

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0321

MITCHELL BURGARD,

Appellee/Petitioner,

v.

STACY JACOBSEN,

Appellant/Respondent.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana Eleventh Judicial District Court, Flathead
County, Cause No. DR-15-2015-141
The Honorable Heidi J. Ulbricht, Presiding

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INTRODUCTION

Mitchell devotes much of his *Answer Brief* to relitigating the appealability of the February 15, 2024 *Contempt Order* (Doc. 34). But that issue is resolved: on May 6, 2025, this Court denied Mitchell’s *Motion to Dismiss*, stating, “while the February 15, 2024 Order was not appealable in March 2024, it is appealable now” and that the Court “may review any previous order...which led to and resulted in the [final] judgment.” *Order*, DA-24-0321 (May 6, 2025) (“May 6 *Order*”). Thus, the appeal should be decided on the merits.

On the merits, this appeal turns on the text of the parties’ Marital Property Settlement Agreement (Doc. 11), which awards Yasmine (the parties’ cat) to Stacy and obligates Mitchell to care for her until Stacy requests possession. The only event that could start a 20-day clock for Stacy to retrieve Yasmine is if, after the sale of the marital home, Mitchell moves to a residence that does not allow cats. That event never happened.

Yet the district court’s *Contempt Order* left Mitchell with permanent possession of Yasmine. That ruling effectively modified the decree’s property distribution, therefore affecting Stacy’s substantial rights.

The Court should reverse that decision and enforce the decree as written. Yasmine belongs to Stacy. The proper remedy is to recognize Stacy’s ownership and

remand for directives implementing a prompt, humane transfer consistent with the MPSA.

I. This Court’s May 6, 2025 Order Confirmed Appellate Jurisdiction.

Mitchell spends the majority of his Response repeating the same arguments addressed in his *Motion to Dismiss and Brief in Support*, DA-24-0321 (Apr. 18, 2025) (“*Motion to Dismiss*”). This Court has already rejected them: “[W]hile the February 15, 2024 Order was not appealable in March 2024, it is appealable now: The District Court rendered final judgment and this Court may review any previous order excepted or objected to which led to and resulted in the Judgment.” May 6 *Order*. Nothing has changed that conclusion since.

Nonetheless, ignoring the May 6, 2025 *Order*, Mitchell argues that Stacy’s appeal was rejected by this Court on March 26, 2024, when she first attempted to appeal the issue. But Stacy’s first appeal was dismissed because it was filed before there was a ruling on her *Motion for Additional Evidence* (Doc. 27), which tolled the original appeal time. *See* M. R. App. P. 4(5)(a). Her appeal was premature. Once that motion was resolved, the defect was cured, and the order became appealable.

Mitchell’s “law-of-the-case” theory fails to discuss this Court’s May 6, 2025 *Order* and thus he gets the argument backwards. The law of the case on appealability is the May 6, 2025 *Order*, denying dismissal and allowing review of the *Contempt Order* as part of the final judgment. Law of the case does not freeze a ruling in place

when the material posture changes. Here, the absence of final judgment (the sole barrier in March 2024) has been cured, and the Court’s May 6 *Order* recognizes that change.

Nor is there any substance to Mitchell’s “second bite at the apple” refrain. Stacy simply followed the rules and this Court’s May 6 *Order* now controls.

II. By Transferring Ownership of the Cat from Stacy to Mitchell, the Contempt Order Modified the MPSA and Affected Stacy’s Substantial Property Rights.

Montana law is clear that a contempt ruling becomes appealable when it includes an ancillary determination affecting the substantial rights of the parties. Mont. Code Ann. § 3-1-523(2); *Lutes v. Lutes*, 2005 MT 242, ¶ 7, 328 Mont. 490, 492, 121 P.3d 561, 563. Property ownership is a substantial right. *See, e.g., In re Marriage of Stevens*, 2011 MT 124, ¶ 15, 360 Mont. 494, 498, 255 P.3d 154, 157 (finding a contempt order that affected a party’s right to possession of a truck was appealable.) In Montana, pets are considered property.

Applied here, the effect of the *Contempt Order* is obvious. Before the proceeding, the *Marital Property Settlement Agreement* (“MPSA”) awarded Yasmine to Stacy with Mitchell as caretaker “until [Stacy] requests possession.” Doc. 11 ¶ 9(c). After the court denied contempt, Stacy was left with no enforceable right to Yasmine; Mitchell was her owner. That redistribution of property functionally revised the written terms of the MPSA. As such, that determination is

appealable. § 3-1-523(2), MCA.

Consider a simple analogy. The MPSA awards Stacy an antique piano, but because of Stacy's unstable housing, the parties agree Mitchell will store it until she can take it. They add a clause: if Mitchell later moves to a no-pianos residence, he may, after notice, place it with a third party. He never moves to such a residence, yet when Stacy is finally ready to retrieve the piano, he claims that she forfeited it and it is now his. That would be a redistribution of property affecting her substantial rights.

From a legal standpoint, this case is no different. Yasmine may be a cat rather than a piano, but the unique facts of this case should not obscure the clear terms of the MPSA: Yasmine was awarded to Stacy, not Mitchell.

Despite this, Mitchell characterizes the *Contempt Order* as merely denying contempt and maintaining the status quo. His arguments are not compelling. "Status quo" is not a basis to revise a decree; the MPSA's default was caretaking, not ownership. And here, the "status quo" existed because the contract's default rule required Mitchell to keep caring for Yasmine unless and until (1) Stacy requested possession or (2) he moved to a residence that did not allow cats, and after notice, she failed to act. Continued caretaking does not constitute ownership and treating it as such impermissibly modifies the terms of the agreement.

Finally, Mitchell's reliance on *In re Marriage of Marez & Marshall*, 2014 MT 333, 377 Mont. 304, 340 P.3d 520, lends no support to his argument. *Marez* involved custody and visitation under a parenting plan. *Id.* ¶ 25. This is not a child custody case. Thus, far from being the "controlling" authority Mitchell attributes to it, *Marez* has no relevance here beyond its recitation of other legal authority. Moreover, to the extent the case is relevant, it only supports Stacy's position because the Court found that the district court's contempt order was appealable since parenting is a substantial right. *Id.* Either way, whether analogizing pets to children (*Marez*), or treating them as property (*Stevens*), the ownership of Yasmine constitutes a substantial right.

The controlling point is that this Court has already determined that the *Contempt Order* is reviewable on appeal from the final judgment. And because the *Contempt Order* effectively altered the decree's property distribution, it "affects the substantial rights" of the parties and warrants appellate correction. § 3-1-523(2), MCA; *Lutes*, 2005 MT 242, ¶¶ 12, 18–19. While the legal point is dispositive, it's worth noting why it matters: pets are unique, irreplaceable property, and Stacy has invested time, money, and effort to this issue precisely because Yasmine is not fungible. The *Contempt Order* deprives her of that specific asset, and the companionship attached to it, without the contractual trigger or remedy chosen by the parties. The MPSA, like all contracts, should be enforced as written.

III. Because Mitchell Moved To Residence That Allowed Cats, the 2016 Notice Was Not Valid and the 20-Day Deadline was Never Triggered.

Courts interpret contracts according to their plain and ordinary meaning and will not insert into the contract what has been omitted or omit what has been inserted. *Heath v. Heath*, 272 Mont. 522, 527, 901 P.2d 590, 592 (1995). If the terms of the contract are clear, “there is nothing for the courts to interpret or construe and the court must determine the intent of the parties from the wording of the contract alone.” *Doble v. Bernhard*, 1998 MT 124, ¶ 19, 289 Mont. 80, 959 P.2d 488 (internal quotations omitted); *see also* § 28–3–303, MCA.

In his *Response*, Mitchell omits the language in the contract that contradicts his position and then argues his position with the relevant contract language excluded (Answer Brief, p. 26). Thus, for clarity, it is worth restating the operative clause in full here:

Further, Wife shall be awarded possession of the parties' cat (Yasmine). Husband agrees to care for said cat until Wife requests possession thereof. Following the sale of the marital home as set forth under ¶ 9(d) below, if Husband's new residence does not allow cats, he shall notify Wife and Wife shall make arrangements to either take the cats or make other arrangements for the care of the cats within 20 days following Wife's acknowledged receipt of said notice from Husband. If Wife fails to take the cat or make arrangements for care, Husband shall be allowed to give the cats to an appropriate caregiver.

(Doc. 11, ¶ 9(c)) (emphasis added).

Mitchell's argument conveniently omits the clause "if Husband's new residence does not allow cats." But that clause is essential to the interpretation of the agreement because it makes clear that notice is expressly conditional. It applies only if, following the sale of the marital home, "Husband's new residence does not allow cats." If that event occurs and Mitchell gives notice, then Stacy has 20 days to take the cat or arrange care. Failing that, Mitchell "shall be allowed to give the cat to an appropriate caregiver." Absent the trigger, the default sentence governs: "Husband agrees to care for said cat until Wife requests possession."

It is well established that "a court has no authority to disregard the express language used by the parties" in a contract. *Herrin v. Herrin*, 182 Mont. 142, 146, 595 P.2d 1152, 1155 (1979) (citing *Williams v. Insurance Company of North America* (1967), 150 Mont. 292, 295, 434 P.2d 395, 397). Thus, the clause "if Husband's new residence does not allow cats" cannot be simply set aside for convenience. It must be given effect as written.

And here, it is undisputed that the trigger never occurred; Mitchell never moved to a residence that did not allow cats. Instead, he testified that in 2016 he moved into a new place that allowed cats but nonetheless gave Stacy notice because "it seemed like it was a good time." (Tr. Vol.1, 61: 1-8.)

Mitchell's effort to recast the clause as a general deadline (actual notice is enough; the purpose was satisfied) contradicts the clear text of the agreement in

which the parties explicitly agreed that notice was triggered only by him moving to a no-cats residence. The MPSA does not state, “following the sale of the marital home, if Husband feels like it’s a good time, he shall notify Wife.” A courtesy notice in 2016 cannot mature into forfeiture if the contract’s condition did not exist.

The final clause of paragraph 9(c) of the MPSA provided that if Stacy failed to take the cat or arrange care within 20 days of a proper notice, then “Husband shall be allowed to give the cat to an appropriate caregiver”. In other words, the MPSA contemplated two outcomes for Yasmine post-divorce: either Stacy would eventually take possession, or, if she was unwilling or unable at the critical juncture, Yasmine would be placed with someone outside the immediate family who could care for her. The agreement did not contemplate Mitchell retaining the cat permanently for his own benefit beyond the temporary caretaking role, except insofar as he might continue as the caregiver until one of those two outcomes occurred.

Mitchell, however, contends that the *purpose* of the condition was fulfilled because Stacy received notice in 2016, and Yasmine was well cared for so any technical non-occurrence of the condition should be overlooked (Answer Br. 27). This argument fails both legally and factually. Legally, courts are not free to rewrite such agreements under the guise of interpretation. *Boyne USA, Inc. v. Lone Moose Meadows, LLC*, 2010 MT 133, ¶ 17, 356 Mont. 408, 412, 235 P.3d 1269, 1272. It

would violate basic contract law to enforce the 20-day requirement despite the unfulfilled condition that was supposed to trigger it.

Factually, while Stacy did receive a notice in 2016, the notice was premature relative to the contract's trigger. Mitchell was not being forced out of Yasmine's life by a housing restriction; thus, the essential reason for requiring a quick transfer (i.e., that Mitchell *couldn't* keep Yasmine any longer) did not exist. The District Court's interpretation effectively deleted the condition precedent from the contract, treating the 20-day period as if it applied unconditionally. That was an error. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. § 28-3-301, MCA. The phrase "if Husband's new residence does not allow cats" is not meaningless. It is written in the MPSA and thus must be given effect. Under these facts, the effect is that Yasmine should be awarded to Stacy.

IV. By Ignoring Stacy's Attempts to Retrieve Yasmine, Mitchell's Conduct Waived Compliance with Any Notice Requirements.

Even assuming *arguendo*, if the condition precedent did not apply, and a 20-day clock started on June 30, 2016, after Mitchell sold the marital home and notified Stacy, Mitchell's subsequent conduct waived enforcement of the deadline.

A. Mitchell's Conduct.

1. On July 29, 2016, Mitchell wrote Stacy that he agrees to an open-ended extension for Stacy to retrieve Yasmine, "I need to know that there is an intention for you to get Yasmine [in a] matter of weeks or months and not years." (Tr. Vol. 1, 26: 5-18, 63-64) He asked to keep Yasmine in the interim for the cat's well-being. Stacy took him at his word: "I trusted Mitch at the time." (Tr. Vol. 1, 41.) "I trusted that he would -- I trusted at the time that he was being sincere with me." (Tr. Vol 1, 42: 15-16.) "I had a new job, I was really far from home, and I trusted him." (Tr. Vol. 1, 43: 1-2.)
2. After the notice She repeatedly followed up regarding Yasmine, and "sought parameters" on Mitch's fostering, including financial compensation, through emails and attorney communications. (Tr. Vol 1, 29-31; Ex. M)
3. However, soon after the 2016 notice, Mitchell admitted that he "gradually stopped responding" to Stacy and by November 2016 "started blocking Stacy's emails." (Tr. Vol. 1, 79: 16-20.) He testified that he wanted communications to go through lawyers (Tr., Vol. 1, 81: 2-3.) and that he blocked Stacy because he believed that, at that point, "the cat had become mine." (Tr. Vol. 1, 80: 8-17.) Yet, he never informed Stacy that Yasmine

was now “his.” He simply started ignoring her. From November 2016 until February 2023, Mitchell never communicated with Stacy. There was never a new deadline set, or a new notice sent. However, Mitchell’s admission that he ignored Stacy and chose not to respond shows deliberate obstruction.

4. Stacy confirmed that Mitchell blocked her from all numbers, and she could not get calls or emails returned. (Tr. Vol. 1, 19, 46, 53.) She explained that if Mitchell had indicated that he was no longer willing to continue fostering Yasmine, she would have flown to Montana and brought Yasmine to her parents in Florida, despite the stress this would have caused the cat. (Tr. Vol. 1, 27–28.) However, she “knew there was a legal agreement” and Yasmine was better off staying with someone she knew than being fostered by someone else. (Tr. Vol. 1, 41: 7-20.)
5. In January of 2017, Stacy had no idea that Mitchell had taken the position that Yasmine now belonged to him, “That was not my understanding at all.” (Tr. Vol. 2, 45.) This was confirmed in March 2017, when Stacy emailed Mitchell stating she wanted Yasmine back. Mitchell did not respond. (Tr. Vol. 1, 46, 1-6.)
6. In 2019, Stacy left a voicemail for Mitchell’s counsel describing her efforts to recover Yasmine. It went unanswered. (Tr. 48) She also traveled back

to Montana from California and left a note at Mitchell's residence intending to prompt contact so she could arrange pickup. (Tr. Vol. 1, 46-48). Stacy testified she was scared of approaching Mitchell directly about retrieving Yasmine, (Tr. Vol. 1, 43: 3-11) "I needed to approach Mitch very carefully," (Tr. Vol. 1, 43) in order to avoid unnecessary escalation of the situation. Despite her fear, she went to his house to see him face-to-face confirmation of his intentions, in order "to get my cat back." (Tr. Vol 1 46: 22). Mitchell did not answer the door, and never responded to the note left by Stacy.

7. In 2020, Stacy still could not reach Mitchell directly and thus used a third party to attempt to retrieve Yasmine. Mitchell admits he was contacted, but refused the request, claiming he did not "know" the caller, that "as of November 2016 ... it's been my cat," and that Stacy had forfeited any claim years earlier. (Tr. Vol. 1. 77-78.) Mitchell made no attempt to verify anything with Stacy regarding this contact despite knowing that she was trying to retrieve Yasmine.
8. In February of 2023, Stacy finally reached Mitchell by phone. It was the first time he had communicated with her since 2016. She again demanded Yasmine back, but he refused. (Tr. Vol. 1, 52-53.) Stacy filed her *Motion for Contempt*, later that year.

9. Stacy testified that her documented efforts were “not an inclusive list” and that “there’s so many more times” she tried to recover Yasmine or reach resolution. (Tr. Vol.1, 55: 3-10.) Further evidence of Stacy’s efforts are included in Stacy’s *Motion for Additional Evidence*, (Doc. 27.)
10. The Court found that Stacy was never prepared to take possession of Yasmine, and any follow up was only to visit the cat. *Contempt Order*, pg. 2 at ¶ 6. The evidence does not support that finding.

Rather, the record shows Mitchell’s obstruction: he expressly extended the period, then blocked direct contact, imposed attorney-only contact conditions not in the contract, and later claimed forfeiture based on a deadline he both indefinitely extended and made impossible to meet.

The MPSA did not authorize Mitchell to ignore Stacy’s communications or condition her rights on attorney-only channels. By recasting Stacy’s attempts to enforce her rights as an attempt to “create trauma” and to “emotionally dysregulate” him, (Tr. Vol. 1, 32, 17-22), Mitchell prioritized his personal preferences over his contractual obligations. Yet, his testimony demonstrates that he received Stacy’s requests and deliberately chose to disregard them, depriving Stacy of any meaningful opportunity to exercise her rights under the terms of the MPSA.

For his part, Mitchell tries to recast his retention of Yasmine as a virtuous act beyond the MPSA’s requirements: “Mitchell went beyond the MPSA’s requirements

by granting extensions” and continuing to care for Yasmine when he wasn’t obligated to. (Answer Br. 27–28). But, under the first part of paragraph 9(c), Mitchell was indeed obligated to care for Yasmine until Stacy could take her. (Doc. 11.) That was the agreement. But by not invoking the caregiver clause and giving Yasmine away in 2016, Mitchell effectively affirmed that obligation and kept it in place. He cannot have it both ways, declining to invoke one mechanism (third-party transfer) while claiming that Stacy no longer has any right because he could have given the cat away.

In this sense, the District Court’s reasoning turns the MPSA on its head. The MPSA’s caregiver clause was meant to ensure Yasmine’s welfare if Stacy failed to step up in a scenario where Mitchell could not continue care. It was not meant as a license for Mitchell to hold the cat hostage for years and then claim de facto ownership. Mitchell’s continued possession of Yasmine was always in service of Stacy’s eventual possession. This Court should not endorse an outcome that effectively rewrites the clause to say, “Husband may keep the cat as his own if Wife doesn’t take it within 20 days.” If that were the intended result, the contract would have said so. It did not.

V. Stacy Did Not “Abandon” Her Rights in Equity.

Finally, Mitchell paints a picture of Stacy as a derelict pet owner who “abandoned” Yasmine for nearly a decade and now seeks to disrupt an elderly cat’s

life out of the blue (Answer Br. 34–35). The emotional rhetoric aside, the legal question is whether Stacy’s delay, in light of the parties’ agreement and conduct, extinguished her contractual rights. It did not.

True, nine years is a long time. But the record shows this period was not marked by any objection or notice from Mitchell that Stacy’s delay was unacceptable. Her inability to take Yasmine earlier was due to her housing situation (the exact problem the parties anticipated might happen). Mitchell was the one who had stable housing for the cat and was willing to continue caring for her. Thus, the passage of time was a mutual accommodation, not an act of willful abandonment by Stacy. Mitchell’s arguments about providing all the vet care and daily needs for years, while true, are exactly what he agreed to do until Stacy took possession. He cannot invoke his fulfillment of his own promise as evidence that Stacy somehow forfeited her rights.

Moreover, when Stacy’s circumstances changed enough that she could assert her rights she did so by filing her *Motion for Contempt*. That is not the action of someone who abandoned her interest. It is the action of someone seeking belated enforcement of a continuing right. Laches or equitable estoppel might arguably bar relief if Mitchell had been prejudiced by the delay (e.g. if caring for Yasmine had been a significant unexpected burden or if evidence had been lost). But it is clear that Mitchell was going to care for Yasmine regardless, if not for Stacy’s benefit,

then for Yasmine's and his own. Equity does not favor one party simply because he volunteered to do more than strictly required. If anything, equity would seek to carry out the intention of the MPSA with minimal disruption: at this stage in Yasmine's life, perhaps by ensuring Yasmine's well-being while recognizing Stacy's ownership. That could have been accomplished by a structured transition from Mitchell to Stacy. Instead, the District Court's decision left Stacy with nothing, effectively rewarding Mitchell for withholding the cat and ignoring Stacy.

CONCLUSION

This is a difficult case; one party will lose a beloved pet. But under the current law, pets are property and, as such, the MPSA decides this case. To that end, the terms are clear: Yasmine is awarded to Stacy and Mitchell is obligated to care for her until Stacy requests possession. The 20-day provision is conditional on a no-cats residence, which never occurred. By treating continued caretaking as ownership, the district court effectively modified the decree's property distribution and affected Stacy's substantial rights. The *Contempt Order* should be reversed. The Court should recognize Stacy's ownership and immediate right to possession and remand with instructions to enforce the MPSA as written, including a brief, humane transition plan that prioritizes Yasmine's welfare.

DATED this 24th day of September 2025.

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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 text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count excluding caption, tables, certificates, and signature blocks is 3,824 as calculated by Microsoft Word.

DATED this 24th day of September 2025.

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I, Jason M. Scott, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 09-24-2025:

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