

DA 18-0678

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 286

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IN RE: J.K.N.A, S.G.N.A, and K.A.N.A.,

Minor Children,

LORA DIANE ADAMI,

Petitioner and Appellee,

and

KAREN CHERYL NELSON,

Respondent and Appellant.

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APPEAL FROM: District Court of the Fourth Judicial District,  
In and For the County of Missoula, Cause No. DR-16-199  
Honorable Leslie Halligan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Marybeth M. Sampsel, Measure Law, P.C., Kalispell, Montana

For Appellee:

Susan G. Ridgeway, Jill Gerdrum, Axilon Law Group, PLLC,  
Missoula, Montana

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Submitted on Briefs: November 6, 2019

Decided: December 10, 2019

Filed:

  
Clerk

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Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Karen Cheryl Nelson (“Nelson”) appeals from an order of the Fourth Judicial District, Missoula County, which determined the parties had entered into a common law marriage. As a result of finding a valid common law marriage, the District Court awarded spousal maintenance be paid by Nelson to Lora Diane Adami (“Adami”), equitable division of the Nelson-Adami estate, calculation of Nelson’s child and medical support, and attorney’s fees to Adami.

¶2 We address the following issues on appeal:

- 1. Whether the District Court erroneously concluded that Adami established a common law marriage with Nelson.*
- 2. Whether the District Court committed procedural errors requiring reversal.*
- 3. Whether the District Court erred in granting a variance from child support guidelines in its calculation of child support.*
- 4. Whether the District Court erred in awarding Adami attorney’s fees.*

¶3 We affirm.

#### **PROCEDURAL AND FACTUAL BACKGROUND**

¶4 In 1996, Nelson and Adami, both unmarried, began a relationship as a same-sex couple that continued for a period of nearly twenty years. Since same-sex marriage was not legally available or socially acceptable in states where the Nelson and Adami resided throughout their relationship, they did not marry. Nelson and Adami parented three children (“the children”) together, with Adami being the biological mother of all three through artificial insemination: J.K.N.A. (born 2000), S.G.N.A. (born 2002), and

K.A.N.A. (born 2005). At the time of trial, Nelson, Adami, and the children had resided in Missoula County for over 180 days prior to the filing of Adami’s Verified Petition for Parentage, Parenting Plan, Child Support, and Equitable Division of Property.

¶5 In the late 1990s, Nelson and Adami discussed beginning a family. Ultimately, through a mutual decision, Adami gave up her career as a pharmaceutical sales representative and Nelson continued pursuing her career as a physician. Prior to beginning the artificial insemination process, Nelson and Adami agreed that regardless of legal and societal disapproval, they were committed to each other and to having a family together.

¶6 In selecting a sperm donor, Nelson and Adami sought a donor with physical traits like Nelson. They also chose to give each of the children both of their last names to reflect their parenting covenant. Due to legal barriers, Nelson and Adami did not use the word “marriage,” but termed their relationship as “a committed relationship.” At the time of their decision to raise children together, Nelson and Adami made commitments toward each other to be life partners and function as married couples do. Adami bore three children that Nelson co-parented. All three children were given the last name of Nelson-Adami.

¶7 While Adami assumed the role of primary caregiver for the children, Nelson assumed the role as the breadwinner and took steps to financially provide for Adami and the children. Nelson named Adami as the beneficiary of all of her retirement accounts and life insurance policies. In considering new jobs, she only considered those that were in places acceptable to Adami. Nelson ensured that Adami and the children had health

insurance through her employment. Nelson cared for Adami post-childbirth. Likewise, Adami took care of Nelson as needed and even cared for Nelson's brother when he was undergoing addiction treatment, including paying \$4000 on a credit card in her name for his treatment.

¶8 Nelson and Adami jointly chose godparents for their children and asked to be, and were, accepted by their church congregation as a family. Both Nelson's and Adami's extended family treated the other as a member of the family, essentially as if they were married spouses.

¶9 In support of Nelson's career, Nelson and Adami frequently moved. After Nelson finished her residency in Virginia, she accepted a job as a physician at a local hospital and opened an outpatient private practice in Palestine, Texas, in 2001. Due to the move, Adami's employment and career became secondary to Nelson's, as Adami was unable to obtain employment in pharmaceutical sales in Palestine. Nelson and Adami agreed that Adami would quit her career and spend her time as a caregiver for their young children. Shortly after, Adami gave birth to their second child in 2002.

¶10 In 2004, Nelson's and Adami's third child was born and in 2006 the family moved to Grand Junction, Colorado, where Nelson ran an outpatient pain clinic. In 2009, the family moved to Wyoming, as Nelson accepted a position as the medical director at a pain and spine clinic. In 2012, Nelson accepted a job in Missoula, Montana, with Providence Health and purchased a house on Daly Street ("Daly House"). Adami stayed with the children in Wyoming until the end of the school year and then moved the family and their belongings to Missoula.

¶11 In July 2014, Nelson purchased a second residence in Missoula on Connell Street (“Connell House”) across the alley from the Daly House. Adami objected to the purchase since it was a major expense (\$529,000), but Nelson rebutted that her parents would live there and pay rent and that she needed a quiet place to do her research work. Nelson’s and Adami’s business advisor also advised against the purchase and testified they could not afford it. Due to the Connell House purchase, their savings were depleted by improvements and ongoing mortgage payments.

¶12 In August 2014, Nelson informed Adami that she was ending their relationship and would move into the Connell House in September. Over Adami’s objections, Nelson proceeded to remodel the Connell House so that the children would each have an updated bedroom. The down payment and remodeling of the Connell House used approximately \$47,000 from their joint bank accounts and the mortgage added a debt obligation of \$3,500 each month.

¶13 In the fall of 2014, Adami obtained employment, earning \$33,900 annually. Nelson and Adami continued to pool their income and Adami continued to pay the bills from their joint funds. In protest of Nelson’s expenditures on the Connell House, Adami withdrew \$37,314.64 from their joint account and deposited it into her personal account. She later removed the remaining funds from the joint account. Nelson began withdrawing funds from a joint stock account.

¶14 In January 2015, Nelson was notified that her employment would be ending in June 2015. Adami asked Nelson to sell the Connell House to reduce their debt, but Nelson declined. Instead, Nelson decided to list the Daly House on the market. Despite

being offered to move into the Connell House, Adami and the children moved their furnishings into storage and began living in a camper-trailer parked on property belonging to a family friend.

¶15 The Daly House sold in September 2015; Nelson shared half of the proceeds from the sale with Adami. Adami used the proceeds to, among other things, secure a rental residence for herself and the children. Around this time, Nelson cut off Adami's access to joint funds. Adami then asked Nelson for child support payments. Adami's full-time income was insufficient to support the children and she was forced to spend her proceeds from the sale of the Daly House.

¶16 In the fall of 2015, Nelson received two competing employment offers: one for a position at Community Hospital in Missoula and the other for a position at a hospital in Anchorage, Alaska. Nelson accepted the Anchorage position and moved to Alaska sometime in October 2015. While Nelson presumed that Adami and the children would move with her to Anchorage, she moved without any commitment from Adami. Adami decided that it was not in the children's best interest to relocate to Alaska. At the time of trial, Nelson reported that she would be moving back to Missoula and, eventually, fully executed an employment agreement with Community Hospital. However, on November 22, 2017, Adami provided notice to the District Court that Nelson's employment had ended at Community Medical Center. At the time of the District Court's order, Nelson reported that she was employed by the hospital in Anchorage working 70 hours each month, and had opened a private practice in Missoula.

¶17 Throughout their relationship, Nelson and Adami were known by their friends and family as a committed couple who conducted themselves as if they were married. While Nelson and Adami did not always hold themselves out as a couple to strangers or people who might not be accepting, friends, colleagues, and family members knew that they were monogamous and testified they acted as a married couple. Nelson wrote on benefit forms that Adami was her “partner” or “domestic partner.” Nelson also occasionally referred to Adami as her “wife.”

¶18 Nelson and Adami also commingled their assets and earnings during their relationship. Much of their real property was co-owned and referred to by Nelson and Adami as “our” property. Nelson and Adami were each a signor on each other’s bank accounts and family bills were paid from both accounts. They also formed a company together for investment purposes called Nelson Adami Farms, later Nelson Adami Entropy. Their business advisor, Steve Wright, confirmed that the investments were for the joint benefit of Nelson and Adami. While Nelson was the sole owner of the company for tax purposes, Adami was an authorized agent for the company and on the Edward Jones investment account. Adami was also granted ten percent ownership of Nelson’s company called Nelson Medical Intelligence.

¶19 Nelson and Adami financially protected each other and their children as members of a family unit. In 2002, Nelson listed Adami as the beneficiary on a \$500,000 term life insurance policy and listed her as the beneficiary on a life insurance policy available through her employment at Providence. At the time of the District Court’s order, Adami still had a life insurance policy listing Nelson as the beneficiary. Upon separating, in

December 2014, Nelson wrote an email to Adami outlining that she will continue being the primary wage earner and that Adami should continue to be the primary domestic provider. Further, she intended to divide the assets that they acquired between October 2001 and December 2014 to ensure that neither of them shifts down a socioeconomic level due to the separation. Nelson's and Adami's business advisor testified that everything they did was global for the benefit of everyone in the family and that Nelson had always referred to the property in her name as "theirs."

¶20 In March 2016, Adami filed the Verified Petition for Parentage, Parenting Plan, Child Support, and Equitable Division of Property. Adami alleged in the petition that: 1) Nelson should be recognized as a parent under Montana's Uniform Parentage Act ("UPA"); 2) Nelson should provide child support to Adami for the children; and 3) equitable apportionment of the assets and debts that accumulated during their relationship should be determined according to community property principles or claims of unjust enrichment. Nelson filed a counter-petition in March 2016 seeking the establishment of a parenting interest pursuant to a third-party parenting determination and corresponding parenting plan. Over objection from Nelson, in September 2016, Adami moved to add claims of common law marriage, spousal support, and attorney fees. In November 2016, Nelson added claims related to attorney's fees and costs, and adoption. Hearings were held on January 26-27, 2017, and on February 21, 2017.

¶21 On November 9, 2018, the District Court issued a 144-page Findings of Fact, Conclusions of Law and Judgment, and a Parenting Plan and Child Support Order. The District Court found that a common law marriage existed between Nelson and Adami



beginning at the time of J.K.N.A.'s birth in February 2000, that the marriage was irretrievably broken around August or early September 2014, and that it should be dissolved. The District Court awarded spousal maintenance to Adami and ruled that Nelson's and Adami's property should be equitably distributed. The District Court further held that Nelson was a parent of the children under the UPA, that a shared parenting plan was in the best interests of the children, and that Nelson was required to pay child support according to the revised child support calculations and the appropriate variance. The District Court denied Nelson's counterclaim for adoption of the children since she was found to be a parent under the UPA. The District Court held that Adami was entitled to an award of attorney's fees.

#### **STANDARDS OF REVIEW**

¶22 This Court reviews a district court's findings of fact to determine whether they are clearly erroneous. *Matter of Estate of Alcorn*, 263 Mont. 353, 355, 868 P.2d 629, 630 (1994). When reviewing a district court's conclusions of law, we determine whether the court's interpretation of the law is correct. *Alcorn*, 263 Mont. at 355, 868 P.2d at 630. We will not substitute our judgment for a district court's judgment regarding the credibility of witnesses or weight accorded to the testimony. *Harrison v. Liberty Nw. Ins. Corp.*, 2008 MT 102, ¶ 12, 342 Mont. 326, 181 P.3d 590. A district court's procedural rulings are reviewed for an abuse of discretion. *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 26, 351 Mont. 464, 215 P.3d 649. We review a district court's award of attorney's fees in a dissolution action for abuse of discretion. *Weibert v. Weibert*, 2015 MT 29, ¶ 8, 378 Mont. 135, 343 P.3d 563.

## DISCUSSION

¶23 *1. Whether the District Court erroneously concluded that Adami established a common law marriage with Nelson.*

¶24 At the outset, same-sex couples have a fundamental right under the United States Constitution to marry in all states. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Rolando v. Fox*, 23 F. Supp. 3d 1227, 1236 (D. Mont. 2014) (invalidating §§ 40-1-103, -401(1)(d),(4), MCA, Mont. Const. Art. XIII, § 7). Importantly, there is a strong presumption in favor of retroactive application of new rules of law. *Stavenjord v. Mont. State Fund*, 2006 MT 257, ¶ 9, 334 Mont. 117, 146 P.3d 724 (citing *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, ¶ 29, 325 Mont. 207, 104 P.3d 483). Therefore, *Obergefell*'s holding that state prohibitions against same-sex marriage violate the United States Constitution operates retroactively in relation to Adami's claim that a common law marriage existed with Nelson, and her claim is not barred on those grounds. *See Ranolls v. Dwelling*, 223 F. Supp. 3d 613, 622-24 (E.D. Tex. 2016) (holding *Obergefell* applies retroactively to a claim of common law marriage).

¶25 Montana law recognizes common law marriage under § 40-1-403, MCA. The party asserting a valid common law marriage must prove by a preponderance of the evidence that the parties: 1) were competent to enter into a marriage;<sup>1</sup> 2) assumed a marital relationship by mutual consent and agreement; and 3) confirmed their marriage by cohabitation and public repute. *Barnett v. Hunsaker*, 1998 MT 279, ¶ 32, 291 Mont. 412, 968 P.2d 281. The moving party does not have the burden of proving that the above

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<sup>1</sup> Element one is satisfied since *Obergefell* applies retroactively and no other competency issues have been raised.

elements “all happened immediately or instantly,” but rather they can arise over the course of the relationship. *In re Marriage of Swanner-Renner*, 2009 MT 186, ¶ 21, 351 Mont. 62, 209 P.3d 238.

¶26 In Montana, common law marriage “is an equitable doctrine used to ensure people are treated fairly once a relationship ends.” *Snetsinger v. Mont. Univ. System*, 2004 MT 390, ¶ 32, 291 Mont. 412, 968 P.2d 281 (explaining that the concept is “designed, in part, to prevent unjust economic harm to couples who have held themselves out as [spouses]”). Public policy favors the finding of a valid marriage and the presumption in favor of matrimony is one of the strongest known to the law. *Barnett*, ¶ 32; *In re Estate of Murnion*, 212 Mont. 107, 113, 686 P.2d 893, 897 (1984). Not only does public policy favor a finding of matrimony, Montana’s marital code “shall be liberally construed and applied to promote its underlying purposes, which are to: . . . (2) strengthen and preserve the integrity of marriage and safeguard family relationships.” Section 40-1-101, MCA.

¶27 Ceremonial or non-ceremonial marriage is a deliberative agreement between parties “that they will hold toward each other the relation of [spouse], with all the responsibilities and duties which the law attaches to such relation . . . .” *Miller v. Sutherland*, 131 Mont. 175, 182, 309 P.2d 322, 326 (1957) (citation omitted). Accordingly, in a marital relationship, the spouses “contract toward each other mutual obligations of respect, fidelity, and support.” Section 40-2-101, MCA.

¶28 Regarding the second element, mutual consent must be based on deliberate action by each party. While mutual consent may be implied from the conduct of the parties, “marriage cannot be said to steal upon them unawares.” *Barnett*, ¶ 34 (citation omitted).

In other words, one “cannot become married unwittingly or accidentally” and the “consent required must be seriously given with the deliberate intention that marriage result . . . .” *Sutherland*, 131 Mont. at 182, 309 P.2d at 326.

¶29 Here, the District Court found that Nelson’s and Adami’s conduct demonstrated mutual consent to marry. In reviewing the record, the evidence is overwhelming that Nelson and Adami mutually treated and respected each other in the same manner as a married couple. Nearly every major decision they made was mutually discussed and decided. Examples include the decisions of whether they should start a family, who would bear their children, the children’s surnames to adopt both Nelson and Adami, who would assume the primary roles, where the family would live, and how they would invest their finances. Nelson and Adami also mutually selected a sperm donor with physical traits like Nelson so that their children would resemble both parties. They mutually chose godparents for their children and asked to be accepted by their church congregation as a family.

¶30 Moreover, Nelson and Adami commingled their finances and supported each other with their labor. While Adami relied on Nelson’s income, Nelson likewise relied on Adami’s support in domestic affairs. Prior to the decision to start a family, Nelson and Adami pooled their resources and made the mutual decision to divide labor in a way that would provide a stable income for the family. While Nelson held the majority of their real property in her name, this was for tax purposes and she referred to the property as “ours.” They were signors on each other’s bank accounts, and Adami would pay the bills from both accounts and transfer funds between accounts as needed. Nelson and Adami

also formed a company for investment purposes, which their business advisor confirmed was an investment made for their joint benefit, even though Nelson was the sole owner for tax purposes. Adami was granted 10% ownership of Nelson's company, Nelson Medical Intelligence.

¶31 Nelson and Adami financially protected each other and their children as members of a family unit. They consistently listed the other as a beneficiary on their life insurance policies, as well as in their retirement accounts. Nelson always found a way to obtain health insurance for Adami and the children through her employment. Nelson's and Adami's business advisor testified that everything they did was global for the benefit of everyone in the family.

¶32 Nelson and Adami cohabited for eighteen years, were engaged in a monogamous relationship, and their actions indicated a desire to be engaged in a marital relationship. Nelson wrote letters expressing her love for Adami and her desire to be with her in a committed relationship. Nelson and Adami disregarded societal and legal disapproval and engaged in a marital-like relationship by pooling their resources, supporting each other financially and emotionally, and starting a family together.

¶33 In light of the overwhelming evidence that Nelson and Adami mutually respected and supported each other similar to a married couple, their conduct is sufficient to establish that mutual consent to marry existed. Nelson and Adami did not engage in marital-like conduct unwittingly or accidentally; rather, the facts indicate their financial and familial actions, which were decided upon mutually, were taken purposefully and deliberately in a manner similar to a married couple. While Nelson disputed much of the

evidence in the record, the District Court repeatedly found her testimony and statements made in her affidavits not credible. The District Court did not err in finding that Adami met her burden that mutual consent to marry existed.

¶34 Regarding the third element of a common law marriage, cohabitation<sup>2</sup> and public repute, the District Court also did not err in finding that Adami met her burden. In establishing public repute, the couple must hold themselves out to their community as spouses. *Barnett*, ¶ 38. The course of conduct establishing public repute “cannot be partial, it must be complete and sincere, [and] when we speak of repute, we mean reputation, being the character and status commonly ascribed to one’s actions by the public.” *Sutherland*, 131 Mont. at 184, 309 P.2d at 328; *Barnett*, ¶ 38. In analyzing public repute, we view the “public” as the people in the couple’s community “whose knowledge would establish reputation,” not strangers or the broader public with whom the couple has minimal, if any, acquaintances. *Sutherland*, 131 Mont. at 184-85, 309 P.2d at 327-28.

¶35 Here, Nelson and Adami presented several witnesses who described them as married. While Nelson and Adami did not always hold themselves out as a couple to strangers or people who might not be accepting to them, Nelson’s and Adami’s friends, colleagues, and family members viewed them as spouses. The record provides ample evidence that those closest to Nelson and Adami viewed them as married, practically married, or a family. While Nelson and Adami lived in Charlottesville, they were viewed by Nelson’s colleague, Dr. Tanya Solis, as a couple. Dr. Solis later moved to Palestine to

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<sup>2</sup> Adami established cohabitation and the issue was not contested.

join Nelson in her medical office and testified that Nelson talked about Adami as her partner and would occasionally refer to her as her wife. Several other witnesses testified that Nelson and Adami conducted themselves as a married couple and were known to be monogamous and were a family. In fact, the only witnesses who testified that they did not view Nelson and Adami as married were Nelson's mother and sister, but their testimony indicates that this is because they refused to accept that same-sex couples could be married. Even though Nelson's mother refused to accept same-sex marriage, she treated Adami the same as how she treated her other children's spouses, including sending Adami a Mother's Day card acknowledging her appreciation of Adami and noting Nelson would be "lost without you."

¶36 Nelson and Adami also took actions similar to a married couple. Among other things, they attended couple's counseling together. Nelson and Adami, along with their children, asked to be, and were, accepted by their church congregation as a family unit. The children assumed Nelson-Adami as their surname.

¶37 Nelson strongly asserts that there is no justification for treating same-sex and opposite-sex couples differently in our analysis of whether a common law marriage existed, and that doing so would violate equal protection clauses of the Montana and United States Constitution. We agree that regardless of the fact that Nelson and Adami were in a same-sex relationship, the record demonstrates that a common law marriage existed. Overall, the record in this case reflects that, under the elements we apply to any asserted common law marriage, Adami has met her burden. *Compare with In re*

*Marriage of Hansen and Roffe*, 2019 MT 284, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_. The District Court did not err in finding a common law marriage.<sup>3</sup>

¶38 2. *Whether the District Court committed procedural errors requiring reversal.*

¶39 Nelson claims the District Court procedurally erred by allowing Adami to amend her petition and by issuing its judgment without Nelson receiving notice consistent with Uniform District Court Rule 10. She argues that because her counsel withdrew before the District Court issued its decision and she was not served with notice of Adami's posttrial filings, the District Court's orders should be reversed. Nelson also argues, under theories of judicial admission and judicial estoppel, that since Adami's counsel made a statement that Nelson and Adami were not "legally married" during a hearing deciding temporary support and parenting, Adami should have been barred from later amending her petition to add the claim of common law marriage.

¶40 Nelson's judicial admission and estoppel arguments fail. For a statement to constitute a judicial admission, three criteria must be met: 1) the statement must be made to the court; 2) the statement must be made by a party, or a party's attorney; and 3) the statement must be a statement of fact, and not a statement of opinion or law. *Bilesky v. Shopko Stores Operating Co., LLC*, 2014 MT 300, ¶ 13, 377 Mont. 58, 338 P.3d 76. The court "must still consider the entire context in which the statements were made before determining whether a statement constitutes a judicial admission." *Bilesky*, ¶ 14.

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<sup>3</sup> Nelson's claims regarding the District Court's award of spousal maintenance and equitable division of property rests on the premise that a common law marriage did not exist. Since we hold otherwise, we will not address those two arguments and affirm the District Court's ruling.



Whether a statement constitutes an admission is in the discretion of the district court and is reviewed for correctness. *Bilesky*, ¶¶ 12, 14.

¶41 The District Court was correct in rejecting Nelson’s argument of judicial admission. The finding by the District Court and the statement by Adami’s counsel that Nelson and Adami were “not legally married” was not a statement of fact based on an analysis of their relationship and whether they could have been “married” in the non-traditional sense of the term. As the District Court held, whether Nelson and Adami were “married” in the non-traditional sense is a mixed question of law and fact that requires legal analysis of the status of the law around common law marriage as applied to their relationship. Further, Adami had stated in her original petition regarding their relationship that: “They acquired the reputation, character, and status of people who behaved the same as married people and whose relationship was equal to marriage.” As the District Court correctly held: “While it is true that the parties were not ‘married’ in a formal sense . . . , it does not foreclose other definitions of marriage which can only be determined upon analysis of the applicable law and specific facts.”

¶42 Regarding the judicial estoppel claim, Nelson is barred from raising the claim since she failed to raise it during trial, and we will not fault the District Court for failing to address such issue since Nelson’s substantive rights were not affected. *Hansen Tr. v. Ward*, 2015 MT 131, ¶ 19, 379 Mont. 161, 349 P.3d 500.

¶43 In any case, Nelson’s judicial estoppel claim does not have merit. Element three of a judicial estoppel claim is that “the position presently taken must actually be inconsistent with the original position.” *Fiedler v. Fiedler*, 266 Mont. 133, 140, 879 P.2d

675, 679 (1994). The statement made by Adami’s counsel related to whether or not Nelson and Adami were “legally married” in a formal ceremonial sense, not whether their relationship rose to the level of a common law marriage. As discussed above, Adami’s original petition essentially already contained factual allegations tantamount to a claim of common law marriage, and Adami never stated otherwise. Adami’s present position regarding her common law marriage claim is not inconsistent with the original position plead in her petition.

¶44 The District Court also did not commit reversible error in issuing its order absent a Rule 10 notice to Nelson. “Rule 10 does not obligate the adverse party to advise his opponent regarding the option or possibility of pursuing post-trial proceedings in the district court.” *Prescott v. Innovative Res. Grp., LLC*, 2010 MT 35, ¶¶ 18-19, 355 Mont. 220, 225 P.3d 1253 (holding that where there are no further proceedings to be had against an opponent whose counsel has withdrawn posttrial, a failure to abide by Rule 10 notice does not require reversal of a district court’s decision). Rule 10(b)(2) specifically requires: “When the attorney representing a party to an action . . . withdraws . . . that party, *before any further proceedings* are had against him must be given notice by any adverse party . . . .” Mont. Unif. Dist. Ct. R. 10(b)(2) (emphasis added). In this case, Nelson’s counsel, with her consent, filed a motion to withdraw on July 19, 2018, which the District Court granted on July 30, 2018. At this point, trial had ended, no further proceedings were scheduled, and Nelson and Adami were awaiting the District Court’s orders on the various issues. Since no further proceedings were had or scheduled, notice requirements under Rule 10, as well as § 37-61-405, MCA, do not apply here.

¶45 3. *Whether the District Court erred in granting a variance from child support guidelines in its calculation of child support.*

¶46 Nelson alleges that the District Court erred in granting a variance from the child support guidelines without first applying the guidelines and without Adami presenting sufficient evidence to support the need for a variance. The District Court granted a variance in the child support calculations to exclude consideration of any maintenance awarded to Adami on the basis that including the maintenance amount in the calculation would reduce the amount of child support such that the children's standard of living would be far below what existed while Nelson and Adami were married. The District Court found that the guidelines support allowance of \$11,047 for the three children was too low given the resources of Nelson and Adami and the standard of living enjoyed prior to separation, and that reducing the child support amount by Adami's spousal maintenance amount would not be in the best interests of the children.

¶47 An award made by a district court will not be disturbed on appeal unless there has been a clear abuse of discretion resulting in substantial injustice. *Grenfell v. Grenfell*, 182 Mont. 229, 232, 596 P.2d 205, 207 (1979) (holding that a district court does not err in its award of child support where it hears evidence concerning the income of the parties, the standard of living of the family before the separation, and other relevant factors in determining child support). Importantly under this analysis, a "child's standard of living should not, to the degree possible, be adversely affected because a child's parents are not living in the same household." Admin. R. M. 37.62.101(2); § 40-4-204(2)(c), MCA.

¶48 Here, the District Court, after weighing the evidence and computing the child support using the child support guidelines, concluded that a variance was necessary to ensure that the children maintained their standard of living. The District Court made the finding that “the addition of maintenance, even the modest amount considered by the Court, in these circumstances would negatively impact the children and perpetuate the significant income disparity between parental households.” In analyzing the incomes of Nelson and Adami and relying on the child support guidelines, as exemplified in Exhibit B of the District Court’s order, the District Court did not abuse its discretion in calculating child support so as to ensure the children maintained their standard of living enjoyed prior to their parent’s separation.

¶49 *4. Whether the District Court erred in awarding Adami attorney’s fees.*

¶50 Section 40-4-110, MCA, grants a district court discretion to award attorney’s fees in a domestic relations case. An award of attorney’s fees under the statute “must be reasonable, based on necessity, and rooted in competent evidence.” *Weibert*, ¶ 10. We will not disturb an award of fees if it is supported by substantial evidence. *Weibert*, ¶ 10.

¶51 In determining necessity, the factors considered are: 1) the requesting party’s inability to pay her own attorney’s fees; 2) the other party’s ability to pay attorney’s fees; and 3) the relative financial positions of the parties. *Schmieding v. Schmieding*, 2000 MT 237, ¶ 26, 301 Mont. 336, 9 P.3d 52, *reversed in part on other grounds*, 2003 MT 246, 317 Mont. 320, 77 P. 3d 216. The nonexclusive factors included in determining the reasonableness of attorney’s fees are: 1) the amount and character of the services rendered; 2) the labor, time, and trouble involved; 3) the character and importance of the

litigation in which the services were rendered; 4) the professional skill and experience required; 5) the character and standing of the attorneys in their profession; and 6) the result secured by the services of the attorneys. *Morning Star Enters. v. R. H. Grover, Inc.*, 247 Mont. 105, 113, 805 P.2d 553, 558 (1991).

¶52 The District Court correctly found that a necessity existed on behalf of Adami. Adami would be unable to pay her fees without using a significant portion of the estate awarded to her and doing so would negatively impact her ability to meet her needs for housing, child care, and retirement. Further, a significant disparity between Nelson and Adami in their economic situation exists with Nelson's salary being at least eight times that of Adami's. As the District Court found, Nelson will eventually be able to replenish her share of the estate spent on attorney's fees, but Adami will not.

¶53 Regarding reasonableness of the fees, the District Court did not abuse its discretion. While it is generally required that a district court hold a separate evidentiary hearing to establish the reasonableness of fees, *In re Marriage of Dennison*, 2006 MT 56, ¶ 24, 331 Mont. 315, 132 P.3d 535, the District Court established substantial evidence to support its determination on the reasonableness of the fees. The District Court evaluated each of the reasonableness factors in its 144-page decision.

¶54 First, regarding the amount and character of the services rendered, the District Court established that Adami had paid \$67,502 in attorney's fees, mostly from funds she received from the sale of the Daly House, and that Adami still had \$112,578 in unpaid legal debts. Overall, the evidence established that Adami's attorney's fees amounted to

around \$212,502. Likewise, Nelson accrued \$357,720.35 in legal fees and paid \$106,054.79, leaving a balance of \$251,665.56.

¶55 The District Court also established evidence concerning the labor, time, and trouble involved. Having sat through the trial, the District Court is well aware of the labor, time, and trouble involved in this case. Testimony during trial by Nelson's and Adami's financial advisor and Adami revealed that Nelson had repeatedly changed her mind regarding financial plans or agreements made between them that resulted in unnecessarily causing Adami to incur legal fees. Examples included Nelson's agreement to transfer the Texas Clinic to Adami but then later refusing to sign the deed that Nelson's and Adami's financial advisor prepared, Nelson's refusal to memorialize an agreement reached regarding the sale proceeds of the Daly House, and Nelson's representation that she would begin making child support payments but then failing to do so until receiving a court order several months later. Such conduct by Nelson created additional and unnecessary trouble which further complicated the litigation and added to the attorneys' labor and time commitments in the case.

¶56 Third, the character and importance of the litigation was established by the District Court. The case involved a dissolution of a marital relationship between a couple who had, among other issues, an asserted common law marriage, a substantial amount of shared assets that needed to be equitably divided, three children whose child support needed to be calculated, and spousal maintenance that needed to be established. There is no question that the litigation was of high importance to both Nelson and Adami.

¶57 Factors four, five, and six were also established by the District Court. In reviewing the record of this case, it is clear that tremendous professional skill and experience was required of the attorneys in this case. Establishing a common law marriage, spousal maintenance, child support calculations, and the like is no simple task and requires not only a clear grasp of the legal issues but also a command of the factual issues involved, of which there were many in this case. The result secured by the services of the attorneys provided for a fair and equitable distribution of Nelson's and Adami's assets and responsibilities.

¶58 Overall, in determining the reasonableness of the fees, the District Court considered each of the reasonableness factors. The District Court also considered the impact that the fees would have on the marital estate and on the equitable distribution of the marital estate. Moreover, the District Court compared each party's attorney's fees in determining the reasonableness of the fees requested by Adami, finding that Nelson's fees were substantially higher. After reviewing the substantial evidence in the record, the District Court appropriately summed up its decision on attorney's fees providing: "Given the complexity of the issues, disparity in incomes, and necessity demonstrated by [Adami], the allocations ordered by the Court are reasonable, equitable and appropriate after careful consideration of the facts." We find the District Court's award of attorney's fees was supported by substantial evidence and the failure to hold an evidentiary hearing was harmless error since it had no significant impact on the result.

## CONCLUSION

¶59 The District Court did not err in finding a common law marriage existed between Nelson and Adami. In affirming the existence of a common law marriage, we also affirm the District Court's findings regarding spousal maintenance and equitable division of property since Nelson's claims regarding those issues hinged on the existence of a common law marriage. We also decline to reverse the District Court based on Nelson's alleged procedural errors. Regarding child support, the District Court did not clearly abuse its discretion in granting a variance from the child support guidelines since evidence in the record supported that the children's standard of living would be negatively affected without the variance. Lastly, we affirm the District Court's award of attorney's fees.

¶60 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ BETH BAKER

/S/ DIRK M. SANDEFUR

/S/ JIM RICE

/S/ INGRID GUSTAFSON