Tr. Trans. 3-26.

visit on occasion. Tr. 1-53, 54. Doug and Carol spent most of their time with friends who lived in Montana. Tr. 1-54.

They loved each other very much and intended to be together permanently. Tr. Trans.1-49. They continued to discuss marriage. FOF, ¶ 7; Tr. Trans. 1-54:24 to 55:18. After moving to Montana, they had a general understanding Montana recognized common law marriages. *Id.* They had both been married before and did not see the point in a formal marriage ceremony or marriage certificate, though Carol would have enjoyed having a formal marriage ceremony. *Id.*

Doug and Carol specifically agreed they had a common law marriage. FOF, ¶ 8; Tr. Trans. 1-54:24 to 55:11. Doug gave Carol Cartier love bracelets and a ring as symbols of their marriage. Tr. Trans. 1-55:19 to 56:3. Carol wore the bracelets constantly and liked to wear the ring on occasion when they went out. *Id.*<sup>3</sup>

Jeff Johnson and his family called Doug “Grandpa D.” FOF, ¶ 15; Ex. 205; Tr. Trans. 2-189:2-4. At trial, a card to Doug from Jeff and his family was introduced as evidence. Ex. 205. The card accompanied a

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<sup>3</sup> Ex 432 is an example of a photograph of Carol wearing the bracelets while visiting Appellant.

family photobook, which Jeff sent only to grandparents. Ex. 206; Tr. Trans. 2-190:17-24. Jeff addressed the envelope of the card to “Grandpa D” and the card referred to Doug as Grandpa D. Ex. 205. Doug also introduced a voice message at trial where Jeff referred to his new daughter as Doug’s granddaughter and said he loved Doug. Ex. 223; Tr. Trans. 1-64:9-11. It was common for Doug and Jeff to say they loved each other. Tr. Trans. 1-64: 16-18.

Carol executed a will in 2002, long before her relationship with Doug. Ex. 30. After they moved to Montana, Carol called Jeff Johnson to advise him that she intended to set up a “living will” or “life estate” for Doug, but never got around to it. Tr. Trans. 2-196:23 to 197:5.

Appellant did not get along with his brother or Doug. Appellant had a falling out with Jeff and they did not speak for several years. Tr. Trans. 1-54:2-9. Appellant was not invited to Jeff’s wedding in 2016. Tr. Trans. 2-198:20

Appellant strongly dislikes Doug. Tr. Trans. 1-67:18-23. In 2013, Appellant sent Doug a rambling email where he levied various false allegations against Doug and offered to pay him money to leave his

mother.<sup>4</sup> Ex. 435; Tr. Trans. 1-70. For that reason and others, Doug and Carol's relation with Appellant was strained and Carol did not talk about Doug with Appellant. Tr. Trans. 1-57:7-11; 3-87:3-12.

**C. THEY TOLD PEOPLE THEY WERE MARRIED.**

The people who knew Carol and Doug understood they were married. See FOF, ¶¶ 13-15. Doug and Carol told some friends they had common law marriage and Doug and Carol referred to each other as husband and wife. *Id.*

Carol's close friend Shelley Patton is a family law attorney in California. FOF, ¶ 10; Tr. Trans. 2-56:17 to 57:15. They became friends around 1987. Tr. Trans. Tr. Trans. 2-57:19 to 58:1. Shelley was close to Carol, not Doug. Tr. Trans. 2-72:1-5. In fact, Shelley represented Doug's first wife in their divorce several decades ago. *Id.*

Shelley was Carol's confidant. Tr. Trans. 2-58:2 to 2-63:18-21. They talked about everything, from the most intimate details of Carol's life to everyday, mundane matters. Tr. Trans. 2-63:18-21. They specifically discussed matters related to Carol's family, her estate

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<sup>4</sup> Appellant relies on his own email to contend Carol paid \$966,000. No other evidence supports this outrageous claim, and the evidence demonstrates the email was just "BS." Tr. Trans. 3-77:23 to 80:16.

planning, and her relationship with Doug. *Id.* “She saw Doug as the love of her life and his – and her soulmate, and she told me that.” Tr. Trans. 2-50:24-25. “Carol believed they were meant to be together.” *Id.* at 61:12-13. Shelley and Carol spoke regularly even after Carol moved to Montana. FOF, ¶ 11. Carol would also visit Shelley when she returned to California. *Id.*

Shelley had numerous conversations with Carol about her marriage to Doug. FOF, ¶ 10; Tr. Trans. 2-63:22 to 70:12. Shelley knew about Carol’s family dynamics and was deeply concerned Carol did not have her affairs in order. *Id.* Shelley did not think common law marriage – as opposed to a formal legal marriage – was a good idea. *Id.* She had concerns about the informality of common law marriage and the potential problems that could arise in the future. *Id.* Shelley also advised they would not be able to file taxes jointly. Tr. Trans. 2-67:5-12.

The witnesses who knew Doug and Carol in Montana provided similar testimony. Birgit Hance met Carol soon after she moved to Montana. Tr. Trans. 2-106:19 to 207:2. They spent an extraordinary amount of time together skiing, became close friends, lived near Doug and Carol, had dinner regularly, and spent Thanksgiving and

Christmas together. Tr. Trans. 107:2 to 111:21. She thought they were married, referred to them as husband and wife, and testified the entire locker room at Bridger Bowl thought they were married.<sup>5</sup> Tr. Trans. 2-112:10 to 113:7-16.

Similarly, Zeljko Barack and his wife Sadie met Doug and Carol shortly after they moved to Bozeman and knew them very well. Tr. Trans. 3-72:6 to 76:7. They were good friends, had dinner frequently and spent Thanksgiving and Christmas together. *Id.* Carol took Zeljko's kids to the movies and Doug took one of them to visit colleges. *Id.* Zeljko introduced Carol and Doug as husband and wife multiple times and remembers Carol referring to Doug as her husband. Tr. Trans. 3-76:12-23 & 3-85:11 to 86:3.

Shepard Casey was a close friend who helped Doug and Carol move to Montana. Tr. Trans. 3-93:21 to 94:9. He eventually moved to Montana in 2011 and regularly spent time with Carol and Doug. Shepard has a specific recollection of a conversation where Doug represented that he and Carol had a common law marriage. Tr. Trans.

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<sup>5</sup> An email involving Birgit and her daughter (Nina) referred to Carol as Doug's wife. Ex. 236.

3-95:22 to 97:5. Dr. Phil Auman was friends with Carol and Doug, heard Doug introduced Carol as his wife and that he thought they were legally married. Tr. Trans. 2-138:18-25. Joe Diaz heard Carol refer to Doug as her “hubby” and a card from Joe referred to Carol as Doug’s wife. Ex. 235.

**D. CAROL AND DOUG BUILT A HOUSE TOGETHER.**

Doug and Carol initially lived together in a house at 118 Falling Star Road in Bridger Canyon. FOF, ¶ 18. They eventually built a house on the neighboring lot at 200 Falling Star Road. FOF, ¶ 19. They hired Ed Ugorowski as their architect and Highline Partners as the general contractor. *Id.* Mr. Ugorowski became friends with them, spent a significant time with them professionally and personally, thought they were married, and referred to Carol as Doug’s wife. Ex. 226.

Carol and Doug were both parties to the construction contract with Highline Partners. FOF, ¶ 20; Ex. 207. Though the money for construction came primarily from Carol, Doug was heavily involved in the construction process. *Id.*

Doug worked on the construction site on a regular basis for two years. FOF, ¶ 21. He did carpentry work, drove vehicles, shoveled snow



from the construction site and spent months working on large wooden beams that would be used in the house. Tr. Trans. 1-79:9 to 83:18. He was very concerned about the budget and did what he could to reduce costs. *Id.*

Doug also worked on various other aspects of the project. FOF, ¶ 21. He met with the architect and engineers, handled issues with Gallatin County and the homeowners' association, met with representatives of Stockman Bank, reviewed invoices and lien releases and authorized payments from the construction loan. Tr. Trans. 1-79:9 to 83:18.

Their home was eventually featured in the Big Sky Journal. Ex. 208. The article referred to Doug as "husband." *Id.*; Tr. Trans. 1-83:19 to 87:25. Carol and Doug specifically discussed that the article should refer to Doug as husband. Ex. 209; Tr. Trans. 1-83:19 to 87:25. Carol shared copies of that article with her friends, including the witnesses who testified at trial. *See e.g.* Tr. Trans. 2-116:7-9 & 145:1-12; 3-31:22 to 32:2 & 82:5-10 & 166:24 to 167:4.

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**E. CAROL AND DOUG SUPPORTED EACH OTHER AND ACTED LIKE A MARRIED COUPLE.**

Carol and Doug supported one another. FOF, ¶ 24. Doug handled the sale of Carol's house in San Diego and worked with the city and contractors to fix a compliance issue so that it could be sold. FOF, ¶ 25. With a power of attorney, Doug negotiated a lease agreement for Carol concerning a property she owned in California. *Id.*; Tr. Trans. 1-99:1-3.

Carol and Doug shared a bank account and credit cards. FOF, ¶ 16. Carol listed Doug as the beneficiary of an IRA account. Carol also designated Doug as her "common law husband" on a membership for an air ambulance service. Ex. 212 (Nail005949-50).

In 2016, Doug discovered that a property in Big Sky was going up for auction. FOF, ¶ 26. He investigated the property and participated at the auction. Tr. Trans. 1-99:4 to 101:10. Doug successfully bid on the property and entered a buy-sell agreement. *Id.* He found other investors and formed Freedom Pass Partners, LLC ("Freedom Pass").<sup>6</sup>

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<sup>6</sup> Doug is listed as the legal owner on the documents concerning Freedom Pass. Doug specifically designated Carol as his permitted transferee on the Freedom Pass Operating Agreement so there would be no question that the interest in Freedom Pass would transfer to Carol if he died.<sup>6</sup> Ex. 1. Doug also transferred title to his vehicles to Carol, including a vehicle he drove in high school and a boat that originally belonged to his father. See Ex. 428 & 429.

The 1/3 interest in Freedom Pass cost Doug and Carol \$450,000. *Id.*

That interest is now worth around \$2.5 million. *See* Dkt. 167.

Doug did not refer to themselves as married on every document. FOF, ¶ 17. With respect to certain documents, they were uncertain whether it was appropriate to list themselves as married by virtue of their common law marriage. *Id.* Carol's tax returns stated that she was single, as did some other financial forms. *Id.* Some health care records stated they were single, though some health care records indicated they were married. *Id.*

#### **F. CAROL DIED UNEXPECTEDLY.**

On the morning of October 5, 2018, Doug visited the doctor for an appointment. FOF, ¶ 28. The medical record indicates that Doug advised the treating physician he was "married, lives up Bridger Canyon, sk[ies] 100 days per year." Ex. 438 (Nail006608).

Carol and Doug were going to get together with friends later that day. FOF, ¶ 29. Doug drove into town to get supplies and when he returned, found Carol lying on the floor, unresponsive. *Id.*

Doug called 911. FOF, ¶ 30. A copy of the recording was heard at trial and admitted into evidence. When asked by the operator whether

Carol was Doug's wife, he responded "YES, YES, YES, YES!" Ex. 243.

Carol was flown to Bozeman Health where medical records indicate she suffered from pulmonary embolism. FOF, ¶ 31; Ex. 422. The medical records refer to Doug as husband. *See id.* at AJ000365 (referring to "the patient's husband"), AJ000371 ("found unresponsive by her husband."), AJ000379 ("The patient's husband").

Carol then was transported to a hospital in Salt Lake City, Utah, where she died on October 7, 2018. FOF, ¶ 32. Doug was listed as Carol's spouse on Carol's death certificate (Ex. 55), as her husband on the cremation record (Ex. 65), and as her husband on an anatomical gift form (Ex. 238).

## II. BRIEF PROCEDURAL HISTORY

This case should have been a probate matter handled by the Estate. Instead, Appellant has attempted to leverage his wealth and the court system to pursue his personal vendetta against Doug.

Appellant filed three separate lawsuits arising from the probate case: two in Montana and one in California. *See* Dkt. 167. First, he filed a lawsuit against Doug in Montana purporting to assert claims for damages on behalf of the Estate. *See Defendant and Counterclaimant's*

*Motion to Dismiss for Lack of Standing and Brief in Support* (March 2, 2022) (Dkt. 193). He alleges claims for damages against Doug because Carol and Doug shared their finances – even though shared finances is evidence of common law marriage.

Next, Appellant sued Mr. Mercer and Jeff Johnson and Doug in California. He sued Mr. Mercer because he was unhappy with decisions made by the Estate. *See* Dkt. 167. Appellant sued Jeff Johnson because he initially supported Doug’s claim of common law marriage. Tr. Trans. 218; Ex. 69, ¶ 35D. Jeff Johnson thought Appellant was “out for blood” and that Appellant was “untrustworthy” and had “a proven record of lying and cheating.” Ex. 76 & 78. During the course of litigation, Appellant and Jeff had a meeting with their father Lee Johnson. Tr. Trans. 218. At that meeting, they decided to work together to take care of Carol’s estate. *Id.* The lawsuit against Jeff was subsequently dismissed he then testified for Appellant. *Id.*

Finally, Appellant filed a lawsuit against Freedom Pass to interfere with the sale of property under contract for \$7.5 million. Dkt. 167. Appellant contends the Freedom Pass investment—which increased in value over 500% from \$450,000 to approximately \$2.5

million—belongs to Appellant. *Id.* At the same time, Appellant represents to this Court that Doug mismanaged the couples’ finances and criticizes Doug for poor investments. *See* Appellant’s Br. 5-7.

### **STANDARD OF REVIEW**

This Court reviews “a district court’s findings of fact to determine whether they are clearly erroneous.” *In re Estate of Zugg*, 2025 MT 78, ¶ 6, --- Mont. ---, --- P.3d --- (citing *In re Estate of Hunsaker*, 1998 MT 279, ¶ 25, 291 Mont. 412, 968 P.2d 281). Findings of fact are clearly erroneous if “not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if, after reviewing the record, this Court is left with a definite and firm conviction that a mistake has been made.” *Hunsaker*, ¶ 26 (citations omitted).

“On appeal from a bench trial, [w]e view the evidence in the light most favorable to the prevailing party.” *Zugg*, ¶ 7 (quoting *Kulstad v. Maniaci*, 2009 MT 326, ¶ 52, 352 Mont. 513, 220 P.3d 595). “The trial court determines the credibility of witnesses and the weight assigned to their respective testimony.” *Kulstad*, ¶ 52 (citation omitted). “We do not consider whether evidence supports findings that are different from those made by the district court. We confine our review to the

determination of whether substantial credible evidence supports the findings actually made by the district court.” *Kulstad*, ¶ 52 (citation omitted); *see also Wareing v. Schreckendgust*, 280 Mont. 196, 210, 930 P.2d 37 (1996) (“we review a district court’s findings to determine whether substantial evidence supports those findings, not contrary findings.”). “We will not second guess the district court’s determination regarding the strength and weight of conflicting testimony.” *Double AA Corp. v. Newland & Co.*, 273 Mont. 486, 494, 905 P.2d 138, 142 (1995).

### **SUMMARY OF ARGUMENT**

The District Court found Doug and Carol entered into a common law marriage based on substantial, credible evidence in the record. Appellant improperly requests that this Court reweigh the evidence and substitute its judgment for the District Court in violation of the well-settled law governing common law marriages and the standard of review.

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## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY FOUND THAT DOUG AND CAROL ENTERED A COMMON LAW MARRIAGE.

#### A. PUBLIC POLICY FAVORS MARRIAGE AND THE PRESUMPTION IN FAVOR OF MATRIMONY IS STRONG.

There is a rebuttable presumption that a man and woman “deporting themselves as husband and wife have entered into a lawful contract of marriage.” Section 26-1-602(30); *In re Marriage of Swanner-Renner*, 2009 MT 186, ¶ 16, 351 62, 209 P.3d 238; *Zugg*, ¶ 8.

“Public policy favors the finding of a valid marriage and the presumption in favor of matrimony is one of the strongest known to the law.” *In re J.K.N.A.*, 2019 MT 286, ¶ 26, 398 Mont. 72, 454 P.3d 642; *see also In re Estate of Murnion*, 212 Mont. 107, 113, 686 P.2d 893, 897 (1984) (“the presumption in favor of matrimony is one of the strongest known to the law” and “every intendment of the law is in favor of matrimony”); *In the Matter of Estate of Ober*, 2003 MT 7, ¶ 16, 314 Mont. 20, 62 P.3d 1114 (“public policy as well as statutory law, favors the finding of a valid marriage”).

“Not only does public policy favor a finding of matrimony, Montana’s marital code ‘shall be liberally construed and applied to



promote its underlying purposes, which are to: ...(2) strengthen and preserve the integrity of marriage and safeguard family relationships.”

*In re J.K.N.A.*, ¶ 26 (quoting § 40-1-101, MCA).

Common law marriage “is an equitable doctrine used to ensure people are treated fairly once a relationship ends.” *In re J.K.N.A.*, ¶ 26 (quoting *Snetsinger v. Mont. Univ. System*, 2004 MT 390, ¶ 32, 325 Mont. 148, 104 P.3d 445 (explaining that the concept is ‘designed, in part, to prevent unjust economic harm to couples to have held themselves out as [spouses]’)).

#### **B. THE ELEMENTS OF COMMON LAW MARRIAGE.**

The party asserting the existence of a common law marriage has the burden of proving three elements: (1) that the parties were competent to enter into a marriage; (2) that the parties assumed a marital relationship; and (3) that the parties confirmed their marriage by cohabitation and public repute. *In re Matter of Estate of Hunsaker*, 1998 MT 279, ¶ 32, 291 Mont. 412, 968 P.2d 281.

“The moving party does not have the burden of proving that the above elements ‘all happened immediately or instantly,’ but rather they can arise over the course of the relationship.” *In re J.K.N.A.*, ¶ 25,

(citing *In re Marriage of Swanner-Renner*, 2009 MT 186, ¶ 21, 351 Mont. 62, 209 P.3d 238). Regarding competency, a party may not enter a marriage before the dissolution of a prior marriage. Section 40-1-401(1)(a), MCA. However, “[p]arties to a marriage prohibited under this section who cohabit after removal of the impediment are lawfully married as of the date of the removal of the impediment.” Section 40-1-401(2), MCA; *see also In re Matter Estate of Alcorn*, 263 Mont. 353, 357, 868 P.2d 629, 631 (1994).

The District Court found Doug and Carol were competent to marry after Doug’s divorce became final on May 17, 2010. *See Order*, COL, ¶ 6. Appellant does not appeal that finding or dispute that Doug and Carol lived together in an exclusive, committed relationship. Appellant contests the District Court’s factual findings regarding mutual consent and public repute.

**C. DOUG AND CAROL MUTUALLY CONSENTED TO MARRIAGE.**

“The mutual consent of the parties does not need to be expressed in any particular form.” *Hunsaker*, ¶ 34. “Mutual consent can be implied from the conduct of the parties.” *Id.* As explained by this Court, mutual consent “must always be given with such an intent on the part

of each of the parties that marriage cannot be said to steal upon them unawares.” *Id.* (citing *State v. Newman*, 66 Mont. 180, 188, 213 P. 805, 807).

This Court’s decisions in *Alcorn*, *Hunsaker*, and *Ober* provide guidance. In *Alcorn*, a ring, a concrete walkway, and the testimony of the surviving spouse were sufficient to uphold a finding of mutual consent. *Id.*, 263 Mont. at 357, 868 P.2d at 357. In *Hunsaker*, the Court reversed the district court and found mutual consent based on a grandfather clock, an engagement ring, and testimony of the surviving spouse that the couple “felt” married to each other. *Id.* at ¶¶ 36, 37. In *Ober*, address labels and a wallet photograph, when combined with the testimony of the surviving spouse, were sufficient to establish mutual intent. *Id.* at ¶ 16.

The evidence was sufficient to demonstrate mutual intent even in the fact of contrary evidence. For example, in *Ober* the party opposing the common law marriage of John and Selma introduced the following evidence at trial:

- (1) Selma did not assume John’s last name; (2) John and Selma maintained separate property and bank accounts; (3) John and Selma filed their taxes as “single” taxpayers; (4) John and Selma filed documents with the Farm Service

agency as “single” persons; (5) John did not designate Selma as the beneficiary on his life insurance policy; (6) John did not report Selma as his spouse to his employer; (7) John granted his brother Benno Ober power of attorney in three separate documents; (8) John continued to pay rent on an apartment in Conrad, Montana, after he moved into Selma’s home near Power, Montana; and (9) Selma continued to receive her widow’s survivor benefit from the Social Security Administration under the name of her deceased husband, Frank Klein. Appellants further maintain that no evidence exists to prove that Selma called John her husband or that John called Selma his wife.

*Ober*, ¶ 11.

**1. There is substantial evidence of mutual consent.**

Doug presented substantial, direct evidence that he and Carol mutually consent to a common law marriage, including Doug’s testimony that he and Carol agreed they had a common law marriage, Shelley Patton’s testimony that Carol stated she had a common law marriage with Doug, the air ambulance form created by Carol which referred to Doug as “common law husband,” Shepard Casey’s testimony that Doug informed him he and Carol had a common law marriage, the magazine article which refers to Doug as the husband, evidence that Doug and Carol referred to each other or were introduced as husband and wife, and that Carol wore bracelets and, on occasion, a ring as a symbol of their marriage.

Doug also introduced substantial evidence that implies mutual consent, including that Doug and Carol lived together, shared finances, entered contracts together, built a house together, and the testimony of several friends who testified that Doug and Carol acted like a married couple and were considered husband and wife, among other things.

This case is not a close call. Substantial evidence supports the District Court's findings of common law marriage, and it should be affirmed.

## **2. Appellant ignores relevant law.**

Appellant contends the District Court erred because it did not accept his version of the facts. He contends the “objective evidence,” and “objective indicia” established that Carol was single because she did not have a wedding ceremony, listed herself single on her taxes and other documents, and she was allegedly concerned that she had a common law marriage to Doug. Appellant's Br. 23-32.

First, Appellant ignores this Court's standard of review. A district court's findings are reviewed “to determine whether substantial evidence supports those findings, not contrary findings.” *Wareing v. Schreckendgust*, 280 Mont. 196, 210, 930 P.2d 37 (1996). Appellant's

argument amounts to nothing more than an improper request for this Court to reweigh the evidence and substitute its judgment for the District Court.

Second, Appellant does not mention, let alone address, Montana public policy which favors marriage and the strong statutory presumption in favor of matrimony. *In re J.K.N.A.*, ¶ 26.

Third, Appellant does not give this Court's guiding decisions on common law marriage appropriate consideration. He repeatedly emphasizes the documents where Carol listed herself as single, for example, even though this Court's decisions in *Alcorn*, *Hunsaker*, and *Ober* all involved similar fact patterns, and the Court found the existence of a common law marriage in every case.

### **3. Credibility of witnesses is important.**

At trial, Appellant presented testimony from: (1) Carol's hairdresser in California (Bobbi Schoeder); (2) the woman who did her Botox injections in California (Monique LaBauve); (3) a Russian billionaire whose son was Appellant's fraternity brother at USC (Igor Olenicoff); (4) the husband and daughter of a friend from their early

years in Bozeman (Jeff Wetmore and Maggie Stein); and (5) Jeff Johnson.

The District Court was in the best position to weigh the credibility of those witnesses. For example, while testifying by zoom Mr. Olenicoff represented he was Carol's close friend – yet he did not know where she lived in Montana, did not know Doug's full name and had never met Doug. Tr. Trans. 4-70:25 to 71:3 & 4-76:18-22. Remarkably, Mr. Olenicoff was a central figure in the infamous UBS banking scandal and paid a \$77 million fine to the IRS. Tr. Trans. 4-72:19 to 73:25.

Similarly, Ms. Schoeder and Mr. Wetmore both testified that they did not discuss marriage with Carol. Tr. Trans. 3-127:25 to 128:15 & 3-205:14-17. Ms. LaBauve presented fanciful testimony that she suspected Doug of foul play in Carol's death. Maggie Stein did not know Carol very well (Tr. Trans. 186:4-8) and, if anything, her testimony about a conversation with Carol regarding common law marriage, years before Carol's death, actually supports Doug's case.

Jeff Johnson's testimony deserves special attention. Jeff initially supported Doug's claim of common law marriage but changed his story after Appellant sued him in California. Even then, the best testimony

Jeff could muster at trial to support Appellant was that he never asked Carol about her relationship with Doug at any point while they were living in Montana. Tr. Trans. 2-193. Jeff also acknowledged that Carol told him she wanted to set up a life estate or living trust for Doug. *Id.* at 196:23-197:5. According to Jeff, he cut her off and said he didn't want to hear about it. *Id.*

In contrast, Doug presented the testimony of their actual close friends in Montana – the individuals with whom they spent Thanksgiving and Christmas, longtime friends, and neighbors. Doug also presented the testimony of Shelley Patten, a family law attorney who was Carol's close friend and confidant, who testified:

Well, I wasn't happy at all about the fact that Carol felt that she didn't need to get married. Like, go down to the clerk of court's office and get married because she believed that their common-law marriage in Montana was enough. And I apologize for my tone of voice because you are resurrecting a conversation that really irritated me.

And I said, I was very clear with her. California doesn't recognize common law and it's a dangerous situation to do that, and the law could change in Montana, and you shouldn't do that, and I wanted her to get married and I wanted her to have a complete will drafted that said everything that she wanted to say in it and Carol just never got around to it.

She just really didn't think it was necessary and she said, we are married. We're soulmates. He's the love of my life.



We have a great relationship. I don't need to do this. And I said, you do need to do this and, you know, I was just very forceful about it, but I come from a state that doesn't recognize common law, and as a family law attorney, I've seen the parade of horrors.

Tr. Trans. 2-64:2-24.

The District Court “was in the best position to judge the credibility of the witnesses” and its finding that should be affirmed. *Alcorn*, 263 Mont. at 633, 868 P.2d at 633. The District Court believed Shelley because she told the truth. Doug and Carol loved each other and had a common law marriage. And they should have been wise enough to get formally married to avoid the parade of horrors that this matter has become.

**D. DOUG AND CAROL CONFIRMED THEIR MARRIAGE BY COHABITATION AND PUBLIC REPUTE.**

With respect to cohabitation and public repute, this Court “consider[s] how the public views the couple.” *Hunsaker*, ¶ 38. “Relevant to this inquiry is whether the couple held themselves out to the community as husband and wife.” *Id.* at ¶ 38. (*citing Alcorn*, 263 Mont. at 358-359, 868 P.2d at 632). “A common law-marriage does not exist if the parties have kept it a secret.” *Id.* Further, although “allowing people to assume a marital relationship is not, by itself,

enough evidence to create a common-law marriage, it is evidence that the parties held themselves out to the community as married.”

*Hunsaker*, ¶ 42.

In *Alcorn*, the Montana Supreme Court noted that: the wife: 1) never changed her last name; 2) did not list her husband as a beneficiary on her employee life insurance, health insurance or retirement forms; 3) filed her tax returns as single; and 4) her husband stated in his will that he was a single during his relationship with the wife. *Alcorn*, 263 Mont. at 358, 868 P.2d at 631-32.

This Court found the couple was married, however, because they spent all their free time together, the wife wore the wedding ring, they regularly hosted people at the house, the wife cared for the husband during an extensive illness, several witnesses testified they considered the couple married, and they held themselves out as a married couple to those witnesses. *Alcorn*, 263 Mont. at 358-359, 868 P.2d at 632; *see also Hunsaker*, ¶¶ 41-42; *In re Estate of Murnion*, 212 Mont. 107, 129, 686 P.2d 893, 905 (1984).

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**1. There is substantial evidence of public repute.**

Doug and Carol lived together the entire time they lived in Montana. They built a house together, which was featured in a magazine article that referred to Doug as “the husband” and gave a copy of the article to all their friends and family. Ex. 208.

Once again, the question of whether substantial evidence supports the District Court’s finding is not a call. They held themselves out as a married couple. Kaitlyn called Carol her stepmom, Jeff’s family called Doug “Grandpa D” and Doug and Carol referred to each other as husband and wife. The friends they spent time within Montana thought they were married.

Appellant cites *Miller v. Sutherland*, 131 Mont. 175, 309 P.2d 322 (1957) as though that case supports his position. That case involved a May-December relationship where they lived apart most of the time. *Id.* at 131 Mont. at 178. They spent summers together on a ranch and respondent, after the “fall work was completed, would go to a community in the vicinity of where appellant was teaching and secure a tourist cabin, motel, or other living quarters and appellant would visit him over the weekends.” *Id.* They did not visit much with other people

and “appellant represented the respondent as her father.” *Id.* “Nothing appears in the record to show repute in the community or neighborhood that they were married, it does not even appear to be reputed in the very household in which they were then residing. *Id.* at 184. In stark contrast, Doug and Carol did not keep their relation a secret, lived together their entire marriage, and held themselves out to the public as a married couple.

Moreover, the district court in Miller found that there was no marriage and this Court was unwilling to substitute its judgment for the judgment of the district court. Appellant asks this Court to do the opposite. As with his argument regarding mutual consent, Appellant ignores the standard of review, Montana public policy, and this Court’s more recent, governing decisions regarding common law marriages.

The District Court correctly found Doug and Carol confirmed their relationship through public repute and its decision should be affirmed.

### **CONCLUSION**

The Court should affirm the District Court’s finding of common law marriage.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of May, 2025.

CRIST, KROGH, ALKE & NORD, PLLC

A handwritten signature in blue ink, appearing to read "B. A." followed by a horizontal flourish.

By: \_\_\_\_\_

Ben Alke


*Attorney for Appellee*

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellant Procedure, I certify that this Response Brief is printed with a proportionately spaced Century text typeface of 14 points, is double-spaced (except for footnotes and quoted and indented material which are singled spaced); with left, right, top and bottom margins at one inch; and the word count as calculated by Microsoft Office Word does not exceed 10,000 words, excluding the Table of Contents, Table of Authorities, and Certificate of Compliance.

DATED this 12<sup>th</sup> day of May, 2025.

CRIST, KROGH, ALKE & NORD, PLLC

By:   
Ben Alke

*Attorney for Appellee*

## **CERTIFICATE OF SERVICE**

I, Benjamin J. Alke, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-12-2025:

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