IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA-23-0538

IN THE MATTER OF THE ESTATE OF: DARCY BROCKBANK, Deceased.

ON APPEAL FROM THE MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY,
THE HONORABLE HOWARD F. RECHT

APPELLANT'S REPLY BRIEF

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ARGUMENT

Appellee makes several arguments that the Will presented lacks authenticity, including reliance on the adoption of the Uniform Electronic Wills Act ("UEWA"). Appellee conflates several issues to distract the Court from simple statutory construction: "[e]xcept where contrary to express statutory language, courts must liberally construe statutes enacted for remedial or 'beneficent' purposes 'to effect their objects and to promote justice.' " *Larson v. State By & Through Stapleton*, 2019 MT 28, ¶ 29, 394 Mont. 167, 190, 434 P.3d 241, 256. The proper question on appeal, then, is whether the secured text message sent by the Decedent should be probated as a writing or document intended as a will under Mont. Code Ann. § 72-2-523.

Appellee also includes two new arguments raised for the first time in this appeal, including the political question doctrine and the adoption of the Uniform Electronic Transactions Act ("UETA"). "It is well established that we do not consider new arguments or legal theories for the first time on appeal,..." *Pilgeram v. Greenpoint*, 2013 MT 354, ¶ 20, 373 Mont. 1, 7, 313 P.3d 839, 843. These arguments raised by Appellee for the first time in their response brief should be disregarded.

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I. The adoption of the UEWA does not affect the analysis required to determine whether the text message is a document intended as a will.

The UEWA was prepared and proposed by the Uniform Law Commission ("ULC") to provide states with a uniform regimen to recognize electronically executed wills. Appellant agrees the UEWA does not redefine a will or change the formalities required under the UPC, but instead the UEWA creates additional ways an adopting state recognizes a will as valid. In fact, the UEWA's Prefatory Note identifies several cases supporting ULC's decision to create the UEWA, including the Court of Appeals for Michigan case, *In re Estate of Duane Francie Horton II.*, 325 Mich. App. 325, 925 N.W.2d 207 (2018), cited by Appellant in his opening brief on Pg. 16. Appellee App. 2, Prefatory Note, pp. 1-2. The UEWA was created to provide uniformity to electronic wills because states already use statutes substantially similar to Mont. Code Ann. § 72-2-523 to admit electronic wills to probate.

Additionally, Section 6 of the UEWA titled "Harmless Error" is substantially the same as Mont. Code Ann. § 72-2-523. Appellee App. 2, Section 6, Harmless Error, pp. 12-13. Appellant realizes Brockbank's secured text message is neither a witnessed will nor a holographic will, which means even if Montana hypothetically adopted the UEWA, the text

message would undergo the same scrutiny as applied under Mont. Code Ann. § 72-2-523 to be admitted to probate. Appellee uses the UEWA as smoke and mirrors to distract the Court from the law, Mont. Code Ann. § 72-2-526, which provides the framework for the Court to probate the secured text, even without the adoption of the UEWA. Montana has not adopted the UEWA, and Appellee's analysis of the UEWA is a distraction from the relevant statutes, which the Court must construe liberally. Mont. Code Ann. § 72-2-523.

II. The Montana legislature determined the Uniform Probate Code speaks for itself and the UETA should defer to the Uniform Probate Code.

The Montana Legislature adopted the UETA in 2001, which includes Mont. Code Ann. § 30-18-103(2)(a), stating the UETA does not apply to transactions governed by the Uniform Probate Code ("UPC"). Appellee, in their brief, expands the plain language of the UETA. Neither the UETA nor the UPC precludes wills from existing purely in an electronic form. In the UETA, the Legislature granted deference to the UPC as the controlling code regarding the creation and execution of wills. Mont. Code Ann. § 30-18-103(2)(a). As noted in both Appellant and Appellee's briefs, there are three ways under the UPC to have a valid will: 1) witnessed will (Mont. Code Ann.§ 72-2-522(1)); 2) holographic will (Mont. Code Ann. §

72-2-522(2)); and, 3) documents intended as a will (Mont. Code Ann. § 72-2-523).

A witnessed will has the strictest formality, requiring documents to be signed by the testator or by a party in the testator's conscious presence. Mont. Code Ann.§ 72-2-522(1)(b). This statute has frequently been construed to require a wet signature from all parties. Mont. Code Ann.§ 72-2-522(2) provides: “A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.” The statute specifically requires the signature to be in the testator’s hand writing.

Mont Code Ann. § 72-2-523, in contrast, states in full:

> Although a document or writing added upon a document was not executed in compliance with 72-2-522, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document ***or*** writing to constitute:
>
> (1) the decedent's will;
> (2) a partial or complete revocation of the will;
> (3) an addition to or an alteration of the will; or
> (4) a partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the will. (Emphasis added.)

The statute expressly does not require the document to be tangible or reflect the testator's signature. The requirement, by clear and convincing evidence, is the decedent intended the document or writing to constitute one of the outlined testamentary documents. Appellee argues the Court should rely on the UETA to wholly invalidate an electronic document under the UPC. The argument is overly broad and an unsupported interpretation of the UETA's language and purpose. If the Legislature intended to make electronic wills wholly invalid, there would be no reason for the disjunctive used in Mont Code Ann. § 72-2-523: "document or writing." The UPC speaks for itself, and the language in the UETA does not prevent an electronic document from being probated as a will. Mont Code Ann. § 72-2-523.

III. A matter of first impression does not prevent the Court from liberally construing the Montana Uniform Probate Code.

The question of whether a secured text message may be probated as a document or writing intended as a will is a matter of first impression in Montana. Nevertheless, Mont. Code Ann. § 72-1-202 provides as follows:

> (1) To the full extent permitted by the constitution, the court has jurisdiction over all subject matter relating to:
>
> (a) estates of decedents, **including construction of wills** and determination of heirs and successors of decedents, and estates of protected persons; and

(b) protection of minors and incapacitated persons.

(2) The court has full power to make orders, judgments, and decrees and take all other action necessary and proper to administer justice in the matters which come before it. (Emphasis added.)

The Montana Legislature has given Montana courts subject matter jurisdiction over the construction of wills and the determination of heirs and successors of the decedent. Mont. Code Ann. § 3-5-302(1)(b); *See also* Mont. Code Ann. § 72-1-202. Courts are also given full power to take all other actions necessary and proper to administer justice in probate matters. Mont. Code Ann. § 72-1-202(2). Here, the Court is being asked to determine, under Montana law, if the construction of a text message is a valid will. Montana courts have been given clear authority to adjudicate the construction of wills.

Appellee in their subject matter jurisdiction argument, raises <u>for the first time on appeal</u>, the political question doctrine, which is substantively not applicable here. Appellee relies on *Larson v. State* which states:

> The "political question doctrine [generally] excludes from judicial review [only] those controversies ... which revolve around policy choices and value determinations constitutionally committed for resolution to" other branches of government or to the people in the manner provided by law. *Japan Whaling Ass'n*, 478 U.S. at 230, 106 S.Ct. at 2866. In contrast, it is particularly within the province of the judiciary to construe and adjudicate provisions of constitutional, statutory, and the common law as applied to facts at issue in particular cases. *Japan Whaling Ass'n*, 478 U.S. at 230, 106 S.Ct. at 2866. 2019 MT 28, ¶ 39.

Appellee asserts the recognition of electronic wills is a political question, which must be determined by the Legislature. As discussed *supra*, the fact that the Legislature has not yet adopted the UEWA does not preclude an electronic document or electronic writing from being found to be intended as a will under Mont. Code Ann. § 72-2-523. The determination is a simple matter of existing statutory interpretation.

The Court in *Larson* further stated, "[e]xcept where contrary to express statutory language, courts **must liberally construe** statutes enacted for remedial or 'beneficent' purposes 'to effect their objects and to promote justice.' " *Larson v. State By & Through Stapleton*, 2019 MT 28, ¶ 29. (Emphasis added). Mont. Code Ann. § 72-2-523 does not contain express language requiring a document or writing must be tangible or that a document or writing cannot be electronic. *See In re Maynard*, 2006 MT 162, ¶ 5, 139 P.3d 803 ("[i]t is not a court's function to insert what has been omitted or omit what has been inserted"). Mont. Code Ann. § 72-2-523 is a remedial statute to ensure the intent of the testator is effected, even when the formalities of drafting a will are not.

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IV. Mont. Code Ann. § 72-2-523 was approved by the Legislature to allow documents to be probated as a will, even if the formalities of will construction were not met.

a. Appellee has failed to present any evidence countering the authenticity which was supported by three lay witnesses and an expert witness.

Appellee argues the secured text message submitted as a will in this case does not meet the hallmarks of authenticity. *See Appellee's Response Brief*, pp. 31-33. Appellee failed to preserve their argument for appeal. The argument is inappropriately raised. *Pilgeram*, at ¶ 20.

Substantively, Appellee relies on Mont. Code Ann. § 72-2-522, which sets out the formalities for the execution of a witnessed will and a holographic will. There is no dispute the secured text message in this case does not meet the requirements of Mont. Code Ann. § 72-2-522. However, Appellee ignores the exception at the beginning of the statute: "[e]xcept as provided in 72-2-523..." Mont. Code Ann. § 72-2-522(1). The operative statute, Mont. Code Ann. § 72-2-523, specifically allows probate of documents which do not meet the formal requirements of a will. Appellee asks the Court to insert requirements into Mont. Code Ann. § 72-2-523, which simply do not exist. Appellee asks the Court to defeat the remedial directive of the statute. In briefing, Appellee extensively uses the word "tangible," even though the word appears nowhere in Mont. Code Ann. §

72-2-523. *See Response Brief*, chart p. 19. In fact, the statute states "document or writing," not "tangible" document or writing. Mont. Code Ann. § 72-2-523. If the Legislature intended a document or writing intended as a will to be "tangible" they would have explicitly provided for that either through a definition or including the word "tangible."

At the sole hearing before the district court, Appellant provided testimony from three lay witnesses and one expert witness regarding, in part, the authenticity of the message. Peeti Karmasuta was the party to whom the secured text message was originally sent. Mr. Karmasuta testified that he took the screenshot of the message sent by the Decedent. He further testified that Decedent screen name (DBX) and "his photo is the same that he always use." *Hearing Transcript* (June 20, 2023), 13:25 - 14:1-5. Mr. Karmasuta said he was in the habit of taking screenshots of messages sent by Decedent, and that the particular screenshot fairly and accurately represented the message received on January 8, 2023. *Hrg. Trancr.,* 14:22-23 - 15:6-9. David Holden was then called to the stand, who testified he specifically recalled receiving the same "foreboding" message from Decedent. *Hrg. Trancr.,* 30:5-20 - 31:4-6. Appellant Theodore Tenold also was called as a lay witness. Mr. Tenold testified further, confirming the same message as sent by Decedent to him. *Hrg.*

Trancr., 40:1-10-24-25, 41:1-10. Mr. Tenold confirmed the user name and image matched Decedent's identity. *Hrg. Trancr.,* 41:23-25 - 42:1-2. Appellee provided no cross-examination, witnesses, or other documentary evidence challenging the authenticity of the secured message either at the sole hearing or elsewhere in district court.

To further confirm the authenticity of the secured text message, Appellant called an expert witness, Benjamin Cotton. Mr. Cotton testified that he reviewed several copies and artifacts on four different individuals' Wire accounts of those who had communicated with Decedent through his Wire account and the original screenshot taken by Mr. Karmasuta. *Hrg. Trancr.,* 51:12-18. Upon review of the documents, Mr. Cotton - in his expert opinion - determined the screenshot had not been altered. *Hrg. Trancr.,* 52:21-22. Mr. Cotton's un-rebutted testimony confirmed the secured text message was sent by the Decedent. *Hrg. Trancr.,* 57:2-8. Appellee did not object to Mr. Cotton's qualifications and failed to present any evidence including competing expert opinion challenging Mr. Cotton's testimony. Consequently, clear and convincing evidence demonstrates the secured text message was a true and accurate copy of the original message that was sent. In other words, it was authentic.

B. The secured text message sent by Decedent demonstrates Decedent's testamentary intent in a more persuasive manner than *Kuralt*.

Decedent's intent evidenced in the secured text message is clear and uncontested. The "bedrock principle" of Montana courts, when examining a proposed will, is to determine the Decedent's intent. *In re Estate of Kuralt, infra,* at 341. The facts from *Kuralt* include a letter sent by the decedent to a non-family member with language stating, in relevant part, "I'll have the lawyer visit the hospital," which was sufficient to create a testamentary document. *Id*. at 338.

The language used by the Decedent in the secured text message is substantially similar to the language used by *Kuralt*. Decedent wrote "touching up my will" and clearly articulates the Decedent's intent regarding his interest in the sword company. Appellee attempts to circumvent the Court's precedent from *Kuralt* by citing to a case decided forty-five (45) years before *Kuralt,* and, notably, before the adoption of the Uniform Probate Code. *In re Watts' Estate* may not have been explicitly overturned in the *Kuralt* opinion, but the decision in *Kuralt* has the implicit effect of overturning *Watts'*.

Decedent's intent is further buttressed when looking at the surrounding circumstances at the time Decedent sent the secured

message and subsequently passed away.[1] Uncontested testimony shows at or around the time Decedent sent the text message and died: Decedent was in the Ukraine before and shortly after its invasion from Russia,[2] his health was failing, he was concerned about his life, he wanted his sword company to go to his partners because he believed his brothers had stolen from his father's estate, and Ukraine was in extreme turmoil due to conflict with Russia.

The secured text message does not have to provide conclusive evidence of the intent, nor does the document itself have to be intended as the testamentary document. *See*, *In re K.L.*, 2014 MT 28, ¶ 14, 373 Mont. 421, 318 P.3d 691, *Matter of Estate of Ramirez*, 264 Mont. 33, 36, 869 P.2d 263, 265 (1994), *In re the Estate of Kuralt*, 303 Mont. 335, 338, 2000 MT 359, 15 P.3d 931. The secured text message and surrounding circumstances show clear and convincing evidence that Decedent intended

[1]Appellee argues the text message is titled "still no news about the Norishige wak?" This is, in fact, not a title but the text message which was sent prior between parties before the text message at issue was sent. This is demonstrated in the formatting at the bottom of the sending party's identification photo and the gray dot next to the message.

[2]Appellee expresses their unsupported belief that Decedent went to the Ukraine to enter with the intent of entering the Russian/ Ukraine conflict. There is no evidence as to why Decedent visited the Ukraine, but there is testimony to show he regularly visited the Ukraine. The citation Appellee appeal uses to support their claim is from the district court order, which states, "He passed away in Kyiv, Ukraine, during the Russian/ Ukraine conflict."

his sword company to be devised to the named parties.

CONCLUSION

The UPC speaks for itself, and the Appellee's arguments regarding the UTEA and the UEWA attempt to distract the Court from the actual issue and the relevant statute. Mont. Code Ann. § 72-2-523 is a remedial statute for testators who have failed to comply with the formalities of a witnessed will or a holographic will. The Montana legislature, through Mont. Code Ann. §§ 72-1-202 and 72-2-523, have provided courts with subject matter jurisdiction over the construction of wills. The Court must use the authority granted by the Legislature to liberally construe the Mont. Code Ann. § 72-2-523. Court precedents, in *Kuralt, K.L.,* and *Ramirez,* establish the bedrock principle in examining a will is the intent of the testator. Courts should not create superfluous hurdles to a testator intent simply because a "document" is transmitted electronically rather than on paper. Here, the intent of the Decedent is clear and the surrounding circumstances support his intent further. For the foregoing reasons, Appellant respectfully requests this Court reverse the district court's ruling and hold that Decedent's writing satisfies the requirements of Mont. Code Ann. § 72-2-523. The secured text message should be probated as a will. A contrary result would frustrate the testator's clear intent in favor of technical formalities unsupported by Mont. Code Ann. § 72-2-523.

Dated this 15th day of March, 2024.

ST. PETER LAW OFFICES, P.C.

By: _____
Don C. St. Peter

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, 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, and the word count does not exceed 5,000 words, excluding Certificate of Service and the Certificate of Compliance.

Dated this 15th day of March, 2024.

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I, Donald Craig St. Peter, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-15-2024:

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