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STATE OF MONTANA
Case Number: DA 24-0645

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

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

Deceased.

ALAN LEE JOHNSON,

Plaintiff and Counter-Defendant/Appellant

v.

DOUGLAS J. NAIL,

Defendant and Counterclaimant/Appellee

APPELLANT'S REPLY BRIEF

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

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INTRODUCTION

Appellee, Douglas J. Nail ("Doug"), is utilizing Montana's recognition of common law marriage to continue his financial exploitation of Carol A. Hudson ("Carol") after her death. He has convinced the District Court of the existence of a common law marriage where the record clearly establishes that Carol never consented to a marital relationship and that Carol and Doug confirmed a marital relationship by public repute.

The record establishes Carol did not consent to a marital relationship. Carol filled out 33 separate documents in which she identified herself as "single" and/or "unmarried" that span the length of their time together. Carol repeatedly told her family and close friends that she would never marry again, as she had gone through two difficult divorces, already her two sons and was financially independent. There was no reason to be remarried. Carol confided in her close friends that Doug was financially exploiting her and that she wanted to find a way to end the relationship, but she was scared. Carol even reached out to two attorneys from Montana to make certain that Doug could not claim a common law marriage, if something were to happen to her.

The record further demonstrates Carol and Doug never confirmed a marital relationship by public repute. Carol never took Doug's last name and neither wore wedding rings. Carol represented herself as single and unmarried to everyone in her

life—her family, friends, bankers, financial advisors, life insurance representatives, accountants, medical providers, the United States Government, the Montana Department of Revenue and the Internal Revenue Service. Doug similarly represented himself as single and unmarried to his medical providers, his attorneys, a California court, as well as Carol's bankers, accountants, financial advisors, and life insurance providers. Doug did not claim a marital status on his tax returns since he has not filed tax returns since 2008 per his own admission.

Instead of addressing the evidence in his response, Doug deflects to irrelevant topics that have no bearing on the existence of a common law marriage. Doug devotes a significant portion of his Response Brief attempting to make this case about Carol's son, AJ. However, even if what Doug argued was true, which it is not, it has no bearing on whether he held a marital relationship with Carol. Doug's avoidance of the issues is telling.

The record establishes that Carol and Doug never assumed a marital relationship by mutual consent and did not confirm their marriage by public repute. The District Court committed clear error in finding that a common law marriage existed.

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ARGUMENT

I. Even if There is Substantial Evidence, Which There is Not, the District Court has Misapprehended the Evidence and a Review of the Record Establishes a Mistake Has Been Committed.

Doug argues that the findings are supported by substantial evidence and, therefore, the District Court's decision must be affirmed. Doug fails to recognize that this Court applies a three-prong test for clear error. Doug omits the other two prongs of the analysis. A finding of fact is clearly erroneous if (1) it is not supported by substantial evidence, (2) if the district court has misapprehended the effect of the evidence, or (3) if a review of the record leaves the reviewing court with a definite and firm conviction that a mistake has been committed. *In re Marriage of Swanner-Renner*, 2009 MT 186, ¶ 13, 351 Mont. 62, 209 P.3d 238. Therefore, even if the findings are supported by substantial evidence, this Court must consider the two other prongs: whether the district court has misapprehended the evidence or a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed. *Interstate Prod. Credit Ass'n v. Desaye*, 250 Mont. 320, 820 P.2d 1285 (1991).

A. A Review of the Record Leaves the Court with the Definite and Firm Conviction that a Mistake Has Been Committed.

Doug claims AJ's position is an "improper[] request that this Court reweigh the evidence[.]" Resp., p. 18. However, the standard of review requires this Court to determine "if a review of the record leaves the reviewing court with a definite and

firm conviction that a mistake has been committed." *In re Marriage of Swanner-Renner*, ¶ 13. A complete review of the record—not just what the District Court included in its Findings—reveals that the District Court failed to consider critical evidence. This failure to consider significant evidence resulted in the District Court reaching a flawed conclusion.

1. *Carol sought legal guidance to make certain Doug could not claim a common law marriage*.

In approximately 2016, Carol contacted her friend, Maggie Stein, who is a Montana attorney, for the purpose of wanting "to make sure she was protected if the relationship ended." (Trans. 3-174:7-18). Specifically, Carol feared Doug would claim the existence of a common law marriage to assert a right to her considerable assets. Carol knew what Doug was capable of. Ms. Stein observed that Carol seemed scared and intimidated. (Trans. 3-174:7-18; 182:6-14). Although Ms. Stein did not believe a marriage existed, she referred Carol to another family law attorney, who was more familiar with this area of the law. (Trans. 1-187:10-189:18).

Carol followed Ms. Stein's advice. Carol's close friend, Nikki Labauve, confirmed she reached out to an attorney for further guidance. Carol talked with a Bozeman attorney "to make sure that their relationship was not defined as a common law [marriage]". (Trans. 3-149:15-23). The fact that Carol reached out to two Montana attorneys for the purpose of making certain that Doug could not claim a

common law marriage is clear evidence Carol did not consent to a marital relationship.

Doug asserts, without explanation, that Carol's discussion with Ms. Stein regarding common law marriage "actually supports Doug's case."[1] Resp. Brf., p. 26. Although not entirely clear, Doug seems to argue that Carol's concern Doug would claim a common law marriage is evidence, itself, that a common law marriage existed. The argument is without merit. 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 the unawares." *In the Matter of Estate of Hunsaker*, 1998 MT 279, ¶32, 291 Mont. 412, 968 P.2d 281. The fact that Carol contacted sought legal advice to make certain Doug could not claim a marital relationship is unequivocal evidence that Carol did not consent to marriage.

2. *The objective evidence establishes that Carol never consented to a marital relationship*.

Doug's reliance on *Hunsaker* and *In re Alcorn*, 263 Mont. 353, 868 P.2d 629 (1994), is misplaced. *Alcorn* and *Hunsaker* are distinguishable because there was clear, objective evidence that the decedent had consented to a marital relationship. In *Hunsaker*, the decedent had given the spouse a wedding ring and the couple displayed a grandfather clock, which was engraved with their first initials over the

[1] Doug suggests that Carol's discussion with Ms. Stein took place "years before Carol's death". However, the discussion occurred while the home at 200 Falling Star was under construction, which was 2016 and 2017. Carol died on October 7, 2018.

letter "H" for their last name. *Hunsaker*, ¶¶ 35 and 36. In *Alcorn*, the decedent had given the surviving spouse a ring with a horseshoe design and that same horseshoe design was etched into the concrete on the walkway to the martial home. *Alcorn*, 263 Mont. at 357, 868 P.2d at 631.

Here, at most, Doug has a single insurance form and a factually incorrect parenthetical on the last page of an article as evidence of Carol's consent. When the Court weighs this evidence against the objective evidence establishing that Carol did *not* agree to marry Doug, there is no actual comparison. The objective evidence demonstrating a lack of consent is overwhelming. There was no marriage ceremony. (Trans. 2-34:22-35:9). Carol never took Doug's last name and neither wore wedding rings. *Id*.; (Trans. 2-184:23-185:11). Carol's assets were titled solely in her name. (Trans. 1-50:18-20; Exhs. 58). Carol filed her tax returns with the IRS, under oath, as a single taxpayer[2]. (Exhs. 440, 441, 37, 41, 44, 48, 53, and 54). Carol identified Doug as her "partner" or "significant other" other in life insurance and IRA beneficiary forms. (Exhs. 43 and 421). Carol identified herself as "single" in her Last Will and Testament and did not provide for Doug in her estate plan (Exh. 30). Carol identified herself as single on all medical records (Exhs. 422-424). Carol identified herself as single on all loan applications. (Exhs. 412, 415-419). Carol identified

[2] Doug claims they did not file joint tax returns because "they didn't know what to do". However, Doug worked with Carol's accountant to prepare each return. (Trans. 1-108:19-109:1).

herself as single on each of her personal financial statements. (Exhs. 33-34, 46, 51, 410-411)[3]. In addition, Carol contacted two attorneys to make certain Doug could not claim a common law marriage if the relationship were to end.

Doug's reliance on *In re Estate of Ober*, 2003 MT 7, 314 Mont. 20, 62 P.3d 114 is also misplaced. In *Ober*, as in this case, the parties maintained different names, separate property and bank accounts, filed taxes as "single" taxpayers, and identified themselves as single on several documents. *Ober*, ¶11. However, this is where the comparison ends. This Court found the existence of a common law marriage based on evidence the husband had proposed and the wife accepted, the couple both wore rings, the couple had address labels made identifying them under the same last name, and the husband carried a picture of his wife in his wallet with words "my wife" inscribed in his own handwriting. *Ober*, ¶12. Thus, the weight of the evidence demonstrating the existence of a marriage outweighed any contrary evidence. The same cannot be said in this case.

3. *The District Court ignored uncontradicted evidence that Doug financially exploited Carol throughout the relationship*.

Doug and Carol relied entirely on Carol's income. Doug had stated he was not employed at any time between 2008 to 2018. (Tr. 2-9:24-10:23). Although Doug claims he received income from "investments", he admitted he has not filed a tax

[3] In total, Carol signed 33 separate documents in which she unequivocally identified herself as "single" or "unmarried".

return since before 2008. *Id*. Doug did have his own bank account. (Trans. 2-44:24-45:5).

Doug took control of most aspects of Carol's financial affairs. (Trans. 1-155:7-21). Doug was identified as an "agent/signer" on one of Carol's Stockman Bank accounts. (Exh. 413). Doug used his access to Carol's money to pay the substantial monthly balances on his credit card, make risky investments, and lend Carol's money to his family and friends. (Trans. 158:14-23; Tr. Exh. 435).

Carol was concerned with Doug's failure to contribute and excessive spending. In 2012, Carol sought guidance from two of her friends, Ms. Stein and Shelley Patton, who are both attorneys, about documenting the debts Doug owed to her. Carol emailed Ms. Stein:

> I have an accounting for other monies owed to me by Doug. Doug acknowledges he owes me the money but at this point nothing is in writing and if anything should happen to Doug, I have nothing legally to stand on so I would like to discuss how to handle this situation.

(Exh. 35). Carol expressed the same concerns to Ms. Patton in a 2012 email:

> To secure the money he owes[,] Doug purchased a million dollar term life insurance policy to cover the debt until he can make some money to pay me back. Doug understands I am no longer paying for his expenses . . . . Doug was not please (sic) with my decisions but he knows this is the only way our relationship has a chance to work.

(Exh. 36). Importantly, this evidence demonstrates that as of 2012—which is two years after the District Court found a marriage to exist—Carol was expressing

concerns that are not consistent with a person who considers themselves married. Neither Doug nor District Court even acknowledge the evidence.

Doug further dismisses evidence he owed Carol $966,000 in credit card charges as an "outrageous claim" only supported by AJ's own email[4]. Resp. Brf., p. 8 (fn. 4). However, Doug fails to recognize that amount of the debt is corroborated by other evidence. On December 19, 2012, three weeks prior to AJ's email, Carol sent an email to Ms. Patton which noted "Doug purchased a million dollar life insurance to cover the debt." (Exh. 36). The amount of the insurance policy was not a coincidence. It was necessary to cover the $966,000 debt owed to Carol.

Doug continued to use his access to Carol's financial resources to exploit her throughout the relationship. Doug's financial exploitation continued throughout the relationship. Doug used Carol's money to invest $100,000 to purchase an interest in property in Costa Rica[5] (Trans. 1-160:13-161:7), between $125,000 and $200,000 was invested in a Mexican business venture (Trans. 1-158:14-23), and approximately $450,000 was used to purchase a 1/3 interest of 260 acres located next to the Yellowstone Club outside of Big Sky with two other individuals (Trans. 1-106:4-7). As evidence of Doug's true motive, Doug refers to the Costa Rica and Mexico investments—both total losses—as "our" investments but identifies the Big

[4] AJ's January 11, 2013 email outlines, in detail, the ways in which Doug mistreated and took advantage of his mother, including a reference to the $966,000 debt. (Tr. Exh. 435).
[5] Doug did not know the location of the property, other than it was somewhere in San Jose.

Sky investment Freedom Pass Partners, which was under contract for $7.5 million, as solely his. (Trans. 2-16:19-17:10). The funding source for the Big Sky Investment came directly from Carol refinancing a property she solely owned. She wired the money for the purchase and reported her investment on her tax returns. She received K-1's for this property yet, Doug claims it is his.

Doug's efforts to establish a common law marriage for the purpose of extracting even more money from Carol should not come as a surprise. Doug was convicted of federal bribery charges and served a prison term. (Tr. 1-249:7-9). His daughter testified that he transferred title of an apartment building to her to avoid his creditors. (Trans. 3-59:22-61:2). Finally, in litigation with his second wife, the California court found that he was not credible. (Exh. 409).

4. *The District Court ignored uncontradicted evidence that Doug abused and mistreated Carol throughout the relationship*.

Carol's close friend, Ms. Labauve[6] described in detail a trip she took to Montana to visit Carol in August 2017. (Trans. 3-142:22-24). Although the trip was meant to be an opportunity for Carol and Ms. Labauve to spend time together, Doug never left Carol alone with Ms. Labauve. (Trans. 3-145:22-146:12). Carol alerted Ms. Labauve it was not safe for her to email or text because Doug had access to her phone and her email and would read her messages. (Trans. 3-166:1-9). Ms. Labauve

[6] Doug's suggests Ms. Labauve was merely "the woman who did her Botox injections in California." Resp. Brf., p. 25. In fact, Ms. Labauve met Carol in 2005 and became one of Carol's close friends, which is why Ms. Labauve travelled to Montana to visit. (Trans. 3-133:19-20).

observed that Carol seemed very unhappy, mentally broken, and scared for the entirety of her trip. (Tr. Trans. 3-148:9-19; 3-154:19-155:7). Carol explained how poorly Doug treated her and described the ongoing problems arising from his excessive drinking and spending. (Trans. 3-148:2-151:1). Carol stated she feared how Doug would react if she ended the relationship. (Trans. 3-148:8-149:12). They discussed a plan for Carol to end the relationship. (Trans. 3-148:20-149:23). Carol was desperate to end the relationship but lacked the mental strength and self-esteem to act. *Id*.

Carol told her friend and confidant, Igor Olenicoff, how Doug was abusive and was misusing her money. It bothered Carol that Doug was using her financial resources to fund his lifestyle, while he contributed nothing to the relationship. (Trans. 4-62:11-64:21). She told Mr. Olenicoff that Doug was using Carol's money to make questionable investments, including an investment in a business in Mexico. *Id*. She confided that she wanted to end her relationship with Doug but did not how. (Trans. 4-68:10-69:7). Carol told Mr. Olenicoff that Doug threatened if she took any action against him that he would turn her life upside down. (Trans. 4-64:9-64:21). Mr. Olenicoff described Carol as "frantic and quite scared." *Id*. Carol "wanted him out of her life" but she lacked the self-confidence and mental strength to act. (Trans. 4-68:10-22). Carol was afraid of Doug. *Id*.

The record demonstrates that Doug had a history of mistreating and intimidating women. In his first divorce, Doug's first ex-wife felt it necessary to obtain a "Stay-Away Order", requiring Doug to stay "at least 100 yards away" from her and her residence. (Exh. 402, AJ002901). Doug's second ex-wife described him as a "very, very frightening man" and alleged that he caused extensive damage to the marital home. (Exh. 409). Among other allegations, the second ex-wife alleged "a dead skunk was dropped in a hole in a bathroom wall" and "[t]here were stains in the upstairs master bedroom, which appeared to be Husband's name signed in urine." *Id*. (AJ024673). The Court ultimately held Doug "had committed waste and damage to the residence". *Id*. (AJ024677). The Court found that Doug was not credible. *Id*. (AJ024676).

B. The District Court Has Misapprehended the Effect of Evidence.

The District Court further misapprehended the effect of evidence it relied on in finding Carol and Doug had assumed a marital relationship by mutual consent and public repute. The very evidence the District Court relied on in finding the existence of a common law marriage supports an opposite conclusion.

1. *The District Court misapprehended evidence of the ring and bracelets*.

Doug and the District Court rely on evidence that Doug gave Carol two Cartier bracelets as a symbol of their marriage[7]. Finding #8. However, Doug gave one of

[7] Doug has offered no explanation how he could afford two Cartier bracelets when he did not work during the relationship and did not have his own bank account. (Trans. 2-9:24-10:23; 2-44:24-45:5).

the Cartier bracelets while they were still living in California. (Trans. 1-55:19-25; 2-40:10-41:7). Doug did not work. He did not have the resources to buy a Cartier bracelet. Carol bought it for herself. Doug claims the parties considered themselves to be married upon the move to Montana. (Trans. 1-47:17-48:15, 1-55:5-11). It follows that the bracelets could not have been given as a symbol of marriage when one of the bracelets was given prior to when Doug claims a marriage was formed. No one other than Doug testified that the bracelets were a symbol of marriage. Doug simply chose a piece of jewelry that Carol had worn and assigned it a significance that fit his narrative.

The District Court also relied on evidence Doug gave Carol a ring as a symbol of their marriage. FOF, ¶8. However, the only evidence that exists that Carol wore a ring is Doug's self-serving testimony that she wore it occasionally. (Trans. 1-55:21-56:3). The ring does not appear in any photograph admitted into evidence. (Exhs. 432, 201-204). Aside from Doug, not a single witness—there were 15 witnesses—could recall Carol wearing a ring[8]. Although Phil Aumann provided a sworn affidavit in litigation that Carol wore a ring, he recanted his testimony and acknowledged at trial he had no recollection of a ring. (Trans. 2-151:8-152:20).

[8] In effect, the district court relied solely on the self-serving testimony of Doug, a convicted felon, who has previously been found not credible by another court. (Trans. 2-52:8-10).

2. *The District Court misapprehended evidence of the magazine article*.

Doug and the District Court attribute significant weight to a small local real estate magazine article that provides a single reference to Doug as the "husband". Finding #23. However, the parenthetical was not even factually correct. It incorrectly asserted that Doug's high school car was a 1966 Ford Bronco, which is not accurate. (Trans. 1-85:19-86:1). The article makes no other mention of Doug and Carol being married or references to "husband" or "wife." However, the district court's more significant omission is its failure to even consider the email exchange relating to the magazine article. In the email, the author asked how she should refer to Carol and Doug within the article. Carol then forwarded the email to Doug, asking "How do you think we should handle this?" (Exh. 209). If Carol and Doug considered themselves married since 2010, there is no reason for Carol to ask this question. Both Doug and the District Court avoid addressing this telling fact.

3. *The District Court misapprehended the effect of Shelly Patton's Testimony*.

Doug and the district court rely heavily on the testimony of Shelly Patton as evidence of Carol's consent to a marital relationship. Findings #10-13. Ms. Patton recalled a specific conversation at Carol's Del Mar home where she told her she was married to Doug. (Trans. 2-65:11-19). This was the last time she spoke with Carol on the subject. *Id*. Carol sold her Del Mar home in 2012 or 2013. Finding #12. Between 2012 and the time of Carol's death, Carol filled out more than two dozen

documents contradicting Ms. Patton's testimony. Ms. Patton's claim is also inconsistent with the email Carol sent to her during this same timeframe. Carol's December 19, 2012 email states Doug was obtaining a life insurance policy to "secure the money he owes." (Exh. 36). This same email indicates that Carol is going to stop paying for Doug's expenses as "this is the only way our relationship has a chance to work." Clearly, such statements do not reflect the existence of a martial relationship.

Doug and the district court further rely on the testimony of Shepard Casey, Doug's close friend and like the majority of Doug's other witnesses had ties financially related. The district court focuses on Mr. Casey's testimony that Doug told him he had a common law marriage. However, the district court ignores the context in which the statement was made. It was in response to Mr. Casey's question, "[A]re you ever just going to get married." (Trans. 3-96:7-17). Based on the question, Mr. Casey did not think Doug was married. This conversation took place in approximately 2016 or 2017. (Trans. 3-96:7-17). Further, Mr. Casey never heard Carol say she was married. (Trans. 3-105:7-9). He never heard Carol refer to Doug as her spouse. He never saw Carol wear a ring. (Trans. 3-104:12-14).

4. *The District Court misapprehended evidence that Carol and Doug "shared finances," including a bank account and credit cards*.

The District Court found that "shared finances" and "shared a bank account and credit cards" as evidence supporting the parties' consent to a marital relationship.

Finding #16. The District Court misinterpreted the evidence. Doug's "sharing" of Carol's finances were a major point of contention in the parties' relationship. Doug was merely an "agent/signer" on one of Carol's bank accounts. (Exh. 413). He was not listed as an "owner" or "beneficiary" on either of the accounts. (Exh. 413 and 414). Further, while Doug held an American Express in his name, Carol paid the monthly balances.

The use of word "shared" suggests a mutual contribution. However, Doug never contributed to the parties' finances. In fact, Doug did not have a bank account in his own name (Trans. 2-9:24-10:23) nor was he employed at any time during their relationship between 2008 to 2018. (Trans. 2-44:24-45:5). Further, Doug has not filed a federal tax return since before 2008. (Trans. 2-10:18-23). As described by the uncontradicted testimony of Ms. Stein, Ms. Labauve, and Mr. Olenicoff, Doug lived off Carol's resources. The District Court misapprehended the effect of evidence of Carol and Doug's "shared finances".

II. The District Court's Finding of a Common Law Marriage Tramples on Carol's Testamentary Wishes and Intent.

Carol made her testamentary wishes known through her estate planning documents. Carol prepared a Will (Tr. Exh. 30) and a Revocable Trust (Tr. Exh. 401), leaving everything to her sons—and nothing to Doug. The Trust Agreement notes that it had been amended eight (8) separate times, demonstrating Carol understood how to make changes and that if she wanted to make changes to provide for Doug,

she would have. In 2014, Carol also engaged an attorney to review her estate plan. (Tr. Exhs. 248 and 249). There were no changes to her Will or Revocable Trust resulting from this engagement. She could have changed her Will or her Trust at that time but did not.

If not reversed, the District Court's decision will allow Doug to evade Carol's testamentary wishes. Doug, through the augmented estate, will be awarded a significant share of Carol's estate, despite her clear intentions to leave her assets solely to her children—not Doug. Specifically, Doug stands to receive a financial windfall relating to the interest in Freedom Pass Partners, LLC, which owns a 260-acre parcel located outside of Big Sky. This property was previously under contract for $7.5 million.

CONCLUSION

Common law marriage "is an equitable doctrine used to ensure people are treated fairly once a relationship ends." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶24, 325 Mont. 148, 104 P.3d 445 (explaining that the concept is "designed, in part, to prevent unjust economic harm to couples who have held themselves out as [spouses]"). It is not intended to be used to perpetuate financial exploitation of after the relationship has ended. Yet, that is precisely what Doug is using it for. Doug, a convicted felon and professional grifter, only now claims the existence of a marriage because it is to his financial benefit to do so.

The District Court committed clear error in finding that a common law marriage existed between Carol and Doug. Doug failed to meet his burden in proving that Carol and Doug assumed a marital relationship by mutual consent and that they confirmed such marriage by public repute. The Court should reverse the District Court's October 22, 2024 *Order*.

Dated this 10th day of June 2025.

COTNER RYAN BLACKFORD, PLLC

/s/ Kyle C. Ryan
Kyle C. Ryan

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that Appellants' Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word, is not more than 5,000 words, excluding the Certificate of Compliance.

Dated this 10th day of June 2025.

COTNER RYAN BLACKFORD, PLLC

/s/ Kyle C. Ryan
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CERTIFICATE OF SERVICE

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