IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 08-0374

JAMES A. LeFEBER

Petitioner and Appellant,

v.

MAGGIE R. JOHNSON, aka MARGARET ROSE JOHNSON,

Respondent and Cross Appellant.

APPELLEE AND CROSS-APPELLANT'S ANSWER BRIEF

On Appeal from the District Court of the
Twenty-First Judicial District Court of the State of Montana,
In and for the County of Ravalli,
The Honorable James A. Haynes presiding

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Johnson restates the issues:

1. Did the District Court err in both misapprehending and erroneously failing to recognize several key facts which support a conclusion that the Property at issue was held in either a constructive trust or a resulting trust for the benefit of LeFeber?

2. Did the District Court err in concluding that neither a constructive trust nor a resulting trust resulted when the Property at issue was deeded to "Maggie R. Johnson, a single woman as nominee" and Johnson treated the Property as her own?

3. Did the District Court err in concluding that a portion of the Property at issue was gifted to Johnson after concluding that no constructive trust or resulting trust existed?

4. Did the District Court err in concluding that equitable estoppel barred LeFeber's claim of constructive trust or resulting trust because of LeFeber's representations that Johnson owned the Property at issue?

5. Did the District Court err in concluding that the Property at issue should be partitioned granting each party an undivided one-half interest in the Property?

Johnson's cross-appeal issues are:

1. Did the District Court err when it concluded that the Full Durable Power of Attorney drafted by LeFeber does not control in this matter and equitable doctrines, rather then contract law, applies in this case?

2. Did the District Court err when it concluded that in equity the proof establishes that a tenancy in common exists between LeFeber and Johnson involving the Property at issue?

3. Did the District Court err when it concluded that there was no prevailing party and that Johnson was not entitled to attorney fees?

I. STATEMENT OF THE CASE

The Appellee and Cross-Appellant, Maggie R. Johnson, aka Margaret Rose Johnson (hereinafter "Johnson"), is satisfied with the Appellant's, Statement of the Case, but states that Johnson Cross-Appeals from the District Court's July 29, 2008 *Final Judgment and Order*, which fully incorporates the Court's May 7, 2007 *Findings of Fact and Conclusions of Law* and the Court's July 8, 2008 *Opinion and Order-Partition.*

III. STATEMENT OF THE FACTS

This matter arises out of a dispute as to the ownership of property located at 297 St. Joseph Lane (hereinafter "Property"), Stevensville, Montana. (*See* Appellee and Cross-Appellant's Appendix Tab "A",

Petitioner's Trial Exhibit 15[1]).

In October 1984, Johnson and James A. LeFeber (hereinafter "LeFeber") began living together in Sandpoint, Idaho. (*See* Appellant's Appendix Tab 2, District Court's *Findings of Fact* (hereinafter "FOF") ¶ 1). Johnson's previous marriage was dissolved in August of 1985 and dissolution of LeFeber's previous marriage was granted in the fall of 1991. (FOF ¶¶ 2-3). There is no assertion of a common law marriage by either party in this matter. (FOF ¶ 4) (*See* Appellant's Appendix Tab 3, Transcript on Appeal, Non-Jury Trial, March 5 and 6, 2007, Johnson (hereinafter "TT") 35: 7-18). The parties lived together for over twenty years and LeFeber admitted that even though they were not married, in a sense, they really were acting like they were married. (LeFeber TT 92: 18-23).

Between 1985 and 1994, Johnson and LeFeber made several moves to different rental properties, but did not purchase a home. (FOF ¶¶ 6-8. Johnson TT 292: 6-25).

On December 1, 1991, Johnson and LeFeber initialed a Full Durable Power of Attorney (hereinafter "POA") drafted by LeFeber using a form he received from a friend. The POA provides that Johnson, as attorney-in-fact for LeFeber, in his stead, could do any and all acts which he could do if

[1] Pursuant to M. R. App. P. Rule 12(9), pages of the trial transcript ("TT") showing the page at which trial exhibits were identified and admitted or withdrawn are set out at TT pages 4-8.

personally present, and would have the fullest powers possible (emphasis added). (FOF ¶ 9). (Johnson TT 286: 7-24). The POA was initialed by LeFeber and Johnson and in the fall of 1994, LeFeber had the POA witnessed in Montana, by Luanne Guilder, Deborah Ross and John Fullerton. (FOF ¶ 9) (LeFeber TT 84:22-25, 85: 1-25, 86; 1-5). The POA was signed and witnessed at a later date because the Internal Revenue Service (hereinafter "IRS") questioned pass-throughs of oil and gas royalties from Johnson to LeFeber[2], and Don Russell, LeFeber's accountant, thought that a witnessed POA would be more acceptable to the IRS. (LeFeber TT 167:10-24; Johnson TT 21: 15-22).

The POA does not address real estate that might be acquired in the future, but clearly provides as to real estate:

> 3. Enumeration of Attorney-In-Fact's Powers. Among the powers granted to my attorney-in-fact are.
>
> (e) Manage Real Estate. To take possession of any real estate that belongs to me or to which I may be entitled to possession and to receive any rents or profits that may be due from the real estate as agreed. In connection with these powers, my attorney-in-fact is empowered to enter into new leases for any term, renew or extend existing leases for any term, and to sell, convey, mortgage or possess any real estate affected by these

[2] In 1991, LeFeber transferred producing oil and gas interests to Maggie R. Johnson. This transfer will be more fully explained *infra*.

> presents. My attorney-in-fact is also empowered to commence and prosecute for me and in my name any suits or actions for the recovery of the possession of any real estate belonging to me or to which I may be entitled and for rents and profits due from such real estate or from any other real estate which is the subject of these presents excluding[3] those which my attorney-in-fact has possession.

FOF ¶ 11, (*See also* Appellee and Cross-Appellant's Appendix Tab "B", at 2 of 4 through 3 of 4, ¶ 3(e)) (emphasis added).

The POA was never filed in the public record. (FOF ¶ 11; LeFeber TT 151: 2-25, 152: 1-5). No testimony was entered at trial supporting any evidence that Johnson managed the Property, only that she lived at the Property.

The POA was drafted by LeFeber primarily to provide Johnson with her own source of income, which LeFeber believed would "boost Johnson's self-esteem." (FOF ¶ 12; LeFeber TT 69: 2-21, 153: 17-25, 154: 1-4; Johnson TT 29: 4-6). On December 5, 1991, LeFeber conveyed and assigned to Johnson interests in oil and gas properties that he owned. (FOF ¶ 13; Johnson TT 59: 23-25, 60: 1-6). The conveyance and assignment of the oil and gas interests was from James A. LeFeber to Margaret R. Johnson, not from James A. LeFeber, trustee to Margaret R. Johnson, Nominee, or

[3] Petitioner Appellant misquotes the POA as stating "including" but the document states "excluding those which my attorney-in-fact has possession." (*See* Appellant's Opening Brief at 4).

any other fiduciary term. (*See* Appellee and Cross-Appellant's Appendix Tab "C"). Only when the oil and gas interests were reassigned to LeFeber did LeFeber use the terms from Margaret R. Johnson, Nominee to James A. LeFeber, trustee. (*See* Appellee and Cross-Appellant's Appendix Tab "D"). Johnson then reconveyed the oil and gas interests to LeFeber on August 31, 2005, because that is what she believed the POA was set up to require her do. (*Id.*) (Johnson TT 30: 2-18).

In addition to the oil and gas interest and the Property, LeFeber also put the telephone bill, power bill, gas bill, phone, Direct TV and all three vehicles in Johnson's name. (Johnson TT 305: 16-25, 306: 1-8). LeFeber never carried insurance on the Property or vehicles that he put in Johnson's name. (Johnson TT 280: 16-23).

In approximately 1992, LeFeber and Johnson began looking for a house to buy. (FOF ¶ 16). They looked in Washington, Idaho and Montana. *Id.* (LeFeber TT 89: 3-15). LeFeber told Johnson that she could pick out the house that she wanted and that he would "buy her a home." (FOF ¶ 16). (*See* Appellee and Cross-Appellant's Appendix Tab "E", Petitioner's Trial Exhibit 24, Deposition of Margaret Johnson (hereinafter "Dep. Johnson") 16: 3-15; Johnson TT 293: 1-25, 294: 1-6). LeFeber says he meant he would provide the funds for the purchase. (FOF ¶ 16; LeFeber TT 92: 8-14).

Johnson heard these words to mean that LeFeber would gift and convey to her a house and real property. (FOF ¶ 16; Johnson TT 291: 23-25, 292: 1-25, 293: 1-11). In early summer 1994, Johnson found the home she wanted in Stevensville, Montana, the disputed Property in this case. (FOF ¶ 16; Johnson TT 293: 12-23).

Both LeFeber and Johnson signed the Agreement to Buy and Purchase the Property on June 17, 1994 for a purchase price of $111,750.00. (FOF ¶ 17). The Final Agreement To Sell and Purchase the Property contemplated that the "TITLE MAY BE FINALIZED IN TRUST, CORPORATION, TRUSTEE OR NOMINEE, ESCROW WILL BE ADVISED PRIOR TO CLOSING." (emphasis added) in capital letters as part of the Special Provisions thereto. *Id.* All of the negotiated Agreements to Sell and Purchase set forth that the Property was to be held as joint tenants with rights of survivorship, which LeFeber never questioned during the negotiations. (LeFeber TT 147: 20-25, 148: 1-25, 149: 1-15). The title company issued its title insurance policy upon the Property in the name of "MAGGIE R. JOHNSON, a single woman as nominee." (FOF ¶ 18). LeFeber paid for the purchase of the Property by a lump sum cash payment (*see* FOF ¶ 22) with a casher's check that LeFeber had issued for the closing. The cashier's check was issued from the Seafirst Bank and

identified the purchaser of the Property as Maggie Johnson. (*See* Appellee and Cross-Appellant's Appendix Tap "E" (hereinafter "Dep. Johnson"), Dep. Exhibit D at 39[4]).

On June 28, 1994, a Warranty Deed for the Property was granted to: "MAGGIE R. JOHNSON, a single woman as nominee." (FOF 19). (*See also* Appellant's Appendix Tab 8, Warranty Deed). Nowhere in the title insurance policy or the Warranty Deed are there any terms that define the nominee or any limitations on the power of Johnson to convey the Property. Johnson testified that LeFeber inserted the "a single woman as nominee" language prior to the closing and without Johnson's knowledge. (FOF ¶ 19; Johnson TT 294: 7-25, 295: 1-12). Johnson queried LeFeber about this language after they left the closing and LeFeber declined to elaborate to Johnson his interpretation of the words "as nominee" on the deed. (FOF ¶ 19; Johnson TT 321: 24-25, 322: 1-25, 323: 1-10). The Property was never titled in LeFeber's name. Johnson never agreed to act as LeFeber's nominee with regard to the Property. (FOF ¶ 19; Johnson TT 296: 8-17). LeFeber testified that the term "a nominee and an agent are essentially one and the same." (LeFeber TT 203: 11-25, 204: 1-16).

[4] At the Deposition of Margaret Johnson a number of pages were lumped together as Deposition Exhibit D. For the convenience of the Court, the pages of Exhibit D have been numbered for reference. For an explanation of Deposition Exhibit D, *See* TT 320:12-25; 321: 1-15.

The Property was newly constructed and did not have any landscaping to speak of when LeFeber and Johnson moved in. The Property also had an unfinished basement. (FOF ¶ 24). Testimony established that Johnson helped finish the basement, helped build the deck and helped put a roof on the deck, installed tile flooring, helped construct the greenhouse on the Property, installed a stove pipe outside and on the roof, helped fence the yard, purchased and laid railroad ties, helped install a fountain and a pond, and installed and maintained almost all of the extensive landscaping on the Property, including planting approximately 50 trees, 200 shrubs, and over 1,000 perennial bulbs and plants. *Id.* (Johnson TT 297: 2-25, 298: 1-25, 299: 1-19; Robert Dunsmore TT 247-251; Margene Dunsmore TT 261-263). (*See also* Appellee and Cross-Appellant's Appendix Tab "G", Respondent's Trial Exhibits B and C). Johnson's efforts increased the value of the Property. (FOF ¶ 24). Sheila Veerkamp conducted a Comparative Market Analysis for the Property on September 13, 2005. (FOF ¶ 30). (*See* Appellee and Cross-Appellant's Appendix Tab "H", Respondent's Trial Exhibit F, Comparative Market Analysis). In her report, Ms. Veerkamp states the average price of "SOLD" comparable property listings is $210,975.00, and the average price of "ACTIVE" comparable property listings is $226,283.33. *Id.* Ms. Veerkamp goes on to state that her

estimated opinion of list price is between $224,500 and $226,900, and her estimated opinion of a sales price is between $214,900 and $219,900. *Id.*

LeFeber has paid the property taxes on behalf of Johnson since the purchase in 1994 to the present. (FOF ¶ 25). At LeFeber's insistence and with LeFeber's help, Johnson applied for Property Tax Assistance from 1998 to 2005 pursuant to Mont. Code Ann. §15-6-134. *Id.* When LeFeber learned of the Property Tax Assistance program in 1998, he obtained the documents from Ravalli County, prepared the documents, and had Johnson sign them. *Id.* (*See* Appellee and Cross-Appellant's Appendix Tab "I" LeFeber TT 175: 20-25, 176-188, 189: 1-6). On at least one occasion, LeFeber signed Johnson's name on the application. (*See* Cross-Appellant's Appendix Tab "I", Respondent's Trial Exhibit P; LeFeber TT 182: 17-25). All of the signed applications represent that Johnson is the sole legal owner of the Property. *Id.* LeFeber did not attempt to contact the county and have the title holder of record changed from "Maggie Johnson" to "Maggie Johnson as nominee" during the time he received reduced property taxes using Johnson's yearly income. (LeFeber TT 175:20-25, 176: 1-25).

For the year 1996, LeFeber paid property taxes of $959 for the Property and for the year 1997, LeFeber paid taxes of $974. (FOF ¶ 27). In 1998, following Johnson's application and acceptance for Property Tax

Assistance, LeFeber paid property taxes for the Property of $554, a reduction of $440 from the previous year. *Id.* Since 1998, Johnson's tax bill for the Property has been between $274 and $698. *Id.* In 2004 and 2005, LeFeber claimed real estate taxes of $1,487 and $1,396 respectively on his income tax return, yet the tax bills from Ravalli County are $698 and $694 respectively. *Id.* (*See* Appellee and Cross-Appellant's Appendix Tab "J", Respondent's Trial Exhibit Z and Appellee and Cross-Appellant's Appendix Tab "K", Respondent's Trial Exhibit MM; LeFeber TT 177:22-25, 178-188, 189:1-6).

After their relationship ended, LeFeber presented Johnson with a quitclaim deed for the Property. Johnson refused to sign it because she believes LeFeber gifted the Property to her and only now, because the relationship failed, LeFeber is asserting that it was not a gift. (FOF ¶ 29; Johnson TT 60: 16-23).

There is no document that explains the alleged "nominee" relationship that LeFeber is asserting applies to this real estate transaction. The POA only states that Johnson may act as LeFeber's nominee, but does not define what a nominee is. After the parties separated, Johnson applied for a revolving line of credit at the Rocky Mountain Bank in Stevensville. Following a title search, the Bank gave Johnson a $10,000 line of credit

secured by a Deed of Trust against the Property. (*See* Appellee and Cross-Appellant's Appendix Tab "E", Dep. Johnson Exhibit D at 45, Deed of Trust). The bank only suspended Johnson's line of credit following the judicial proceeding initiated by LeFeber in which a *lis pendens* was filed with respect to the Property. (*See* Appellee and Cross-Appellant's Appendix Tab "E", Dep. Johnson Exhibit D at 56, Letter to Johnson from Rocky Mountain Bank). The bank stated that Johnson "may not hold good and marketable fee simple title to the real property with the full right, power and authority to execute and the [sic] deliver the Deed of Trust." *Id.*

IV. SUMMARY OF THE ARGUMENT

The evidence presented at trial is persuasive that no constructive trust exists as a matter of law. The property at issue was knowingly and voluntarily gifted to Johnson by LeFeber, and Johnson unconditionally accepted the gift. No clear and convincing evidence has been presented that rebuts this presumption. With no definition or limiting language regarding "nominee" in the POA or the June 28, 1994, Warranty Deed, no force or effect should be given to the term "nominee" and the POA does not apply to the Property at issue because the POA excludes property in the possession of the attorney-in-fact. LeFeber's actions of lowering his payment of the property taxes through Johnson's application and acceptance for Property

Tax Assistance outweigh any claim of unjust enrichment that may be alleged against Johnson and defeats any claim of a constructive or resulting trust.

V. STANDARD OF REVIEW

"[C]laims involving the existence of resulting and constructive trusts are claims in equity. *See* § 72-33-218, MCA, and § 72-33-219, MCA" *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 11, 307 Mont. 45, ¶ 11, 36 P.3d 408, ¶ 11. In reviewing matters in equity, this Court is guided by Mont. Code Ann. § 3-2-204(5), "which requires that in equity cases and in matters of an equitable nature, [this Court] review['s] 'all questions of fact arising upon the evidence presented in the record....'" *Id.* "In reviewing the findings of fact, [this Court] determine[s] if the court's findings are clearly erroneous; and, in reviewing the conclusions of law, [this Court] determine[s] if the court's interpretation of the law is correct." *Id.* (citation omitted). "Further, this Court, sitting in equity, is empowered to determine all questions involved in the case and to do complete justice, including the power to fashion equitable results." *Id.*

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ARGUMENT

VI. RESPONSE TO JAMES A. LeFEBER'S APPEAL

A. The District Court's *Findings of Fact* are not clearly erroneous and are supported by substantial evidence and the District Court did not misapprehend the effect of the evidence when it correctly concluded that the Property was not held in trust for the benefit of LeFeber.

Without expressly stating his contention as such, LeFeber contends that the District Court's *Findings of Fact* are clearly erroneous in part because he argues that "Issue One; The District Court both misapprehended, and mistakenly failed to recognize, several key facts which support the conclusion that the real Property at issue was held in trust for the benefit of LeFeber." (*Appellant's Opening Brief* at 8). This Court has stated, "A finding is clearly erroneous if it is not supported by substantial evidence, the district court misapprehended the effect of the evidence, or our review of the record convinces us the district court made a mistake." *In re Marriage of Thorner*, 2008 MT 270, ¶ 20, 345 Mont. 194, ¶ 20, 190 P.3d 1063, ¶ 20 (emphasis added).

LeFeber contends that the District Court misapprehended the evidence regarding the POA when the District Court found at FOF ¶ 11 that the POA did not specifically address property that was "conveyed, assigned or

acquired in the future." (*Id.*). LeFeber further argues that this finding implies that the POA does not apply to property acquired in the future. (*Id.* at 8-9).

LeFeber argues that the POA does not specifically address property acquired in the future but because the POA does not limit Johnson's attorney-in-fact power, the POA does address property acquired in the future. (*Id.* at 9).

As more fully set forth *infra*, LeFeber fails to note that the POA at ¶ 3(e) excludes any real estate that is in possession of the attorney-in-fact, Johnson. (*See* Appellee and Cross-Appellant's Appendix Tab "B", Petitioner's at 2 of 4 and 3 of 4, ¶ 3(e)). In addition, the POA clearly provides that Johnson could manage LeFeber's hydrocarbon interests as she did. No where in the POA does it state that Defendant would transfer a future ownership interest in real estate. (*Id.*).

Next LeFeber argues that the District Court makes a mistake at FOF ¶ 19, where it finds that Johnson did not agree to act as LeFeber's nominee regarding the St. Joseph Property because the documentary evidence proves otherwise. (*Appellant's Opening Brief* at 9). LeFeber contends that Johnson signed the POA agreeing to act as LeFeber's attorney-in-fact. (*Id.*). As explained *supra* and *infra*, the POA does not apply to the Property. LeFeber then contends that Johnson signed three Agreements to Sell and Purchase on

the Property that clearly set forth that Johnson was acting as nominee. (*Id.* at 10). However, LeFeber leaves out the critical evidence that the three Agreements to Sell and Purchase set forth that the "Title may be finalized in trust, corporation, trustee or nominee." Not just titled in nominee. (*See* Appellant's Appendix Tabs 5-7). Finally, LeFeber contends that the District Court at FOF ¶ 19 found that Johnson did not object to acting as LeFeber's nominee regarding the St. Joseph Property. (*Appellant's Opening Brief* at 10). However, LeFeber does not provide the entirety of the Court's FOF which provides:

> 18. The First American Title Company issued it's title insurance policy upon the St. Joseph property in the name of "MAGGIE R. JOHNSON, a single woman as nominee."
> 19. The final purchase was made on those terms. The June 28, 1994 Warranty Deed grants the property to "Maggie R. Johnson, a single woman as nominee." [Exhibit E]. Jim directed insertion of the "a single woman as nominee" language prior to closing. Maggie never agreed to act as Jim's nominee related to the St. Joseph property. However, Maggie acknowledged in testimony that she made no objection before or at the closing to the deed's language of "Maggie R. Johnson, as single woman as nominee." Maggie queried James about this language sometime after they left the closing. Jim declined to elaborate to Maggie about his interpretation of the words "... as nominee" on the deed. Nor did Jim agree to change the deed in favor of Maggie thereafter to eliminate the words "as nominee."

(*See* Appellant's Appendix Tab 2 at 6) (emphasis added).

The District Court's FOF ¶ 18-19 clearly show that Johnson did not acquiesce to the "as nominee" language or understand the meaning of the term.

LeFeber then contends that the District Court in FOF ¶ 28 misapprehends LeFeber's intent when he signed the December 28, 1999 letter which states, "Maggie has rights to stay at 297 St. Joseph Lane." (*Appellant's Opening Brief* at 10). LeFeber argues that his intent was not to give any ownership of the Property to Johnson but only to convince Johnson that she was welcome to return to the Property. (*Id.* at 11). LeFeber argues that Johnson's own testimony was that she wanted a writing that gave her an ownership interest in the Property and the best she could get out of LeFeber was the letter of December 28, 1999. (*Id.*).

The December 28, 1999 letter followed a separation of the parties because, as Johnson testified, LeFeber had become miserable, was drinking too much and had become verbally abusive. (Johnson TT 275: 11-25, 276: 1-25, 277: 1-25). The letter was written by LeFeber to convince Johnson to return to the Property and to assure Johnson that if she returned she had a right to the Property. *Id.* (FOF ¶ 28). LeFeber testified that he is a certified public accountant and financier. (LeFeber TT 64: 4-25, 65: 1-5). LeFeber is aware of the necessity of precision in the use of legal wording and the

difference between a right and a privilege. (LeFeber TT 349: 13-25, 350: 1-22, the Court TT 358: 6-18). The District Court found some credibility concerns with LeFeber's testimony at trial. (The Court TT 359: 12-25, 360: 1-15).

The testimony of Johnson and then LeFeber, when questioned by the Court, convinced the Court to correctly make its FOF ¶ 28.

Finally, LeFeber argues that the district Court failed to issue a finding that Johnson transferred all property to LeFeber except the real Property at issue. (*Appellant's Opening Brief* at 12). However, the District Court did issue findings regarding the return of property to LeFeber and explained why Johnson did not convey the real Property to LeFeber. (*See* FOF ¶¶ 11, 12, 13, 15, 16, 17, 19, 26, 28, and 29).

The District Court's FOF are supported by substantial evidence, the Court did not misapprehend the effect of the evidence, and the Court did not make a mistake. Therefore, the FOF should not be modified.

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B. The District Court correctly concluded that neither a constructive trust nor a resulting trust resulted in favor of LeFeber when LeFeber paid the purchase price and the Property at issue was deeded to "Maggie R. Johnson, a single woman as nominee".

1. No resulting trust arose in favor of LeFeber as to the Property at issue.

LeFeber correctly argues that pursuant to Mont. Code Ann. § 72-33-[219]:

> A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the person holding title would be unjustly enriched if he were permitted to retain it.

(*Appellant's Opening Brief* at 13). Additionally, LeFeber is correct that in *In re the Marriage of Moss*, 1999 MT 62, ¶ 29, 293 Mont. 500, ¶ 29, 977 P.2d 322, ¶ 29, this Court found:

> [A]lthough a constructive trust may be imposed because the title holder obtained title by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, a constructive trust may also be imposed pursuant to § 72-33-219, MCA, in cases where a title holder innocently obtained title to property but would be unjustly enriched if they were allowed to retain the title.

(*Appellant's Opening Brief* at 13).

This Court concluded in cases decided after the 1989 Montana Legislature enacted the Montana Trust Code that "although fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful acts may

be the basis for imposing a constructive trust, these factors are not necessarily a prerequisite to imposing a constructive trust pursuant to § 72-33-219, MCA." (*Marriage of Moss*, ¶ 30).

LeFeber disregards that this Court has also found that the party alleging the existence of any trust expressed, resulting or constructive must establish the trust's validity "by evidence that is clear, convincing and practically free from doubt." *Hilliard v. Hilliard* (1992), 255 Mont. 487, 492, 844 P.2d 54, 57 (citation omitted) (emphasis added).

LeFeber argues that like *Moss*, this Court should find that Johnson will be unjustly enriched should she continue to hold title in her name. (*Appellant's Opening Brief* at 14-15). However, the facts in *Moss* are not similar to the present case. In *Moss,* the property at issue was purchased with an advance to Steve (Don and Shirley's son) and Julie by Don and Shirley and the title was in Don and Shirley's name. (*Moss*, ¶ 31). Further, Steve did extensive work on the property and built a house on the property. *Id.* From these facts this Court found that Don and Shirley would be unjustly enriched should the title remain in their name and ruled that a constructive trust did not arise in favor of Don and Shirley. (*Moss*, ¶ 33).

Unlike *Moss*, in the present case, LeFeber's principle theory is that a constructive trust arose from the conveyance of the Property to "Maggie R.

Johnson, a single woman as nominee." (*See* Appellant's Appendix Tab 2, District Court's *Conclusions of Law* (hereinafter "COL") ¶ 1). It is undisputed that LeFeber paid the purchase price for the Property and has paid the Property taxes since the purchase. However, the District Court correctly concluded that unlike the Oil and Gas interests conveyed to Johnson in 1991, when LeFeber explained the purchase of the Property in 1994, LeFeber did not disclose to Johnson the reasons why the term "nominee" was used in the title of the Property. (COL ¶ 4). The District Court further concluded that LeFeber used vague statements such as "I'll buy you a home," and Johnson had to make her own interpretation as to the meaning of LeFeber's statements. *Id.* LeFeber did not discuss with Johnson the reason why "nominee" was used or explain the term to her. *Id.*

After the purchase of the Property, LeFeber "engaged in acts wholly inconsistent with [Johnson's] role as an agent or nominee holding bare legal title to the [Property]. *Id.* He represented to the Montana Department of Revenue that Johnson was the sole owner of the Property. *Id.* In 1999, LeFeber assured Johnson that she had "rights" to the Property. *Id.*

The District Court failed to add that LeFeber, throughout the over twenty year relationship, used the term nominee when it was to his advantage and omitted the term when it was to his disadvantage. During the

time LeFeber received property tax reductions, he never informed Ravalli County that the title to the Property was held by Johnson as nominee. The POA was not recorded in the public record and only when the IRS questioned the payment of royalties to Johnson, did LeFeber produce the POA to the IRS.

Finally, and possibly most important, under ¶ 3(e) of the POA, real estate in the possession of the attorney-in-fact is excluded. *Id.* LeFeber, for some reason unknown to Johnson, misquotes paragraph 3(e). (*See* Appellant's Appendix Tab 4 at 2 of 4 through 3 of 4, ¶ 3(e) and *supra* at 5)

Although this additional evidence was not included by the District Court, the Court correctly concluded that LeFeber did not prove by clear and convincing evidence that a constructive trust arose in favor of LeFeber from the conveyance of the Property to "Maggie R. Johnson, a single woman as nominee."

Next, LeFeber contends that Johnson violated her fiduciary duty to LeFeber by not quitclaiming the Property to him. LeFeber raises this argument for the first time on appeal. (*Appellant's Opening Brief* at 16). "It is well settled that [this Court] will not address an issue on appeal that a party did not properly raise in the district court." *In re Estate of McDermott,*

2002 MT 164, ¶ 39, 310 Mont. 435, ¶ 39, 51 P.3d 486, ¶ 39 (citation omitted).

Although first raised here on appeal, this argument is without merit for the reason that the Property is excluded from the POA as set forth *supra*. In addition, unlike the conveyance of the oil and gas producing properties, which Johnson knew were titled in LeFeber's name prior to the conveyance, Johnson understood that the Property was gifted to her and was never in LeFeber's name and could not be returned.

Finally, LeFeber asserts that even though intent is not a necessary element to impose a constructive trust, LeFeber's intent to create a trust was demonstrated by the use of the term "as nominee" in the Warranty Deed and when purchasing the Property. (*Appellant's Opening Brief* at 17). LeFeber insisted that the Property be transferred to Johnson as "a single woman as nominee." *Id.* LeFeber's argument fails because as he argued earlier, intent is not an element necessary to impose a constructive trust. Further, at trial LeFeber admitted that he has never created a trust but has meant to do so since prior to 1994. The evidence presented does not show that LeFeber intended to create a trust.

After extensive research, no Montana cases were found on point regarding constructive trusts as they relate to cohabitating couples where no

common law marriage is asserted, as is the case here. However, the Supreme Court of Kentucky in *Rakhan v. Zusstone*, 957 S.W.2d 241 (KY 1997), did address this issue. (*See* Appellee and Cross-Appellant's Appendix Tab "M", copy of *Rakhan v. Zusstone*). At issue in *Rakhan* was "the proper disposition of real property purchased during the course of a lengthy, non-marital relationship and placed only in the name of one party." (*Rakhan* at 243). The Court reversed the lower court's judgment in favor of the plaintiff and granted the house to the defendant in whose name the house had been placed. The plaintiff paid for the house and it was used as the parties' residence until their separation, as in this case. The Court concluded that no trust was established because the parties' cohabitated for nearly twelve (12) years, the defendant was the "natural object of [plaintiff's] bounty", and the plaintiff failed to produce sufficient evidence to support a finding that the transaction was anything other than a gift. *Id.* at 245.

This Court should find here, as the Kentucky Supreme Court correctly found, that no trust exists. In this case, the parties' cohabitated for over twenty (20) years in an intimate and exclusive relationship not unlike a marriage, and Johnson was the object of LeFeber's bounty.

2. No resulting trust arose in favor of LeFeber as to the Property at issue.

LeFeber claims that pursuant to Mont. Code Ann. § 72-33-218(1), all of the elements of a resulting trust are present because LeFeber paid the full purchase price for the Property and the Property was transferred to Johnson. (*Appellant's Opening Brief* at 18).

LeFeber then argues that the District Court erred when it found that there was no resulting trust pursuant to Mont. Code Ann. § 72-33-218(2)(c), which provides that a resulting trust does not arise:

> [W]henever the transfer is made in order to accomplish an illegal purpose and the policy against unjust enrichment of the transferee is outweighed by the policy against giving relief to a person who has entered into an illegal transaction.

(*Appellant's Opening Brief* at 18-19).

LeFeber contends that if there was any illegal purpose, it did not occur until four years after the transfer to Johnson and therefore, the transfer was not made in order to accomplish a lower taxation on the Property. *Id.* at 19. LeFeber goes on to state that assuming arguendo, LeFeber transferred the title to accomplish a lower taxation, it was not illegal because the deed was recorded with the term nominee and Ravalli County should have inquired as to why Johnson held the Property in her name "as Nominee." *Id.* LeFeber concludes that Mont. Code Ann. § 72-33-218(2)(c) does not apply because

no such inquiry was made and therefore, LeFeber "took advantage of the tax loophole that was presented to him." *Id.* (emphasis added).

This argument defies reason. Just because LeFeber was able to, possibly illegally, reduce the property taxes he paid to Ravalli County does not mean that the District Court erred by concluding that a resulting trust did not arise from the actions of LeFeber.

At the conclusion of this section of LeFeber's *Opening Brief* he declares "[a]s an aside, if this Court were to determine that that the transfer was made, by LeFeber, in order to accomplish an illegal purpose, the minor tax benefit he received due to the transfer is far outweighed by the unjust enrichment Johnson would receive, . . ." *Id.* at 20. This argument must fail for the reason that LeFeber seems to argue that it is permissible to break the law if the benefit received does not amount to a large sum of money. The District Court correctly concluded that no resulting trust arose.

LeFeber also argues that *Hilliard v. Hilliard* (1992), 255 Mont 487, 844 P.2d 54, is on point with the present matter. In *Hilliard*, this Court concluded that after the plaintiff put property in his son's name for the purpose of preventing execution upon the property by his ex-wife and no claims had been presented to be executed upon the property, no one had been defrauded so there was no illegality that would defeat the claim of a

resulting trust. (*Appellant's Opening Brief* at 20). LeFeber asserts that this case is the same because no illegal purpose has been found and therefore, a resulting trust should arise in favor of LeFeber. *Id.* *Hilliard* is not persuasive. The District Court found that LeFeber did in fact represent to the State of Montana that Johnson owned the Property to reduce his tax payments to the state. (COL ¶ 7). Even though it has not been proven that the act was illegal, the harm has been committed and the District Court correctly found that no resulting trust arose pursuant.

C. The District Court correctly concluded that a portion of the Property at issue was gifted to Johnson after concluding that no constructive or resulting trust existed.

LeFeber first argues that he could not have gifted the Property to Johnson because this Court has concluded that the gift presumption has not been extended to relationships such as sibling relationships, and aunt-nephew relationships. (*Appellant's Opening Brief* at 20-21). LeFeber then cites to *Detra v. Bartoletti* (1967), 150 Mont. 210, 433 P.2d 485 and *Peterson v. Kabrich* (1984), 213 Mont. 401, 691 P.2d 1360, for this proposition. LeFeber's reliance is misplaced. Mont. Code Ann. § 72-33-218, provides in part:

> (1) Where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person who paid the purchase price.

> (2) Subsection (1) does not apply in any of the following circumstances:
>
> (b) whenever the transferee is a spouse, child, or other natural object of the bounty of the person who paid the purchase price; (emphasis added).

Further, it has long been held in Montana that:

> If the property is purchased by one with his own money, and the title is placed by him in another to whom he stands in a confidential relation, such as husband, wife, parent, child, or such other relation that one may naturally have a claim upon the bounty of the other, then the presumption is that the conveyance is made as a gift.

Clary v. Fleming (1921), 60 Mont. 246, 198 P. 546, 547 (citations omitted) (emphasis added).

LeFeber then argues that the POA applies to the purchase of the Property and that he did not gift the Property to Johnson and that the deed demonstrates that Johnson received the whole Property "as nominee." (*Appellant's Opening Brief* at 22). While LeFeber's argument is correct, it does not support his contention that he did not gift the Property to Johnson. LeFeber contends that there is no limiting language qualifying "as nominee." *Id.* LeFeber is again correct. There is no language that limits or defines the term nominee and therefore, because Johnson is the natural object of

LeFeber's bounty, just as in *Rakhan*, there is no resulting trust and the Property is presumed a gift to Johnson.

LeFeber then argues that the District Court inserted language into the deed to find that a portion of the Property was gifted to Johnson. (*Appellant's Opening Brief* at 22-23). The Court was sitting in equity and therefore, could fashion an equitable result.

LeFeber then asserts that Johnson cannot state when the Property was gifted and contends that Johnson believes that the gift was either in 1994 or 1999. (*Appellant's Opening Brief* at 23). This is incorrect. Johnson testified that LeFeber gifted the Property to her in June of 1994 and then affirmed that she had rights to the Property in his note to Johnson in December of 1999.

LeFeber then asserts that he did not have donative intent because he did not file a Gift Tax Return with the IRS. *Id.* at 23-24. Throughout the twenty year relationship, LeFeber continually gave mixed intentions to Johnson. The intent of LeFeber cannot be ascertained by his actions because his intent changed whenever the situation benefited his purposes.

LeFeber then argues that there was never delivery of the Property because he kept dominion and control over the Property and Johnson vacated the Property while LeFeber remained. (*Appellant's Opening Brief* at

24). This argument is again without merit. Johnson treated the Property as her own and even Johnson and LeFeber's neighbors conceded at trial that they believed the Property was Johnson's and that she treated the Property as her own. The only time that Johnson left the Property were those times when LeFeber became so miserable to be around that she would leave until LeFeber would again be civil enough to live with. As stated *supra*, this relationship was not unlike a marriage. Finally, Johnson could not continue with the relationship and left LeFeber for good in September, 2005.

Finally, the District Court erred when it did not consider Johnson's argument that the limiting words "as nominee" in the deed should be disregarded because the District Court concluded that the Property had not been reconveyed to or encumbered by a third party. (COL ¶ 13). Mont. Code Ann. § 70-21-307, provides:

> Conveyance of real property hereafter placed of record in any office of any county clerk and recorder in which the name of the grantee is followed by the word "trustee", "as trustee", or some similar fiduciary term and in which no terms and conditions of such purported trust or any limitation on the power of the grantee to convey shall be set forth so that any person dealing with such real property could learn therefrom what, if any, limitation exists upon the authority of the grantee with regard to the reconveyance or encumbrance of such property shall be considered as though such property had been conveyed to such grantee without any limitation upon his

> authority to reconvey or encumber as fully as though the word "trustee", "as trustee", or any equivalent fiduciary expression had not been used in connection with his name, and the use of the word "trustee" or "as trustee" or any equivalent fiduciary expression purporting a trust contained in such conveyance shall have no force or effect in charging any purchaser or encumbrancer thereof with notice of any limitation of power on the part of the person so named as trustee to deal with such lands as his own. (emphasis added).

In Fact, after the parties separated, Johnson applied for a revolving line of credit at the Rocky Mountain Bank in Stevensville. Following a title search, in which the Rocky Mountain Bank obviously disregarded the term "nominee", the Bank gave Johnson a $10,000 line of credit secured by a Deed of Trust against the Property, thereby encumbering the Property. The bank only suspended Johnson's line of credit following the judicial proceeding initiated by LeFeber and a *lis pendens* being filed with respect to the Property. (*See* Appellee and Cross-Appellant's Appendix Tab "E", Dep. Johnson Exhibit D at 56).

D. The District Court correctly concluded that equitable estoppel barred LeFeber's claim of constructive or resulting trust because of LeFeber's representations that Johnson owned the Property.

This Court has held that six elements are necessary in order to establish an equitable estoppel claim:

> (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts;
>
> (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party;
>
> (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon;
>
> (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon;
>
> (5) the conduct must be relied upon by the other party and lead that party to act; and
>
> (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse.

Seeley v. Liberty Northwest Ins. Corp., 2000 MT 76, ¶ 10, 299 Mont. 127, ¶ 10, 998 P.2d 156, ¶ 10.

LeFeber maintains that the District Court incorrectly concluded that equitable estoppel bars LeFeber's trust claim. (*Appellant's Opening Brief* at 25-26). LeFeber first asserts that he did not represent to Johnson that she owned the Property and that he did not conceal his interpretation of the term "nominee." LeFeber contends that he always insisted upon the term "as nominee" and as such he could not have represented to Johnson that she owned the Property. *Id.* at 26.

To the contrary, evidence presented at trial clearly shows that there is no definition for the term "nominee" and LeFeber continually assured Johnson that he would buy her a home. LeFeber never explained the term to Johnson and even after closing on the Property, he refused to tell Johnson what the term meant when asserted in the deed.

Next, LeFeber argues that Johnson either knew what qualifications the term "nominee" contained regarding the transfer or she should have known, and the term was included in the POA. *Id.* at 26-27. Johnson asked LeFeber on several occasions what the term meant and LeFeber never answered her queries or gave vague answers to her. Further, LeFeber asserts that the term was included in all the Agreements to Buy and Purchase the Property and Johnson should have raised the issue at that time. *Id.* at 27. Also included in the Agreements to Buy and Purchase the Property was the term "may be finalized in trust, corporation, trustee or nominee." Johnson did not know which term would be used until closing and when she asked for an explanation she received none.

Finally, LeFeber contends that Johnson did not act in such a way as to change her position for the worse. *Id.* Johnson did act to her detriment. She believed that LeFeber was purchasing the Property for her and as a result, she treated the Property as her own and made significant contributions to the

Property. Only later did Johnson learn that her actions did not give her the results she believed she was receiving.

The District Court correctly found that LeFeber represented that Johnson owned the Property and he concealed his intentions regarding his interpretation of the term "nominee." LeFeber knew his concealment. The truth of the concealment was not known by Johnson, the concealment was made to both persuade Johnson to continue to contribute to LeFeber's life and well being, and to achieve lower property taxes on the Property, with the expectation that Johnson would act upon the conduct to her detriment. (COL ¶ 17).

The District Court correctly concluded that equitable estoppel bars LeFeber's claim of constructive or resulting trust.

E. The District Court correctly concluded that the parties cohabitated for over twenty years and Johnson made significant contributions to the Property after it was purchased and that the Property should be partitioned with each party owning an undivided one-half interest as tenants in common.

As set forth *supra*, this Court should find that no constructive or resulting trust arose in favor of LeFeber and that the Property was gifted to Johnson. The Property should be awarded to Johnson as sole owner. Should this Court affirm the District Courts *Finding of Fact and Conclusions of Law* and *Order* and find that the Property should be partitioned, then pursuant to

the law of partition and the evidence presented, each party should be awarded an undivided one-half interest in the Property.

LeFeber relies on the self-serving testimony and exhibits provided at the May 29, 2008 Hearing on Partition for his assertion that his contributions to the Property are far greater than Johnson's. (*Appellant's Opening Brief* at 28-30). LeFeber ignores the trial testimony, exhibits and FOF ¶ 24 which show that Johnson made significant contributions to the Property. (*See supra* at 9-10).

LeFeber cites to *Flood v. Kalinyaprak*, 2004 MT 15, 319 Mont. 280, 84 P.3d 27, in support of his contention that he should be awarded a greater portion of the Property than Johnson. (*Appellant's Opening Brief* at 28-29). However, LeFeber fails to completely provide the *Flood* Court's full analysis.

In *Flood v. Kalinyaprak*, 2004 MT 15, 319 Mont. 280, 84 P.3d 27, this Court addressed the division of property between cohabitating tenants in common. The plaintiff and the defendant in *Flood* cohabitated for five years. *Flood*, ¶¶ 5; 10. During their relationship the parties purchased several parcels of land in and around Polson, Montana as tenants in common.

One of the parcels, Lot 10, was purchased in 1992 along with other

lots for a total price of $34,000. The majority of the purchase price was paid by the defendant. *Id.* ¶ 6. In 1993 the plaintiff individually purchased a home in Polson for the parties to live in. *Id.* ¶ 7. The plaintiff sold the home and the parties began building a home on Lot 10 financed by the plaintiff's profit from the sale of the Polson home which totaled approximately $100,000. *Id.* ¶¶ 7-8. No designation reflecting unequal ownership was placed in the deeds or any written document. *Id.* ¶ 6.

The parties separated and put Lot 10 on the market for $250,000. ¶ 10. No offers were received on Lot 10 until 2001, when an offer of $180,000 was received, and the defendant refused to accept the offer. ¶ 11. The plaintiff initiated a partition action to force the defendant to accept the offer. *Id.*

Further, the plaintiff brought a claim for unjust enrichment contending the defendant would be unjustly enriched if he received 50% of the proceeds because the plaintiff had provided the majority of the cost of constructing the house. *Id.* In November 2001, the parties accepted an offer of $198,000 and the defendant asserted he was owed 50% of the sale proceeds. *Id.* ¶ 12.

The court concluded form the evidence presented that each party owned 50% of Lot 10 and the proceeds of the sale should be split equally. *Id.* ¶ 13. The plaintiff appealed.

This Court stated that "partition is an equitable action in which the court has great flexibility in fashioning appropriate relief for the parties." *Id.* ¶ 17 (citations omitted) (emphasis added). Further, "tenants in common are presumed to own property equally absent an agreement to the contrary." *Flood*, ¶ 17. Finally:

> [T]he [district] court noted its equitable approach required an assessment of monetary contributions, other expenditures that enabled the parties to acquire and maintain the property, conduct of the parties, and expressed intent of the parties . . . [and] it would be "unfair ... to allow [the plaintiff's] contributions to be preserved in an asset and [the defendant's] contributions simply dissipated."

Id.

This Court affirmed the lower court's finding that the proceeds from the sale of Lot 10 should be shared equally by the tenants in common and set forth the following rules:

> The intent of the cotenants must be proven by a preponderance of the evidence, and may be demonstrated by conduct over the course of time, sharing of other expenses, labor, or any other admissible means. Finally, in a partition action, a court may consider a final resolution that confers no unfair advantage on any cotenant in light of all the evidence.

Id. at ¶ 28.

In conclusion, this Court held that "[t]he District Court properly considered the conduct of the parties during their relationship to determine what their intent was regarding the distribution of the proceeds from the sale

of Lot 10 and the house thereon. The Court's judgment that such proceeds should be distributed in equal shares is affirmed." *Id.* ¶ 45.

In the present matter, the District Court concluded that Johnson contributed to the Property. (*See* COL ¶ 9). Specifically:

> Jim told Maggie he would buy her a home, directed the deed to this home be placed in Maggie's name ("a single woman as nominee") refused to clarify any limitations he placed on the words "as nominee," told Maggie she had "rights" in this property, and effectively represented to the rest of the world that Maggie was the sole legal and equitable owner of this property.

(COL ¶ 15).

The District Court then concluded that there was clear and convincing evidence that Jim gifted an undivided interest in the Property to Maggie. *Id.* Then, under an equitable estoppel approach the Court found by clear and convincing evidence that the parties have a common ownership of the Property. (COL ¶ 16).

The District Court found that:

> Maggie and Jim lived together for over twenty (20) years in an intimate, confidential, committed relationship, however outside of marriage. Equity requires this Court consider the over twenty year cohabitation of the parties coupled with the "rights" promised by Jim to Maggie, the representation endorsed by Jim to third party [sic] that Maggie owned this real property, and the contributions made by Maggie to the relationship and to the property,

> in the distribution of the real property located at 297 St. Joseph Lane.

(COL ¶ 21).

The District Court further found that the "proof establishes, by clear and convincing evidence, that a tenancy in common exists between Jim and Maggie involving their estate in the St. Joseph property." (COL ¶ 24).

As found in *Flood*, tenants in common are presumed to own property equally absent an agreement to the contrary. *Flood*, ¶ 17.

In the present case there is no agreement as to the proportionate ownership of the Property. However, the Court did find that Maggie made significant contributions to the Property that increased its value. (*See supra* at 9-10). As such, the District Court, because of Maggie's significant contribution to the Property, found that Jim and Maggie own the Property equally.

Further, it would be "unfair ... to allow [LeFeber's] contributions to be preserved in an asset and [Johnson's] contributions simply dissipated." *Flood*, ¶ 17.

This Court should affirm the District Court's *Order* awarding the parties an undivided one-half interest in the Property.

VII. CROSS-APPEAL ISSUES

A. The District Court erred when it concluded that equitable doctrines rather then contract law controls the POA.

The District Court wrongly concluded that the POA should not be interpreted under contract, but should be resolved by application of other legal principles and equitable doctrines. (COL ¶ 20).

"The lack of any definition of '[nominee]' in the contract [LeFeber] drafted [means] that it [is] incumbent on the District Court to decide what the term means. In doing so, the court must be guided by § 28-3-501, MCA, which provides: 'The words of a contract are to be understood in their ordinary and popular sense . . . .'" *Cole v. Valley Ice Garden, LLC,* 2005 MT 115, ¶ 27, 327 Mont. 99, ¶ 27, 113 P.3d 275, ¶ 27. "Where the parties' contract fails to define a term, we look to this rule of construction, as well as to the general rule that unclear language in a contract should be construed against the drafter. *See,* §28-3-206, MCA." *Id.*

The POA drafted by LeFeber fails to define the term "nominee" and no Montana law defines the term nominee as used in the POA. The unclear language must be construed against the drafter, LeFeber, and the resulting conclusion is that the Property has been gifted to Johnson and should remain solely in her name.

B. The District Court erred when it concluded that in equity the proof establishes that a tenancy in common exists between LeFeber and Johnson involving their estate in the Property.

The District Court concluded that clear and convincing evidence in this case establishes that a tenancy in common exists between LeFeber and Johnson involving their estate in the Property. (COL ¶ 24). The Court fails to apply the evidence that LeFeber continually told Johnson that he would purchase a house for her. Further, LeFeber and Johnson's closest neighbors believed that the Property belonged to Johnson. In December of 1999, LeFeber provided Johnson with a hand written and signed note stating that "Maggie has rights to stay at 297 St. Joseph Lane."

Johnson and LeFeber lived together for over twenty (20) years in an intimate and confidential relationship, not unlike a married couple. The Property at issue is not unlike a marital estate. In a case involving the partition of property owned by a couple that were never married and had only cohabitated, this Court stated that "the approach used to partition the property here could be termed similar to that used to divide a marital estate in a dissolution action, as equitable principles are applied and contribution is a factor, we do not utilize the Marriage and Divorce Act as a guide to make our decision here." *Flood v. Kalinyaprak*, 2004 MT 15, ¶ 20, 319 Mont. 280, ¶ 20, 84 P.3d 27, ¶ 20.

The evidence in the present case is persuasive that no constructive trust exists as a matter of law. The property at issue was knowingly and voluntarily gifted to Johnson and Johnson unconditionally accepted the gift. With no definition or limiting language regarding "nominee" in the POA or the Warranty Deed, no force or effect should be given the term and the POA does not apply to the Property at issue. LeFeber's actions of lowering his payment of the property taxes through Johnson's application and acceptance for Property Tax Assistance outweigh any claim of unjust enrichment that may be alleged against Johnson. Equity should not control and this Court should find that the Property was gifted to Johnson and she should retain title to the Property.

C. The District Court correctly concluded that from its Findings of Fact and Conclusions of Law there is no prevailing party to this action and therefore, neither party should be awarded attorney fees.

The District Court concluded that no constructive or resulting trust arose in favor of LeFeber and incorrectly concluded that the Property was not knowingly and voluntarily gifted in its entirety to Johnson. From this conclusion the District concluded that there is no prevailing party in this matter and therefore, neither party should be awarded attorney fees.

Should this Court correctly find for Johnson and order that the Property be retained and titled solely in Johnson's name, Johnson would be the prevailing party and entitled to attorney fees.

"A district court's grant or denial of attorney fees is a discretionary ruling which we review for abuse of discretion." *Harding v. Savoy*, 2004 MT 280, ¶ 68, 323 Mont. 261, ¶ 68, 100 P.3d 976, ¶ 68 (citation omitted). "The longstanding rule in Montana, also known as the American Rule, is absent a contractual or statutory provision to the contrary, attorney fees will not be awarded to the prevailing party in a lawsuit. *Id.* (citation omitted). "[I]n rare instances a district court may award attorney fees to an injured party under its equity powers." *Id.* (citation omitted).

"We have recognized equitable exceptions to the American Rule." *Harding*, ¶ 69 (citation omitted) This Court has held that "a district court may award attorney's fees to make an injured party whole under its equity powers." *Erker v. Kester*, 1999 MT 231, ¶ 44, 296 Mont. 123, ¶ 44, 988 P.2d 1221, ¶ 44 (citations omitted). "[S]uch awards are determined on a case-by-case basis." *Harding*, ¶ 69.

In the present case, neither a statutory nor contractual basis for an award of attorney fees exists but to make Johnson whole, under its equity powers, the District Court should award Johnson her attorney fees.

LeFeber has extensive holdings that far exceed Johnson's assets, and Johnson has expended much of her assets in the defense of this action brought by LeFeber. Should this Court find that Johnson was gifted the Property by LeFeber as the object of his bounty during their over twenty year relationship, to make Johnson whole, she should be awarded attorney fees.

VIII. CONCLUSION

The District Court correctly found that no constructive or resulting trust arose in favor of LeFeber. The POA applies to the transfer by LeFeber to Johnson of the oil and gas interests owned by LeFeber prior to the transfer. The POA does not apply to the purchase of the Property because LeFeber placed the Property in Johnson's name, the Property was never in LeFeber's name, and the POA excludes real estate in the possession of the attorney-in-fact, Johnson. Furthermore, the facts demonstrate that the Property was a gift to Johnson from LeFeber. LeFeber granted rights to Johnson to stay at the Property and continually expressed to Johnson that he would purchase her a house. LeFeber's actions of reducing his tax liability by representing to the State of Montana that Johnson was the sole owner of the Property far out weigh any unjust enrichment that may be attributed to

Johnson. The District Court erred when it concluded that the Property be owned as a tenancy in common between Johnson and LeFeber.

Johnson respectfully request this Court find that Johnson is the owner of record of the Property located at 297 St. Joseph Lane, Stevensville, Montana and order that the Property be deeded to Maggie R. Johnson. Further, this Court should remand this case to the District Court for determination of attorney fees which Johnson would be entitled to.

RESPECTFULLY SUBMITTED this 3rd day of December, 2008.

P.MARS SCOTT LAW OFFICES

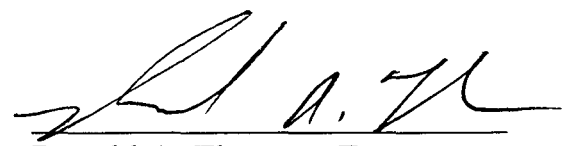
By: _____
P. Mars Scott, Esq.

RESPECTFULLY SUBMITTED this 3rd day of December, 2008.

By _____
Ronald A. Thuesen, Esq.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text of fourteen (14) points; is double spaced; and the word count calculated by WordPerfect 8.0 for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding the cover page, table of contents, table of authorities, certificate of compliance, certificate and appendix.



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CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing document to be mailed to the following persons, at the address shown, by placing a copy of the same in the United States Mail at Missoula, Montana, in an envelope with first class postage prepaid, this 3rd day of December, 2008.

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