Recent Montana Cases Affecting Estate Planning
(Updated through January 2007)
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1. Conservatorship

a. **Duty / Cause for Removal** (In re Saylor, 328 Mont. 415, 2005 MT 236 (2005))

(i) When a conservator breaches the duties imposed upon him by statute governing conservator's fiduciary duties, there is good cause for removal. 72-5-423, M.C.A.

(ii) Conservators may be removed for good cause under 72-5-414, but "good cause" is not defined.

(iii) 72-5-423 provides that a conservator is to observe the standards of care applicable to a trustee.

2. Trusts

a. Division of Trust into Shares (In re The Dorthy W. Stevens Revocable Trust, 327 Mont. 39, 112 P.3d 972 (2005))

(i) Facts

(1) Revocable trust created by mother; two ranch properties transferred into it

(2) Upon mother's death, 4 sons were beneficiaries and trustees

(3) Trust could be terminated upon agreement of majority of trustees and trust beneficiaries entitled to 51% of the net income

(4) The death of any of the sons would not terminate the Trust; the deceased son's interest would pass in accordance with his estate directives or by intestate succession.

(5) Two sons became dissatisfied with the management of the Trust and the ranches and petitioned to divide trust in two.

(ii) **72-33-416. Division of trusts.** On petition by a trustee or beneficiary, the court, for good cause shown, may divide a trust into two or more separate trusts, if the court determines that dividing the trust will not defeat or substantially impair the accomplishment of the trust purposes or the interests of the beneficiaries.

(iii) So, under 72-33-416, must establish:

(1) Good cause

(2) Trust purposes

(3) Interests of the beneficiaries

(iv) District Court held good cause did not exist to divide the trust, and granted summary judgment; Supreme Court upheld.

(v) The Official Comments to 72-33-416 suggest that a division of a trust is appropriate when family members disagree or a beneficiary moves to a different part of the country. However, the statute itself requires that the trial court must make a determination of good cause in each case, which requires consideration of the individual circumstances, and then a discretionary call. In other words, not every situation involving family disagreements or moves by beneficiaries will necessarily constitute good cause for a trust division.

b. **Partial Revocation of Trust by Conveyance of Property** (Cole Revocable Trust v. Cole, 317 Mont. 197, 75 P.3d 1280 (2003))

(i) Facts

(1) Trustor deeded Flathead County property into his revocable trust.

(2) Trustor amended the trust on several occasions, one of which followed his re-marriage. This amendment acknowledged the recent marriage but provided that Trustor "hereby confirms and ratifies all the existing provisions of the Trust Agreement and has intentionally made no provision in the Trust for his wife Alta Cole." On December 8, 1989, Edgar executed a third amendment. This amendment required that, upon his death, the Flathead Property be held for Alta's use during her lifetime, with the trust accounting for maintenance fees, taxes, insurance, and other expenditures relative to the property.

(3) Six months later, the Trustor signed a deed granting the Flathead Property to himself and his new wife as JTWROS.

(4) Then the Trustor executed a fourth amendment to the trust agreement. The fourth amendment: revoked all prior amendments; granted a life estate in the Flathead Property to Alta; obligated the trust to pay Alta's property taxes, fire insurance, utilities, upkeep, and maintenance on the property; directed the remaining net trust income to be paid to Alta during her lifetime; named Dennis Cole (son? brother?) as the trustee, in the event Trustor could not act in that capacity; and granted the remaining trust estate to Dennis upon Alta's death.

(5) At the time Edgar executed the warranty deed, the trust provided:

2.01. While living, and competent, the Trustor may at any time or times, *by written notice filed with the Trustee,* (1) change any beneficiary; (2) amend any provision hereof to such extent as may be acceptable to the Trustee; (3) revoke this trust in

whole or in part; or (4) withdraw all or any part of the trust estate.

(6) Dennis died. Alta claimed the Flathead Property belonged to her; Dennis claimed it passed under the Trust.

(ii) Did the execution of the warranty deed constitute a partial revocation of the trust under 2.01?

(1) No. There was no written notice filed with the Trustee.

(2) The deed was not unequivocal.

(iii) Was there a breach of warranty under the deed?

(1) Maybe. But the issue had not been raised until the appeal, so the Supreme Court refused to consider it.

c. **Removal of Trustee** (Estate of Berthot, 312 Mont. 366, 59 P.3d 1080 (2002))

(i) Facts:

(1) Appellants became the income beneficiaries of a trust entitling them to receive the net income from the trust during their lifetime. Upon the death of whichever Appellant died last, the trust would terminate and the principal would be distributed equally among Appellants' six children.

(2) Appellants wanted to change the corporate Trustee. They were unhappy because the Trustee had been investing for growth rather than income. The trust was irrevocable, and did not provide them any power to change the trustee, but they argued they could do so my amending the trust using 72-33-406, M.C.A

(ii) **72-33-406. Modification or termination of irrevocable trust by all beneficiaries.** (1) Except as provided in subsection (2), if all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust upon petition to the court.

(2) If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust. Under this section the court does not have discretion to permit termination of a trust that is subject to a valid restraint on transfer of the beneficiary's interest as provided in part 3.

(iii) 72-33-406 M.C.A. requires unanimous consent of beneficiaries in order to modify or terminate trust; where 1 of 6 income beneficiaries remains neutral, that is not unanimous consent.

(iv) Even if there is unanimous consent, trustee will not be removed if to do so would be contrary to a material purpose of the trust. 72-33-406(2). Trustee will not be removed for administering trust in manner to promote growth rather than income (trust was heavily invested in equities), where

the trustor's intent is to benefit the remaindermen, rather than the income beneficiaries.

(v) Side issue: It is not a conflict of interest for a corporate trustee to base its fees on the value of the trust under administration, where those fees are consistent with amounts charged by other corporate trustees.

3. Gifts

a. **Gift to dissolved corporation** (Valley Victory Church v. Sandon et al., 326 Mont. 340, 109 P.3d 273 (2005))

(i) Facts:

(1) Valley Victory Church (the Church) of Kalispell incorporated as a religious corporation. The Church hired an attorney to attend to its responsibilities as a corporation, including filing required annual reports with the Secretary of State. The attorney subsequently left the state of Montana, but did not inform the Church that it needed to continue filing annual reports in order to retain its status as a corporation. Because of a failure to file the next annual report, the Secretary of State suspended the Church's corporate status and involuntarily dissolved the corporation. The Secretary of State sent notice of the suspension, but it sent the notice to the Church's former attorney's now vacant office. Therefore, the Church did not receive word of the suspension. It is undisputed that the Church continued operating as though it were a religious corporation, and that it did so in good faith.

(2) Donors gave a plot of land outside to the Church. The donors gave the land partly because they wished to help the Church, but also partly because they wanted to take advantage of the tax deduction for the gift.

(3) "The Church anticipated erecting a new church building on the property. Before it could do so, however, it needed to raise the level of the land. Therefore, around the time the [donors] made their gift, a sign was placed on the land asking for anyone who wanted to help out to dump fill dirt on the property. Many different parties took advantage of this opportunity. Unfortunately, much of the fill contained asphalt and garbage. The Department of Environmental Quality told the Church that the asphalt and garbage must be removed from the fill. The substantive claims of this suit, not at issue in this appeal, concern damages the Church incurred in cleaning the fill."

(4) The Church then sued excavating businesses for damages due to dumping of asphalt and other fill on land, and business filed third-party complaint against alleged donors of land to church. Businesses brought motion for summary judgment, contending that

church did not own land due to lapse in corporate status at time land was donated and thus lacked standing.

(5) The District Court ruled that the Church could not have accepted the gift from the donors because at the time it was not a corporation; and since the Church did not acquire ownership of the land, it lacked standing to bring the suit.

(ii) Relation Back

(1) The Supreme Court ruled that the reinstatement of the corporation related back to the date of dissolution under 35-6-202, M.C.A., and therefore the corporation was able to accept a gift

(2) § 35-2-725, M.C.A., states: "A dissolved corporation continues its corporate existence but may not carry on any activities except those appropriate to wind up and liquidate its affairs...." The statute then enumerates what these "activities" include, but does not list "receive gifted property," or the like.

(3) The Supreme Court said, "If § 35-6-202, M.C.A., is read as not allowing the corporation to ratify past corporate acts (such as the acceptance of gifted property, or the making of a contract), it becomes meaningless. Instead, § 35-2-725, M.C.A., governs the acts of corporations that are in liquidation while § § 35-6-201 and 202, M.C.A., give corporations the option of applying for reinstatement, especially in instances such as this one where they were involuntarily dissolved for failure to file an annual report."

b. **Requirement of Donative Intent** (Valley Victory Church)

(i) Same case as above, but additional issue raised by donors was that they did not have requisite donative intent at time of gift, because they thought the church was incorporated.

(ii) An inter vivos gift requires: (1) donative intent, (2) delivery, and (3) acceptance.

(iii) When the donors discovered that the Church was in fact not a legal corporation, they filed a "Revocation and Notice of Invalidity of Deeds." Because this revocation was before the Secretary of State reinstated the Church's corporate status, the donors contended the reinstatement did not retroactively create donative "intent" which had already been revoked.

(iv) One of my all time favorite statements by the Montana Supreme Court: "Thankfully, we can dispose of this issue without a deep analysis into the metaphysical status of the "potentiality" and "actuality" of the Strucks' donative intent. As with constitutional matters, we will seek to resolve an issue so as not to decide a metaphysical question."

(v) The Supreme Court ruled that the corporation by estoppel doctrine prevented the donors from contesting the gift.

(1) Where one has recognized the corporate existence of an association, he is estopped to assert the contrary with respect to a claim arising out of such dealings.

(2) The doctrine may apply to the corporation itself, or to the corporation's opponent.

(3) A person or entity who has contracted with, or otherwise dealt with a company as a corporation is estopped to deny its corporate existence.

(4) The doctrine rests upon equitable principles, and should only be applied when equity requires it.

(vi) This was the first time the Montana Supreme Court explicitly followed the corporation by estoppel doctrine ("This Court has recognized the validity of the doctrine in the past, and while we have not explicitly applied it as a rule of law, we have done so implicitly.")

(vii) The Supreme Court distinguished this from the *de facto* corporation doctrine, which it stated has been abolished by adoption of the Montana Business Corporation Act.

(viii) "We conclude that under the corporation by estoppel doctrine neither the Respondents nor the Strucks may argue that the Church was not a corporation when the Strucks made their gift. Respondents are merely doing so in order to avoid the question of liability in tort. It would be inequitable to allow them to escape this possible liability just because the Church, acting in good faith, was involuntarily dissolved at the time the possible liability arose."

c. **Qualified Gifts** (In re Guardianship and Conservatorship of Gilroy, 323 Mont. 149, 99 P.3d 205 (2004))

(i) Facts

(1) Mother and father had 4 children.

(2) Mother and father transferred 4 vehicles into joint tenancy with one son.

(3) After father died, mother transferred home into joint tenancy with same son.

(4) A month later, mother was diagnosed by three doctors as having Alzheimer's disease.

(5) Six months after that, daughter petitioned to have guardian appointed for mother. Petition was granted. Guardian was a third party.

(6) Guardian sought return of vehicles and residence. Son resisted.

(ii) Applicable Law

(1) Section 70-3-201, M.C.A., provides that "a gift in view of death is one which is made in contemplation, fear, or peril of death with intent that it shall take effect only in case of the death of the giver."

(2) A gift in view of death may be revoked by the giver at any time. Section 70- 3-203, M.C.A..

(iii) The vehicles

(1) The son "admitted he had no expectation of using or possessing the vehicles while his parents were alive. His testimony thus revealed that the vehicle title transfers were not intended to create a present possessory interest and were made conditional upon the death of both Mr. and Mrs. Gilroy. In addition, [the daughter's] testimony corroborated David's statements that he had agreed to transfer the property back and had never claimed a present, gifted interest in the property. Because the evidence established that addition of David's name to the titles of the four vehicles was for purposes of controlling their ultimate distribution upon the deaths of both Mr. and Mrs. Gilroy, and that the vehicles were to remain for the use and benefit of the Gilroys for so long as they desired, the transfer was a qualified transfer which was revocable by Mrs. Gilroy or her Guardian after Mr. Gilroy's death."

(2) "The distribution of property to another may validly be accomplished by designation upon its title, however, pursuant to § 70-3-203, M.C.A., such transfers, when made in view of death, are qualified and may be revoked by the giver at any time."

(3) So, the son had to return the vehicles. Even though father died sometime earlier.

(4) P.S., the four vehicles included a 1971 Plymouth, 1979 Lincoln, 1984 Paro motor home, and a 1984 Ford Truck.

(iv) The house

(1) On direct examination, the son admitted that, prior to the transfer of the property to him, he had agreed to transfer the property back to his mother upon her request in the event she wanted to sell the home. The son's testimony was corroborated by two other witnesses.

(2) "In Montana, delivery occurs by either 'words, acts, or both.' 'The law does not require actual handing over of the document so long as it is handled in a way that unequivocally shows the intention of the settlor.' Here, Mrs. Gilroy's intention that David would transfer the house back to her upon request was expressed and confirmed by David prior to the signing of the deed."

(3) The Supreme Court found that the purpose in deeding an interest in the property to the son was to control the distribution upon the

mother's death. Therefore, it was determined that placement of the son's name on the real property by way of a deed was a qualified and revocable gift that was later revoked by the mother's Guardian.

4. Wills & Estates

a. Duty of Personal Representative to Disclose (Estate of Stukey, 323 Mont. 241, 100 P.3d 114 (2004))

(i) Facts:

(1) Decedent signed a will in 1998. Some time later, she was declared incompetent and involuntarily committed to the Montana State Hospital at Warm Springs. In that will she disinherited one daughter (Evon) and bequeathed a majority of her estate to another (Charlene).

(2) Thereafter, a conservatorship was filed and Evon was appointed conservator of Decedent's estate.

(3) Evon thereafter requested her mother's law firm to provide her with documents and information regarding her mother's assets. Included with these documents was her mother's 1998 will in which Evon had been disinherited.

(4) Without notifying the court or Decedent's counsel, Evon moved her mother from Warm Springs, relocated her to Washington state, and placed her in an Alzheimer's unit of an assisted living home. While in the Alzheimer's unit, Decedent purportedly signed a new will dated February 12, 2001, bequeathing all of her estate to Evon and her family. Decedent remained in the Alzheimer's unit until her death on March 8, 2001.

(5) Following Decedent's death, her law firm filed a petition to probate her 1998 will and requesting that Charlene be appointed personal representative. Evon filed a petition in Washington attempting to probate the later will of Decedent.

(6) The parties began negotiations to resolve which will would be admitted to probate and the issues raised in the conservatorship. The parties held a settlement conference, and reached an agreement as reflected in a Memorandum.

(7) The Memorandum set forth certain payments to be made by the estate with the remainder to be divided equally between Charlene and the Leistiko heirs. The assets to be distributed were determined by resorting to inventory reports Evon filed under oath in various courts.

(8) Neither Charlene nor her attorney knew until approximately nine months after the Memorandum was signed that part of the assets Evon had reported under oath were actually annuities and joint te-

nancy properties which were to be paid to Evon upon the death of her mother. By virtue of being named beneficiary, Evon received the proceeds of the annuities of approximately $256,000 within one week of the mediation. She contends she should be able to keep all of those, and only probate assets were subject to division pursuant to the Memorandum.

(9) Charlene contended in the District Court that Evon did not now have a right to reduce the settlement amount by the value of the annuity and joint account proceeds and the District Court agreed. Evon now appeals. Charlene's argument was that Evon should be estopped from now asserting that assets that had been included in inventories filed by Evon were not part of the settlement.

(ii) "Decedent's daughter, who agreed to a settlement that divided decedent's estate between daughter and decedent's niece based on daughter's prior inventory of estate, was equitably estopped from asserting that certain assets in inventory were annuities and jointly held property not subject to division under settlement agreement; daughter remained silent during settlement negotiations as to existence of annuities and joint property, daughter knew that no other parties knew of such property and that all of them believed that amount to be divided was amount reflected in inventory, and niece agreed to division of estate based on daughter's misrepresentations as to its value. M.C.A. 26-1- 601(1)"

b. **NEW: Adult Adoption** (Estate of Bovey, 331 Mont. 254, 132 P.3d 510 (2006)

(i) Ford Bovey was a beneficiary of a trust created under the Will of his mother, Sue Bovey.

(ii) The residuary clause of the trust read as follows:

Upon the death of my son, Ford, this trust shall terminate and all of the then remaining accrued and unpaid income and all of the then remaining principal of this trust shall be distributed, outright, and free of trust, in equal shares, to my then living heirs-at-law.

(iii) Ford had no children of his own, but adopted the daughter of his wife, when the daughter (Lisa) was 25 years of age.

(iv) The court found Lisa was not entitled to take the residuary of the trust, due to the provisions of 72-2-715, M.C.A., which provides as follows:

72-2-715. Class gifts construed to accord with intestate succession.

…

(3) In addition to the requirements of subsection (1), in construing a dispositive provision of a transferor who is not the adopting parent, an adopted individual is not considered the child of the adopting parent unless the adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent.

(v) The court found that Lisa had not lived as a regular member of the household of the adopting parent.

(vi) Ford had also made statements that it was his intent in adopting Lisa to allow her to take the residuary of the trust. The court found this to be the equivalent of attempting to exercise a power of appointment he did not have.

c. When Cash isn't Money (Estate of Bjerke, 322 Mont. 280, 95 P.3d 704 (2004)

(i) Facts:

(1) Teri Hanson was one of the named beneficiaries in the last will and testament of E. Gilman Bjerke. However, a year after Mr. Bjerke's will was admitted to probate, certain real property devised to Hanson had not yet been distributed to her. Meanwhile, the personal representative had distributed over $150,000 to the named beneficiary of the residuary estate, Scobey Alumni Foundation, Inc. (SAFI). Hanson filed a declaratory action seeking an interpretation and declaration of her rights pursuant to Mr. Bjerke's will. Hanson claimed that the eighth paragraph of the will gave her all personal property not designated on a list attached to the will. That portion of Mr. Bjerke's will states:

> EIGHTH: I have made a list of all my personal belongings and household effects, and have set forth in said list the party to whom I wish to give each item, and have made this list available to my said personal representative, and it is my desire that said heirs and beneficiaries abide by that list as if it were a part of this, my Last Will and Testament. Any article of personal property not designated by said list shall be determined to be a content of my house and shall be bequeathed to Teri R. Hanson.

(2) Hanson argues that money is personal property. Accordingly, since Mr. Bjerke's money was not included on the attached list, Hanson posits that Bjerke intended to bequeath all money to her as contents of his house.

(3) Darrel Tade, the personal representative responded, seeking to void all of Hanson's inheritance other than one dollar by invoking the "no-contest" provision of the will.

(4) Hanson moved to have Darrel Tade removed as personal representative.

(ii) The phrase "personal property" includes money.

(iii) But here, the testator referred not just to "personal property," but more specifically to "articles of personal property." Furthermore, the testator had attached a list of items of tangible personal property, pursuant to § 72-2-533, M.C.A.. The list included such items as a pickup truck, a snowblower, and a floor hoist.

(iv) "We hold that the District Court honored the intent of the testator and correctly concluded that 'cash' (i.e., currency and coin) is an item of tangible personal property and that paragraph eight bequeathed to Hanson any cash deemed to be found within the house. On the other hand, invested money is not an 'article of personal property' and thus does not pass to Hanson under paragraph eight as 'contents of the house.'"

(v) What about stock certificates?

d. Contracts for Devises (Estate of Braaten, 322 Mont. 364, 96 P.3d 1125 (2004))

(i) Decedent's Will left his entire estate to his son. For roughly twelve years prior to Keith's death, his stepson, Herman Braaten (Herman), and Herman's family cared for Keith and his residence. Keith was infirm and cantankerous, yet Herman and his family fed Keith, painted his house, tended the yard, took him to the doctor, bathed him, took him to the grocery store, cared for his dog, cleaned his carpet, and dug a well on his property, among other chores. Herman maintains that Keith promised to leave the house to him upon his death and that this promise motivated him to attend to Keith and his property.

(ii) The son (Barney) lived in Texas, had not visited Montana for nearly a decade, and relied on Herman to tend to his father's needs. After Keith's death, Barney gave Herman several items from Keith's estate, but he sold the house for $65,000 and retained the proceeds in the estate.

(iii) Hermann lost, because of explicit provisions of 72-2-534:
72-2-534. Contracts concerning succession. (1) A contract to make a will or devise or not to revoke a will or devise or to die intestate, if executed after July 1, 1975, may be established only by:
(a) provisions of a will stating material provisions of the contract;
(b) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or
(c) a writing signed by the decedent evidencing the contract.

e. **Claims for Care** (Estate of Orr, 313 Mont. 179, 60 P.3d 962 (2002))

(i) Facts:

(1) Everett T. "Jazz" Orr died at the age of 79 survived by his eight adult children. He had executed a holographic will that was subsequently replaced by a written Will, both of which contained substantially similar terms. He created yet another will in which he named a personal representative to his Estate but did not change the distribution of his assets among his children, but this latter will was not signed.

(2) Three of his daughters claim they began assisting their father with some of his basic daily care needs such as cleaning, cooking, paying bills, arranging for medical care and the like, following their mother's death.

(3) Under the Will admitted to probate, those 2 of those 3 daughters were left $2,000 and the other $1,000, while the bulk of his estate was left to his sons.

(ii) "Generally, it is true that when services are provided to one person by another and such services are knowingly and voluntarily accepted, the law presumes that the services were provided in expectation of payment. … Where a relative seeks payment for such services, the presumption is that the services were rendered gratuitously."

(iii) This presumption can be rebutted, with a showing of proof that there was an express agreement for payment of services or there exist "facts and circumstances from which such an agreement can be inferred." Additionally, a claimant must prove that a remuneration agreement existed "at the time the services were originally rendered."

(1) The daughters submitted claims against the estate for services rendered. They each testified about non-specific comments and somewhat veiled "promises" allegedly made by their father to each of them personally, outside the presence of anyone else. That did not rise to the level of proof or evidence of an express or implied agreement that successfully rebuts the presumption.

(2) The three daughters "admitted that services to Mr. Orr began due to filial relationship." Additionally, Donna testified that she would have performed these services for her father "if he hadn't had any money." Such admissions are fatal to a claim of express or implied contract for remuneration under these circumstances.

(3) The father executed a second will, *after* one daughter had provided care-giving services to him. Had he wished to provide the allegedly-promised compensation from his Estate and guarantee its payment, the will change would have been a perfect opportunity to do so.

f. Civil Procedure

(i) **Appeal from Order Appointing Personal Representative** (Estate of McMurchie, 321 Mont. 21, 89 P.3d 18 (2004))

(1) An order granting letters of administration is an appealable order. An aggrieved party has thirty days from the date of entry of an order to file a notice of appeal. An appeal after that is too late.

(ii) Required Notice (Estate of Spencer, 313 Mont. 40, 59 P.3d 1160 (2002))

(1) Closing formally an estate that has been opened informally requires notice to interested persons. .

(a) Appeal period does not start until notice of entry of judgment is entered.

(2) Rules of Civil Procedure are not applicable to informal probates, but they are to formal probates

(3) Distinction between formal and informal probate:

(a) Judge

(b) Notice

(iii) **NEW: Probate Orders from Other States** (Estate of Lambert (2006) 333 Mont. 444, 143 P.3d 426).

(1) Probate opened informally in Alabama, which did not require notice to heirs did not have to be recognized in Montana.

g. Administration Expenses

(i) Cost to maintain house is chargeable to devisee who continues to live there. Estate of McMurchie

(ii) "Though Dorothy's house was part of her estate, at her death it immediately devolved to her specific devisee, Mary. Only if David [the Personal Representative] had determined that it was necessary for him to take possession of the house for administration purposes would he, as personal representative, have been obligated to manage, improve, repair, insure, or pay taxes on the property pursuant to § 72-3-613, M.C.A.. David, however, did not take possession of the house. Rather, Mary lived in it from the time of Dorothy's death. Thus, the payments made by David for upkeep on the house were solely for Mary's benefit and chargeable as an advance against Mary's share of the residue of Dorothy's estate."

h. Undue Influence

(i) **(**Pense v. Lindsey, 316 Mont. 429, 73 P.3d 168 (2003))

(1) Confidential relationship can be established merely by basic assistance in the form of personal care, transportation and/or advice in financial affairs.

(2) Physical and mental condition can affect ability to withstand influence.

(a) Had dementia

(b) Led protected life

(c) Extremely generous in childlike manner … "profligate generosity"

(d) Combination of physical and mental traits led to "unique weakness of mind"

(3) Pense signed deed conveying her homestead to new-found "friends."

(4) "This call set in play a relationship between Pense and Jack, and a course of events that saw Pense authorize and then revoke no less

than five wills over a period of eighteen months. The wills were prepared first by her divorce attorney Bryan, whom Pense later said prepared a will without being asked to do so; by Jack's employer Stephens, who prepared wills # 2 and 5 in the sequence to the benefit of Jack; and by Murnion, who acted as "local counsel" for both Bryan and Stephens, and who prepared two wills falling between the Stephens' wills that omitted any reference at all to Jack. The various wills were remarkable for their disparity--Pense went from endowing to disinheriting her cousins, ranch employees and Jack, usually without any apparent triggering events. One factor above all struck the District Court about these changes in bequest: when Stephens wrote the wills, Jack figured prominently in them, being named personal representative of Pense's estate and inheriting the homestead."

(5) "[S]he believed that she was signing an agreement giving the Lindseys access to her grandfather's homestead property for recreational purposes. She stated she did not intend to give this property to the Lindseys."

(6) The Montana Supreme Court found a confidential relationship. It said, "in most confidential relationships, one party provides to another party basic assistance in the form of personal care, transportation, and/or advice in financial affairs."

(7) Also found the presence of other factors showing undue influence.

(8) Court concluded the deed had been executed under undue influence.

(ii) **NEW**: Stanton v. Wells Fargo Bank Montana, N.A.Mont. (2007), --- P.3d ----, 335 Mont. 384, 2007 WL 242566 (Mont.), 2007 MT 22.

(1) Attorney / accountant drafted amendment to trust and Will naming himself as sole beneficiary.

(2) Charity who had been named in prior trust sued to set aside on the grounds of undue influence. Also sued corporate trustee for breach of duty in failing to protect it as beneficiary.

(3) Attorney was the ex-son-in-law of decedent. He had maintained a close relationship with the decedent, taking her places and checking on her frequently.

(4) Decedent's daughter had requested that her mother take good care of her ex-husband.

(5) Attorney conceded confidential relationship, but court found that still didn't establish undue influence.

(6) Charity wanted the burden of proof to be on the attorney. Court didn't require that.

(7) Undue influence is defined at 28-2-407, M.C.A. as follows:

28-2-407. What constitutes undue influence. Undue influence consists in:

(1) the use by one in whom a confidence is reposed by another or who holds a real or apparent authority over him of such confidence or authority for the purpose of obtaining an unfair advantage over him;

(2) taking an unfair advantage of another's weakness of mind; or

(3) taking a grossly oppressive and unfair advantage of another's necessities or distress.

(8) The *Stanton* court said, "To determine whether there has been undue influence, a court may consider: (1) any confidential relationship between the person alleged to be exercising undue influence and the donor; (2) the physical condition of the donor as it may affect his or her ability to withstand influence; (3) the mental condition of the donor as it may affect his or her ability to withstand influence; (4) the unnaturalness of the disposition as it relates to showing an unbalanced mind or a mind easily susceptible to influence; and (5) the demands and importunities as they may affect the donor, taking into account the time, place, and surrounding circumstances."

(9) The *Stanton* court said these five criteria are "nonexclusive" and merely guide the court in applying the statutory requirements.

(10) The court also found no duty owed by the trustee to the beneficiary. This was a revocable trust, and 72-33-701, M.C.A. provides that the only duty is owed to the one who has the power to revoke.

(iii) **NEW**: Estate of Harms, 335 Mont. 66, 149 P.3d 557 (2006)

(1) Father left stock in ranch corporation to one son who had worked on ranch his whole adult life. Others received much smaller amounts; one child completely disinherited;.

(2) Court found that it was not an unnatural disposition to leave bulk of estate to one child.

(3) Applied the same test as *Stanton* in finding that there was no undue influence.

(4) Also found that there was sufficient testamentary capacity, applying the three prong test it has used since 1965, namely, the testator must be aware of:

(a) The nature of the act to be performed;

(b) The nature and extent of the property to be disposed of; and

(c) The objects of his or her bounty.

i. Holographic Wills

(i) Ademption (Holtz v. Deisz, 316 Mont. 77, 68 P.3d 828 (2003))

(1) Facts:

(a) "A few days prior to his trip to California, Michael left a sealed envelope addressed to "Dad" in his room in the home he shared with JoAnn Holtz, petitioner. This was consistent with his practice of leaving such sealed envelopes with his father before he left town for extended periods."

(b) Michael suffered stroke while on California trip. Went to nursing home.

(c) Property left to co-habitant was sold to provide for nursing home care.

(2) Letter was determined to be a holographic will. Did not specify disposition of residuary. Letter provided for disposition of majority of assets to co-habitant. Court said this indicated general rather than specific devise, so no ademption.

(3) Even if it had been specific, statute require finding of intent to adeem, and that intent was not shown, so same result either way.

(ii) Holographic Wills vs. Writings Intended as Wills (and Codicil vs. Property List) - Estate of Johnson, 313 Mont. 316, 60 P.3d 1014 (2002)

(1) **Facts**: Earl Johnson died testate and was survived by two sons, Roger and Russell Johnson. Earl had executed a formal will. Russell was appointed personal representative of Earl's estate and offered the will for informal probate proceedings. After Russell filed the Final Account and Personal Representative's Sworn Statement to Close Estate, his brother Roger filed a petition for a formal probate. At issue was a holographic document executed by Earl shortly before his death. The document is merely a list of some of Earl's possessions and names. It is entirely in Earl's handwriting and is signed and dated.

(2) In the informal probate proceeding, Russell treated the document as a list detailing to whom Earl wished certain property to be distributed. Roger alleged the document constituted a codicil to the will.

(3) District Court found on summary judgment that the document was a list of personal property. But District Court decided this applying 72-2-523. Writings intended as wills which requires clear and convincing evidence rather than 72-2-522. Execution -- witnessed wills -- holographic wills, which does not.

(iii) **NEW**: Estate of Lambert, 333 Mont. 444, 143 P.3d 426 (2006)

(1) Decedent lived in Alabama and was coming to Montana to work in Yellowstone National Park, when he died in an automobile accident.

(2) He had nothing other than a small bank account back in Alabama.

(3) He left a writing that was a holographic will under Montana law, but might not have been under Alabama law.

(4) The *Lambert* court set forth the following three requirements for a holographic will to be a valid in Montana:

(a) First, the testator must be at least eighteen years of age and of sound mind. Section 72-2-521, MCA.

(b) Second, a holographic will meets the formalities of execution if its material provisions are in the handwriting of the testator and signed by the testator. Section 72-2-522, MCA.

(c) Finally, the testator must have testamentary intent; he or she must intend that the document will dispose of his property after death.

(5) His son was appointed Personal Representative in intestacy in Alabama. His mother was appointed Personal Representative in Montana, on the basis that she was named as Personal Representative under the holographic will.

(6) The mother claimed that the estate had a survival action, which was Montana property, and therefore Montana law should govern. The Montana Probate Code applies to "the property of nonresidents located in this state." 72-1-201(2), M.C.A. Apparently, this is not limited to real property. It is unusual for intangible personal property to be probated in a state other than the state of the decedent's domicile.

(7) The Montana court did not recognize the Alabama court's jurisdiction, because the Montana Uniform Probate Code only requires that recognition be given to final orders of a court of another sate when in a proceeding involving notice, and in this case, the Alabama probate had been opened informally, without notice.

72-3-312. Effect of final order in another state. A final order of a court of another state determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state if it includes or is based upon a finding that the decedent was domiciled at his death in the state where the order was made.

(8) Note: The Montana law for holographic wills might not have been applied had the court determined that the survivor action was not Montana property.

j. **Required Witnesses to Execution of Will** (Estate of Hall, 310 Mont. 486, 51 P.3d 1134 (2002))

(i) For a will to be valid, two people typically must witness the testator signing the will and then sign the will themselves. *See* § 72-2-522(1)(c), M.C.A..

(ii) If two individuals do not properly witness the document, § 72-2-523, M.C.A., provides that the document may still be treated as if it had been executed under certain circumstances. One such circumstance is if the proponent of the document establishes by clear and convincing evidence that the decedent intended the document to be the decedent's will.

(iii) In Estate of Hall, husband and wife had signed joint will only in the presence of their attorney. Evidence indicated they did not consider it final, pending some changes, but that until the final document was prepared, this is what they intended as their will.

(iv) Daughter from previous marriage contended the original will should be probated, not the joint will.

k. Apportionment of Taxes

(i) In general, taxes are to be apportioned, but this can be overcome by explicit provision in Will.

(ii) And when a Will contains such an explicit provision a codicil that is silent on the point will also be governed by that provision. The Will and the codicil must be construed together. Kuralt III, 315 Mont. 177, 68 P.3d 662 (2003).

(iii) Such a provision is not overridden by an express purpose stated in the Will to tax full advantage of the marital deduction so as to save estate taxes.

l. NEW: Partnership Property

(i) In Cerise v. Cerise, 332 Mont. 548, 138 P.3d 427 (2006), a memorandum decision that cannot be cited as precedent, the Court determined that property owned by two brothers was partnership property, and so the one brother's attempt to devise a part of the property under his Will failed. Instead, it passed as part of his partnership interest.

m. Priority of Appointment as Personal Representative

(i) In Estate of Ober 314 Mont. 20, 62 P.3d 1114 (2003), Decedent (John) died intestate. His brother was appointed Personal Representative. Decedent's female cohabitant (Selma) objected and petitioned to be appointed Personal Representative.

(ii) Issue: Brother had priority to be appointed unless Selma was married to John.

(iii) The party asserting the existence of the common-law marriage must prove that: (1) the parties were competent to enter into a marriage; (2) the parties assumed a marital relationship by mutual consent and agreement; and (3) the parties confirmed their marriage by cohabitation and public repute.

(iv) Female cohabitant was determined to be common law wife, despite the following evidence introduced at trial: (1) Selma did not assume John's last name; (2) John and Selma maintained separate property and bank accounts; (3) John and Selma filed their taxes as "single" taxpayers; (4) John and Selma filed documents with the Farm Service agency as "single" persons; (5) John did not designate Selma as the beneficiary on his life insurance policy; (6) John did not report Selma as his spouse to his employer; (7) John granted his brother Benno Ober power of attorney in three separate documents; (8) John continued to pay rent on an apartment in Conrad, Montana, after he moved into Selma's home near Power, Montana; and (9) Selma continued to receive her widow's survivor benefit from the Social Security Administration under the name of her deceased husband, Frank Klein. Finally, the Appellants assert that John was not wearing a ring in any of the photographs introduced into evidence at trial.