Montana Estate Planning Case Law
(2007 through 2011)

Presented to Western Montana Estate Planning Council

By

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Attorney – CPA

January 10, 2012

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RIGHT TO DIE

BAXTER

Holding: Physicians may prescribe drugs that are self-administered by a competent adult with the intention and result of killing himself, without the physician being guilty of homicide. ***Baxter v. State***, 354 Mont. 234 224 P.3d 1211 (2009)

Issue:

Montana law provides that homicide is a crime, but also provides that the consent of a victim to what is otherwise a criminal act is a defense, subject to enumerated exceptions, such as when the victim is incompetent to give consent, and, of particular importance in this case, when allowing the defense would be against public policy.

In this case, the issue was whether a physician who prescribes suicide drugs could rely on this "consent defense;" that is, if the physician could otherwise be held responsible for the homicide of the patient, could the physician claim that the patient had consented to the act. The state argued that it would be against public policy to allow a "consent defense" but the Montana Supreme Court held that it was not against public policy.

It is worth noting that the Supreme Court was asked to determine this case on constitutional grounds, but they declined to do that and instead based their decision on an interpretation of existing statutes.

Ruling:

What was not decided:

The District Court had held that a competent, terminally ill patient has a right to die with dignity under Article II, Sections 4 and 10 of the Montana Constitution. Sections 4 and 10 address individual dignity and the right to privacy, respectively. The District Court further held that the right to die with dignity includes protecting the patient's physician from prosecution under Montana homicide statutes. The District Court concluded that Montana homicide laws are unconstitutional as applied to a physician who aids a competent, terminally ill patient in dying.

The Supreme Court, however, invoked the judicial principle that it should decline to rule on the constitutionality of a legislative act if it is able to decide the case without reaching constitutional questions. Because the Supreme Court found the physicians' actions were protected by statute, there was no need to reach the constitutional issues raised. Although the District Court had based its ruling on the Montana Constitution, the Supreme Court did not. Consequently, if the

consent defense statute is amended, this issue might return to the Supreme Court to be determined on constitutional grounds.

What was decided:

The Supreme Court found that a physician's assistance in providing the means to end one's own life was not against public policy and therefore did not come within the exception to the consent defense for acts against public policy.

Rationale: Public Policy

The Supreme Court looked to other case law and found that in general it is "against public policy" to find that a victim would have consented to an assault and battery or other acts of violence by someone else. This case, however, involved no breach of the peace and was between a physician and patient. The physician did not administer the drugs.

The Supreme Court also looked to the Montana Rights of the Terminally Ill Act, which allows for living wills, and found that the legislature in effect found that public policy was served by allowing individuals to make their own decisions about the circumstances under which they would die.

VALIDITY OF TESTAMENTARY TRANSFERS

TESTAMENTARY CAPACITY

Estate of Lightfield

In ***Estate of Lightfield***, 351 Mont. 426, 213 P.3d 468 (2009) the Supreme Court restated the test for testamentary capacity:

> [A] testator is competent if he is possessed of the mental capacity to understand the nature of the act, to understand and recollect the nature and situation of his property and his relations to persons having claims on his bounty whose interests are affected by his will.... The testator must have sufficient strength and clearness of mind and memory to know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and the nature of the act which he is about to perform, and the names and identity of the persons who are to be the objects of his bounty, and his relation towards them.

Testamentary capacity requires the testator be aware of three elements: (1) the nature of the act to be performed, (2) the nature and extent of the property to be disposed of, and (3) the objects of his or her bounty.

Testamentary capacity is determined as of the date the will was executed.

The proponent of a will has the burden of establishing prima facie proof of its due execution. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation.

Where a duly executed will is submitted for probate, a presumption exists that the testator was competent and of sound mind.

The Supreme Court found that the Testatrix did *not* have testamentary capacity, based on the following factors:

- There was evidence in the record that as much as one year before the holographic will, the Testarix was confused and uncertain about her assets;
- She often did not know what was happening around her, and she was delusional;
- She often could not remember people, nor could she recall what she had done with her property;
- She thought that the sheriff as well as everyone in Richland County was on drugs;
- She was paranoid and thought people were stealing from her;
- She was not truly aware she would be treating her children differently;
- When she signed her holographic will, the Testatrix did not understand that it would govern the distribution of her assets upon her death and would revoke any prior wills that she may have made;
- She was not aware of the objects of her bounty.

UNDUE INFLUENCE

Statutory Definition

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

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

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

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

Case Law

FIVE CRITERIA

The Montana Supreme Court has established five criteria to determine whether undue influence exists. In ***Estate of Lightfield***, 351 Mont. 426, 213 P.3d 468 (2009), those criteria were described as follows:

1. any confidential relationship between the donor and the person allegedly exercising influence;

2. the physical condition of the donor as relevant to her ability to withstand influence;

3. the mental condition of the donor as relevant to 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 undue influence; and

5. the demands and importunities as they affect the donor, considering the relevant circum-

stances.

The five criteria may, but need not, be present in an undue influence case; they are simply nonexclusive considerations available to guide the trial court in its application of the statutory requirements. The statutory requirements control. ***Lightfield***.

STANTON V. WELLS FARGO BANK MONTANA, N.A.

To establish undue influence, a confidential relationship must be shown. But, the presence of a confidential relationship does not alone establish undue influence. The opportunity to exercise undue influence on a person is not sufficient to prove undue influence and invalidate a will or a transfer of property. Rather, the opportunity to exercise undue influence is to be considered and correlated with the alleged acts of influence to determine if the acts amount to undue influence. ***Stanton v. Wells Fargo Bank Montana, N.A.***, 335 Mont. 384, 152 P.3d 115 (2007).

So in *Stanton*, where an attorney ex-son-in-law who spent significant amounts of time with his ex-mother-in-law, who drafted a will and trust leaving her estate to him, after she had previously executed a trust leaving her assets to charity, the Montana Supreme Court found that the son-in-law had a confidential relationship with his mother-in-law, but had *not* exerted undue influence.

The Supreme Court looked to the following evidence to establish that undue influence was not present:

Confidential Relationship

The ex-son-in-law (Stanton) admitted to a confidential relationship with the decedent (Frances). That was not an issue. The ex-son-in-law (Stanton) remained close to the decedent (Frances). After the death of Stanton's ex-wife and Frances's daughter (Joanne) the relationship between Stanton and Frances improved. Stanton visited Frances daily, drove her around town when she needed, and also drove her to California several times to visit her brothers.

Mental and Physical Condition

Testimony from people who knew Frances was that Frances remained physically active and independent during the time in question.

Frances lived independently.

Frances was admitted to the hospital briefly for heart trouble in 1999, but her medical records indicate that she was alert, oriented, and looked much younger than her 90 years. The medical records also indicate that Frances had not required any medical attention during the previous 30 years.

Friends also described Frances as mentally sharp and strong-willed even into her 90's.

Frances was diagnosed with Alzheimer's in late 2003, but no evidence was provided that established that Frances suffered any decline in her mental condition leaving her susceptible to undue influence at the time she executed the documents in question in 2000.

The charity offered the deposition testimony of a physician in an attempt to establish that Frances suffered from the effects of Alzheimer's disease at the time she made changes to her 1996 Trust Agreement and Will, but the physician never met or examined Frances and she never had undergone a neuropsychological evaluation for him to review. The court found his testimony speculative.

Unnaturalness of the Disposition

Frances had no connection with the charity during her lifetime, other than to name it as a beneficiary of her trust.

The District Court concluded that the disposition to Stanton was a more natural distribution than a distribution to charities to which Frances had little or no connection during her lifetime.

Frances still referred to Stanton as her "son-in-law" even after his divorce and that Frances promised Joanne that she would "take care" of Stanton.

Frances's brother also knew of, and supported, Frances's intention to leave her estate to Stanton.

Demands and Importunities

Finally, the District Court found that Trail's End (the charity) failed to present any evidence that Stanton made any requests or demands on Frances to amend her Will or Trust or to provide any monetary gifts to him.

ESTATE OF LIGHTFIELD

In ***Estate of Lightfield***, 351 Mont. 426, 213 P.3d 468 (2009), a son took his mother to his attorney to have her sign a will leaving everything to him to the exclusion of his sister. The Supreme Court upheld a finding of undue influence based on the following factors:

- During the time the property transfers in question were made, the son maintained a confidential relationship with the mother to the exclusion of the daughter.
- The mother's health was failing and she had broken bones during the time she was under the son's care.
- The mother's mental health was also failing.
    - Her attorney initially refused to draft a will for her because he believed she was paranoid and delusional. The attorney at one time called the mother to determine if she could sign the deed transferring her real property into the trust. She did not remember him.
    - The mother wrote to her attorney telling him she had taken trust documents to a local government office and that people were going into the ditch by her house and she needed to pull them out. However, the attorney had the trust documents, and there is no evidence anyone was in a ditch. One month after that, the mother executed the February 2003 oil and gas lease with the son as co-trustees.

- A little more than six months after that, the mother made a holographic will leaving all of her earthly possessions to the son and completely disinheriting the daughter. The disposition was unnatural in that it left everything to the son, at a time when the son had close contact with the mother, and disinherited the daughter.

- The son took the mother to his attorney to draft a will leaving everything to him at a time when she was exhibiting delusions. The attorney created a living trust instead. Then, the son called a week later saying the mother was asking for a will leaving everything to him. When the attorney declined to draft the will the son wanted, an attempt was made to have another attorney do so. Around this time, the mother wrote checks to the son for the entire amount of the rent and surface damage payments her trust had received from the oil and gas lease.

MONROE V. MARSDEN

The court imposed a constructive trust on assets obtained through undue influence by testator's caregiver and husband. Monroe v. Marsden, 207 P.3d 320, 350 Mont. 327 (2009).

Josephine Marsden had four children, including Robert Monroe, the Personal Representative of her estate, and Melissa Worley. When Josephine's health declined in 1999, Melissa and her husband, John, moved in with Josephine to care for her. Over the course of the next four years, Melissa and John gutted Josephine's finances. The extent of the plunder is vividly expounded by the Court:

> "Up until the time Melissa and John moved into Josephine's house, they had lived for some time rent free in another house owned by Josephine. Melissa had worked part time at a casino and the highest gross yearly income she could recall was just over $10,000. She only sporadically filed income tax returns. John did occasional construction jobs and worked on cars, and had never filed an income tax return in his life. Neither of them had a checking account, credit card or any material assets.
>
> "Throughout her life Josephine Marsden was frugal and independent, took great care in her financial transactions and was a meticulous record-keeper. At the time of her 1999 hospitalizations she owned several pieces of unencumbered real estate; including her home, the house that Melissa was living in, land near Ovando and land in Florida. She had monthly income from Social Security, a pension and an annuity that typically exceeded her monthly expenses by several thousand dollars. In 1999 the balance in her checking account was over $17,000 and her medical expenses were covered by Medicare and a private supplemental policy. Josephine kept collections of stamps, silver dollars and dolls in her house, and had varying amounts of cash on hand in an envelope, often running into the thousands of dollars.
>
> "When Melissa moved in to care for her mother in late 1999 or early 2000, she also assumed all control over her mother's financial affairs. She controlled Josephine's checking account, her mail and payment of bills and expenses. By the time of Josephine's death in 2004, Melissa had obtained title to all of Josephine's real property; had sold the Ovando and Florida land; had encumbered the remaining property with over $175,000 in loans

taken out in Josephine's name; and had used part of the loan proceeds to buy property in Missoula and Las Vegas. The Las Vegas property was a condominium unit that John bought from his family. Melissa had exhausted all the cash in Josephine's house and had repeatedly overdrawn Josephine's checking account. Melissa had fraudulently cashed one of Josephine's certificates of deposit, established for the designated benefit of her children and grandchildren, by forging Josephine's name to it. She attempted to cash a second of Josephine's certificates of deposit by forging her signature but was stopped by the credit union. Melissa and John obtained and used credit cards in Josephine's name and charged the account to the credit limit of $9,000. They exhausted all of Josephine's savings, social security, retirement and annuity income. Melissa and John retained for their own use all rental income from Josephine's two rental units and never accounted for it. They destroyed years of Josephine's financial records and kept very few records of Josephine's financial affairs after Melissa assumed control. Melissa fabricated lease documents and forged signatures on them to obtain loans in Josephine's name. Melissa lied about the lease forgeries and other forgeries at the trial in District Court.

"After moving to Josephine's home, Melissa used Josephine's money to pay all of her and John's personal bills and obligations, and in doing so repeatedly overdrew Josephine's checking account. Melissa made no attempt to separate Josephine's bills and expenses from those incurred by her family and has never provided any accounting of the expenditures of Josephine's income and assets."

The District Court not only found that Melissa and her husband had exerted undue influence over Josephine, but imposed a constructive trust on the assets they had obtained from her, entered a judgment against them, and took the unusual step of awarding attorney fees and costs to the Estate. The Supreme Court upheld the District Court on every issue.

The biggest question in this case is why the attorney for Melissa and John would bother appealing this case.

ESTATE OF HARMON

In ***Estate of Harmon***, 360 Mont. 150 253 P.3d 821 (2011), the Testatrix signed two different wills approximately one month apart near the end of her life. The Testatrix's son admitted to probate a will executed by the Testatrix in January 2009 and her caretaker submitted a handwritten document signed by the Testatrix in December 2008 purporting it to be the Testatrix's valid holographic will. Although Testatrix had a will from 1976 that left everything to her son, this December 2008 document did not revoke her 1976 will but left several pieces of property to her caretaker and gave an option to her longtime tenant to buy at a discount the property he had been renting from her. The caretaker had started working for the Testatrix earlier in 2008 following a stroke she suffered.

In January 2009, the Testatrix was hospitalized with pancreatic cancer and released several weeks later. On January 31, she executed a self-proved will at her home, in the presence of her attorney, two witnesses from her attorney's office, her son, and her son's family. This will explicitly revoked all prior wills, including the 1976 Will and the December 2008 Holographic Will, and left all property to the Testatrix's son.

The Testatrix made both her son and attorney aware of her desires with respect to her caretaker, who was included in the January Will but did not receive as much as in the December Will. The attorney's affidavit stated he discussed with the Testatrix the January Will's omission of explicit bequests to the caretaker and specifically offered to reinstate those bequests, but the Testatrix confirmed her desire that her son simply carry out her wishes under the January Will.

The District Court entered summary judgment in favor of the probate of the January Will. The caretaker appealed entry of summary judgment claiming that he had raised issues of fact establishing undue influence and as a result summary judgment was not proper. These "issues" had been raised in affidavits containing allegations that the Testatrix had made certain statements to the caretaker to the effect that her son was greedy, that she had been hoodwinked by execution of the January Will, and other similar allegations.

The caretaker had alleged that the Testatrix's son had exerted undue influence over her in getting her to sign the January Will. But the Supreme Court ruled that "General allegations of poor health are not sufficient to show undue influence. Rather, evidence must be presented that proves undue influence actually was 'exercised upon the mind of the testator directly to procure the execution of the will. Mere suspicion that undue influence may have or could have been brought to bear is not sufficient.'" ***Estate of Harmon*** ¶ 22.

To meet his burden and defeat summary judgment, the caretaker was required to present admissible evidence of specific acts of undue influence sufficient to raise a genuine issue of material fact. ***Estate of Harmon*** ¶ *21*. The Supreme Court found that the caretaker's affidavits were all hearsay, did not meet any of the exceptions to the hearsay rule, and since the hearsay would not be admissible at a hearing, their presence in an affidavit did not raise any factual issues that would preclude summary judgment.

REVOCATION

Statutory Authority

§72-2-527, M.C.A. governs the circumstances under which a Will is revoked either by writing or by act.

§72-2-812, M.C.A. governs when one can be a "surviving spouse" for purposes of probate and nonprobate transfers (including by Will) upon divorce, annulment or decree of separation.

In general, those transfers become null and void upon divorce or annulment, but not upon separation

The term "divorce" is used here, even though it is a "dissolution of marriage" in Title 40, Chapter 4 "Termination of Marriage, Child Custody, Support". Presumably, the courts would not distinguish between "divorce" and "dissolution of marriage" for purposes of applying this statute.

§72-3-813, M.C.A. in general provides that one who "feloniously and intentionally" kills another cannot inherit or otherwise receive property from the decedent.

§72-3-814, M.C.A. specifically provides for the revocation of probate and nonprobate trnasfers by divorce.

This statute, enacted in 1993 and last amended in 1999, overlaps somewhat with §72-3-812, M.C.A. but is somewhat broader. 812 states that the divorced person is not a surviving spouse, but 814 affects the divorced person and relatives of the divorced person.

Revocation of Document

ESTATE OF IRVINE

Estate of Irvine, 360 Mont. 545, 264 P.3d 127, DA 10-0430 (2011) is decided by memorandum opinion and shall not be cited and does not serve as precedent.

Decedent's Will left his estate to his wife if she survived him and to his step-son if his wife did not survive him. His wife did not survive him. Decedent's mother, Va Va, argued that the Will was invalid and so by intestacy she would receive his estate. But she presented no evidence that the Will had been revoked or superseded, so this was decided in favor of the step-son.

There has to be more to this case than what was reported. Va Va was in a nursing home with Alzheimer's disease. The Court mentions that this appeal was filed after "significant litigation involving issues not before this Court."

Revocation By Divorce

ESTATE OF MARCHWICK

A decedent's pour-over Will and revocable Trust had been executed during her marriage, but she was divorced the year before her death. The trust provided for distributions to her step-children, as well as to her natural daughter and husband.

§72-2-814, M.C.A. provides that certain probate and nonprobate transfers are revoked as a result of divorce, including any "revocable disposition or appointment of property made by a divorced individual to the individual's former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse."

The decedent's daughter applied to be and was appointed Personal Representative of the estate. In that capacity, she filed a petition with the court seeking declaratory relief acknowledging revocation of the probate and non-probate transfers to her mother's ex-husband and former step-children by reason of the divorce. She filed her petition under §27-8-204, M.C.A. which provides that a person having an interest in the administration of a trust or of the estate of a decedent may petition the court for a declaration of rights as to the administration of the trust or estate.

The District Court converted the proceeding to formal probate, held a hearing on all outstanding issues, and issued a declaratory judgment finding that the distributions to the former step-children had been revoked by the divorce.

The step-children appealed, arguing that the District Court violated their due process rights by issuing its declaratory judgment, even though no civil action had been commenced by the filing

of a complaint. They wanted the opportunity to conduct discovery, but the court determined discovery would not have provided them any opportunity not already presented to them. As a matter of law, the divorce had the effect of revoking the distributions to the step-children under the Trust and no further process would have changed that result. ***Estate of Marchwick***, 356 Mont. 385 234 P.3d 879 (2010).

Revocation by Homicide

STATUTE

Montana's "slayer statute" is found at §72-2-813, M.C.A. which provides that -

> An individual who feloniously and intentionally kills the decedent forfeits all benefits under this chapter with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed the killer's intestate share.

ESTATE OF SWANSON

Rule: A guilty plea to a charge of deliberate homicide does not by itself conclusively establish that a killer acted feloniously and intentionally for purposes of the slayer statute. **Estate of Swanson**, 344 Mont. 266, 187 P.3d 631 (2008)

In *Swanson*, a mother shot and killed two of her children, then immediately called 911 to report that she shot the children. She was charged with two counts of deliberate homicide. She pled guilty to both counts.

The father, as Personal Representative of his children's estates, argued the mother should not inherit, arguing that the guilty pleas established the mother had "feloniously and intentionally" killed their children. The District Court agreed, but the Supreme Court did not.

The Supreme Court said that the doctrine of collateral estoppel (which would have permitted the guilty plea to be used against the mother) applies only when there is a final judgment on the merits in a previous proceeding, and a guilty plea does not meet that requirement.

The determination of whether the slayer acted "feloniously and intentionally" was a question of fact to be established at trial.

A guilty verdict would have led to a different result than a guilty plea.

> The Supreme Court quoted the Official Comment to §72-2-813(7), M.C.A., which states that "A judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section." (Emphasis added).
>
> And an acquittal would not have established that the killer did not act "feloniously and intentionally."
>
> The above Comment also states, "Acquittal, however, does not preclude the acquitted individual from being regarded as the decedent's killer for purposes of this section."

Intestacy by Mistake

ESTATE OF AYERS

A recital in a Will of a conveyance of land which was not in fact made, or which proved to be ineffectual, will not operate as a devise. ***Estate of Ayers***, 338 Mont. 12, 161 P.3d 833 (2007)

Kathleen, the mother, owned a 50% undivided interest in real property with one of her daughters, Donielle, as tenants in common. The real property, referred to as the "Fishtail Property" was referenced in this provision of the mother's Will:

> Fishtail Property Acreage and Buildings-in dual name of Kathleen Lynch Ayers and Donielle Ayers Slanina, at this time, shall remain in her name. She has promised to share title and all duties with Lorielle Ayers Waisanen.

Donielle contended that this language meant she was to get 100% of the Fishtail Property.

The District Court found that this provision made no valid devise of the Fishtail property, and the mother's 50% interest was to pass by intestacy, resulting in Donnielle having a 75% ownership interest and the other daughter, Lorielle, having a 25% ownership interest.

Donielle, who was also Personal Representative of the estate, basically ignored the court's decision and proposed a final distribution of 100% of the Fishtail Property to herself with a payment from the Estate to Lorielle of "any difference that may result from the distribution to Donielle of the Fishtail Residence property that exceeds Donielle's equal share of the residue."

The Supreme Court found that the Will indicated the mother had mistakenly assumed that Donielle would take sole ownership to the Fishtail Property by operation of law as the surviving joint tenant,[1] but that her misstatement of Donielle's ownership interest in the Fishtail Property "cannot act as evidence of her intent to devise that property." ***Ayers*** ¶ 18. Accordingly, the Supreme Court found that the District Court had correctly determined that the Will made no valid devise of the Estate's 50% interest in the property and that it was to pass by intestacy.

The Supreme Court also noted that the total value of the Estate was approximately $100,000, that the daughters "have been litigating for almost eight years over their respective rights to the Fishtail property" and that attorney fees for the Personal Representative alone were $28,000. ***Ayers*** ¶¶ 5 & 11.

VOIDING TRANSFERS AFTER THE FACT

Living Trust Act

STATUTORY PROVISIONS

The Montana Living Trust Act is found in Title 30 under the chapter on securities regulation. §30-10-901, et seq.

Its stated purpose is "to regulate the marketing and sale of living trusts in Montana and to

[1] "Kathleen reminds Donielle that '[s]he has promised to share title and all duties with Lorielle Ayers Waisanen.' Kathleen's reminder to Donielle would be superfluous unless she assumed that Donielle held the sole right to survivorship in the Fishtail property." *Ayers* ¶ 16.

provide civil remedies for fraudulent and deceptive sales practices." §30-10-902, M.C.A.

ESTATE OF REEDER

In ***Estate of Reeder v. Olsen***, 361 Mont. 534, 2011 MT 70N (2011), a memorandum opinion not citable as precedent, the Supreme Court upheld summary judgment against a Colorado trustee who for $10,000 prepared five different trusts for a Montana resident. The Coloradan was not a registered investment advisor or licensed attorney in Montana. The trust documents provided that three of the trusts had Nevada situs and two Massachusetts. The decedent was the initial trustee, and the preparer the successor trustee. He had been referred to the decedent by a previous client who befriended the decedent. This "friend" identified herself as the Chancellor of American University of Mayonic Science and Technology, a philosophy which, as the District Court quoted from a brochure, "derives its history, philosophy, goals, and objectives and teaching from the work of Mamuni Mayan who was a scholar, scientist, artist and builder approximately 10,000 years ago in the ancient past of the Kumari continent and South India."

The District Court described the Trust documents as "page after page of pseudo-legal gibberish." The Trusts would ultimately place the decedent's property in the hands of her "friend" and her friend's relatives.

The Trusts were determined to be business trusts within the meaning of §35-5-101, M.C.A., created by an instrument under which property is held and managed by trustees for the benefit and profit of such persons as are or may become the holders of transferable certificates evidencing beneficial interests in the trust estate. The District Court invalidated the trusts for failing to comply with the statutory requirements for business trusts. The transfers to the Trusts were voided by the court.

The court also ruled the drafter of the Trusts was in violation of the Montana Living Trusts Act for offering or selling a trust in Montana without licensure. The estate was entitled to recover the $10,000 fee for creation of the Trusts as authorized by the Montana Living Trusts Act.

The court further found the Trusts were securities and granted the estate's claim of securities registration violation and awarded the estate its attorney fees.

The appellants claimed on appeal that the District Court did not have subject matter jurisdiction because the Trusts had out of state situs and had been drafted and signed in Colorado. The Supreme Court ruled the District Court did have subject matter jurisdiction and no objection to personal jurisdiction had been made at the District Court level and therefore had been waived and would have been present in any event due to the telephone conversations between the drafter of the Trusts and the decedent. The Trust documents may have provided for out of state situs, but the situs was established in Montana by the trustee (the decedent) residing here, and her property was here.

FIDUCIARY DUTY

REMOVAL FOR CAUSE

Conflict of Interest

ESTATE OF ANDERSON-FEELEY

A Personal Representative may be removed for cause (pursuant to §72-3-526, M.C.A.), which may be shown by a conflict of interest. Estate of Anderson-Feeley 340 Mont. 352, 174 P.3d 512 (2007)

A 69 year old woman married a man in his early forties, appointed him as her agent under a power of attorney, designated him as Personal Representative under a Will she drafted leaving ¾ of her estate to her children and ¼ to him.

At that time, she had assets in excess of $4 Million.

When she died six years later, her assets were less than $30,000. The District Court pointed to evidence that the new husband may have transferred significant assets from his wife for his personal benefit.

When she died, the husband was appointed Personal Representative, but her son successfully challenged to have him removed, on the grounds that the potential claims the Estate had against him personally presented a conflict of interest. This finding was upheld.

ESTATE OF PETERSON

In *Anderson-Feeley*, the Court also discussed a prior case, ***Estate of Peterson***, 265 Mont. 104, 874 P.2d 1230 (1994), in which a Personal Representative had been removed for having a conflict of interest.

The Personal Representative was an attorney who had represented the decedent in a personal injury claim. He and another attorney entered into an agreement with their client that if the case was set for trial, they would get a 40% contingency fee of any recovery. They filed a two-page complaint, requested and acquired a trial date, and then settled the case for $3,125,000.

After that, the attorney drafted a Will for the client appointing himself as Personal Representative, and was in fact appointed Personal Representative upon the client's death.

A relative sought to have the attorney removed as Personal Representative on the grounds that he would not be likely to pursue a claim against himself for an excessive fee on the personal injury case. The court found a conflict of interest and removed the attorney as Personal Representative.

AS ELEMENT OF UNDUE INFLUENCE

Stanton v. Wells Fargo Bank Montana, N.A.

Conflict of interest is one basis for removal of a fiduciary for cause. In ***Stanton***, a conflict of interest was asserted as a basis for establishing undue influence. An attorney prepared a Trust Agreement, Will and gift of stock for his ex-mother-in-law, all of which benefited him.

The Supreme Court noted this could constitute a violation of Rule 1.8(c) of the Montana Rules of Professional Conduct,[2] which prohibits a lawyer from preparing an instrument on behalf of a client giving the lawyer any substantial gift or bequest. There is an exception in Rule 1.8(c) for instruments prepared on behalf of certain relatives, but after Stanton's divorce, he was no longer a relative of his ex-mother-in-law and so the exception did not apply. The Court declined to set aside the transfers. "We have previously stated, however, that a violation of a professional conduct rule 'should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.'" ***Stanton*** ¶ 24. Consequently, the burden of proving undue influence remained on the charity.

Failure to Account

IN RE BAIRD

In the case of ***In re Baird***, 349 Mont. 501 204 P.3d 703 (2009), the Trustee had not provided annual accountings, but due to the particular facts that was not considered sufficient cause for removal of the Trustee.

The statutory grounds for removal of a trustee are set forth at §72-33-618, M.C.A., and include a breach of the trust by the trustee, insolvency or other unfitness of the trustee, hostility or lack of cooperation among co-trustees that impairs administration of the trust, failure of the trustee to act, and the catch-all, "other good cause."

There was no question that annual accountings were required, both by the trust agreement and by statute. However, the only assets in the trust were a personal residence and some mineral rights. The trustee's position was that there was no income for which to account, and the Court agreed under those circumstances the failure to provide an annual accounting was not good cause for removal of the trustee.

Although the Supreme Court upheld the District Court, it also emphasized an accounting was required and imposed a requirement that in the future the trustee was to provide annual accountings.

DUTY TO DIVERSIFY

In re Trust B

In ***In re Trust B***, 343 Mont. 240, 184 P.3d 296 (2008), Grandfather by a will executed in 1966 created a testamentary trust for the lifetime benefit of his only child, Mary Ann, with remainder over to his four granddaughters.

Mary Ann gave "stern instructions" to the Bank trustee that it was to invest virtually the entire trust principal in bonds so as to produce a higher current income. Between 1978 and 1998 98.1% of the trust assets were invested in bonds and notes, and 1.9% in cash or cash equivalents.

The Bank's trust officer wrote to the granddaughters on at least two different occasions asking

[2] Rule 1.8(c) of the Montana Rules of Professional Conduct states, "A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative."

them to consent to the trust's exclusive investment in bonds, but did not explain how that could be contrary to their best interests. Mary Ann did tell her daughters that the Bank considered stocks to be in their best interests, but also told them that "the trust was none of their business," at which point they wrote letters back to the Bank consenting to the investment strategy.

The Bank presented to the court a Third Accounting for the period 1974 to 1978 and a Fourth Accounting for the period 1978 to 1995, which the court approved. The Bank did not advise the District Court of the disadvantageous nature of its investment strategy for the remainder beneficiaries over this lengthy period.

After speaking to an attorney, the granddaughters sought to set aside the Third and Fourth Accountings. At a meeting with the Bank's trust officer, the attorney pointed out that if the trust had invested 40% in the stock market over the trust's life, the assets would have been worth approximately $10 Million; instead, the assets were worth approximately $3 Million.

The principal issues before the Supreme Court were in regard to whether the granddaughters had any right to object to the Third and Fourth Accountings, but the real issue here is whether the Bank could be held liable to the remainder beneficiaries for failing to diversify the nature of the trust investments. Clearly the Bank realized it was at risk, as evidenced by the attempts it made to get the remainder beneficiaries to consent to the investment strategy. That issue was not reached in the case before the Supreme Court; the case was remanded to the District Court for further proceedings, and apparently was ultimately settled. But the danger to a trustee of a strong-willed life beneficiary is evident from this case.

DUTY TO THIRD PARTIES

Redies v. Attorneys Liability Protection Society

Privity as a defense had been eroded in other cases involving accountants and engineers, but because it was still unclear during the period of time involved in this case of a legal malpractice claim, the Montana Supreme Court found that the position taken by ALPS—that an attorney hired by a former conservator did not owe the former protected person a duty of care—was reasonable under the law existing when the malpractice action was commenced. ALPS was being sued in an unfair trade practices action for bad faith and had asserted as an affirmative defense that it had a reasonable basis in law or fact to contest this particular claim. ***Redies v. Attorneys Liability Protection Society***, 335 Mont. 233, 150 P.3d 930 (2007).

Watkins Trust v. Lacosta

In the ***Redies*** case, the ambiguity as to the privity defense was because it was not until 2004, in a matter of first impression in Montana, that the Montana Supreme Court held that an attorney may owe a duty to a nonclient beneficiary of an estate plan. ***Watkins Trust v. Lacosta***, 321 Mont. 432, 92 P.3d 620 (2004). Privity is no longer a strict defense in a legal malpractice claim.

BENEFICIARIES

POWER TO CHANGE BENEFICIARIES

Guardianship and Conservatorship of Lucille Anderson

A conservator has the power to remove a beneficiary from a Transfer on Death (TOD) account without notice to the beneficiary, but the conservator may do so only with court approval. ***Guardianship and Conservatorship of Lucille Anderson***, 353 Mont. 139, 218 P.3d 1220 (2009).

§72-5-421, M.C.A., states that "the court has the following powers that may be exercised directly or through a conservator." The "following powers" include subparagraph (3), which does not specifically include the power to make a change in beneficiary designation of a TOD account, but does permit a change in beneficiary designation under an insurance policy. The Supreme Court said there was "no substantive distinction" between a beneficiary designation for an insurance policy and one for a TOD account, and because the powers under the statute "included but were not limited to" those enumerated, the Supreme Court found the District Court could order a change in the beneficiary designation.

But this highlights an ambiguity in the statutory language. Subparagraph (3) states that "After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has all the powers over the person's estate and affairs that the person could exercise if present and not under disability, except the power to make a will."

The issue then is whether all the powers enumerated under (3) can be exercised only after a hearing, or whether the hearing is for the purpose of determining whether a basis for appointment exists, after which the court may exercise those powers "through a conservator" as stated in the introductory clause of the statute. For example, subparagraph (3)(d) includes the power to enter into contracts. Is the conservator required to have a court hearing every time a contract is needed for the protected person? That may come as a surprise to many conservators. But this "contract" provision is in the same subparagraph (3) as the change of beneficiary provision, which the Court found required a hearing.

Remember, subparagraph (3) applies to "all the powers over the person's estate and affairs that the person could exercise if present and not under disability." In other words, everything.

At present, the law in Montana seems to be that a conservator cannot act without a court hearing.

RIGHT TO NOTICE OF HEARING

In General

IN RE TRUST B

In general, trust beneficiaries are entitled to notice of hearing on trust proceedings under §72-35-306, M.C.A., and in a case of first impression, the Montana Supreme Court has now held that the beneficiaries are also entitled to notice of entry of judgment or order in a trust proceeding under Rule 59(b), M.R.Civ.P., and failure to provide such notice will toll the time for beneficiaries to file any post judgment motions. ***In re Trust B***, 343 Mont. 240, 184 P.3d 296 (2008).

ESTATE OF HOLMES

Although ***In re Trust B*** was a case of first impression as to trust beneficiaries, the Supreme Court had previously held that notice of entry of judgment is required to be given to devisees at the conclusion of formal probate proceedings. ***Estate of Holmes***, 183 Mont. 290, 599 P.2d 344 (1979).

ESTATE OF BOVEY

The Trust Code requires that notice of time and place of a hearing on a petition regarding a trust be mailed to all beneficiaries who are entitled to notice. §72-35-306, M.C.A.

The court may exercise jurisdiction in proceedings under this division on any basis permitted by Rule 4 of the Rules of Civil Procedure. §72-35-105, M.C.A.

Rule 4 of the Rules of Civil Procedure provides for service of process in civil actions, including service of process by publication.

In ***Estate of Bovey***, 358 Mont. 14 244 P.3d 716 (2010), the Supreme Court found that persons who claimed they not been properly served had no basis for contesting entry of an order approving distribution of a trust. They claimed they were entitled to a share of the distribution, but the court ruled they were barred by entry of an order determining the identity of the beneficiaries, excluding them.

Sue Bovey died in 1988 leaving one son, Ford Bovey. She established a trust for Ford's benefit that continued for his lifetime and then upon his death was to be distributed to Sue's then-living heirs at law. Ford adopted a 25 year old daughter; upon his death the Trustee instituted litigation to determine who were the heirs of Sue Bovey for purposes of distributing the Trust. After trying to find Sue Bovey's heirs, the Trustee obtained an order determining the heirs of Sue Bovey and the court entered default judgment against all persons who did not appear.

The appellants contended that the default judgment against them was not effective because they were entitled to actual notice. Service by publication under Rule 4 M.R.Civ.P is effective only if the person to be served cannot be located after due diligence. But the court determined the Trustee had exercised due diligence in trying to locate the heirs of Sue Bovey and they were bound by the judgment. The Trustee's attorney had reviewed the family tree, reviewed records in the Clerk of Court office, inquired at the Trustee's offices, conducted an internet search, and searched phone books for the Missoula and Great Falls areas. The Trustee also engaged a process server who was apparently unable to locate any Sue Ford Bovey heirs.

Exceptions to Notice Requirement

GUARDIANSHIP AND CONSERVATORSHIP OF LUCILLE ANDERSON

Even though a hearing was required in ***Anderson***, the court found that notice was not required to be given to the TOD beneficiary, because it had no present interest in the TOD account, and therefore was not an "interested person." *See* §72-6-306, M.C.A.

The Court in *Anderson* contrasted the beneficiary of a TOD account with the beneficiary of a

trust, who *would* have right to notice of the hearing, because the statutory definition of "interested person" (§72-1-103(3)(a), (25), M.C.A.) includes trust beneficiaries. But see *Stanton* below.

It is instructive to note that under §72-1-103(3)(c), M.C.A. includes within the definition of "beneficiary" the beneficiary of a TOD or POD account, but under §72-1-103(25), M.C.A., an "interested person" includes "beneficiaries … having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person." Since *Anderson* involved a TOD account and not a trust estate or the estate of a decedent, the TOD beneficiary was not an "interested person" within the definition.

STANTON V. WELLS FARGO BANK MONTANA, N.A.

A charitable beneficiary of a revocable trust has no right to notice from the Trustee that the trust has been changed to remove the charity as a beneficiary. ***Stanton v. Wells Fargo Bank Montana, N.A.***, 335 Mont. 384, 152 P.3d 115 (2007).

A trustee does not owe a fiduciary duty to the beneficiary of a revocable trust. ***Stanton.*** §72-33-701, M.C.A.

DEBTS OF BENEFICIARIES

DEBT PREVIOUSLY DISCHARGED IN BANKRUPTCY

In re Marjorie Q. Ward Revocable Trust

Son borrowed $100,000 at 10% interest from Stepsister in 1989, but never made a payment on the note.

Mother executed her revocable trust in 1992, and in 1998 amended it to provide that before Son would receive any distribution from the trust, his share would be decreased by the amount he owed his Stepsister at the time of Mother's death.

Son filed for Chapter 7 bankruptcy in 2005 and his promissory note to Stepsister was discharged.

Mother died in 2009.

The issue was whether Son "owed" his Stepsister anything at the time of Mother's death, given that the debt had been discharged in bankruptcy.

The Court found that Mother's intent was that Son's share was to be reduced by the principal amount of the promissory note plus accrued interest for a total of $298,356.16. The trustor's intent controlled over any bankruptcy provision. In ***In re Marjorie Q. Ward Revocable Trust***, 2011 MT 308 ¶18, --- P.3d ---- (2011).

Estate of Firebaugh

The court in **Ward Revocable Trust** cited the 1995 case of ***Estate of Firebaugh***, 271 Mont. 418, 422, 897 P.2d 1088, 1091 (1995), which held that a son's debt to his mother that had been discharged in bankruptcy was still offset against his share of his mother's estate as a debt he owed her.

Again, the testatrix's intent is what controlled, not the classification of the debt under bankruptcy law.

CREDITORS CLAIMS

CHILD SUPPORT

Estate of Hicks

In ***Estate of Hicks***, 360 Mont. 91, 252 P.3d 175 (2011), it was held that paid to former husband's child support obligation was not offset by death benefits from Social Security paid to his children upon his death.

The parenting agreement provided, "In the event of the death of Father before both children graduate from high school or become emancipated, Father's support obligation continues through that time in the same manner as if he had survived, and Father shall make provision for payment of such child support either by means of provision in Father's estate for a trust for both children or through life insurance, or both, as discussed below." The court found this was not ambiguous: the obligation to pay $550 per child per month continued in same manner that his child support obligation would have continued had he survived, and the agreement did not provide for credit against child support for payments from outside source.

The result could have been different had the agreement been drafted accordingly.

DISTRIBUTIONS

STATUTORY PREFERENCE FOR IN KIND DISTRIBUTIONS

Unless a contrary intention is indicated by a decedent's Will, estate assets are to be distributed in kind to the extent possible. § 72-3-902, M.C.A.

Subpart (2) of this statute provides that the devise of a stated sum of money *may* be satisfied with property distributed in kind if (a) the person entitled to the payment has not demanded payment in cash, (b) it has been valued at fair market value as of the date of distribution, and (c) no residuary devisee has requested that the asset remain a part of the residue. § 72-3-902(2), M.C.A.

VALUATION DATE FOR IN KIND DISTRIBUTIONS

Estate of Snyder

Whether distributions in kind are to be valued as of date of death or as of date of distribution is controlled by the testator's intent. ***Estate of Lucile B. Snyder***, 352 Mont. 264, 217 P.3d 1027 (2009).

The District Court had looked to subpart (2) of §72-3-902, M.C.A. which provides that in kind distributions are valued as of the date of distribution, but the Supreme Court found that was overridden by the testator's intent to have distributions valued as of date of death. *Snyder* ¶4.

The Supreme Court could also have found that subpart (2) did not apply because by its terms it only applies when a devisee is to receive a stated sum of money. In *Snyder*, the devisees were to each receive ½ of the residuary estate, not a stated sum of money.

This was the third appeal in this estate, which had been open for 15 years.

In *Snyder I* and *Snyder II*, the Supreme Court had ruled that the son and the daughter were to receive equal shares of their mother's residuary estate, the son was to receive stock in the family drug store business, which was to count toward his half of the residuary estate, and the stock and other property were to be valued as of the mother's date of death.

In *Snyder II*, the Supreme Court remanded the case to the District Court for determination of values. The District Court determined the values but then ruled that the assets could not be distributed as the Supreme Court had directed because the values of the assets had changed so much during the 15 years the estate had been open that distributing them as directed by the Supreme Court would frustrate the mother's intent to treat her children equally.

> The two principal assets were stock in a drug store and 40 acres on Flathead Lake, which were of roughly equivalent value at the decedent's death in 1992, but in the intervening 15 years, the lake property had increased in value from approximately $160,000 to approximately $5 Million, while the drug store stock had not increased nearly as much.

The Will had stated that the two children were to receive equal distributions of the residuary with 51% of the drug store stock first apportioned to the son, but counting towards his half of the residuary.

The Supreme Court had ruled in *Snyder I* and *Snyder II* that the son should get all of the drug store stock and the daughter the lake property.

The Supreme Court held that *Snyder I* and *Snyder II* had established the law of the case—that the Will indicated the testarix's intent to have the estate distributed pursuant to its value at the decedent's death, not at the date of distribution value—and was not going to reopen its previous rulings.

Although after 15 years of probate there was a great disparity in the value of the distributions to the son and the daughter, the Supreme Court found that was merely due to the delay caused by litigation in the estate.

The Supreme Court remanded the case for further proceedings to value and distribute the remaining Estate based on federal estate tax values.

NEED FOR CERTAINTY

Turk v. Turk

A brother removed a truck and equipment from the garage of his sister, which had been part of the estate that was to be equally divided among the siblings. The sister brought charges against the brother for theft and trespass. ***Turk v. Turk***, 341 Mont. 386, 177 P.3d 1013 (2008).

"Though the estate has been closed for more than eight years, the heirs gave conflicting testimony as to how the equipment was to be distributed amongst the Turks, and whether each received his or her fair share." ***Turk*** ¶ 6.

A jury ultimately determined the truck and equipment belonged to the brother who took it.

Ideally, the distribution of the estate should be in writing and of record. But as a practical matter, items of tangible personal property are frequently distributed to the heirs with no permanent record of who was entitled to each item.

AGREEMENTS

PREMARITAL AGREEMENTS

Marriage of Weiss

In ***Marriage of Weiss***, 357 Mont. 320 239 P.3d 123 (2010), husband and wife signed had a premarital agreement in 1990. At the time, wife had significant assets and husband did not. Husband was provided an opportunity to buy 20% ownership of the company where he worked, once in 2000 and again in 2004. The first time, he bought his interest with a gift from his in-laws, earnings from his job, and $20,000 provided by his wife. The second time, he bought his interest with money from his 401(k) and $280,000 provided by his wife. During the course of the marriage, the husband repaid his wife the $280,000 used for the 2004 ownership purchase. When the marriage ended in 2008, the wife contended that she had invested in her husband's business and was entitled to a share of the company's distributions; the husband contended that the $20,000 used for the 2000 purchase was a gift and the $280,000 used for the 2004 purchase was a loan that had been repaid.

The wife relied on a provision of the premarital agreement that property of one party could not become property of the other unless so stated in a written instrument signed by the former and notarized. The husband relied on a provision of the premarital agreement that joint business ventures could only be created by execution of a separate written document. He testified that he gave his wife a repayment schedule for the $280,000 loan before she made the transfer and printed a new copy of the spreadsheet each time he made a payment and balance remaining on the loan.

The Supreme Court found these provisions to be contrary to one another and to have created an ambiguity. The wife's attorney had drafted the premarital agreement and although the agreement contained a provision stating that the no provision is to be interpreted against a party simply because that party's legal representative drafted the provision, the court found that to be against Montana law, which provides ambiguous provisions are to be interpreted against the party creating the ambiguity.

The District Court had relied on a third provision in the premarital agreement that the parties did not intend to share together in the ownership of any property and accordingly divided property according to how it was titled, including the business ownership which was titled in the husband's name.

The husband was not represented by separate counsel at the time the premarital agreement was drafted and signed. The husband signed it without making any changes. The court used this against the wife in finding that any ambiguity would be interpreted against her. This presumably could have been avoided had the husband been represented by an attorney and had there been actual negotiation over the provisions.

It may not have made a difference in the end, however. The facts before the court tended to demonstrate that a loan had been made, not an investment.

SETTLEMENT AGREEMENTS

Estate of Burrell

In ***Estate of Burrell***, 358 Mont. 460, 245 P.3d 1106 (2010) the Supreme Court upheld the District Court's enforcement of a settlement agreement.

PROCEDURE

JURISDICTION OF THE DISTRICT COURT IN PROBATE

Subject Matter Jurisdiction is Limited in Scope

ESTATE OF HAUGEN

A District Court sitting in probate does not have jurisdiction over a trust dispute once the probate has ended and the decedent's estate has been closed, even though the trust was testamentary trust created pursuant to a Will probated by that District Court. ***Estate of Haugen***, 346 Mont. 1, 192 P.3d 1132 (2008).

§ 72-1-202, M.C.A. provides District Courts with limited subject matter jurisdiction over probate and conservatorship matters, specifically over all subject matter relating to "estates of decedents, including construction of wills and determination of heirs and successors of decedents …."

§ 72-35-101, M.C.A. confers upon District Courts exclusive subject matter jurisdiction over trust proceedings. "A trust proceeding brought pursuant to the Montana Trust Code is a proceeding separate and apart from the probate of an estate." *Haugen* ¶12.

District Courts sitting in probate once had jurisdiction over trusts after probate had closed, but the statute providing that jurisdiction, § 72-12-101, M.C.A. (1987) was repealed in 1989 when § 72-35-101, M.C.A. was enacted. Beware of this when reviewing cases arising before 1989.

PRIOR CASES ON LIMITED JURISDICTION

The *Haugen* case cites earlier cases outlining the limited jurisdiction of a court sitting in probate:

> Disputes as to the title to property are not within the subject matter jurisdiction of the District Court in a probate proceeding. Any question of title to property between the estate and persons claiming adversely to it must be determined in proper proceedings instituted for that purpose. ***Graff's Estate***, 119 Mont. 311, 316-17, 174 P.2d 216, 218 (1946).
>
> The approval of a settlement of a wrongful death action which was pursued by the personal representative of the decedent's estate was beyond the limited grant of jurisdiction under § 72-1-202(1), M.C.A. ***Estate of Pegg***, 209 Mont. 71, 84, 680 P.2d 316, 322 (1984).
>
> A district court sitting in probate did not have jurisdiction to decide title to real property. ***Estate of Thomas***, 216 Mont. 87, 89-90, 699 P.2d 1046, 1048 (1985).

Subject Matter Jurisdiction for Enrolled Member of Indian Tribe

ESTATE OF BIG SPRING

The state district court had no jurisdiction over the probate of an Indian tribe member's estate, because the decedent was an enrolled member of the tribe, the entire estate was located within exterior boundaries of the reservation at time of the member's death, all parties to the probate case were member Indians, and the tribe had not consented to state assumption of civil jurisdiction pursuant to procedures outlined in federal and state statute. Estate of Big Spring, 360 Mont. 370, 255 P.3d 121 (2011).

The term "Indian" is not interchangeable with "tribal member," and the relevant distinction in a determination of inherent tribal civil jurisdiction, with respect to the status of individuals, is between tribal member and nonmember.

Indians residing on an Indian reservation of a tribe other than their own are considered nonmembers for purposes of civil jurisdiction.

Where an action involves a member Indian and Indian country, the court has an independent obligation to determine whether jurisdiction exists, even in the absence of a challenge from a party.

VENUE

Estate of Strange

As long as Montana has subject matter jurisdiction over a probate, there is no *de minimis* exception to determine whether it has venue. ***Estate of Strange*** 343 Mont. 296, 184 P.3d 1029 (2008).

The District Court had confused jurisdiction with venue when it found that jurisdiction was proper in Montana, but venue was not. The District Court said there was no venue in Montana because the decedent's Montana assets (fishing gear, a rifle, assorted tools and an investment account) did not establish a "significant connection" to Montana.

The Supreme Court said that "venue pertains to the propriety of a given county in Montana for probating a decedent's estate … The question of whether Montana is the proper state is governed by Montana's territorial jurisdiction statute, not the venue statute. *See* §72-1-201(2), M.C.A." *Strange* ¶ 11.

The District Court's finding that Montana had jurisdiction over the Montana assets was based on its determination that it had jurisdiction over the son who had acquired fiduciary control over his father's property and was a Montana resident subject to the laws of this state. *Strange* ¶ 8.

The decedent never resided in Montana, but periodically visited his son in Billings, with whom he left the few items of personal property mentioned above. In addition, his son opened an account with Putnam Investments for the father, which the son managed in Montana under a power of attorney executed by the father. *Strange* ¶ 3.

Once the District Court concluded that jurisdiction was proper in Montana, the only issue should have been whether that county was the proper county for venue. *Strange* ¶ 12.

"There is no statutory requirement that a decedent's property have a 'significant connection' to Montana." *Strange* ¶ 12.

"The general nature of the probate code allows for multiple probate proceedings to be initiated in the various states where a decedent had property. Contrary to the rule in civil actions, there is no 'single forum' requirement under the Uniform Probate Code. Instead, our statutes allow for an initial filing in Montana if a decedent owned property here, §72-1-201(2), MCA, followed by ancillary probate proceedings in other jurisdictions when necessary." *Strange* ¶ 10.

§72-1-201(2), M.C.A. provides that the Uniform Probate Code, as adopted by the Montana Legislature, applies to "the property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state[.]"

STANDING

Estate of Glennie

To have standing to contest a Will, one must be an "interested person" as defined in §72-1-103(25), M.C.A. That requires demonstrating a pecuniary interest in a successful challenge to the Will. ***Estate of Glennie***, 2011 MT 291, ___ P.3d ___ (2011).

Father was a rancher who executed a Will a few weeks prior to his death leaving the ranch 2/3 to Son 1, 1/6 to Son 2 and 1/6 to Daughter, and the residue of his estate to Wife. Son 2 objected to probate of the Will asserting undue influence by Son 1 and alleging a prior Will had left him a larger share of the ranch. Wife as Personal Representative of the estate moved to dismiss Son 2's objection on the basis that he lacked standing to contest the Will. The District Court dismissed the objection.

The Estate argued that if Son 2 were successful in challenging the Will, Father would then have died intestate and his entire estate would pass to Wife, so Son 2 had no pecuniary interest in challenging the Will and therefore no standing.

Son 2 argued that there was an earlier Will that left him a larger share of the ranch, and therefore he did have a pecuniary interest that gave him standing.

The Estate argued Son 2 had not produced any earlier Will. Son 2 responded that he needed to conduct discovery in order to produce the Will. The Estate countered that Son 2 had not conducted discovery during the 11 months the District Court had the motion to dismiss under advisement. Son 2 pointed out that the parties had mutually agreed to extend discovery until the District Court ruled on the motion.

The Supreme Court found Son 2 had a pecuniary interest in challenging the Will and therefore had standing.

The Estate's motion was akin to a motion to dismiss under 12(b)(6) of the Montana Rules of Civil Procedure, and for purposes of such motions the court is required to assume as true all the allegations of the pleading for which dismissal is sought. Accordingly, the court was obligated to assume as true the allegations of Son 2 that Son 1 had exerted undue influence over Father and that a prior will left a larger portion of the ranch to Son 2. Under this analysis, Son 2 had no obligation to establish a factual dispute. The Supreme Court did note that Son 2 would be required to es-

tablish first that the probated Will was invalid and second that the doctrine of dependent relative revocation should apply, under which a testator who has cancelled an old will while making a new will would prefer the old will to intestacy. The Supreme Court specifically made no determination as to whether the doctrine of dependent relative revocation would apply in this case.

STATUTE OF LIMITATIONS AND OTHER TIME BARS

Survival Actions

RUNSTROM V. ALLEN

The minority tolling of the statute of limitations for a survival action continues only for the period of the minor's survival. ***Runstrom v. Allen***, 345 Mont. 314, 191 P.3d 410 (2008).

A survival action belongs to the decedent's estate, and only the estate's personal representative may bring the survival action. The Personal Representative is required to be an adult. The statute of limitations starts running again upon the death of the minor, because any survival claim then must be pursued by an adult, the Personal Representative of the minor's estate. *Runstrom* ¶ ¶ 19-20.

Wrongful Death Claims

Minority tolling does not apply to a wrongful death claim. *Runstrom*.

Insured Claims

GOETTEL V. ESTATE OF BALLARD

Claims against a decedent's estate that are otherwise time-barred can still be brought if the decedent or Personal Representative has insurance for the claimed liability.

Montana's nonclaim statute, § 72-3-803, M.C.A., provides that claims against a decedent's estate are barred unless presented within the earlier of 1 year following the decedent's death or certain other specified dates. So, in general, 1 year following the date of the decedent's death all claims not presented will be barred.

There is an important exception in subsection (3)(b) for "any proceeding to establish liability of the decedent or the personal representative for which the decedent or the personal representative is protected by liability insurance." Consequently, in ***Goettel v. Estate of Ballard***, 356 Mont. 527, 234 P.3d 99 (2010), the Montana Supreme Court allowed Goettel, who had been involved in a car accident involving decedent Ballard, to proceed with a claim against Ballard's estate even though he did not file a claim against Ballard's estate within one year of Ballard's death.

Failure to Timely Appeal

IN RE TRUST B

In general, a motion for a new trial must be filed within ten days of service of notice of entry of judgment. Rule 59(b), M.R.Civ.P. However, if notice of entry of judgment or order is not given to trust beneficiaries after a formal trust proceeding, the time to file post judgment motions is tolled. ***In re Trust B***, ¶29. This case, discussed in more detail under Fiduciary Duty/Duty to Diversify beginning on page 14 dealt with whether the granddaughters could get a

new trial on the Bank's Third and Fourth Accounting for the trust. The Supreme Court ruled that sufficient grounds existed for a new trial.

The Bank objected that 11 years had passed since the District Court approved the Fourth Accounting and the granddaughters were therefore precluded from reopening the proceeding. But the granddaughters never received notice of the District Court's entry of the 1995 Order Approving Fourth Accounting so the time to request a rehearing was tolled.

The Bank contended that the granddaughters were not entitled to notice of entry of judgment because they had not appeared at the hearing. The Supreme Court however ruled that the granddaughters were entitled to and did not receive notice of the hearing on the Fourth Accounting, as required by §72-35-306, M.C.A. and were entitled to notice of entry of judgment or order in trust proceedings.

This was the Montana Supreme Court's first ruling on whether notice of entry of judgment must be given to trust beneficiaries after a formal trust proceeding.

ESTATE OF HOLMES

Although ***In re Trust B*** was a case of first impression as to trust beneficiaries, the Supreme Court had previously held that notice of entry of judgment is required to be given to devisees at the conclusion of formal probate proceedings. ***Estate of Holmes***, 183 Mont. 290, 599 P.2d 344 (1979).

ATTORNEY FEES

ESTATE OF STUKEY

Estate of Stukey, 2009 MT 167N, 214 P.3d 788 (2009) is a case the Montana Supreme Court described as having an "extensive history" and the Court found that several statutory bases existed for an award of attorney fees as requested by the Personal Representative of the estate, including: §37–61–421, MCA, (assessing excess costs for multiplying the proceedings unreasonably and vexatiously); §72–1–111, MCA, of the Uniform Probate Code (providing restitution against the perpetrator of fraud); and M.R. Civ. P. 11 (providing for sanctions including costs and reasonable attorney fees when an attorney submits a document for an improper purpose, such as to delay proceedings).

This case is a memorandum decision that cannot be cited for precedent, but it is useful to keep in mind that attorney fees are not necessarily limited to what is provided under the Probate Code.

ESTATE OF BURTON

Estate of Burton, 352 Mont. 550, 218 P.3d 497 (2009) is another unpublished decision, but still instructive. This involved an estate in which the Personal Representative had been removed and replaced as Personal Representative by one of the devisees of the estate. The District Court awarded attorney fees to the new Personal Representative and the Supreme Court said that the District Court did not abuse its discretion in awarding attorney fees as allowed by §72-3-632, M.C.A.

That statute provides that if a Personal Representative defends or prosecutes a proceeding in good faith, whether successful or not, the Personal Representative is entitled to receive from the estate the Personal Representative's necessary expenses and disbursements, including reasonable attorney fees

incurred. The removed Personal Representative objected to the award of attorney fees to the new Personal Representative on the grounds that the new Personal Representative was not Personal Representative at the time she incurred the attorney fees. The Supreme Court said that by substituting the new Personal Representative for the former, the District Court was justified in ordering recovery of attorney fees for the new Personal Representative.

That seems like a strained reading of the statute, but the Supreme Court found that this and the other issues raised were "clearly controlled by settled Montana law." I am not sure what that law is. There is no reported case coming to a similar result.

If a devisee were successfully to seek removal of a Personal Representative but the devisee were not appointed as successor Personal Representative, presumably attorney fees would not be allowed to the successful devisee. §72-3-632, M.C.A. provides for an award of attorney fees only to a Personal Representative, not anyone else.

In coming to this result the Supreme Court cited a marital dissolution case in stating that it will review an award of attorney fees by a District Court only for abuse of discretion. It seemed to look to the wrongful conduct of the removed Personal Representative in determining that the District Court had not abused its discretion by awarding attorney fees.