

**IN THE SUPREME COURT OF THE STATE OF MONTANA**  
**DA 21-0012**

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IN THE MATTER OF THE ESTATE OF  
DOUGLAS C. DOWER,

Deceased.

LINDA GAYLENE DOWER,

Appellant,

-vs-

JAYNE LUX,  
Personal Representative,

Appellee.

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On Appeal from the Montana Eighth Judicial District Court  
Cascade County, Montana, Cause No. BDP-20-003

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**APPELLANT'S REPLY BRIEF**

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**APPEARANCES:**

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Comes Now the Appellant, Linda Gaylene Dower (hereinafter “Linda”) and submits the following Reply Brief.

### **INTRODUCTION**

The District Court’s Order finding the estate of Douglas C. Dower is insufficient and the decedent’s revocable one-half interest in the Dower Family Trust is unavailable to satisfy statutory allowances is contrary to black letter Montana law that protects surviving spouses. Such incorrect conclusions result in a disposition of decedent’s estate that is in contravention public policy. *See Estate of Wilhelm*, 233 Mont. 255, 262-263, 760 P.2d 716, 723 (1998) (stating the [public policy] goal is to ensure that the family of a decedent is not left destitute and this right is granted “apart from, and in addition to, any rights flowing from the estate”); *see also In re Estate of Martelle*, 2001 MT 194, ¶16-26, 306 Mont. 253, 256-57, 32 P.3d 758, 760-61 (finding that the Section 72-2-412, MCA, creates an absolute benefit to the surviving spouse). The order should be reversed and Linda should receive her full statutory allowances and exempt property from her deceased husband’s estate.

The undisputed facts show:

- Linda is decedent’s surviving spouse (CR 1, p. 1, 3);
- Decedent’s estate value is approximately \$315,173.73 (CR20, p. 1);
- The Dower Family Trust holds assets valued at more than \$300,000, one-half of which is includable in decedent’s estate, is reportable on the estate

inventory, and is included in the decedent's estate for tax purposes, thus providing a step-up basis (CR20, p. 7);

- One-half of the Dower Family Trust remained fully revocable and amendable by Decedent up until the time of his death (*See* Dower Family Trust, Article 2, Subpart 2, and Article 5, Subpart 2; First Amendment to Dower Family Trust);
- Decedent's estate, as defined by statute, is composed of personal property, his interest in the Dower Family Trust, and all other jointly-owned property at the time of his death (*See, generally*, CR20);

Given the foregoing, the Estate of Douglas Dower has more than enough assets to fully satisfy Linda's statutory allowances. Abatement is neither necessary nor appropriate under the circumstances.

Montana law dictates that the District Court's order finding decedent's estate insufficient to fully satisfy statutory allowances and exempt property, as well as Linda's specific bequest of personal property, should be reversed. If allowed to stand, such result punishes decedent's surviving spouse to the benefit of all other heirs and creditors, in direct contradiction to Montana's stated policy to protect surviving spouses. *See* Estate of Wilhelm, 233 Mont. at 262-263, 760 P.2d at 723 (stating the statutory allowance and exempt property are granted "apart from, and in addition to, any rights flowing from the estate"); *see also* In re Estate of Martelle, 2001 MT 194, ¶¶16-26, 306 Mont. at 256-57, 32 P.3d at 760-61 (upholding the District Court's finding that it had **no authority**, given the plain language of the applicable statutes, **to limit the homestead allowance** despite the fact that the

spouse received two residential houses through joint tenancy (emphasis added)). Appellee's argued interpretation of the controlling statutes would create absurd results, wherein surviving spouses are no longer given protections above and beyond those of general creditors, leaving such to be disinherited without notice and consent. *See* Mont. Code Ann. Section 72-3-808(1) (stating the clear priority of family allowances and exempt property over any other creditor claims, and requiring creditors be paid from the estate, which includes non-probate transfers, such as those held by a revocable living trust).

Montana law does not allow heirs and devisees to shield property in a revocable trust from creditors, and this Court should not conclude that assets held in a revocable living trust can be excluded from the estate and made unavailable to satisfy mandatory statutory allowances and exempt property protecting a surviving spouse. *See Estate of Wilhelm*, 233 Mont. at 262-263, 760 P.2d 716, 723 (1998) (finding that rights of surviving spouses have priority over creditor claims even to the point of extinguished liens against property filed prior to decedent's death).

The District Court's order should be reversed, and instructions given that because decedent's estate is sufficient to satisfy Linda's full entitlement to statutory allowances and exempt property, the Personal Representative should be ordered to pay Linda her fully statutory allowances and exempt property, in addition to her specific bequests under decedent's Will without abatement of any kind.

## ARGUMENT

### **I. This Court Should Reverse the District Court's Order Finding that Decedent's Estate Is Insufficient and Subject to Abatement.**

Through a misunderstanding of the application of the probate statutes, the District Court changed years of fundamental Montana law, and severely chipped away at established protections for surviving spouses. *See, e.g., In re Estate of Martelle*, 2001 MT 194, ¶26, 306 Mont. at 256-57, 32 P.3d at 760-61 (holding that the plain language of the homestead statute creates an absolute benefit to the surviving spouse and should be liberally construed to effectuate its purpose, a public policy to protect the surviving family of the decedent); *Estate of Wilhelm*, 233 Mont. at 262-63 (holding family protection and allowances granted pursuant to statute state public policy and should be liberally construed); *Estate of Lawson*, 222 Mont. 276, 278-79, 721 P.2d 760, 762 (1986) (holding allowances are payable of the assets of the estate and are not chargeable against the widow's share); *Estate of Merkel*, 190 Mont. 78, 82-84, 618 P.2d 872, 875-76 (1980) (holding that the [homestead allowance] insures that the spouse will be adequately cared for, thus fulfilling the ultimate purpose of the statute). If this Court upholds the District Court's fundamental abandonment of longstanding case law, this Court will also have abandoned and disavowed the long-enforced protections safeguarding

surviving spouses, and created a pathway for individuals to essentially disinherit surviving spouses.<sup>1</sup>

**a. Appellees’ argument fails under the law, facts, and logic.**

Statutes are to be construed in a manner that does not “lead to absurd results if a reasonable interpretation can avoid it.” *See, e.g., City of Missoula v. Fox*, 2019 MT 250, ¶18, 397 Mont. 388, 395, 450 P.3d 898, 903; *see also Junkermeier, Clark, Campanella, Stevens, P.C., v. Alborn*, 2020 MT 179, ¶15, 400 Mont. 408, 414, 469 P.3d 111, 116. Statutory construction is required to account for the statute’s text, language, structure, and object. *Van der Hule v. Mukasy*, 2009 MT 20, ¶10, 349 Mont. 88, 92, 217 P.3d 1019, 1021; *see also In re Maynard*, 2006 MT 162, ¶5, 332 Mont. 485, 486-87, 139 P.3d 803, 804 (2006). The purpose in construing a statute is to ascertain the legislature’s intent and to give effect to the legislative will. *See* Mont. Code Ann. Section 1-2-102; *Van der Hule v. Mukasy*, 2009 MT 20, ¶10, 349 Mont. at 92, 217 P.3d at 1021. Legislative intent is to be ascertained, in the first instance, from the plain meaning of the words used – the Court’s inquiry must be with the words of the statute themselves. *Van der Hule v. Mukasy*, 2009 MT 20, ¶10 (emphasis added). It is not a court’s function to insert what has been omitted

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<sup>1</sup> If so desired, spouses may plan around the application of statutory exemptions, exempt property, and spousal shares by providing informed consent in writing. It is undisputed, it was not given in this matter. Linda has made no such waiver.

or omit what has been inserted. *See In re Maynard*, 2006 MT 162, ¶5, 332 Mont. at 486-87 (citing *Matter of Langendorf*, 262 Mont. 123, 125-26, 863 P.2d 434, 436 (1993)) (emphasis added).

Here, Montana public policy and legislative intent is clear –to ensure the surviving spouse is not left destitute and dependent on the public for support. *See* Mont. Code Ann. Sections 72-2-411; 72-2-412; and 72-2-413 (explicitly stating that the statutory allowances and exempt property have priority over all claims against the estate and cost of administration) (emphasis added); *see also Estate of Wilhelm*, 233 Mont. at 262-65, 760 P.2d at 723-24 (explaining the strong public policy underpinning statutory allowances and exempt property and the clear priority these claims have above all other claims). Chapter 2, Part 4 of the Montanan Uniform Probate Code states “[t]his part applies to the **estate** of a decedent who dies domiciled in [Montana]. Statutory allowances grant the surviving spouse a vested interest in property. *See Estate of Wilhelm*, 233 Mont. at 262-263, 760 P.2d at 723 (finding that this vested rights even supersedes liens which attach prior to decedent’s death). Statutory allowances and exempt property should be liberally construed to effectuate [their] purposes. *See Lawson*, 222 Mont. at 278-79, 721 P.2d at 761-62 (finding that the nature of family allowances precludes defenses of offset, satisfaction, payment or abandonment).

The plain language used in the statute, the use of an explicitly defined term, public policy, and the remaining provisions of the Montana Uniform Probate Code clearly provide all of Douglas Dower's assets, including his one-half interest in the Dower Family Trust, are available to fully satisfy statutory allowances and exempt property. Appellee's argument that the word "probate" should be inserted into the statute where it was omitted simply to fit the desire of the Personal Representative is without merit. See In re Maynard, 2006 MT 162, ¶5, 332 Mont. at 486-87. This Court has long ago determined that inserting words into statutes where they were omitted is not part of this Court's function. *Id.*

As shown above, Appellees' argument fails under the law, facts, and logic, as Appellee's argued application will lead to absurd results, and is contradictory to this Court's function in its interpretation of statutes. See Junkermeier, Clark, Campanella, Stevens, P.C., v. Alborn, 2020 MT 179, ¶15, 400 Mont. at 414, 469 P.3d at 116.

**b. The Statutory Definition of Estate applies to Mont. Code Ann. Section 72-2-415.**

"If the estate is otherwise sufficient, property specifically devised may not be used to satisfy rights to homestead allowance or exempt property. Subject to this restriction, the surviving spouse, guardians of minor children, or children who are adults may select property of the estate as homestead allowance and exempt property." Mont. Code Ann. Section 72-2-415(1).

In the Montana Uniform Probate Code “estate” is a term of art with a specific definition as set forth in the Montana Uniform Probate Code. *See* Mont. Code Ann. Section 72-1-103(15); *see also* City of Bozeman v. Mont. Dept. of Natural Resources and Conservation, 2020 MT 214, ¶13, 401 Mont. 135, 140, 471 P.3d 46, 50. Estate is a defined term, and applies to Mont. Code Ann. Section 72-2-415, by its plain language which reads:

. . . in chapters 1 through 6, the following definitions apply”  
(15) “Estate” includes the property the decedent, trust, or other person whose affairs are subject to Chapters 1 through 5 as originally constituted and as it exists from time to time during administration.

There is no authority or justification to support Appellee’s that the legislature intended only the “probate estate” to be subject to statutory allowances and exempt property. *See* Mont. Code Ann. Sections 72-1-103(15); 72-38-505(1). Appellee simply cites multiple statutes in an attempt to confuse the Court and seeks some magical rainbow path where the statutory definition of “estate” should not be applied. In this case, Appellee’s argument is without merit and provides no support for her advocacy of a more limited definition.

The plain language definitively contradicts Appellee’s argued application:

“After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate

estate is inadequate to satisfy those claims, costs, expenses, and allowances.” Mont. Code Ann. Section 72-38-505(1)(c).

The unambiguous language requires that decedent’s one-half interest in the revocable trust is available to pay claims, including statutory allowances to a surviving spouse. Mont Code Ann. Section 72-38-505(1)(c). When read in conjunction with the other applicable statutes and public policy, the only reasonable result is that abatement is improper and Linda Dower should receive her full statutory allowances and exempt property in addition to all property devised to her under the Will and through joint tenancy. *See* Mont. Code Ann. Sections 72-1-103(15); 72-2-411; 72-2-412; 72-2-413; 72-2-414; 72-2-415; 72-38-505(1)(c); *see In re Estate of Martelle*, 2001 MT 194, ¶20 (upholding the District Court’s conclusion that it had no discretion to disallow or limit the homestead allowance because the plain language of the statute creates an absolute benefit); *Lawson*, 222 Mont. at 278-79, 721 P.2d at 761-62 (finding payment of allowances and exemptions is in addition to any rights flowing from decedent’s will).

Mont. Code Ann. Section 72-2-415 specifically sets forth how payment of statutory allowances and exempt property interacts with devises to the surviving spouse and specifically states “[i]f the **estate** is otherwise sufficient, **property specifically devised may not be used to satisfy rights to homestead allowance or exempt property.**” (Emphasis added). Instead, Appellee suggests the Court impose a more limited definition by arguing that the legislature must have meant (but did

not explicitly say) to include “probate estate.” “Probate estate” is not present in the relevant statutes. This Court has already determined it is inappropriate to insert words into a statute that were omitted. *See In re Maynard*, 2006 MT 162, ¶5, 332 Mont. at 486-87 (citing *Matter of Langendorf*, 262 Mont. at 125-26, 863 P.2d at 436). If our legislature thought it was appropriate to limit it to the “probate estate,” it would have said so in the language of the statute. It did not!

The language of the statute is clear and unambiguous. The definitions set forth in Mont. Code Ann. Section 72-1-103 apply to chapters 1 through 6, unless there is clear language, legislative intent, or context which supersedes a specific definition. *See* Mont. Code Ann. Section 72-1-103. Further, Appellee’s arguments result in general creditors having superior rights to spouses, and allows for spouses to be disinherited without informed consent. Such results contravene the clearly established protections safeguarding surviving spouses. Such new application must be rejected by this Court.

Douglas Dower’s \$315,173.73 estate is more than sufficient to satisfy the full statutory allowances and exempt property to Linda, in addition to her specific devise under the Will. Any other result is an absurd change of long ago adopted and construed Montana Law. *See* Mont. Code Ann. Section 72-2-415; *see, e.g., see In re Martelle*, 2001 MT 194, ¶20 (upholding the District Court’s conclusion that it had no discretion to disallow or limit the homestead allowance because the plain

language of the statute creates an absolute benefit); Lawson, 222 Mont. at 278-79, 721 P.2d at 761-62 (finding payment of allowances and exemptions is in addition to any rights flowing from decedent's will).

**II. This Court Should Order Jayne Dower Lux be Removed as the Personal Representative.**

The Personal Representative makes no attempt to justify the cruel and obviously wrong behavior she undertook in this administration, and just argues the Order denying Jayne's removal is not properly before this Court without citation to any authority for her argument. This is because there is no authority to cite.

An appeal can only be taken from a final judgement to special order made after final judgment. M.R. App. P. Rule 1. While the Order denying the removal of the personal representative was not a final order, it became appealable when the rights of the parties were determined, which was done in the summary judgment order. As that order was appealed, removal of Jayne Dower Lux as Personal Representative is properly before the Court. This Court has established, "[a] final judgment is one which constitutes a final determination of the rights of the parties, any judgment, order or decree leaving matter undetermined is interlocutory in nature and not a final Judgment for purposes of appeal." See In re Estate of Boland, 2019 MT 236, ¶47, 397 Mont. 319, ¶47, 450 P.3d 849, ¶47, (noting that "[a] judgment is considered final only if it determines the rights of the parties and disposes of all the

issues involved so that no future action by the Court will be necessary in order to settle and determine the entire controversy”).

The Court should not allow Jayne Dower Lux to continue with her campaign to deprive her step-mother’s access to funds and assets, which as shown above the surviving spouse is absolutely entitled. The Order of the District Court must be reversed to remove Jayne Dower Lux and install a personal representative who will assure spousal protections of Linda will be applied.

### **CONCLUSION**

This Court should reverse the District Court’s error in ignoring decades of black letter case law and statutory provisions which protect surviving spouses from becoming wards of the state. Such result creates loop hole which will incentivize estate planning practitioners to circumvent the well-established statutory and binding Montana case law protecting surviving spouses. Even more scary results occur as such new law gives creditors more rights to be paid than the surviving spouse. This is an absurd result and in contravention of well-established public policy. The law is clear, decedent’s estates must be used to satisfy the decedent’s creditors at death, first and foremost being the claims of a surviving spouse. The terms are defined, and not limited, and include trust property. *See* Mont. Code Ann. Section 72-1-103(15) The Montana legislature and Montana Courts have been more than vigilant in ensuring sure such brutal and anti-family results are never allowed

in this state. This Court should not reverse its longstanding history of protecting surviving spouses.

Based on the foregoing, this Court should reverse the District Court's order and order:

(1) Douglas Dower's estate, for purposes of payment of statutory allowance and exempt property includes decedent's one-half interest in the Dower Family Trust;

(2) Douglas Dower's estate is sufficient to pay all statutory allowances and exempt property to Linda in addition to her bequest of personal property under decedent's Will; and

(3) Abatement of Linda's specific bequest is inappropriate under the circumstances and contrary to Montana law and public policy;

(4) Jayne Dower Lux should be removed as the Personal Representative and the public administrator appointed as the Personal Representative of the Estate.

DATED this 13<sup>th</sup> day of May, 2021.

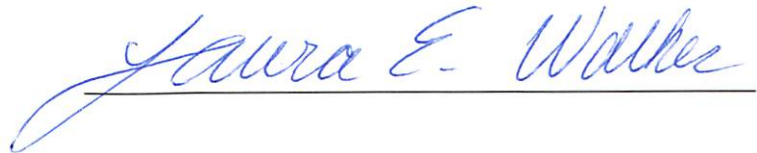
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2019 is 3,059 words, excluding certificate of service and certificate of compliance.

DATED this 13<sup>th</sup> day of May, 2021.

  
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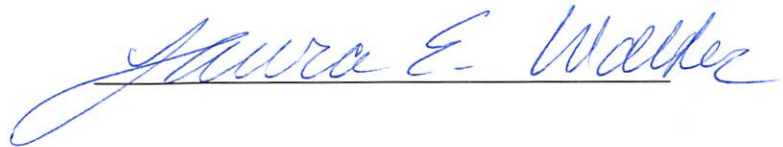
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing document was served this date upon the following counsel by me by delivering a copy thereof, or by me causing a copy thereof to be delivered, to:

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DATED this 13<sup>th</sup> day of May, 2021.

A handwritten signature in blue ink that reads "Aurora E. Walker". The signature is written in a cursive style and is positioned above a horizontal line.

## CERTIFICATE OF SERVICE

I, Laura E. Walker-Livergood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-13-2021:

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