

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 22-0456

IN THE MATTER OF THE ESTATE OF:
HORATIO W. BURNS,
Deceased.

**On Appeal from the Montana Sixth Judicial District Court
Sweet Grass County
Hon. Brenda R. Gilbert, Presiding**

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RESPONSE TO LINDSAY'S STATEMENT OF THE ISSUES

New Trial Motion. The District Court did not abuse its discretion in denying Lindsay's motion for a new trial. In the interests of judicial efficiency and preservation of the parties' resources, Alison joins the Personal Representative's position regarding Lindsay's appeal of the District Court's denial of her motion for a new trial. For the reasons stated by the Personal Representative in his brief, Alison agrees that Lindsay is not entitled to a new trial on any grounds. The District Court did not abuse its discretion in allowing Lindsay's motion for a new trial to be deemed denied by Rule 59(f). Alison will not address this issue further in her brief.

Order on Motion to Strike. The District Court did not abuse its discretion when it denied Lindsay's Motion to Strike, holding that Alison was not required to move the court to intervene to respond to Lindsay's allegations in her Petition.

Award of Alison's Attorneys' Fees. The District Court was correct when it held that Alison defended the will's validity and was therefore entitled to an award of her attorneys' fees and costs pursuant to Montana Code Annotated § 72-12-206.

Order on Post-Judgment Interest. The District Court correctly interpreted Montana Code Annotated § 25-9-205 that post-judgment interest may

change yearly. In the interests of judicial efficiency and preservation of the parties' resources, Alison joins the Personal Representative's position regarding Lindsay's appeal of the District Court's decision regarding post-judgment interest. Alison will not address this issue further in her brief.

ALISON'S STATEMENT OF THE CASE

Alison Burns ("Alison") is Cameron H. Burns' ("Cameron") wife, and Horatio W. Burns' ("Horatio") daughter-in-law. Horatio died on August 20, 2018. Dkt. 231, Final Pre-Trial Order, Agreed Facts ¶ 1. Horatio's Will, which he duly executed on January 15, 2016, appointed Cameron as Horatio's Personal Representative. Dkt. 231, Agreed Fact ¶ 6. Cameron informally applied to open Horatio's Estate (the "Estate") on September 12, 2018 and was issued letters of appointment that same day. Dkt. 1 – 4. On September 13, 2019, Lindsay Burns Barbier ("Lindsay") filed her Verified Petition Objecting to Probate of Will (Lindsay's "Petition"), which instigated this litigation. Dkt. 32. Lindsay's Petition alleged that Horatio lacked testamentary capacity when he executed his Will and that the Will was the product of undue influence by Cameron and by Alison. See Dkt. 32, Lindsay's Petition, ¶¶ 17-31.

The parties engaged in extensive written discovery. In response to discovery responses from each other, the Estate and Lindsay each served

more than ten supplemental discovery responses on one another and produced tens of thousands of pages of documents. Alison assisted Cameron in his capacity as Personal Representative in responding to Lindsay's discovery requests.

Lindsay issued a *subpoena duces tecum* to Alison on November 18, 2020, at her home in Connecticut. In response, Alison produced several categories of documents as requested by Lindsay. Most, if not all, of the documents produced by Alison had already been produced by the Estate with Alison's assistance.

After that, Alison cooperated with Lindsay to secure her appearance at a deposition at the offices of Lindsay's counsel in Billings, Montana. Alison cooperated in traveling to Montana for her deposition because her status as a party to this litigation required it. Alison traveled to Montana and was deposed by Lindsay on March 31, 2021.

Before deposing Alison, Lindsay's counsel served Alison with Discovery Requests under Rules 33, 34, and 36 of the Montana Rules of Civil Procedure. Lindsay served Alison with 24 interrogatories and 43 requests for admission on March 12, 2021. Alison timely responded to Lindsay's discovery requests when she served her responses on April 20, 2021,

following Lindsay's counsel's courtesy extension. Discovery closed on April 16, 2021. Dkt. 92.

Alison served her Verified Response to Lindsay's Petition on April 20, 2021. Dkt. 110. Alison's Verified Response largely denied the allegations of Lindsay's Petition.

The parties engaged in mediation on April 30, 2021, via remote means. Dkt. 94, 107. Mediation included Cameron, Alison, Lindsay, and Seth Burns, Lindsay and Cameron's brother. Following unsuccessful mediation, Seth appeared and filed a motion to intervene as a co-petitioner with Lindsay. Dkt. 121. On June 29, 2021, the District Court denied Seth's motion to intervene. Dkt. 147.

On June 4, 2021, the Estate served an unopposed motion requesting the District Court extend certain filing deadlines, including the motions deadline. Dkt. 131. That motion resulted from negotiation among counsel to fix the motions deadline. The District Court granted that motion, setting the motions deadline, including motions for summary judgment and motions in limine, for June 22, 2021. Dkt. 134. On June 22, 2021, Alison filed a motion for summary judgment against Lindsay's claims of undue influence and testamentary incapacity, requesting that the District Court probate the Will. Dkt. 139. On June 25, 2021, counsel for the H.W. Burns

Family LLC (the “LLC”) filed a motion, also the result of negotiations among counsel, amending the deadlines for responses to various pending motions. Dkt. 144. The Court granted that motion, fixing Lindsay’s response deadline for Alison’s motion for summary judgment on July 27, 2021. Dkt. 146.

Lindsay moved to strike Alison’s Verified Response and Motion for Summary Judgment on July 19, 2021 and requested a stay of her obligation to respond to Alison’s Motion for Summary Judgment. Dkt. 155. In her Motion to Strike, Lindsay argued that because Seth was not allowed to intervene, Alison should not participate in the litigation. Dkt. 155, p. 1-2. Alison Responded to Lindsay’s Motion to Strike on July 22, 2021, arguing that Alison and Seth were not similarly situated and that Alison had an unqualified right to defend against Lindsay’s allegations that she unduly influenced Horatio when he made his Will. Dkt. 159. Lindsay filed her Reply brief supporting her Motion to Strike tardily on August 9, 2021. Dkt. 171. The District Court denied Lindsay’s Motion to Strike on September 13, 2021, reasoning that because Lindsay alleged Alison unduly influenced Horatio, Alison was not required to move to intervene to answer Lindsay’s Petition. Dkt. 187. The District Court denied Lindsay’s request for a stay as moot because Lindsay responded to Alison’s Motion for Summary

Judgment on July 27, 2021. Dkt. 187, Order; Dkt. 165, Response to Summary Judgment.

On February 7, 2022, the case proceeded to a seven-day jury trial in Sweet Grass County. Dkt. 239. At the close of the Petitioner's case Alison and the Estate filed a Rule 50(a) Motion for Judgment as a Matter of Law and Brief in Support. Dkt. 238. The Court denied the 50(a) Motion. Trial Tr. 16:6-25, Feb. 11, 2022. The jury entered its verdict, denying Lindsay's incapacity claim (12 – 0) and undue influence claim (10 – 2). Dkt. 244, Special Verdict.

Following the trial, Alison and the Estate timely moved to recover attorney fees and costs under Montana Code Annotated § 72-12-206. Dkt. 246-249. The District Court ordered Lindsay to pay costs for Alison and the Estate (Dkt. 277-280) and subsequently Lindsay to pay their attorneys' fees. Dkt. 281. The Court directed the Parties to engage expert witnesses for an attorney fee hearing. Dkt. 281.

ALISON'S STATEMENT OF FACTS

In the interest of efficiency, Alison incorporates the Estate's Statement of Facts as if fully set forth herein by reference. The remainder of Alison's Statement of Facts is provided to contextualize Alison's role in this litigation.

Horatio's second wife, Judith Pachy Burns ("Pachy"), died suddenly in a car accident on January 6, 2013. Dkt. 231, Agreed Fact ¶ 19. On March 20, 2013, shortly after Pachy's death, Horatio suffered a stroke. Dkt. 231, Agreed Fact ¶ 20. Following Horatio's stroke, Alison assisted him with his many administrative responsibilities for the cattle ranch in Montana, Horatio and Pachy's sheep ranch in Lone, Oregon, and Pachy's estate. Trial Tr. 270: 2-10, Feb. 11, 2022, ("He had two working businesses really, the sheep ranch in Lone which had, you know which really Pachy was responsible for or was doing all the management of and also the family ranch in Big Timber. And you can't just put everything on hold until Rasch got better. We had people who needed to be paid. We had employees. There were, there were businesses that were expecting to be paid for goods and services that they had supplied."). Alison continued doing the bookwork for the ranch through the rest of Horatio's life. Trial Tr. 270:18-22, Feb. 11, 2022, ("MR. KELLY: And so, that began in 2013. How long, did you ever stop doing that work? MS. ALISON BURNS: I didn't. Well, the sheep ranch got sold. But I didn't stop doing, helping with the bookwork for the LLC."); Trial Tr. 279: 12-16, Feb. 11, 2022, ("At one point when Rasch was back at the ranch and his eye sight was better I was actually thinking it

would be really nice to give all this paperwork back to him and he was happy having me do it. It's not that much fun, I guess.”).

Horatio appreciated Alison's work assisting him in selling the sheep ranch in Ione. Horatio gifted Alison \$14,000 from the sale proceeds of the ranch in Ione once it sold in 2015. Trial Tr. 6: 12-25, Feb. 14, 2022. In addition to selling the Oregon sheep ranch in 2015, Seth gave notice of his intent to dissociate from the LLC, requiring Horatio, Cameron, and Lindsay as the remaining LLC members to negotiate a buy-out with him. Trial Ex. 61.

Horatio devised land he called the Iverson to Alison. Dkt. 2, p. 5. Horatio purchased the Iverson in his name in approximately 2002 or 2003. Trial Tr. 9:10-12, Feb. 14, 2022. The Iverson provides grazing pasture for the cattle, deeded access to some of the ranch's land, and stock water rights. Trial Tr. 8:22—9:7, Feb. 14, 2022. The Iverson adds approximately 90 head to the carrying capacity of the LLC's ranching operations. Trial Tr. 9:15-16, Feb. 14, 2022.

Because Alison was not a Burns descendant, she could not hold any part of the LLC's membership interest under its operating agreement. Trial Tr. 9:24-25, Feb. 14, 2022. Horatio bequeathed the Iverson to Alison to ensure she had a continued interest in the ranch after he died. Trial Tr. 9:

21-22, Feb. 14, 2022, “I know, I believe that he wanted me to have skin in the game as he put it.” The years Alison spent assisting Horatio with the ranch’s books and administrative work also involved Horatio passing on his knowledge to Alison, better positioning her to ensure the ranch’s continued operation. Trial Tr. 8:15, Feb. 14, 2022; Trial Ex. 85; Ex. 43; Trial Tr. 251:17—24.

STANDARDS OF REVIEW

1. The District Court’s Order denying Lindsay’s Motion to Strike should be reviewed for Abuse of Discretion.

The heart of Lindsay’s Motion to Strike addresses who is a proper party to this litigation. This Court reviews issues of joinder and non-joinder for an abuse of discretion by the District Court. *John Alexander Ethen Trust Agreement v. River Res. Outfitters, LLC*, 2011 MT 143, ¶ 49, 361 Mont. 57, 256 P.3d 913. “The facts and circumstances of each case determine whether a court must join a particular non-party. We will reverse for an abuse of discretion the district court’s decision whether to join a party.” *Id*; internal citation omitted. Lindsay is incorrect when she asserts that de novo review applies to her Motion to Strike. The appropriate standard of review is for abuse of discretion.

2. The District Court's Order awarding Alison her attorneys' fees should be reviewed for correctness.

Alison agrees that the District Court made a legal conclusion when it awarded her attorneys' fees according to Montana Code Annotated § 72-12-206, and, therefore, this Court reviews the District Court's ruling to determine whether the District Court was correct.

SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion, nor did it err, when it denied Lindsay's request to strike Alison's Verified Response and Motion for Summary Judgment and to stay Lindsay's Response to Alison's Motion for Summary Judgment. The Court ruled that, given Lindsay's allegations of undue influence against Alison, Alison was a proper party to this litigation and did not need to file a motion to intervene to answer Lindsay's Petition. Alison is an interested party in this probate action whether she files an appearance or not. Further, given Alison's substantial participation in the litigation before Lindsay's Motion to Strike, particularly Lindsay's service of discovery requests on Alison, the Court determined that Lindsay treated Alison as a party. Lindsay cannot have it both ways.

The District Court did not address the timing of Lindsay's Motion to Strike. Still, the District Court would have been correct in denying Lindsay's motion because of its untimeliness, coming after the motion's deadline and

outside the timeframe required by Rule 12(f) of the Montana Rules of Civil Procedure.

The District Court correctly awarded Alison her attorneys' fees pursuant to Montana Code Annotated § 72-12-206. The Court reasoned that Alison, in defending against Lindsay's allegations that she unduly influenced Horatio, defended the validity of the Will. The Court further reasoned that the text of Montana Code Annotated § 72-12-206 does not limit an award of attorneys' fees to the Estate or its Personal Representative. Rather, a party must defend the will to be eligible for an award of fees following a contestant's unsuccessful will contest. The statute imposes no further restrictions, and it would be inappropriate to read any into the statute because the language is clear and unambiguous. Given the District Court's finding that Alison defended the validity of Horatio's Will, the District Court was correct in concluding that Alison was entitled to an award of her reasonable attorneys' fees. Mont. Code Ann. § 72-12-206.

ARGUMENT

I. The District Court did not abuse its discretion when it denied Lindsay's Motion to Strike.

Lindsay argues that, despite the centrality of Alison to Lindsay's case and legal theories, and despite the Probate Code's explicit grant of rights to Alison as an interested person in this will contest, the District Court should

have allowed her to prevent Alison's participation by a late and unsound motion to strike. Lindsay advocates for a rule allowing disappointed heirs to accuse a will's beneficiaries of undue influence while preventing them from defending their conduct and interests under the will. The Montana Probate Code does not allow such a rule.

Alison filed her Verified Response to Lindsay's petition on April 22, 2021. Dkt. 110. Alison's Response is substantively similar to the Estate's Verified Response, creating no new issues of fact or law. *Compare* Dkt. 110, Alison's Response *with* Dkt. 36, Verified Response of Personal Representative. Lindsay filed her Motion to Strike on July 19, 2021: 88 days after Alison filed her Response and 27 days after both the motions deadline and Alison's Motion for Summary Judgment. Dkt. 155.

Not only was Lindsay on notice that Alison was acting as a party in filing and serving pleadings and motions, but Lindsay treated Alison as a party. Lindsay served discovery requests on Alison on March 12, 2021.

A. Alison is a proper party to these proceedings.

Lindsay's insistence that Alison should have filed a motion to intervene and that the District Court should have denied the motion to intervene ignores the basic rights granted to Alison under the Probate Code and the

Montana Rules of Civil Procedure. Lindsay made Alison a proper party by alleging Alison unduly influenced Horatio. Dkt. 32, ¶¶ 17—31.

1. The Probate Code and Montana Rules of Civil Procedure explicitly allow Alison’s Response.

Montana Code Annotated § 72-1-103(25) provides that devisees are among “interested persons” granted certain rights under the Probate Code. Among the rights of interested persons are the “rights of application and petition,” including for an order of formal probate. See Mont. Code Ann. § 72-3-105.

That parties are allowed to defend their interests is axiomatic to our justice system. Montana Rule of Civil Procedure 19(a)(1)(B)(i) requires that an available person “must be joined as a party if that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may as a practical matter impair or impede that person’s ability to protect the interest.” Mont. R. Civ. P. 19(a)(1)(B)(i).

Montana Code Annotated § 72-3-101(2) states, “Upon the death of a person, the decedent’s real and personal property devolves to the persons to whom it is devised by the decedent’s last will...” This Court described what ‘devolve’ means in *Babcock v. Maxwell*, 29 Mont. 31, 35, 74 P. 64 (Mont. 1903):

An estate is said to 'devolve' upon another when by operation of law, and without any voluntary act of the previous owner, it passes from one person to another, but it does not devolve from one person to another as the result of some positive act or agreement between them. The word is itself of intransitive signification, and does not include the result of an act which is intended to produce a particular effect. It implies a result without the intervention of any voluntary actor. Instances of its appropriate use are found when speaking of the succession of estates upon death, or upon a change of official incumbents; also in proceedings in bankruptcy or insolvency, where by the act or operation of law the estate of the bankrupt devolves upon his assignee.

Internal citation and quotation omitted. Thus, under Montana Code Annotated § 72-3-101(2), Alison had a defensible and present interest in the subject matter of the Estate on Horatio's death, making her a *required* party under Rule 19.

The District Court correctly concluded that Alison is an appropriate party to this litigation based on her status as an interested person. "Alison is a party to this action pursuant to § 72[-1]-103(25), MCA, and need not file a Motion to Intervene." Order Denying Petitioner's Motion to Strike and for Stay, App. Ex. 7, p. 55; bracketed text supplied.¹ The court further reasoned, "The fact that Lindsay's Petition makes allegations directly against Alison regarding undue influence and other matters causes the court to conclude that Alison must be permitted to defend herself as an

¹ All appendix citations are to Appellant, Lindsay Burns Barbier's appendix unless otherwise noted.

interested party.” *Id.* These conclusions flow directly from Montana Code Annotated § 72-3-105, Alison’s right to petition for formal probate orders, and Rule 19, allowing parties to participate in litigation that may impair or impede their interests. Lindsay’s Petition jeopardized Alison’s interest in Horatio’s estate with allegations of Alison’s conduct. As an interested person, Alison has the right, without moving to intervene, to participate in this litigation. She would have this right even if her conduct were not directly at issue in Lindsay’s Petition. Alison’s interests in these proceedings would be severely prejudiced had the District Court granted the Motion to Strike, contrary to Lindsay’s arguments.

2. Alison is central to Lindsay’s Legal Theories and Case.

Lindsay complains she was “double team[ed]” at trial and throughout this litigation by Alison’s participation as a party. Appellant’s Opening Brief, p. 30. This argument ignores that Alison’s participation directly resulted from Lindsay’s allegations and the contentions she raised in her Petition and the pretrial order. See Dkt. 32 & 231. Further, it is not uncommon for litigation to involve more than two parties, all represented by counsel, particularly when each party has an interest in the outcome of the litigation.

The District Court was correct when it noted, “The fact that Lindsay’s Petition makes allegations directly against Alison regarding undue influence

and other matters causes the court to conclude that Alison must be permitted to defend herself as an interested party.” App. Ex. 7, p. 55. Lindsay cannot allege Alison unduly influenced Horatio and then keep Alison out of the litigation about Alison’s conduct and concerning Alison’s interest in Horatio’s Estate.

3. Lindsay treated Alison as a party to her benefit.

It is a “longstanding rule of law that a person who is not acting under mistake or fraud and who acquiesces in an error loses his right to object to the error.” *Goodman Realty, Inc. v. Monson*, 267 Mont. 228, 234, 883 P.2d 121, 124 (1994); *citing Schillinger v. Huber*, 133 Mont. 80, 85, 320 P.2d 346, 348-49 (1958); Mont. Code Ann. § 1-3-207 (“Acquiescence in error takes away the right of objecting to it.”). Further, Montana Code Annotated § 1-3-212 provides, “A person who takes the benefit shall bear the burden.”

First, as examined above, Lindsay made allegations against Alison that implicated Alison’s interests in the estate. In these circumstances, Alison must be a party under the test in Montana Rule of Civil Procedure 19(a)(1)(B)(i).

Second, Lindsay admitted Alison is a proper party by serving discovery requests on her pursuant to Montana Rules of Civil Procedure 33, 34, and 36. Under Lindsay’s discovery requests, Alison answered 43 requests for

admission and 24 interrogatories, all as a party. Thus, Lindsay admitted that Alison is an appropriate party to this litigation. By serving discovery requests on Alison, Lindsay waived any objection to Alison's participation in this litigation as a party.

4. Alison's Response was timely.

The grant of rights to interested persons under Montana Code Annotated § 72-3-105, whereby an interested person may petition the court for orders of formal probate, does not terminate when a decedent's child files a petition challenging a will. Rather, the rights of interested persons to petition the court terminate when the will is admitted to probate by the court under an order of formal probate. See *Raleigh v. District Court of First Judicial Dist.*, 24 Mont. 306, 310, 61 P. 991, 993 (1900). *Raleigh* involved a challenge to a will based on a lack of testamentary capacity and fraud in the execution. See *Id.*, generally. The will contestant filed a challenge before the hearing to probate the will. *Id.* The hearing was continued, and the challenger's petition was dismissed without prejudice for failure to state a claim. *Id.*, at 310, 61 P. at 992. After that, before the postponed hearing to probate the will, the contestant filed a second challenge to the will, which was stricken as a successive contest before probate. *Id.* This Court directed the lower court to entertain the second will challenge because "In

the present proceeding there was no law or rule of practice which prevented the institution of the second contest at any time prior to the hearing of the petition for the probate of the will.” *Id.*, at 311, 61 P. at 993. Accordingly, petitions are authorized by interested persons “absent a law or rule of practice” before the will is probated. As petitions are authorized prior to the probate of a will, so too, responses to petitions must be timely before probate of the will, absent the default of any party.

Here, as the trial on Lindsay’s Petition was not yet set, and because Alison participated in discovery, mediation, and filed substantive motions, the District Court determined, pursuant to *Raleigh*, that Alison’s Verified Response was timely.

Lindsay may argue that the rule in *Raleigh* would require the District Court to find Seth’s Motion to Intervene and Petition were also timely. The Court should disregard that argument. Seth never appealed his Motion to Intervene, so it is not before this Court. Lindsay cannot gesture to Seth’s denied Motion to Intervene to bolster her Motion to Strike because, as the District Court noted, “The Court sees a distinct difference in disallowing Seth to intervene as a party and allowing Alison to both respond to and file motions or petitions in this matter.” App. Ex. 7, p. 55. By asserting that Seth’s denied Motion to Intervene controls Alison’s participation in this

matter, Lindsay is arguing that Alison should suffer for the choices of Seth and his counsel. The District Court's finding that Seth was late does not require the District Court also to conclude Alison was untimely, given the many differences between them.

B. Lindsay's Motion was untimely.

While the District Court based its decision on the substance of Lindsay's Motion to Strike and did not address the motion's timeliness, the District Court would have been correct had it determined Lindsay's waived her objection by not timely raising it.

Montana Rule of Civil Procedure 12 governs motions to strike. In relevant part, it states, "The Court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading." Mont. R. Civ. P. 12(f)(2).

The record conclusively establishes that Lindsay's Motion to Strike fell outside the timeframe prescribed by Rule 12(f). Alison filed her Response on April 22, 2021. Dkt. 110. Lindsay filed her Motion to Strike on July 19, 2021, 88 days after Alison filed her Response. Dkt. 155. Additionally, the Motion to Strike came nearly a month after the motions deadline. Because

the Motion to Strike was dispositive toward Alison's participation, it must be filed before the motions deadline.

Lindsay's reliance on Rule 12(a) to argue that Alison's Response was untimely is undercut by her tardiness under Rule 12(f). It would be awkward and inequitable to grant a moving party relief regarding another party's timeliness when, under the same rule, the moving party is untimely. "A person who takes the benefit shall bear the burden." Mont. Code Ann. § 1-3-212.

C. Even if Lindsay is correct, she is not entitled to a new trial without Alison's participation.

Assuming *arguendo* that the District Court should have granted her Motion to Strike, Lindsay would not then be entitled to a new trial. Any prejudice to Lindsay by the District Court's 'errant' order was, in part, Lindsay's own doing. Lindsay cannot passively object to Alison's participation while serving her discovery requests, allow Alison to file a responsive pleading without moving for default, negotiate deadlines to Alison's Motion for Summary Judgment, and then file a Motion to Strike as an insurance policy against the adverse verdict that resulted. Lindsay cannot show any prejudice from Alison's participation that she did not acquiesce to, and certainly, none that would entitle her to a new trial.

In sum, Alison is a proper party to this litigation. Lindsay made Alison central to her case in an attempt to set aside Horatio's Will and the devises that devolved to Alison on his death. Further, Alison is an interested person in the will contest, who is granted the rights of application and petition by law. Lindsay's late Motion to Strike cannot prevent Alison's participation in this litigation, both because of Alison's substantive rights in the Estate and because Lindsay waived any objection to Alison's participation by her actions and omissions. For these reasons, the District Court did not abuse its discretion when it denied Lindsay's Motion to Strike that would have functionally 'un-joined' Alison from the litigation.

II. The Court was correct when it awarded Alison's attorney fees pursuant to Montana Code Annotated § 72-12-206.

The District Court correctly held that Alison is entitled to recover her attorneys' fees from Lindsay because Alison was defending the validity of Horatio's Will, "The Court concludes that Alison was independently defending the validity of the will in responding to Lindsay's claims that she unduly influenced the decedent and other matters. This brings Alison squarely within the provisions of § 72-12-206 MCA." Order Regarding Alison Burns' Motion for Attorneys' Fees, App. Ex. 9, p. 67.

A. Montana Code Annotated § 72-12-206 mandates that Lindsay pay Alison’s attorney fees.

Montana law requires that a party contesting the validity of a will must pay the attorneys’ fees and costs of the party who successfully defends the will’s validity:

Fees and expenses—by whom paid. When the validity or probate of a will is contested through court action, the attorney fees and costs, as provided in 25-10-201, incurred in defending the validity or probate of the will must be paid by the party contesting the validity or probate of the will if the will in probate is confirmed.

Mont. Code Ann. § 72-12-206.

When considering the language of a statute in Montana, the courts must presume “that the terms and words used were intended to be understood in their ordinary sense.” *In re Woodburn’s Estate*, 128 Mont. 145, 153, 273 P.2d 391, 394-95 (1954). Therefore, when the Court distinguishes between words such as “may” and “shall” in a statute, “The word “may” is commonly understood to be permissive or discretionary... In contrast, “shall” is understood to be compelling or mandatory. *Gaustad v. City of Columbus (In re City of Columbus Police Dep’t)*, 265 Mont. 379, 381-82, 877 P.2d 470, 471 (1994).; internal citations omitted. Here, the word “must” is to be given its intended meaning: mandatory. In *Black’s Law Dictionary* (6th ed. 1990),

Must is defined as: “This word, like the word “shall,” is primarily of mandatory effect... and in that sense is used in the antithesis to “may.”

The District Court correctly concluded that Montana Code Annotated § 72-12-206 requires Lindsay to pay Alison’s fees. The District Court noted Lindsay alleges Alison was a party only to defend herself, not the Will. “This ignores the basic fact that Lindsay’s claims of undue influence by Alison, if successful, would have most certainly invalidated the will.” App. Ex. 9, p. 67. The District Court continued, “This is surely an adequate test for determining whether Alison was defending the will’s validity. The Court concludes that Alison was independently defending the validity of the will in responding to the allegations of undue influence and other issues raised by Lindsay.” App. Ex. 9, p. 67. The District Court then held, “Alison is entitled to an award of attorneys’ fees.” App. Ex. 9, p. 67. As a beneficiary, Alison had no role in the administration of the Estate; her only role was defending the validity of the Will by answering Lindsay’s allegations of undue influence. Thus, Alison’s attorney fees ‘incurred in defending the will’ must be paid by Lindsay.

Lindsay treated Alison as a party defending the Will. Lindsay alleged Alison unduly influenced Horatio, deposed her, and served her with discovery requests. Lindsay’s purpose behind naming Alison in her Petition

and subjecting her to discovery was to set aside Horatio's Will. Alison, in defending against Lindsay, was defending the Will.

B. The District Court's award of fees to Alison does not contradict the District Court's decision to deny Lindsay's Motion to Strike.

Lindsay argues that based on her denied Motion to Strike, Alison's participation in this litigation was *only* to defend her own interests; Alison could not, therefore, have 'defended the validity of the will' as required by Montana Code Annotated § 72-12-206. Appellant's Opening Brief, p. 34. Lindsay's argument that the District Court contradicted itself in these two orders is wrong for several reasons.

Lindsay argues for a distinction without a difference. Her assumption that Alison should have filed a motion to intervene to defend 'her own interests' is wrong. As noted above, a motion to intervene was not required of Alison because she was an interested person under the Probate Code and a necessary party to the litigation under Rule 19. Thus, Alison's participation in this litigation is not cabined outside of Montana Code Annotated § 72-12-206 by a non-existent motion to intervene or analysis thereunder.

Lindsay's argument attempts to parlay the order denying her Motion to Strike into an order that somehow restricted Alison's participation in this

litigation. That order explicitly *did not* limit Alison’s participation in this case. Certainly, it did not relegate Alison to defending only her ‘own interests’ as somehow distinct from the devise Horatio left her.

C. *In re Baxter’s Estate* is inapplicable to this case because the facts and legal questions are clearly distinguishable.

In re Baxter’s Estate, 94 Mont. 257, 22 P.2d 182 (1933) provides no support to Lindsay’s argument that the District Court erred in awarding Alison’s attorneys’ fees. In *Baxter*, this Court decided that the estate of that decedent was not liable to pay the fees of a devisee under the then-applicable laws. That holding does not support Lindsay’s argument that the mandatory fee shifting provided by Montana Code Annotated § 72-12-206 should not apply to Alison. Every citation Lindsay provides to *Baxter* is in the context of a devisee seeking to have his attorneys’ fees awarded out of the estate. The fee-shifting statute at the time gave the probate court discretion in awarding attorneys’ fees “as justice may require,” according to Lindsay’s brief. Appellant’s Opening Brief, p. 35. That is not the framework at issue here, which mandates that Lindsay pay the attorneys’ fees “incurred in defending the validity or probate of the will.” Mont. Code. Ann. § 72-12-206.

In addition to applying a different statute, the legal issues in *Baxter* are not in play here. The language in *Baxter* concerning benefits gained by Baxter's Estate and the other devisees, yet declining to award fees out of the Estate to a devisee, was made in the context of the common fund doctrine. *Baxter* at 270-71, 22 P.2d at 188. The *Baxter* Court described the common fund doctrine, "When a fund is brought into court through the service of an attorney, or where his services have added to or preserved or increased the amount being administered, the court of primary jurisdiction may properly allow a reasonable compensation for his services to be paid from the fund." *Id* at 271, 22 P.2d at 188; citation omitted. The common fund doctrine is not at issue here, nor is a discretionary award of attorney fees.

In addition to addressing different statutes and different legal issues, *Baxter* is distinguishable based on the claims brought to invalidate the will. In *Baxter*, thirty-three individuals claimed to be cousins of the testatrix and "filed a petition to revoke the probate of the will, alleging incompetency of the testatrix to make it and fraud in the execution thereof." *Id.* at 257, 22 P.2d at 184. Here, in addition to lack of testamentary capacity, Lindsay brought Alison into this action by alleging that Alison unduly influenced Horatio. The District Court recognized this in its Order Denying Lindsay's Motion to Strike,

“Lindsay brought Alison into this case through depositions and discovery requests... The fact that Lindsay’s Petition makes allegations directly against Alison regarding undue influence and other matters causes the court to conclude that Alison must be permitted to defend herself as an interested party.” App. Ex. 7, p. 55. Lindsay’s claims against Alison were direct attacks on the validity of the Will. Nothing in *Baxter* allows Lindsay to avoid the effects of her own failed claims brought in this contest. Montana Code Annotated § 72-12-206 requires that Lindsay pay Alison’s attorneys’ fees.

D. There is nothing to ‘strictly construe’ in Montana Code Annotated § 72-12-206; it must simply be applied.

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” Mont. Code Ann. § 1-2-101. “In the construction of a statute, the intention of the legislature is to be pursued if possible.” Mont. Code Ann. § 1-2-102. “Legislative intent must first be determined from the plain words used in the statute, and when that is possible, no other means of interpretation are proper.” *In re Estate of Erickson*, 2017 MT 260, 389 Mont. 147, 406 P.3d 1; citations omitted.

Lindsay argues that the ‘principles of statutory construction and public policy’ required the District Court not to award Alison her attorneys’ fees under the fee-shifting statute. Lindsay’s argument is wrong because it ignores the first and most basic step of determining whether a statute applies – reading the plain language. Without identifying any language in Montana Code Annotated § 72-12-206 subject to strict or liberal construction, Lindsay urges ‘strict construction’ of a statute whose meaning is plain.

Lindsay’s arguments regarding public policy, the American Rule, and the laws of other states have no bearing on the plain text of Montana Code Annotated § 72-12-206. The correctness of the District Court’s decision turns on whether Alison ‘defended the validity of the will.’ The District Court was correct that Alison, in responding to Lindsay’s claims of undue influence, was defending the validity of the Will. Thus, the statute’s operative language, which focuses on who is liable for paying, applies, “...must be paid by the party contesting the validity or probate of the will....” Mont. Code Ann. § 72-12-206. Even the statute’s title emphasizes who must pay fees, “Fees and expenses – by whom paid.” *Id.*

Lindsay’s argument that Montana Code Annotated § 72-12-206 is limited only to the Estate is not supported by the statute’s language. Were the statute limited only to the Estate, it would say so. To insist otherwise

violates the statute prohibiting a court from including what the legislature has omitted from a statute. Mont. Code Ann. § 1-2-101. Further, this Court has allowed more than one person to be awarded fees under Montana Code Annotated § 72-12-206. *In re Estate of Lande*, 1999 MT 179, 295 Mont. 277, 983 P.2d 316, involved an appeal regarding the fee-shifting statute. In that case, the District Court awarded the successful defenders of the will their attorney fees against the contestant. The *Lande* Court held, “Here, § 72–12–206, MCA, entitled the successful defenders against a will contest to attorney fees as a matter of law.” *Id.*, ¶ 31. Notably, the *Lande* court used the word “defenders” in the plural, indicating that the Statute’s mandatory fee recovery applies to each defender of a will. *Id.* The word “defenders” in *Lande* also undercuts Lindsay’s position that only the Estate is entitled to an award of attorneys’ fees. By its plain text, the statute allows “defenders,” not only an estate acting through its personal representative, to recover their fees.

Public policy considerations also weigh in Alison’s favor. Montana Code Annotated § 72-12-206 prevents a disappointed heir from undermining testamentary dispositions they do not like. The apparent policy implications of the fee-shifting statute are to protect the testator’s intentions from depletion by failed will contests. Were the fee-shifting statute inapplicable to

Alison, Lindsay's failed will contest would reduce Horatio's gift to Alison by the fees Alison expended in defense of Horatio's Will.

The District Court was correct when it awarded Alison's attorneys' fees under Montana Code Annotated § 72-12-206 because Alison successfully defended the validity of Horatio's Will against Lindsay's will contest. The statute's language applies to Alison. Lindsay's arguments against Alison's "straightforward statutory entitlement"² to her fees all ignore "the basic fact that Lindsay's claims of undue influence by Alison, if successful, would have most certainly invalidated the will." App. Ex. 9, p. 67.

CONCLUSION

Alison participated in this case because she had to after being dragged into it by Lindsay. Horatio entrusted her with a piece of his ranch, his life's work, hoping she would keep it, cherish it, and use it to benefit the continuation of the ranch, "I want my estate to enhance the continuation of H.W. Burns Family LLC as explained in further detail below." Dkt. 2, Last Will and Testament of Horatio W. Burns, p. 2. By his devise to Alison, Horatio ensured she had a vested interest in continuing his ranch, or as he put it, "skin in the game." Trial Tr. 9: 21-22, Feb. 14, 2022.

² *Lande*, at ¶ 26.

Despite having been made aware by her father of his desire to devise the Iverson to Alison after his death,³ Lindsay alleged Alison orchestrated or participated in a scheme to unduly influence Horatio by leveraging her assistance with the ranch's bookwork over Horatio, among other unflattering accusations. Because of her status as an interested person in the estate and Lindsay's allegations directly at Alison's conduct, Alison was required to defend Horatio's Will. The District Court did not abuse its discretion when it kept Alison in this litigation as a party, despite Lindsay's Motion to Strike. Ultimately, the jury agreed with Alison and the Estate – Horatio's Will was his own free expression of his testamentary intent, and it should stand. Dkt. 244.

Through extensive litigation and a seven-day jury trial, Alison expended significant time, emotional energy, and funds to defend Horatio's Will. The Court correctly awarded Alison's attorneys' fees pursuant to Montana Code Annotated § 72-12-206. Otherwise, Lindsay's failed challenge would decrease the gift Horatio gave Alison. The fee-shifting statute protects the gift Horatio entrusted to Alison.

This Court should affirm the District Court on all issues appealed by Lindsay.

³ Trial Tr. 148:8—15; 225:25—226:2, Feb. 10, 2022.

Respectfully submitted this 19th day of July, 2023.


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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Arial text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word does not exceed 10,000 (6800) words, excluding the Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.



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