Selected Recent Montana Probate & Estate Planning Case Law (2014 through 2018)

Presented to Western Montana Estate Planning Council

By
Richard M. Baskett
Attorney – CPA

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Darty v. Grauman, 391 Mont. 393, 419 P.3d 116 (2018)

- Takeaway: TOD Designation trumped trust
- Facts:
  - Decedent executed transfer on death (TOD) beneficiary designations for three brokerage accounts
  - Decedent executed estate-planning documents including a will and a living trust
  - Decedent executed a deed and asked his attorney to transfer the property into the Trust, which the attorney did. Decedent notified his attorney that he planned to transfer the brokerage accounts himself, which he did not do. Upon his death, the TOD designations were still in effect.
- Holding:
  - Valid nontestamentary transfers are unaffected by testamentary documents and effectuate transfers of items outside the probate estate.
  - Testimony of attorney as to decedent's intention didn't alter result.

Tonn v. Estate of Sylvis, 390 Mont. 268, 412 P.3d 1055 (2018)

- Takeaway: Anti-lapse statute did not apply to Trust with express provision
- Facts:
  - Testator had 3 children
  - Testamentary trust provided for all three children and for division and distribution of trust at death of each child.
    - If any child of mine should predecease me or die during the term of this trust, then one-third of the principal of the trust as it then exists shall be distributed unto my deceased child's living descendants by right of representation.
    - Upon the death of the next child, then one-half of the principal of the trust as it then exists shall be distributed unto said deceased child's living descendants by right of representation.
    - Upon the death of my last child this trust shall terminate and all of the trust property, including any undistributed income, shall be distributed to the living descendants of said deceased child by right of representation.
    - If any child of mine should die without leaving living descendants, then the share of my deceased child shall be held in trust as herein provided for my surviving children.

    - Order of deaths of children:
        - Child 1 died in 2001 survived by wife and 3 children.
        - Child 2 died in 2010 with no wife or children.
        - Child 3 died in 2016 survived by 2 children.
    - At death of Child 1, no principal distribution. Instead, his widow and children received 1/3 of the net income of the trust.
    - At death of Child 2, no principal distribution. Instead, ⅔ of net income paid to Child 3.
    - At death of Child 3, issue was whether her beneficiaries were to receive ½ or ⅔ of the trust.
- Law:
    - The Montana anti-lapse statute is at §72-2-717 MCA and in general provides for alternative distribution of interest that named beneficiary failed to receive for not having survived until the specified time or event.
    - But it applies only "in the absence of finding a contrary intention."
- Issue: Did the anti-lapse statute provide that Child 1's share was to pass to his heirs?
- Holding: No.
- Rationale:
    - The intention of the testator was express.
    - At Child 1's death, that 1/3 share was supposed to be distributed to his heirs.
    - At Child 2's death without heirs, his share was to continue in trust for testator's surviving children.
        - "Surviving children" was determined at time of Child 2's death, not at testator's death.
        - Child 3 was only surviving child at that time.
    - The "right of representation" provision was important. The trust provided that upon the death of a child without descendants, that share was to continue in trust for the benefit of testator's surviving children, without reference to "right of representation." This indicated to the court that Child 1's heirs were not to be included.

Larson v. Larson, 389 Mont. 458, 406 P.3d 925 (2017)

- Takeaway: How *not* to prove undue influence / lack of testamentary capacity, in this case involving gift of shares in ranch corporation.
- Facts:
    - Ranch corporation. One son lived and worked at the ranch, the other lived in Billings.
    - Parents' Wills provided surviving spouse was to own 51% of shares with balance to pass equally to two sons.
    - After father's death, expressed desire to keep the farm in the family, which she didn't think possible if ownership was divided equally between two sons.

    - Mother expressed interest in giving her shares to ranch son. City son started to exert pressure on her not to change her will and to keep things the way "Dad left them."
    - 2008 meeting at attorney's office. Mother was upset. She wanted ranch son to get a greater share of stock. At that meeting, the Father's stock was distributed in accordance with his Will, leaving the Mother with 51% and his shares were distributed equally to the two sons, but because the Father had given ranch son 10 shares years earlier, they ended up with slightly different percentages: 24.52% and 24.49%.
    - A few weeks later, Mother, perhaps as part of Medicaid planning, told attorney she wanted to give all but 10 of her shares to ranch son. Attorney prepared certificates, which she signed and returned, but attorney failed to cancel the old certificates.
    - City son found out, then took mother back to Billings with him. Instituted guardianship. Mother signed affidavit she did not understand what she signed when she transferred shared to ranch son.
    - Medical testimony that mother had mild cognitive impairment in 2008 when stocks were transferred and significant impairment in 2012.
    - In November 2008, Mother gave city son power of attorney. He opened joint bank accounts. She loaned him $35,000 to buy a GTO, and then forgave the balance of the loan.
    - In June 2009, city son sued ranch son alleging undue influence.
- Issue: Was there undue influence?
- Holding: No
- Rationale:
    - Court found no evidence of undue influence or incompetence. In fact, the District Court said it was city son who attempted to exert undue influence and, though he was asserting she was incompetent in 2008 when she transferred the stock, he later on had her sign a power of attorney and enter into a loan agreement and forgive his car loan.
    - The mother had expressed to others why she was transferring the shares, and both her attorney and accountant were convinced she was fully competent. No undue influence here.
    - Mere suspicion of undue influence is not enough. Must show specific acts.
- Issue: Was the gift complete?
- Holding: Yes.
- Law:
    - "A gift is a transfer of personal property made voluntarily and without consideration. Section 70-3-101, MCA.
    - "A gift inter vivos requires (1) donative intent, (2) delivery, and (3) acceptance. Valley Victory Church v. Sandon, 2005 MT 72, ¶ 14, 326 Mont. 340, 109 P.3d 273 (citing Albinger v. Harris, 2002 MT 118, ¶ 31, 310 Mont. 27, 48 P.3d 711).

    - "The only revocable gift recognized by Montana law is a gift in view of death. Sections 70-3-103, -201, MCA.
    - "Otherwise, a gift made without condition becomes irrevocable upon acceptance. Section 70-3-103, MCA; Albinger, ¶ 31.
    - "Delivery, which manifests the intent of the giver, must turn over dominion and control of the property to the recipient." Albinger, ¶ 31. When the essential elements of donative intent, voluntary delivery, and acceptance are demonstrated by clear and convincing evidence, the gift is complete. Albinger, ¶ 31.
    - "The court will not void the transfer when the giver experiences a change of heart. Albinger, ¶ 31 (citing Gross v. Gross, 239 Mont. 480, 781 P.2d 284 (1989) (holding a father was barred from revoking a gift of real property transferred to his son))." Larson ¶¶ 31 & 32.
- Rationale:
    - Factor 1: Extensive testimony by attorney, accountant and ranch son and testator regarding donative intent;
    - Factor 2: Voluntary delivery of stock certificates to ranch son by testator.
    - Factor 3: Ranch son accepted the share certificates.

Matter of Estate of Erickson, 389 Mont. 147, 406 P.3d 1 (2017)

- Takeaway: Attorney fees for unsuccessful contest of Will, even though Will not directly attacked.
- Facts:
    - 2015 Death of father.
    - Survived by second wife and children of first marriage.
    - 1995 Will
    - 2008 Codicil executed after death of first wife named son as Personal Representative.
    - Wife filed for informal appointment of Personal Representative in intestacy.
    - Two days later, son filed Petition for Formal Probate
    - Wife's attorney said she was not going to object to the Will or the appointment of son, but also said they would address the "Idaho document" at the hearing.
    - No objection to Will or appointment by wife's attorney at hearing, nor were any issues raised as to the "Idaho document."
    - 5 months later, wife's attorney filed a creditor's claim based on the 6 Point Document; said it was a contract to make a Will.
    - 3 months after that, filed Petition for Elective Share. 1 month after that, Personal Representative denied Creditor's Claim.
    - Wife hired new attorney. Petitioned to allow creditor claim. Then petitioned for relief from Formal Testacy Order or in alternative Imposition of Construct Trust. Wife withdrew her creditor's claim.
- Issue: Was wife entitled to relief from Order granting Formal probate?
- Holding: No.

- Rationale:
    - There was a dispute over whether this issue was to be determined under Rule 60(b) of MRCivP or under §72-1-207 of the UPC.
    - Court ruled UPC controlled.
    - Montana Rules of Civil Procedure apply to all probate actions and proceedings, unless specifically provided to the contrary in the UPC or the Rules of Civil Procedure are inconsistent with the provisions of the UPC. §72-1-207 specifically governed issuance of order of formal probate.
    - Formal testacy order is final unless the proponents can show they were unaware of the other Will or were unaware of the earlier proceeding.
- Issue: Was the Personal Representative entitled to attorney fees for successfully defending the Will and Codicil?
- Holding: Yes.
- Law: **§72-12-206 MCA: Fees and expenses—by whom paid**. When the validity or probate of a will is contested through court action, the attorney fees and costs, as provided in 25-10-201, incurred in defending the validity or probate of the will must be paid by the party contesting the validity or probate of the will if the will in probate is confirmed.
- Rationale:
    - Wife did not initially contest the Will, but when her creditor's claim was denied, she then presented the Idaho document as a second codicil. The Personal Representative contested that and defended the probate of the Will and Codicil. He gets attorney fees.
    - Even though wife was not contesting the initial Will and Codicil, by presenting another purported Codicil the Supreme Court interpreted that as putting the Personal Representative in a position of defending the initial Will and Codicil, and that's what triggered attorney fees.

Wood v. Anderson, 388 Mont. 166, 399 P.3d 304 (2017)

- Takeaway: Laches can prevent denial of creditor claim
- Facts:
    - Oral agreement by grandparents to sell 5 acres to grandson for $30,000.
    - Grandson and his wife (but for simplicity, referred to hereafter as grandson) paid $15,000 down and paid for survey.
    - Grandfather wrote accountant asking how to report $15,000 payment towards sale of land.
    - Grandfather had attorney prepare real estate transfer documents; never signed.
    - Grandfather died soon after that.
    - Attorney who prepared the real estate transfer documents was also attorney for the estate. She asked grandson for additional information. He didn't reply but spoke with his mother (one of the PR's) who told him nothing would be done until his interest in the land was addressed.
    - PR's closed estate. Children sold all land including the 5 acres to third party.

- Issue: Did the grandson have an enforceable contract?
- Holding: Yes.
- Rationale: Even though statute of frauds invalidates oral contracts for sale of real property, other written evidence can support contract, even if in more than one document.
    - Must establish material terms:
        - the parties,
        - the subject matter,
        - a reasonably certain description of the property affected,
        - the purchase price or the criteria for determining the purchase price, and
        - some indication of mutual assent.
    - In this case, the District Court identified several writings which established the existence of a valid, written contract between.
        - the unsigned Land Purchase Agreement;
        - the land survey describing the property to be sold, paid for by the grandson;
        - the $15,000 check issued by to grandfather, who then endorsed and deposited the check; and
        - the letter from grandfather to his tax preparer referencing the $15,000 he received as partial payment for the "piece of ground" he sold.
    - Indicators of mutual assent:
        - Grandfather deposited the check,
        - told his accountant that he had sold a portion of his property,
        - allowed for the survey to be completed on his property, and
        - the survey proposal, cashier's check, and tax preparer letter were each signed by either grandfather or grandson.
    - Partial Performance
        - Even in the absence of a written contract, the Montana Supreme Court has "long recognized the doctrine of part performance as an exception to the Statute of Frauds."
- Issue: Was the grandson entitled to judgment against the distributees of the estate?
- Holding: Yes.
- Law: UPC has nonclaim provisions limiting the time in which claims can be made against an estate. §§ 72-3-803, -1011, and -1013, MCA.
- Rationale:
    - §72-3-803 requires creditors to file claims against an estate within a specified period of time or be forever barred from asserting their claim. Under § 72-3-801, MCA, a personal representative is required to give notice, either in writing or by publication, to the creditors of an estate. ¶ 16.
        - It provides that all claims arising at or after the death of a decedent, including those founded on contracts not based on a contract with a personal representative, "are barred against the estate, the personal representative, and the heirs and devisees of the decedent" unless the claim is presented "within the later of 4 months after it arises" or "within 1

year after the decedent's death." Section 72-3-803(1)(a), 2(a)-(b), MCA. ¶ 16.

- But "in ***Tulsa Prof'l Collection Servs., Inc. v. Pope***, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), the United States Supreme Court held that an unsecured creditor's claim is an intangible interest in property protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Pope, 485 U.S. at 485, 108 S.Ct. at 1345." ¶ 17.
    - "Notice by publication is insufficient to protect a creditor's property interest where the identity of a creditor is known or "reasonably ascertainable": instead, a creditor must be given "notice by mail or other means as certain to ensure actual notice. ***Pope***, 485 U.S. at 491, 108 S.Ct. at 1348 (quoting ***Mennonite Bd. of Missions v. Adams***, 462 U.S. 791, 800, 103 S.Ct. 2706, 2712, 77 L.Ed.2d 180 (1983))." ¶ 17.
- "And in ***Boyer v. Sparboe***, 263 Mont. 289, 867 P.2d 1116 (1994), we held that an estate cannot use § 72-3-803, MCA, to a bar creditor's claim where the estate: 1) has actual notice of a claim; and 2) through a representation, gives assurances to the claimant that no creditor's claim action is necessary to protect the claim. Boyer, 263 Mont. at 294, 867 P.2d at 1119-20." ¶ 18.
    - Owner of gold coins stored at business of decedent was on multiple occasions told by son his property was safe. Even though son was not PR, and owner had not filed creditor claim, Supreme Court said estate could not bar owner from retrieving gold coins.
    - **Note**: Representations of family member were binding on estate.
- Estate cannot use failure to file a claim to bar a creditor claim when 1) estate had actual notice of the claim; and 2) makes representations to the creditor that filing a creditor claim is not necessary to protect the creditor's claim.
- Estate could not use §72-3-803(2)(b) to bar claim.

- Also, under §72-3-1011 MCA when estate closed by sworn statement, Personal Representative remains liable for 6 months for claims for breach of fiduciary duty not otherwise barred.
- And, under §72-3-1012 MCA, distributees take subject to undischarged, unbarred claims.
    - Later of 3 years after death or 1 year after distribution.
    - No bar to recovery of property received as a result of fraud.
- Overriding fraud provision of UPC (§72-1-111(1)): Person injured by fraud can get relief against the perpetrator of the fraud or any person benefiting from the fraud, whether innocent or not, by bringing action within 2 years of discovery of the fraud. ¶ 23.

        - Constructive fraud when mother told her son (the grandson) that she would personally see to it that no action would be taken to allow for the transfer of the five-acre tract until their interest in the property was first addressed.
        - The District Court found that at some point she "changed her mind" and acquiesced to the estate's plan to deny her son's claim of interest in the contract and the property, but failed to disclose her change in position to her son.
        - Because grandson filed complaint within 2 years of discovering fraud, complaint was timely.
    - Judgment remanded so District Court could add the other distributees as being liable for the judgment.

Matter of Estate of Edwards, 387 Mont. 274, 393 P.3d 639 (2017)

- Takeaway: Undue influence can be established by circumstantial evidence (and be careful who you hire as housekeeper).
- Facts:
    - 2010 Will named niece as Personal Representative & Trust named her as co-Trustee. Left bulk of estate to niece.
    - Niece hired housekeeper for aunt in 2011.
    - New Will & Trust in 2012 left most everything to housekeeper and handyman and $300,000 to hospital.
- Issue: Was there substantial credible evidence that 2012 Will and Trust were procured by undue influence, fraud or duress.
- Holding: Yes.
- Law:
    - "Montana law provides that a finding of either undue influence, fraud, or duress may invalidate a will or a trust. Section 72-38-406, MCA; see § 72-3-310, MCA. The statute defines undue influence as:
        - (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." ¶ 55.
    - Will contestants have the burden of establishing undue influence, fraud, or duress in the execution of the will. ¶ 55.
    - "To establish undue influence, a party must present specific acts showing that undue influence actually was exercised upon the mind of the testator directly to procure the execution of the will." ¶ 56.

    - A trier of fact should consider "the opportunity for undue influence, including the testator's susceptibility to influence, and whether the disposition of property was natural." ¶ 56.
    - The mere "opportunity to exercise undue influence on the testator is not sufficient to prove undue influence and invalidate a will. 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." ¶ 55.
    - A finding of undue influence may be based on circumstantial evidence. ¶ 56.
- Rationale:
    - Prior to housekeeper's employment, niece maintained a close relationship with her aunt throughout niece's childhood and adult life. Aunt and her husband treated niece "like their daughter." Aunt spoke on the phone with niece almost daily.
    - Close friends testified housekeeper kept aunt isolated.
    - Behavior changed.
    - Medical testimony given that aunt was socially isolated and susceptible to undue influence.
    - Late 2012, housekeeper started telling aunt to sign documents, wrote checks for herself, was added as signer of checking account and got power of attorney.
    - Handyman spent time with aunt, took her to attorney's office, told her that her niece wanted her in a nursing home. Niece noticed aunt became cold and distant toward her.
    - Substantial evidence of undue influence:
        - confidential relationship;
        - real or substantial authority over Helen; isolation of Helen;
        - power of attorney;
        - right to sign checks.
    - Also, substantial evidence of opportunity to exercise undue influence:
        - social isolation;
        - medical testimony of vulnerability to influence;
        - unnatural disposition of estate, especially given prior close relationship to niece.
    - Also, substantial circumstantial evidence of "specific acts" of undue influence:
        - increased involvement with aunt coincided with her change in personality and relationship with niece;
        - evidence they preyed on aunt's fear of going to a nursing home;
        - exclusive access to aunt gave them opportunity to pressure her into changing estate plan.
    - So, the opportunity to exercise undue influence together with both direct and circumstantial evidence was valid grounds to find undue influence.
- Issue: Should the niece be awarded attorney fees?
- Holding: Yes.

- Law:
    - **72-12-206. Fees and expenses -- by whom paid**. When the validity or probate of a will is contested through court action, the attorney fees and costs, as provided in 25-10-201, incurred in defending the validity or probate of the will must be paid by the party contesting the validity or probate of the will if the will in probate is confirmed. If the probate is revoked, costs, as provided in 25-10-201, but not attorney fees, must be paid by the party who resisted the revocation or out of the property of the decedent, as the court directs.
    - **72-3-632. Expenses of personal representative in estate litigation**. If a personal representative or person nominated as 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.
- Rationale:
    - "The history of [72-12-206] makes clear that if a party successfully contests a will, she is entitled to costs, but not attorney fees, whereas if a party successfully defends a will, she is entitled to both attorney fees and costs." ¶ 87.
    - The District Court had ruled that the niece had contested the probate of the 2012 Will, but that the housekeeper and handyman had not contested the probate of the 2010 Will.
    - But the Supreme Court ruled that the housekeeper and handyman were contending that the 2010 Will was invalid because it had been revoked. The niece was defending the 2010 on the grounds the 2012 Will was invalid.
    - When the 2012 Will was invalidated due to undue influence, the 2010 Will should have been admitted to probate and as such was a "will in probate" governed by the attorney fee statute. ¶ 90.
- Supreme Court remanded for determination of attorney fees niece should get. She had filed a bill of costs and statement of fees in which she requested a total of $903,468.56, which included $892,018.63 in attorney fees and $11,449.93 in costs.

Matter of Estate of McClure, 385 Mont. 130, 381 P.3d 566 (2016)

- Takeaway: Missing some important information … but court required marital trust to be funded even though estate below exemption.
- Facts:
    - In 1993, Husband and Wife 1 created joint revocable living trust.
        - $600,000 estate tax exemption that year.
    - Trust provided for creation of Decedent's Trust to hold assets up to estate tax exclusion, excess to Survivor's Trust.
    - Wife 1 died in 2004.
        - Estate was less than estate tax exclusion of $1.5 Million.
        - Nothing done to divide trust into Decedent's Trust and Survivor's Trust.
        - Husband continued to accumulate assets which he included in the Trust.

- Husband married Wife 2 in 2006.
    - Prior to marriage, Husband granted Wife 2 a life estate in their marital home, which was a Trust asset.
- 2012: Husband amended trust to provide lifetime benefit to Wife 2 and appoint her as successor trustee. Remainder to pass to Husband's children.
- Husband died 4 months later.
- District Court ruled that under the formula clause, nothing was to be allocated to the Survivor's Trust because the estate was not over the estate tax exemption. Instead, everything should have been allocated to the Decedent's Trust which was irrevocable.
    - Husband's purported amendment was ineffective.
    - Husband's purported creation of life estate in the residence also was ineffective.

- Issue: Should assets have been allocated to the Survivor's Trust?
- Holding: Yes.
- Rationale:
    - Trust provisions:
        - Section 3.1 of the Trust Agreement provides that the trustee "shall divide the entire Trust Estate into" a Survivor's Trust and a Decedent's Trust.
        - Section 3.2 of the Trust Agreement, the principal of the Survivor's Trust consists of only those assets not allocated to the principal of the Decedent's Trust.
        - Section 3.3 provides that the principal of the Decedent's Trust "shall consist of assets equal in value to the maximum amount, if any, that can pass free of federal estate tax by reason of the unified credit."
    - But the Supreme Court said "Unquestionably, '[t]he trustor's intent controls our interpretation of a trust agreement.'" ¶ 21.
    - It said the District Court should have taken into account extrinsic evidence in the form of Trust Instructions that showed the intent of the settlors "to provide for the health, support and maintenance of [Husband and Wife 1] during their lifetimes, in their accustomed manner of living." The Trust's expressed secondary purpose, on the other hand, "shall be to permit [Husband and Wife 1] to provide funds for the reasonable health, support, and education of" their children. ¶ 22.
        - "By concluding—based on [the District Court's] narrow emphasis on Section 3.3—that [Husband and Wife 1's] "primary purpose was to avoid estate taxes, not to fund the Survivor's Trust," the [District Court] elevated the Trust Agreement's stated secondary purpose—to provide for [children]—over the express primary purpose—to provide for [Husband] upon [Wife 1's] death. ¶ 22.
    - The Supreme Court said that the provisions of the Trust Agreement, construed "in their ordinary and grammatical sense," required that the Trust be divided into a revocable Survivor's Trust and an irrevocable Decedent's Trust upon Wife 1's

death so that Husband would have the ability to manage his survivor's share for his support during the remainder of his lifetime. ¶ 23.

- The Supreme Court said the Trust Agreement was ambiguous and that is why the extrinsic evidence in the form of Trust Instructions was admissible. ¶ 24.

In re Estate of Kurth, 384 Mont. 261, 378 P.3d 1151 (2016)

- Takeaway: Probate of Will after 3 years will be denied if it appears there has been undue delay in asserting applicable exception.
- Facts:
  - Decedent signed instrument he "dictated" but it wasn't in his own handwriting. Left everything to niece and her husband.
  - Niece signed affidavit to collect assets from decedent's estate but never probated the "holographic" will.
  - Decedent also owned mineral rights. They weren't probated.
  - In 2013, oil & gas company wanted to lease minerals. Now, became important to probate and distribute the mineral rights. 13 years since decedent's death.
- Issue: Was the probate of the Will barred?
- Holding: Yes.
- Law:

> **72-3-122. Time limit on probate, testacy, and appointment proceedings -- exceptions**. (1) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than 3 years after the decedent's death, except:
> …
>
> (d) an informal appointment or a formal testacy or appointment proceeding may be commenced after the time period if no proceedings concerning the succession or estate administration have occurred within the 3-year period after the decedent's death, but the personal representative has no right to possess estate assets provided in 72-3-606 beyond that necessary to confirm title to the property in the successors to the estate, and claims other than expenses of administration may not be presented against the estate; and
>
> (e) a formal testacy proceeding may be commenced at any time after 3 years from the decedent's death for the purpose of establishing an instrument to direct or control the ownership of property passing or distributable after the decedent's death from one other than the decedent when the property is to be appointed by the terms of the decedent's will or is to pass or be distributed as a part of the decedent's estate or its transfer is otherwise to be controlled by the terms of the decedent's will.
> ….

- Rationale:
    - Proponent could have asserted exception under (d), but never did until late.
    - Didn't probate Will for 13 years.
    - Other side would be prejudiced because all their discovery had been based on exception under (e).

Volk v. Goeser, 382 Mont. 382, 367 P.3d 378 (2016)

- Takeaway: Don't change life insurance beneficiaries during pendency of divorce while stay is in place. Life insurance passed by intestacy because husband violated stay during divorce.
- Facts:
    - As part of Marital Settlement Agreement, husband agreed to execute a Will naming his son as beneficiary of his entire estate.
    - MSA listed one policy worth $1 Million, but not another worth $1.5 Million. MSA provided if an asset was not listed it was to be awarded to the opposing party.
    - While restraining order was in effect, husband changed beneficiary of both policies to his sister.
    - 4 months after divorce, husband died at age 45 without a Will.
    - Insurance company paid proceeds of policies to sister. She bought a house in California and otherwise invested the proceeds.
- Issue: Should a constructive trust be imposed on sister due to receipt of life insurance?
- Holding: Yes.
- Applicable Statutes:
    - Upon filing for divorce, court issued mandatory restraining order under § 40–4–121(3), MCA, 2009:

      …

      3. Petitioner and Respondent are hereby restrained from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability coverage held for the benefit of a party or a child of a party for whom support may be ordered.
    - §72-2-814(s)(a)(i) MCA provides that with certain exceptions, a divorce or a marriage revokes any revocable "disposition or appointment of property made by a divorced individual to the individual's former spouse in a governing instrument."
        - The Official Comments to the statute give life insurance as an example of what is covered by this statute.
- Rationale:
    - District Court:
        - Restraining order was not an issue because once the divorce was final, wife would have been removed as beneficiary of policy by operation of law under §72-2-814 MCA.

        - All husband was required to do was execute a Will naming son as residuary devisee; life insurance policies would not have passed under the Will.
        - Failure to disclose second life insurance policy had no effect because the term policy had no value at time of divorce, only at his death. It was an undisclosed asset, but had zero value for purposes of the divorce.
    - Supreme Court:
        - Yes, §72-2-814 MCA would have been applicable after divorce was final, in which event the policy would have lapsed, been distributed to husband's estate and passed to his son through intestacy.
        - Husband might have been able to change beneficiary after the divorce, but the court is not going to speculate as to what he would have done. The fact is, he violated the restraining order.
        - Failing to disclose the second policy may have had no effect on divorce decree, but still husband changed beneficiary while stay was in effect, so it will be treated the same way as the other life insurance policy.
        - Sister was unjustly enriched by receipt of the life insurance.
            - 3 elements for unjust enrichment:
                - a benefit conferred upon a defendant by another;
                - an appreciation or knowledge of the benefit by the defendant; and
                - the acceptance or retention of the benefit by the defendant under such circumstances that would make it inequitable for the defendant to retain the benefit without payment of its value.
            - All 3 elements present here.
        - Constructive Trust was proper remedy to unjust enrichment
            - Even though sister did nothing wrong.
            - A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the person holding title would be unjustly enriched if he were permitted to retain it.
    - Dissent:
        - TRO had been lifted so there was no unjust enrichment of the sister.
        - Change of beneficiary may have been voidable until entry of the decree of dissolution, but after that there were no restraints on his ability to make changes.
        - The MSA did not apply to life insurance policies; it only required the husband to execute a Will leaving his estate to his son.
        - The MSA has no provision regarding life insurance.

In re Estate of Schreiber, 381 Mont. 173, 357 P.3d 920 (2015)

- Ademption case

- Facts: Will provided that if specifically devised lots of real estate were sold, devisee was to receive proceeds. Specifically devised CD's did not have similar provision.
- Issue: Did specific devises adeem?
- Holding: Yes and no.
- Law: Nonademption statute at §72-2-616 MCA

  (1) A specific devisee has the right to the specifically devised property in the testator's estate at death and: ...

  (f) unless the facts and circumstances indicate that ademption of the devise was intended by the testator or ademption of the devise is consistent with the testator's manifested plan of distribution, the value of the specifically devised property to the extent the specifically devised property is not in the testator's estate at death and its value or its replacement is not covered by subsections (1)(a) through (1)(e).
- Rationale:
  - Nonademption statute creates mild presumption against ademption by extinction. Party claiming ademption has burden of establishing ademption was intended or is consistent with plan of distribution. ¶ 13.
  - Provision in Will regarding lots of real estate indicated testator's intention devise was not to be adeemed.
    - PR said the proceeds had to be traceable, but that was not required by the Will.
    - Supreme Court said that is not required. "Proceeds" need not be traceable. Testator did not intend ademption, so cash equal to sales proceeds must be distributed.
  - Different result for CD's
    - Will devised 5 specifically identified CD's that were no longer in existence at testator's death, but testator made no back up provision.
    - That established his intent that they should adeem.
    - **Query**: Would this have been different if testator had not been specific regarding real estate?

In re Estate of Harris, 379 Mont. 474, 352 P.3d 20 (2015)

- Takeaway: Probate of Will is permitted after 3 years when probate is limited to confirming title to property.
  - Contrast to ***Kurth***.
- Facts:
  - Wife and Husband 1 married and had 3 children.
  - Husband 1 died in 1963.
  - Wife married Husband 2 in 1965.
  - Wife inherited mineral interests. Her 1983 Will left these to her children and Husband 2.
  - Wife signed new Will in 1997 leaving everything to Husband 2 and naming him as Personal Representative.

- Wife died in 1999.
- Husband 2 thought all their assets were owned JTWROS.
  - Checks for mineral interests had been payable to the two of them.
  - Didn't probate 1997 Will.
- In 2013, oil & gas company wanted to lease the land with the mineral interests but determined Husband 2 was not on the title. Told Husband 2 probate would be required.
- Husband 2 filed for probate of 1997 Will. Children objected. Said the mineral rights were supposed to pass to them by intestacy.
- District Court issued summary judgment in favor of Husband 2.
  - No genuine issue of material fact as to testamentary capacity or undue influence.

- Issue: Was the probate of the Will barred by the 3-year limit of §72–3–122, MCA?
- Holding: No.
- Rationale:
  - Subsection (d) of §72–3–122, MCA states "an informal appointment or a formal testacy or appointment proceeding may be commenced after the time period if no proceedings concerning the succession or estate administration have occurred within the 3–year period after the decedent's death, but the personal representative has no right to possess estate assets as provided in 72–3–606 beyond that necessary to confirm title to the property in the successors to the estate, and claims other than expenses of administration may not be presented against the estate."
  - Husband 2 was only confirming title to assets. Subsection (d) exception applied. ***Estate of Taylor*** overruled.
    - ***Estate of Taylor*** had held that "if a will is not probated within three years of death, the assumption of intestacy is final."
    - Subsequent revisions to §§72–3–102 and 72–2–122, MCA changed the law ***Estate of Taylor*** had relied on.
  - What about ***Kurth***?
    - Laches can be a bar to exception (d) under §72–3–122, but that wasn't present in this case.
- Issue: Was summary judgment proper?
- Holding: Yes.
- Rationale:
  - Contestants alleged lack of testamentary capacity and undue influence.
  - Their Affidavits, however, set forth no credible material evidence of that.
    - Affidavits only showed opportunity for undue influence, not specific acts of undue influence. So did not raise material issue preventing summary judgment.
    - Affidavits that testator was under "mental stress" and "not in a good frame of mind" is not enough to establish lack of testamentary capacity.

- Affidavits by themselves are not sufficient to preclude summary judgment. Need "material and substantial evidence" to raise a genuine issue of material fact.

In re Estate of Quirin, 379 Mont. 173, 348 P.3d 658 (2015)

- Takeaway: Disinherited daughter could not overcome substantial evidence of testamentary capacity.
- Facts:
  - Testator died 1/10/2011 survived by 2 daughters. First 2 Wills left everything to daughters. Third Will in 2010 left everything to friends and charity, nothing to daughters.
  - Prior to drafting Third Will, attorney told testator there might be a Will contest, but testator said she and her daughters were not close.
  - Third Will admitted to probate 1/18/2011.
  - Disinherited daughter alleged lack of testamentary capacity.
- Issue: Did testator lack testamentary capacity to sign the 2010 Will?
- Holding: No.
- Rationale:
  - Substantial evidence of testamentary capacity:
    - "[Nancy] Moe [the attorney] concluded that Quirin intended to make a new will, understood that she was making a new will, understood her assets, and otherwise understood the consequences of what she was doing. Moe, therefore, drafted a will based on her June 4 discussion with Quirin. She mailed a draft of the will to Quirin on June 18, 2010. On June 23, 2010, Moe, accompanied by two paralegals from her office, visited Quirin's home. Moe and the paralegals observed that Quirin was dressed and articulate and that there was nothing to suggest that Quirin did not have testamentary capacity. Quirin and Moe spoke about the will and their June 4 conversation. Quirin signed the will prepared by Moe during this visit. The paralegals signed the will as witnesses." ¶ 5.
    - This is how to establish testamentary capacity.
    - In addition, 4 months after signing the Will, the testator had a conversation with the friend she had named as Personal Representative and told her she was "adamant" about keeping the Will the way it was.
  - Factors showing testamentary capacity:
    - 1st factor, awareness of nature of act to be performed, established by testator seeking out attorney, telling her what she wanted to do, following up, and then having conversation with friend months later discussing what had been done and why.
    - 2nd factor established by interactions with banks, awareness of amount and location of money being hidden at home, and ability to identify to attorney and friend amount and location of assets.
    - 3rd factor established by testator specifically mentioning daughters in her Will, specifying she was intentionally excluding them, taking them off her

bank accounts, changing locks at house so their keys would no longer work.

In re Estate of Lawlor, 378 Mont. 281, 343 P.3d 577 (2015)

- Niece had standing to contest Will but no standing to seek removal of PR.
- Facts:
  - Will signed 12/6/2012; died day later. No issue or spouse. 3 surviving siblings, 1 deceased who had living daughter and that daughter had a son.
  - Will left everything to two living sisters, did not mention deceased sister, and specifically excluded brother.
  - Daughter of deceased sister petitioned to convert to formal probate due to lack of testamentary capacity.
  - She and her son subsequently filed a motion seeking removal of Personal Representative due to conflicts of interest; not based on any change of testacy status.
- Issue: Did the daughter of the deceased sister have standing to contest the Will admitted to probate?
- Holding: Yes.
- Rationale: If the Will were overturned, the daughter of the deceased sister would be entitled to a share of the estate as an heir.
- Issue: Did the daughter of deceased sister and that daughter's son have standing to seek removal of the Personal Representative?
- Holding: No.
- Rationale: Removal of Personal Representative can be sought only by an interested person, and they did not meet the definition.
  - No "claim" against the estate because not trying to enforce any liability. ¶ 26.
  - When Will is admitted to probate, presumption of testacy arises, leaving heirs at law without any property interest in the estate. ¶ 27.
  - Standing cannot be based on successful outcome of pending Will contest. ¶ 28.
  - Heir at law has no property interest in the Estate while Will contest is pending, so no standing to petition for removal of PR for cause. Where Will has already been admitted to probate, heir at law is presumed not to be a successor to the Estate. ¶ 29.
  - Also didn't have priority for appointment as PR so couldn't use that as basis for being considered an interested person. ¶ 31.
- Dissent:
  - "Appellants have presented prima facie evidence in support of their removal request. As they have an interest in preserving the Estate as disinherited heirs in a will contest proceeding, they have standing to request removal of the personal representative." ¶ 42.
  - Heir has interest in protecting estate pending determination whether Will is invalid.

In re Estate of Mead, 376 Mont. 386, 336 P.3d 362 (2014)

- Takeaway: Witness not present at signing of Will but still counted because testator acknowledged his signing to witness within a reasonable time.
- Facts: Testator dictated his Will to his neighbor who wrote it down for him. Testator signed the Will and the neighbor signed as witness. She then thought it would be good to have a second witness so had her husband come over. Upon looking at the Will, he said to the testator "So, [my wife] wrote your will. Did she sign it too?" The testator said "No, that's my shaky handwriting."
- Issue: Should Will be invalidated for not complying with execution requirements, specifically not having two witnesses?
- Holding: No.
- Law: Subject to certain exceptions, §72-2-522(1), MCA, provides that in order to be valid a will must be (1) in writing, (2) signed by the testator, and (3) signed by two witnesses. The witnesses may sign within a reasonable time after having witnessed the signing or within a reasonable time after the testator acknowledges signing the will.
- Rationale: The second witness had signed within a reasonable time after the testator acknowledged signing the Will, so he counted as a valid witness.

In re Estate of Kelly, 376 Mont. 361, 334 P.3d 911 (2014)

- Takeaway: Partnership agreement was "governing instrument" for passage of limited partnership interest resulting in it passing by intestacy, not under limited partner's valid Will
- Facts:
    - Family Limited Partnership created 12/2001 in Illinois.
        - Parents each held 1% GP interests
        - 4 Children each held 24.5% LP interests
    - Father died 10/2003; his interest passed to Mother
    - Mother died 2/2011; her 2% interest passed in equal shares to 4 children
    - Testator daughter died 9/2013.
        - Will did not mention FLP interest
        - Residuary clause passed to beneficiaries some of whom were not eligible to be part of the FLP.
    - 7.2 of FLPA states:

      "The Partnership shall not terminate and dissolve upon the death, legal incapacity or termination of a Limited Partner.

      "The respective heirs of any deceased Limited Partner shall have the right to become a substitute Limited Partner by executing an amendment to this Partnership Agreement and, as provided by law, agreeing to be bound by all of the terms and conditions hereof and to assume all of the obligations of the deceased Limited Partner provided such respective heirs are the lineal descendants of KEVIN DONAL KELLY and ASTA WIDLUND KELLY.

"If the respective heirs of any deceased Limited Partner are not lineal descendants of KEVIN DONAL KELLY AND ASTA WIDLUND KELLY, then the deceased Limited Partner's interest shall automatically revert to the remaining Limited Partners and shall be transferred to said remaining Limited Partners by the legal representative of the deceased Limited Partner as soon as practicable.

"If the respective heirs of the deceased Limited Partner are the lineal descendant but do not desire to become a Limited Partner, then the respective heirs of the deceased Limited Partner may offer to sell the interest of the deceased Limited Partner to the remaining Limited Partners on a pro rata basis...." (Emphasis added).

- Issue: Is the partnership agreement a "governing instrument" that controls the disposition of the partnership interest?
- Holding: Yes.
- Rationale:
    - Limited Partnership Act in Illinois and Montana provide that the Partnership agreement "governs" relations among partners, which the District Court interpreted to mean that it was a "governing instrument" under the UPC that determined how the partnership interest was to pass.
    - UPC says if a "governing instrument" creates an interest in one's "heirs" then the interest passes under the laws of intestate succession. §72-2-721, MCA.
    - Definition of "governing instrument" under §72-1-103(20), MCA doesn't specifically include partnership agreements, but argument was that FLP created a future interest.
        - But that would be the case only if the FLP agreement were a "dispositive, appointive of nominative instrument of any similar type, which does not appear to be the case.
    - The FLPA is controlled by Illinois law but disposition of the partnership interest at death is governed by Montana law.
    - Notable quote: "***Presuming*** the FLPA to be a "governing instrument" under both Montana and Illinois law, its designation of 'heirs' properly refers to those designated under the intestate succession law of the state of her demise, Montana. Because Laura died while domiciled in Montana, Montana probate law applies." ¶ 21.
        - This is a central issue to the disposition of this case, but the Supreme Court doesn't really get to that issue.
    - Even though testator had a Will, Supreme Court agreed partnership agreement was a "governing instrument" and the partnership interest had to pass by intestacy.

Estate of Hedrick v. Lamach, 375 Mont. 74, 324 P.3d 1202 (2014)

- Takeaway: Joint Will provided that residuary was to pass to all children in mixed family, but assets transferred by wife to her living trust could not be considered part of her residuary.
- Facts:
    - Husband and Wife executed joint will 7/18/1983.
    - Each had three children from previous marriages.
    - Provisions of Will:
        - THIRD: We mutually give to whichever of us shall be the survivor the entire residue of our property which we may respectively own at our death.
        - FOURTH: The survivor of us gives the entire residue of his or her property which he or she may own at the time of death to our children by former marriages, JUDITH A. ARMOLD, KENNETH D. HEDRICK, SHEENA S. LAMACH, PAUL H. SIMPSON, JACQUELYN M. KRUEGER and JERRY J. SIMPSON, in equal shares, share and share alike. …
        - SIXTH: Our purpose is to dispose of our property in accordance with a common plan. The reciprocal and other gifts made herein are in fulfillment of this purpose and in consideration of each of us waiving the right, during our joint lives, to alter, amend or revoke this Will in whole or in part, by codicil or otherwise, without notice to the other, or under any circumstances after the death of the first of us to die.
    - Husband died in 1995 and his estate passed to Wife.
    - In 1996, Wife created a living trust and transferred much of her assets to it.
        - Residuary beneficiaries were her 3 children and 1 child of Husband.
        - 2 children of Husband were excluded.
- Issue: Did the joint will prevent Wife from transferring assets to the living trust with a different disposition scheme than the will?
- Holding: No.
- Rationale:
    - The joint will left the surviving spouse the "entire residue" of the property owned by the deceased spouse but did not have language restricting how the surviving spouse may use this property.
    - Joint will said "entire residue" of surviving spouse was to pass to all six children. Supreme Court that does not include property transferred during life, such as to a living trust.
    - The only explicit restriction was that Wife may not alter, amend, or revoke the joint will.
    - Still, not the end of it. Petitioner argued that creation of trust did not transfer assets out of wife's control during her lifetime; it was fully amendable. But for

some reason, the provisions of the trust agreement were not put into evidence, so Supreme Court remanded so District Court can determine whether trust is valid.