

# MONTANA LAWYER

State Bar  
— of —  
Montana

November 2017 | Vol. 43, No. 2

## YOU SAY IT'S YOUR BIRTHDAY CAN YOU PROVE THAT?

### Youth Guardianship Cases

An excellent  
pro bono  
opportunity



### Revised Uniform Fiduciary Access to Digital Assets Act

### Also in this edition:

- > Working group advises against using LLLT model in Montana
- > Is this a profession or a business? Let's talk about it
- > Attorney well-being: We all have a role
- > Take the Pro Bono Connect Challenge
- > Hennen selected as Area A Trustee
- > 2 oral arguments scheduled in November

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# INDEX

## November 2017

### Feature Stories

Guardianship for Special Needs Kids .....	10
Evidence Corner: The Birthday Column .....	12
Fiduciary Access to Digital Assets .....	20
Risk Management: Is This a Business or a Profession? .....	24

### Regular Features

Member News .....	4
Court orders .....	7
State Bar News.....	8
Supreme Court Oral Arguments .....	26
In Memoriam.....	27
Job Postings/Classifieds.....	30



***The Honorable Leslie Halligan of Missoula is a 4th Judicial District judge. Before her appointment as district judge, she served as a standing master in the 4th Judicial District and as a deputy county attorney in Missoula County.***

# We all have a part to play to improve lawyer well-being

We've known for years that stress and high rates of depression and substance abuse are serious problems in the legal profession.

A 2016 study conducted by the ABA and Hazelden Betty Ford Foundation determined that 21 percent of licensed attorneys are problem drinkers, 28 percent struggle with some level of depression and 19 percent show symptoms of anxiety. Not only are these significant percentages, these statistics are more than numbers, they reflect the struggles of our friends and colleagues.

We need to do better as a group to take care of ourselves and each other.

The National Task Force on Lawyer Well-Being, a task force initiated by the ABA's Commission on Lawyer Assistance Programs, has created a road map to addressing these serious and potentially deadly problems. Missoula's own Chris Newbold, executive vice president of ALPS, was a member of this task force.

The task force's report, titled "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change," reminds us of the role that we must take to address these issues. The "we" includes employers, bar associations, judges, law schools, and, yes, you.

If you need a reason why you should take action on well-being, the report offers three:

- Improving lawyer well-being is an important way to make your firm or legal organization more effective – it can reduce turnover, increase productivity and profitability, improve client satisfaction, and give you a competitive advantage.

- Well-being influences ethics and professionalism. Studies have suggested that as many as 70 percent of disciplinary proceedings and malpractice claims against lawyers involve substance use or depression, and often both.

- Promoting well-being is the right thing to do. Untreated mental health and substance

use disorders ruin lives and careers, and they affect too many of our colleagues.

There are specific actions all of us can take. Acknowledge these problems and take responsibility. If you are an organizational leader, demonstrate a personal commitment to well-being. Facilitate, destigmatize, and encourage seeking self-help. Foster collegiality and respectful engagement throughout the profession. Guide and support the transition of older lawyers. De-emphasize alcohol at social events. Start a dialogue about suicide prevention.

The State Bar of Montana has long taken attorney wellness seriously – it's why we started the Lawyer Assistance Program and why we continue to offer quality CLE programming. Presentations on wellness, through inspiring individuals like Cathy Tutty, a Butte attorney, who engaged and enlightened attendees on the importance of wellness at the recent Women's Law Section CLE. The State Bar of Montana is also answering the call by offering a number of free CLE webinars. The first of these, at noon on Dec. 6, will address problem gambling and is presented by Jeffery P. Wasserman of the Delaware Council on Gambling Problems.

As President, I am exploring the establishment of a committee or commission to help guide and focus our efforts. If you have interest in this area, please reach out and let me know. Wellness is so much more than work-life balance.

I share the National Task Force on Lawyer Well-Being's hope that its report creates a movement to improve well-being in the legal profession.

I encourage you to download a copy of the "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change," which is available on the State Bar website, [www.montanabar.org](http://www.montanabar.org), and to do your part, individually and collectively, to improve our profession.

### Former State Labor & Industry Commissioner Bucy joins Taylor Luther Group

The Taylor Luther Group is pleased to announce former Montana Department of Labor & Industry Commissioner Pam Bucy will be joining the firm as a new member. Taylor Luther Group is a boutique law/government relations firm. Bucy will be specializing in business, employment, and administrative law as well as election and campaign finance law and strategic communications.

Bucy graduated from Rocky Mountain College earning degrees in English, political science and history. She went on to earn her Juris Doctor degree from the University of Montana School of Law. In law school, she wrote for the Public Land and Resources Law Review and participated on the Jessup International Moot Court Team.



Bucy

Upon graduation, Bucy worked as a Deputy County Attorney for Lewis and Clark County for several years before moving on to the Montana Department of Justice where she spent nearly eight years as the Executive Assistant Attorney General for Attorney General Mike McGrath. Bucy's work at the Attorney General's office focused on criminal, elections, and constitutional issues. Bucy also directed the agencies legislative agenda.

Bucy comes to the firm after her recent tenure as the Commissioner of the Department of Labor & Industry following her appointment by Governor Steve Bullock. As Commissioner, Bucy administered the work of over 900 state employees and provided policy and legal advice on all aspects of Montana's economy including employment, unemployment, worker's compensation, professional and occupational licensing and high-level economic development. Bucy also worked as an associate attorney

for the law firm of Luxan & Murfitt, PLLC, where she specialized in business and employment law and strategic communications.

Pam was born and raised in Townsend. During her free time, she can be found floating, hunting, boating or hiking with her family somewhere in Montana.

You can reach her at [pam@taylorluthergroup.com](mailto:pam@taylorluthergroup.com).

### Church, Harris, Johnson & Williams in Great Falls welcomes 2 new attorneys

The law firm of Church, Harris, Johnson & Williams is pleased to announce the addition of two attorneys.

Burt Hurwitz has rejoined the law firm as a shareholder attorney.

Hurwitz was raised on his family's ranch in Meagher County. He attended Rocky Mountain College in Billings for undergraduate then the University of Montana School of Law in Missoula. His proudest accomplishment in law school was co-founding the Rural Advocacy League, a student group dedicated to raising awareness of legal issues affecting rural Montanans.



Hurwitz



Keyes

In 2007, Burt graduated from law school and received four awards, the Outstanding Law Student Award, the Dean's Award in Recognition of Outstanding Student Leadership, the Carol Mitchell Award given to a senior for understanding and commitment to mediation and alternative dispute resolution, and the International Academy of Trial Lawyers Student Advocacy Award.

Hurwitz began his legal career in Great Falls as an associate with Church,

Harris, Johnson & Williams. His practice focused on real property litigation, trust and estate litigation, and water law. In 2011, Hurwitz and his wife moved to Billings, where he practiced with the firm of Felt, Martin, Frazier & Weldon. There, his practice focused on all aspects of civil litigation, primarily representing local and regional banks, school districts, and small businesses. In 2014, Hurwitz and his family moved to the family ranch in White Sulphur Springs where he practiced as a solo attorney.

Now that Hurwitz has returned to Church Harris, his practice will continue to focus on civil litigation, including real property litigation, trust and estate litigation and water law. He will maintain an office in the lower level of the Meagher County Courthouse, 15 W. Main St., White Sulphur Springs.

Marin Keyes has joined the firm as an associate attorney.

Although Keyes was born in Washington, her family soon moved to Billings, for a change of pace. After high school, she attended the University of Montana and graduated with a B.A. degree in sociology. She continued on to the University of Montana School of Law and earned her Juris Doctor in May 2017. As a law student, Keyes was a staff member and editor of the Montana Law Review. Her clinical placement was with the federal district court in Missoula, working as an intern for U.S. Magistrate Judge Lynch.

Keyes is a member of the firm's tax and transactional practice group and intends to focus her practice on estate planning, taxation, and real property and business transactions. She is admitted to practice in Montana state court and is a member of the State Bar of Montana. When not working, She enjoys hiking with her dog, camping, and spending too much time at the library finding a good book to read.

Church, Harris, Johnson & Williams, P.C. is a full-service law firm with locations in Great Falls, Helena and White Sulphur Springs Montana. The firm has been serving quality business and individuals, in a wide range of legal



disciplines, since 1949. Please visit our website at [chjw.com](http://chjw.com) for more information. Both Keyes and Hurwitz can be reached at 406-761-3000.

### Enrooth joins as associate at Vicevich Law in Butte

Vicevich Law, P.C., of Butte is excited to announce that Matthew C. Enrooth has returned home and joined the firm as an associate attorney.

Enrooth was born and raised in Butte where he attended and graduated from Butte High School. After high school, he attended Montana State



Enrooth

University where he graduated with a B.A. in neuroscience and cell biology in 2008. After finishing his undergraduate degree Matthew attended law school at the University of North Dakota, where he received his Juris Doctor, cum laude.

While attending law school Matthew received multiple awards including the Burtness Scholar award in property law, being inducted into the Phi Delta Phi legal honors society and being inducted into the National Order of Barristers for having exhibited excellence and attaining high honors through the art of courtroom advocacy.

Prior to joining Vicevich Law, Enrooth was a law clerk for the Honorable Ray J. Dayton in Anaconda. Most recently he worked for the Montana Office of the Public Defender in Bozeman. While working for the public defender's office he represented hundreds of clients with issues ranging from misdemeanor DUIs and domestic violence charges, to felony aggravated assault and felony methamphetamine and heroin drug possession charges.

Enrooth is excited to be back home and working for the people in his home town community of Butte. His primary areas of practice include litigation and criminal matters.

### MLSA welcomes Reed, Valencia for elder justice, agricultural worker programs

Montana Legal Services Association is pleased to announce the addition of two new attorneys.

Erick Valencia has joined Montana Legal Services Association as MLSA's inaugural agricultural worker staff attorney, based in Missoula. As a staff attorney, he is assisting agricultural and migrant workers who face civil legal problems. Valencia attended law school at the Alexander Blewett III School of Law after serving two terms



Valencia

at MLSA as a Justice for Montanans AmeriCorps member. During law school, Erick interned at the American Civil Liberties Union of Montana and worked as an Agricultural Worker Outreach intern at MLSA.

Katy Reed has recently joined Montana Legal Services Association as an Elder Justice AmeriCorps Legal Fellow in Missoula. She joins MLSA's Victim's Legal Assistance Network (VLAN), and will be providing services to low income senior Montanans facing civil legal issues. Katy served two terms as a Justice for Montanans member at MLSA prior to attending law school at the University of Washington. In law school, Katy participated in the Innocence Project Northwest Clinic. She also advocated for low-income clients as an intern with the Bellingham Public Defender and at the Washington Appellate Project.

### Brown Law Firm welcomes Dunn to firm's Billings office

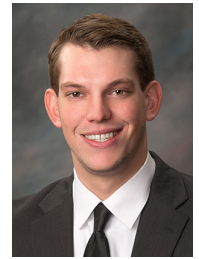
The Brown Law Firm, P.C., with offices in Billings and Missoula, announces that Aaron M. Dunn has joined the firm as an associate at the Billings location.

Dunn, originally from Spokane, Washington, graduated magna cum laude from Washington State University

in 2014 with a degree in political science and a minor in criminal justice.

He worked as an intern at Brown Law Firm in the summer of 2016. He earned his Juris Doctorate from the University of Montana's Alexander Blewett III School of Law in May 2017.

His practice area focuses on civil litigation defense, with an emphasis on insurance disputes.



### Wambsgans, Braun open Bozeman family law practice

Sheryl Wambsgans and Maggie Braun, both formerly of Element Law Group, have opened a new practice, Bridger Law, with an office located in downtown Bozeman. The small boutique family-oriented law firm practices throughout Montana. Bridger Law offers



Wambsgans

additional services in misdemeanor criminal defense and various civil litigation matters.

Wambsgans graduated from the University of Denver-Sturm College of Law in 2008. She practices in the areas of criminal defense and family law and serves on the Board of Directors for Big Brothers and Big Sisters in Bozeman, Montana.



Braun

Braun graduated from the University of Montana School of Law and has been practicing in and around the state of

Montana since 2010, in civil litigation and family law. Maggie is an active community volunteer through the Thrive CAP program and the Bozeman public library.

For more information, please visit [bridgerlawmt.com](http://bridgerlawmt.com).

# Harris appointed 13th Judicial District judge

Gov. Steve Bullock on Tuesday appointed Billings attorney Don Harris as Yellowstone County District Court judge.

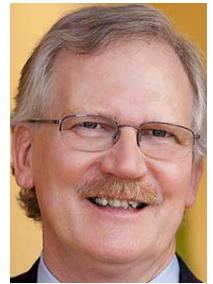
Harris was one of three people the Judicial Nomination Commission submitted for consideration to the governor.

Harris, 65, is a partner at Harris, Gannett and Varela in Billings. He is a 1983 graduate of the University of Montana School of Law, and received a Bachelor of Arts degree from the University of Montana.

A past member of the Montana Trial Lawyers

Association, Harris was named the Montana Trial Lawyer of the Year in 2013. He also has been honored with the State Bar's Distinguished Service Award and the Montana Civil Rights Protection and Advocacy System's Courage Award.

His field of practice includes commercial litigation, professional negligence, insurance coverage/bad faith, plaintiff personal injury, nursing home negligence/abuse, and wrongful death. Don is a member of MTLA's Board of Directors and serves on the Commission on Practice.



Harris

## Anne Sherwood joins Morrison, Sherwood, Wilson & Deola as associate attorney

The Helena law firm of Morrison, Sherwood, Wilson & Deola, PLLP, is pleased to announce that Anne Sherwood has joined the firm as an associate.

Sherwood graduated with honors from the University of Montana School of Law in 2017. She received her master's degree in communication with an emphasis in rhetoric from the University



Sherwood

of Montana in 2014. As a law student, Sherwood received the American Bar Association's Steiger Fellowship in consumer protection law and was one of 15 women nationally to be selected for the ABA's "Ms.

JD" Student Fellowship in 2016. As a legal intern, Sherwood worked for the Montana Office of the Commissioner of Political Practices and in the Attorney General's Office in the Consumer Protection Division. She was also a member of the National Moot Court Regional Championship team in 2016.

As a Helena native, she is happy to be returning home to practice law alongside her father, Rick Sherwood, and intends to focus her practice primarily on

consumer protection, campaign finance, employment, personal injury, intellectual property, and constitutional law.

## HONORS

### Pagnotta elected president of Montana Defense Trial Lawyers

Nicholas J. Pagnotta was elected president of the Montana Defense Trial Lawyers at the organization's annual meeting in Missoula.

Pagnotta is a partner in the Williams Law Firm, Missoula and Bozeman, managing the firm's Bozeman office. He specializes in complex civil litigation, including professional liability, product liability, construction defect, insurance coverage, trucking liability, personal injury and wrongful death.



Pagnotta

Pagnotta is a fourth-generation Montanan. He grew up

in Bozeman and Billings. He graduated from Montana State University with a Bachelor of Science degree and received his J.D. from the University of Montana. He has received the highest rating of AV from Martindale-Hubbell. He is admitted to the state bars of Montana and California, the U.S. District Courts of Montana, Southern California and North Dakota, and the U.S. Court

## Submitting to Member & Montana News Section

The Montana Lawyer welcomes submissions from Montana attorneys about new jobs, honors, publications, and other accomplishments.

Please send member news and photo submissions to [editor@montanabar.org](mailto:editor@montanabar.org). Email or call 406-447-2200 with any questions.

There is no charge for member news submissions.

of Appeals for the Ninth and Tenth Circuits. He has tried numerous cases in California and throughout Montana, and has appeared and argued appeals before the Montana Supreme Court and the Ninth Circuit.

Pagnotta has served on the Montana Defense Trial Lawyers Board of Directors and as an officer. He is actively involved in the Defense Research Institute, and has been selected as a member of the International Association of Defense Counsel, an invitation-only global legal organization for attorneys who represent corporate and insurance interests.

Pagnotta and his wife, Melissa, live in Bozeman with their two children, Mallory and Fiona.

# Working group advises against using LLLT legal services model in Montana

A working group studying the viability of the Limited License Legal Technician legal service model in Montana has unanimously concluded that it would not be the appropriate way to address the state's increase in self-represented litigants.

The court is now taking public comment on the report. Comments must be filed with the Clerk of the Montana Supreme Court by Monday, Dec. 18.

The Montana Supreme Court formed the working group in April to explore the LLLT model in use in Washington, instituted in 2012 with an initial focus on family law. In Washington's program, license candidates must earn an associate degree completed in an ABA-approved paralegal program, complete 15 hours in family law through a curriculum developed by and ABA-approved law school and spend 3,000 hours working under the supervision of a licensed attorney.

In addition to Washington's LLLT program, the working group, chaired by recently retired Montana Supreme Court Justice Patricia Cotter, considered Utah's proposed Licensed Paralegal Practitioner program, a document review assistance program proposed by the judges from Helena's 1st Judicial District and the work of Montana attorneys with a limited-scope practice.

Instead of adopting a LLLT-style program, the working group concluded that Montana should continue to use the various clinics and programs available, increase the usage of webinars for training and advice phone clinics, and increase the number of lawyers willing and able to provide pro bono assistance. The group also noted that development of a linear path to completion of a pro bono dissolution with clear notice and direction, like the 1st Judicial District intends to implement, would bring much-needed organization to the process.

In reaching its conclusion, the working group cited three chief concerns:

- Washington's LLLTs are prohibited under rules of conduct from giving actual legal advice to clients, negotiating with other litigants or lawyers, and appearing in court on behalf of a client. Given these constraints, it is not clear whether one with an LLLT degree could substantially relieve either the challenges self-represented litigants themselves face or the challenges faced by courts when dealing with self-represented litigants.

- Montana does not have uniform forms. Statewide uniformity of forms is an essential component of the LLLT and LLP programs. All students are trained and tested on one uniform set of forms, and all LLLTs must use those forms in their practices.

- It is generally assumed that in order to earn an income sufficient to support self and office and repay student loans, an LLLT must charge a minimum of \$75 to \$100 per hour, and/or

work for a firm. These factors may be a deterrent for many low- and moderate-income persons.

All of the working group members do support the idea of developing uniform forms throughout Montana, particularly in family law cases. However, the report notes that it may be difficult to implement a statewide uniform form program, given that elected clerks of court and sheriffs may not support the idea.

The group members also generally agreed that while components of the LLLT program are worthwhile, the training required by the program is excessive. They determined that what is needed is training on filling out the forms that must be completed in dissolution matters, which could be accomplished through webinars and by educating staff at self-help centers.

The court's order on the comment period is available at [www.montanabar.org](http://www.montanabar.org), along with the working group's report and attached exhibits.

## Court amends temporary e-filing rules

The Montana Supreme Court has amended the Temporary Electronic Filing Rules effective immediately.

The rules are amended to clarify that the seven paper copies that e-filers are required to submit must comply with Rule 12(1)(i), M. R. App. P.

The court also amended the rules to encourage e-filers who file an appendix to include a table of contents with electronic bookmarks to make the appendix readily searchable. Also, other than documents required to be filed under Rule 12(1)(i), M. R. App. P., paper copies of appendix documents need not be filed.

The court's order with the amended rules attached are posted on the bar website.

## APPOINTMENTS

The Montana Supreme Court has appointed three new members to the Uniform District Court Rules Commission. They are the Honorable Amy Eddy of Kalispell, and Helena attorneys Jim Molloy and Rebekah French.

Eddy is appointed as chair and as a District Court Judge member of the commission for a term ending Oct. 1, 2020. Molloy is appointed as a civil trial attorney representing the plaintiff for a term ending Oct. 7, 2019. French is appointed as a civil trial attorney representing the defendant for a term ending Nov. 17, 2021.

The court also reappointed the Honorable Gregory G. Pinski as a District Court Judge member of the commission for a term ending Nov. 17, 2021.



### Hennen selected as State Bar trustee for Area A

The State Bar's Board of Trustees has selected Ryan Hennen to serve as the board's new trustee for Area A, Flathead and Lake Counties.

Hennen, a 2015 graduate of the University of Montana School of Law, currently works for the Office of the Public Defender's Region 1 office in Kalispell. He previously served as a law clerk to the Honorable Sam E. Haddon, U.S. District Court for the District of Montana, and served as a special deputy county attorney for the Yellowstone County Attorney's Office in 2014.



Hennen

Hennen, who is also running for election to the Whitefish City Council, said public service has always been meaningful to him and he is excited for the opportunity to increase his involvement in the bar.

Hennen takes over the term of Jessica Polan, who resigned her position when she recently moved out of Area A. The term ends in September 2018.



### All November, take the bar's Pro Bono Connect Challenge

The State Bar of Montana thanks all attorneys who give back to their community through the provision of pro bono services. There remain many low-income Montanans in need of legal assistance with nowhere to turn. You may be the only help. During the month of November the State Bar is running a special challenge to help meet these legal needs.

The Montana Pro Bono Connect phone advice project is a program through the Montana Legal Services Association that allows you to provide phone advice at your convenience on a variety of legal issues including family law, consumer law, bankruptcy, landlord tenant, and wills and estates. Through Montana Pro Bono Connect you can provide bite-size pro bono with one or two hours of pro bono service. It's a great way to put your legal skills to work for the public good, with the added bonus of malpractice coverage through MLSA.

For each phone advice appointment taken with Montana legal services you

will be entered into a drawing for free CLE certificates! To sign up for a shift, simply use this form <https://www.surveymonkey.com/r/DLKMND7> to choose a day, time, and subject area. For more information or to volunteer, please contact Angie Wagenhals at [awagenha@mtlsa.org](mailto:awagenha@mtlsa.org) or by calling 406-442-9830 ext. 148.

### Volunteer internships available at US Department of Justice

Do you know any law students interested in a volunteer legal internship at U.S. Department of Justice?

Every year, over 3,000 volunteer legal interns serve in U.S. Department of Justice components and U.S. Attorneys' Offices throughout the country. Any law student enrolled at least half-time and who has completed at least one semester of law school is eligible to apply for a volunteer legal internship.

DOJ offices recruit for legal interns through vacancy announcements posted on the DOJ Legal Careers web page at [www.justice.gov/legal-careers/volunteer-internship-opportunities](http://www.justice.gov/legal-careers/volunteer-internship-opportunities). Each announcement lists the applicable deadlines and requirements and students interested in volunteer internships at DOJ for spring and summer 2016 should apply now. Students apply directly to each office in which they have an interest.

## Legislative News

### 2017 Legislature summary of legislation available

The Montana Legislative Services Division has published a booklet summarizing legislation enacted in the 2017 Legislature.

This compilation includes a concise and objective review of the change in the law included in legislation, organized by subject.

During the Montana Legislature's 2017 session, legislators requested 2,644 drafts. Of that total, legislators introduced 1,188 bills or resolutions, and the outcome resulted in 553 bills or resolutions enrolled.

### 2017 MCA now available online

The 2017 update of Montana Code Annotated is now available online.

According to a state of Montana news release, the web version of the MCA contains the full statute text and histories, but not cross references, compiler's comments, and other features found in the paper version. The website also lists information about how to purchase the MCA and related materials.

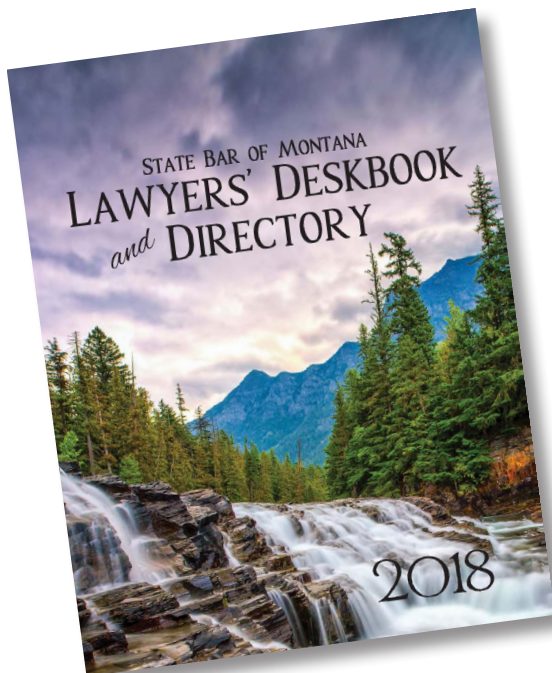
Legislative Services will send all MCA subscribers the searchable 2017 MCA Folio version on USB, and state agencies will be able to access the searchable 2017 MCA Folio at the state MINE site. The

2017 MCA Folio version contains all of the information available in the paper copy, along with the annotations. Both the paper copy and annotated folio are available at [leg.mt.gov/css/Publications/purchase.asp](http://leg.mt.gov/css/Publications/purchase.asp).

The online 2017 MCA is at a new web address: [leg.mt.gov/bills/mca/index.html](http://leg.mt.gov/bills/mca/index.html). Users should change any bookmarks or document links to reflect this new web address.

For additional information, contact Legislative Services Executive Director Susan Fox at [sfox@mt.gov](mailto:sfox@mt.gov) or 406-444-3066 or Todd Everts, director of legal services/code commissioner, at [teverts@mt.gov](mailto:teverts@mt.gov) or 406-444-4023.





# 2018 DESKBOOK & DIRECTORY

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# Guardianship for special-needs kids offers excellent opportunity for pro bono service

By Thomas J. Lynaugh and Larry E. Riley

Montana Rules of Professional Conduct Rule 6.1 recommends that lawyers render at least 50 hours of pro bono service each year. However, there exist realities that can make it hard to do: concern about how to schedule pro bono work with an already busy schedule and finding pro bono work you can do. We have participated in an excellent option that allows you to do important and rewarding work, but also allows you to be in control of that work and the schedule. That work is doing guardianships for families with special-needs children.

From the pro bono work we have done in this area, we have learned of the extensive need in Montana to assist these families in becoming guardians as those children turn 18. Without being their guardians the parents run the risk of not having the necessary legal authority to make important decisions after age 18.

The applicable law, necessary legal documents and procedure involved are brief and easy to understand. You can control the timing of the work that is done. And, in almost all of the cases, it is not necessary for you to go to court to conclude the guardianship. Finally, it is a misnomer to say that you do not “get paid” – because of the sincere gratitude you will receive from the families.

Particularly what is needed is:

- A sufficient number of attorneys to do the guardianships so that the work is spread around and doesn't become too much work for any attorneys.
- In addition to attorneys to do the guardianships, there is a need for attorneys to serve as the court-appointed attorney for the child. That work is usually done by an attorney from the Public Defender's Office, but because of the time demands on those attorneys, there is sometimes a delay before they can do the necessary interview.
- Depending on the income of the individual families, and the preferences of the attorneys involved, the guardianships would be done either on a pro bono basis, a reduced fee basis or, a fee for service basis.

Here is a brief overview of what is involved in doing a special-needs guardianship, which you may already know from the work you have previously done:

1. Talking to the parent(s) who will be the guardian(s) to gather the information necessary to prepare the Petition for Appointment of Full and Permanent Guardian. This can easily be done by phone.

2. Prepare the Petition for Appointment of Permanent Guardian and file it with the District Court.

After the Petition has been filed, prepare an Order Appointing a Physician, Visitor and Attorney for the judge to

sign.

3. Write to the physician and visitor requesting their reports indicating their agreement that a guardian should be appointed.

4. After receiving the reports from the physician and the visitor, send those reports to the public defender's office (or the independent attorney being used in place of the public defender) so the parents and the daughter or son can be interviewed and an independent evaluation can be made as to the appropriateness of the guardianship.

5. After the guardianship has been approved by the public defender's office (or by the independent attorney), file with the court the reports of the physician, visitor and attorney and prepare an Order Appointing Full and Permanent Guardian.

6. The guardianship must be filed in the county where the Ward resides. If no one is contesting the guardianship, and that is the situation in the vast majority of the cases, the court can enter its Order without the necessity of a hearing. This also makes it easy to do a guardianship in a county other than the county in which you practice.

7. Once the court has entered its Order Appointing Full and Permanent Guardian, prepare the Letters of Guardianship and arrange for the letters to be signed by the parent(s) and issued by the court.

A question is sometimes raised as to whether these guardianships should be done on a pro bono basis if the family involved is not low income. In working with many of the special-needs families we have learned that the time, energy and money demands for those families are so much more than for a family without a special-needs daughter or son that any assistance that can be rendered is welcomed and appreciated. We have also learned that because of the expenses involved, many of the families are reluctant to contact an attorney. That's why we are getting feedback from various people to find a recommended policy concerning attorneys' fees that will be fair to everyone involved and yet welcoming and encouraging to the families.

In coordination with the State Bar of Montana, we would like to establish a network of attorneys throughout Montana who would be willing to do special needs guardianships. This proposal was presented to local bar presidents at their Local Bar Leadership Conference in Helena in April 2016 and received a very favorable reception.

We are hopeful we can come up with a list of attorneys, literally from Sidney to Libby, who would be willing to assist with these guardianships. The names of those attorneys, and their contact information, would be kept by the program and information regarding the program would be advertised to various

Guardianship, page 26



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# You say it's your birthday ... but could you prove it?

## Both Montana Rules of Evidence and Common Law provide practical work-arounds for proving a person's birthdate when it is relevant in a legal proceeding

By Cynthia Ford

The annual photo calendars I make for my long-suffering family enable me to annotate specific dates. Thus, Sept. 1 says "Mom's Birthday Month!;" Sept. 10 says "Time to shop for Mom's presents;" Sept. 25 "Cake should be chocolate with white frosting;" and Sept. 29<sup>1</sup>: "MOM'S BIRTHDAY!" But is Sept. 29 really my birthday? Could I prove that in court? How? Surprisingly, this subject has required significant contortion in various evidentiary doctrines.

### The Problem

Rule 602 requires personal knowledge by a witness before testifying. "A witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The hearsay rule, 802, is the flip side of the same concept: if the basis of a person's testimony is a statement by another person, the testimony is inadmissible. "Hearsay is not admissible except..." Both rules express the same preference for direct communication to the jury by the person who actually perceived the event and can recount it, under oath and observation. Most of all, the hearsay rule guarantees an opportunity to expose inaccuracies (or downright lies) through cross-examination, "the greatest legal engine ever invented for the discovery of truth."<sup>2</sup>

I have always "known" my birthdate, but how? No doubt, I

was there at the birth, but try as I might, I<sup>3</sup> remember nothing about it, much less the date on which it occurred. As a newborn, even if a person had some dim memory of the process<sup>4</sup> it is impossible to think that s/he popped out, looked up at the clock, and then used barely-opened eyes to check the calendar on the wall. Thus, by definition, the birthday girl herself fails the personal knowledge requirement and a foundation objection should succeed per Rule 602.

If I am not a qualified witness as to my birthdate, who is? The only people with actual knowledge of the date and time of a baby's birth are those adults who were present at the event. For sure, my mother was and remembered it well (as I do the births of my two children). The medical personnel involved in the delivery could also testify from their personal knowledge, but probably don't retain specific details as to each of the hundreds of babies they help deliver. In 1954 (I just turned 63, I think), fathers were not present in the delivery room, but could at least testify as to the date on which they first saw their newborn, and perhaps give a lay opinion per Rule 701 that that was the date of birth.

So, to prove a person's birthdate when it is relevant (or essential)<sup>5</sup> in a legal proceeding, your best bet to avoid any evidence objection is to call the person's birth mother. Pragmatically, this simple solution may not be so simple. Where the mother is dead (sadly, as is my own) or unknown (per older adoption practices) it is impossible to call the mother. Even where she is known and alive, she may be across the country or hostile. Last of all, the jury has limited patience, and may begrudge the time spent on establishing a fact that jurors (and all regular people) regard as a non-issue.

### The Fix

Fortunately, the law is not an ass,<sup>6</sup> after all. Even before the adoption of the Montana Rules of Evidence, state law pro-

<sup>1</sup> I know you are reading this after Sept. 29, but don't despair: you can still catch me next year, if you calendar now. I like my chocolate dark...

<sup>2</sup> John H. Wigmore, quoted in *Lilly C. Virginia*, 527 U.S. 116 (1999).

<sup>3</sup> Apparently a few people think they do, but so far most scientific sources indicate that the development of the brain makes this extremely unlikely or impossible. My basis for the previous sentence is a 10-minute Internet search, using the highly technical term "memory of birth." As with all things Google, I could have spent hours, if not days, reading each of the articles posted there but I did not.

<sup>4</sup> See fn. 3.

<sup>5</sup> Statutory rape is the quintessential criminal charge where proof of the ages of the defendant and victim are key. See, MCA 45-502. On the civil side, it might be tasteless, but Jim Carey's cross-examination of his own client in "Liar, Liar" proves the point: <https://www.youtube.com/watch?v=1jQP0Y2T2OQ>

<sup>6</sup> This phrase is usually attributed to Charles Dickens, in "Oliver Twist" (1838), but apparently was first published by George Chapman in a play in 1654. See, <http://www.phrases.org.uk/meanings/the-law-is-an-ass.html>.



vided and continues to provide several practical work-arounds which incorporate into the law of evidence easy and pragmatic methods of proving a person's birthdate.

#### A. Common Law

In 1898<sup>7</sup>, only nine years after statehood, the Montana Supreme Court affirmed a conviction of "rape upon a child of less than 16 years" by her father, Bowser. The defendant argued that the victim's testimony as to her own age was inadmissible hearsay. The Court rejected this view, largely on practical grounds:

Recent authorities hold that the age of a prosecuting witness alleged to be under the age of consent may be proved by her own testimony. Underh. Cr. Ev. § 342; Whart. Cr. Ev. § 236; *People v. Ratz*, 115 Cal. 132, 46 Pac. 915; *Bain v. State*, 61 Ala. 75. The fact that the witness derived her knowledge of her age from statements of her parents, or family reputation, does not make it inadmissible. Persons of the age of discretion, and many who are of even tender years, know enough of themselves to state their ages with intelligence and accuracy. Such testimony is often essential to prove age, and for this reason it is competent; being excepted from the rules generally excluding hearsay evidence.

Bowser also argued that he should have been allowed to test the basis of the victim's knowledge of her birth, apparently through voir dire before she gave her direct testimony, but lost that one too:

[C]ounsel make a point upon the ruling of the court denying their request to interrogate the prosecutrix concerning her knowledge of the fact of her age. But, although the leave to examine the witness was denied while she was testifying in response to questions put to her by the county attorney, it appears that upon cross-examination defendant's counsel had full opportunity to test her knowledge of her age, and did test it, and thereafter moved to strike out all of the testimony of the witness concerning her age, because it was hearsay. The ruling of the court was correct, and no prejudice was done to appellant's rights.

In *State v. Vinn*,<sup>8</sup> Vinn was convicted of statutory rape of his stepdaughter. The girl, Florence, testified for the prosecution as to her age, saying that she was 17 on the date of the event charged (another part of the case deals with the admissibility of several similar uncharged events). The defense disputed her personal knowledge:

She was questioned further as to the sources of her knowledge, and stated that her mother had told her of the date of her birth. She also stated that she had seen the certificate of her baptism, which recited the date of her birth. It was

objected that this evidence was not admissible, because it was hearsay...

The Montana Supreme Court affirmed the admission of the victim's testimony about her age, despite her lack of personal knowledge, invoking both *Bowser* and common law from other states, which also was based largely on necessity:

The fact that the witness derived her knowledge of her age from statements of her parents, of family reputation, does not make it inadmissible. Persons of the age of discretion, and many who are of even tender years, know enough of themselves to state their ages with intelligence and accuracy. **Such testimony is often essential to prove age, and for this reason it is competent, being excepted from the rules generally excluding hearsay evidence.** (Emphasis added)

The court also was untroubled by Florence's testimony that she had seen a baptismal certificate, which showed her birthdate. Acknowledging that the certificate itself was probably inadmissible, the court nonetheless found the victim's testimony about the contents of the certificate proper:

It may be conceded... that the baptismal record was not admissible to prove the date of the witness' birth, though it recited this date. (Citations omitted)... The result of the examination, however, was not to introduce the contents of the certificate, but to disclose to the jury how, in part, the witness obtained her knowledge. If the person whose age is in question may prove it by his own testimony, the fact that he gains his knowledge from the statements of his parents or from family reputation does not render his testimony inadmissible. *State v. Bowser*, supra; *People v. Ratz*, 115 Cal. 132, 46 Pac. 915. He certainly cannot have personal knowledge of the circumstances attending his birth, nor of its date. Neither do we see how such testimony can be rendered incompetent by the fact that the same knowledge has also been gained by the reading of writings in possession of the family and preserved as records of family history.

In the same case, Florence's mother, wife of and witness for the defendant, testified that Florence was in fact over 18 on the critical date. There apparently was no objection to this evidence, because as we have seen above, the mother had the requisite personal knowledge. However, on rebuttal, the prosecutor called several rebuttal witnesses to prove that on other occasions, the mother had told them that Florence was under 18. The Montana Supreme Court did not differentiate between the possible uses of these prior inconsistent statements, but found no problem with their admission, and the defense apparently did not ask for an instruction limiting the out-of-court statements to impeachment rather than proof of

<sup>7</sup> *State v. Bowser*, 21 Mont. 133, 53 P. 179 (1898).

<sup>8</sup> 50 Mont. 27, 144 P. 773 (1914).

the fact they asserted.<sup>9</sup>

One of the witnesses who testified that Mrs. Vinn had told her Florence was under 18 was the Fergus County Superintendent of Public Schools. The superintendent's testimony went further, and established the foundation for admission of a school registration document. The judge overruled the defense hearsay objection, and again was affirmed on appeal, under the public records exception: "The document was a public record required by law to be kept by this officer. ... It was admissible as prima facie evidence of the facts therein stated."

*State v. Newman*<sup>10</sup> is to the same legal effect as *Vinn* and is a colorful depiction of Butte America in 1930. Chief Justice Callaway's recitation of the facts is one of the gems of Montana jurisprudence:

The story the transcript tells smacks rather of the early day mining camps than of the Montana of the present era. Defendant, once before a convict, ran a dance hall called the Bowery, where he sold whisky over a "lunch-counter," and provided dancing girls who worked upon a percentage basis. The success of the girls depended upon the number of drinks they persuaded their partners to buy. The evidence respecting the conduct of defendant's place might serve to bring to the minds of the oldsters the warning note of the well-known ballad of the early '90s, in which the singer, after narrating that such things were done and said on the Bowery, declared he would never go there any more!

According to the state's evidence, defendant employed prosecutrix to work at the lunch counter in the Bowery, but quickly transferred her to the dance floor, although he knew that she was but sixteen years of age. He insisted upon her drinking whisky whenever her partner called for drinks at the bar—which was at the end of each dance. One night when she was intoxicated defendant took her from the dance floor to his bedroom where he raped her. The bedroom was connected with the kitchen which adjoined the dance hall. Twice again he did that. Then he came to stand before a bar himself, the probability of which he might, with the exercise of a little sense, have foreseen—the bar of justice, and he must now take what it dispenses.

In *Newman*, the convicted rapist was the 16-year-old girl's employer, rather than a family member. The family testified consistently for the prosecution that she was 16. Despite their lack of personal knowledge, the defendant did not object to the testimony of age from the victim or her sister. The only

issue on appeal seems to be the admission of the baptism certificate produced by the mother, to resolve her confusion about the exact month of her daughter's birth, but the defendant failed to object to its admission.

Prosecutrix and her married sister testified that prosecutrix was 16 years of age when the alleged offense was committed, and that she would not be 17 until Jan. 31, 1930. The sister said she had told defendant before prosecutrix went to work for him that the girl was only 16. The mother of prosecutrix, who spoke English imperfectly, said the girl was 16, was born in 1913, but was confused as to the month. On cross-examination the witness said she had a paper at home showing when prosecutrix was born. During a recess, the paper was procured, and, upon redirect examination, it was offered; counsel for defendant saying, "We admit it in evidence." The document was a certificate of baptism, dated Feb. 13, 1913, in which it was recited that prosecutrix was born Jan. 30, 1913. It may be that the certificate would have been excluded had proper objection been made (*State v. Vinn*, 50 Mont. 27, 144 P. 773), but defendant's counsel, having consented to its admission, cannot now urge error.

## B. Montana Rules of Evidence

The hearsay exceptions in Montana Rules of Evidence 803 and 804 codify several methods of proving a person's birthdate, and thus age, some of which are oral and others documentary. The key to using these tools is to recognize the inherent hearsay problem before trial, and then prepare to either avoid it (by calling the mother, see above) or provide the foundation corresponding to the applicable hearsay exception.

803(4): Statements for purposes of medical diagnosis or treatment.... These usually consist of statements by a patient to a health care provider, who then testifies about those statements. The Montana Commission Comment observes: "The guarantee of trustworthiness is provided by the patient's motivation for proper diagnosis and treatment." The rule limits the subjects of these statements, but includes statements of "medical history," which seems to include statements of a patient's age so long as "reasonably pertinent to diagnosis or treatment." There are no Montana cases applying this exception to a statement about a patient's age, but if the witness/health care provider testifies that they<sup>11</sup> needed the age to diagnose or treat the patient, this exception should work. Here is a sample foundation:

Q: Who are you?

A: I am the doctor who treated V.

Q: As part of your ordinary treatment, do you take a medical history from your patient?

A: Yes, always; it is the standard practice for all doctors.

Q: In this case, did you need to know the age of V in order to treat her appropriately?

A: Yes.

## Birthday, page 16

9 Now, the MRE would allow these prior inconsistent statements as substantive proof that Florence was indeed 17, not 18. MRE 801(d)(1) provides: "A statement is not hearsay if: (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony." This is one of the areas in which Montana differs significantly from the FRE version, which allows a prior inconsistent statement for substantive purposes only if the statement "was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition," not the case in *Vinn*.

10 88 Mont. 558, 294 P. 377 (1930).

11 It is hard for me to use the plural "they" when I am clearly talking about a single witness, but old dogs do learn new tricks, and one of my former students recently wrote convincingly about the need to abandon gender-specifying pronouns. For a better explanation, see, e.g., [https://www.washingtonpost.com/news/work/wp/2016/01/08/donald-trump-may-win-this-years-word-of-the-year/?utm\\_term=.a81fd9f76573](https://www.washingtonpost.com/news/work/wp/2016/01/08/donald-trump-may-win-this-years-word-of-the-year/?utm_term=.a81fd9f76573)





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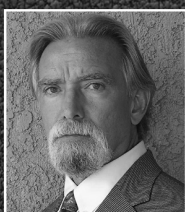
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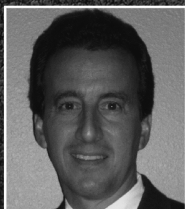
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Q. Why?

A. Because....

Q. Did you explain why you needed to know how old V was to her/her mother (depending on who transmitted the information)?

A. Yes.

Q. What did V/mother say when you asked how old she was?

A. She said she was 13.

**803(9) Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

The only Montana case that applies this exception dealt with a death certificate, where the court held that the certificate was admissible to prove the death, but that the information that the decedent was a passenger (rather than the driver, as the defendant contended) should have been redacted. *State v. Gould*.<sup>12</sup> Montana law requires registration of live births<sup>13</sup>, as well as deaths, so this subsection should apply equally to birth certificates offered to prove the date of birth. Under an identical federal version of 803(9), the 9<sup>th</sup> Circuit held that a Mexican birth certificate (properly authenticated<sup>14</sup>, an entirely different issue) was admissible in a criminal case where the defendant was convicted of being a deported alien found in the United States, although the issue apparently was location rather than date of birth. *U.S. v. Palomares-Munoz*.<sup>15</sup>

**803(11) Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

The Montana Evidence Commission commented that this is a specialized form of the 803(6) "business records" exception, but stronger: [religious records have the] "same guarantees of trustworthiness as the records admitted under Exception (6). This guarantee is enhanced by the unlikelihood of false information being provided to religious organizations." The federal Advisory Committee Note discusses explicitly the use of church baptism certificates to prove age:

However, both the business record doctrine and Exception [paragraph] (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge*, 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity.

<sup>12</sup> 216 Mont. 455, 704 P.2d 20 (1985).

<sup>13</sup> 50-15-221. Birth registration.

<sup>14</sup> Birth certificates are self-authenticating under M.R.E. 902, so if you obtain the necessary certification from the public office which holds them, you should be able to admit these as exhibits without any witness.

<sup>15</sup> 5 Fed.Appx. 709, 2001 WL 219951.

This ACN thus seems to authorize use of a baptism certificate, including any included statement as to the baptisee's birth, to prove birthdate in addition to baptism date. Because church records are not self-authenticating, the proponent will need to call a foundation witness to admit a religious record, to testify both as to its authenticity and to the foundation facts of a religion which keeps records:

Q. Who are you?

A. I am a minister/rabbi/imam etc. in the church/temple/mosque etc. of ...

Q. Is that a religious organization?

A. Yes.

Q. Does your organization keep regular records of its religious ceremonies and activities?

A. Yes.

Q. Do these records include records of the births in members' families, including the dates of those births?

A. Yes.

Q. Do you believe that these records are accurate?

A. Yes.

Q. Do your records include a record of the birth of V?

A. Yes.

Q. Can you identify Exhibit A?

A. Yes, I can.

Q. Is that an accurate photocopy of a record in your organization's files?

A. Yes.

Q. Whose birth record is it?

A. V's.

Q. I offer Exhibit A. May I publish an enlargement for the jury?

Q. According to your record, Exhibit A, what is the date of birth of V?

A. Sept. 29, 1954.

**(12) Marriage, baptismal, and similar certificates.**

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

This subsection is similar to the preceding one, but deals with certificates of events (ceremonies or sacraments), rather than simply religious records of personal or family history facts. Its guarantee of trustworthiness is similar to the public records and vital statistics exceptions but: "goes beyond those exceptions in the area of sacrament and so expands Montana law. Note the certification procedure requires authentication. See Rule 902." MT Commission Comment. In the context of proving birthdate/age, this exception seems to apply to religious ceremonies performed at birth, or other sacraments administered at specific ages such as Christian baptism and confirmation or bar and bat mitzvah in the Jewish religion. I could not find any Montana case applying this subsection.

The necessary foundation and authentication for the bar mitzvah example would be:

Q. Who are you?



A. I am the rabbi of Temple Sinai.  
 Q. Is that a religious organization?  
 A. Yes, it is a Jewish temple.  
 Q. Do the rules or practices of your religion authorize you to perform ceremonies or sacraments?  
 A. Yes.  
 Q. Does your religion issue certificates to reflect these ceremonies or sacraments?  
 A. Yes.  
 Q. Are these certificates issued at or near the time the ceremony or sacrament occurs?  
 A. Yes.  
 Q. Is a bat mitzvah one of these ceremonies?  
 A. Yes.  
 Q. Does a bat mitzvah occur at a certain age?  
 A. Yes, at 13.  
 Q. Do you recognize Exhibit B?  
 A. Yes.  
 Q. What is Exhibit B?  
 A. A certificate of bat mitzvah for V, dated Oct. 1, 1967, issued by Temple Sinai. This is a photocopy of the certificate we have in our files.  
 Q. And does Exhibit B show the date of the bat mitzvah of V?  
 A. Yes, Sept. 30, 1967.  
 Q. Does Exhibit B make any statement as to the birthdate of V?  
 A. Yes, it does.  
 Q. What is the date of V's birthday, according to the bat mitzvah certificate?  
 A. Sept. 29, 1954.  
(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.  
 The Montana Evidence Commission commented that (13) is identical to FRE 803(13), and with Montana law prior to adoption of the MRE, observing further: "The guarantee of trustworthiness is provided by the unlikelihood that a false family record would exist." The Commission cited a 1915 case, *In re Colbert's Estate*<sup>16</sup>, in which a mutilated family Bible was admissible, even though neither the trial judge nor the Supreme Court thought it bore much weight:  
 The learned trial judge in receiving it said:  
 "I will admit it in evidence. What weight I will give it is a matter for future consideration. I don't like the looks of it."  
 With this attitude we are in entire accord. The admissibility of a family Bible containing a family tree or record does not depend upon authorship or authenticity of the entries; but upon the fact that it is the family Bible and record, recognized as such by those with whose genealogy or pedigree it is concerned (*People v. Ratz*, 115 Cal. 132, 46 Pac. 915; *Jones v. Jones*, 45 Md. 144), and for the same reason neither chronological order nor superficial integrity can be a condition to its reception, whatever effect these circumstances may have upon its probative value. So, in view of the testimony of Mrs. Beedy that these entries were made by persons who are now dead

and that the Bible and record have always been recognized in the family of Mrs. Clement as their family Bible and record, we think it was admissible, though as a factor in respondents' case it may be worse than worthless.

153 P. at 1026. I have not found any cases on this issue decided since the M.R.E.

I do have, maybe ghoulishly, an urn containing the remains of my dear departed Irish wolfhound, Fiona, which states "Best huge<sup>17</sup> dog ever, made it to 14 years old!" Under 803(18), the second half of this inscription would be admissible, because it states a fact "concerning personal history." I could use it to prove that Fiona<sup>18</sup> lived 14 years. The first half, the opinion "best huge dog," does not qualify because it is an opinion, not a statement of fact, even though it is inscribed on an urn. The exact evidence would be something like:

Q. Who are you?  
 A. Cynthia Ford.  
 Q. Did you have a dog named Fiona?  
 A. I did, about 40 years ago.  
 Q. Do you remember how old she was when she died?  
 A. Not exactly. I think she was pretty old, but I have forgotten exactly how old.  
 Q. Do you have Fiona's ashes?  
 A. Yes, I can't bring myself to give them up, even though it's been years. I guess I should see someone about that.  
 Q. Do you keep the dog's ashes in an urn?  
 A. Yes, I do, and I brought it here today.  
 Q. Is exhibit A the urn itself?  
 A. Yes.  
 Q. Is there an engraving on the urn, Exhibit A?  
 A. Yes.  
 Q. Does that engraving state a historical fact as to Fiona's age?  
 A. It does.  
 Q. Move the admission of Exhibit A.  
 J. Admitted.  
 Q. Please read to the jury the second half of the inscription on the urn.  
 A. "Made it to 14 years old!"

This out-of-court statement, offered to prove the dog lived for 14 years, is admissible even though it is hearsay, because of 803(13).

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce or dissolution of marriage, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

Under this subsection, a wide variety of witnesses may testify to a person's birthdate (and other personal facts) by recounting the reputation in a designated group about that fact. The Montana rule is identical to the federal rule, and the Montana Commission Comments quote the federal Advisory

<sup>17</sup> Our household also includes a mid-sized Golden Retriever and a tiny Norwich terrier, so this distinction is critical to save offense.

<sup>18</sup> I do recognize the argument that "family" might not include pets, but I will leave that discussion to my fabulous colleague, Professor Stacey Gordon, who has much more expertise in animal law.

<sup>16</sup> 51 Mont. 455, 153 P. 1022 (1915).

Notes, which in turn quote Wigmore:

The guarantee of trustworthiness of this and other reputation exceptions that follow is found “when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community’s conclusion, if any has been formed, is likely to be a trustworthy one”. Advisory Committee’s Note, 56 F.R.D. supra at 317, quoting 5 Wigmore, Evidence, Section 1580 at 444.

The commission noted but accepted the expansion of this rule from the common law, which restricted such evidence to family members, to associates and community members. The topic of this testimony likewise was broadened beyond marriage to include today’s subject, birth, and several other facts.

By analogy to other uses of reputation evidence, the witness needs to be a member of a group in which the reputation is known. This could be the birthday girl herself, or any other member of the group, so long as the witness can establish that there is such a reputation and what it is. Here, for example, let’s use the victim’s brother:

Q. Who are you?

A. I am V’s brother.

Q. In your family, does everyone have a belief as to V’s birthday?

A. Yes, we all know when it is and celebrate it then every year.

Q. Would you call that a reputation within the family?

A. I guess so.

Q. What is the reputation in your family as to V’s birthday?

A. That she was born on Sept. 29, two years before me, so 1954.

Although only a few offices regularly celebrate workers’ birthdays, if V is employed at one of those, any of her coworkers could testify similarly:

A. I am the accounting supervisor at EJ, Inc., and I have worked there for five years.

Q. How many other employees are there?

A. Fifteen.

Q. Is V one of them?

A. Yes.

Q. At EJ, Inc., do you celebrate each other’s birthdays?

A. Yes; we like to think of ourselves as a kind of family.

Q. What is the reputation at your office about when V’s birthday is?

A. Do you mean when do we celebrate V’s birthday?

Q. Yes.

A. On Sept. 29.

Q. Is there a reputation for how old V is, what year she was born?

A. She just turned 63, so 1954. We had 63 candles on the cake.

Again, I could not find any Montana Supreme Court cases applying this subsection — maybe you will be the first to use it in some case where age is disputed.

MRE 804 provides several other exceptions to the hearsay

rule, but these can be used only if the declarant who said “X was born on Sept. 29, 1954” is unavailable to testify in person. Rule 804(a) lays out non-exclusive examples of unavailability, including death or illness. Once you have proven that the declarant can’t be a witness, section 804(b)(4) comes into play for establishing a birthdate:

(4) Statement of personal or family history.

(A) A statement concerning the declarant’s own birth, adoption, marriage, divorce or dissolution of marriage, legitimacy, relationship by blood, or family history, even though the declarant had no means of acquiring the personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other’s family as to be likely to have accurate information concerning the matter declared.

The Montana Evidence Commission Comments note that MRE 804(b)(4) is substantially identical to the federal version, and observes:

The distinction between 803(19) and this exception is that Rule 803(19) allows the same subject matter to be proven by reputation evidence while this exception relies upon the declaration of an unavailable witness to prove the same type of facts. The guarantee of trustworthiness for this exception is identical to that found for Rule 803(19). ... In addition, it is quite natural for persons to discuss family history among members of the family or close friends and it is highly unlikely that falsehood would be repeated in this context.

The unavailable declarant can be the subject herself, under (A), or someone else either in the subject’s family or very close to the family (B). The test is not whether the declarant had personal knowledge of the birthdate, but whether she was “likely to have accurate information” of the date.

I did not find any Montana cases applying MRE 804(b)(4), although there are some federal and other state cases out there that might be persuasive if you had the first Montana case. However, the text of the rule itself provides sufficient guidance for the foundation requirements for this hearsay exception. The witness is someone who heard the declarant state the subject’s birthday. Under A, the declarant was the birthday girl herself. The witness is anyone who heard the birthday girl say what her birthday was.

Q. Did you ever hear V say what her birthdate was?

A. Yes, a million times.

Q. Is V here in the courtroom today?

A. No.

Q. Do you know why not?

A. Yes, she is in the hospital in labor with her first baby.<sup>19</sup> I drove her there myself this morning. OR Yes, she died last year. [This is necessary to show unavailability under 804(a)].

Q. What did V tell you about her birthdate?

<sup>19</sup> This basis for unavailability under Rule 804(a), pregnancy, will actually be the subject of another, much shorter, Evidence Corner column soon.

A. She was born on Sept. 29, 1954.

Under 804(b)(4)(B), the out of court declarant was someone other than the birthday girl, who was either in the family or sufficiently close to the family that the declarant would likely have accurate knowledge of the birthday, perhaps an old family friend. The witness is anyone who heard the declarant state the birthday of the subject:

Q. Are you related to V?

A. No, but I knew her brother, Ben.

Q. Do you know why Ben is not in the courtroom for this trial?

A. Yes, he is dead.

Q. Did Ben ever tell you what V's birthdate was?

A. Yes. He said she was born on Sept. 29, 1954.

Non-hearsay: two more ways to skin the cat: defendant's own admission and observation of jury

In the 2014 case of *State v. Ghostbear*,<sup>20</sup> defendant was convicted of sexual assault. The victim was his girlfriend's daughter. After the verdict, the trial judge concluded that the prosecution had failed to establish the age differential between defendant and victim which would trigger a felony, rather than misdemeanor, penalty. The state appealed, and the Supreme Court reversed and remanded for sentencing as a felony,<sup>21</sup> even though the jury did not make a specific finding of the ages of the defendant and victim. The majority described the evidence at trial:

While Ghostbear contends and the District Court determined that there was no evidence of his age and the age of the victim, the record shows otherwise. The State correctly notes that during trial the District Court admitted into evidence a recording and a transcript of an interview of Ghostbear by a law enforcement officer. Early in that interview Ghostbear stated that his date of birth was in 1977, making him 34 years old at the time of the offense. In addition, in that same interview Ghostbear acknowledged that the victim was just turning age 8, making her age 7 at the time of the alleged offense. The victim also testified that she was age 8. The jury heard this evidence and was able to corroborate the respective ages of Ghostbear and the victim because each of them testified at trial. The jurors were entitled to infer from what they observed that the ages of Ghostbear and the victim were as he acknowledged them to be in the admitted interview. The jurors were instructed that they could consider "the appearance of the witnesses on the stand." The jurors saw, and therefore could consider, the appearance of Ghostbear as a mature man and the victim as a child. Ghostbear does not point to any contrary evidence of age in the record nor does he argue that there was any conceivable way that the jury could fail to conclude that the victim was under the age of 16

and that Ghostbear was more than 3 years older.

Ghostbear does not contend that the respective ages were in any way contested during the trial.

The concurring justices opined that the judge had committed error with regard to charging the jury on the elements of the crime, but then concluded that the error was harmless:

A.T. testified that she was eight years old at the time of trial, making her six or seven at the time of the offense. In Ghostbear's interview with law enforcement, a recording of which was played at trial, he acknowledged that A.T. was just turning eight. In addition, he stated that his date of birth was in 1977, making him 33 or 34 at the time of the offense. At trial, Ghostbear was asked, "Did you drink when you were a kid?" to which he responded, "No, ... I didn't have a drink of alcohol until I was 18 years old."

The evidence of A.T.'s age and Ghostbear's age was uncontroverted. The evidence established that A.T. was roughly six or seven at the time of the offense and Ghostbear was three or more years older than A.T. Indeed, no rational trier of fact could have concluded that A.T. was over 16 years old or that there was less than a three-year age difference between A.T. and Ghostbear.

This case demonstrates that if approximate age or a differential in ages is all that is necessary, rather than an exact date, the jury may simply consider the appearance of the witnesses as they testify. To make sure this is clear, the party using this route should propose a jury instruction based on *Ghostbear*, to the effect that "As well as any other evidence on the issue of age, you are entitled to infer from what you observed during the trial the age(s) of \_\_\_\_\_."

Lastly, the admission of Ghostbear's own statement as to the age of the victim by his opponent, the prosecution, also escaped the hearsay rule and substantively established her age. MRE 801(d)(2)(A) provides, as sort of a magic wand, that an out-of-court statement offered to prove what it asserts is not hearsay, even though it otherwise exactly fits the definition of hearsay in 801(c), if that statement was made by the opposing party:

A statement is not hearsay if...

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement...

The Montana Commission comment notes that this subsection is identical to the FRE. The federal Advisory Committee Note specifically provides that personal knowledge by the party-opponent declarant of the fact asserted is NOT required for admission of his statement:

No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken

20 376 Mont. 500, 338 P.3d 25, 2014 MT 192

21 Justices McKinnon and Baker concurred in the result.





# Revised Uniform Fiduciary Access to Digital Assets Act and its impact on estate planning

By E. Edwin Eck

The Revised Uniform Fiduciary Access to Digital Assets Act (hereinafter the “Act” or “RUFADAA”), adopted by the 2017 Montana Legislature, significantly impacts the drafting of wills, trusts, and powers of attorneys as well as the representation of parties in protective proceedings.<sup>1</sup> Enabling attorneys to assist their clients in planning for the management and disposition of their digital assets, the Act specifically addresses concerns raised by fiduciaries (i.e., personal representatives trustees, conservators, and agents acting under powers of attorney) regarding the difficulty, if not impossibility, of accessing documents, music, and photographs stored in the cloud, as well as social media accounts and emails. The Act permits fiduciaries to access digital assets, including the content of electronic communications, under certain circumstances. The Act also assures the companies holding those assets, called “custodians,” that they can allow that access without liability if they act in accordance with the provisions of the Act.

Federal Law and Privacy Considerations. Concerned with protecting an individual’s right to privacy, Congress has

enacted two important pieces of relevant legislation. In 1986, Congress enacted the Stored Communications Act<sup>2</sup> as part of the Electronic Communications Privacy Act. The Stored Communications Act creates privacy rights protecting the content of a computer user’s (the “user’s”) electronic communications. Generally, the Stored Communications Act prohibits custodians from voluntarily disclosing the content of electronic communications to the government or to any person or entity. One of the exceptions to this prohibition is a disclosure pursuant to a user’s “lawful consent.”

In addition, Congress provided further privacy protection by enacting the Computer Fraud and Abuse Act<sup>3</sup> which criminalizes the unauthorized access of computer hardware and the data stored on the hardware. A user may authorize access by a third party. However, a question arises with respect to fiduciaries, i.e., whether the appointment of a fiduciary constitutes the requisite authorization?

The Act: Privacy Concerns and the Differing Treatment for Electronic Communications and Other Digital Assets. Reflecting the privacy concerns that underlie the above federal legislation, RUFADAA treats the content of

<sup>1</sup> Mont. Code Ann. § 72-31-401 et seq. Senator Mary McNally was the primary sponsor of S.B. 118, the Revised Uniform Fiduciary Access to Digital Assets Act (2015). Senator Nels Swandal and Representative Jeff Essmann co-sponsored the bill.

<sup>2</sup> 18 U.S.C. § 2701 et seq.

<sup>3</sup> 18 U.S.C. § 1030.



“electronic communications” differently from other digital assets.<sup>4</sup> Electronic communications include the subject line and content of email messages, text messages, instant messages, social media posts that are sent to a select group of people (as opposed to the general public), and other electronic communication between private parties.

Electronic communications are a subset of digital assets. In addition to electronic communications, digital assets include document and photograph files, contact lists, web domains, virtual currencies (e.g. Bitcoins), and online accounts with companies like Netflix or Amazon.

In general terms, the default provision of the Act is that fiduciaries do not have access to the content of electronic communications, unless the user consented or a court orders that the fiduciary have access. As to other digital assets, the default provision of the Act is that fiduciaries do have access, unless prohibited by a court or the user.

Although the mere appointment of a fiduciary does not give that fiduciary access to the content of electronic communications, the fiduciary may have access to a “catalogue” of the user’s communications. That catalogue identifies each person with whom a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.<sup>5</sup> Access to this catalogue of a user’s communication can prove helpful. For example, by reviewing the catalogue

4 Compare Mont. Code Ann. § 72-31-406 with Mont. Code Ann. § 72-31-407 concerning deceased users, Mont. Code Ann. § 72-31-408 with Mont. Code Ann. § 72-31-409 concerning powers of attorney, and Mont. Code Ann. § 72-31-411 with Mont. Code Ann. § 72-31-412 concerning trusts.

5 See Mont. Code Ann. § 72-31-402(4).

of a decedent’s emails, a personal representative might note monthly communications from a bank. This, in turn, would alert the personal representative to the possibility the decedent maintained an account at that bank.

**User Consent.** The Act permits custodians to provide “online tools,” i.e., agreements distinct from the terms-of-service agreement.<sup>6</sup> An online tool permits users to consent to the disclosure of digital assets, including the *content* of electronic communications.<sup>7</sup> Those user directions are legally enforceable.<sup>8</sup>

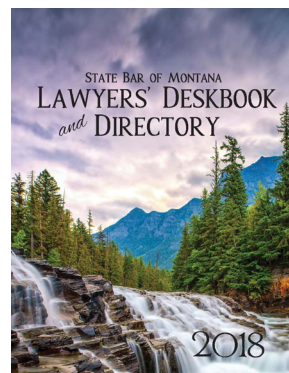
If the custodian does not provide an online tool, or if the user does not use the online tool provided, the user may give legally enforceable directions for the disclosure of digital assets, including the *content* of electronic communications, in a will, trust, power of attorney, or other written record. If, however, those directions are inconsistent with directions given in the

6 Terms-of-service agreements, also known as “terms of use” agreements, are drafted by custodians and set forth the rules by which a user must agree in order to use the internet service. Sometimes these agreements are in the form of a disclaimer. As noted by the Uniform Law Commission in its comment to the definition found in section 2 of the Act, “It refers to any agreement that controls the relationship between a user and a custodian, even though it might be called a terms-of-use agreement, a click-wrap agreement, a click-through license, or a similar term.” [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015\\_RUFADAA\\_Final%20Act\\_2016mar8.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf).

7 See Mont. Code Ann. § 72-31-402(16).

8 For example, Facebook provides an online tool. By clicking through “settings,” “security,” and then “legacy contact,” a user can “choose a friend” to have access to the user’s account. Alternatively, the user can request that his account be deleted. Google provides users a similar choice. One must click through “my account,” “personal inform & privacy” – “assign an account trustee,” “inactive account manager,” and “add trusted contact.” Or one can “optionally delete account.”

# 2018 Lawyers' Deskbook



**Verify Your Listing!**

All changes to your contact information for the next edition of the Deskbook & Directory are due by **November 20, 2017**

**3 ways to update your information:**

**Email\*:**

[jdiveley@montanabar.org](mailto:jdiveley@montanabar.org)

**Update Online:**

Log in at [www.montanabar.org](http://www.montanabar.org) and Edit your Bio (under Manage Profile)

**Fax\*:**

(406) 442-7763

\* for verification purposes please include your Bar number or Date of Birth

online tool, the directions in the online tool govern.<sup>9</sup>

Similarly a user may prohibit access using an online tool if available, or if no online tool is provided or utilized, a user may prohibit access using the same traditional estate planning documents (will, trust, or power of attorney).

**Planning for Access to Electronic Communications.** As a practical matter, a user desiring his fiduciary to have access to the content of the user's electronic communications should include express authorization in the user's will, trust, or power of attorney. Although as noted, the user can also provide access through an online tool, the online tool typically permits access to only one designated individual. Contrast that with well-drafted wills, trusts, and powers of attorney, which typically include designations of contingent and successor personal representatives, trustees, and agents.

Another reason for a user to prefer fiduciary authorization in a traditional estate planning document is to overcome a potential provision in a terms-of-service agreement purporting to restrict fiduciary access to digital assets. Mont. Code Ann. § 72-31-404(3) permits a terms-of-service agreement to restrict a fiduciary's access to digital assets. Although a user could overcome such potential restrictions by utilizing either an online tool or a traditional estate planning document, it is unlikely that a custodian would include restrictions in its terms-of-service agreement and also provide an online tool to overcome those same restrictions. Thus, a traditional estate planning document should authorize fiduciary access to all digital assets (electronic communications and other digital assets).

If an attorney's client decides to authorize fiduciary access in the client's estate planning documents, the client should be cautioned to review his digital account settings, including his possible prior use of an online tool. As noted above, those settings (perhaps made unwittingly years ago) if reflected in an online tool, will prevail over contrary directions in a conventional estate planning document.

**Wills.** A client may authorize his personal representative to have access to all of his digital assets, including the content of electronic communications. If so, the client's will might include a provision such as the following:

The party serving as personal representative of my estate, including any contingent or successor serving as personal representative:

(a) may access, modify, delete, manage, and transfer my digital assets, including the content of electronic communications sent to me or received by me;

(b) may access, use, and manage my digital devices, including smartphones, tablets, laptops, desktops, related storage devices, and any similar digital device, including those devices that may be developed in the future; and

(c) may access, control, modify, and delete my passwords and other electronic credentials associated with my digital assets and my digital

devices.

I intend that my personal representative have the same authority, power, and access to my digital assets (including the content of electronic communications) and digital devices as I had during my lifetime. Thus, this authority granted to my personal representative shall be construed to be my lawful consent under:

(1) the Computer Fraud and Abuse Act of 1986, as amended;

(2) the Electronic Communications Privacy Act of 1986, as amended; and

(3) any other applicable federal or state data privacy law or criminal law.

Critical to any provision authorizing access are express references to the content of electronic communications, the Computer Fraud and Abuse Act of 1986, the Electronic Communications Privacy Act of 1986, amendments to those acts, and other applicable federal or state privacy law or criminal law.

However, if a client indicates his intent that all of his digital assets be erased, his will might include a provision such as the following:

I direct that all of my digital assets be deleted.

Conceivably a client may want some digital assets disclosed and other digital assets deleted. Again, that wish could be accomplished by direction in the will or other document, so long as the direction is not inconsistent with any direction provided in an online tool.<sup>10</sup>

**Trusts.** The Act provides similar rules for trusts.<sup>11</sup> If the original user of a digital asset is also the trustee, the custodian must disclose all digital assets, including the content of electronic communications requested by the trustee.<sup>12</sup> For example, if the trustee of a self-settled, revocable trust transfers his email account to the trust, the custodian must disclose the contents of that email account upon the request of that trustee.

If, however, the trustee is not the original user, the custodian must disclose digital assets other than the content of electronic communications and provide a catalogue of electronic communications, unless otherwise directed by the user or ordered by the court.<sup>13</sup> However, if the trust instrument includes a provision indicating the original user's consent to the disclosure of the content of electronic communications, the custodian must comply with a trustee's request.<sup>14</sup> Such a trust provision might be fashioned after the sample language for wills provided above.

**Powers of Attorney.** Under the Act, custodians must disclose digital assets other than the content of electronic communications to an agent acting under a power of attorney,

<sup>10</sup> Mont. Code Ann. § 72-31-406(4).

<sup>11</sup> See Mont. Code Ann. §§ 72-31-410, 72-31-411, and 72-31-412.

<sup>12</sup> Mont. Code Ann. § 72-31-410.

<sup>13</sup> Mont. Code Ann. § 72-31-412.

<sup>14</sup> Mont. Code Ann. § 72-31-411.

<sup>9</sup> Mont. Code Ann. § 72-31-403.

unless otherwise directed by the user or ordered by the court. Additionally, custodians must provide a catalogue of the user's electronic communications.<sup>15</sup> If, however, the power of attorney expressly grants the agent authority over the content of the principal's electronic communications, the custodian must comply with the agent's request.<sup>16</sup> Again, such an express authorization might be fashioned after the sample language for wills provided above. As noted in the comments under RUFADAA as promulgated by the Uniform Law Commission,

There should be no question than an explicit delegation of authority in a power of attorney constitutes authorization from the user to access digital assets and provides "lawful consent" to allow disclosures of the content of an electronic communication from an electronic-communication service or a remote-computing service pursuant to applicable law.<sup>17</sup>

Conservators for Protected Persons. The Act treats conservators differently than other fiduciaries. Because a protected person may retain some right to privacy in his personal communications, the mere appointment of a conservator does not permit a conservator to directly access digital assets. Access can be obtained only by a court order after an opportunity for a hearing.<sup>18</sup> If the court grants access, custodians must disclose the protected person's digital assets other than the content of electronic communications.<sup>19</sup> Additionally, courts may expressly order a custodian to disclose the content of electronic communications.

Furthermore, Mont. Code Ann. § 72-31-413(3) permits a conservator with plenary authority to ask the custodian to suspend or terminate the protected person's account for good cause. This allows a conservator concerned about a protected person's online behavior, to request suspension or termination of a social media account. Nothing in Mont. Code Ann. § 72-31-413, however, permits the conservator to monitor the account. As a practical matter, the conservator, to persuade the protected person to permit monitoring of the account, may threaten a termination or suspension request.

Fiduciary's Request for Digital Assets. When requesting access to digital assets, fiduciaries must submit specified documents to the custodian. Those documents vary slightly depending on whether the fiduciary is the personal representative of the user's estate,<sup>20</sup> an agent under a power of attorney,<sup>21</sup> a trustee,<sup>22</sup> or a conservator.<sup>23</sup>

The custodian may request the fiduciary to provide a number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account and evidence linking the account to the user.<sup>24</sup> In the case of an estate, the custodian may request the personal

representative provide a court order finding that the user had a specific, identifiable account with the custodian.<sup>25</sup>

To minimize the likelihood that custodians will request court orders, I recommend that a client who wishes to consent to fiduciary access, sign a separate document authorizing fiduciary access and identifying the client's important accounts. That authorization should link those important accounts to the client user by providing the client's usernames, numbers, addresses, and other unique subscriber and account identifiers, but not their passwords. The document should authorize the client's fiduciaries to access the content of electronic communications, as well as other digital assets. The authorization could be fashioned after the sample language for wills provided above. Also, the authorization should be acknowledged by a Notary Public. This authorization would supplement the express consent provisions in wills, powers of attorneys, and trusts.

I cannot predict the future conduct of custodians under this new Act. Perhaps the authorization described in the preceding paragraph will prove unnecessary. However, until custodians have demonstrated a pattern of respecting user's consent to fiduciary access, I think the preparation of such an additional document is prudent.

Other Aspects of the Act. The custodian need not disclose digital assets deleted by the user. The custodian may assess a reasonable administrative charge.<sup>26</sup> If, within 60 days of receiving the fiduciary's request, the custodian fails to comply with the request, the fiduciary may seek a court order directing compliance. A custodian is immune from liability for any act or omission done in good faith compliance with the Act.<sup>27</sup>

The Act does not apply to an employer's digital assets used by an employee in the ordinary course of the employer's business.<sup>28</sup> Thus, the Act does not apply to an employer's internal email system.

Disposition of Digital Assets. The Act does not address the transfer of ownership of digital assets in a will or trust. Terms-of-service agreements must be reviewed to determine a client's ability to devise such assets or provide for their distribution under the terms of a trust.

Uniformity. Thirty-six states have enacted the Revised Uniform Fiduciary Access to Digital Assets Act. Also as of the date of this article, the Act has been introduced in the legislatures of eight other jurisdictions this year. One set of rules should benefit both users and custodians who have multistate digital interests.

**Digital Assets, page 27**

15 Mont. Code Ann. § 72-31-409.

16 Mont. Code Ann. § 72-31-408.

17 See comment under § 9 of RUFADAA. [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015\\_RUFADAA\\_Final%20Act\\_2016mar8.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf)

18 Mont. Code Ann. § 72-31-413(1).

19 Mont. Code Ann. § 72-31-413(2).

20 Mont. Code Ann. §§ 72-31-406 and 72-31-407.

21 Mont. Code Ann. §§ 72-31-408 and 72-31-409.

22 Mont. Code Ann. §§ 72-31-411 and 72-31-412.

23 Mont. Code Ann. § 72-31-413.

24 See Mont. Code Ann. §§ 72-31-406(5), 72-31-407(4), 72-31-408(4), 72-31-409(4), 72-31-411(4), 72-31-412(4) and 72-31-413(2)(c).

25 Mont. Code Ann. § 72-31-406(5)(c).

26 Mont. Code Ann. § 72-31-405 fully describes other procedural aspects for the custodian's disclosure of digital assets.

27 Mont. Code Ann. § 72-31-415.

28 See § 20(3) of S.B. 118. That section is not codified in Title 72, Chapter 31 Mont. Code Ann.



# Is this a profession or a business?

## Let the great debate begin!

By Mark Bassingthwaight, Esq.  
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Over the years, I have witnessed a few vigorous debates where the point of contention was whether the practice of law is a business or a profession and, let me tell you, this can be an emotionally charged topic. Things get really exciting if in one of these debates you have those who really do find the notion of equating the practice of law in any way, shape or form with the running of a business as an extremely offensive position up against those who are in it solely for the money. I remember one particularly heated debate where one of the money folks actually stated that he viewed the very existence of our rules of professional conduct as a personal affront. Wow. That got everyone's attention. As for me, I tend to take the middle ground. After all, if a lawyer fails to find financial success in his or her practice, the privilege of being able to practice in this honored profession will not be long lived.

In the past, I would often walk away from these debates simply shaking my head because I failed to see their true value. Today however, and to my great surprise, I'm starting to believe lawyers should not only have this debate but we should elevate it and take it center stage. Why? Because tremendous change is afoot. Non-attorneys are moving into various service sectors that have traditionally been the exclusive purview of lawyers, legal services are being commoditized at an ever-increasing rate, and artificial intelligence has arrived on scene. This is not meant to be a siren call. It is what it is. Change in and of itself is neither good nor bad; but here's my concern. Those who embrace the business side of the debate are running rickshaw over those who view law as an honored profession simply due to their success in driving such change. In light of the pace of this change, I feel a need to ask this question. Is there a cost to all this, and if so, is the cost worth it?

As you reflect upon the costs involved, allow me to share a few thoughts. Non-lawyers who deliver services in the legal services sector are not subject to the regulations licensed attorneys are. From a societal perspective, is this a positive or negative? Of

course, how can the rapid commoditization of legal services not have an impact on how the general public views lawyers and their role in society today? And finally, as I think about the long-term ramifications of computers replacing the human element in the practice of law, my head starts to hurt. Can computers even be programed to interact as a professional? Heck if I know, and I suspect few will care.

Look, I get it. Change is a constant and there really are some incredibly successful legal service business models that are meeting very real and legitimate legal needs. Honestly, I applaud many of the entrepreneurs who have proved to be so adept in doing so. In my humble opinion, however, I fear our profession may be losing its identity in the process and I'm not convinced we shouldn't be worried about that particular cost.

I suspect there will never be a great debate within our profession about the value of professionalism in the practice of law, but there sure should be. A comment I have heard in every corner of the U.S. during all my years traveling for ALPS, and from more longtime lawyers than I can remember, is some variation of "I'm so thankful to be at this point in my career. If I was just starting out, I don't think I could do it because the practice just isn't fulfilling anymore." Every one of these individuals was expressing regret. Regret that something has been lost. I am positing that what has been lost might be our sense of professionalism.

As I see it, society no longer seems to view lawyers as practitioners of an honored profession. Why? Is it because the debate has been lost before it even got started? Is it because so few seem willing to take up the cause? It's not for me to say. What I can say, however, is this. Whether we like it or not, each of us has a role to play in how the changes to our profession will continue to evolve because even a passive, do nothing response has a consequence. So, while a great debate may never occur, there is no reason why each of us can't have our own personal debate. I have come to believe in its value. Perhaps if enough of us do, we will find a way to preserve the integrity and reputation of the legal profession together. Is it worth it? You tell me.



**ALPS Risk Manager Mark Bassingthwaight, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Many of his recent seminars to assist you with your solo practice are available at [montana.inreachce.com](http://montana.inreachce.com).**



# STATE BAR OF MONTANA

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## Would you like to boost your income while serving low- and moderate-income Montanans?

**We invite you to participate in the Modest Means program** {which the State Bar sponsors}.

If you aren't familiar with Modest Means, it's a reduced-fee civil representation program. When Montana Legal Services is unable to serve a client due to a conflict of interest, a lack of available assistance, or if client income is slightly above Montana Legal Services Association guidelines, they refer that person to the State Bar. We will then refer them to attorneys like you.

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## What are the benefits of joining Modest Means?

**While you are not required to accept a particular case, there are certainly benefits!**

You are covered by the Montana Legal Services malpractice insurance, when you spend 50 hours on Modest Means and / or Pro Bono work (you'll need to track your time and let us know), you will receive a free CLE certificate to attend any State Bar sponsored CLE. State Bar Bookstore Law Manuals are available to you at a discount and attorney mentors can be provided. If you're unfamiliar with a particular type of case, Modest Means can provide you with an experienced attorney mentor to help you expand your knowledge.

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## Questions?

**Please email:** [ModestMeans@montanabar.org](mailto:ModestMeans@montanabar.org)

You can also call us at 442-7660.



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## Are You Interested in Joining The Modest Means Program?

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You can also email your contact info to [ModestMeans@montanabar.org](mailto:ModestMeans@montanabar.org)

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## Court to hear two oral arguments in November

All arguments scheduled for 9:30 a.m. in the Courtroom of the Montana Supreme Court, Helena

**Wednesday, Nov. 8:** *Stokke v. American Colloid*

A former employee of a company contracted at a bentonite mine on the Montana-Wyoming border is seeking damages for injuries she suffered in a fall.

Denice Stokke worked for a trucking company that provided contracted services at American Colloid's bentonite mine. Stokke was injured when she fell while crossing boards to access a water well at the mine,

The District Court granted American Colloid summary judgment, ruling that it owed no legal duty to Stokke because general contractors are not liable to the employees of their subcontractors.

Stokke appeals, arguing that American Colloid is liable for her damages under her separate premises liability claim. She also argues that the company is liable for her injuries under three exceptions to the general rule of no liability for injuries to a subcontractor's employees: where the general contractor negligently exercises retained control over a subcontractor's work; where the activity is inherently dangerous; or where there is a non-delegable duty based upon contract.

American Colloid argues that none of the three exceptions apply under the facts of this case, and that a determination that there is no duty under the owner-independent contractor liability analysis also results in a finding of no duty under a premises liability theory.

The Honorable Amy Eddy, Kalispell, will sit for Justice Michael E. Wheat, who is retiring on Dec. 31.

**Wednesday, Nov. 29:** *Bassett v. Lamantia, City of Billings*

Robert T. Bassett filed a federal law suit for damages from injuries he suffered when Billings police officer Paul Lamantia tackled him, in a case of mistaken identity, while the officer was pursuing a criminal suspect.

Under the public duty doctrine as recognized in Montana, law enforcement officers are protected from claims of negligence based on their unique status as public servants. In this case, the Ninth Circuit Court of Appeals has asked the Montana Supreme Court to answer the following question:

Under Montana law, does the public duty doctrine shield a law enforcement officer from liability for negligence where the officer is the direct and sole cause of the harm suffered by the plaintiff?

The Montana Trial Lawyers Association has filed a friend-of-the-court brief on Bassett's behalf. The Montana County Attorneys Association, Montana Sheriffs and Peace Officers Association, the Montana Association of Chiefs of Police, and the Montana Police Protective Association, and the Montana League of Cities and Towns, the International Municipal Lawyers Association, and the Montana Association of Counties have filed friend-of-the-court briefs on behalf of Lamantia and the City of Billings.

The Honorable Nickolas C. Murnion, Forsyth, will sit for Justice Wheat.

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### Guardianship, from page 10

social service agencies across the state that work with special needs families. Also, to assist the attorneys who are interested in doing the guardianships we will be having a webinar and following, those that participate will be sent a proposed engagement letter, a complete set of court documents and proposed letters to the physician, visitor and public defender electronically. The two of us will be available to travel to local bar meetings to do presentations on the whole guardianship process and answer questions. We will also be available to take calls at any time during the process if attorneys have questions. Finally, in cooperation with the State Bar and local bars, the presentations to local bars will be approved for one-half hour of CLE credit and one-half hour of ethics credit

In the smaller communities in Montana we will probably only need one or two attorneys to volunteer. However, in the larger communities we hope to have at least 8 or 10 lawyers to volunteer. That way, no one lawyer will become overloaded and if the lawyer is asked to do a guardianship but can't at that particular time, there will be others in that community the clients can call.

We are now working out the details of how this pilot statewide Guardianship Program will be administered, how

lawyers will sign up for it, and how help will be provided as lawyers begin the process. Once that has been completed we will publish a follow-up article with that information. Pending that publication if you have thoughts, questions or suggestions, feel free to call us (Tom Lynaugh, 406-670-4187, or Larry Riley, 406-218-8800).

In the book "The Happy Lawyer," authors Nancy Levit and Douglas O. Linder refer to an ageless observation by Aristotle:

Aristotle used the words "good spirit" to describe the feelings that accompany a life well lived – one of engagement and immersion in activities that contribute to a better society. Aristotle believed that true happiness came not simply from feeling good – but from feeling good for good reasons – a feeling that generally comes from *doing* good.

Assisting with these special needs guardianships will be *doing* good.

**Larry Riley practiced law for 50 years with Garlington, Lohn and Robinson and now heads up the Elder Justice Program for Missoula Aging Services as a full-time volunteer. Tom Lynaugh practiced for 40 years with the Billings firm Lynaugh, Eiselein, Fitzgerald and Grubbs, has been active in the in Yellowstone County pro bono program for over 25 years and is currently chair of the Yellowstone Area Bar Association Pro Bono Committee.**



## In Memoriam

Please pass along news of Montana attorney deaths to the Montana Lawyer by sending an email to [editor@montanabar.org](mailto:editor@montanabar.org)

### Carolyn Kembel Ennis

Carolyn Kembel Ennis died on Oct. 20, at the age of 76, in Whitefish. She loved Montana, was a remarkable woman, and will be remembered as a beloved civic champion who made innovative and generous contributions to the quality of life in her city and state.



Ennis

Carolyn, who married Bruce Ennis and worked at the University of Montana School of Law when he attend law school, took on the challenge of a career in law herself in mid-life, graduating from the University of Montana School of Law and passing the bar exam in 1988.

She served as executive director of the St. Vincent's Hospital Foundation before entering private practice in Billings.

According to her obituary, Carolyn was actively involved in

the Billings community and throughout Montana. Her lifelong dedication to community involvement resulted in the legislative campaign to pass mandatory public school kindergarten in Montana. She was instrumental in developing Billings' first historic district. She served as board member of the Yellowstone Art Center, the Alberta Bair Theatre for the Performing Arts, the Montana Cultural Trust, and the Montana Committee for the Humanities (Humanities Montana). In addition, she supported and participated in many other civic projects. She cherished her community involvement and gave her time quietly to dozens of new initiatives.

All are welcome to attend a funeral liturgy at 10:30 a.m. on Friday, Nov. 10, at St. Patrick's Co-Cathedral, Billings. A special celebration will follow at Yellowstone Art Museum.

In lieu of flowers, send donations to the Flathead Lakers, P.O. Box 70, Polson, MT 59860; or Home Options Hospice, c/o KRH Foundation, 310 Sunnyview Lane, Kalispell, MT 59901.

### Digital Assets, from page 23

#### Conclusion

The Act removes many obstacles to a fiduciary's access to digital assets.<sup>29</sup> Given the prevalence of digital assets, Montana

<sup>29</sup> As we all know, personal representatives have long been able to manage and distribute a decedent's writings stored in filing cabinets and photographs found in albums. Now these personal representatives may be able to manage and distribute documents and photos stored in the cloud.

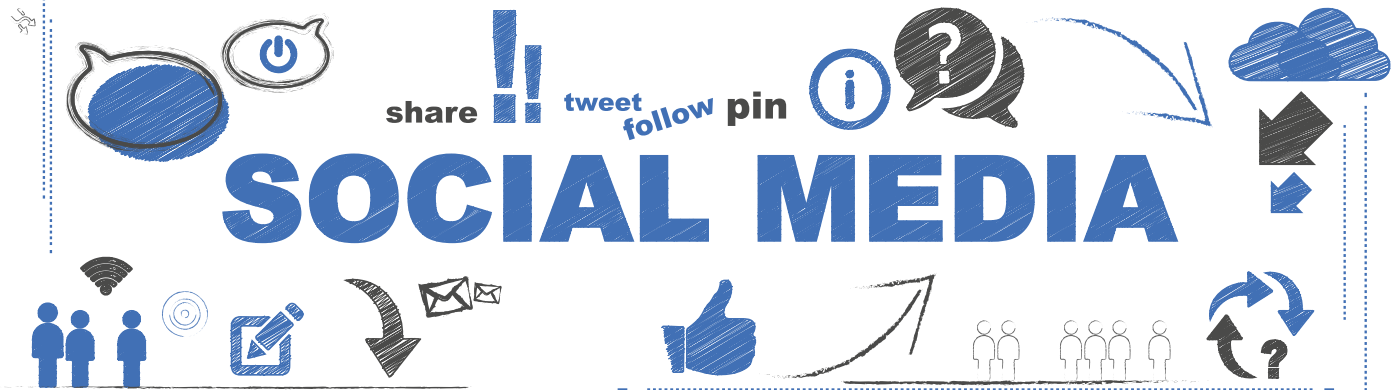
attorneys can expect to be called upon to draft wills, trusts, and powers of attorney consistent with their client's intentions regarding access to digital assets and privacy rights. If their clients wish their fiduciaries to have access to the content of their electronic communications, express provisions should be included in clients' wills, trusts and powers of attorney. Separate documents identifying important accounts and linking those accounts to the user should also be prepared. Further, care should be taken to examine any online tool a client may have utilized.



## STATE BAR OF MONTANA

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with the apparently prevalent satisfaction with apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility. the results, calls for generous treatment of this avenue to admissibility.

Thus, even if Ghostbear's lack of actual personal knowledge about the birthdate of the victim would preclude his live testimony at trial about her age (unless one of the routes explored above applied), it does not bar admission of his out-of-court statement on the subject, so long as his opponent offers

that statement. The lesson here is to scour the information in your case to see if, anywhere, your opponent has acknowledged the age or birthdate which you must establish. If so: consider that a present, whether it is your birthday or not.

### **Conclusion**

Consider this column my birthday present to you, whenever your birthday is and however you "know" that. See you next month, when we will all be a bit older.

*Professor Cynthia Ford teaches Civil Procedure, Evidence, Family Law, and Remedies at the University of Montana's Alexander Blewett III School of Law.*

# Lawyer Referral & Information Service

When your clients are looking for **you** ... They call **us**

**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.

**It's inexpensive:** The yearly cost to join the LRIS is minimal: free to attorneys their first year in practice, \$125 for attorneys in practice for less than five years, and \$200 for those in practice longer than five years. Best of all, unlike most referral programs, Montana LRIS doesn't require that you share a percentage of your fees generated from the referrals!

**You don't have to take the case:** If you are unable, or not interested in taking a case, just let the prospective client know. The LRIS can refer the client to another attorney.

**You pick your areas of law:** The LRIS will only refer prospective clients in the areas of law that you register for. No cold calls from prospective clients seeking help in areas that you do not handle.

**It's easy to join:** Membership of the LRIS is open to any active member of the State Bar of Montana in good standing who maintains a lawyers' professional liability insurance policy. To join the service simply fill out the Membership Application at [www.montanabar.org](http://www.montanabar.org) -> Need Legal Help-> Lawyer Referral and forward to the State Bar office. You pay the registration fee and the LRIS will handle the rest. **If you have questions or would like more information, call 406-442-7660 or email [mailbox@montanabar.org](mailto:mailbox@montanabar.org).** We are happy to better explain the program and answer any questions you may have.



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**LITIGATION ATTORNEYS:** Knight Nicastro, LLC is a regional litigation firm with offices in

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**METEOROLOGIST:** Dr. Matthew Bunkers, a certified consulting meteorologist (CCM) and forensic meteorologist, can provide reports, depositions, and testimony in the areas of weather and forecasting, severe summer and winter storms, applied climatology and meteorology, and statistics. Matt currently works for the Rapid City, SD, National Weather Service, but he is allowed to provide CCM services separate from his full-time job. More information is provided at <http://npweather.com>, and you can contact Matt at [nrnpnwweather@gmail.com](mailto:nrnpnwweather@gmail.com) or 605.390.7243.

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