SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA 24-0084

FAYE JACKSON, an individual, and as Personal Representative of the Estate of Edna Balkoski, Deceased,

Plaintiff, and Appellant,

vs.

STEVEN BALKOSKI, an individual,

Defendant, and Appellee.

APPELLANT'S BRIEF

On Appeal from the Montana 18th Judicial District, Gallatin County
Cause No. DV 2019-726C
Before Hon. John Brown

Appearances:

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STATEMENT OF THE CASE

Edna Balkoski ("Edna") was ninety-two years old when she signed a quitclaim deed transferring half of her residence, and largest asset, to her son Steven Balkowski ("Steven") on January 14, 2016. Later, Edna decided to move from Bozeman to Billings because she became unhappy with her healthcare in Bozeman and wanted to be by her daughter, Faye Jackson. When she hired a real estate agent to list her property for sale, she was informed that the quitclaim deed she signed on January 14, 2016 immediately transferred half her interest to Steven the day she signed it. The real estate agent informed Edna that Steven would have to agree to sell the Property before she would list it for sale. Steven refused to sell the property unless he received half of the sale proceeds directly from escrow.

Needing the proceeds from the sale of the property to finance her healthcare and the remainder of her life, Edna asked Steven to transfer title back to her. Steven

refused. Edna filed the underlying litigation against Steven to obtain the half interest back from him alleging undue influence, recission and mistake. During the pendency of litigation, Edna recorded documents severing the joint tenancy with Steven. Edna passed away in August 2020, and on September 4, 2020, the District Court substituted Edna as a party and replaced her with her Estate—the Appellant, here. (Doc. 81).

A bench trial was held on February 8, February 10, and March 1, 2021. During trial, Appellant's counsel moved, and was granted, leave to amend the Complaint, pursuant to Montana Rule of Civil Procedure 15(b)(2), to include a claim for the creation of a constructive trust resulting from unjust enrichment based on admissions from Steven and his daughter that Steven informed Edna, prior to her executing the quitclaim deed, that he would use his half of the proceeds of any sale for Edna's benefit.

Over two-and-a-half years after the bench trial, on November 1, 2023, the District Court issued its original Findings of Fact, Conclusions of Law and Order ("Original Order"). However, the Original Order failed to address the Estate's claim for a constructive trust. (Doc. 125). The District Court then stayed this matter, and issued its Amended Findings of Fact, Conclusions of Law and Order ("Amended Order") addressing the constructive trust claim and rejecting the same. (Doc. 132). The Estate filed a Motion to Stay Order Pending Appeal, which has been briefed

but the District Court has not ruled upon. (Doc. 138 and 139). The Estate filed its Notice of Appeal on February 8, 2024. (Doc. 141).

STATEMENT OF THE FACTS

1. Edna Balkoski ("Edna") and her husband Stanley Balkoski (who passed away in 1995) had two children, Faye Jackson ("Faye") and Defendant-Appellee Steven Balkowski ("Steven"). (Doc. 132, p. 2).

2. At all times relevant herein, Steven resided in Washington and Faye resided in Montana. (Doc. 132, p. 2).

3. Edna filed the underlying action in June of 2019, but passed away in 2020, during the pendency of this litigation, at the age of 97. (Doc. 75).

4. Faye was appointed as the personal representative of the Estate of Edna M. Balkoski ("Edna's Estate") and continued with the litigation on behalf of her mother's estate. (Doc. 81).

5. In December of 2013, Edna purchased 2411 Milkhouse Avenue in Bozeman, Montana (the "Property") and was its sole owner. (Trial Transcript Day One – 47:1-4, Exhibit 3).

6. The Property was Edna's largest asset. (Trial Transcript Day One – 47:1-4, Exhibit 3; Trial Transcript Day Two – 215:17 – 23).

7. Initially Faye lived in the Property with Edna. (Trial Transcript Day Two - 48:12-14).

8. In late spring or early summer of 2015 Faye moved out of the Property and to Billings. (Trial Transcript Day Two - 46:24 – 47:6).

9. Steven, while living in Washington learned that Edna provided Faye a loan, which Faye had been repaying. (Trial Transcript Day Two – 112:17 – 113:3; Trial Transcript Day Three – 118:4-6).

10. Steven grew agitated with Edna's loan to Faye. (Trial Transcript Day Two – 112:17–113:3).

11. Steven felt the loan from Edna to Faye would affect the inheritance he expected to receive from Edna, and that he believed he was entitled to fifty percent (50%) of Edna's estate. (Trial Transcript Day One – 89:18 – 90:7).

12. Even though Edna did not get along with Steven's daughter, Adria, and even referred to Adria as the "diabolical child," Steven had his daughter move into Edna's house. (Trial Transcript Day One – 57:9 – 17; Trial Transcript Day Two – 198:24 – 199:6).

13. On September 14, 2015, Steven came to see Edna in Montana, and he got very emotional during a conversation with Edna; after which Edna said she would appoint Steven as her "attorney-in-fact." (Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S – 87:12-88:11).

14. On September 15, 2015, Steven drove Edna to U.S. Bank and witnessed Edna sign a General Power of Attorney that appointed Steven as Edna's

"attorney-in-fact." (Trial Transcript Day One – 75:15-25, Plaintiff's Trial Exhibit 5).

15. That General Power of Attorney provided Steven the authority to act in Edna's name with respect to certain matters, including, but not limited to real estate transactions, banking transactions, and estate transactions. (Trial Transcript Day One – 75:15-25, Plaintiff's Trial Exhibit 5).

16. Steven understood that the General Power of Attorney was "very powerful thing that I had to -- I would have to get more counsel if something would have arose." (Trial Transcript Day One – 65:1 – 4, and 102:5 – 9).

17. During this time, and until her death, Edna experienced medical issues and several symptoms of those medical issues, including anxiety issues and breathing problems. (Trial Transcript Day One – 177:3 – 8). Edna was also very hard of hearing and had vision issues. (Trial Transcript Day One – 215:5 - 7).

18. Edna's medical issues resulted in her admission to the hospital or her seeking medical care on numerous occasions and from July 22, 2015 until November 13, 2015, Edna was either hospitalized, visited the emergency room, or had a medical visit on at least ten (10) separate occasions. (Trial Transcript Day One – 167:6-8, 169:19-20, 173:5-25, 175:7-8, 182:7-15; Trial Transcript Day Two – 149:10-13 and 22-24).

19. Steven personally observed or was made aware of Edna's various

medical issues and her numerous hospitalizations, admissions to the emergency room, and medical visits. (Trial Transcript Day One – 150:9 – 18).

20. Steven again traveled back to Montana to see Edna in January 2016. (Trial Transcript Day One – 84:24 – 85:5).

21. On or around January 13, 2016, Steven and Edna had a conversation at her Property. During that conversation Steven got visibly upset and emotional while talking about money issues, including his inheritance, and Edna's loan to Faye. (Trial Transcript Day One – 87:12 – 88:11; Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S – 45:21 – 46:25).

22. Steven brought up the idea that Edna should sign a new deed to the Property and include Steven on the new deed to the Property. (Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S – 47:3 - 6). Edna felt that she had no choice but to put his name on the deed to the Property. (Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S – 47: 3-6, and 11-13).

23. Steven told Edna if the Property was sold during Edna's life that he (Steven) was going to use any proceeds from the sale for Edna's care and for her future expenses. (Trial Transcript Day Two – 159:15-25; 203:21 – 204:4; Trial Transcript Day Three – 149:24 – 150:6).

24. Steven then arranged to drive Edna to Security Title on January 14, 2016 and Edna signed the quitclaim deed ("Quitclaim Deed"), as the sole owner of

the Property, to Edna and Steven as joint tenants with a right of survivorship, while Steven watched. (Trial Transcript Day One – 123:6 – 124:6).

25. At the time the Quitclaim Deed to the Property was signed, Edna was ninety-two (92) years old. (Doc. 132, p. 2).

26. Edna recalls that the people at Security Title "didn't explain anything about the document [Quitclaim Deed]." (Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S – 45:19-20).

27. Even though Steven knew his role as the "attorney-in-fact" was a very powerful thing and knowing that he should get "more counsel" if something arose, he did not inform nor advise Edna to talk with an attorney prior to her signing the Quitclaim Deed granting him half-interest in the Property. (Trial Transcript Day One – 88:12 – 18).

28. After the Quitclaim Deed was signed, Steven went back to live in Washington and Edna continued to live at the Property. Nothing changed from Edna's perspective except that Adria eventually moved out after the Quitclaim Deed was signed. (Trial Transcript Day Two – 187:17 – 20).

29. Steven testified that his intentions were that the Quitclaim Deed was signed to protect his inheritance, and because he felt he was entitled to fifty percent (50%) of the inheritance from his mother (Edna) – not to ensure his mother had money to fund the remainder of her life and her healthcare. (Trial Transcript Day

One – 89:18 – 90:7).

30. Steven did not pay Edna for the ownership interest he received from the Quitclaim Deed and he also did not provide any monetary consideration for her signing the Quitclaim Deed. (Trial Transcript Day One – 91:17 – 18, and 92:11 - 20).

31. In 2018 and 2019, Edna became upset and dissatisfied with the level of medical care she was receiving in Bozeman. (Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S – 60:9 – 11). As a result, she decided to move to Billings for better treatment and care options. (Trial Transcript Day Two – 126:20-23, Plaintiff's Trial Exhibit 10).

32. Edna needed to sell the Property to help finance the remainder of her life including a purchase of a home in Billings where she would live. (Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S – 38:9 – 14).

33. In preparation for the move to Billings, Edna met with a real estate agent to list the Property and her real estate agent informed Edna that she would need the permission of the "co-owner" of the Property to sell the Property and that the other co-owner of the Property was her son – Steven. That information made Edna very upset. (Trial Transcript Day Two – 46:17 – 20, 86:18 – 25).

34. After learning the information from the real estate agent, in early April 2019, Edna reached out to Steven and requested that he sign a quitclaim deed to

return complete ownership of her Property to her so that she could fund the remainder of her life and move to Billings. (Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S –52:3 – 14; Plaintiff's Trial Exhibit 10; Trial Transcript Day Two – 195:17-18, Plaintiff's Trial Exhibit 9).

35. Steven refused to sign the quitclaim deed requested by his mother, and instead in a letter dated April 4, 2019, he indicated he would not sign off on any sale unless he received half of the sales price less half the closing costs. (Plaintiff's Trial Exhibit 11). Steven continued to refuse to agree to sell the Property unless he received half the sale price in multiple letters. (Trial Transcript Day One – 118:13-14, Plaintiff's Trial Exhibit 12; Trial Transcript Day One – 135:7-8, Plaintiff's Trial Exhibit 14; Trial Transcript Day One – 138:21-22, Plaintiff's Trial Exhibit 15).

36. Edna eventually passed away without ever being able to benefit from the equity she had in the Property. (Doc. 75).

SUMMARY OF THE ARGUMENT

In Montana a claim for unjust enrichment does **not** require proof of wrongdoing, including proof of mistake, fraud or undue influence. *Northern Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24, ¶ 29, 368 Mont. 330, 296 P.3d 450 (emphasis added). The District Court, however, incorrectly concluded that proof of mistake, fraud, or undue influence is a prerequisite to a finding of unjust enrichment. Based on this improper conclusion the District Court wrongly

concluded that unjust enrichment was not proved, and the District Court failed to analyze the third element of unjust enrichment: whether Steven's retention of half the interest in the Property is inequitable under the circumstances. Evidence of Steven's pressure on Edna about his inheritance, his false assurances to Edna that sale proceeds would be used for her benefit during her life, his facilitation of execution of the Quitclaim Deed to himself, and his subsequent refusal to sell the Property (as Edna requested) unless he received half the sale proceeds to be divided between his family members, and deprivation of Edna's use and benefit of the proceeds of her largest asset during her life, all support a finding that Steven's retention of half ownership interest in the Property would be inequitable.

The District Court also incorrectly concluded that evidence of specific acts of influence were not presented. Specific Acts of influence are present when there are "demands and importunities". Steven's emotional pleas to Edna regarding inheritance, his false assurances made prior to execution of the Quitclaim Deed, and facilitation of her executing the Quitclaim Deed are such acts. The District Court's incorrect conclusion resulted in the summary dismissal of the Estate's undue influence claim without the required analysis of the evidence.

Although the Estate's interest in the Property was not an issue in the case, and despite that Edna severed the joint tenancy with Steven prior to trial, the District Court incorrectly concluded that Steven has the sole interest in the Property. Such a

conclusion deprived the Estate of its property without an opportunity to be heard, in violated the Estate's due process rights. Such a conclusion was an incorrect application of Montana law in light of Edna's severance of the joint tenancy.

STANDARD OF REVIEW

Findings of fact in a civil bench trial are reviewed to determine if they are supported by substantial credible evidence. *JTL Group, Inc. v. New Outlook*, LLP, 2010 MT 1, ¶ 30, 355 Mont. 1, 223 P.3d 912; citing *DeNiro v. Gasvoda*, 1999 MT 129, ¶ 9, 294 Mont. 478, 982 P.2d 1002. The evidence is viewed in the light most favorable to the prevailing party. *Id*. Conclusions of law in this context are also reviewed for correctness. *Id*.

ARGUMENT

I. A CONSTRUCTIVE TRUST RESULTED FROM STEVEN'S UNJUST ENRICHMENT

A constructive trust is an "involuntary trust" that "arise independently of any express contract and may be proven by parol evidence." *In re Est. of McDermott*, 2002 MT 164, ¶ 24, 310 Mont. 435, 441, 51 P.3d 486, 490. "A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the person holding title would be unjustly enriched if the holder were permitted to retain it." § 72-38-123, MCA. "A

constructive trust serves as a proper remedy to unjust enrichment." *Volk v. Goeser*, 2016 MT 61, ¶ 45, 382 Mont. 382, 396, 367 P.3d 378, 388. A claim for unjust enrichment, in the context of a constructive trust, requires proof of three elements:

> (1) a benefit conferred upon a defendant by another; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention of the benefit by the defendant under such circumstances that would make it inequitable for the defendant to retain the benefit without payment of its value.

Volk, ¶ 45.

a. THE DISTRICT COURT REQUIRED PROOF OF FACTS THAT ARE NOT NECESSARY TO ESTABLISH A CLAIM OF UNJUST ENRICHMENT WHEN IT REQUIRED THE ESTATE TO PROVE MISTAKE, FRAUD OR UNDUE INFLUENCE.

Here, the District Court concluded that "Steven acknowledges that he received title to the property at issue pursuant to the Quit Claim Deed [sic], which he was aware of and appreciated. This satisfies the first two elements of unjust enrichment." (Doc. 132, ¶ 12). The central dispute in this appeal, therefore, surrounds the third element in which the District Court "was required to weigh the facts and evidence to determine whether the retention of the benefit" by Steven under these circumstances would be inequitable without payment of its value. *Volk*, ¶ 42.

In refusing to impose a constructive trust, however, the District Court analyzed the facts and evidence under an improper legal lens. Rather than weigh the facts and evidence to determine whether Steven's retention of the benefit would be inequitable, the District Court instead concluded that the Estate was required, and

failed, to prove that Steven accepted the transfer of the property by mistake, fraud or undue influence:

> "…the Estate failed to prove that the Quit Claim [sic] Deed was induced by mistake, fraud, or undue influence. ***Therefore,*** the Estate failed to prove that Steven received and accepted the transfer of the property at issue under inequitable circumstances. ***The Estate thus failed to establish its claim for a constructive trust***."

(Doc. 132, Conclusions of Law ¶13, citing *Darty v. Grauman,* 2018 MT 129, ¶12, 391 Mont. 393, 397, 419 P.3d 116, 119)(emphasis added).

The District Court relies on *Darty* to support the proposition that the Estate had to prove that the Quitclaim Deed was induced by mistake, fraud or undue influence. Nowhere in, however, did this Court ever hold that mistake, fraud or undue influence was required for a finding of unjust enrichment and resulting constructive trust. In fact, this Court has repeatedly held that a finding of wrongdoing by the defendant is not necessary to prove unjust enrichment. *See Northern Cheyenne Tribe*, ¶ 29; *Volk*, ¶ 45.

The Estate did not need to prove mistake, fraud or undue influence to prove the third element of unjust enrichment. Rather it needed to prove that Steve's retention of the Property under the circumstances of this case would be inequitable without payment of its value. *Volk*, ¶ 45. The District Court's Conclusion of Law was incorrect, and as a result, it did not conduct an analysis of the facts to determine if it would be inequitable for Steven to retain the Property.

b. THE DISTRICT COURT'S IMPROPER LEGAL REQUIREMENT—OF MISTAKE, FRAUD OR UNJUST ENRICHMENT— TO PROVE UNJUST ENRICHMENT RESULTED IN IT IGNORING RELEVANT EVIDENCE THAT PROVED STEVEN'S INEQUITABLE RETENTION OF THE PROPERTY.

The District Court's use of the wrong legal criteria to evaluate the third element of unjust enrichment was reversable error because it did not evaluate facts relevant to the third element. For example, the District Court's findings of fact is void of the evidence showing that Steven made assurances to Edna that the proceeds of any sale of the Property would be used to benefit her.

Steven's own daughter, Adria, testified that Steven told Edna, before Edna signed the quitclaim deed, that he was going to put the proceeds from any sale of the house into a trust in case Edna needed it for her future care and expenses. (Trial Transcript Day Two – 159:15-25; 203:21 – 204:4). Steven admitted at trial that his stated intention was to put any money he received from the sale of the Property while Edna was alive into a trust for Edna's well-being. (Trial Transcript Day Three – 106:9 – 20); (Trial Transcript Day Three – 149:24 – 150:6). His subsequent conduct, however, contradicted this verbal assurance to Edna.

When Edna became dissatisfied with her healthcare in Bozeman, she wanted to sell the Property support her move to Billings and fund the remainder of her healthcare and life. (Trial Transcript Day Two – 126:20-23, Plaintiff's Trial Exhibit 10). When she was informed that the Quitclaim Deed she signed had given Steven an immediate half-interest in the Property, she asked Steven to transfer the Property

back to her. (Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S – 52:3 – 14; Trial Transcript Day Two – 126:20-23, Plaintiff's Trial Exhibit 10; Trial Transcript Day Two – 195:17-18, Plaintiff's Trial Exhibit 9).

Steven, however, recanted on his assurances. He refused to sell the Property unless he received half of the proceeds by "certified check for my sales proceeds on the date of closing. This is non negotiable." (Trial Transcript Day One – 109:8-9, Plaintiff's Trial Exhibit 11). Steven testified at trial that when he received the proceeds, he intended to divide the proceeds among various family members. (Trial Transcript Day One – 132:24 – 133:7). He also testified that he procured the Quitclaim Deed as a way to protect what he believed he was entitled to: half of Edna's estate. (Trial Transcript Day One – 89:18 – 90:7). Instead of allowing Edna to access the proceeds she needed, Steven's actions, and the control he exerted during the time he was Edna's attorney-in-fact, were more self-serving: aimed at securing what he believed his inheritance should be, rather than genuinely using the interest in the Property to benefit Edna, as he assured her.

All of the foregoing facts were relevant to an analysis of whether Steven's retention of the Property was inequitable under the circumstances. Yet, they were void from the District Court's findings of fact because it wrongfully concluded that there must be mistake, fraud or undue influence to support an unjust enrichment claim.

c. THE FINDINGS OF FACT THAT THE DISTRICT COURT RELIED ON TO SUPPORT ITS RULING NOT ONLY LACKED SUBSTANTIAL EVIDENCE BUT WAS CONTRARY TO THE EVIDENCE PRESENTED.

The District Court also committed a reversible error because the findings of fact it relied on to reach its conclusions were not supported by substantial evidence. Here, the District Court's findings of fact not only ignored Steven's aforementioned assurances to Edna prior to Edna's signing the Quitclaim Deed in 2016, it also erroneously found "Steven's testimony at trial regarding a plan for the proceeds of a sale of the property during Edna's lifetime was hypothetical as no specific sale was negotiated, and no sale occurred." (Doc. 132, ¶ 25). The District Court, however, misapprehends the facts.

Steven precluded the sale of the Property over Edna's pleas to sell. There was undisputed evidence that Edna attempted to sell the Property in April of 2019, but that the sale could not occur because, contrary to Steven's prior assurances, Steven refused to sell the Property. (Trial Transcript Day One – 109:8-9, Plaintiff's Trial Exhibit 11; Trial Transcript Day One – 135:7-8, Plaintiff's Trial Exhibit 14; Trial Transcript Day One – 138:21-22, Plaintiff's Trial Exhibit 15). The verbal assurances by Steven to put the proceeds from a sale toward Edna's future care were not "hypothetical", the assurances were made, but because Steven recanted and refused to sell the Property, it deprived Edna's use of **any** of the proceeds.

Moreover, the District Court also found that "Steven testified that Edna transferred the property as a gift to Steven, to avoid probate and to balance the cash gifts she had previous given to Faye." However, Steven never testified that Edna transferred the Property to him as a gift. Steven never testified that Edna transferred him the Property to avoid probate. In fact, Steven's testimony regarding probate was limited to the following exchange with his counsel:

> BY MS. HARRIS:
> Q. So did you, at any point, discuss with your mom probate?
>
> A. No.
>
> Q. Do you know what probate is, sir?
>
> A. No, I can't tell you what probate is. I think it's a legal thing.

(Trial Transcript Day One – 61:8-13). Steven also confirmed in his testimony that the reason he wanted Edna to sign the Quitclaim Deed was to protect what Steven believed he should inherit from his mother. (Trial Transcript Day One – 89:18-21). When asked if Steven believed he was entitled to a specific amount of inheritance from his mother (Edna), he responded that he was entitled to fifty percent. (Trial Transcript Day One – 90:5-7). As such, findings of fact ¶ 20 is clearly erroneous.

The principles of equity allow this Court broad discretion in creating constructive trusts. *N. Cheyenne Tribe*, ¶ 32; *see also Eckart v. Hubbard,* 184 Mont. 320, 325, 602 P.2d 988, 991 (1979) (affirmed that the principles of equity allowed a

court simply to declare a constructive trust "shall be [declared] to exist. Nothing else is required."). Steven has been unjustly enriched because he holds "property under such circumstances that in equity and good conscience he ought not to retain it." *N. Cheyenne Tribe*, ¶ 33 (citation omitted). Steven assured his mother that if the property were sold, the funds would be used for her future healthcare and for her use during the remainder of her life. (Trial Transcript Day Two – 159:15-25; 203:21 – 204:4). (Trial Transcript Day Three – 106:9 – 20); (Trial Transcript Day Three – 149:24 – 150:6).

Instead, when Edna attempted to sell the Property, Steven refused to sell unless he received half of the proceeds from escrow, because, as he testified to at trial, he wanted the "inheritance" that he believed he was entitled to and would divide it up among his family. (Trial Transcript Day One – 109:8-9, Plaintiff's Trial Exhibit 11; Trial Transcript Day One – 132:24 – 133:7). As such, Edna's Estate respectfully requests this Court remand this matter with instructions back to the District Court to impose a constructive trust over Steven's ownership interest in the Property for the benefit of the Estate. And, to return the parties to the status quo that existed prior to the Quitclaim Deed, with further instructions to order that the entire Property be transferred to Edna's Estate or order Steven to pay the value of his ownership interest in the Property to Edna's Estate. *Volk*, ¶ 39 ("returning the parties to the status quo in this case would require return of the life insurance proceeds to the estate…").

II. SPECIFIC ACTS OF UNDUE INFLUENCE WERE PRESENTED BUT NOT CONSIDERED BY THE DISTRICT COURT

Conclusion of Law ¶ 7 determined that there was no undue influence. (Doc. 132, p. 5 and 6). This conclusion was based solely on the conclusion that evidence of a specific act of undue influence was required and that "There is no evidence of such specific act". (Doc. 132, p. 6). This conclusion is incorrect.

What a "specific act" of influence actually is, has never been clearly articulated in case law. However, this Court has indicated that evidence of an act that was "exercised upon the mind of the testator directly to procure the execution . . ." of the document would suffice. *In re Est. of Harmon,* 2011 MT 84, ¶ 22, 360 Mont. 150, 155, 253 P.3d 821, 827. This Court has also considered "demands and importunities" acts of influence. *Pense v. Lindsey*, 2003 MT 182, ¶ 26, 316 Mont. 429, 436, 73 P.3d 168, 173.

In *Pense,* for example, an elderly woman (Pense) who had previously resisted conveying a property, abruptly decided to convey the property to her "friends" (the Lindsey's) after they explained to her their plans they had for the land. *Id.,* ¶ 28. The Court noted that after Pense relented to the Lindsey's requests to convey the property to them, the Lindsey's then jumped into action and "made arrangements for the Deed to be prepared and executed." *Id.* When Pense asked for her land back, the Lindsey's then "attempted to set the conditions for its return." *Id*. The Montana Supreme Court held that "Pense possessed a weakness of mind and that the

Lindsey's actions over these several months constituted their taking an unfair advantage of that weakness under § 28-2-407(2), MCA (1999)." *Id*. This Court upheld the District Court's finding of undue influence.

Conclusion of law ¶ 7's conclusion that "[t]here is no evidence of such specific act" is incorrect; the District Court simply did not recount evidence of the acts of influence in its findings of fact. On or around January 13, 2016, Steven was talking to Edna and got visibly upset and emotional while talking about money issues, including his inheritance. (Trial Transcript Day One – 87:12 – 88:11; Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S – 45:21 – 46:25). Steven believed that he was entitled to 50% of Edna's Estate and became concerned that he would not receive what he thought he was entitled to. (Trial Transcript Day One – 89:18 – 90:7). During this conversation Steven brought up the idea that Edna should sign a new deed to the Property and include Steven on the new deed to the Property. (Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S – 47:3 - 6). Edna felt that she had no choice but to put his name on the deed to the Property. (Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S – 47: 3-6, and 11-13). Steven assured Edna if the Property was sold during Edna's life that he (Steven) was going to use the proceeds he received from the sale for Edna's care and for her future expenses. (Trial Transcript Day Two – 159:15-25; 203:21 – 204:4). Steven then drove Edna to Security Title to sign the Quitclaim Deed. (Trial

Transcript Day One – 86:7-8, Plaintiff's Trial Exhibit 6; Trial Transcript Day One – 123:6 – 23). While Steven (Edna's attorney-in-fact at the time) was present, on January 14, 2016, Edna signed the Quitclaim Deed as the sole owner of the Property to Edna and Steven as joint tenants with a right of survivorship. (Trial Transcript Day One – 86:7-8, Plaintiff's Trial Exhibit 6; Trial Transcript Day One – 123:6 – 23).

Given this evidence of "specific acts" of influence, this Court has explained that a trier of fact should then "consider 'the opportunity for undue influence, including the testator's susceptibility to influence, and whether the disposition of property was natural." *Matter of Est. of Edwards*, 2017 MT 93, ¶ 56, 387 Mont. 274, 289, 393 P.3d 639, 650. This Court further explained that "the opportunity to exercise undue influence is to ***be considered and correlated*** with the alleged acts of influence to determine if the acts amount to undue influence". *Id.* (emphasis added)(citation omitted). There does not need to be direct evidence of undue influence, "[a] finding of undue influence may be based on circumstantial evidence." *Id;* citing *In re Est. of Lightfield*, 2009 MT 244, ¶¶ 40-42, 351 Mont. 426, 434–35, 213 P.3d 468, 475.

Here, however, the District Court, never even considered the opportunity for undue influence, nor analyzed the correlation between the "opportunity to exercise undue influence" with the "acts of influence" because it wrongly concluded that

there simply was no evidence of specific "acts of influence". As a result, the District Court summarily ruled against the Estate on undue influence.

The District Court never considered the evidence that Edna was experiencing significant physical and mental distress ailments, including severe anxiety, for which she was seeking medical treatment. (Doc. 46, Exhibit A, ¶¶ 9 – 10). That Steven had his daughter Adria move into the Property to serve as Steven's "representative", and that Edna did not get along with Adria and even referred to Adria as the "diabolical child". (Trial Transcript Day One – 57:9 – 17; Trial Transcript Day Two – 198:24 – 199:6). Or that Adria stayed at the property until after the Quitclaim Deed was signed. (Trial Transcript Day Two – 187:17 – 20). It never analyzed the correlation of these and other facts with the evidence of acts of influence that occurred when Steven bemoaned to Edna about money, his inheritance, and the loan that Edna provided to Faye. (Trial Transcript Day One – 87:12 – 88:11; Trial Transcript Day One – 147:9-11, Defendant's Trial Exhibit S – 45:21 – 46:25). It never considered Steven's assurances to Edna prior to her signing the Quitclaim Deed that he would use proceeds from the sale of the Property for her benefit. (Trial Transcript Day Two – 159:15-25; 203:21 – 204:4). That Steven then hurriedly arranged and drove Edna to Security Title for her to sign the new Quitclaim Deed and Steven watched over Edna as she signed the Quitclaim Deed. (Trial Transcript Day One – 86:7-8, Plaintiff's Trial Exhibit 6; Trial Transcript Day One – 123:19 – 124:6).

None of these facts, or others, were considered or analyzed by the District Court because it wrongfully concluded that there was no evidence of specific acts of influence. Rather its incorrect conclusion summarily deprived the Estate of consideration of the foregoing evidence. The Estate, therefore, respectfully requests that the District Court's decision be overturned and the matter remanded.

III. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT STEVEN HAD SOLE RIGHTS TO THE PROPERTY AND THEREBY VIOLATED THE ESTATE'S DUE PROCESS RIGHTS.

The Estate's ownership interest in the Property was never at issue. Neither party sought a judicial declaration, order or judgment from the District Court determining that Steven was the sole owner of the Property, not even Steven. (Doc. 79). As such, this issue was not before the District Court. Nevertheless, in its conclusion of law ¶ 16, the District Court stated in part "with the death of Edna, Steven has sole rights to the property." (Doc. 132). Following the entry of the Amended Order, Steven and his counsel have taken certain action, which are not part of this record and will not be recounted here, to take sole possession and control of the Property based on conclusion of law ¶16. However, it is clear their actions are based on conclusion of law ¶16.

An essential element of due process is the "opportunity to be heard." *Bardsley v. Pluger*, 2015 MT 301, ¶ 15, 381 Mont. 284, 287, 358 P.3d 907, 910. Failing to allow the parties to litigate, or even brief an issue that was not part of the proceedings

is akin to denying the parties an opportunity to be heard prior to taking the Estate's interest in the Property, and is a violation of due process. *In re Marriage of Coogler,* 2004 MT 122, ¶ 24, 321 Mont. 243, 90 P.3d 414.

Even assuming the District Court could *sua sponte* adjudicate an issue not before it, conclusion of law ¶16 is based on an incorrect interpretation of the law, which clearly ignored (or misapprehended the effects of) the severance of the joint tenancy and the other efforts that Edna took prior to her death to accomplish the severance of the joint tenancy. Edna severed the joint tenancy when she filed her Severance of Joint Tenancy that she signed on February 20, 2020 ("Edna's Declaration of Severance"). (Doc. 60, Exhibit A; Doc. 138, Exhibit A). Also on February 20, 2020, Edna signed a Quitclaim Deed which was filed as further support of her desire to terminate the joint tenancy ("2020 Quitclaim Deed"). (Doc. 60, Exhibit B; Doc. 138, Exhibit A). The 2020 Quitclaim Deed and Edna's Declaration of Severance are collectively referred to as "Edna's Severance Documents".

Edna's Severance Documents successfully severed the joint tenancy that existed between Edna and Steven after the recording of the Quitclaim Deed in 2016. "A joint tenancy in real property may be severed during lifetime by a conveyance on the part of a joint tenant. Such a conveyance is termed a severance." *In re Matye's Est.,* 198 Mont. 317, 320, 645 P.2d 955, 957 (1982). Edna's Severance Documents confirmed her desire and intent to sever the joint tenancy. Moreover, once Edna's

Severance Documents were recorded against the Property, they became official documents that effected title to the Property. *Miller v. Title Ins. Co. of Minnesota*, 1999 MT 230, ¶ 17, 296 Mont. 115, 120, 987 P.2d 1151, 1154. The District Court's *sua sponte* conclusion of law that "Steven has sole rights to the property" was simply incorrect in light of Edna's severance of the joint tenancy prior to the bench trial.

CONCLUSION

The Estate was not required to establish the existence of mistake, or fraud, or undue influence to prove that Steven was unjustly enriched. The Estate had to establish that it would be inequitable for Steven to retain ownership in the Property when Steven assured Edna that her most valuable asset would still be used for her benefit during her life, and then prevented her from benefiting from it. This was inequitable. The District Court did not analyze these facts because it was using the wrong legal criteria. As such, the Estate respectfully requests that the Court overturn the District Court and remand directing it to impose a constructive trust, or fashion an appropriate remedy in light of Steven's unjust enrichment.

Likewise, the District Court incorrectly concluded that there was no evidence of a specific act of influence. Steven's act of emotionally pleading with his mother, making false assurances to her to persuade her to transfer the Property, and facilitating execution of the Quitclaim Deed are specific acts of influence. Since the Court incorrectly concluded there was no evidence of acts of influence, it failed to do the required analysis of the facts. As such, the Estate respectfully requests that the Court overturn the District Court and remand.

The Estate also respectfully requests this Court overturn the District Court's conclusion of law ¶ 16, which ignored Edna's Severance Documents and actions, and had the effect of taking a Property interest from the Estate without due process.

Dated: April 15, 2024

Respectfully submitted,

THE RABB LAW FIRM, PLLC

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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 is not more than 10,000 words in that it consists of 6,753 words, excluding certificate of service and certificate of compliance.

Dated this 15th day of April, 2024.

Michael L. Rabb
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CERTIFICATE OF SERVICE

I, Michael Lloyd Rabb, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-15-2024:

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