MONTANA LAWYER
State Bar of Montana
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AS I LAY DYING

With Halloween passing, the Evidence Corner series examines dying declarations in Montana

Also inside:

Mental Illness and Incarceration | Patent law | Rule 7, *Hendershott*, HB-555
Medicaid estate recovery | New chapter of the Federalist Society

2013 IOLTA COMPLIANCE AND PRO BONO REPORTING ONLINE FORMS ARE LIVE.

FORMS DUE DECEMBER 2

Montana attorneys must complete the IOLTA Compliance Certificate each year in accordance with the Montana Supreme Court Rules of Professional Conduct. Reporting is mandatory. (Required by Rule 1.18 of the Rules of Professional Conduct). Details inside and online at www.montanabar.org

MONTANA LAWYER

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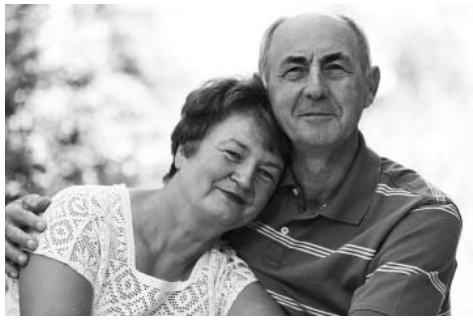

Because all people deserve equal access to safety, security, and opportunity, the Montana Justice Foundation works to achieve equal access to justice for all Montanans.

- Legal Aid Grants
- Law Related Education
- Loan Repayment Assistance Program

Many thanks for your support! May the joy of the season be with you the whole year through.

MONTANA JUSTICE FOUNDATION

Making Justice Accessible to All Montanans

To learn more about the Foundation and our work or to make a tax-deductible gift please visit us at: www.mtjustice.org

Feeling like a grouch?

Better habits require better skills

Lewis & Clark Journal Entry, Monday August 11, 1806 (Meriwether Lewis):

we fired on the Elk I killed one and he wounded another, we reloaded our guns and took different routs through the thick willows in pursuit of the Elk; I was in the act of firing on the Elk a second time when a ball struck my left thye about an inch below my hip joint, missing the bone it passed through the left thye and cut the thickness of the bullet across the hinder part of the right thye; the stroke was very severe; I instantly supposed that Cruzatte had shot me in mistake for an Elk as I was dressed in brown leather and he cannot see very well; under this impression I called out to him damn you, you have shot me, and looked towards the place from whence the ball had come, seeing nothing I called Cruzatte several times as loud as I could but received no answer.

Meriwether Lewis had a bad Monday. Out hunting and shot in the butt by a member of his team. Today's hunting is for recreation and food, not survival. But we don't expect to be shot by a companion. Or do we? A colleague shared that I should not write any letter without expecting my prose to be copied into a pleading. In a younger day, I wrote an attorney (we're still friends) "Gosh dog you sure ate your Wheaties . . ." making jest of his aggressive tactics. Sure enough, I was directly quoted in a later pleading.

Law Schools are full up just teaching essential subjects of law. There's little classroom time left for good ole professionalism. Kinda like parenting. I learned that's not a natural skill for many of us – book stores have shelves devoted to improving ourselves. Most of us think we'll be just fine – until our first child and we get cranky and short cause nobody told us about – whatever. Strange, that in our profession, there is no such bookshelf and very little instruction on just how to get along. We just assume it's natural– go to the office and be nice to everyone. Yet anyone's first week of practice dispels our naiveté. Discourtesy in letters, pleadings, phone calls (returned or not); verbal abuse of clients, witnesses, even our own staff tarnishes all of us. Kinda hard to promote our profession to the public when we occasionally shoot each other. I dispute the claim that this is part of our maturation. Disrespect is never OK.

So let's get past the "talk the talk" and try something real. We might start by admitting we're not naturals and better habits require better skills. Here's the challenge: Tear out this page, copy the numbered items and tape it to the side of every monitor in the office.

NOVEMBER JOB SKILLS

1. Call, don't email. Again, try it with you friends first and practice.
2. When you call, don't discuss the case right away. Tell a joke; ask about last weekend's game; thank them for the work they did on whatever (unrelated to your case). The point is, engage in some small talk that humanizes the dialogue. Sound silly? If it does, then you're woefully out of practice and this task is for YOU. Out of character? Good, surprise someone that you called other than to be your normal self. Perhaps in a month or so you'll become known for your pleasant calls rather than being . . . well, whatever others think of us.
3. When someone calls you, don't let it start with the case. Same as No. 2. Tell them it's great to hear from them and you really want to visit with them. Not true? Say it anyway. Practice that every time and it'll start to become true.
4. If they don't take your call, talk to the staff. I love this part. Repeat No. 2 here also. Use the same joke, ask about family. They might be shocked, but when you then ask to leave a message or get the discovery response, there's a better chance it goes to the top of the stack. I usually ask to speak to the attorney, but when that just doesn't work, staff are nearly always helpful. I get dates, appointments, even partial responses to letters. "Could you ask _____ if we could schedule _____" generally works. But remember to be cheerful and grateful. "Please" and "thank you" still work.
5. Go see them. We've just about lost personal contact with technology. Drop in and say "hi" and just say "hi." What for? Because it invites a relationship without an agenda. We lost this skill awhile back. If that doesn't work, leave the same message that you just stopped in

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Notes from the trail

Dear members, officers, trustees and staff:

The trail is long but the views are great & the company so fine. Fall travel reminds us why we live in the Treasure State.

Annual Meeting Planning

October 10, we reviewed the Helena convention and thought it was a pretty good hit. We liked the panel discussion format and Supreme Court argument. We're looking into promotional packages to encourage attendance. The committee will likely tour Big Sky soon to scope out reception location options.

Bozeman tour, Part 1

I stopped in Belgrade October 10 and met the two attorneys there. I love small town folk – reminds me of home. One, a busy part time city attorney and the other a retired Marine Captain. October 11 saw the Mediation CLE, moderated by Pat Quinn. We deputized Pat with a badge and scarf & met some folk. They're looking hard at some possible legislation for mediation. Seems fittin'.

Then hit the streets in Bozeman and tied up to a small firm and a large firm. I'm really overdressed – most folks wear jeans and one office had a yellow lab greeting folks. I think she was senior partner.

Bozeman & Western Tour No. 2

October 17 we returned to speak to the Gallatin Bar for their monthly meeting at the Highland Golf Club. Great meeting; met some new Bozeman members and welcomed old friends. Then knocked on doors, visiting domestic, P.I. attorneys and the local chief public defender.

Here's the next good spot for a trustee meeting: Sacajawea Hotel in Three Forks. Let's have a meeting here!

October 18, stepped in on the Construction Law CLE and saw some Flathead folk and some old classmates. I asked the group which day of Lewis & Clark journals was in the last Montana Lawyer with the prize being a CLE certificate. But no one had read it! We'll try that again another day. We left Bozeman at 11:00 and headed northwest to Manhattan and Three Forks. Pretty little towns, with a couple good members serving the public there. Offices were closed, but we visited by phone.

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to say "hi" and wish them well. Or schedule an appointment. Can't take the time? You don't have time to extend a courtesy? How's that working for you?

6. Attend local Bar functions. And once there, same agenda as No. 2. Leave your bitterness toward _____ (person or event) under your plate. Sit at a new table and introduce yourself to colleagues you don't know. Ask about them – quit talking about yourself – you're less likely to be grouchy if you focus on them. Smile and laugh – it's contagious. They'll come away with their own positive experience and, guess what, perhaps a good skill. Random kindness costs nothing.
7. What are your goals? I hope that your client's goals and your agenda are the same. Might want to check that. We're so good at posturing, we can forget what the goal post color is. When you know, try sharing that. While you're at it, ask the other side what their goals are. If they don't know or if it's a secret, you got a problem. Kinda hard to prepare for the argument when you don't know what it is. I love getting a case to mediation, but if it's to find out what the other side wants, somebody didn't do their job.

This isn't difficult stuff. But the trials we face can unknowingly bring out our worst. Pride and habit deceive us into making bad behavior seem normal. Lewis was shot in the butt. So what made you a grouch this week? Clip this page and try it this month. If it doesn't help, try it again anyway cause it's just courteous and we should all be that way. Whatever happens – call or write me a note. You might have a better idea. If you're still grouchy, ask if you or Meriwether Lewis had it worse.

Next Month: Stay tuned; we'll talk about another lost tradition.

SAYINGS FROM JIMMY:

Consider it pure joy when you face a trial (not an easy task, whether the trial is jury, nonjury or personal) because the testing of your character develops perseverance. Perseverance in turn can make you complete and not lacking anything.

— Randy Snyder, chief deputy
(406) 837-4383 | rsnyder@rsnyderlaw.us

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From here the road turned north to Townsend and the Broadwater County Courthouse. Tried to meet up with the County Attorney & Justice of the Peace, but everybody was out today.

Many fine, old courthouses serve our smaller towns. I especially liked the advice posted on the door of the courtroom (pictured above).

We continued north to East Helena and again caught some folk by telephone. Our Deskbook shows a number of East Helena attorneys, but they only live there and commute to Helena. The day was long and the sun getting low, so I wandered on home to the Flathead, ready for another day touring our fine state.

The coach rides on and there's always extra seats. Come along this great ride & see Big Sky country at its finest. Till then, stay in the saddle, offer a kind word to one who needs it and never let that pretty sun set on an angry day.

Respectfully Submitted,

Randall A. Snyder
Yer chief deputy

———

May the road rise up to meet you.
May the wind be always at your back.
May the sun shine warm upon your face;
the rains fall soft upon your fields and until we meet again,
may God hold you in the palm of His hand.

— Traditional Gaelic blessing

Annual mandatory IOLTA compliance certification is due Dec. 2, 2013

What do I need to do?

For all active attorneys, starting Nov. 1:

1. Go to www.surveymonkey.com/s/2013IOLTAPROBONO or follow the link at www.montanabar.org
2. Complete the mandatory IOLTA certificate
3. Complete the annual pro bono report

- Under Rule 1.18(e) of the Rules of Professional Conduct, each lawyer/firm must file an annual certificate of compliance with the IOLTA program.

- The pro bono reporting form is provided for you to report you pro bono activity, conforming to Rule 6.1 of the Rules of Professional Conduct.

Potts joins MLSA

Montana Legal Services Association (MLSA) is pleased to announce attorney Michelle Potts has joined the firm as the Director of Strategic Focus and Development.

Potts received her BA at University of Wisconsin, Madison with honors and her law degree from the University of Denver, College of Law, Order of the Coif. While in law school, she was Articles Editor for the University of Denver Law Review, received several awards for academic excellence (first in class), and was a research assistant in legal ethics. After graduation, Potts clerked for Justice Marsha K. Ternus on the Supreme Court of Iowa.

Potts previously served as the Development Director for the Mountain Park Environmental Center in Beulah, Colorado, helping connect children to outdoor experiential science learning. She also practiced employee benefits law in Chicago, Illinois and general law in Pueblo, Colorado. Now settling in Helena, Michelle looks forward to contributing to the access to justice for all Montanans.

MLSA is a non-profit law firm that empowers low-income people by providing legal information, advice, and other services free of charge. Its mission is to protect and enhance the civil legal rights of, and promote systemic change for, Montanans living in poverty.

Connell joins Guza, Nesbitt & Putzier

Connell

Guza, Nesbitt & Putzier, PLLC, a full service litigation, family law and transactional law firm is pleased to announce the addition of Haley Connell as an associate attorney. Haley grew up in Missoula, MT. She graduated magna cum laude from Georgetown University with a B.A. in Political Science. After college, Haley taught English in Argentina before returning to Montana to begin law school at the University of Montana.

While attending law school, Haley served as the Montana Law Review Notes Editor and interned for the Office of the State Public Defender. After graduating in 2012, Haley clerked for the Honorable Michael E. Wheat at the Montana Supreme Court.

Haley will be focusing her practice on general civil litigation, family law and criminal law. She is licensed to practice in the state and federal courts of Montana.

When not working, Haley enjoys running, backpacking, camping and relaxing at her family cabin at Flathead Lake.

Haley can be contacted at: Guza, Nesbitt & Putzier, PLLC, 25 Apex Drive, Suite A, Bozeman, MT 59718. Phone: (406)586-2228; Fax: (406)585-0893; Email: hconnell@gnplaw.com.

Potts joins Halverson & Mahlen

Halverson & Mahlen, P.C., is pleased to announce the association of Adrianna Potts. She practices in civil litigation, focusing primarily on insurance and insurance defense. Adrianna was born and raised in St. Ignatius, Montana. In 2010, she received her undergraduate degree from Montana

Potts

State University. She began law school the following fall at the University of Wyoming College of Law, where she participated in multiple competitions including participating in Regional competition twice for the Trial Advocacy/Mock Trial Competition. She also received awards in advocacy and Bankruptcy. Adrianna graduated from law school with honors in 2013 and started with Halverson & Mahlen after successful passage of the Montana bar exam. Outside of work, Adrianna enjoys spending time with her husband and dog.

Adrianna will join James R. Halverson, Thomas L. Mahlen, Jr., and John L. Wright in their commitment to providing individuals, businesses, and insurance companies with ethical, efficient and effective legal representation throughout Montana in a wide variety of practice areas, including commercial litigation, construction, insurance, products liability, personal injury, employment law, and fire/arson cases. Please visit the firm's website, www.hglaw.net, and contact the firm at:

Halverson & Mahlen, P.C., Creekside Suite 301, 1001 S. 24th Street West, P.O. Box 80470, Billings, MT 59108-0470. Phone: (406) 652-1011. Fax: (406) 652-8102.

Miller joins Brown Law Firm

Brown Law Firm, P.C., Billings, Montana, is pleased to announce that Andrew J. "A.J." Miller has joined the firm as an associate. A.J. graduated with honors in English Literature and Creative Writing from the University of Montana in 2007. He returned to the University of Montana School of Law in 2009 and graduated in May, 2012. Following graduation, he was the law clerk for the Honorable Judge Gregory R. Todd of Yellowstone County. He is a member of the Montana Defense Trial Lawyers Association and the Yellowstone Area Bar Association. His practice focuses primarily on insurance coverage and civil defense litigation.

Miller

Iguchi joins Holland & Hart

Holland & Hart LLP is pleased to announce the addition of Jamie Iguchi to the firm's commercial litigation practice. She is based out of the firm's Billings office.

Iguchi provides counsel on a range of litigation matters, including assisting clients with drafting pleadings, discovery requests, legal research and other business matters.

Prior to joining Holland & Hart, Iguchi was a senior law clerk to the Honorable Blair Jones of the Montana 22nd Judicial District.

She is admitted to practice in California, Montana and New York.

Iguchi is the president-elect of the New Lawyers' Section of the State Bar of Montana.

She holds a J.D. from the University of California, Davis, and a B.A. from the University of California at Santa Barbara.

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Small joins Holland & Hart


Small

Holland & Hart LLP is pleased to announce the addition of Steven Small to the firm's bankruptcy, finance and real estate and construction practices. He is based out of the firm's Billings office.

Small advises clients on acquisitions and sales, financing, commercial leasing, secured and unsecured financing transactions, mergers, asset and stock purchases and loan workouts and restructurings. He also represents clients in business transactions, entity formation, corporate and partnership reorganizations, estate planning, trust administration and wealth transfer.

He is a member of the Montana Defense Trial Lawyers, the Northwest Indian Bar Association, the Indian Law Section of the Montana Bar Association, the Business Law Section of the American Bar Association (ABA), the Contracts Document Division of ABA Construction Industry Forum and the Yellowstone County Bar Association.

Small holds a J.D. from the University of Montana School of Law, an M.B.A. and a B.S. in Finance from the University of Montana School of Business Administration and a B.A. in Native American Studies from the University of Montana.

Bjerke-Owens joins Silverman Law Office

Silverman Law Office, PLLC is pleased to announce that Jessica H. Bjerke-Owens has joined the firm as an associate attorney. Jessica was born and raised in Helena. She received a B.A. and B.S. from the University of North Dakota in 2008; her law degree and M.P.A. from the University of Montana in 2012; and her LL.M. in Taxation from the University of San Diego in 2013. During her time at UM, she participated in the Volunteer Income Tax Assistance program and Child Support Enforcement Division clinic. She was selected as the Carr Ferguson Graduate Tax Research Fellow at USD and provided legal assistance to low-income taxpayers through the Federal Tax Clinic. Jessica's practice areas include estate planning, tax controversy, business law, and transactions. Jessica can be reached at (406)449-4TAX (829) or Jessica@mttaxlaw.com.

Mackay returns to private practice


Mackay

Thomas A. Mackay is pleased to announce his return to private practice opening the Mackay Law Firm, PLLC.

A fourth generation Montanan, Tom received his Juris Doctor degree from the University of Montana School of Law in 2001. After law school, he began his practice as an associate attorney for Moulton, Bellingham, Longo & Mather, P.C. in Billings. While at the Moulton Firm, Tom was exposed to a wide ranging civil practice including jury and bench trial experience, bankruptcy practice, commercial law and insurance defense.

In 2005, Tom accepted a position with the United States District Court as Law Clerk/Staff Attorney to Senior District Judge Jack Shanstrom. In that position, Tom was privileged to assist federal judges in the District of Montana and the District of Columbia on a variety of civil and criminal cases in federal court.

Active in community service, Tom has served as past chairperson of the Downtown Billings Association and the Montana State Bar, Bankruptcy Section. Presently, he is an active Court Appointed Special Advocate (CASA) volunteer.

Tom is admitted to practice law in the State of Montana in both federal and state courts. He is engaged in the civil practice of law with a focus on representing injured Montanans. To that end, Tom has affiliated with the Law Offices of Gavin W. Murphy, PLLC as Of Counsel.

Tom my be reached at 2722 3rd Avenue North, Suite 400, Billings, Montana 59101, by phone at 406-256-2151 or email at tmackay@mackayfirm.com.

Kasting named in "Best Lawyers in America"

Kent M. Kasting, managing shareholder of the Bozeman law firm of Kasting, Kauffman & Mersen, P.C., has been included in the 2013-2014 edition of Best Lawyers in America in the field of family law for Montana. In addition, the publication has named him Lawyer of the Year in family law for the Billings/Bozeman metropolitan area. Mr. Kasting has also been listed in the 2013-2014 edition of "Mountain States Super Lawyer" in family law for Montana. He is a Fellow in the American Academy of Matrimonial Lawyers and has served as president of its Mountain States Chapter.

Court selects Mecklenberg Jackson as new state law librarian

The Montana Supreme Court has selected Lisa Mecklenberg Jackson to serve as the state law librarian, effective Oct. 2. Jackson was selected from a pool of three finalists and replaces Judy Meadows who was the law librarian from September 1984 until her retirement in May 2013.

The library provides access to legal information to Montana's courts, legislature, state officers and employees, attorneys, and members of the general public.

"Her broad based background in library science, as a practicing attorney, together with her vision for making the State Law Library more accessible in an electronic age combine to make Lisa an excellent choice to serve as the next librarian," said McGrath.

Before being appointed as the law librarian, Jackson was the in-house counsel for Equity Management, Inc. in Missoula. Previously, she worked as a librarian for Missoula Public Library. She was also a staff attorney for the Montana Legislature in the Legislative Services Division.

Jackson received her law degree from the University of North Dakota and her master's in library and information science from the University of Washington. Jackson is a member of a number of professional activities and a community volunteer on many levels.

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Haynes joins Joyce, Johnston & MacDonald


Haynes

Mike Haynes has joined the Law Firm of Joyce, Johnston & MacDonald. Mike was raised in Butte and graduated from Butte High School. He continued his education at Montana Tech, where he graduated with honors in 2009. Mike went on to study at the University of Montana School of Law where he received his law degree in May 2013. He is admitted to practice in all state and federal courts throughout Montana. Mike's areas of practice include representing injured persons in claims involving automobile collisions, workplace accidents, disability and insurance. Mike looks forward to serving the legal interests of clients throughout Montana.

Pugh joins Tarlow, Stonecipher & Steele

The law firm of Tarlow, Stonecipher & Steele, PLLC, recently welcomed Matt J. Pugh to its practice. Matt was born and raised in Kalispell. He graduated with honors from the University of Montana School of Law in 2012. For his undergraduate education, he attended Montana State University and received a degree in Business Management and Economics in 2008, graduating with highest honors. During law school, Matt served as an editor of the Public Lands & Resources Law Review. He spent the last year working as a law clerk to Justice Patricia Cotter at the Montana Supreme Court. Matt is admitted to practice law in Montana and the U.S. District Court for the District of Montana. He will be engaged generally in the firm's practice, with an emphasis on litigation. Please contact Matt at (406) 586-9714 or mpugh@lawmt.com.

Montana law student wins pro bono award

On October 18, third year University of Montana law student Emily Lucas received this year's Montana Law Student Pro Bono Service Award. The award is a collaboration between Montana Legal Services Association (MLSA), the University of Montana School of Law, and several community partners. The distinction included a $500 check donated by Crowley Fleck, PLLP, which was presented to Lucas during Friday's ceremony held at the Missoula County Courthouse.

A deserving candidate, Lucas has donated an estimated 200 hours to volunteer legal work outside the classroom over the last three years. Her involvement in pro bono has ranged from implementing a domestic violence clinic, working with Crime Victim's Advocate Office, DOVES, the YWCA, and Rubin & Ries Law Offices. Her passion when it comes to the law is to work with victims of domestic violence. She says access to legal services is important in all areas, but when domestic violence is present, civil legal representation can create an avenue for victims to leave. According to Lucas, "the ability to leave reduces the overall prevalence of violence within a community."

Although pro bono benefits the community and her clients, Lucas says she feels just as rewarded about the experience.

"I think it's important to remember that providing pro bono services is not only beneficial to those who are served, it is personally rewarding. It can provide an unparalleled opportunity for career development through direct supervision by practicing attorneys and meaningful client interactions," she said.

The award is handed out annually in October to a third year law student who has demonstrated extraordinary commitment to public service and pro bono legal work during their law school career.

— Elizabeth Weaver MLSA AmeriCorps VISTA

Continuing Legal Education

For more information about upcoming State Bar CLE, please call *Gino Dunfee at* ***(406) 447-2206.*** You can also find more info and **register at *www.montanabar.org*,** just click the CLE link in the Member Tools box on the upper-right side of the home page. We do mail out fliers for all multi-credit CLE sessions, but not for 1-hour phone CLE or webinars. The best way to register for all CLE is online.

November

Nov. 8 - Montana's New Uniform Trust Code (MT UTC), Substituted Judgment for Conservators and Estate Planning — Crowne Plaza, Billings. Sponsored by the Business, Estates, Trusts, Tax & Real Property (BETTR) Law Section. 6.75 Montana CLE Credits, including 2.00 Ethics credits.

Nov. 21 - Noon Webinar: 2013 Legislative Session Update for Nonprofits and Charities. Sponsored by the CLE Institute. 1.00 CLE credit. Pre-Registraton closes 11/18.

December

Dec. 6 - Criminal Law Evidence — Hilton Garden Inn, Missoula. Co-Sponsored by the Criminal Law Section and CLE Institute. Keynote Speaker is Professor Edward J. Imwinkelried, of UC Davis School of Law. 6.00 CLE Credits.

January, 2014

Jan. 17-19 - CLE & SKI — Big Sky. Sponsored by the CLE Institute. Approved for 10.00 CLE credits, including 3.00 Ethics credits. Earn all your Ethics credits for this reporting period. Other areas covered include important information on health care reform, business law update, law office security tips and a Supreme Court update.

February

Feb. 14 - Annual Real Estate CLE — Fairmont Hot Springs. Details pending.

Getting individuals committed to the MT State Hospital out of county jails

By Anna Conley

A disturbing trend is occurring in our state that negatively impacts individuals with mental illness. The following hypothetical example illustrates the problem: Imagine John Doe is an individual with a significant history of mental illness who requires regular medication to function, but does not receive adequate treatment in his community, and occasionally stops taking his medications. John Doe is transient and subsists on a very limited income.

John Doe is arrested for theft, and charged accordingly. Unable to post bond, John Doe is held as a pre-trial detainee in a county detention center and appointed a public defender. After meeting with John Doe, the public defender determines there are likely mental health issues impacting him, and requests a court ordered mental fitness evaluation. The court orders the mental fitness evaluation and commits John Doe to the Montana State Hospital ("MSH") for evaluation. While awaiting transfer to the MSH, John Doe sits in the county detention center for over a month. The county detention center has very limited mental health treatment, and John Doe does not receive the medications he needs and does not get evaluated by a mental health professional. His mental condition deteriorates rapidly, and he is put into isolation for the duration of his incarceration because he is not appropriate for general population, which further exacerbates his condition.

Lack of funding or resources is not a justification for the prolonged detention in county detention centers of individuals court ordered to the state hospital.

This scenario is occurring with regularity throughout Montana. Extended stays in county detention centers by individuals in need of mental health treatment are a result of an underfunded and overwhelmed Montana Department of Health and Human Services. In 2012, Montana District Judge David Ortley addressed this issue in *State v. Brown,* DC-03-438(A) (Mont. 11th Dist. 2012). A defendant was committed to MSH for evaluation, but remained in a Flathead County Detention Center for over a month. Although the defendant ultimately received the treatment and medication he needed from mental health staff in Flathead County and his commitment was eventually rescinded, Judge Ortley made the following comment regarding the lag time in sending the defendant to the state hospital: "Mental health providers are not free to ignore the orders of the courts charged by the legislature with ensuring the mentally ill are provided with fundamentally fair proceedings... [I]t is incumbent on those duty bound to obey the order to seek legal redress and not simply ignore the order to the potential detriment of the mentally ill." *Id* at 2, ¶3.

Incarcerating pre-trial detainees with mental illness in county detention centers despite court orders that they be transferred to MSH amounts to punishment in violation of their Fourteenth Amendment rights to medical and psychiatric care. *Oregon Advocacy Center v. Mink,* 322 F.3d 1101, 1120, 1122 (9th Cir. 2003). *See Terry v. Hill*, 232 F.Supp.2d 934 (2002) (the due process clause prohibits pre-trial detainees from being punished prior to conviction, and "delay in transferring court ordered pretrial detainees to the [state hospital] for evaluation or treatment, amounts to punishment of the detainees").

Pre-trial detainees court ordered to MSH who are subject to prolonged incarceration in county detention centers retain a liberty interest in both freedom from incarceration absent criminal conviction and restorative treatment. *Id.* This interest cannot be infringed unless outweighed by a legitimate state interest. Courts have held that states have no legitimate state interest justifying prolonged detention in county detention centers of individuals who are court ordered to a state hospital. *See e.g., Mink*, 322 F.3d at 1121; *Advocacy Center for Elderly and Disabled v. Louisiana Dept. of Health and Hospital*, 731 F.Supp.2d 603, 610 (E.D. La. 2010) ("defendants' policy of subjecting Incompetent Detainees to extended delays in jail before their transfer to Feliciana [state hospital] bears no rational relationship to the restoration of their competency or a determination that they will never become competent").

While in county detention centers, such pre-trial detainees are often provided inadequate mental health treatment, and in some cases no mental health treatment whatsoever, and suffer from exacerbated mental illness symptoms as a result. *See Advocacy Center for Elderly and Disabled*, 731 F.SUpp.2d at 610 ("[t]he mental health treatment that the Incompetent Detainees are receiving in local jails is minimal, and defendants provide them with virtually the same level of mental-health treatment that is available to the average inmate who has not been deemed incompetent to stand trial"). Put simply by the U.S. Supreme Court: "confinement in prison is punitive and hence more onerous than confinement in a mental hospital." *Heller v. Doe by Doe*, 509 U.S. 312, 325 (1993). As such, prolonged incarceration in county detention centers after being court ordered to MSH

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Supreme Court gets it right in difficult gene case

By Toni Tease

In June of this year, the U.S. Supreme Court decided a case involving the patentability of human genes. According to the Court, human genes in and of themselves are not patentable, but synthetic replications of them are. The issue before the Court was whether the patent holder had the exclusive right to isolate certain genes and to synthetically replicate those genes. The Court decided that the answer to the former question was no, and the answer to the latter question was yes (with the caveat that the synthetic replications are not the same as the naturally occurring genes).

In *Association for Molecular Pathology v. Myriad Genetics, Inc.,* 133 S. Ct. 2107 (2013), three of Myriad's patents were at issue. These patents covered not only the actual DNA sequences themselves but also nucleotide sequences for complementary DNA (cDNA), which is synthetically created DNA that omits portions of the DNA segment that do not code for proteins. In other words, the patents covered not only DNA as it exists in nature but also a man-made, synthetic form of DNA that does not exist in nature and that was created for diagnostic purposes. Specifically, the cDNA contains only the exons and omits the introns that are normally present in DNA.

The specific genes that Myriad patented are the genes that govern susceptibility to breast and ovarian cancer. Myriad discovered the location and sequence of these genes and used this information to develop diagnostic tests that inform women as to their risk of developing these types of cancers. When other companies developed similar tests (and typically charged less money for them), Myriad sued for infringement of its patents, and the accused companies challenged the validity of those patents.

In reaching its conclusion, the Court reasoned that products of nature are not eligible for patent protection, but something that is not naturally occurring is. (For example, you cannot find a plant in the woods and patent it, but you could patent the use of that plant for medicinal purposes.) Even brilliant discoveries--such as Myriad's discovery that mutations of the BRCA1 and BRCA2 genes increase the risk of certain cancers--are not patentable if they involve simply discovering a fact of nature. The same is true of extensive effort--no matter how great the investment in time and personnel, extensive effort alone is irrelevant to the patentability analysis.

The controversial issue--and one that has been the subject of many debates in intellectual property forums across the country--was whether the isolation of certain genes from the rest of the DNA strand should be patentable. The issue of the patentability of the cDNA was less controversial because cDNA does not occur in nature. According to the Court, the mere act of isolating a gene, by severing the covalent bonds that bind it to the rest of the chromosome, is not an act of invention. (My analogy is that this would be like picking a leaf off of a tree and attempting to patent the leaf.) In the latter instance, the Court reasoned, Myriad did not create anything. On the other hand, cDNA is not the same as a naturally occurring DNA segment because it is an exons-only molecule. Because it is "distinct from the DNA from which it is derived," the Court held that it is patentable.

Finally, the Court noted that if Myriad had attempted to patent novel methods of isolating the DNA strands, those claims may have been upheld--but the methods Myriad used were well-known in the industry. The Myriad patents also included claims for applications of its knowledge concerning the BRCA1 and BRCA2 genes (as in the above analogy regarding patenting the use of a plant for medicinal purposes), but those claims were not challenged. In patent parlance, the challenged claims were "composition" claims that went to the gene sequences themselves.

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violates pre-trial detainees' right to restorative treatment. *Mink*, 322 F.3d at 1122; *Terry*, 232 F.Supp.2d at 943 ("the lack of inpatient mental health treatment [in jails], combined with the prolonged wait in confinement, transgresses the constitution"). Even a few weeks in a detention center without proper medication and treatment for a prisoner with mental illness can lead to significant suffering and deterioration.

Lack of funding or resources is not a justification for the prolonged detention in county detention centers of individuals court ordered to the state hospital. *See Advocacy Center for Elderly and Disabled,* 731 F.Supp. at 624 ("Defendants' limited resources are a concern, but lack of funding cannot justify the continued detention of defendants who have not been convicted of any crime, who are not awaiting trial, and who are receiving next to no mental-health services").

We at the ACLU of Montana encourage attorneys representing individuals detained in county detention centers after being court ordered to MSH to raise this constitutional violation with district court judges, and stop county detention centers from serving as the holding ground for individuals in need of mental health treatment.

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Mandatory appellate mediation and domestic violence in Montana

By Wesley Parks*

INTRODUCTION

The Montana prohibition against district court mediation where there is a reason to suspect domestic violence is inconsistent with Rule 7 of the Montana Rules of Appellate Procedure ("Rule 7"), which mandates mediation. In *Hendershott v. Westphal*, the Montana Supreme Court affirmed "an absolute bar to mediation where the [district] court finds a reason to suspect abuse."[1] On April 20, 2013, the Montana Legislature expanded *Hendershott* by enacting House Bill 555 ("HB-555"), providing survivors the option to attend district court-ordered mediation upon written, informed consent.[2] Despite *Hendershott* and HB-555, mediation is required in Montana Supreme Court domestic relations cases even when domestic abuse is at issue.[3]

Unlike HB-555's district court opt in provision, Rule 7 only provides a telephonic mediation option for domestic violence cases. As Rule 7 is currently written, either party may request telephonic mediation by motion submitted to the appellate mediator when the *district court* makes a finding of domestic violence.[4] Yet, studies have shown that telephonic mediation does not protect against abusive partner control.[5]

Montana Supreme Court screening for domestic violence in domestic relations cases does not occur even though such violence may increase during the volatile period between trial and appeal. Incidents of certain types of domestic violence are known to increase after the survivor leaves the relationship.[6] Often, domestic violence will not materialize in a relationship "until the conflicts raised by the separation escalate to violence"; survivors are more at risk for assaults, homicide, and stalking after separation or divorce.[7] Further, studies have shown divorce may escalate the frequency and severity of domestic violence beyond the initial separation phase.[8] Considering that the time between trial, the filing of an appeal, and the completion of appellate mandated, self-executing[9] mediation can take 105 days or more,[10] the Court should scrutinize cases for domestic violence during this period. However, the *Hendershott* rule and HB-555 protections disappear on appeal, and the appellate system does not assess whether domestic violence has developed when it may more likely erupt.

Domestic violence survivors deserve continuity of protection as their cases work through the judicial system. This article will first discuss Montana case law regarding the self-executing aspects of mandatory appellate mediation to illustrate how the Montana Supreme Court has not given a clear standard regarding when—*or if*—cases involving domestic violence may be excused from mediation. Then, this article will illustrate how certain forms of domestic violence—those containing the element of coercive control—are more likely to occur at the appellate level, how telephonic mediation fails to address domestic violence adequately, and how Rule 7 may assist abusers in continuing the cycle of abuse via manipulation of the court system. Lastly, this article will conclude with a discussion on why the *Hendershott* rule and HB-555, which provides a provision for informed

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Hendershott v. Westphal, 2011 MT 73, 360 Mont. 66, 253 P.3d 86.

1 *Id.* at ¶ 25. In *Hendershott*, the Court held, "§ 40-4-301(2) . . . explicitly prohibits [district] courts in family law proceedings from authorizing or continuing mediation of any kind where there is a reason to suspect emotional, physical, or sexual abuse." *Id.* at ¶ 31.

2 Mont. H. 555, 63d Reg. Sess. (2013), available at http://data.opi.mt.gov/bills/2013/billpdf/HB0555.pdf. The bill did not address appellate mediation rules.

3 Mont. R. App. P. 7(2)(b) (2011). Rule 7 requires mandatory mediation in all domestic relations cases, except those dealing with "neglected children, paternity disputes, adoptions, and all juvenile and contempt proceedings." *Id.*

4 *Id.* This portion of Rule 7 provides, "In addition, if there has been a finding by a district court that one of the parties has been a victim of domestic violence, the appellate mediation may be conducted by telephone upon motion submitted to the mediator by either party."

5 *See* Laurie S. Coltri & E. Joan Hunt, *A Model for Telephone Mediation*, 36 Fam. & Conciliation Courts Rev. 179 (1998); *see also* Joanne Belknap et. al., *The Roles of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 Duke J. Gender L. & Policy 373 (2012) discussed *infra*, Section III.

6 Desmond Ellis & Noreen Stuckless, *Separation, Domestic Violence, and Divorce Mediation*, 23 Conflict Resolution Quarterly 461, 462-463 (2006).

7 Michael P. Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence*, 102 (N.E. U. Press 2008). Johnson notes that "the majority of women who were victims of intimate partner assault were separated or divorced." *Id.* at 101. Johnson points to studies that have shown, after separation or divorce, women were found twenty-five times more likely to be assaulted, ten times more likely to be killed, and also more likely to be victims of stalking. *Id.* at 101-102.

8 Lisa Stolzenberg & Stewart J. D'Alessio, *The Effect of Divorce on Domestic Crime*, 53 Crime & Delinquency 281, 284 (2007) (citing George W. Barnard, Hernan Vera, Maria I. Vera, & Gustave Newman, *Till Death Do Us Part: A Study of Spouse Murder*, 10 Bulletin of the American Association of Psychiatry and Law, 271-280 (1982) (finding violence intensifies after divorce); Marion Kershner, Diane Long, & Jon E. Anderson, *Abuse Against Women in Rural Minnesota*, 15 Public Health Nursing, 422-431 (1998) (finding divorced women 2.5 times more likely to be abused than married women); Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 Violence and Victims, 3-16 (1993) (finding significant increases in homicide risk for separated and divorced survivors of domestic violence)).

9 *See* Mont. R. App. P. 7(9). Rule 7 provides that appellate mediation is "self-executing," meaning that the parties must partake in mediation without Court intervention, and motions to opt out of mandatory appellate mediation will be summarily denied.

10 *See* Mont. R. App. P. 5(a)(i). Rule 5(a)(i) requires that the appeal from a final judgment be filed with the Montana Supreme Court within 30 days. *See also* Mont. R. App. P. 7(3)(a). Mandatory appellate mediation must be completed within 75 days of filing the appeal.

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consent, should equally apply to appellate mediation.

MANDATORY, SELF-EXECUTING APPELLATE MEDIATION AND THE "EXTRAORDINARY CIRCUMSTANCE" EXCUSE

"Mandatory" Compliance Requirements

At its inception, mandatory appellate mediation in Montana did not contemplate as one of its primary purposes the protection of survivors of domestic violence. Mandatory mediation focuses primarily on judges' values of facilitating settlement, decongesting court dockets, and saving costs—not meeting the needs of survivors of domestic violence.[11] The Montana Supreme Court implemented mandatory appellate mediation on October 1, 1996, with two main goals in mind: (1) providing disputing parties with a less expensive alternative to the normal appellate process; and (2) reducing the overburdened Montana Supreme Court docket.[12] The Court views the goals of mandatory appellate mediation with such importance that failure to comply with the mandatory appellate mediation rule subjects such cases to potential dismissal.[13] In order to accomplish these overarching primary goals, the Court designed the appellate mediation rule to be completely self-executing (i.e. not subject to motion practice or Court intervention).[14]

The Montana Supreme Court has vacillated in dealing with non-compliance with the mandatory appellate mediation rule. In *Dobrocke v. City of Columbia Falls*,[15] the Court initially took a hard stance against non-compliance. In *Dobrocke*, counsel erroneously argued that an appeal from a summary judgment ruling was not subject to mediation even though the summary judgment ruling was based on money damages.[16] The Court sternly reminded counsel that the rule applies to any civil case in which money damages are sought and "the determining factor is the relief sought and not the type of order or judgment being appealed."[17] Drawing from authority granted in the Montana Constitution,[18] the Court held, "[I]n the future, an appellant's failure to comply with these rules *will* subject the appeal to dismissal."[19]

Dobrocke's hardline approach of mandatory dismissal in cases of non-compliance with the appellate mediation rule was not long-lived. In *Roberts v. Nickey*,[20] the Court overruled *Dobrocke*'s absolute dismissal requirement when the rule is not followed. In *Roberts*, John Nickey ("John") and Phyllis Roberts ("Phyllis") divorced in 1977, and John was ordered to pay child support.[21] In 1998, Phyllis sued John for unpaid child support.[22] The district court entered judgment against John in the amount of $6,300, and John appealed the court's denial of his motion to set aside judgment.[23] John's counsel did not comply with the mandatory mediation rule, which requires family relations cases to attend appellate mediation. The Court noted that child support actions did not fall under the exceptions of "parental rights, paternity disputes, [or] adoptions" under the appellate mediation rule.[24] Despite counsel's failure, the Court found that an absolute dismissal for non-compliance was too harsh of a sanction, overruling *Dobrocke*.[25] As a result, the Court held that failure to comply with the mandatory appellate mediation rule *may* lead to dismissal of the appeal.[26] The *Roberts'* discretionary dismissal rule for non-compliance has been integrated into Rule 7 and remains part of its current version.[27]

Self-Executing Appellate Mediation

Although the Montana Supreme Court has inconsistently dealt with dismissal for non-compliance, the Court has remained unswerving in its position that mandatory appellate mediation is self-executing[28] and explicit in its opposition to motions to forgo it. In *Harwood v. Glacier Elec. Co-op., Inc.*, the parties did not choose a mediator within the time allotted in the appellate mediation rule.[29] The appellant filed a motion without objection to extend time for mediator selection after the Court already assigned a mediator.[30] The Court denied the motion and emphasized that mandatory appellate mediation is self-executing; otherwise, "the caseload of the Court will not decrease, but may very well increase as the Court considers and rules upon motions which address the mediation process, *such as motions to opt out of the mediation requirements*. . . ."[31] Similarly, in *In re Marriage of Nagra*,[32] the parties jointly moved the Court for an extension of time to complete the mandatory mediation process.[33] The Court admonished counsel and referenced its previous holding in *Harwood*:

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11 Megan G. Thompson, *Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard*, 86 Or. L. Rev. 599, 605 (2007).

12 *Harwood v. Glacier Elec. Co-op., Inc.*, 282 Mont. 38, 39, 939 P.2d 981, 981 (Mont. 1997); *See also* Mont. R. App. P. 7(1)(a)-(e) (2013).

13 *Roberts v. Nickey*, 2002 MT 37, ¶ 14, 308 Mont. 355, 43 P.3d 263. The Court "may dismiss an appellant's appeal for failure to comply [with the mandatory appellate mediation rule]." *Id.*

14 *Id.*; *Compare* Mont. R. App. P. Rule 7(9) (2013) *with* Mont. R. App. P. 54 (1996).

15 *Dobrocke v. City of Columbia Falls*, 200 MT 179, 300 Mont. 348, 8 P.3d 71 (overruled by *Roberts v. Nickey*, 2002 MT 37, 308 Mont. 355, 43 P.3d 263 43).

16 *Id.* at ¶¶ 23-24.

17 *Id.* at ¶ 24.

18 Mont. Const. art. VII, § 2(3). The Montana Supreme Court has the authority to "make rules governing appellate procedure, practice and procedure for all other courts. . . ." *Id.*

19 *Id.* at ¶ 26 (emphasis added). The Court did not summarily dismiss the case because the Clerk of Court erred in failing to notify counsel to file an amended notice of appeal. *Id.* at ¶ 25.

20 *Roberts v. Nickey*, 2002 MT 37, 308 Mont. 335, 43 P.3d 263.

21 *Id.* at ¶ 5.

22 *Id.*

23 *Id.* at ¶ 9.

24 *Id.* at ¶¶ 12-13.

25 *Id.* at ¶ 13. As in *Dobrocke*, the Clerk of Court was partly to blame for failing to notify John that his appeal did not comply with the rule; thus, John was not given an opportunity to amend his appeal. The Court reasoned that dismissing the case under these circumstances was too severe of a sanction. *Id.* at ¶ 14.

26 *Id.* (emphasis added).

27 Mont. R. App. P. 7(8). "Substantial noncompliance with this rule *may*, on motion of a party or by the [S]upreme [C]ourt *sua sponte*, result in the assessment of mediator fees, imposition of monetary sanctions, costs, *dismissal of the appeal*, or such other sanction as the [S]upreme [C]ourt deems appropriate." *Id.* (emphasis added).

28 *See* Mont. R. App. P. 7(9), *supra* n. 10.

29 *Harwood*, 282 Mont. at 39, 939 P.2d at 981 (emphasis added).

30 *Id.*

31 *Id*. (emphasis added).

32 *In re Marriage of Nagra*, 283 Mont. 339, 943 P.2d 82 (Mont. 1997).

33 *Id.* at 340, 943 P.2d at 82.

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> [W]e take this opportunity to caution appellate practitioners that with this Opinion and Order, we have twice clearly provided notice that [the appellate mediation rule] is self-executing and does not authorize motion practice before this Court. We will look with disfavor on further efforts by counsel in cases subject to the [appellate mediation] Rule to involve this Court in . . . proceedings via motions.[34]

Domestic Violence and the "Extraordinary Circumstance" Standard for Excuse

A recent domestic violence case appealed to the Montana Supreme Court suggests that domestic violence is not considered an extraordinary circumstance that would excuse a case from appellate mediation. Previously in *Harwood*, the Court noted that it would "not insert itself in the [mediation] process except under unusual or *extraordinary circumstances*"[35] without giving any indication as to what exactly constituted such circumstances. However, the Court's recent denial of a writ of supervisory control in *Veland v. Olenberg*[36] may shed light on what constitutes extraordinary circumstances. Under the writ of supervisory control, the Court exercises supervisory powers and original jurisdiction over a lower court.[37] The Court previously established the rule that "[s]upervisory control . . . is 'an *extraordinary remedy*' to be exercised only in '*extraordinary circumstances*.'"[38]

In *Veland*, the Court indicated that domestic violence did not qualify as an extraordinary circumstance deserving of the extraordinary remedy of supervisory control.[39] In *Veland*, Lise Veland ("Lise") petitioned the Montana Supreme Court to execute a writ of supervisory control after the lower court amended a parenting plan providing her children with unsupervised visits with her former abuser.[40] Counsel for Lise argued:

> The [district] court's recent orders forcing Lise to deliver her children to visitation with Robert in unsafe settings, over which she has no control, not only deny Lise's Constitutional rights, more importantly, they place Lise and the children in substantial, imminent, and unreasonable risk of harm.[41]

The domestic violence at issue in *Veland* did not meet the extraordinary standard for supervisory control. Supervisory control is an "*extraordinary remedy* [requiring extraordinary circumstances] and is sometimes justified when urgency or emergency factors exist *making the normal appeal process inadequate.*"[42] In *Veland*, the Court denied the extraordinary writ, finding no mistake of law causing gross injustice or constitutional issues of state-wide importance.[43] In other words, the Court found no extraordinary circumstance worthy of the extraordinary remedy even though domestic violence was at issue. Thus, the Court will not likely find domestic violence an extraordinary circumstance that would excuse such cases from mandatory appellate mediation in the future.

Rule 7 Applied to Prior Montana Supreme Court Rulings

Procedural rules control over contrary state statutes

The Montana Rules of Appellate Procedure trumps contrary state statutory laws when conflicts arise between them. In *In re Formation of East Bench Irrigation Dist.*, a dispute involving the boundaries of an irrigation district, a conflict between procedural rules and statutory law arose regarding the timing of filing the appeal.[44] The Montana Rules of Appellate Procedure provided that the appeal was to be filed within 30 days,[45] whereas § 85-7-1810 provided that all appeals involving the extension of irrigation lands must be filed within 10 days of the district court's entry of judgment.[46] The Montana Supreme Court held the appellate rule was controlling.[47] The Court reasoned that Article VII, Section 2(3) of the Montana Constitution "vested the rule-making authority with this Court, relegating to the Legislature only the power to veto" procedural rules within two legislative sessions after promulgation.[48] The Legislature cannot enact laws governing or replacing rules of appellate procedure.[49] As such, the Court would have to exercise its own rule-making authority to change Rule 7.

Rule 7 controls over *Hendershott* and HB-555

As the above discussion demonstrates, the Court is likely to look unfavorably upon motions to opt out of mediation in cases involving domestic violence, possibly subjecting counsel to sanctions and the case to dismissal unless the elusive extraordinary circumstance exception is met. Rule 7 specifically provides, "[I]f

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34 *Id.*

35 *Harwood*, 282 Mont. at 39, 939 P.2d at 981 (emphasis added). The focus here is on "extraordinary" rather than "unusual" as domestic violence can hardly be considered "unusual" given its common occurrence. *See e.g.* Joanna Bunker Rohrbaugh, *A Comprehensive Guide to Child Custody Evaluations: Mental Health and Legal Perspectives*, 528 (2008) (domestic violence in 12 to 55% of couples); Connie J. A. Beck, J. Michael Menke & Aurelio Jose Figueredo, *Validation of a Measure of Intimate Partner Abuse (Relationship Behavior Rating Scale–Revised) Using Item Response Theory Analysis*, 54 Journal of Divorce & Remarriage, 58-59 (2013) (Intimate partner abuse is common occurring in 12 to 30% of the general population and between 59 and 98% of the divorcing population).

36 *See* Or. Denying Writ of Supervisory Control, *Veland v. Olenberg* (Mont. Mar. 27, 2013) (No. OP 13-0176).

37 Mont. R. App. P. 14(3) (2013).

38 *Miller v. Eighteenth Jud. Dist. Court*., 2007 MT 149, ¶ 16, 337 Mont. 488, 162 P.3d 121 (emphasis added) (citing *Evans v. Montana Eleventh Judicial Dist. Court*, 2000 MT 38, ¶ 15, 298 Mont. 279, 995 P.2d 455; *Park v. Montana Sixth Judicial Dist. Court*, 1998 MT 164, ¶ 13, 289 Mont. 367, 961 P.2d 1267.)

39 *See* Or. Denying Writ of Supervisory Control, *Veland v. Olenberg* (Mont. Mar. 27, 2013) (No. OP 13-0176).

40 Pet. For Writ of Supervisory Control, *Veland v. Olenberg*, 14 (Mont. Mar. 8, 2013) (No. OP 13-0176).

41 Pet. For Writ of Supervisory Control, *Veland v. Olenberg*, 5 (Mont. Mar. 8, 2013) (No. OP 13-0176).

42 Mont. R. App. P. 14(3)(a)-(c) (emphasis added). In order for the Court to take a case on a writ of supervisory control, one of the following criteria must be met: (1) "[t]he other court is proceeding under a mistake of law and is causing a gross injustice"; (2) "[c]onstitutional issues of state-wide importance are involved"; or (3) "[t]he other court has granted or denied a motion for substitution of a judge in a criminal case." *Id.*

43 Or. Denying Writ of Supervisory Control, *Veland v. Olenberg* (Mont. Mar. 27, 2013) (No. OP 13-0176). In Section IV *infra*, I argue that there is an equal protection constitutional basis for concern.

44 *In re Formation of E. Bench Irr. Dist*., 2008 MT 210, ¶ 2, 344 Mont. 184, 186 P.3d 1266.

45 Mont. R. App. P. 4(5)(a).

46 Mont. Code Ann. § 85-7-1810.

47 *In re Formation of E. Bench Irr. Dist*., ¶ 9.

48 *Id.* at ¶ 6.

49 *Id.* at ¶ 7.

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there has been a finding by a district court that one of the parties has been a victim of domestic violence, appellate mediation *may be conducted by telephone upon motion* submitted to the mediator by either party."[50] Rule 7 also states, "Motions to opt out of mediation . . . will be subject to summary denial."[51] Counsel representing survivors of domestic violence have reason to be significantly apprehensive in filing motions to circumvent appellate mediation, even if doing so would best serve to protect their clients.[52]

As prior precedent and Rule 7 indicate, any attempt to move the Court beyond the purview of telephonic mediation when domestic violence is at issue will unlikely lead to a favorable ruling. The Court could reprimand counsel—as in *Harwood* and *Nagra*—and subject the appeal to potential dismissal for failing to precisely follow the rule—as in *Dobrocke*—or deny any motion to opt out for not meeting the extraordinary circumstance standard—as in *Veland.* In addition, counsel could be sanctioned in any manner the Court deems appropriate despite the *Hendershott* rule and the opt in provisions of HB-555 at the district court level.[53]

COERCIVE CONTROL AND INCREASED RISK FOR VIOLENCE ON APPEAL

Coercive Control as the Basis of the *Hendershott* Decision and HB-555

Contemporary domestic violence scholarship has identified four pervasive types of domestic violence: (1) "intimate terrorism" defined by a pattern of coercive control and violence; (2) "violent resistance" where the control of the abuser is met with violence by the abused; (3) "situational couple violence" exemplified by outbursts of violence by either partner that does not involve coercive control; and (4) "mutual violent control" where both partners partake in coercive controlling behavior and violence against one another.[54]

The type of domestic violence contemplated in *Hendershott*—domestic violence involving a pattern of intimidation and control—led to an affirmation of an absolute bar to *district court*-ordered mediation when there was a reason to suspect abuse. In *Hendershott*, the Montana Supreme Court reviewed the legislative history behind the "reason to suspect" standard provided in § 40-4-301(2), which barred mediation in these cases.[55] The Montana Legislature established this standard because "a reason to suspect emotional abuse should prohibit mediation due to *the significant difficulties in mediating a conflict where one person is intimidated by another*."[56] Thus, the Court contemplated intimidation (i.e. coercive control) in affirming the absolute bar to mediation.

HB-555 gives survivors a voice in determining whether mediation is appropriate for them. HB-555 expands upon *Hendershott*'s absolute bar and requires parties to provide informed, written consent before a district court can authorize mediation when the court suspects physical, sexual, or emotional abuse.[57] Consistent with contemporary knowledge regarding domestic violence, HB-555 recognizes that not all domestic violence involves coercive control and that some domestic violence cases may be appropriate for mediation.

Coercive Control, Separation Violence, and Post-Divorce Violence

Despite the Court's reasoning in *Hendershott*, Rule 7 fails recognize that abusive relationships with elements of intimidation may erupt into violence as couples are separated and as litigation escalates to the appellate level.[58] Studies on domestic violence have shown that separation and divorce involving coercive and controlling abusers may instigate violence due to the direct threat to the abuser's ability to control or intimidate his partner.[59] "[D]omestic violence [literature] has long recognized that attempting to leave an intimate terrorist puts a woman at increased risk of violence . . . because leaving is the ultimate threat to his control."[60] Women who have children with their abusers are at an increased risk for post-divorce domestic violence.[61] Survivors are more likely to be murdered after leaving the relationship when compared to staying with abusers.[62] Yet, the protections afforded survivors through *Hendershott* and HB-555[63] fail to protect them when their cases are appealed—at a time when survivors may be more at risk.

When a survivor decides to leave an intimate terrorist, assaults or attacks on the abused partner commonly occur throughout and beyond litigation. These "separation attacks" have been described as "violent and coercive moves [that occur] in the process of separation."[64] The coercive and controlling abuser uses separation attacks in "an attempt to gain, retain, or regain power in a relationship, or to punish the woman for

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50 Mont. R. App. P. 7(2)(b) (emphasis added).

51 Mont. R. App. P. 7(9).

52 *See* Mont. H. 555, 63d Reg. Sess., *supra* n. 3. At the district court level, attorneys zealously advocating for their clients are able to forgo mediation if the client gives written, informed consent pursuant to the recently passed HB-555. An attorney who successfully keeps his client out of district court mediation on these grounds may nonetheless be forced into mediation at the appellate level, without Court involvement because the rule is "self-executing" and "not open to motion practice." *In re Marriage of Nagra*, 283 Mont. at 340, 943 P.2d at 82.

53 *See* Mont. R. App. P. 7(8). "Substantial noncompliance with this rule may, on motion of a party or by the [S]upreme [C]ourt *sua sponte*, result in the assessment of mediator fees, imposition of monetary sanctions, costs, dismissal of the appeal, or such other sanction as the [S]upreme [C]ourt deems appropriate." *Id.*

54 Johnson, *supra* n. 8, at 5-12.

55 *Hendershott*, ¶¶ 22, 24; *See also* Mont. Code Ann. § 40-4-301(2).

56 *Hendershott*, ¶ 25 (emphasis added).

57 Mont. H. 555, 63d Reg. Sess., *supra* n. 3. There is still a bar on mediation when there is a reason to suspect domestic violence "[u]nless each of the parties provides written, informed consent." *Id.*

58 *See Hendershott*, ¶ 33. It should be noted that Rule 7 was not at issue in *Hendershott*. However, Justice Baker's dicta regarding the "potential conflicts" between other statutes not at issue in *Hendershott* led to the passing of HB-555. Thus, it would also appear to be an oversight for the Court not to address its own rule.

59 Johnson, *supra* n. 8, at 103.

60 *Id.* at 102.

61 Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children after Divorce: The American Law Institute's Model*, 37 Family Court Review 393, 394 (1999).

62 Margo Lindauer, *Damned If You Do, Damned If You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win*, 20 Am. U. J. Gender Soc. Policy & L. 797, 817 (2012). Lindauer states, "Research shows that a battered woman is 75 percent more likely to be murdered when she tries to escape or has escaped, than when she stays."

63 *See* Mont. H. 555, 63d Reg. Sess., discussed *supra* n. 3.

64 Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 65 (1991).

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ending the relationship."[65] Further, separation attacks can take place over long periods after the abused partner leaves and extend far beyond divorce and the time frame considered by courts litigating cases.[66] In *Stoneman v. Drollinger*, the Montana Supreme Court recognized "that termination of an abusive relationship actually poses an increased risk of escalation in domestic violence."[67] The Court also acknowledged that divorced women account for three-quarters of all battered women and are 14 times more likely to be battered than non-divorced women.[68] Despite the Court's observations, Rule 7 may force survivors into mandatory mediation with their abusers.

The frequency and severity of domestic violence has been shown to increase after divorce.[69] Nonetheless, Rule 7 mandates mediation in post-divorce cases including "dissolution issues, child custody and support issues, maintenance issues and modifications of orders entered with respect to those issues."[70] A study conducted on 147 couples prior to participation in divorce mediation found higher incidents of "assaults, emotional abuse, being seriously hurt physically, and being seriously hurt emotionally" when the abusive partner was coercively controlling.[71] A history of drug use, a history of threats to kill the partner leaving the relationship, and a history of suicide threats were the greatest predictors of post-separation violence.[72] Yet, Montana does not screen for any such predictors at the appellate level before sending these couples into mandatory mediation. A quantitative study using data from the National Incident-Based Reporting System and the Census compared the relationship between divorce rates and domestic violence finding that the "divorce rate exhibits a positive and substantive effect on the ex-spouse victimization rate."[73] In other words, as divorce increases in a population the ex-spouse abuse rate also increases. Interestingly, the data from this study also showed that domestic violence crimes involving coercive control composed only 8% of crimes committed between spouses and 33% of crimes between ex-spouses.[74] Another qualitative study of fourteen survivors of domestic violence and their experience with family law litigation found abuser perception of losing a court case increased anger and provided fodder for continued abuse and coercive control.[75] Although research has shown that post-separation violence and post-divorce violence is more likely to occur when coercive control is involved, Rule 7 mandates that these cases attend appellate mediation with the only available option for survivors being telephonic mediation.[76]

65 *Id.*

66 *Id* at 83.

67 *Stoneman v. Drollinger*, 2003 MT 25, ¶ 23, 314 Mont. 139, 64 P.3d 997 (2003) (internal citation omitted).

68 *Id.* (internal citation omitted).

69 *See* Reihing, *supra* n. 54, at 394; Stolzenberg & D'Alessio, *supra* n. 9, at 296.

70 Mont. R. App. P. 7(2)(b).

71 Ellis & Stuckless, supra n. 7, at 473.

72 *Id.* at 476.

73 Stolzenberg & D'Alessio, *supra* n. 9, at 296.

74 *Id.* at 298.

75 Donald Richard Froyd., Jr., *Retaliatory Violence After Family Court: Victim Safety After Family Court Litigation in Intimate Partner Violence Cases* 158 (PhD. Dissertation, Walden U. 2011) (UMI Dissertation Publishing 3473272).

76 Mont. R. App. P. 7(2)(b).

The Inadequacy of Telephonic Mediation

Telephonic mediation in domestic violence cases as provided in Rule 7 does not sufficiently address the issue of power imbalance that makes mediation inappropriate. An abuser with a history of coercive control can create insurmountable power imbalances through verbal intimidation of the abused partner.[77] Coercive controlling abusers often use the telephone as the primary device to maintain control over their victims.[78] In reality, telephonic mediation worsens the situation, tilting the power imbalance in favor of the perpetrator who uses the phone as a coercive instrument.[79]

Telephonic mediation is not appropriate for many domestic violence survivors because it does not cure the potential for verbal intimidation or guarantee survivor protection. In the 1990s, a study was conducted on a telephonic mediation service that mediated family law cases.[80] Of the 519 telephone mediations examined in the study, 18.7 percent were found unsuitable for telephonic mediation "due to abuse or violence issues or mental health issues severe enough to warrant terminating [telephonic] mediation and suggesting other interventions."[81] The telephone mediators in the study "expressed concern over the impact of their work on families in which domestic violence, substance abuse, and other endangerments had occurred."[82] Telephonic mediation created special problems for families at risk of domestic violence due to the "inability to obtain information from body language and nonverbal cues" created by this mediation form.[83] The mediators in this study reported that telephonic mediation did not satisfactorily address survivor safety.[84] Additionally, an abuser may use Rule 7's telephonic mediation option as part of a larger scheme of manipulating the court system to continue to coercively control the survivor.

The Use of the Courts as an Abusive Device

An abuser will use the court system to continue the pattern of abuse if permitted. "Perpetrators of domestic violence become very adept at using the legal system as one more tactic of control against the victim, and they do this in a variety of ways."[85] Courts can give the abuser the power to manipulate children

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77 *See* Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 Cardozo J. Conflict Resol. 425, 437 (2011).

78 Joanne Belknap et. al., *The Roles of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 Duke J. Gender L. & Policy 373, 386-387 (2012). "Phone calls from abusers can consist of calling and hanging up, silent calls, conversational calls, abusive calls, and monitoring calls; most stalkers use a combination of these phone tactics. In addition to conversational calls, abusers frequently use phone calls both to apologize and woo their victims back, and to threaten victims if they break up with their abuser, call the police, or go forward on a case already in the hands of the police or courts." *Id.*

79 *Id.*

80 Laurie S. Coltri & E. Joan Hunt, *A Model for Telephone Mediation*, 36 Fam. & Conciliation Courts Rev. 179 (1998). The study focused on a collaborative child support enforcement agency and east coast county mediation service.

81 *Id.* at 187, 189.

82 *Id.* at 190.

83 *Id.* at 191-192.

84 *Id.* at 192.

85 Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 Seattle J. for Social Justice 1053, 1064 (2011).

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through visitation rights so that the abuser can maintain access and continue to monitor, control, or abuse the survivor.[86] The abuser may offensively use the courts to persuade and charm court personnel into believing he is a nonviolent party.[87] The abuser may defensively use the courts to discredit the survivor, deny the claims of abuse, claim the abuse was mutual, or claim the survivor's current partner is unfit.[88] Abuse can also continue through "the filing of a seemingly endless stream of various complaints and motions that amount to harassment, retaliation, or intimidation."[89] Moreover, the court system can be used as a tool to economically abuse the survivor through legal fees and court costs that impact the survivor's financial stability.[90] "[B]atterers not only control the court process itself but also show the abused party that they are in control, not the court."[91]

Survivors of domestic violence should have some control in choosing the manner in which their disputes with abusers are resolved; however, Rule 7 denies survivors the freedom of agency and autonomy.[92] Mandatory domestic violence policies focus on dominance feminism that exacerbates the subordinated and victimized status of women, implying that abused women are powerless and incapable of acting rationally for themselves.[93] Such mandatory policies further the problematic notion that abused women "are incapable of engaging in independent deliberation [and] devalues these women as members of the political society and invites and justifies what some might characterize as paternalism on their behalf."[94] Also, mandatory policies are ineffective because they can deter abuse in some settings and not others and may increase future violence.[95] Changing Rule 7 to comport with *Hendershott* and HB-555 will give survivors control over whether mediation is appropriate for them and simultaneously assist in decreasing abusers' ability to use the courts as an abusive, agency- and autonomy-usurping tool.

HENDERSHOTT, HOUSE BILL 555, AND EQUAL PROTECTION

Rule 7 may result in equal protection violations because, as drafted, it fails to provide the same protections for survivors of domestic violence as provided in *Hendershott* and HB-555. The Montana Constitution mandates, "No person shall be denied the equal protection of the laws."[96] The equal protection doctrine requires that all people under similar circumstances are to be treated similarly.[97] Rule 7 does not provide survivors of domestic violence under similar circumstances with the same protections provided at the district court level. HB-555 expanded the *Hendershott* ruling, empowering survivors by giving them a choice—through informed, written consent—to attend mediation.[98] Conversely, Rule 7 requires mediation for survivors, only giving them the option to mediate via the telephone, which does not adequately address the issue of coercive control.[99] Thus, domestic violence survivors are not treated equally on appeal.

Rule 7 forces similarly situated survivors into mediation on procedural grounds that violate equal protection guarantees. A law or policy that contains what appears to be a neutral classification may violate equal protection if different burdens are imposed on different classes of people.[100] Rule 7 is part of a larger systemic problem of procedural rules and judicial practices that penalize victims of domestic violence rather than give them access to the legal system that should protect them.[101] Although uniformity of procedural rules between district courts and appellate courts are not mandated by equal protection principles,[102] procedural rules cannot arbitrarily and unjustly discriminate between similarly situated people, even when suspect class is not at issue.[103]

Not only are survivors of domestic violence burdened more heavily than the other classes of individuals that Rule 7 governs, nearly all of the survivors of the coercive control type of domestic violence are women;[104] thus, heightened scrutiny[105]

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86 *Id.* at 1065-1066. "Any opportunity for the batterer to be physically present with the victim or her children affords an opportunity for physical violence or threats of such violence." *Id.* at 1072.

87 *Id.* at 1067.

88 *Id.* at 1067-1069.

89 *Id.* at 1069-1070.

90 *Id.* at 1071.

91 *Id.* at 1072.

92 *See* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 Fla. St. U. L. Rev. 1, 25 (2009). Here, I use the terms "agency" and "autonomy" as defined by Goodmark. In feminist literature, "agency" refers to the principle that individuals have the right to make decisions that impact their lives, have the capacity to make ethical decisions, and that larger society should not infringe upon the decision-making process. *Id.* at 25. "Autonomy" refers to the freedom of personal choice and the ability to exercise that choice in society. *Id.*; *See also* Melissa Hamilton, *Judicial Discourses on Women's Agency in Violent Relationships: Cases from California*, 33 Women's Studies International Forum 570, 576 (2010) In a study of over 60 domestic violence cases, Hamilton found that judicial discourse involving female agency in domestic violence cases is "silenced, marginalized and illegitimated in court reports and expert testimonies by institutionalized male power and through social, economic and political subordination of women in family and society." *Id.*

93 Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 Fla. St. U. L. Rev. 1, 4-5 (2009).

94 *Id.*at 28.

95 Eduardo R.C. Capulong, *Family Mediation after* Hendershott: *The Case for Uniform Domestic Violence Screening and Opt-In Provision in Montana*, 74 Mont. L. Rev. 273, 302 (2013).

96 Mont. Const. art. II, § 4

97 *See Schmill v. Liberty N.W. Ins. Corp.*, 2003 MT 80, ¶ 12, 315 Mont. 51, 67 P.3d 290. "The equal protection clause requires that 'all persons be treated alike under like circumstances.'" *Id.* (internal citation omitted).

98 *See* Mont. H. 555, 63d Reg. Sess., discussed *supra* n. 3; *see also Hendershott*, *supra* n.1.

99 *See supra* Section III(C).

100 *Snetsinger v. Montana U. System*, 2004 MT 390, ¶ 16, 325 Mont. 148, 104 P.3d 445 (internal citation omitted).

101 Jane K. Stoever, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 Ohio St. L.J. 303, 305 (2011). Stoever argues that "[s]tates should rectify procedural barriers to seeking court protection that stand in the way [of protecting survivors of domestic violence]." *Id.* at 342.

102 *See Dohany v. Rogers*, 281 U.S. 362, 369 (1930) (holding that the equal protection clause of the United States Constitution does not mandate the uniformity of procedural rules).

103 *See Lee v. Habib*, 424 F.2d 891, 902 (D.C. Cir. 1970) (court procedural rules that "invidiously discriminate" violate equal protection guarantees of the United States Constitution).

104 *See* Johnson, *supra* n. 8, at 23. According to Johnson, "Intimate terrorism is in fact perpetrated almost entirely by men." *Id.* This type of domestic violence is the most unsuited for mediation because of the elements of coercive control involved.

105 *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (equal protection analysis involving sex and gender differences must withstand intermediate scrutiny and "must serve important governmental objectives and must be substantially related to achievement of those objectives").

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would apply to women impacted most negatively by Rule 7. The outcome of intermediate scrutiny inquiry would turn on what governmental interest Rule 7 was meant to achieve. An equal protection analysis that purports the important governmental interest in Rule 7 is to lessen Supreme Court dockets and litigation costs may withstand intermediate scrutiny as Rule 7 arguably is substantially related to that purpose.[106] Rule 7 also appears to serve the important governmental interest of protecting survivors of domestic violence through telephonic mediation.[107] However, telephonic mediation has not been shown to be substantially related to protecting survivors.[108] Thus, an intermediate scrutiny inquiry that utilizes protection from domestic violence as the governmental interest should fail an intermediate scrutiny analysis.

When comparing the potential governmental interests at stake, protecting survivors from their abusers should take precedence over the value of lessening overburdened appellate dockets. Survivors should be able to choose whether or not to mediate throughout the entire course of litigation. Rule 7 should be redrafted to comport with the Court's own ruling in *Hendershott* and the Montana Legislature's enactment of HB-555.

CONCLUSION

Rule 7 should be redrafted to reconcile its conflict with *Hendershott* and HB-555 and provide survivors of domestic violence with the option to choose mediation at the appellate level. In addition, Rule 7 should include a screening procedure to ensure that cases at risk for separation and post-divorce violence are not being forced into mediation. Mandating mediation for survivors at the appellate level defies reason, is inconsistent with contemporary knowledge on domestic violence, and fails to treat survivors equally throughout the entire process of litigation. The *Hendershott* rule and HB-555 has empowered survivors by giving them the freedom to choose how to settle their disputes. Empowerment of survivors through the court system has been shown to improve depression, quality of life, and the level of satisfaction with the legal system.[109] Rule 7 should mirror the philosophy of empowering survivors and eschew the telephonic mediation provision and instead provide an opt in provision consistent with *Hendershott* and HB-555.

106 *See e.g. Harwood v. Glacier Elec. Co-op., Inc.*, 282 Mont. 38, 39, 939 P.2d 981, 981 (Mont. 1997); Mont. R. Civ. P. 7(1)(a)-(e) (2013).

107 *See* Mont. R. App. P. 7(2)(b).

108 *See supra* Section III(C).

109 Lauren Bennett Cattaneo & Lisa A. Goodman, *Through the Lens of Therapeutic Jurisprudence: The Relationship Between Empowerment in the Court System and Well-Being for Intimate Partner Violence Victims*, 25 J. Interpersonal Violence 481, 497 (2010).

Medicaid estate recovery

By Sol Lovas

Medicaid is the government program that pays for medical and long-term care for the aged, blind and disabled who need it and can't afford it. Qualifying for and living with Medicaid can be difficult, and the difficulties do not end with the Medicaid recipient's death. Why? Because Medicaid often has the right to be reimbursed after the recipient's death for the amounts that Medicaid spent for the recipient's care during life.

This is called Medicaid estate recovery. Many Medicaid recipients have few assets, so estate recovery for them is not an issue. But a person can be on Medicaid and still own certain exempt assets, such as a home, a car, and a self-employment farm or business. The spouse of a nursing home resident is entitled to keep at least $23,184 of non-exempt assets and investments. In some cases, a spouse can keep up to $115,920. These retained assets are what estate recovery is all about, but very few families are aware of the threat that estate recovery poses to these assets, or how long that threat can last.

The relevant questions are: Who, What, When, Where, Why, How, and How Much? And what other issues should the family consider?

I. Whose medical expenses can be recovered?

Estate recovery is authorized for "recoverable medical assistance", which is defined as payments made for the medical and long-term care expenses of Medicaid recipients who were over 55, or were in a long-term care facility (nursing home) at any age. MCA 53-6-165(4) & -167(1); MT DPHHS Medical Assistance Policy Manual ("MA Manual" 1401-1).

II. A. What assets can be recovered against?

A. Personal Accounts: The funds remaining in a recipient's nursing home or bank account must be paid to Medicaid upon death. MCA 53-6-168.

B. Pre-Paid Funeral Plans over $5,000: If the prepaid amount is not fully used for funeral expenses, the excess is paid to Medicaid. MCA 53-6-169.

C. The Probate Estate: Recovery against the probate estate includes all of the probate assets, and specifically includes any and all assets which were deemed exempt for eligibility purposes during the recipient's life. MCA 53-6-167(1) & -167(5)(c). Estate recovery therefore applies after death to many family homes, farms and businesses. The family home is by far the most commonly-affected asset.

D. Non-Probate Assets: If a third party receives assets from a deceased recipient by "distribution" or "survival", Medicaid can pursue estate recovery against the third party. "Distribution" means from an estate or informal estate substitute; "survival" includes property passing to "survivors, heirs, assignees or beneficiaries" through "joint tenancy, tenancy in common, right of survivorship, conveyance by the recipient subject to life estate, living trust, or *other arrangement*". MCA 53-6-167(2)&(5)(emphasis added); MA Manual 1401-1. Montana Medicaid does not currently pursue all of the types of assets which could possibly be pursued under the "survival" language, but this is internal policy, not a regulation, and can be changed at any time.

E. Medicaid Lien: MCA 53-6-171 to -187; MA Manual 1402-1. Medicaid can place a lien on real property that a nursing home Medicaid recipient owns (such as a home or farm) to secure the repayment of "past, present and future recoverable medical assistance". MCA 53-6-173(3). Payment comes due "upon sale, transfer, or exchange of any right, title, or interest of the recipient in the property or upon the recipient's death". MCA 53-6-173(3)(b). The lien applies only to the property described in the lien. MCA 53-6-173(1). It can be renewed every 6 years, indefinitely. MCA 53-6-174(4). The lien can be pursued in addition to estate recovery. MCA 53-6-143(4) & -188.

II. B. What assets can't be recovered against?

A. Exempt people: There can be no estate or lien recovery if the recipient is survived by a spouse, or by a child who is under 21, blind or disabled. MCA 53-6-167(9); MCA 53-6-178(3). This exempts all of the decedent's property, not just the property received by the spouse or disabled child. The exemption ends when the spouse or child dies.

B. Exempt assets: A few types of assets are completely exempt from estate and lien recovery, such as Indian trust property (MA Manual 1401-1), and property protected by a "partnership" long-term care insurance policy (MCA 53-6-804, MA Manual 903-2). There is a limited exemption from lien recovery (up to $100,000) for a home which is being sold by a surviving spouse. MCA 53-6-182; ARM 37-82-437

C. Lifetime Gifts: Lifetime gifts do not fit within the definition of "estate", "distribution" or "survival", so the value of property received by lifetime gift is not subject to estate recovery. However, some states take the position that property transferred pre-death from the recipient to the surviving spouse is nevertheless subject to estate recovery following the surviving spouse's death. There is also a specific provision that recovery against a third party must be reduced by the amount of any gift made to the third party which created a penalty period for the recipient. MCA 53-6-167(2).

A lifetime gift of property subject to a Medicaid lien does

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not extinguish the lien. MCA 53-6-174(2).

D. Hardship Waiver: Estate and lien recovery can be waived if recovery would result in undue hardship. MCA 53-6-167(8); MCA 53-6-180(1)(c). Montana allows waivers under certain very limited circumstances for family participants in a family farm or business, for relatives living in a residence which was owned by the recipient, and in a few other fairly rare circumstances. ARM 37.82.431; ARM 37.82.436. A waiver is requested from Medicaid, and is subject to judicial review by the court in the proceeding brought to enforce recovery. MCA 53-6-167(8)(c); MCA 53-6-180(1)(c).

E. "Not Cost-Effective" Waiver: Medicaid can waive estate or lien recovery if pursuit would not be "cost-effective", considering, among other factors, the precedential value of obtaining a court decision on the issue involved for use in other cases. MCA 53-6-167(7); MCA 53-6-180(2).

III. Where can Montana Medicaid enforce its claim?

Only in Montana. Any claim for estate recovery against persons or property in another state will face difficult jurisdictional and conflict of laws issues.

IV. Why do we have estate recovery?

Federal law requires the states to pursue recovery against the probate estate; states may, but are not required to, extend recovery to non-probate assets. 42 USC Sec. 1396p(b). Montana has extended recovery to assets received by distribution or survival. MCA 53-6-167(2).

Federal law requires the states to pursue recovery against the probate estate; states may, but are not required to, extend recovery to non-probate assets. 42 USC Sec. 1396p(b). Montana has extended recovery to assets received by distribution or survival. MCA 53-6-167(2).

V. How is estate recovery pursued?

A. Personal accounts: The nursing home pays the date of death balance directly to Medicaid. MCA 53-6-168. For bank accounts, the family gets a letter demanding immediate payment.

B. Pre-paid funerals: The funeral home pays the unused funds directly to Medicaid. MCA 53-6-169.

C. Probate estate: Medicaid files a creditors claim in the probate proceeding. MCA 53-6-167(1). Medicaid is a general unsecured creditor. MA Manual 1401-1; MCA 72-3-807(1)(g). Like any other creditor, if the probate estate is insufficient to pay all creditors claims, Medicaid can demand that the Personal Representative sue to bring certain non-probate assets back into the probate estate. MCA 72-6-228 (nonprobate transfers); MCA 72-6-123 (beneficiary deeds); MCA 72-38-505 (revocable trusts).

D. Third parties: Medicaid sues the third party for recovery. MCA 53-6-167(2). If recovery was suspended during the life of an exempt spouse or disabled child, it is unclear whether Medicaid may legally pursue post-death recovery against third parties, including the estate of the spouse or child, since the suspension/revival provision (MCA 53-6-167(9)(b)) only authorizes post-death recovery actions against "the *recipient's* estate" (emphasis added). Montana Medicaid is nevertheless filing creditors claims in surviving spouses' estates.

E. Medicaid lien: Per the statutes, the lien is enforced by application for a writ of execution, leading to a forced sale. MCA 53-6-175 to -187. However, any transfer of the property involving title insurance will trigger repayment in order to clear the title.

VI. How much can Medicaid recover?

Medicaid can recover from a recipient's estate the **lesser** of all recoverable payments or whatever is available to it as a creditor of the estate. MCA 53-6-167(1). Medicaid can recover from each third party the **lesser** of all recoverable payments or the value of all property received from the decedent by distribution or survival, less the offset for any penalized gift. MCA 53-6-167(2). Medicaid may choose to pursue the recipient's estate, or third parties, or both, until its claim is paid in full. MCA 53-6-143(4) & -167(6)(a). The claim is for the "amount" of recoverable medical assistance, so it does not require tracing of assets, and is enforceable against any and all assets owned by the estate or third party.

The fact that others may also be liable is not a defense – the liability is joint and several, to the limit of the property value each person received from the decedent. MCA 53-6-167(6)(b). However, each person sued should be able to join or cross-claim against any other liable persons for contribution. Rules 20 &22, M.R.Civ.P.

The Medicaid lien secures repayment of "past, current, and future recoverable medical assistance". MCA 53-6-173(3). If property subject to lien is transferred, there is no statutory language that limits the lien to amounts accrued as of the date of transfer.

Several issues remain:

First, interest. The lien statute provides for interest "as provided by law". MCA 53-6-175. The estate recovery statute is silent as to interest. MCA 53-6-167.

Second, the statutes do not specify how far back prior to death Medicaid's claim can go. Medicaid presents its claim for all amounts paid since the recipient either turned 55 or entered a nursing home. This may conflict with the 5-year statute of limitations for claims based on a "statutory debt created by payment of public assistance". MCA 27-2-211.

Third, medical providers have up to a year to present claims to Medicaid, and it takes time for Medicaid to process and pay provider claims. Therefore, the amount initially set forth in a creditors claim, or in an application for a writ of execution, may

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not be the full amount ultimately claimed by Medicaid.

VII. When can Medicaid file for recovery?

The limitations period for estate or lien recovery can sometimes be – forever.

A. Probate Estate: The statute of limitations for creditors claims is four months from first publication of the notice to creditors, or one year from date of death, whichever is **earlier**. MCA 72-3-803. The estate recovery statute provides that "[n]otwithstanding any statute of limitations or other claim presentation deadline provided by law", estate recovery claims are deemed timely as long as they are filed "within the time specified in the published notice to creditors". MCA 53-6-167(4)(a). This works as long as a probate was filed, and a notice to creditors was published. But in many Medicaid cases there is no probate; and in some probates publishing a notice to creditors is not required. Unless an estate was filed, **and** a notice to creditors was published, the limitations period for a claim against the estate appears to be – forever.

B. Third Party Claims: The statue of limitations for third party claims is three years from date of death, or three years after closure of the recipient's estate, whichever is **later**. MCA 53-6-167(4)(b). No matter how long after death a probate is filed, the three years do not start to run until the estate is closed. If no probate is filed, the limitations period appears to be – forever.

Nor does the claim end with the third party's death. Medicaid claims the right to pursue estate recovery against a third party "during the [person's] lifetime" or "from the person's estate after the person's death". DPHHS brochure (rev 6/12) "Montana Medicaid Lien & Estate Recovery Program". Probate law permits this, as long as the applicable statute of limitations has not run. MCA 72-3-802 & -803.

C. Surviving Spouse or Child: Although estate recovery cannot proceed if there is a surviving spouse or a child who is under 21, blind, or disabled, this "does not preclude [Medicaid] from recovering from the recipient's estate after the death of the surviving spouse or child". MCA 53-6-167(9)(b). This revives the claim if the spouse or child dies before closure of the recipient's estate, if an estate has been filed.

Montana Medicaid views this provision as also reviving post-death claims against third parties (see V.D. above). Medicaid is currently filing claims against the "estate of the surviving spouse if the spouse dies within three years of the recipient". DPHHS Estate Recovery brochure. The three year limitation is internal policy, not a regulation, and can be changed at any time. If this policy is expanded to remove the three-year limit for spouses, or is applied to revive post-death claims against other third parties, or against a deceased child's estate, many people will face totally unexpected estate recovery claims, sometimes decades after the original recipient's death. Filing and closing the recipient's estate might solve this problem by starting the three-year limitations period running, but it is unclear from the statute whether the suspension of the claim also suspends the statue of limitations.

Although estate recovery cannot proceed if there is a surviving spouse or a child who is under 21, blind, or disabled, this "does not preclude [Medicaid] from recovering from the recipient's estate after the death of the surviving spouse or child".

D. Medicaid Lien: The Medicaid lien may be enforced for up to three years after the **latest** of "(a) a sale, transfer or exchange of any right, title or interest of the recipient in the property; (b) the death of the recipient, or (c) the death of the recipient's surviving spouse". MCA 56-3-187. The effect of the "transfer" language is unclear. If real property subject to the lien is transferred by the recipient during life, the applicable limitations period is three years after (someone's) death, and the transfer language is moot. Therefore the transfer language can only apply to post-death transfers. Since there can't be a transfer by the *recipient* after death, the transfer language has to apply to post-death transfers by others of what used to be the recipient's property, in which case the limitations period appears to be – forever.

Lien recovery is suspended if there is a surviving spouse or disabled child. MCA 53-6-178(3). Recovery is limited to three years after the death of the spouse or child, but the lien remains on the property until then regardless of intervening transfers. MCA 53-6-181.

Several questions remain:

First, if the limitations period is forever, when does interest start, and is it ever suspended?

Second, the statutory procedure to contest a lien or request a waiver only applies during the execution process. MCA 53-6-177. How do you contest the lien or request a waiver if the property is being transferred?

Third, what can be done to avoid these problems? Whenever a Medicaid recipient dies, you should file a probate, publish the notice to creditors, and close the probate as quickly as possible. This forces Medicaid to file its estate claim immediately, and it starts the three-year limitations period for third party claims running. But this does not work for liens.

VII. Other Issues:

Family Liability for Unpaid Nursing Home Bills

Sometimes a nursing home resident runs out of money, but never qualifies for Medicaid (or qualifies late), and dies owing a nursing home bill. The nursing home may:

First, urge the family to continue pursuing the decedent's application for Medicaid (or even file one), since death does not prevent or terminate a Medicaid application.

Second, submit a creditors claim in the recipient's estate.

Third, if the decedent was married, pursue the surviving

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spouse, since nursing home care is a "necessity" for which the spouse is liable. MCA 40-2-133 & -106.

Fourth, pursue the children, since Montana has filial support laws which require adult children to contribute to the support of an indigent parent. MCA 40-6-214 & -301. Filial support laws vary from state to state, and nursing homes have been successful in suing the children in some states that have filial support laws, and not in others. Montana does not have a court ruling on point, and filial support lawsuits are being filed in Montana. The threat of a filial support action may prompt the family to pay up.

Fifth, try to find another basis for pursuing family members. If a family member signed the admissions agreement as "Responsible Party", did the family member breach any provision of the agreement, creating a claim for damages in the amount of the unpaid bill? Nursing homes are prohibited by law from *requiring* family members to guarantee payment of the nursing home bill, but did any family member "*voluntarily*" guarantee payment? 42 USC Sec. 1395i-(3)(c)(5)(A)(ii); MCA Sec. 50-5-1104(1). If assets were gifted to children in order to achieve Medicaid eligibility, can a fraudulent conveyance claim of any sort be made? The threat of such an action may prompt the family to pay up.

The Donee Fine

Medicaid can sue to collect a civil fine from a person who received a gift from a Medicaid recipient, if that gift resulted in a penalty period, and the recipient nevertheless received Medicaid through an undue hardship waiver. MCA 53-6-190 (enacted 2013). The fine is 100% to 150% of the amount Medicaid paid during the penalty period, plus costs and attorney fees. Medicaid can also sue to set aside the transfer and require the return of the transferred property. The limitations period is not specified.

CONCLUSION:

The death of an aged or disabled loved one does not end the family's problems. Medicaid estate recovery lurks in the wings for many years, and unpaid nursing homes are getting more creative about ways to recover from family members. Current efforts at health care reform do not address long-term care issues. As state budgets shrink, and our population ages, the problems will get worse. Medicaid will seek to limit eligibility and increase estate recovery. Nursing homes will seek other sources of payment. Families will be left facing nursing home bills submitted by Medicaid, or by nursing homes, or both. And there are no easy answers.

Sol Lovas *has been practicing Family Wealth Law in the Billings area since 1980. After practicing with a general law firm for several years, she opened her own solo practice in 1992, in order to specialize in Family Wealth Law. She is a VA-accredited veterans benefits counselor, and is the first and only Certified Elder Law Attorney (CELA) in the state of Montana.*

Lawyer Referral & Information Service

How does the LRIS work? Calls coming into the LRIS represent every segment of society with every type of legal issue imaginable. Many of the calls we receive are from out of State or even out of the country, looking for a Montana attorney. When a call comes into the LRIS line, the caller is asked about the nature of the problem or issue. Many callers "just have a question" or "don't have any money to pay an attorney". As often as possible, we try to help people find the answers to their questions or direct them to another resource for assistance. If an attorney is needed, they are provided with the name and phone number of an attorney based on location and area of practice. It is then up to the caller to contact the attorney referred to schedule an initial consultation.

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Montana Lawyers Chapter of the Federalist Society starting

What I learned from Justice Scalia, and what if everybody had a football

By Chris J. Gallus

In August, I attended Montana's inaugural Federalist Society event in Bozeman with 300 other Montanans crammed into a banquet hall. The event featured a brief speech by Justice Antonin Scalia followed by a long and engaging Q&A. Whether you are a Scalia fan or not, he is an engaging and likable speaker, and the event was well-received by all in attendance. In addition to being entertained by Justice Scalia's wit and lightheartedly sardonic style, I learned a lot and was challenged to rethink some old opinions. Chief among what I learned from Justice Scalia's remarks is that legal analysis should start, and end, with a plain reading of constitution's language in the context of when and why it was written. The same should apply to the reading of any law.

Justice Scalia's view is that far too often the concept of an evolving constitution allows courts to decide what rights we ought to have, when that is the province of elected legislatures. That is an odd view for him to have when he's one of the few who gets that power. In my opinion, it also places too much power in us as attorneys. My late mentor and friend Dave Fisher, who served Montana on the PSC and as chief executive in Butte, was fond of saying, "What if everyone had a football?" To me, that is what the notion of an evolving constitution allows. It doesn't work all that well.

Justice Scalia also spoke in simple terms of how plain language of the Constitution establishes individual rights over majority rule even, or perhaps especially, in a democratic government. The language of the Constitution is usually clear and well established. You only need to read the Bill of Rights to establish individual freedoms often trump the concept of majority rule.

Being a lawyer/lobbyist, I took a particular interest in Justice Scalia's disdain for the use of legislative intent. Courts are established to read the language contained within the law rather than determine why a collective majority of elected officials voted the way they did. I've always been partial to establishing legislative intent. As a witness to how a particular law passed I see an advantage because it may bolster my particular position. It certainly gives me an opportunity to sound intelligent sometimes, and anyone who knows me can attest I need to take advantage of that every chance I get. Yet, I think Justice Scalia is right, and having just argued away 20 percent of my business, let me also admit to being a hypocrite. During the last session I would go into small rants — OK, long rants — when listening to ballot issue sponsors testify about why they wrote something, and how that related to the "intent" of 450,000 voters. Crazy, right? In reality, Justice Scalia's view ought to prevail. Laws should be written so judges can decide what was actually said rather than what someone may have meant.

I also have a better understanding that you can be for reasonable restraints on government without being anti-government, and you can be pro-constitution without being radical. Saying "founding fathers" shouldn't cast you off to the asylum for the political extreme. There is value in sticking to the original meaning of the words of the constitution — or any law — and judicial decisions should not give way to popularity or majority rule. Changing the original meaning of the Constitution is difficult. You do it by amending the document. That means having strong support from a wide national base. The Constitution is designed that way on purpose. Giving each generation an easy path to making their own mark upon the Constitution, in my opinion, would have destroyed the document long ago. The ability to change the Constitution is there. It has been done. When sentiment is strong enough it will be amended again. We should avoid this notion of an evolving Constitution, and the temptation to ask the judiciary to amend it for us.

As so often happens in life, because I mentioned the right thing to the wrong person I was tasked with writing this article and starting a Montana Lawyers Chapter of the Federalist Society. The Federalist Society was founded in 1982 to preserve freedom, separation of government powers and to promote the notion that the judiciary exists to say what the law is rather than what it should be. The society seeks to reorder priorities within the legal system to place a premium on individual liberties. The Federalist Society started its Lawyers Division in 1986 and now involves some 46,000 lawyers in 75 chapters across the country. The chapters work to host speeches and panels on current legal topics. The Federalist Society also has 15 chapter groups on a wide range of issues.

Over the next few months we will be organizing the Montana Chapter and encouraging you to become a member. Right now, you can feel free to learn more or join the Federalist Society by going to www.fed-soc.org, or email me at galluslaw@gmail.com if you want to assist in forming the Montana Chapter.

Until then, let's play with one ball and one quarterback. Let us also hope that quarterback is playing for the Grizzlies.

Court cases from May 1 - June 25

Editor's note: *Because of limited print space, the new format of Beth Brennan's case briefs for print in the Montana Lawyer are abbreviated. Full versions -- including explanation of facts, procedural posture & holding, and reasoning -- are available at the author's website -- http://brennanlawandmediation.com/mt-supreme-court-summaries*

By Beth Brennan

STATE V. BULLPLUME

Keywords: 5-0 panel, Affirmed, Failiure to register as sex offender, Lenihan exception, Probationary conditions

State v. Bullplume, 2013 MT 169 (June 25, 2013) (5-0) (McKinnon, J.)

Issue: (1) Whether Bullplume waived appellate review of the requirement that he pay for his court-ordered evaluations and treatment, and (2) whether the district court abused its discretion in imposing certain conditions on Bullplume's sentence, related specifically to sexual offenders.

Short Answer: (1) Yes, and (2) no.

Affirmed.

CITY OF MISSOULA V. GIRARD

Keywords: 5-1 panel, Reversed, Right to jury trial, Waiver

City of Missoula v. Girard, 2013 MT 168 (June 20, 2013) (5-1) (McKinnon, J.; Rice, J., dissenting)

Issue: Whether the district court correctly held that Girard's failure to appear at the final pretrial hearing constituted a waiver of his right to trial by jury.

Short Answer: No.

Reversed.

IN THE MATTER OF ADB

Keywords: 5-0 panel, Affirmed, Guardian ad litem, Parent-child, Termination of parental rights

In the Matter of ADB, 2013 MT 167 (June 20, 2013) (5-0) (McKinnon, J.; McGrath, C.J., specially concurring)

Issue: (1) Whether DPHHS made reasonable efforts to reunite Mother with ADB; (2) whether the district court properly concluded that Mother's drug addiction rendered her unfit to parent ADB, and that her condition was unlikely to change within a reasonable time; (3) whether the district court had jurisdiction to terminate Father's parental rights; (4) whether Father's attorney rendered ineffective assistance of counsel; (5) whether the district court erred in terminating Father's parental rights based upon his incarceration for mitigated deliberate homicide; and (6) whether the district court correctly concluded that terminating Mother's and Father's parental rights was in ADB's best interest.

Short Answer: (1) Yes; (2) yes; (3) yes; (4) no; (5) no; and (6) yes.

Affirmed.

CITIZENS FOR BALANCED USE V. MAURIER

Keywords: 7-0 panel, Bison, Injunctive relief, Reversed

Citizens for Balanced Use v. Maurier, 2013 MT 166 (June 19, 2013) (7-0) (McGrath, C.J.; Rice, J., concurring)

Issue: Whether the district court properly issued a preliminary injunction on the basis that the Department of Fish, Wildlife & Parks had violated § 87-1-216, MCA, by transferring bison to the Ft. Peck Reservation.

Short Answer: No. Tribal lands are not "private or public lands in Montana," and the statute therefore does not apply.

Reversed.

STATE V. WAGNER

Keywords: 5-0 panel, Affirmed, DUI, Motion to suppress, Particularized suspicion

State v. Wagner, 2013 MT 159 (June 18, 2013) (5-0) (McKinnon, J.)

Issue: Whether the officer had particularized suspicion to justify an investigative stop.

Short Answer: Yes.

Affirmed.

ROSE V. STATE

Keywords: 7-0 panel, Affirmed, Ineffective assistance of counsel, Postconviction relief

Rose v. State, 2013 MT 161 (June 18, 2013) (7-0) (Wheat, J.)

Issue: Did the district court properly deny Rose's claim for postconviction relief, which alleged (1) that Rose's trial counsel provided ineffective assistance, (2) that appellate counsel provided ineffective assistance by failing to raise certain issues on appeal, and (3) that Rose was denied access to counsel at a

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critical stage of the trial.

Short Answer: (1) Yes, (2) yes, and (3) this issue could have been raised on direct appeal and will not be considered in a petition for postconviction relief.

Affirmed.

PENNINGTON V. FLAHERTY

Keywords: 5-0 panel, Admissibility of evidence, Affirmed, Implied property restrictions, Summary judgment

Pennington v. Flaherty, 2013 MT 160 (June 18, 2013) (5-0) (Morris, J.)

Issue: Whether the district court properly held that the subdivision plat and recorded restrictions were the only restrictions on the use of Pennington's property.

Short Answer: Yes.

Affirmed.

LECOUNT V. DAVIS

Keywords: 5-0 panel, Child support lien, Reversed

LeCount v. Davis, 2013 MT 157 (June 18, 2013) (5-0) (Baker, J.)

Issue: Whether the district court correctly held that LeCount could foreclose on a child support lien created by the Child Support Enforcement Division.

Short Answer: No.

Reversed

CARTWRIGHT V. SCHEELS ALL SPORTS, INC.

Keywords: 5-0 panel, Affirmed, Employee handbook, Expert witness admissibility, Good cause to terminate, Jury verdict, Wrongful discharge

Cartwright v. Scheels All Sports, Inc., 2013 MT 158 (June 18, 2013) (5-0) (McKinnon, J.)

Issue: Whether the district court erred in (1) denying summary judgment to Cartwright and allowing Scheels to argue good cause for terminating Cartwright's employment; (2) failing to sanction Scheels for discovery abuse and destruction of evidence; (3) denying Cartwright's motion to amend the pleadings; (4) allowing Scheels' expert witness to testify about ultimate issues of fact and law; and (5) allowing witnesses to testify about rumors heard at Scheels about Cartwright.

Short Answer: (1) No; (2) no; (3) no; (4) no; and (5) no.

Affirmed

STATE V. STEIGELMAN

Keywords: 5-0 panel, Affirmed, Concurrence, Speedy trial

State v. Steigelman, 2013 MT 153 (June 6, 2013) (5-0) (Morris, J.; Baker, J., concurring)

Issue: Whether the state violated Steigelman's constitutional right to a speedy trial.

Short Answer: No.

Affirmed

BELL GENERATIONS TRUST V. FLATHEAD BANK

Keywords: 6-1 panel, Affirmed, Easement, Foreclosure, Summary judgment

Bell Generations Trust v. Flathead Bank, 2013 MT 152 (June 5, 2013) (6-1) (Cotter, J., for the majority; Wheat, J., dissenting)

Issue: Whether the district court properly determined that Bell's easement rights were subordinate to Flathead Bank's interests in the property, and were properly foreclosed upon and extinguished by the bank trhough a trustee's sale.

Short Answer: Yes.

Affirmed.

ROLAND V. DAVIS

Keywords: 5-0 panel, Affirmed, Ditch easement,

Roland v. Davis, 2013 MT 148 (June 4, 2013) (5-0) (Morris, J.)

Issue: Whether the district court properly determined that Roland had no ditch easement across property owned by Davis.

Short Answer: Yes.

Affirmed.

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LEAR V. JAMROGOWICZ

Keywords: 5-0 panel, Affirmed, Discovery, Order of protection

Lear v. Jamrogowicz, 2013 MT 147 (June 4, 2013) (5-0) (Cotter, J.)

Issue: Whether the district court properly dismissed Lear's civil action without prejudice, rather than with prejudice.

Short Answer: Yes.

Affirmed.

PALLISTER V. BLUE CROSS/BLUE SHIELD

Keywords: 5-0 panel, Affirmed, Class action, Substitution of judge

Pallister v. Blue Cross/Blue Shield, 2013 MT 149 (June 4, 2013) (5-0) (Rice. J.)

Issue: Whether the district court erred in denying Pallister's motion for substitution of judge on remand.

Short Answer: No.

Affirmed.

IN THE MATTER OF TRACEY L. MORIN

Keywords: 5-0 panel, Affirmed, Rule 11 sanctions

In the Matter of Tracey L. Morin, 2013 MT 146 (June 4, 2013) (5-0) (McGrath, C.J.)

Issue: Whether the district court Rule 11 sanctions on Morin were an abuse of discretion.

Short Answer: No.

Affirmed.

MARRIAGE OF SCHWARTZ AND HARRIS

Keywords: 5-0 panel, Affirmed & reversed, Dissolution - property division, Dissolution -- property valuation,

Marriage of Schwartz and Harris, 2013 MT 145 (May 30, 2013) (5-0) (Rice, J.)

Issue: (1) Whether the district court erred by valuing the estate as of 2009 rather than 2002, when the parties separated; (2) whether the district court erred in its valuation of the Grizzly Security business; (3) whether the district court erred by failed to award Greg an offset credit for $400,000 paid to Jean while they were separated; and (4) whether the district court erred by ordering Greg to pay Jean $1.259 million without providing a method of payment.

Short Answer: (1) No; (2) no; (3) yes; and (4) yes.

Affirmed in part, reversed in part & remanded.

MCDUNN V. ARNOLD

Keywords: 5-0 panel, Affirmed, Civil procedure,

McDunn v. Arnold, 2013 MT 138 (May 28, 2013) (5-0) (McGrath, C.J.)

Issue: (1) Whether the district court properly allowed McDunns to amend their complaint and add a new claim; (2) whether the district court properly denied Arnold's motion in limine to prohibit reference to the testimony and evidence presented in the justice court; and (3) whether Arnold was denied her right to a trial de novo.

Short Answer: (1) Yes; (2) yes; and (3) no.

Affirmed.

IN THE MATTER OF SC

Keywords: 5-0 panel, Involuntary commitment, Reversed

In the Matter of SC, 2013 MT 140 (May 28, 2013) (5-0) (Morris, J.)

Issue: Whether the district court properly granted the state's third request to extend SC's involuntary treatment plan.

Short Answer: No.

Reversed.

STATE V. KING

Keywords: 5-0 panel, Affirmed, Assault, Homicide, Justifiable use of force,

State v. King, 2013 MT 139 (May 28, 2013) (5-0) (Wheat, J.)

Issue: (1) Whether the district court properly excluded evidence of justifiable use of force as a defense to the charge of deliberate homicide, and (2) whether the district court's exclusion of evidence of the victim's mental health history violated King's Sixth and Fourteenth Amendment rights.

Short Answer: (1) Yes, and (2) no.

Affirmed.

MYRUP V. STATE DEPT. OF REVENUE

Keywords: 5-0 panel, Affirmed, Tax deductions

Myrup v. State Dept. of Revenue, 2013 MT 136 (May 21, 2013) (5-0) (Cotter, J.)

Issue: Whether the district court properly affirmed STAB's denial of tax deductions Myrup claimed for education expenses.

Short Answer: Yes.

Affirmed.

IN THE MATTER OF KB AND TB

Keywords: Indian Child Welfare Act, Reversed, Termination of parental rights

In the Matter of KB and TB, 2013 MT 133 (May 15, 2013) (5-0) (Baker, J.)

Issue: Whether the termination of CB's parental rights complied with statutory requirements governing proceedings involving Indian children.

Short Answer: No.

Reversed and remanded.

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MOLNAR V. FOX

Keywords: 5-0 panel, Affirmed, Political ethics violations

Molnar v. Fox, 2013 MT 132 (May 15, 2013) (5-0) (Rice, J.)

Issue: (1) Whether Fox had standing to file an ethics complaint against Molnar; (2) whether Molnar received unlawful gifts; (3) whether Molnar improperly used state facilities for political purposes; and (4) whether the penalty statute for ethics violation is unconstitutionally vague.

Short Answer: (1) Yes; (2) yes; (3) yes; and (4) no.

Affirmed.

STATE V. STOPS

Keywords: 5-0 panel, Affirmed, Speedy trial

State v. Stops, 2013 MT 131 (May 14, 2013) (5-0) (Cotter, J.)

Issue: (1) Whether the district court's FOF/COLs were sufficient to allow appellate review; and (2) whether the district court erred in holding that Stops' speedy trial rights were not violated.

Short Answer: (1) Yes, and (2) no.

Affirmed.

In re the Marriage of Pfeifer

Keywords: 4-1 panel, Admissibility of evidence, Dissolution - child support, Equitable estoppel,

In re the Marriage of Pfeifer, 2013 MT 129 (May 14, 2013) (4-1) (McGrath, C.J., for the majority; Rice, J., dissenting)

Issue: (1) Whether the district court erred by requiring Phillip to pay child support beyond the parties' child's 18th birthday; and (2) whether the district court should have applied the doctrine of equitable estoppel to preclude Susan's claim for back child support.

Short Answer: (1) No, and (2) no, overruling Marriage of Shorten, 1998 MT 267.

Affirmed.

STATE V. BEACH

Keywords: 4-3 panel, 5-0 panel, Homicide, Reversed

State v. Beach, 2013 MT 130 (May 14, 2013) (4-3) (Rice, J., for the majority, joined by Baker, J. McKinnon, J. and Dist. Judge Richard Simonton; McKinnon, J. concurring separately; Morris, J., dissenting, joined by Wheat, J., and Cotter, J.)

Issue: Whether the district court erred in concluding that Beach was entitled to a new trial because he had demonstrated his actual innocence.

Short Answer: Yes.

Reversed.

NEWMAN V. SCOTTSDALE INSURANCE CO.

Keywords: 5-1 panel, Affirmed & reversed, Attorneys' fees, Insurance policy exclusions, Insurer's duty to defend.

Newman v. Scottsdale Insurance Co., 2013 MT 125 (May 7, 2013) (5-1) (Cotter, J., for the majority; Wheat, J., dissenting)

Issue: (1) Whether the district court erred in considering inadmissible evidence and facts beyond the allegations of the complaint in determining that the insurers had a duty to defend; (2) whether the district court erred in finding a duty to defend but not applying the policy exclusions; (3) whether the district court erred in calculating and awarding attorneys' fees to Newman; and (4) whether the district court erred in finding Montana law controls.

Short Answer: (1) Yes, but it was harmless; (2) no; (3) yes, because it should not have used the contingency fee agreement between Newman and her attorneys as a basis; and (4) no.

IN THE MATTER OF EZC AND EBC

Keywords: 5-0 panel, Affirmed, Termination of parental rights

In the Matter of EZC and EBC, 2013 MT 123 (May 7, 2013) (5-0) (Wheat, J.)

Issue: Whether the district court erred in finding mother subjected her children to chronic abuse or chronic, severe neglect and terminated her parental rights without requiring reunification efforts and a treatment plan.

Short Answer: No.

Affirmed.

WHEATON V. BRADFORD

Keywords: 5-0 panel, Affirmed, Civil procedure, Discovery, Expert witness admissibility,

Wheaton v. Bradford, 2013 MT 121 (May 7, 2013) (5-0) (Rice, J.)

Issue: (1) Whether Bradford's expert was properly allowed; (2) whether Bradford's expert failed to supplement his disclosure; (3) whether the motion for a new trial should have been granted.

Short Answer: (1) Yes; (2) no; and (3) no.

Affirmed.

WITTICH LAW FIRM, P.C. V. O'CONNELL

Keywords: 4-1 panel, Affirmed, Attorneys' fees, Civil procedure, Default judgment, Rule 60, Unpaid legal fees

Wittich Law Firm, P.C. v. O'Connell, 2013 MT 122 (May 7, 2013) (4-1) (Wheat, J., for the majority; Baker, J. concurs; Cotter, J., dissents)

Issue: (1) Whether the district court slightly abused its discretion in denying O'Connells' motion to vacate the default

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judgment, and (2) whether the law firm was properly awarded attorneys' fees.

Short Answer: (1) No, as it was untimely under the 2009 Rules of Civil Procedure, and (2) yes, as the contract allowed them.

Affirmed.

IN RE THE MARRIAGE OF STEAB AND LUNA

Keywords: 5-0 panel, Affirmed & reversed, Dissolution - child support,

In re the Marriage of Steab and Luna, 2013 MT 124 (May 7, 2013) (5-0) (Cotter, J.)

Issue: (1) Whether the district court was required to issue written findings and conclusions to support its order on child support arrearages; (2) whether the district court erred in imposing a 12% annual interest rate on unpaid arrearages; (3) whether the district court erred in not imposing interest on Staeb's unpaid arrearages, only Luna's; and (4) whether the district court erred in taking judicial notice of a bankruptcy court order releasing Staeb from marital debt owed to Luna.

Short Answer: (1) No, as it was presented via a motion; (2) yes, as the statutory rate is 10%; (3) yes; and (4) no.

Affirmed in part, reversed in part, & remanded with instructions.

LEAR V. JAMROGOWICZ

Keywords: 5-0 panel, Affirmed, Discovery, Stalking

Lear v. Jamrogowicz, 2013 MT 147 (June 4, 2013) (5-0) (Cotter, J.)

Issue: Whether the district court properly dismissed Lear's civil action without prejudice, rather than with prejudice.

Short Answer: Yes.

Affirmed.

BEALS V. BEALS

Keywords: 5-0 panel, Appeal dismissed, Standing master

Beals v. Beals, 2013 MT 120 (May 2, 2013) (5-0) (McKinnon, J.)

Issue: Whether a party may appeal directly to this Court from the decision of a standing master.

Short Answer: No.

Appeal dismissed.

BAILEY V. STATE FARM

Keywords: 4-2 panel, Insurer's duty to procure, Reversed

Bailey v. State Farm, 2013 MT 119 (May 2, 2013) (4-2) (Cotter, J., for the majority; Rice, J. & Baker, J., dissenting)

Issue: (1) Whether the district court erred in finding no genuine issues of fact regarding defendants' duty to procure underinsured motorist coverage for Baileys; and (2) whether the district court erred in failing to recognize and impose a heightened duty beyond a duty to procure requested coverage.

Short Answer: (1) Yes, and (2) the Court declines to address this issue.

Dissents: Justice Rice would conclude that the Baileys did not demonstrate genuine issues of material fact and would affirm. Justice Baker agrees, and writes separately to express her concern that the Court has in fact imposed a heightened duty on an insurance agent despite its claim that it is not addressing this issue.

Reversed

Case briefs courtesy of Beth Brennan, who practices in Missoula with Brennan Law & Mediation, PLLC. *http://brennanlawandmediation.com/*

"As I Lay Dying[1]"

A Halloween meditation on the use of dying declarations in Montana

By Cynthia Ford

Montana, like the federal system, has a hearsay exception for "dying declarations." If the out-of-court declarant is unavailable for trial, either by death or some other 804(a) reason[1], his/her out-of-court statement may be admissible despite a hearsay objection if both of two requirements are met:

1. At the time the declarant made the statement, she believed that her death was imminent AND

2. The statement concerns the cause or circumstance of that impending death.

There are two primary explanations for the admissibility of this sort of hearsay. One is religiously-based: if you are about to die, and you believe in any form of judgment after death, you would be least likely to lie at the very moment that judgment is upon you. I always picture the declarant lying on his deathbed, able to see the tunnel of light and perhaps St. Peter at the gate at the end of it, and deciding that it would be a bad time to add a lie to the list of sins already on the book. Even if you are not a firm believer, Pascal's utilitarian "wager" for belief in God may make sense now, and even more on your deathbed:

> Let us weigh up the gain and the loss involved in calling heads that God exists. Let us assess the two cases: if you win, you win everything: if you lose, you lose nothing. Do not hesitate then: wager that he does exist. [2]

If you are more interested in modern rappers than old dead Frenchmen, you may prefer the version from Kendrick Lamar[3]:

> *I'd rather not live like there isn't a God*
> *Than die and find out there really is*
> *Think about it*

The second rationale often expressed for the dying declaration exception is that a person about to die doesn't have much skin left in the game, and stands neither to profit nor lose from telling a lie just before he dies. Both this, and the religiously based rationale, are wide open to rebuttal and criticism, but the exception lives on. Indeed, the U.S. Supreme Court has alluded to the dying declaration as an example of a "firmly rooted" hearsay exception[4], and several of its recent cases on the Confrontation Clause contain dicta indicating that dying declarations may escape the 6th Amendment altogether because of their special status.

Montana vs. Federal Dying Declaration Exceptions

Montana recognized the dying declaration exception for criminal cases at common law and then by statute[5] prior to the M.R.E.. When the Supreme Court adopted the M.R.E. in 1977[6], largely based on the F.R.E., Montana consciously chose to expand its version of this hearsay exception beyond the federal model. If the out-of-court declarant is unavailable for testimony at trial for one of the reasons set forth in 804(a), M.R.E. 804(b)(2) provides an exception to the hearsay rule for:

> (2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant›s death was imminent, concerning the cause or circumstance of what the declarant believed to be impending death.

The federal version of this rule is F.R.E. 804(b)(2):

> (2) Statement Under the Belief of Imminent

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1 This is the title of William Faulkner's seventh novel, which in turn was taken from Homer's Odyssey. Agamemnon is speaking to Odysseus: "As I lay dying, the woman with the dog's eyes would not close my eyes as I descended into Hades." (Ok, used my first major, English. Stand by for the Philosophy component.)

1 A common misconception is that the declarant must have actually died soon after making the statement. This was apparently true under the prior Montana statute, but the Commission Comment indicates this was abandoned on adoption of the MRE provision. Now, in both state and federal court, a dying declaration may be admissible even if the declarant later miraculously recovered, so long as he believed that he was about to die at the time he made the statement. Although 804(a) requires unavailability at trial before any of the 804(b) exceptions can succeed, the declarant can be unavailable by refusing to testify despite a court order, asserting a privilege, being too sick, or simply failing to appear despite the best efforts of the proponent. Of course, death is another—and the clearest—form of unavailability under 804(a), but the death can either be caused by the circumstance which gave rise to the belief of impending death, or something else altogether.

2 Pascal, Blaise, 1670, *Pensées*, translated by W. F. Trotter, London: Dent, 1910. There is a host of secondary sources which will explain far more accurately and in far more detail Pascal's analysis. I recommend, as one starting point, *http://plato.stanford.edu/entries/pascal-wager/#4* See also,
At last, my second major in Philosophy is somewhat relevant!

3 http://rapgenius.com/Kendrick-lamar-faith-lyrics#note-159794

4 See, *Crawford v. Washington,* 541 U.S. 36, 72 (Rehnquist, CJ, concurring); Ohio v. Roberts, 448 U.S. 56, 66 n.9 (recognizing dying declaration as one category of hearsay which "rest[s] upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'"

5 Section 93-401-27(4), R.C.M. 1947.

6 Like virtually all of the M.R.E., 804(b)(2) is substantively identical to the original version adopted by Supreme Court Order in 1976, effective July 1, 1977.

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> Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

Different from the federal rule, Montana allows use of this exception in all cases, both civil and criminal, whereas the federal use is restricted to civil and homicide cases. The Montana Evidence Commission commented:

> This exception is identical to Federal and Uniform Rules (1974) Rule 804(b)(2) except that an introductory clause reading "in a prosecution for homicide or a civil action or proceeding", is deleted. The Commission deleted this clause because it feels that **if statements of this sort are to be admissible in homicide prosecutions, they should also be admissible in any other criminal prosecutions.** Section 93-401-27(4), R.C.M. 1947 [superseded], admits dying declarations in all criminal actions, and so the adoption of the Federal rule would have been a restriction on existing Montana law. None of the cases have expressed the rule that dying declarations are only admissible in prosecutions for homicide, although the cases considering admitting dying declarations have all been this type of prosecution. Note that **the Federal, Uniform, and Montana rule all admit statements of this sort in civil actions***;* this is a major change from the common law. The Commission feels that **if statements of this sort are reliable enough for use in criminal prosecutions, then they should also be used in civil cases where the outcome does not involve personal freedom**. (Emphasis added).

There were no Montana cases dealing with dying declarations in a civil context before the M.R.E. were adopted, presumably because the antecedent statute was confined to criminal cases. Furthermore, despite the invitation of the Montana Commission to extend use of this hearsay exception to all cases, that has not yet occurred in any case appealed to the Montana Supreme Court since 1977.

ONLY ONE MONTANA STATE DYING DECLARATION CASE SINCE 1977, AND IT IS CRIMINAL

The only 804(b)(2) case from the Montana Supreme Court since the M.R.E. were adopted was decided in 2008. Raul Sanchez shot and killed his girlfriend, Aleasha Chenowith, apparently because she had cheated on him with his co-worker. At Sanchez's trial, the prosecutor was allowed to introduce a note written by Aleasha, apparently several days before she was killed. The note read:

> To whom it concerns:
>
> On July 8, 04 around 10:30 p[sic] Raul Sanchez Cardines told me if I ever was cought [sic] with another man while I was dating him, that he would kill me. Raul told me he had friends in Mexico that had medicine that would kill me and our doctors wouldn't know what it was till it was to [sic] late and I would be dead.
>
> So if I unexspetly [sic] become sick and on the edge of death, and perhaps I die no [sic] you will have some answers.
>
> Aleasha Chenowith (written and printed signature)

The trial court admitted this exhibit over the defendant's hearsay objection[7], holding that this note fell within the dying declarations exception in 804(b)(2), as well as two other hearsay exceptions. The trial judge also overruled the defense objection to a neighbor's testimony about an oral statement Aleasha made to her:

> Pamela Ehrlich testified that Aleasha told her that, during an argument, Sanchez stated, "[m]e love you, [Aleasha]. Me not love you that much. You cross me, I kill you."

On appeal, the State argued that both the note and the oral statement were dying declarations and thus admissible. The Montana Supreme Court made short shrift of this argument about both types of evidence, applying the express requirements of the exception and finding that neither met these requirements:

> the District Court incorrectly relied on the "statement under belief of impending death" hearsay exception to admit Aleasha's note. This exception applies to statements "made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstance of what the declarant believed to be impending death." M.R. Evid. 804(b)(2). Aleasha's statements that "if I [unexpectedly] become sick" and "perhaps I die" indicate that she viewed her death as neither certain nor imminent. (Emphasis original.)

State v. Sanchez, 341 Mont. 240, 247-248, 177 P.3d 444, 2008 MT 27. The Court also found that nothing in the oral

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7 The defendant also objected to the note on Confrontation Clause grounds, but the trial judge never ruled on this objection. The Montana Supreme Court held that Aleasha's note was "testimonial" even though it was not made directly to a law enforcement officer, and that although its admission might violate the state and federal confrontation clauses, Sanchez forfeited his right to object on those grounds when he murdered Aleasha. 341 Mont. at 257. But see, *Giles v. California,* 554 U.S. 353 (2008) (holding that the U.S. 6th Amendment right is forfeited only when the defendant's wrongful act was intended to prevent the declarant from testifying against the defendant.)

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statement indicated fear of imminent death at the time Aleasha was speaking to her neighbor. Thus, the Court found, the trial judge committed two evidentiary errors when it admitted these forms of hearsay. (The Court went on to hold that both errors were harmless, in view of other evidence properly admitted on the same point, including Sanchez's own statements of his intention to either slap Aleasha around or shoot her.)

The M.R.E. were adopted the year before I graduated from law school, so we are almost the same legal age. In that time (a lot of time), M.R.E. 804(b)(2) has been the subject of only one case in the Montana Supreme Court. That case, *Sanchez*, was criminal. Despite the Commission's intention to open the use of dying declarations to civil as well as criminal litigants, no civil cases in Montana's state courts appear to have taken advantage of the extension.

A POST-RULES U.S. DISTRICT COURT CIVIL CASE

The U.S. District Court for the District of Montana decided a very interesting and illuminative dying declaration case in 1999, *Sternhagen v. Dow Chemical*, 198 F.Supp. 2d 1113. (It was a civil case, to boot). The plaintiff had grown up to become a board-certified radiation oncologist, but as a teenager he had worked three summers mixing and spraying herbicides on fields of crops. Thirty years later, he was diagnosed with non-Hodgkin's lymphoma, which he believed was caused by his exposure to the herbicide chemicals. On August 22, 1988, he filed a products liability complaint in federal court.

Eight days later, he gave a sworn videotaped statement "upon questioning from his attorney." The defendants were not notified of this event at the time, and had no opportunity to cross-examine Dr. Sternhagen. In the statement,

> Sternhagen said he could recall four labels on the 2, 4–D barrels with which he worked while employed with Valley Flyers and the Fuhrman Ranch. The four were Dow, Ortho (Chevron), Monsanto and Stauffer, i.e., the defendants in this action. Sternhagen also described, inter alia, how his non-Hodgkin's lymphoma was in "stage four," the disease's final stage and the point at which the disease is considered incurable. He stated, based upon his experience as a doctor with other cancer patients, that the average survival time for a person in his condition was three months, and survival of six months would be considered "quite outstanding." Sternhagen said he had received the sacrament of Last Rites from the Roman Catholic Church about 25 times since he was diagnosed as a step to prepare himself for death.
> 108 F.Supp.2d at 1115.

Clearly, Dr. Sternhagen's attorney had read the dying declarations rule and was trying to lay the foundation for the posthumous use of the statement at trial.

Dr. Sternhagen did die before trial[8], and before the defendants moved for summary judgment. The plaintiffs submitted the sworn statement in opposition to summary judgment, to prove the truth of the facts it asserted, as the primary basis for liability of the four named defendants:

> Q: Do you recall, I realize we are going back almost exactly 40 years—?
>
> A: Yes, sir.
>
> Q:—but, as you sit here now, do you recall any labels on the 2, 4–D barrels?
>
> A: I believe I can recall four labels. Those four would be Dow, Ortho, Monsanto and Stauffer, as best as I can recollect.
>
> Q: And those would all be suppliers of the 2, 4–D which you mixed?
>
> A: Yes, sir.
>
> Q: And which you sprayed?
>
> A: Yes.
>
> 108 F.Supp.2d at 1116.

Judge Hatfield found that the statement conformed to federal precedent that descriptions of ingested substances adequately "concern the cause or circumstances" of the imminent death. However, the judge held that the other requirement of the exception, that the declarant believe at the time of making his statement that his death was "imminent," was not met in this case. He quoted the following language from the U.S. Supreme Court's best-known dying declaration case, *Shepard v. U.S.*, 290 U.S. 96, 99-100 (1933):

> [T]he declarant must have spoken without hope of recovery and in the shadow of impending death.... Fear or even belief that illness will end in death will not avail itself to make a dying declaration. There must be 'a settled hopeless expectation' that death is near at hand, and what is said must have been spoken in the hush of its impending presence.... What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture. The patient must have spoken with the consciousness of a swift and certain doom.

Mrs. Shepard's statement to her nurse about her belief that her husband had poisoned her was disqualified because about the same time, Mrs. Shepard had experienced an improvement in her physical condition, and had asked her doctor "you will get me well, won't you?" The U.S. Supreme Court held that these facts contraindicated the required "settled hopeless expectation" and rendered the statement inadmissible.

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8 The parties had agreed to take Dr. Sternhagen's deposition on December 14, but he died on December 4, before that could occur.

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Dr. Sternhagen fared no better. Despite the great "I am positive I am going to die, and soon" language in his statement, his post-statement conduct made the hearsay objection for the defendants. Remember that he gave his statement on August 30, 1988, and prior to that date had had last rites administered about 25 times. The fatal (sorry) facts occurred after that date:

> In this court's opinion, Sternhagen's statement does not fall within the dying declaration exception. When he made the statement, he stated he expected to live another three to six months. He also said he continued to work in a limited way and stated his plans to attempt more work if his condition improved. These are not the type of statements that support a belief in "imminent" death, as contemplated in Rule 804(b)(2). They do not convey a state of mind exhibiting "consciousness of a swift and certain doom" and thus do not provide sufficient indicia of trustworthiness to satisfy the dying declaration exception to the hearsay rule. Additionally, his act of taking a trip to a religious shrine to "receive healing" does not support the notion of a "settled hopeless expectation" that his death was near at hand. For these reasons, the court finds the dying declaration exception inapplicable to Sternhagen's statement.
> 108 F.Supp.2d at 1118.

(The court also rebuffed the plaintiff's attempt to get the statement in through the "residual" exception of F.R.E. 807.[9]) It is hard to say if there was anything else plaintiff's counsel could or should have done to try to preserve Dr. Sternhagen's identification of the toxins, and it is certainly impossible to counsel your dying clients that they should forsake additional treatment because it might interfere with your evidentiary strategy. We don't make the facts, which is one of the hardest things to accept about lawyering…

ILLUSTRATIVE PRE-RULES DYING DECLARATION CASES IN MONTANA

My research[10] revealed about 20 published cases in Montana decided before M.R.E. 804(b)(2) went into effect. All of them are criminal cases. I have selected just two to discuss here, one of which is my favorite[11] of all the dying declaration cases I have ever read, both because of its colorful facts and because it shows the paradigmatic application of the exception. The other case shows a reversal for an improper admission of a hearsay statement which did not meet the requirements of the exception. Taken together, these two cases provide a good diagram of the proper use of this hearsay exception in Montana.

Dying declarations in spades

Sadly, I can only excerpt a small portion of this case, but I hope it will be enough to induce you to read more of *State v. Morran*, 131 Mont. 17, 306 P.2d 679 (1957) sometime soon.

All was not well at Buster Morran's gas station in Malta. He was already way behind in paying for his gas and oil, as well as his rent, and the lessor was going to cancel his lease in August. He had not had fire insurance, but bought and paid for a new policy, effective June 11. At 1:00 a.m. on June 19, Buster went to his bookkeeper's house and dropped off the bank deposit from the day before, as well as the books, some adding machine tapes, and other records. At 2:45 that same morning, June 20, a fire broke out at the gas station. Not surprisingly, the fire marshal later determined it had been set.

Unfortunately, Morran did not act alone in the arson. Shortly after the fire started, the whole station exploded, and two men ran out of the building. They were Mervin Bishop and "Turk" or "Turkey" Freestone (see why I love this case?). Both were taken to the hospital. When they arrived, Bishop was 85% covered with 3rd degree burns, and Freestone was almost 100% covered with the same. Freestone died less than 12 hours after the explosion; Bishop lived until the afternoon of June 23 (about 3 ½ days). The treating physician at the hospital for both men was none other than the father of the Hon. Donald Molloy. Dr. Molloy testified at the trial, both establishing the foundation for the dying declarations and recounting those declarations.

Here is the testimony of Dr. Molloy which established the foundation for the declarations:

> 'Mervin Bishop asked me what was the condition of Turk Freestone. I informed him that Turk Freestone died shortly after they were admitted to the hospital, and he said, 'Am I burned as badly as Turk?' I said, 'Not quite, but just about as bad, Merv.' He said, 'Am I going to live, Doc?' I said, 'No, Merv, you are not." …
>
> On Monday evening, June 20, 1955, Mervin Bishop said to Dr. Molloy, 'I am going to die'. Bishop also made a statement to his friend, Clinton Dennis, which was overheard by Dr. Molloy to the effect that he (Bishop, a former boxer) was 'going down for the long count.'

The local priest also testified at the trial to reinforce the fact that the declarant knew his death was imminent:

> Within a few hours after the fire a Catholic priest was summoned to the hospital and the last rites of the church were administered to both Mervin Bishop and Donald Freestone. The priest, before administering the last rites to Mervin Bishop, received his confession. The testimony of the priest given at appellant's trial indicated that Mervin Bishop was able to respond intelligently to the priest's statements and that the injured

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9 Montana has retained two versions of this "catch-all" exception as 803(24) and 804(b)(5); there is no M.R.E. 807.

10 See, "A Word/Warning about Research," below.

11 This is also the case the Montana Commission discussed (in much less detail, more's the pity) in its Comment to 804(b)(2): "The leading case considering this foundation is State v. Morran, 131 Mont. 17, 30, 306 2d 679 (1956), in which the Court reviewed most of the Montana cases in this area."

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> man seemed to understand the solemnity of the ceremony being performed.

With this foundation, Dr. Molloy was allowed to testify about the contents of the statement which Bishop made in his hospital room on the Tuesday evening (only part of which I reproduce here), indicating that the fire was orchestrated by Morran and that Bishop believed Morran purposely tried to kill him and Turk to destroy evidence of the arson. Bishop said that Morran originally contacted Turk, and Turk had Bishop hide in the men's room at the gas station to listen in on the proposition:

> Mervin Bishop sneaked into the back room and into the men's rest room. Buster Morran then came to the back room with his proposition to Turk Freestone. He stated that he would give him fifty to five hundred dollars, depending on how good a job he did on burning down the Hi-Line Servicenter. He laid the plans for them…
>
> 'So about 2:30, 2:00 to 2:30 in the morning Turk Freestone entered the northwest window of the Hi-Line Servicenter and Mervin Bishop stood jiggers while Turk Freestone entered. Mervin Bishop then followed Turk Freestone through the window. Then instead of setting about their business as they were supposed to, Turk went to the back room to obtain two tires for his car. After he obtained the tires for his car, Mervin was standing jiggers at the front door to make sure no one came.
>
> 'Turk threw a 15-gallon drum of gasoline into the back room as he was instructed, toward the water heater. At this point Mervin Bishop interjected that Buster was supposed to have turned off the flame, the pilot light in the water heater, but he did not, and 'I think he left it on on purpose to catch Turkey and destroy all the evidence.'

The trial court allowed the admission of Bishop's hospital statements as "dying declarations" under the Montana evidence statute then in effect. The defendant argued on appeal that the fact Bishop had said to one person "If you don't stop asking me questions, you're going to give me a nervous breakdown" indicated that he expected to live. The Supreme Court used the appeal as an opportunity to review prior Montana case law on this exception to the hearsay rule, observing that:

> "…if all the facts and circumstances surrounding the declarant at the time of making the declarations show them to have been made under the sense of impending death, notwithstanding declarant may not have said he was without hope of recovery, or was dying, or going to die, then such declarations are admissible in evidence."
> 131 Mont. at 31, quoting from *State v. Russell*, 13 Mont. 164, 168, 32 P. 854, 856 (1893).

The Supreme Court affirmed the judge's admission of the dying declaration, and affirmed the conviction.

No go: No sense of impending death at time of the statement, even though died the same day

State v. Newman, 162 Mont. 450, 513 P.2d 258 (1973) was decided four years before the MRE became effective. Jack Newman was convicted of involuntary manslaughter of his wife, Elsie Newman. She died in the late afternoon in an ambulance on her way from Bozeman to Billings. Early that Saturday morning, Mrs. Newman had asked two of her neighbors to come over to the house after Mr. Newman left. Both neighbors testified at trial that Mrs. Newman told them defendant "had beaten her Friday night after supper and again Saturday morning, and that she was frightened and had to get out of the house." After these conversations, the county attorney came out to the house and, observing the wife's physical condition as well as knowing of her continuing difficulty with alcohol, took her to the local hospital. Several hours later, at the hospital, Mrs. Newman's condition deteriorated and arrangements were made for her to travel to Billings for further treatment. The patient had unexpected seizures in the ambulance about halfway to Billings, and died in Park City. At trial, the husband/defendant's hearsay objection was overruled and the neighbors' testimony about Mrs. Newman's statements was admitted. On appeal, the Supreme Court stated simply:

> The 'dying declarations' exception as stated in section 93-401-27, R.C.M.1947, is not applicable in the instant case because a 'sense of impending death' was never demonstrated.

For these errors, and others, the conviction was reversed and the case remanded for a new trial.

A Quick Look at Dying Declarations and the Confrontation Clause 6th Amendment

As the U.S. Supreme Court has struggled to enunciate its current Confrontation Clause jurisprudence,[12] it has abandoned its former test of "circumstantial guarantees of trustworthiness" in favor of a clear requirement of confrontation through cross-examination, either at trial or beforehand, of a person whose out of court "testimonial" statement is used against the accused. However, a recurring theme is suggestive dicta that dying declarations may be exempt from the Confrontation Clause because they were so firmly accepted before the Founders adopted the Bill of Rights. In *Crawford v. Washington*, 541 U.S. 36 (2004), the landmark case for modern Confrontation Clause application, the Court devoted footnote 6 to the treatment of dying declarations:

> The existence of that exception [dying

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12 The "new" jurisprudence began with *Crawford v. Washington*, 541 U.S. 36 (2004), and continues apace today. The criminal bar will be well aware of these cases, and the Montana corollaries; the civil lawyers among us may well be, and may remain, oblivious, because the 6th Amendment applies only to criminal defendants.

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> declarations] as a general rule of criminal hearsay law cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is sui generis.

541 U.S. at 56, note 6. In *Giles v. California,* 554 U.S. 353 (2008), the Court said:

> … two forms of testimonial statements were admitted at common law even though they were unconfronted. The first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying. Avie did not make the unconfronted statements admitted at Giles' trial when she was dying, so her statements do not fall within this historic exception.

In *Michigan v. Bryant*, 181 S.Ct. 1143 (2011), the out of court statements of the murder victim, made to police as he lay mortally wounded in a gas station parking lot, might have been dying declarations which would have forced the Supreme Court to actually rule definitively on the effect of the Sixth Amendment on the Confrontation Clause (or vice versa). The victim told the police who had shot him; the gunshot wound did in fact cause the victim's death soon thereafter. However,

> The Supreme Court of Michigan held that the question of whether the victim's statements would have been admissible as "dying declarations" was not properly before it because at the preliminary examination, the prosecution … established the factual foundation only for admission of the statements as excited utterances…Because of the State's failure to preserve its argument with regard to dying declarations, we similarly [to *Crawford*] need not decide that question here.

*Bryan*t, 131 S.Ct., at 1151, note 1. Justice Ginsburg's dissent went further:

> In *Crawford v. Washington*… this Court noted that, in the law we inherited from England, there was a well-established exception to the confrontation requirement: The cloak protecting the accused against admission of out-of-court testimonial statements was removed for dying declarations. This historic exception, we recalled in *Giles v. California*, 554 U.S. 353, 358 (2008); see id., at 361-362, 368, applied to statements made by a person about to die and aware that death was imminent. Were the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause exceptions....

Id, at 1177.

Thus, the U.S. Supreme Court has not yet dealt with a case which squarely presented the status of the dying declaration vis a vis the post-Crawford Confrontation Clause. Several state courts have, and so far, have followed the Supreme Court's intimations that the Confrontation Clause does not bar dying declarations, even where the declarations were testimonial, and even where the accused had no opportunity to cross-examine the declarant either at or before trial. E.g., *State v. Beauchamp*, 796 N.W. 2d 780, 788-95 (Wis. 2011), citing a string of other post-*Crawford* state court decisions[13]. See also, Peter Nicolas[14], *'I'm Dying to Tell You What Happened': The Admissibility of Testimonial Dying Declarations Post*-Crawford, 37 Hastings Const. L.Q. 487 (2010). Montana has not yet ruled on this issue because no dying declaration case has been presented to the Supreme Court in the past several years.

MONTANA CONSTITUTION

Article II, Section 24 of Montana's 1972 Constitution provides "[i]n all criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face." The Montana Supreme Court has held that Montana's version of the Confrontation Clause provides even more protection to the accused than the federal version. *State v. Clark*, 1998 MT 221, 290 Mont. 479, 964 P.2d 766. See also, *State v. Mizenko*[15], 2006 MT 11, ¶57, 330 Mont. 299 (Nelson, J., dissenting); *State v. Sanchez*, 2008 MT 27, 341 Mont. 240, ¶32.

In *State v. Sanchez*, discussed above, the prosecutor was erroneously allowed to admit two out-of-court statements by the murder victim, each identifying the accused as the person who probably would kill her. The trial judge held both statements (one written and one oral) to be dying declarations, but the Supreme Court found that neither indicated any awareness that the declarant's death was imminent, as required by Rule 804b2, and thus were inadmissible hearsay. The defense also objected at trial on Confrontation grounds, but the trial court never ruled on these.

On appeal, the Montana Supreme Court devoted a great deal of time and effort to the Confrontation claim. It found that Aleasha's note was indeed "testimonial" and ordinarily inadmissible under both the state and federal confrontation

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13 *Cobb v. State*, 16 So.3d 207, 212 (Fla.App.2009); *People v. Gilmore*, 356 Ill. App.3d 1023, 293 Ill.Dec. 323, 828 N.E.2d 293, 302 (2005); *Wallace v. State*, 836 N.E.2d 985, 996 (Ind.Ct.App.2005); *State v. Jones*, 287 Kan. 559, 197 P.3d 815, 822 (2008); *Commonwealth v. Nesbitt*, 452 Mass. 236, 892 N.E.2d 299, 310–11 (2008); *People v. Taylor*, 275 Mich.App. 177, 737 N.W.2d 790, 795 (2007); *State v. Martin*, 695 N.W.2d 578, 585–86 (Minn.2005); *State v. Minner*, 311 S.W.3d 313, 323, n. 9 (Mo.App.2010); *Harkins v. State*, 122 Nev. 974, 143 P.3d 706, 711 (2006); *State v. Calhoun*, 189 N.C.App. 166, 657 S.E.2d 424, 427–28 (2008); *State v. Lewis*, 235 S.W.3d 136, 147–48 (Tenn.2007); *Gardner v. State*, 306 S.W.3d 274, 289 n. 20 (Tex. Crim.App.2009); *Satterwhite v. Commonwealth*, 56 Va.App. 557, 695 S.E.2d 555, 560 (2010).

14 Prof. Nicolas teaches law at the University of Washington, and is the author of the casebook which I use to teach Evidence at UMLS.

15 The majority opinion in *Mizenko* noted in passing *Crawford*'s language footnote about the possibility of the dying declaration exemption from the Confrontation Clause, but like *Crawford,* the out-of-court statement at issue was not a dying declaration.

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clauses because the defendant had had no chance to cross-examine her. However, the Court went on to consider and eventually agree with the State's argument that Sanchez's murder of Aleasha extinguished his constitutional rights to confrontation, regardless of the motive behind the murder.

Since *Sanchez* was decided, the U.S. Supreme Court has taken the other tack: in order to forfeit a federal 6th Amendment right by wrongdoing, the defendant's wrongful act must have been intended to prevent the declarant/victim from testifying. *Giles v. California*, 554 U.S. 353 (2008). The Montana Supreme Court is free to continue its broader interpretation of the grounds for forfeiting the state confrontation right[16], of course, but must follow *Giles's* narrower version of forfeiture when the defendant's claim is based on the 6th Amendment.

Like the U.S. Supreme Court, Montana has not yet had to face the issue of whether a dying declaration which meets the hearsay exception also must survive a confrontation clause objection, or whether the Montana Constitution impliedly exempts these out of court statements from the right of the accused to "meet the witnesses against him face-to-face."

A WORD/WARNING ABOUT RESEARCH

For no particular reason, my preferred search engine for legal research is WestlawNext. However, I lately have had some disconcerting results, which I thought to share with my readers as a cautionary tale. In researching this article, I first typed in "Rule 804 hearsay" and got immediately to M.R.E. 804, including the text of the rule and the complete set of Commission Comments. I then scrolled down to "Notes of Decisions" and saw that there were 125 cases about Rule 804. They are categorized according to their subject, so I went to the category labeled "Statements Under Belief of Impending Death." There, I found only one case, the Sternhagen case, which technically was decided under the FRE rather than the MRE. I already knew about this case, but I also knew there were other Montana dying declaration cases out there. I modified my search, omitting the reference to the rule and typing simply "dying declarations," to cover cases decided before the M.R.E. were adopted. This approach was much more satisfactory, yielding not only the rule but also 24 cases,[17] all of them from the Montana Supreme Court (and none of them Sternhagen).[18] The third method of research was to go to the actual books (remember them?), in this case, West's Montana Code Annotated.[19] This time, under M.R.E. 804(b)(2), I found the same two cases as I found by doing the rule-based search electronically. I looked in the actual "pocket part" supplement to update my results, but still did not find the Sanchez case even though it clearly was decided under 804(b)(2).

What's the moral? Cover all your bases, use your common sense. If you think the search results look thin, look again. For best results, cross-check your electronic results with the hard copy.

CONCLUSION

Dying declarations may be "firmly rooted" and historic exception to the hearsay rule, if not the Confrontation Clause. Montana explicitly included this exception to the hearsay prohibition in M.R.E. 804(b)(2), so out of court statements made by declarants who believe they are about to die, discussing the cause or circumstances of that imminent death, are admissible to prove the truth of the matters they assert. However, my review of the use of this hearsay exception indicates that it might itself be suffering from non-use, and in danger of wasting away on the vine. Don't forget that it is out there, and that you can use it in both civil and criminal cases.

Happy Halloween.

Cynthia Ford *is a professor at the University of Montana School of Law where she teaches Civil Procedure, Evidence, Family Law, and Remedies.*

16 Ironically, the broader approach to forfeiture yields a narrower application of the state's confrontation right, apparently in contrast to the prior cases interpreting the state right as stronger for the defendant than the federal version.

17 Not all of the 24 cases actually involved application of Rule 804(b)(2), but at least mentioned the term "dying declarations." It is a lot easier for me to read a case and decide that it is not useful than it is to work not even knowing the cases are there.

18 It also indicated that there are 1,657 "secondary sources" on dying declarations. Wow!

19 Actually, I asked the law school's brilliant research librarian, Cynthia Condit, to do this for me. As always when I need help, and quick, she came through and emailed the scan to me at my remote location. (Who says you can't write at home in your jammies?)

Michael Joseph Dooney

Michael Joseph Dooney, Gearhart resident, died unexpectedly on Oct. 19, 2013, while working on his property in Jewell. Michael was born in Portland, to Jack and Mary Claire Dooney, and was a graduate of St. Stephen Grade School, Jesuit High School and Gonzaga University. He received his Doctorate of Jurisprudence at University of San Francisco Law School and was a member of the Order of the Coif. After passing the Oregon Bar, Michael worked as a Deputy District Attorney in Clatsop County and went on to establish his private law practice in Seaside, where he continued to practice law until the time of his death. Michael was a talented musician and an accomplished woodworker. He loved spending time in the woods and outdoors, especially on the family property in Jewell. He was a devout Catholic, a member of the Knights of Columbus and a devoted, generous and loving husband and father, as well as a dear brother, uncle, cousin and friend. Survivors include his wife, Lisa; children, Mary Claire, Maggie, John and Tommy Dooney of Gearhart; brothers, Patrick Dooney of Jewell, John (Donna) and Brian (Shawny) Dooney of Hillsboro; sisters, Sheila Boyd, Maureen Dooney (Jim Mosley) and Kathleen Dooney Foster (Cliff Foster) of Hillsboro and Marron Dooney (Jim Miller) of Portland; and many nieces and nephews.

Dr. Robert Lee Aston

Dr. Robert Lee Aston passed away peacefully at his home, Aston Villa, in Elberton, Georgia, on the first day of September in the year of our Lord 2013 A.D. He was an attorney-at-law, mining engineer and geologist. Dr. Aston maintained a home and office in his native state at Rapidan, Virginia and in Georgia.

He was born in Virginia in 1924, of a long line, maternally and paternally, of Virginians and Anglo-Saxon lineage, the first coming to the English Colony of Virginia in the early 1600s. He was also a direct descendant of Johann Kepler (1571-1630), the famous German astronomer and mathematician.

Dr. Aston received his early education in Georgia and Missouri. He volunteered for military service with the U.S. Army Air Corps in 1942 and served on active duty from 1943 to 1945. During World War II, he flew 35 combat missions against Germany as a First Lieutenant, navigator, with the 67th Squadron of the 44th Bomb Group, 8th Air Force, stationed in England. For meritorious and outstanding valor in combat on a mission to Hamburg, Germany, he received two Distinguished Flying Crosses. He was promoted to the rank of Captain for serving as the Deputy Squadron Navigator of the 67th Squadron. For other combat missions, he received the Air Medal with six Oak Leaf clusters. Following his tour of European combat in February 1945, he was returned to the U.S. and trained as a single engine pilot with the 2nd Air Force for a tour of duty in the Pacific theatre. He completed pilot training as the War ended with Japan and was separated from active duty October 1, 1945. He served with the Air Force reserves for 8 years thereafter and was discharged from the Air Force Reserves in 1953.

Aston was a highly educated man, earning eight university degrees in engineering and law. He graduated from the College of William & Mary in Virginia in 1948 in science and pre-engineering; in 1950 in mining engineering from the Missouri School of Mines, U. of Missouri; in 1984 in law with a Juris Doctor from Woodrow Wilson College of Law, Atlanta, Ga.; in 1985 with a Master of Laws degree from Atlanta Law School, Atlanta, Ga.; in 1992 with a Master of Geological Engineering from the University of Missouri-Rolla; in 1993 with the professional engineer's degree of Engineer of Mines from the University of Missouri-Rolla; in 1996 with a Doctor of Philosophy (Ph.D.) in Civil Engineering-Law from the University of Aston, Birmingham, England; and in 2000 with a Doctor of Engineering (D.E. in engineering law) from the University of Missouri-Rolla. His Doctor of Engineering degree was the eighth such degree ever granted by UMR.

Dr. Aston was an Adjunct Professor at the University of Missouri-Rolla occasionally teaching Mining Law and Environmental Law. He authored three published law books on mining law and environmental law. Dr. Aston was a strong proponent and advocate of the full reclamation of surface mines by landfilling thereby restoring the mined land for surface re-use and conserving land. He had been a long time author of legal articles on the subject of minerals, mining and environmental law for several national and international mining and legal publications. He authored many articles under his own trade marked legal columns "Assays from the Legal Vein" and Aston's Mining Law Case Reviews. Dr. Aston was the Law Editor and a member of the Editorial Board for Mineral Resources Engineering Journal of the Imperial College, London, England.

As an attorney, he was admitted to law practice in the states of Georgia, Virginia, Indiana, and Montana. He was a member of the Bar of the United States Supreme Court, the bars of the 4th, 7th, 9th, and 11th Circuits of the U.S. Courts of Appeal. He had carried appeals to the Supreme Courts of Georgia, Montana and Missouri, and to the U.S. Supreme Court. He was a member of the American Bar Association, the Association of Trial Lawyers of America, the International Bar Association, the Australian Mining & Petroleum Law Association, the Rocky Mtn. Mineral Law Foundation, and the International Mining Professionals Society. Dr. Aston had been a member of the American Institute and Society of Mining Engineers (AIME-SME) since 1952 and was a member of its Legion of Merit. He was a charter member of the Georgia Geological Society, a registered Professional Geologist in the states of Georgia and Missouri.

Dr. Aston began his professional engineering career as a

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land surveyor in 1949 in Arlington and Fairfax Counties, Virginia, and in 1950 as a mining engineer and mine geologist for the Tennessee Copper Company, Ducktown, Tennessee. In December 1958, after a short stint as a plant engineer and assistant superintendent for Signal Mountain Portland Cement Company, Chattanooga, Tennessee, he entered private practice as a consulting mining engineer. He taught mining and petroleum geology at the University of Chattanooga (later U. Tenn at Chattanooga) from 1958-1959. In 1958 he opened a consulting mining engineering office in Signal Mountain, Tenn., subsequently moving his office in 1959 to Tate, Georgia, and then, to Elberton, Ga., in 1960. In April 1964, he started his own stone quarrying company in Virginia with the opening of a black granite mine. He later opened two more granite quarries in Georgia and North Carolina. In 1987, after passing the bar exams in two states, he added the practice of law. Aston maintained law offices in Elberton, Georgia and in Rapidan, Virginia. He continued his Mineral Engineering and Law practice until his death.

Dr. Aston was a member of the Sons of Confederate Veterans and of the Sons of the American Revolution, and a Director of the 44th Bomb Group Veterans Association. He was a life-long member of the Methodist church and served as annual Head Usher for over 20 years at the First Methodist Church in Elberton, Georgia, and was a member of its Administrative Board.

Dr. Aston is survived by his beloved wife, Mary Ellen Pierce Aston, of the home; four children by a former marriage: Laurie Lee Aston of California, Gary Lee Aston, an attorney of Elberton, Georgia and his wife Linda, Roger Aston and his wife, Grace, of California, and Robin Lee Aston of Elberton, Georgia; four grandchildren: Derek David Aston and his wife, Katy, of Elberton, Charlotte N. Aston of Elberton, Ashley Morgan of California, and Ryan Aston of California; and two great-grandchildren: Hayleigh Jo Aston and Brady Anthony Smith. He is also survived by a step-daughter, Katherine and her husband, Tony, and granddaughter, Cortnee Smith, all of Fredericksburg, VA.; and special caregivers: Ms. Celecia Tate, Ms. Theodoshia Brunson, and Mrs. Barbara Fleming.

A service to celebrate Dr. Aston's life was held on Thursday, September 5, 2013 at 11:00 a.m. at First United Methodist Church, Elberton, with Rev. Dr. Wallace Wheeles and Rev. Joe Watson officiating. Interment was at Waterloo Cemetery in Waterloo, Indiana on September 8, 2013.

Arrangements for Dr. Robert Lee Aston were in the care of Hicks Funeral Home of Elberton.

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