Appendix

Appendix List

APPENDIX A-1

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 23-0031

IN THE MATTER OF THE ESTATE OF:
IAN RAY ELLIOT, Deceased.

ORDER

Appellants Jenny Jing, Alice Carpenter, and Mike Bolenbaugh (collectively referred to as "Jing") petition this Court for rehearing of its December 19, 2023 Opinion affirming the District Court's denial of their M. R. Civ. P. 60(b) motion in the probate of the Estate of Ian Ray Elliott. Appellees Joseph Womack and Cindy Elliott oppose the petition.

We granted Jing an extension of time until January 16, 2024, to file her petition for rehearing. Womack points out that the petition was not filed until January 18, after remittitur was issued. The Court accepted the petition after learning from the Clerk that FedEx had delayed in delivering it beyond the guaranteed delivery date. Though Womack correctly observes that the Court did not first recall its remittitur, we do so here *nunc pro tunc* and consider Jing's petition.

This Court will consider a petition for rehearing only upon the following grounds:

(i) That it overlooked some fact material to the decision;

(ii) That it overlooked some question presented by counsel that would have proven decisive to the case; or

(iii) That its decision conflicts with a statute or controlling decision not

addressed by the supreme court. M. R. App. P. 20(1)(a).

Jing raises a host of arguments in their petition. Again, as they did on appeal, Jing raises a number of points attempting to relitigate matters decided in *In re Estate of Elliot*, No. DA 21-0343, 2022 MT 91N, ¶ 3, 2022 Mont. LEXIS 447 (*Estate of Elliot II*). As we noted in the Opinion, Jing's invitation to "reconsider" matters decided in *Estate of Elliot II* is not properly before us in this appeal. Opinion, ¶ 16. Jing contends that the District Court violated Jenny's First Amendment rights and their right to a jury trial when it appointed Andrew Billstein as special administrator of Ian's estate, adding that the hearing also was to consider the veracity of Womack's claim that Ian did not leave a signed will. However, Jing did not appeal the District Court's order appointing Billstein as the special administrator of Ian's estate, and we did not consider that order in their appeal of the Rule 60(b) ruling. Opinion, ¶ 2. Further, "[b]ecause the M. R. App. P. 20(1)(a) requires petitioners to identify or establish, among other things, that this Court 'overlooked some question *presented by counsel* that would have proven decisive to the case,' it is manifest that new arguments cannot be raised in a petition for rehearing." *In re Conservatorship of H.D.K,* S. Ct. No. DA 21-0011, 2021 Mont. LEXIS 910, (Or. Nov. 9, 2021).

Jing also reasserts their arguments that Womack did not have standing to seek appointment of a special administrator and that he committed a fraud upon the court. But we addressed both arguments in our Opinion (¶ 7 n.4, TT 14-16), and Jing has not demonstrated that the Court overlooked a question they presented that

would have proven decisive to the case. Womack did not have to show that he was "injured" by loans made from StarFire to Ian's estate to qualify as an interested person for purposes of seeking, supervised administration. Though Jing cites additional authority for their arguments, none of the cited cases constitutes a "controlling decision" that the Court overlooked, as we agreed with the District Court that Womack qualified as a "creditor" under the definition of "interested person." Opinion, ¶ 7 n.4.

We have considered the remainder of Jing's arguments and determine that they do not raise appropriate grounds for rehearing under M. R. App. P. 20(1)(a).)

IT IS THEREFORE ORDERED that the petition for rehearing is DENIED. Remittitur shall issue forthwith.

The Clerk is directed to provide a copy of this Order to all parties and counsel of record.

DATED this 6th day of February, 2024.

Justices

Justice Ingrid Gustafson recused herself from participating in this appeal.

APPENDIX A-2

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 23-0031n

2023 MT 246N

IN THE MATTER OF THE ESTATE OF:
IAN RAY ELLIOT, Deceased.

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, we decide this case by memorandum opinion. It shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Appellants Jenny Jing, Alice Carpenter, and Mike Bolenbaugh (collectively referred to as "Jing") challenge numerous rulings of the Thirteenth Judicial District Court related to administration of the estate of Ian Ray Elliot. Limiting our consideration to the District Court's December 9, 2022 order denying Jing's M. R. Civ. P. 60 motion, we affirm on all issues.

¶3 Ian was the son of Ada Elliot, whose estate—and before that, her guardianship—has been the subject of numerous prior appeals and petitions before this Court.1 Ada died in 2017, devising her property by will in equal shares to Ian and his sister Cindy and appointing them as her co-personal representatives. Ada's estate consisted primarily of her 96.34% interest in StarFire, a limited partnership that owned and managed valuable real properties in Gallatin County. *In re Estate*

of Elliot, No. DA 21-0343, 2022 MT 91N, ¶ 3, 2022 Mont. LEXIS 447 (*Estate of Elliot II*). Ian, who litigated his mother's estate extensively, died in December 2021, during the pendency of his last appeal. *Estate of Elliot II*, ¶ 2 n.1. Appellant Jenny Jing was Ian's domestic partner and had longstanding involvement with his litigation. The probate of Ada's estate has not yet concluded.

¶4 Ian left a will appointing Jenny and Ian's ex-wife Ann Taylor Sargent co-personal representatives of his estate. Appellants Alice Carpenter and Mike Bolenbaugh were named in Ian's will as devisees. The present litigation was commenced a month after Ian's death when Joseph Womack, special administrator for Ada's estate, filed a petition for supervised administration of Ian's estate and requested the court to appoint Ian's nephew, Adrian Elliot Olson, as personal representative. Womack's petition represented that he had been unable to obtain a signed copy of Ian's purported will and believed he may have died intestate. Cindy simultaneously renounced any right she had to be appointed personal representative. Jenny and Ann filed a response and application for probate of Ian's will, along with their petition to be appointed as personal representatives as the will directed. Jenny and Ann submitted a copy of Ian's signed will with their application. Cindy followed with an objection to Jenny and Ann's request to be appointed as personal representatives and her own application for supervised administration.

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1. See *In the Matter of the Estate of A.H.E.*, No. DA 16-0304, 2016 MT 315N, 2016 Mont. LEXIS 1002; *In the Matter of the Estate of Ada Elliot*, No. DA 17-0618, 2018 MT 171N, 2018 Mont. LEXIS 231; *Elliot v. Womack*, No. OP 21-0473, 405 Mont. 540, 495 P.3d 420 (Sept. 21, 2021); *In re Estate of Elliot*, No. DA 21-0343, 2022 MT 91N, 2022 Mont. LEXIS 447; and *Jing, et al. v. Mont. Thirteenth Jud. Dist. Ct.*, No. OP 23-0642, Order denying writ (Nov. 7, 2023).

¶5 On May 25, 2022, following numerous additional filings and an evidentiary hearing that extended over two days, the District Court entered detailed findings of fact, conclusions of law, and an order for supervised administration of Ian's estate. In relevant part, the court found that, due to Jenny's involvement with Ian's decisions and questionable litigation tactics for years, she "will pick up where Ian left off" if Jenny were to serve as co-personal representative. The court found further that Jenny would not work with Womack. Instead, the court found, "Jenny will pursue litigation to the detriment of Ian's estate and the Estate of Ada Elliot. Such actions will cascade to needlessly delay closure and squander Ian's Estate's remaining assets." The District Court found further, in relevant part:

> Womack is not only the Special Administrator of Ada's Estate but also StarFire's liquidating partner. The major asset of Ada's Estate is land still owned by StarFire. Thus, whether it is a special administrator or a personal representative handling Ian's estate, that person must work with Womack. Jenny is incapable of doing so.
>
> Moreover, if the Court appointed Jenny as co-personal representative, she would have a conflict of interest due to financial records indicating Ian lent Jenny and her entity (Win Win Star) a substantial amount of money. The conflict arises because Jenny disclaims the full amount of the debt. During testimony, Jenny acknowledged Ian probably put between $20,000 and $30,000 into her home. However, when questioned about Ian transferring $21,000 to Jenny during the last year of his life, Jenny denied the scope of the transfers.

> She stated transfers probably totaled $2,000. Ian's financial records admitted as evidence demonstrate Jenny vastly underestimated the total amount of these transfers—hence a conflict of interest arises.

Acting under the authority of § 72-3-701(2), MCA, the court concluded that appointing a special administrator "is necessary to preserve [Ian's] estate or to secure its proper administration." The court appointed attorney Andrew Billstein as special administrator. Jing did not appeal this order.

¶6 More than three months after Notice of Entry of the District Court's Order was filed, Jing filed a motion under M. R. Civ. P. 42 and 60, requesting the District Court to (1) vacate its May 25, 2022 order, (2) allow them to institute an independent action to investigate fraud on the court, and (3) consolidate three pending cases related to Ada's and Ian's estates involving common questions of law and fact.2 On December 9, 2022, the court denied Jing's motion in a thorough order. Jing filed a notice of appeal on January 9, 2023, purporting to appeal the May 25 order. On March 7, 2023, this Court granted Womack's partial motion to dismiss the appeal, noting that an order granting or refusing to grant letters of administration of an estate is considered a final order and must, pursuant to M. R. App. 6(4)(b), be appealed immediately. We ruled that "Appellants' attempt to appeal from the May 23, 2022 Order [sic] is untimely and, as provided by the Rules, their right to appeal that order was waived."3 We directed that Jing's appeal be limited to the District Court's denial of their Rule 60 motion on the three issues identified above.

¶7 We now consider those three issues, reviewing the District Court's denial of

Jing's Rule 60(b) motion for abuse of discretion. See *Puhto v. Smith Funeral Chapels, Inc.*, 2011 MT 279, ¶ 8, 362 Mont. 447, 264 P.3d 1142. As the party seeking to set aside the order, Jing has the burden of proof. *Puhto*, ¶ 8. We do not address arguments in Jing's briefing that relate to the District Court's May 25 order for supervised administration and appointment of Billstein as special administrator.4

Should the order be vacated by reason of mistake?

¶8 Jing asked the District Court to vacate its order because Jenny's testimony, on which the court relied, that she thought she had received about $2,000 from Ian, was a mistake. Upon review of the bank statements, Jenny represented that she owed Ian $8,900. The District Court found this change to be "a distinction without a difference," as it had determined Jenny's debt to be $21,000. Jenny's acknowledgment still left a significant discrepancy with the actual amount of debt, and the court maintained its finding that she had a conflict of interest and an incentive to delay administration of the Estate. The court further rejected Jenny's asserted mistake in not knowing she could object to the court's taking judicial notice of court records in the numerous cases Ian had litigated related to StarFire, his mother, his sister Cindy, and Ada's estate.

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2 Ann Sargent Taylor did not join in the motion and has not participated in this appeal.

3 The District Judge signed the order on May 23, but it was filed on May 25. We refer to the order in this Opinion by the date of filing.

4 As a threshold matter, we reject Jing's argument that the District Court lacked jurisdiction over Womack's petition because he lacked standing to seek supervised administration of Ian's estate. The court may appoint a special administrator on petition of "any interested person." Sections 72-3-402(1), 72-3-701(2), MCA. As the liquidating partner of StarFire, which is a creditor of Ian's estate because of loans he received during the pendency of the probate of Ada's estate, Womack qualifies under the broad definition of "interested person" in § 72-1-103(25), MCA.

¶9 On appeal, Jing includes a chart showing their calculation of the debt and arguing that the $21,900 figure Cindy's counsel submitted was a miscalculation. Jing acknowledges that Jenny's "guess" at trial also was in error but submits that her dispute of the $21,000 figure was justified. Jing maintains that the District Court's acceptance of the $21,000 amount was arbitrary. Jing argues that the court incorrectly determined that Jenny had a conflict of interest when it found that Ian's contribution of funds to maintain and repair Jenny's house was purely a loan, ignoring Ian and Jenny's domestic partnership and how they chose to manage their private finances as a couple.

¶10 Womack responds that the precise amount of debt Jenny owed to Ian's estate is irrelevant. The court made clear that Jenny's debt—whether it be $2,000, $8,900, or $21,900—raised the potential for a claim by Ian's estate against Jenny and incentivized her to delay administration.5

¶11 The relief Jing seeks on appeal is to direct the District Court to vacate its May 25, 2023 order. The evidence on which Jing relied in the Rule 60(b) motion and again on appeal was evidence the court had before it at the time it ordered supervised administration of Ian's estate and appointed a special administrator. Jing was aware of that evidence but did not appeal the May 25 order. In its December 9 order, the District Court explained that any discrepancy in the amount of debt did not change its determination that Jenny should not be appointed as

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5 Womack submits that the hearing exhibit on which Jing relies reflects that Jenny's debt is $15,400, arguing that Jing continues to deny the extent of the debt. Cindy joins in Womack's Answer Brief on appeal.

personal representative of Ian's estate. A court may appoint a special administrator in a formal proceeding if it finds, "after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration[.]" Section 72-3-701(2), MCA. The court explained in its December 9 order that Jenny's debt to the Estate gave her an incentive to delay its administration and that her extensive involvement in Ian's contentious litigation and her inability to work with Womack rendered her appointment contrary to the "proper administration" of Ian's estate. Despite their disagreement with the amount of the debt, Jing has not demonstrated that the court's refusal to vacate its May 25 order was an abuse of discretion.

Did the District Court improperly fail to address Womack's fraud on the court?

¶12 Jing alleges that the District Court's order failed to address the facts they demonstrated that show "high probabilities of Womack's dishonesty to the courts[.]" They accuse Womack of colluding with Cindy to steal an unsigned version of Ian's will to support a claim of intestacy, of concealing or destroying evidence of an audio record, and of misrepresenting or withholding information from the courts. Jing's argument appears to be, first, that Womack should not have been found credible in this proceeding and, second, that he should not be serving as the special administrator in the administration of Ada's estate.

¶13 In their motion before the District Court, Jing cited M. R. Civ. P. 60(d), which preserves a court's power to set aside a judgment for fraud on the court. Jing's arguments about alleged fraud are wide-ranging and include numerous allegations outside the scope of not only their Rule 60(b) arguments to the District Court but

also of this proceeding. Some we already rejected in Ian's appeal of Womack's appointment as special administrator in Ada's estate and will not address further here. See *Estate of Elliot II*, ¶ 20.

¶14 Before the District Court, Jing asserted that Womack committed fraud on the court when he stated during the hearing that "he conducted Ada['s] estate's accounting"; that "Jenny talked Ann [in]to refus[ing to] converse with him"; and that Jenny "refused to provide" Ian's Will. The District Court quoted Womack's testimony during the March 7, 2022 hearing, finding that his testimony was accurate when he explained that he had just gotten the accounting on Ada's estate "back from Wipfli" (which he had hired to perform the accounting). The court also recounted Womack's testimony that he drew an inference from Jenny saying things about him to Ann and that Ian's and Jenny's refusal to communicate with Womack except in writing made it difficult to get anything accomplished. "Drawing inferences," the District Court explained, "is not fraud." The court also noted that Womack explained to Jenny during the hearing what he meant by refusal to provide the will, noting that Jenny did not send it to Womack when he requested it but told him she was "going to wait and [not do] anything for a period of time. . . . So [Womack] took that as a refusal." The court further rejected Jing's assertion that Womack "misrepresented to the Montana Supreme Court [that] Ian obstructed his administration" of Ada's estate. The District Court again explained the evidence that strongly supported its extensive findings of fact and observed this Court's likewise "strong[] reject[ion of] the argument [that] Ian was not obstructionist."

(Citing *Estate of Elliot II*, ¶¶ 19, 23, 28.) The court spent over three additional pages of its order reviewing Jing's myriad additional fraud allegations, refuting them with evidence from the record, and observing that one or more already had been rejected by this Court.

¶15 "Only the most egregious conduct will rise to the level of fraud upon the court." *Falcon v. Faulkner*, 273 Mont. 327, 332, 903 P.2d 197, 200 (1995) (internal quotation and citation omitted). "'It must be such fraud as denied the adversary an opportunity to have a trial or to fully present his side of the case' in order to 'constitute grounds for reopening the decree.'" *Falcon*, 273 Mont. at 332, 903 P.2d at 200 (quoting Lance v. Lance, 195 Mont. 176, 179-80, 635 P.2d 571, 574 (1981)). "[F]raud between the parties or perjury at trial is not fraud upon the court." *In re Marriage of Weber*, 2004 MT 211, ¶ 20, (quoting *In Re Marriage of Miller*, 273 Mont. 286, 292, 902 P.2d 1019, 1022 (1995)).

¶16 Many of Jing's assertions accuse Womack of misrepresentations in his testimony, which amount to allegations of intrinsic fraud that cannot substantiate a Rule 60(b) motion. *Falcon*, 273 Mont. at 332, 903 P.2d at 200; *Marriage of Weber*, ¶ 20. What is more, Jing has not demonstrated any factual basis for their claims that Womack has concealed or destroyed evidence, misled or made untrue representations to the courts, or acted in a retaliatory fashion toward either Ian or Jenny. The District Court gave thorough consideration to the evidence presented in this proceeding, and it reviewed extensively the history and records from Ian's numerous prior cases involving StarFire, his family, and Womack's administration

of Ada's estate. The court did not abuse its discretion when it denied Jing's motion to allow an independent action for fraud on the court. Finally, Jing's invitation to "reconsider" our decision in *Estate of Elliot II* lacks support and is not properly before us in this appeal.

Should the administration of Ian's estate be consolidated with other pending actions?

¶17 Jing's Rule 60(b) motion finally included a request that the District Court consolidate this proceeding with two other cases—the probate of Ada's estate and Ian's suit against Womack—both pending in the Thirteenth Judicial District Court. Noting its limited jurisdiction as a probate court, the court observed that it would not be able to adjudicate any breach of contract claim, citing *In re Estate of Cooney*, 2019 MT 293, 398 Mont. 166, 454 P.3d 1190. We find no error in this ruling.

Should Jenny be declared a vexatious litigant?

¶18 Womack requests that this Court declare Jenny Jing a vexatious litigant in all cases related to or stemming from the administration of Ada's and Ian's estates, arguing that she meets all the requisite factors this Court has articulated to make such a finding. See *Motta v. Granite Cty. Comm'r*s, 2013 MT 172, 370 Mont. 469, 304 P.3d 720. Womack notes that a similar motion has been filed in the District Court in this proceeding. Jing objects, protesting that Womack's motion and their response before the District Court are not part of the record on appeal. They argue it would be unfair to expect them to respond within the confines of their word-limited reply brief.

¶19 As the District Court has pending before it the Appellees' separate motion to declare Jenny a vexatious litigant, we decline to entertain the argument on appeal.

¶20 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This case presents no issues of first impression and does not establish new precedent or modify existing precedent. The District Court did not abuse its discretion when it denied Appellants' Rule 60(b) motion for relief and related motions, and its December 9, 2022 order is affirmed.

/S/ BETH BAKER

We Concur:

/S/ LAURIE McKINNON

/S/ JAMES JEREMIAH SHEA

/S/ JIM RICE

Justice Ingrid Gustafson recused herself from participating in this appeal.

APPENDIX A-3

IN THE SUPREME COURT OF THE STATE OF MONTANA STATE OT MONTANA

DA 21-0343

Filed MAY 10 2022

IN THE MATTER OF THE ESTATE OF
ADA E. ELLIOT, Deceased.

ORDER

The Court's Order of March 1, 2022 (Order), noted the unfortunate death of Appellant Ian Elliot on December 19, 2021, following his filing of a pro se Opening Brief. Appellee Joseph Womack, special administrator of the Estate, filed his Answer Brief on December 21, 2021. After a notice and status report were filed by Ann Sargent and Jenny Jing requesting the appeal not be dismissed and that they be permitted to file Ian's reply brief, the Court entered the Order explaining that substitution of Ian's personal representative(s) would be appropriate under M.R. App. P. 25(1). In that regard, we noted that, while Ian could properly represent himself "pro se" in the appeal, his estate must be represented by legal counsel, and could not be represented by individuals acting "pro se," as indicated on the notices filed by Sargent and Jing. We further explained that a reply brief is not a mandatory filing for an appellant, but optional. M. R. App. P. 12(3). We explained that, while we were willing to grant some time for a personal representative to be appointed and to move for substitution for purposes of filing a reply brief, we could not postpone the appeal indefinitely, as the administration of the subject estate had

to be finalized, and the appeal had already been adequately briefed for decision under the Rules of Appellate Procedure. Consequently, we granted 60 days for substitution of Ian's personal representative under Rule 25 and for appearance of counsel for purposes of filing a reply brief, and ordered that, "[f]ailing such, the Court will thereafter properly decide the appeal based upon the current briefing." Order, March 1, 2022, p. 2.

The Order was entered over two months after Ian's passing, yet substitution did not occur within the following 60-day time period. Rather, Ann Sargent and Jenny Jing filed a motion to intervene in this appeal, and for an extension of time in which to file a pro se reply brief. Sargent and Jenny's request states that they "do not ask to file an Intervenor's brief, but ask to complement Ian's Opening Brief with our reply to Womack's Answer Brief."

Sargent and Jing are attempting to substitute themselves in the place of Ian to file a pro se reply brief on Ian's behalf when they have no authority to do so, and without complying with the Rules of Appellate Procedure. They are not asserted heirs of the Estate now before the Court, but, rather, asserted heirs of Ian's Estate, and have not sought substitution herein as appointed personal representative(s) of Ian's Estate. Finally, this matter cannot be delayed further.

Therefore, IT IS ORDERED that the motion for intervention is DENIED. In accordance with the Court's prior Order, and the time for substitution of the Appellant's personal representative having expired, the Court will decide the appeal based upon the briefing previously filed by the parties.

The Clerk is directed to provide copies of this Order to all counsel of record, and to Ann Sargent and Jenny Jing.

DATED this 10 day of May, 2022.

APPENDIX A-4

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case Number: DA 21-0343

2022 MT 9IN

Decided: May 12, 2022

IN RE THE MATTER OF THE ESTATE OFADAE. ELLIOT, Deceased.

APPEAL FROM: District Court of the Thirteenth Judicial District, For the County of Yellowstone, Cause No. DP 17-0036, Honorable Mary Jane Knisely, Presiding Judge

For Appellant: Ian R. Elliot, Self-represented

For Appellee: Michael Manning, Ritchie Manning Kautz PLLP, Billings, Montana (for Joseph V. Womack)

Joseph Andre Soueidi, Felt Martin PC, Billings, Montana (for Cindy Elliot)

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Ian Elliot (Ian)[1] appeals multiple orders of the Thirteenth Judicial District

1. Ian unfortunately passed away on December 19, 2021, after he had filed his Opening Brief. In this Opinion, we refer to Ian in the present tense for consistency. Filings from two family members or heirs of Ian's expressed an initial interest in substituting his Estate for purposes of filing a reply brief herein, and we entered an order granting time for the filing and stating that, failing such, we would decide the case on the briefing as filed. No reply brief was filed.

Court, Yellowstone County, made throughout the probate of the Estate of Ada E. Elliott (the Estate) and the associated dissolution of StarFire, L.P. (StarFire). He primarily contests District Court rulings relating to actions taken by Joseph Womack (Womack) as the Estate's special administrator and liquidating partner of StarFire.

¶3 Ada E. Elliot (Ada) died on January 28, 2017, leaving a will that appointed her two children, daughter Cindy Elliot (Cindy) and son Ian, as her co-personal representatives and devised her property to them in equal shares. The Estate primarily consisted of Ada's 96.34% interest in StarFire, a limited partnership that owned farmland properties in Gallatin County, valued at approximately $5 million.[2] StarFire had three partners, with Ada as limited partner and Cindy Ian as general partners each owning a 1.83% interest. The siblings disputed the management of StarFire's assets in the years before Ada's death. In October 2014, Cindy filed a dissociation action in Gallatin County to remove Ian as a general partner of StarFire ("Gallatin Litigation"). In October 2015, Ian filed an action against Cindy for fraud and breach of fiduciary duty in federal court, alleging she misappropriated StarFire funds ("Federal Litigation").[3] Both the Gallatin Litigation and the Federal Litigation were pending when Ada died.

¶4 In February 2017, Ian petitioned for probate of Ada's will and to be appointed as personal representative of the Estate. The District Court denied Ian's petition

2. This is the value listed on the Inventory and Appraisement filed for the Estate. However, the parties dispute the value and offer estimates ranging from $2.5 million to $5.2 million.

3 StarFire contracted with Cindy and her management company to manage its financial affairs from 2005-2019.

and granted Cindy's request to appoint a special administrator, due to the sibling's as personal representative of the Estate. The District Court denied Ian's petition and granted Cindy's request to appoint a special administrator, due to the sibling's strained and litigious relationship. Ian appealed the decision to this Court, and we affirmed in July 2018. *In re Estate of Elliot*, No. DA 17-0618, 2018 MT 171N, 9 9, 2018 Mont. LEXIS 231.

¶5 The District Court appointed Womack, a Billings attorney, as special administrator of the Estate on May 28, 2019. Womack was granted the powers of a personal representative, with several enumerated exceptions. The District Court, following a hearing held on July 8, 2019, issued an order granting two motions by Womack to modify the court's restrictions on his authority as special administrator. The Order allowed Womack to terminate the Gallatin Litigation and gave him discretion to continue or withdraw from the Federal Litigation.[4] The District Court also gave Womack permission to initiate a judicial dissolution of StarFire under § 35-12-1202, MCA.

¶6 Womack then filed a "Motion for Order Enforcing Agreement," stating that, directly following the July 8 hearing, Ian, Cindy, and Womack held a partner meeting at which they unanimously agreed to judicially dissolve StarFire, appoint Womack as liquidating partner, and conduct an accounting of its financial records ("Liquidation Agreement"). Womack prepared a consent pleading to dissolve

4 Womack was granted dismissal of the Gallatin Litigation and eventually settled the Federal Litigation with Cindy. The settlement agreement allowed Womack to collect from Cindy's StarFire shares for any financial irregularities discovered through an independent accounting of the partnership.

StarFire at the meeting, but Ian refused to sign it. The District Court held a hearing on August 13, 2019, where Womack and Ian presented testimony and evidence about the June 8 meeting and Liquidation Agreement. Womack asked to be appointed as liquidating partner of StarFire, and Ian objected. Cindy consented to Womack's appointment, testifying that she could "[a]bsolutely not" work with Ian to administer the Estate or manage StarFire. Womack had also filed an August 2019 motion for permission to sell two 20-acre tracts of StarFire's land. All parties, including Ian, agreed to the sale at the hearing. Initially ruling from the bench, the District Court granted Womack's motions, noting his impartiality and experience in such matters. In a following written order, the District Court found the partners unanimously agreed to the Liquidation Agreement at the July 8 meeting and that a "comprehensive accounting and investigation of partnership transactions has not yet been completed, and must be done so that the Probate Estate may be administered." It also found good cause existed for judicial dissolution of StarFire pursuant to § 35-12-1205(4)(b), MCA, and for the appointment of Womack as liquidating partner. The court also gave Womack permission to sell the two tracts of land described in his motion.

¶7 On July 6, 2020, Womack asked to sell two additional StarFire properties, known as the Farmhouse and the Modular Home. He stated that "anticipated expenses and claims against the [E]state far exceed the current funds of StarFire," and he produced a budget overview evidencing the significant shortfall. He estimated the court-ordered accounting would cost at least $150,000, and he Stated

his administration costs were increasing in large part because of "the high litigation costs that must be incurred due to Ian's continued litigation regarding his claim against Cindy."[5] Womack argued the sale of the Farmhouse and Modular Home would enable him to cover expenses and pay Ian and Cindy their remaining distributions from the first sale.[6] Cindy agreed to the sale, but Ian objected.

¶8 Ian filed a "Motion for Injunction and Sanction" ("Contempt Motion") on July 16, 2020, alleging Womack violated the District Court's order by paying accounting firm Wipfli for a forensic accounting of StarFire without permission from the court or the partners." Ian asked the District Court to find Womack in contempt, order him to return the funds paid to Wipfli, and wrap up the accounting. Ian followed with more motions, objecting to Womack's proposed Farmhouse and Modular Home sale and advocating for in-kind distribution of StarFire's assets.

¶9 On August 21, 2020, Ian filed a motion to disqualify Womack as StarFire's liquidating partner ("Motion to Disqualify") for alleged violations of the Rules of Professional Conduct and "financial exploitation" through attempts to coerce Ian into agreeing to sell the additional StarFire properties, all while working for his personal financial gain and colluding with Cindy against Ian. Womack refuted Ian's allegations and noted that he had not yet been paid any compensation for his year-long work as special administrator and liquidating partner. On January 11, 2021,

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5 Further, at that point, Ian had also initiated a civil action in state district court against Womack for fraud, breach of fiduciary duty, and negligence, filed on February 11, 2020.

6 In March 2020, Ian filed a motion to compel Womack to distribute to him his share of the proceeds from the first sale. Ian claimed Womack was intentionally withholding funds he needed to hire an attorney to challenge Womack and Cindy.

contracting with Wipfli and paying for the accounting were part of Womack's duties as special administrator and liquidating partner—he did not violate any court order as alleged by Ian in his Contempt Motion. The District Court granted Womack's motion to sell the additional properties and warned Ian that "the roadblocks in this estate are going to come to an end." The District Court issued a Findings of Fact, Conclusion of Law, and Order on June 10, 2021 ("June 2021 Order"), and concluded there existed "no cause for removing Womack as the Special Administrator of the Estate [] under § 72-3-526, MCA." The District Court found good reason existed to sell the Farmhouse and Modular Home properties— "to pay liquidation and operating expenses of Starfire and the Estate." The court reiterated it "d[id] not intend to entertain further objections to or attempted interference with Womack's performance of his duties."

¶12 Womack entered into listing agreements with real estate agent Jim Toth (Toth). Ian emailed Toth advising him that "StarFire's property sale signed by [Womack] is in Court dispute and you must stop any listing and sale activities of StarFire LP properties" and "the rule of law will prevail and any violation by anyone will eventually be held responsible." In response to Ian's emails, Toth paused his efforts to market the properties. Following a show cause hearing, the District Court found Ian's emails violated its Order to sell the properties and its warning to Ian to stop his interference. The court held Ian in contempt, but it granted him the opportunity to purge his contempt by refraining from further interference with Womack's administration.

¶13 Ian appealed to this Court on July 12, 2021. He filed motions in the District Court and in this Court to stay the proceedings and execution of the June 2021 Order and the Order dismissing his Motion for Relief, pending appeal. Both courts denied his request, and Womack subsequently sold the Farmhouse and Modular Home.

¶14 On appeal, Ian argues that: (a) the District Court erred by enforcing the Liquidation Agreement ordering StarFire's liquidation and appointing Womack as liquidating partner; (b) the District Court erred by denying Womack's removal; (c) the District Court erred by allowing Womack to sell the Farmhouse and Modular Home; and (d) the District Court erred by denying Ian's request for formal discovery and a jury trial, and it acted with bias against Ian in favor of Womack. We affirm on all issues.

¶15 This Court reviews a district court's equitable decisions to determine whether the court's findings of fact were clearly erroneous and whether its conclusions of law were correct. "A finding is clearly erroneous if it is not supported by substantial credible evidence, if the trial court misapprehended the effect of the evidence, or if our review of the record convinces us that a mistake has been committed." *Baston v.*

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8 Ian had filed a motion requesting relief from, or a stay of, the court's oral Order from the April 2021 Hearing allowing the second sale of StarFire properties ("Motion for Relief"). The court dismissed the Motion, writing that "[Ian's] current Motions include nothing more than frivolous arguments to again delay the process of this 2017 Estate proceeding to closure."

9 Both Womack and Toth testified they interpreted this phrase to be a threat of litigation. Ian testified he was simply trying to educate Toth about the law.

10 Jan also petitioned this Court for a writ of injunction or supervisory control, asking us to set aside multiple District Court orders. We denied the petition in September 2021. Elliot v. Womack and Elliot, No. OP 21-0473, Order (Mont. Sept. 21, 2021).

Baston, 2010 MT 207,913, 357 Mont. 470, 240 P.3d 643 (citations omitted). We review de novo questions of statutory interpretation. *State v. McCoy*, 2021 MT 303,] 26, 406 Mont. 375, 498 P.3d 1266 (citation omitted). We review a district court's ruling on discovery matters for abuse of discretion. *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, 9 53, 351 Mont. 464, 215 P.3d 649 (citation omitted). "We review a district court's decision not to hold an evidentiary hearing for an abuse of discretion." *In re Estate of Boland*, 2019 MT 236, § 18, 397 Mont. 319, 450 P.3d 849 (citation omitted). We also review a district court's decision regarding removal of an estate's personal representative for abuse of discretion. A district court abuses its discretion when it "acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice." *In re Estate of Hannum*, 2012 MT 171, 9 18, 366 Mont. 1, 285 P.3d 463 (citations omitted).

¶16 Ian disputes the legitimacy of the Liquidation Agreement, but the District Court also found good cause existed under the relevant statutes to judicially dissolve StarFire and appoint Womack as liquidating partner. As special administrator of the Estate, Womack acted as a partner of StarFire. Upon application by a partner, "the district court may order dissolution of a limited partnership if it is not reasonably practicable to carry on the activities of the limited partnership in conformity with the partnership agreement." Section 35-12-1202, MCA. "[T]he district court may order judicial supervision of the winding up, including the appointment of a person to wind up the dissolved limited partnership's activities if . . . the applicant establishes [] good cause." Section 35-12-

1205(4)(b), MCA. Here the District Court found that "[b]ecause of the ongoing disagreements of the partners it is clear that StarFire, LP serves no further purpose and that judicial supervision of its dissolution is needed." Ian and Cindy could not work together to manage StarFire, and therefore the limited partnership could not carry on its activities. Womack was the natural choice for liquidating partner given his extensive experience and the disqualifying acrimony between the siblings. The District Court's factual findings were amply supported by the record and not clearly erroneous. Its conclusions of law were correct and sufficient for us to affirm its decision to dissolve StarFire and appoint Womack. Therefore, we need not further assess the Liquidation Agreement.

¶17 A party petitioning for removal of a personal representative assumes "the burden of proving some valid grounds for removal pursuant to Section 72-3-526,MCA." In *re Estate of Robbin*, 230 Mont. 30, 34, 747 P.2d 869, 871 (1987) (citation omitted). A district court may remove a personal representative for cause "when removal would be in the best interests of the estate," or if the petitioner shows the personal representative "intentionally misrepresented material facts in the proceedings leading to the appointment or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of the office, or has mismanaged the estate or failed to perform any duty pertaining to the office." Section 72-3-526(2), MCA. An order of removal "is harsh and severe; and irregularities not directly harmful in the management of the estate will be overlooked." *Estate of Robbin*, 230 Mont. at 34, 747 P.2d at 871 (citation omitted).

¶18 In its June 2021 Order, the District Court considered and rejected all potential causes for removal under the statute and further concluded that "Womack's removal is absolutely not in the best interests of the Estate," due to his familiarity with the complex situation and the parties, as well as the purpose of the StarFire dissolution and probate proceedings. We agree. Ian alleged much wrongdoing by Womack, but he offered no testimony or evidence at the hearing to support his allegations, and therefore he failed to meet his burden to "prove some valid grounds" for the "harsh and severe" remedy of removal. *Estate of Robbin*, 230 Mont. at 34, 747 P.2d at 871.

¶19 The record demonstrates that, however sincere he may have been, Ian obstructed Womack's administration with constant litigation and unfounded accusations. He filed numerous, lengthy motions objecting to almost every action by Womack, and even sued him twice personally. Ian forced Womack to fight for virtually every decision, even those that the District Court expressly placed within his discretion, most notably obtaining a full accounting of StarFire. Womack nonetheless acted professionally as special administrator and liquidating partner.

¶20 As for Ian's persistent claim that Womack and Cindy "colluded" and "coordinated" against him, these allegations are based on speculation and are not legally supported. The District Court found "no evidence of such disparate treatment" in Womack's dealings with the siblings. Womack and Cindy often agreed on a legal course of action, but this alone does not indicate collusion or favoritism. There is nothing in the factual record that makes us doubt the District Court's

conclusion on this matter.

¶21 Ian's argument that the District Court should have disqualified Womack for a conflict of interest also fails. Ian compares his litigious conflict with Cindy to his "antagonistic" relationship with Womack, and he argues Womack should similarly be disqualified to serve as personal representative. But unlike his situation with Cindy, Ian was not a co-representative with Womack, and there is no evidence that Womack antagonized Ian other than by making administrative decisions to which Ian objected. "The [d]istrict court has broad discretion in probate matters," and here it found Womack fulfilled his duties appropriately as a neutral third party, despite Ian's litigation against him. *Estate of Robbin*, 230 Mont. at 33-34, 747 P.2d at 871. Ian's citation to *In re Estate of Peterson*, 265 Mont. 104, 874 P.2d 1230 (1994) is in apposite as Womack had no relationship with the Elliot family prior to Ada's death, and the Estate has no claim against Womack. We conclude the District Court did not abuse its discretion by denying Ian's Motion to Disqualify and Motion to Remove.

¶22 The District Court also did not err when it ordered the Farmhouse and Modular Home to be sold to pay StarFire and Estate expenses.[11] Ian continuously objected to the second sale of StarFire properties, instead advocating for

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11 Womack argues this issue is moot because the District Court and this Court denied Ian's motion to stay execution of the District Court's Order allowing sale of the properties, and Womack subsequently sold both properties pursuant to the Order. "[A]n issue is moot when a court cannot grant effective relief or restore the parties to their original position." *Billings High Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 239, § 12, 335 Mont. 94, 149 P.3d 565 (citation omitted). Womack is correct that we cannot restore the parties back to their original, pre-sale positions, but Ian argued in his Motion for Relief and on appeal that the District Court "ignored" a statute, § 72-3-902, MCA, and he challenges the court's dismissal of this argument as "frivolous." The District Court has no discretion to decide whether to apply an applicable statute; thus we review Ian's argument.

administrative cost-saving measures and in-kind distribution of StarFire shares or real property. The first problem with his solution is that, as discussed above, StarFire was judicially dissolved in August 2019. As such, shares of the partnership could not be distributed in kind to Ian and Cindy. Regarding StarFire's remaining real property, Ian correctly cites § 72-3-902, MCA: "Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate must be distributed in kind to the extent possible." Ada's will indicated no contrary intent. But the statute gives preference to in-kind distribution only to the extent possible. As the personal representative, Womack "ha[d] the power to sell estate property if necessary for the estate's administration." As a devisee of the Estate, Ian takes his inherited property "subject to" the Estate's administration. *Northland Royalty Corp. v. Engel*, 2014 MT 295,911,377 Mont. 11, 339 P.3d 599 (citing §§ 72-3-101(2); -606(1); -613(6), MCA).

¶23 Ian essentially argues that the proceeds from the first sale, combined with StarFire's rental income, should have been sufficient to pay for administration of the Estate. He further claims that "[t]he Estate[']s accounting only needed to examine Ada's personal bank account and credit card accounts, so Womack could administrate and distribute the[E]state without having any involvement with StarFire's management." This, unfortunately, was not the reality of the situation. Due to the disorganized state of StarFire's financial records,[12] and Ian's allegations

12 The District Court described the StarFire financial records as "incomplete, convoluted documents." A Wipfli forensic account testified that he was provided 34 boxes of unorganized documents, many of them irrelevant to StarFire, as well as electronic files, and that the condition of the financial records as he received them were "not auditable."

of misappropriation against Cindy, a forensic accounting of StarFire was necessary to settle the Federal Litigation and to determine each partners' actual interest in StarFire before distribution to the partners, including the Estate, and then from the Estate to Cindy and Ian as beneficiaries. In other words, the accounting was essential to ending the seven years of litigation over StarFire and the almost five years of litigation over the Estate. Womack had obtained an order from the District Court to conduct the accounting. Overall, StarFire was "land rich" and "cash poor."[13] Womack's position as special administrator and liquidating partner required him to sell at least some of the property to pay for the administrative costs of the Estate and StarFire's dissolution, both of which required a full forensic accounting. See §§ 35-12-1205(2)(b); -1216(1); 72-3-807(1)(a), MCA. The District Court accepted Wipfli forensic accountant Marc Courey as an expert in forensic accounting, and he testified at the April 2021 Hearing that the complex audit of StarFire could not be completed for less than Womack's contracted price. As expenses increased over time, Womack realized StarFire needed more cash to complete the probate, dissolution, and distributions to the siblings. Despite his oft-stated purpose to save money for the Estate, Ian's interference objectively and significantly increased costs and delays, further necessitating the second sale. Womack spent a considerable amount of time responding to Ian's various motions and lawsuits, time which was necessarily charged to the Estate.

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13 Womack testified that at the time of his appointment as special administrator, StarFire had only $600 in its bank account.

¶24 Rather than indiscriminately selling off family property, Womack tried to act in the best interest of the Estate and Starfire, as was his duty. He sold the land incrementally, obtained a boundary line adjustment to maximize property values, and strategically selected which parcels to sell, leaving several parcels available for in-kind distribution. Ian exhibited an attachment to the land and preferred a different outcome, but complete in-kind distribution was not possible here, and the District Court correctly concluded that the second sale was necessary for the Estate's administration.

¶25 Ian also asserts that the court did not follow the procedures of the Uniform Partition of Heirs Property Act (UPHPA). However, this statute applies to heirs' property that is held in tenancy in common. Section 70-29-402(5), MCA. Here, the property was held by StarFire, not by tenants in common. Therefore, UPHPA is inapplicable, and we will not consider Ian's new theories about retitling properties on appeal.

¶26 Ian lastly takes issue with the District Court's treatment of him and his requests as a pro se litigant. First, he argues the court erred by not granting him formal discovery and a jury trial on the issue of Womack's removal. However, the question of whether to remove a personal representative for cause is within the discretion of the District Court. *Estate of Hannum*, ¶ 18 (citation omitted). Section 72-3-526, MCA, states, "Upon filing of the petition [for removal], the court shall fix a time and place for hearing." (Emphasis added.) The statute does not indicate a right to a jury trial or formal discovery, nor do such rights exist under our precedent. The

District Court properly decided the removal issue after holding a hearing, and Ian chose not to present evidence at that hearing. "District courts have inherent discretionary power to control discovery in their courts." *Lear v. Jamrogowicz*, 2013 MT 147, q 24, 370 Mont. 320, 303 P.3d 790. The District Court appropriately exercised its discretion to determine that Ian's allegations of wrongdoing by Womack did not merit formal discovery.

¶27 Second, Ian asserts the District Court violated his right to due process by favoring Womack. Ian's evidence of favoritism includes the District Court holding more hearings on Womack's motions than for Ian's, consistently deciding in favor of Womack's arguments, and more often "interceding" during Ian's presentation at hearings than during Womack's. Unless there exists a statutory mandate, the decision of whether to hold a hearing is left to the district court's discretion. *Boland*, q 18 (citation omitted). Ian filed many repetitive and unsupported motions, and the District Court correctly exercised its discretion to hold hearings only on certain issues. Ian had an opportunity to present evidence and testimony at each hearing. As for the District Court's decisions following the hearings, rulings in favor of Womack do not equate to bias against Ian. The District Court's rulings were based on law and evidence. Ian's motions often attempted to relitigate issues already decided by the District Court, from the Federal Litigation, from the Gallatin Litigation, and from Ian's individual lawsuits against Womack or Ada's previous conservator. The District Court properly ignored settled issues and irrelevant arguments.

¶28 Ian similarly struggled to stay within the scope of questioning and limit his arguments to the present issues during hearings. Our review of the record shows the District Court acted appropriately to guide Ian's presentation at hearings, interjecting to correct and clarify as necessary. Given Ian's actions, the District Court showed patience and restraint and attempted to assist him as a pro se litigant, and we find no fault with the District Court's management of the hearings. The District Court continued hearings on multiple occasions to allow Ian to find an attorney, but he did not obtain representation.

¶29 Lastly, Ian alleges disparate treatment based on the District Court's contempt rulings, arguing, "Ian was not given the same protection the District Court gave to Womack in the same contempt issue." The two contempt issues, however, are far from the same. The District Court correctly found Womack did not violate a court order by paying Wipfli; rather, the court authorized him to take such action in its previous order.'* Whereas Ian, after multiple warnings from the District Court not to interfere with Womack's administration, contacted Toth in an effort to stop a sale ordered by the District Court. "Contempt is a discretionary tool of the court to enforce compliance with its decisions." *Schaefer v. Egeland*, 2004 MT 199, § 13, 322 Mont. 274, 95 P.3d 724 (citation and quotation omitted). The District Court demonstrated no bias and even allowed Ian a chance to purge his contempt.

¶30 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not

establish new precedent or modify existing precedent.

¶31 Affirmed.

/S/ JIMRICE

We concur:

/S/ MIKE McGRATH

/S/ LAURIE McKINNON

/S/ BETH BAKER

/S/ DIRK M. SANDEFUR

APPENDIX B

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

Cause No.: DP 22-34

Judge Rod Souza

IN THE MATTER OF THE ESTATE OF:
IAN RAY ELLIOT, Deceased.

ORDER GRANTING MOTION FOR LEAVE TO FILE CORRECT EXHIBIT, DENYING MOTION TO VACATE MAY 23, 2022 ORDER, DENYING MOTION TO ALLOW INDEPENDENT ACTION, AND DENYING MOTION TO CONSOLIDATE

This matter comes before the Court on the Motion to Vacate the Court's May 23, 2022 Order, Allow an Independent Action for Fraud on the Court, and to Consolidate Cases of Interested Parties Jenny Jing, Alice Carpenter, and Mike Bolenbaugh (hereafter "Jenny, Alice,and Mike.") [Dkt. 59.] Preliminarily, IT IS HEREBYORDERED that Jenny's, Alice's, and Mike's Motion for Leave to File the Correct Exhibit is GRANTED. [See Dkt. 69 at 1.] Jenny, Alice, and Mike state they intended "to submit [as Ex. A to their motion, their] proposed complaint against Womack [that] accompanied [their] motion to intervene [in] DV21-811." [Dkt. 68 at 1-2.] This Order therefore considers that proposed complaint [Dkt. 21 inDV 21-811] as Ex. A to the Motion to Vacate.

The Court's May 23, 2022 order granted Petitioner Joseph Womack's Petition (that Interested Person Cindy Elliot (hereafter "Cindy™) joined) for Supervised Administration of Ian's Elliot's Estate. [Dkt. 45.] The Order also appointed Andrew

Billstein, Esq. as Special Administrator of Ian's Estate. [Dkt. 45.] In granting the Petition, the Court made extensive Findings of Fact and Conclusions of Law. [Dkt. 45.] Special Administrator Billstein and Cindy oppose Jenny's, Alice's, and Mike's Motion. [Dkts. 65, 66.]

Citing M.R.Civ.P. 60(b), Jenny, Alice, and Mike assert Jenny made a mistake worthy of vacating the order when she testified she "thought she received [about $2,000] from Ian in 2021" when, after review of bank statements she avers owing $8,900. [Dkt. 59 at 6-7.] However, Jenny's change is a distinction without a difference. After review of Ian's bank statements [Ex. V] Finding of Fact 59 found Jenny's debt was $21,000. Jenny now acknowledging to owe Ian's Estate $8,900 still constitutes her disputing owing $21,000. See, also, *In the Estate of Gober*, 350 S.W.3d 597, 600 (Tex. Ct. App.-Texarkana 2011) ("The distinction [regarding when a conflict of interest renders an executor unsuitable] lies in whether there is a dispute about the estate's assets. . . .") Moreover, Conclusion of Law 17 quoted *Estate of Anderson-Feeley*, 2007 MT 354 at 1]13, which stated "[t]he existence of a potential claim against Feeley is sufficient to create a conflict of interest, and such conflict of interest is sufiicient for removal of Feeley as personal representative of Jan's estate." See, also, *In re Estate of Peterson*, 265 Mont. 104, 109, 874 P.2d 1230, 1233 (Mont. 1994) (quoting *In re Rinio's Estate*, 93 Mont. 428, 435, 19 P.2d 322, 325 (Mont. 1933) ("The law does not look with favor upon the administration of estates by a person where conflicts in the performance of his duty are likely to arise."))

Jenny, Alice, and Mike cite *In re Estate of Jochems*, 252 Mont. 24, 826 P.2d 534

(Mont. 1992) (partially overruled on other grounds). [Dkt. 68 at 11.] *Jochems* is inapplicable. It addresses whether a testator was competent to transfer certificates of deposit. See 252 Mont. At 29-30, 826 P.2d at 537. Jenny, Alice, and Mike reference *In re Estate of Graf*, 150 Mont. 577, 437 P.2d 371 (Mont. 1968). [Dkt. 68 at 11-12.] *Graf* is distinguishable. It instructs a Montana Findings of Fact and Conclusions of Law. [Dkt. 45.] Special Administrator Billstein and Cindy oppose Jenny's, Alice's, and Mike's Motion. [Dkts. 65, 66.] Citing M.R.Civ.P. 60(b), Jenny, Alice, and Mike assert Jenny made a mistake worthy of vacating the order when she testified she "thought she received [about $2,000] from Ian in 2021" when, after review of bank statements she avers owing $8,900. [Dkt. 59 at 6-7.] However, Jenny's change is a distinction without a difference. After review of Jan's bank statements [Ex. V,] Finding of Fact 59 found Jenny's debt was $21,000. Jenny now acknowledging to owe Ian's Estate $8,900 still constitutes her disputing owing $21,000. See, also, *In the Estate of Gober*, 350 S.W.3d 597, 600 (Tex. Ct. App.-Texarkana 2011) ("The distinction [regarding when a conflict of interest renders an executor unsuitable] lies in whether there is a dispute about the estate's assets. . ..") Moreover, Conclusion of Law 17 quoted *Estate of Anderson-Feeley*, 2007 MT 354 at fi] 13, which stated "[t]he existence of a potential claim against Feeley is sufficient to create a conflict of interest, and such conflict of interest is sufficient for removal of Feeley as personal representative of Jan's estate." See, also, *In re Estate of Peterson*, 265 Mont. 104, 109, 874 P.2d 1230, 1233 (Mont. 1994) (quoting *In re Rinio's Estate,* 93 Mont. 428, 435, 19 P.2d 322, 325 (Mont. 1933) ("The law does not

look with favor upon the administration of estates by a person where conflicts in the performance of his duty are likely to arise."))

Jenny, Alice, and Mike assert Jenny made another mistake worthy of Rule 60(b) relief in that "she did not know she could object to judicial notice." [Dkt. 59 at 7.] "[T]here is no ground for a Rule 60(b) motion where the mistake is purely a mistake of law, as ignorance of the law is no excuse." *Donovan v. Graff*, 248 Mont. 21, 25, 808 P.2d 491, 494 (Mont. 1991). Moreover, the Court can give Jenny latitude as a pro se litigant, it cannot prejudice the other parties in doing so. See *Greenup v. Russell*, 2000 MT 154, 1[15, 300 Mont. 136, 3 P.3d 124. Giving Jenny legal advice would have significantly prejudiced Womack and Cindy. See, also, *Dujjjl v. State*, 2005 MT 228, 1| 17, 328 Mont. 369, 120 P.3d 398 (Court officers cannot provide legal advice). Regarding mistake, Jenny, Alice, and Mike finally assert Jenny "was too embarrassed to keep asking the [C]ourt or the witness to repeat what she did not hear well." Dkt. 59 at 7.] This is not a basis for Rule 60(b) relief.

Citing M.R.Civ.P. 60(d), Jenny, Alice, and Mike assert Womack committed fraud on the court by stating "he conducted Ada['s] estate's accounting"; "Jenny talked Ann [in]to refus[ing to] converse with him;" and Jenny "refused to provide" Ian's will. [Dkt. 59 at 8—9.] During the March 7, 2022 hearing Womack testified "I have completed the accounting, I just got the accounting back from Wipfli, it's a forensic accounting, that was done." This testimony was accurate. Womack hired Wipfli to perform an accounting of Ada's Estate, and Wipfli completed their accounting. Jenny, Alice, and Mike quote *Dixon v. Comm 'r of Internal* Revenue, 316

F.3d 1041, 1046 (9th Cir. 2003). [Dkt. 59 at 13.] "Fraud on the court occurs when the misconduct harms the integrity of the judicial process." 316 F.3d at 1046. Accurate testimony is not misconduct, and accurate testimony cannot harm the judicial process' integrity.

Regarding Jenny convincing Ann to refuse to talk to him except in writing, Womack testified "I did draw the inference from. . .Jenny. . .sa[y]ing. . .things to [Ann] about me[.] I drew that inference because Ian at some point in my relationship with him and Jenny. . .refused to talk to me any [m]ore[a]nd would only communicate through emails or letters. So my assumption was. . .they told [Ann] that's how [she] should act." Womack's testimony on April 1, 2022 additionally explained the drawbacks to requiring written communication. That requirement precludes "hav[ing] some discussion and. . .an exchange of ideas." Womack additionally testified only communicating in writing makes it "very difficult to get anything accomplished, [is] time-consuming," and impractical.

Drawing inferences is not fraud. Moreover, Jenny, Alice, and Mike have asserted fraud on the Court. [Dkt. 59 at 8-10.] They quote *Pumphrey v. K. W. Thompson Tool Co.*, 62 F.3d 1128, 1132-1133 (9th Cir. 1995). [Dkt. 59 at 12.] *Pumphrey* instructs fraud on the court "must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." 62 F.3d at 1131. Drawing inferences is neither unconscionable nor designed to improperly influence.

During the March 7, 2022 hearing, Womack explained what he meant by

refusal to provide the will. "I requested a copy of the Will, and you [i.e. Jenny] did not send it to me, and then you said that you were going to wait and you weren't going to [do] anything for a period of time, you were obtuse, all you had to do was say, yes, Joe, here is a copy of the Will. And you didn't do that. So I took that as a refusal." Womack further explained "even after [Jenny] attempted to file the petition, [Jenny] didn't send me a copy of that with a copy of the Will either." Womack did not need to provide Jenny's reasoning for his basis to use the word refusal to be accurate.

Jenny, Alice, and Mike quote *Alexander v. Robertson*, 882 F.2d 421 (9th Cir. 1989). [Dkt. 59 at 8.] *Alexander* strongly supports denying their motion. When it involves fraud by officers of the court, fraud on the court prevents "the judicial machinery [from] perform[ing] in the usual manner its impartial task of adjudging cases that are presented for adjudication." 882 F.2d at 424. See, also, *In re Estate of Swanberg*, 2020 MT 153, q 13, 400 Mont. 247, 465 P.3d 1165 ("Submitting a will that may be subject to a will contest is not fraud on the court.") Jenny's, Alice's and Mike's claims do not satisfy *Alexander*'s high standard.

Jenny, Alice, and Mike assert Womack "misrepresented to the Montana Supreme Court [that] Ian obstructed his administration" and cite Jenny's use of Cindy's and Womack's court exhibits to "sho[w] Ian did not obstruct...the cases." [Dkt. 59 at 9.] First, the evidence received strongly supported the extensive Findings of Fact (12, 24-47, Dkt. 45) the Court made otherwise. To succinctly illustrate, Finding of Fact 25 states "Judge Brown moreover 'direct[ed Ian] to Rule

11, M.R.Civ.P., specifically including Rule 11(b), relating to the representations made to the Court by a party upon the filing of any pleading, motion, or other paper, and the availability of sanctions for a violation of Rule 11 by a party." (citing DV 14-829, Dkt. 67 at 4.)] Finding of Fact 29, referencing the high threshold in Montana to dismiss claims, states "[d]espite this high threshold, Judge Harada dismissed all of Ian's claims that she was specifically asked to dismiss." (citing DV 18-536, Dkt. 28.) Finding of Fact 33 states "Judge Knisely dismissed [Ian's lawsuit suing Womack personally] at the pleading stage." (citing DV 20-244, Dkt. 16). Lastly, in Finding of Fact 38, this Court opined "[i]t is remarkable Judge Knisely had to threaten incarceration to achieve compliance with a court order." (citing Ex. E-3 at 2).

Second and equally important, the Montana Supreme Court has strongly rejected the argument Ian was not obstructionist. In re Estate of Elliot, 2022 MT 91N. "The record demonstrates that, however sincere he may have been, Ian obstructed Womack's administration with constant litigation and unfounded accusations. He filed numerous, lengthy motions objecting to almost every action by Womack, and even sued him twice personally. Ian forced Womack to fight for virtually every decision, even those that the District Court expressly placed within his discretion, most notably obtaining a full accounting of StarFire." 2022 MT 91N at 1[19. According to the Montana Supreme Court, Ian's position was "not the reality of the situation." 2022 MT 91N at 1] 23. "Ian similarly struggled to stay within the scope of questioning and limit his arguments to the present issues during hearings." *Id.* at ¶ 28.

Jenny, Alice, and Mike assert it was fraud on the Court for Womack not to allow Jenny and Ann to file a reply brief for Ian's claims regarding Ada's Estate on appeal to the Montana Supreme Court. [Dkt. 59 at 9-10.] "Only 'the most egregious conduct' [such as "bribery, evidence fabrication, and improper attempts to influence the court by counsel"] will rise to the level of fraud upon the court." *Falcon v. Faulkner*, 273 Mont. 327, 332, 903 P.2d 197, 200 (Mont. 1995). Womack not allowing Jenny and Ann file a reply brief because the issue of special administration was pending before the Court is not similar to these examples. Jenny, Alice, and Mike quote *Selway v. Burns*, 429 P.2d 640 (Mont. 1967). [Dkt. 59 at 9-10.] *Selway* does not support their position. Fraud on the court "may be achieved either by affirrnatively misrepresenting facts. . .or by concealment of facts by a person who was under a legal duty to make a full disclosure to the court." 150 Mont. at 9, 429 P.2d at 644 (internal citation omitted). Womack exercising his legal right to oppose Jenny's and Ann's request to file a reply brief is not affirmative misrepresentation or knowing concealment.

Jenny, Alice, and Mike reference Ex. A, which is now Dkt. 21 in DV 21-811. [Dkt. 59 at 8.] Ex. A references *infer alia* Mont. Code Ann. § 72-3-902 and in-kind distributions, condemns Womack's decision to have Wipfli perform an accounting, and accuses Womack of artificially inflating expenses for his own personal gain. The Montana Supreme Court has already rejected these arguments. "[T]he statute gives preference to in-kind distribution only to the extent possible. As the personal representative, Womack 'ha[d] the power to sell estate property if necessary for the

estate's administration.'" *Estate of Elliot*, 2022 MT 91N at § 22. "[T]he accounting was essential to ending the seven years of litigation over StarFire and the almost five years of litigation over the Estate." *Elliot*, 2022 MT 91N at § 22. "Despite his oft-stated purpose to save money for the Estate, Ian's interference objectively and significantly increased costs and delays, further necessitating the second sale. Womack spent a considerable amount of time responding to Ian's various motions and lawsuits, time which was necessarily charged to the Estate." 2022 MT 91N at 23.

Lastly, Jenny, Alice, and Mike assert Womack and Cindy's attorney knowingly presented the false testimony of Adrian Olson, Ian's nephew. [Dkt. 59 at 11-12.] The Court notes they do not challenge [see dkt. 59] Adrian's testimony that is the basis of the Court's Fourteenth Finding of Fact that states "Adrian provided compelling testimony regarding the role of Jenny...in Ian's ongoing litigation strategy." The Court's Finding of Fact 15 states that "Adrian and Ian were very close....Adrian would visit Ian in Montana yearly." Finding of Fact 16 calls Adrian a peacemaker for proposing a settlement to end Ian's and Cindy's longstanding litigation. Finding of Fact 17 observes "Cindy and lan agreed[,] Jenny...became upset with Ian[, a] heated argument ensued, [and] Jenny's disagreement led lan to reject Adrian's proposal." Jenny, Alice, and Mike argue these findings are based on Adrian's false testimony and cite the Court to Exs. B-F to their motion. [Dkt. 59 at 11-12.]

Ex. E is an angry email dated July 4, 2012 from Adrian's email address to Ian. One angry email does not show it was false for Adrian to testify he and Ian were

very close. Moreover, Ex. F is an email from Ian to Adrian dated May 13, 2013 stating [an and Ada "are still hoping to hear from...Adrian." Ian's email shows he did not want to cut all ties with Adrian and did not believe Adrian's angry email meant they would no longer speak.

Ex. B is an August 15, 2013 letter from Cindy to Ian. Ex. C are communications (two of which occurred on August 16, 2013) from Ian stating he signed listing documents and asking the August rental income be used for Ada's care. Ex. D is a letter from a First Interstate Bank Vice President dated October 19, 2015 responding to Ian's inquiries received on October 13, 2015. Exs. B, C, and D are wholly irrelevant to Adrian proposing and presenting a settlement to Ian and Cindy in 2013. Contrary to Jenny's, Alice's, and Mike's motion [dkt. 59 at 11-12], Adrian's testimony did not reference a listing great or a property sale contract. Adrian referenced "a very generic solution" that had not yet decided whether to use a real estate agent or attorney. Further, when Jenny directly referenced a listing agreement when asking Adrian of his proposal, Adrian answered "[i]t wasn't a conversation about listing the property, it was just a family conversation."

Jenny, Alice, and Mike characterize the duty of the administrator of Ian's estate is to "act zealously in defending and protecting Ian's estate [from] adversaries Cindy and Womack." [Dkt. 68 at 6.] As the Court stated in Finding of Fact 56 "Womack is not only the Special Administrator of Ada's Estate but also StarFire's liquidating partner. The major asset of Ada's Estate is land still owned by StarFire. Thus, whether it is a special administrator or a personal representative

handling Ian's estate, that person must work with Womack."

Unsuitability authorizing removal as personal representative "may...be based upon...a mental attitude toward his duty...that creates reasonable doubt whether the executor or administrator will act honorably, intelligently, efficiently, promptly, fairly and dispassionately in his trust." *District Attorney for the Norfolk Dist. v. Magraw*, 628 N.E.2d 24, 27 (Mass. 1994). Such unsuitability can also arise "upon any other ground for believing that his continuance in office will be likely to render the execution of the will or the administration of the estate difficult, inefficient or unduly protracted." *Ashley v. Ashley*, 405 S.W.3d 419, 426 (Ark. Ct. App. 2012). See, also, *Long v. Willis*, 113 So. 3d 80, 83-84 (2d Dist., Fla. Ct. App. 2013) ("Unsuitableness to administer may well consist in an adverse interest of some kind, or hostility to those immediately interested in the estate, whether as creditors or distributees, or even of an interest adverse to the estate itself.") The Court in detailed findings, concluded Jenny would not work with Womack. [Dkt. 45.]

Lastly, Jenny, Alice, and Mike again argue "Womack is not a creditor of Ian's estate." [Dkt. 68 at 6.] As the Court stated in Conclusion of Law 18 of Dkt. 45:

> "Judge Knisely issued an order approving an "[a]greement for StarFire...to Make Loans to Limited Partners and Heirs." [Ex. Z.] Moreover, in correspondence with Womack, Ian called the transaction a "loan." [Ex. L.] Therefore, Womack is a creditor."

To summarize, like the Rule 59 motion Ian filed before Judge Knisely in the probate of Ada's Estate, Jenny's, Alice's, and Mike's motion does "not remotely rise to the level required for" the relief sought. [See DP 17-36, Dkt. 161 at 4.] Assuming arguendo Jenny, Alice, and Mike had shown falsity, the Montana Supreme "Court

has repeatedly held that fraud between the parties, such as perjured testimony at trial, does not rise to the level of fraud upon the court." See *In re Marriage of Hopper*, 1999 MT 310, 1[24, 297 Mont. 225, 991 P.2d 960. See, also, *Traders State Bank v. Mann*, 258 Mont. 226, 237, 852 P.2d 604, 610-11 (Mont. 1993) (partially overruled on other grounds) ("[F]orceful argument' and 'artful pleading' do not rise to the egregious conduct contemplated by this rule, but more closely relate to the Lawyer Defendants' exercise of their duty to zealously represent their client")

IT IS HEREBY ORDERED that Jenny's, Alice's and Mike's Motion to Vacate the Court's May 23, 2022 Order and to Allow an Independent Action for Fraud on the Court IS DENIED.

Jenny, Alice, and Mike lastly request the Court consolidate this case with DP 17-36, *In re Estate of Ada Elliot*, and DV 21-811, Ian Elliot, individually and derivatively on behalf of StarFire, L.P., v. Womack. [Dkt. 59 at 13-14.] Since the Court is a probate court, it has limited jurisdiction. See *In re Estate of Cooney*, 2019 MT 293, 1] 13, 398 Mont. 166, 454 P.3d 1190 ("The probate court's limited jurisdiction does not extend to adjudicating a breach of contract claim"). Accordingly, the Court cannot consolidate the cases.

IT IS HEREBY ORDERED that Jenny's, Alice's, and Mike's Motion to Consolidate is DENIED.

DATED: this 9th day of December 2022.

Hon. Rod Souza, District Court Judge

Additional material from this filing is available in the Clerk's Office.