IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 24-0033

IN THE MATTER OF THE ESTATE OF JESSE BECK,

Deceased.

JASON BECK,

Appellant,

v.

ALEXIA BECK,

Appellee.

APPELLANT'S REPLY BRIEF

On Appeal From
The Montana Twenty-Second Judicial District Court, Carbon County
The Honorable Matthew J. Wald, Presiding

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ARGUMENT

I. In Her Brief, Alexia Completely Ignores MCA § 72-1-101, *In re Estate of Kuralt*, and Restatement (Second) Donative Transfers.

Tellingly, Alexia ignores that the Montana legislature passed MCA § 72-1-101 as part of the UPC in 2019 which expressly clarified that all sections of the UPC (including § 523) shall be "liberally construed" to "discover and make effective the intent of a decedent in distribution of the decedent's property". This is also consistent with the seminal and foundational decision by this Court *In re Estate of Kuralt* which held that "Montana Courts are guided by the bedrock principle of honoring the intent of the testator", which Alexia also ignores in her brief. 2000 MT 359, ¶ 17, 303 Mont. 335, 15 P.3d 931. As discussed in Jason's initial brief, the liberal construction of § 523 should include videos and other recordings as "documents". *See also Larson v. State by and through Stapleton*, 2019 MT 28, ¶ 29, 394 Mont. 167, 434 P.3d 241 ("Except where contrary to express statutory language, courts must liberally construe statutes enacted for remedial or 'beneficial' purposes 'to effect their objects and to promote justice.'")

Alexia also ignores the text of the Restatement (Second) of Donative Transfers (1991), which was expressly relied upon by the Montana legislature in the Official Comments of § 523. As discussed in Jason's initial brief, the Restatement (Second) of Donative Transfers included video recordings in its definition of documents. Thus, when it passed § 523, the Montana Legislature contemplated

video recordings to be documents by its reference and reliance on the Restatement (Second) of Donative Transfers §§ 32.1-33.1.

II. Alexia Mistakenly Argues That Allowing Video Recordings as Intended Wills Would Create "Absurd" Results.

In her brief, Alexia argues that allowing video recordings as intended wills under § 523 would create absurd results. As discussed in Jason's initial brief and here, the opposite is true. To categorically ignore a video wherein the decedent (Jesse, in this case) unequivocally states his testamentary intent only days before his death:

(I) Would create absurd results by requiring courts to ignore a compelling and probative document, *see Montana Sports Shooting Ass'n, Inc. v. State, Montana Dep't of Fish, Wildlife, & Parks*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003;

(II) Be contrary to the plain language of § 523, which allows for probate of "documents" which are intended as wills; and

(III) Violate the bedrock principle that Montana courts are to liberally construe the UPC, including § 523, to "discover and make effective the intent of a decedent in distribution of the decedent's property" and honor the testamentary intent of the decedent, *see* MCA § 72-1-101; *Kuralt*, ¶17.

Alexia also repeatedly conflates the requirements for a formal will under § 522 with

her proposed interpretation of § 523 which she claims requires a "writing". The entire purpose of § 523 is to allow a path to enforce a "document or writing" as a will that does not comply with § 522. Again, the legislature clearly intended § 523 to apply beyond "writings" because it included both the terms "document or writing". If the legislature intended "document" and "writing" to be synonymous, then it would not have included the term "document" in § 523 and would have simply used the term "writing" alone.

Alexia also argues that Jason has offered "*zero*" cases where a U.S. court has ruled the harmless error rule does not apply to video recordings. First, as discussed in Jason's initial brief, there is ample legal authority to support Jason's interpretation of § 523, including Australian cases allowing probate of video recordings under the Australian statute after which § 523 was modelled. Second, Alexia offers *zero* cases where a court (from any jurisdiction) refused to probate a video recording under the harmless error rule.

Alexia mistakenly argues, without any citation to authority, that there is a "near legal consensus among legal scholars who agree that under current statutory schemes, video wills are not valid substitutes for written wills." First, this argument would only apply to a written will under § 522, not an intended will under § 523. Second, the only scholarly authority Alexia provides in her brief is (I) a Baylor Law Review article that speculates, without citing to any direct authority, that the

harmless error rule may not include video or audio recordings; and (II) an Iowa Law Review Note by a then-law student in 1992 (before Montana adopted the harmless error rule) noting that a video could not be a holographic or non-cupative will, which is distinct from the harmless error rule. By no means is this a "near legal consensus".

Lastly, Alexia mistakenly argues that the legislature would have set forth an authenticity requirement in § 523 had it intended to consider video recordings as intended wills. This argument ignores that § 523 expressly requires a showing of "clear and convincing" evidence that "the decedent intended the document or writing to constitute" his will. This evidentiary standard, which Jason was denied the opportunity to establish by the district court, would be met by the submission of evidence and would resolve any concerns about authenticity.

III. Jason Did, in Fact, Argue in His Initial Brief That the Legislature Considered Video Recordings When It Adopted the Harmless Error Rule (§ 523) in 1993.

Contrary to Alexia's statement in her brief, Jason does not concede "that at the time the legislature enacted § 72-2-523 the term 'document' did not include audio or visual recordings." *See* Alexia's Brief at p. 13. Pages 9-11, 13-14 of Jason's brief contain legal arguments that, in 1993, the Montana legislature did, in fact, intend the term "document" to include audio or visual recordings, including quotations from the Official Comments to § 523, the Restatement (Second) of Property (Donative Transfers), and legislation and cases from Australia and other

countries after which the harmless error rule was modelled.

IV. The Adoption, or Lack Thereof, of the Uniform Electronic Wills Act Does Not Impact This Court's Interpretation of § 523 and Whether a Video Recording Can Qualify as an Intended Will.

In pages 20-24 of her brief, Alexia mistakenly argues that the Montana legislature's failure to adopt the Uniform Electronic Wills Act ("UEWA") disqualifies an electronic video from probate under § 523.[1] This argument is without merit. Alexia's argument only applies to whether a will complying with the formal will requirements (i.e. not an intended will) would be enforceable under UEWA.

The Uniform Law Commission's ("ULC") comments to the UEWA establish that the UEWA, or a substantively similar act, is not required for a court to probate an electronic document under the existing laws of many states. For example, the ULC noted:

> In a more recent Ohio case, *In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013), the testator dictated a will to his brother, who wrote the will with a stylus on a Samsung Galaxy Tablet. The testator then signed the will on the tablet, using the stylus, as did the two witnesses. The probate court had to decide whether the electronic writing on the tablet met the statutory requirement that a will be "in writing." The court concluded that it did and admitted the will to probate. In *Castro*, the testator and all witnesses were in the same room and signed using a stylus rather than typing a signature. The Uniform Electronic Wills Act ("the E-Wills Act") gives effect to such a will and clarifies that the will meets the writing requirement. In *Castro*, the

[1] Uniform Law Commission, 2019 Electronic Wills Act; Act Summary (last updated Mar. 25, 2024), https://www.uniformlaws.org/committees/community-home?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71

> testator and witnesses had not signed an affidavit, so the will was not self-proving. Under the E-Wills Act, if a notary is present with the testator and witnesses, the will can be made self-proving. An alternative provided under the E-Wills Act allows a notary present electronically to prepare the self-proving affidavit.

The ULC also analyzed *In re Estate of Horton* (cited in Jason's initial brief) as another example of a court probating an electronic document under "Michigan's harmless error statute". 325 Mich. App. 325, 925 N.W.2d 207 (Mich. App. 2018); *see also Taylor v. Holt*, 134 S.W.3d 830 (Tenn. App. 2003) (another case noted by the ULC probating electronic documents). Indeed, the ULC noted that "existing statutes might validate wills like the ones in *Castro* and *Taylor*, litigation may be necessary to resolve the question of validity" and "[s]tates that have adopted the harmless error rule for will execution could use that rule to validate an electronic will, as the court did in *In re Horton*." (Emphasis added). § 6 of the UEWA is the equivalent of the harmless error rule, and the comments of § 6 acknowledge that 11 states (which includes Montana's § 523) already adopted the UPC's harmless error rule.

Moreover, Montana has not expressly prohibited electronic wills in its adoption of the UPC, unlike other states which have expressly prohibited electronic wills. *See e.g.* N.H. Rev. Stat. § 551:2 (New Hampshire statute which states "[n]othing in this paragraph shall be deemed to allow an electronic will or codicil."); ORS § 112.235 (Oregan statute which states "[a]s used in this section, 'writing' does

not include an electronic record, document or image."). This further supports the fact that Montana courts, like the Michigan court in *In re Estate Horton*, can probate electronic intended wills under the harmless error rule without the adoption of the UEWA.

In summary, § 523 is the harmless error rule, and § 523 allows Montana courts to probate electronic documents, including electronic video recordings. § 523 provides the framework for Montana courts to probate a document intended as a will, even without the adoption of the UEWA.

V. Alexia Improperly Relies Upon Facts and Arguments Not in the Record.

In the last paragraph of page 2 which continues onto page 3 of Alexia's brief, Alexia improperly states "facts" which are not on the record in the district court, are stated for the first time on appeal, and cite to no evidentiary support. In addition, on page 10 of Alexia's brief, Alexia's counsel provides a narrative of the development of technology such as DVDs and camera phones, which is not on the record in the district court, stated for the first time on appeal, and provided no evidentiary support. "The position of this Court is that we will not consider on appeal facts unsubstantiated by the record in the case." *In re Marriage of Hayes*, 256 Mont. 266, 268, 846 P.2d 272 (1993). As such, the Court should disregard these facts and arguments.

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CONCLUSION

This Court should reverse the District Court's Order, find that videos qualify as an intended will under § 523, and remand the case to the District Court to probate the Video consistent with this Court's decision.

DATED this 25th day of March, 2024.

DRIGGS BILLS & DAY, P.C.
Attorney for Appellant Jason Beck

By: /s/ Ian P. Gillespie
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to M. R. App. P. 11, this brief is proportionately spaced, 14-point font, and contains 1,814 words, as counted by the undersigned's word processing software, excluding any Caption, Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and/or any Appendix.

DATED this 25th day of March, 2024.

DRIGGS BILLS & DAY, P.C.
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CERTIFICATE OF SERVICE

I, Ian Philip Gillespie, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-25-2024:

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