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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 24-0133

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 24-0133

Zane Grey,

Petitioner/Appellant

v.

Appellant's Opening Brief

Tamara A. Schmitt,

Respondent/Appellee

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Bowen Greenwood
Clerk of Supreme Court
State of Montana

On appeal from the Montana 11th Judicial District Court
County of Flathead
Cause No. DP 2023-80C
Judge Heidi J. Ulbricht

Appearances:

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II. Jurisdictional Statement

A final decision was entered in the 11th Judicial District Court of Flathead County, which decision improperly admitted a bogus will in probate. In accord with § 25-2-201, MCA, the Supreme Court of the State of Montana has jurisdiction over this appeal from said decision.

III. Statement of the Issues.

1. Did the District Court err in allowing hearsay testimony to validate an unduly executed¹ will into probate then admit the same as evidence when said will was only alleged to be Walter M. Grey's will by the hearsay witness of Appellee and Derek Chappell [non-family members], with no other witnesses or evidence? Said will does not comply with § 72-2-522, 523, MCA.
2. Did the District Court err in its decision to sustain an objection to the signed, dated, verifiable and authentic medical records of Walter, submitted at trial by Appellant's attorney, Timothy Shaffer, which medical records reveal a long history of acute, chronic, significant cognizant impairment and loss of memory mostly from a large, years old hemorrhaging glioblastoma (bleeding brain tumor)? *Doc. 45, Exhibit A, Tr. 2 p. 91, L14.*
3. Did Appellee and Derek Chappell commit a fraud on the District Court by;
 - a. lying about knowing one another,

¹ Unduly executed: the will in question doesn't comply with the protections in the law governing what constitutes a duly executed valid will at, 72-2-522,523, MCA, and should not have been admitted to probate.

- b. Chappell notarizing his own signature as a witness, *Doc. 11, p. 3*,
 - c. Appellee and her counsel lying about the status of the mobile home title, *Tr. 1, p. 77-line 6, p. 78-line 20*.
 - d. Appellee lying about the snapshot of her Facebook page taken by Corie Russell, heir and interested party, *Tr. 2, p. 43, L 19,20*,
 - e. lying about why Appellee's name was not listed as buyer on any of the (8) titles notarized by Chappell on January 31, 2023, with no transfers of interest, claiming a mean dog chased Chappell off *Tr. 2, p.68, L21-25*, which Chappell denied? *Tr. 2, p.86, L 6-8*.
4. Did the District Court err in denying Zane Grey's request for necessary expenses and disbursements in *Doc. 21*, as requested in *Doc. 18*?
5. Did the District Court err in not addressing Appellant's Motion for a hearing to determine the reasonableness of the fees claimed by ZANE GREY as Personal Representative? *Docs 52, 53 with exhibits A, B, C, D*.

IV. Statement of the Case

1. This is a probate case wherein Appellant's father, Walter M. Grey, passed away March 10, 2023, three days before the age of 80, in Kalispell, Montana; where he had lived single and alone thirteen years until late October 2017, when Appellant and family moved in and lived with Appellant's father until late June 2018.

2. To the knowledge of close family and friends, Walter left his estate with no will or asset protection system of any kind. Walter is survived by three adult children; Marshall Lee Grey, Zane Grey and Corie Anna Grey/Russell. Walter also has five grandchildren and one great grandson.

3. On January 30th, 2023, Appellant learned that Walter had become incapacitated on January 27, 2023, in that he could no longer get up and walk around, feed himself, take care of daily business or personal affairs due to a large, hemorrhaging brain tumor, which had been developing for years prior. ***Doc. 45, Exhibit A, Appendix #1.***

4. Twelve days after Walter's passing Appellee presented an instrument alleged to be Walter's will and a Petition to remove Personal Representative and decedent's son, Zane Grey, claiming, in only Appellee's handwriting, Walter wanted Appellee to have everything but the guns and tools, which aren't described in the alleged will, ***Doc. 11, p. 1-3*** or in the alleged "second will" attached as ***p. 4*** along with the many other items belonging to Walter's estate. ***Doc. 31, Supplemental Inventory*** filed by Zane Grey as Personal Representative.

V. Statement of Facts

1. Walter M. Grey had a history of acute, chronic and significant cognizant impairment and memory loss, coupled with diabetes and head injuries from falls on the ice and became incapacitated on the 27th of January 2023 from a large,

hemorrhaging glioblastoma which developed over the last few years, ***Doc. 45, Exhibit A.***

2. Through a regimen of natural supplements to fight inflammation and cancer cells, Walter's mental and physical condition improved significantly in the month of February 2023. Testimony of Appellee's witnesses establishes this fact as well as the Affidavit of Corie Russell. ***Doc. 39.***

3. February 5th, 2023, Appellee claimed to have a will from Walter; however, when Appellant asked Walter about the purported will, Walter couldn't recall anything about a will and stared at the floor with a confused look, genuinely trying to think. Appellant and his father were very close and spoke at least once every 2-3 days for the last thirty-seven years.

4. On February 5, 2023, Appellant asked Appellee to see or have a copy of the purported will Appellee claimed to have, Appellee refused.

5. On March 22nd, 2023, the alleged second will and Petition to Remove ZANE GREY as Personal Representative were presented to the court. Appellant had never heard of the alleged second will. The alleged second will is an undated, illegible, incoherent instrument that bears an apparently forged signature and was unheard of until it was presented at court. Said second will also fails to comply with ***§ 72-2-522, 523, MCA.***

6. Appellant, through Gravis Law, began paperwork for Guardianship/ Conservatorship of Walter, beginning on February 27th, 2023, which was approved by the District Court on March 8, 2023, but Walter died two days later. ***DG-15-2023-0000025-DC, Doc. 1.***

7. These papers were used by Appellee, who had access to Walter's mail, to convince Appellants' father that Appellant was trying to take Walter's home and many properties, which led to Appellant and family's isolation from Walter after February 27th, 2023. ***Tr. 1, p. 72, L 14-16, Doc. 39, p. 16, ¶45.***

8. Appellee became the primary presence influence, , or provider locally available for Walter after January 27th, 2023, due to Walter's physical and mental incapacity and closest family being 140 miles away.

9. Tamara, Appellee, never contacted any of Walter's friends or family about Walter's incapacity and later his death nor offered anything to help with funeral expenses and/or arrangements or any other estate matters related to settling the estate, even though she had all their contact information.

10. Immediately after Walter's death, on March 10, 2023, Appellant, through Gravis Law, filed for Personal Representative of Walter's estate, on March 14th, which was approved the same day. ***DP 23-80 Docs. 1-7.***

11. March 22, 2023, eight days later, Tamara A Schmitt, Appellee, through attorney John M. Wagner, appears on record with the filing of a purported will and a

Petition to remove Zane Grey, son of Walter M. Grey, as Personal Representative of the estate. ***Docs. 8-12.***

12. The purported will is dated January 31st, the same day Appellant arrived at Walter's home in the evening at 5:50, 22 days after the last time visiting on the 9th of January, to find Walter's physical and mental condition had deteriorated significantly and alarmingly in three weeks since Appellant's last visit, as shown in his certified medical records, ***Doc. 45 Exhibit A***, which were refused by the District Court at bench trial. ***Tr. 2, p.91, L13-14.***

13. Medical records from hospitals do not come with "*certifications*", according to medical records personnel at Logan Health Center and the VA, both in Kalispell, Montana, as atty. Wagner implied in his objection at ***Tr. 2 p.91, L1.***

14. Appellant testified to the fact that on January 31st, 2023, Walter's mental and physical condition was very bad. ***Tr. 2, p. 91, L 21-22.***

15. Appellee controlling Walter's cell phone, mail and access to visitation by a monitored, electronic security gate constitutes undue influence which ultimately led to Walter being isolated from outside contact. ***Tr. 2, p. 40, L.1,2.***

16. The purported will only contains a few handwritings of Appellee's giving Walter's guns, none of which are described nor how many nor all the other things there with the guns and ammunition, to Zane Grey, Walter's son, with reloading supplies, which included reloading manuals, documents related to target shooting

and reloading, family pictures and all auto shop tools, but doesn't mention any of Walter's other children or posterity, his personal belongings or the many estate items provided in the *DMV snapshots, Doc. 67, Exhibit A. and Doc. 31, Inventory List*.

17. The signatures of the decedent are incorrectly spelled, illegible and a notary notarizing his own signature as a witness indicates a fraud on the court by Appellee and notary friend, Derek Chappell. *Doc. 11, p. 3*.

18. No one else was present at the alleged signing of the instrument purported by Appellee and Derek Chappell to be Walter M. Grey's will. *Doc. 11*.

19. The notary and witness of the instrument alleged to be Walter's will, Derek Chappell, claims in testimony he specifically remembered that Walter and he were discussing Walter's 25-06 caliber rifle, however, Walter never owned a 25-06 caliber rifle or any other Remington only caliber rifle. *Tr. 1, p. 23, L. 20*.

20. Appellant, Walter Grey and Walter's father, Walter Grey, Sr. are expert marksmen, as proven by expert marksmen ribbons from Army and Air Force service. Appellant and his father spent many years together perfecting these skills and knew and traded one another's firearms regularly.

21. Derek Chappell admitted to having Walter sign incomplete documents which hadn't been explained, or read, to him, *Tr. #1, p. 32, L 31*, which he couldn't see to

read for himself, nor did he have the capacity to understand them if he could have.

Doc. 45, Exhibit A.

22. The power of attorney notarized by Derek Chappell on February 16, 2023, and presented to Walter's bank by Appellee, without Walter present, to withdraw \$800 in funds the same day, with no accounting afterwards, the day after Walter's social security check was deposited, was incomplete as each part of the POA requiring initials indicating the extent of the POA was left blank. ***Tr.1, p. 33, L. 7-12 & Doc. 16, ex. E.***

23. The notary and witness, Derek Chappell, also insinuates in his testimony regarding alleged visits to Walter's home, several times, that Walter was in pain ***Tr. 1, p. 31, L 11,12 & Tr. 2, p.15, L18 & p.20, L17***, however, Walter wasn't in pain and never complained of any pain and even the Registered Nurse who provided in home Hospice Care to Walter a grand total of twenty hours stated in her reports Walter denied having pain. ***Appendix #2, last page.***

24. Witness and friend of Appellee, Gary Treweek, claims to have been Walter's friend, however, Walter was no friend of the Treweek family nor they to Walter.

25. Walter merely rented a house trailer lot where he maintained his home and received his mail inside the busy Treweek Mini storage, U Haul and 7-acre multi business center.

26. The signature, on Appellee's instrument, *Doc. 11, p.3*, doesn't spell Walter M. Grey nor is it in Walter's handwriting; nonetheless, Appellee's notary friend, Derek John Chappell, claims that, during the busy business hours at said Treweek multi business center, Chappell notarized and witnessed said instrument, *Doc. 11, p.3*, for Appellee, and watched Walter sign the same, with no other witnesses present.

27. Appellee testified she contacted Chappell by telephone for notary services on a will, *Tr. 2, p. 42, L, 17, 18, 19*, but Chappell testified the will wasn't mentioned until after the titles had been notarized, with no transfers of interest, while Chappell was allegedly at Walter's home. *Tr. 1, p. 15, L 6, 7, 8*.

28. Chappell testified he specifically remembered notarizing the bus and cargo trailer titles along with the two Harley titles, *Tr. 1, p. 16, L 19*, however, the bus title was previously notarized, and the cargo trailer was unnotarized, *Appendix #6*.

29. Walter's driver license had expired over a year before bench trial and the signature on the license does not match the signature on the instrument alleged to be Walter's will. *Doc. 11, pg. 3, Appendix #4*.

30. Appellant filed a three-page affidavit signed by Walter, dated June 2019, which is written and signed with his handwriting that is very familiar to family and matches the signature on the driver license. *Doc. 45, ex B, Appendix #4*. Appellant has had several powers of attorney from his father, Walter M. Grey, over the years.

31. Appellee and Derek Chappell both lied under oath about knowing one another prior to the notarial acts of January 31, 2023. *Tr. 2, p.43, L1& p.74, L12, Tr. 2, Exhibit 2 & Doc 45, Exhibit E, Appendix #5, p. 2.*

32. The instrument presented by Tamara to be a will of WALTER M. GREY, *Doc. 11:*

- a. contains no handwriting of Walter,
- b. contains no intention of Walter,
- c. contains no signature by Walter,
- d. doesn't describe any of the many properties which Walter owned shown in the uncontested *Inventory List, Doc. 31* and *DMV snapshots, Doc. 67, Ex. A*, filed by ZANE GREY, PR.;
- e. doesn't comply with the laws of Montana found at § 72-2-522,523, *MCA* regarding what constitutes a valid will,
- f. has no witnesses,
- g. was completely objected to by Walter's family and friends. *Doc. 41, FOF 10, Doc. 39.*

33. Appellee is a stranger to the family and friends of Walter M. Grey.

34. Appellee's entire testimonies during *Tr. 1 & Tr 2* regarding Walter's; physical and mental condition; intentions for his property before and after death; response to alleged actions of Appellant; relationship with Appellant and relationship with

Appellee are after the fact, uncorroborated hearsay entered in favor of Appellee at both bench trials with the aid of both attorneys of record.

a. Appellant's attorneys failed to object to the statutorily invalid will's validation and admittance to probate.

b. Appellant's attorneys failed to enter a case for Appellant from the medical records, DMV reports, Walter's friends he ate lunch with every week, Walter driving to Libby every weekend by himself until December 2022 to meet for breakfast with Appellant before they worked on the property and, family Walter had regular conversations with up until the first week of January 2023.

c. All of that information was provided to Appellant's attorneys, but no case was presented for Appellant by those attorneys at the 2-3-hour bench trials.

d. During the entire 4.5 years Appellee lived in the south end of Walter's home, neither Appellee nor any of opposition's witnesses were ever a part of Walter's life as Walter regularly worked on building a retirement home on his land in Libby or at the regular lunch meetings Walter's had with his friends and Appellant in Kalispell and Libby.

e. From October 2017 through June 2018, after returning to Montana from Pennsylvania, Appellant and his family lived with Walter in Kalispell. Then Appellant moved 140 miles away to Noxon, Montana; and nearly every weekend from late 2019 until December 2022, Appellant and his father (Walter)

worked on said retirement property for Walter in Libby, Montana, which was only 47 miles from Appellant's home.

35. The witnesses presented by opposition at bench trial were surprise witnesses that had no personal knowledge of Walter, his condition, relationships or his family prior to this matter; they were not his friends nor did any of them confirm Appellee's alleged will. *Tr. 2.*

36. Appellant accrued costs and expenses related to defending against removal as P.R. by the provisions of an invalid will and requested compensation in accord with §72-3-632 MCA, which removal and compensation were denied by the District Court Judge. *Docs. 18 & 21.*

37. Appellant accrued costs and expenses, including attorney fees, in the administration of the estate to complete all the necessary and required elements prior to closing the estate, according to code, *Doc. 53 with ex. A, B, C, D.* and requested a hearing under § 72-3-634 MCA, *Doc. 52.*

38. Due to being errantly removed as Personal Representative by the provisions of an invalid will, presented by an uninterested party, which was errantly permitted into probate, Appellant requested said hearing to recover costs of administering and defending his father's estate, which estate was errantly turned over to an uninterested party by the provisions of a fraudulent instrument presented as Walter M. Grey's will.

- The District Court Judge took no action regarding said hearing.

VI. Summary of Argument

1. There is no valid will in the estate of WALTER M. GREY due to the facts that:

a. The alleged will presented doesn't comply with the any of the laws of Montana governing what constitutes a valid will;

b. At the time the alleged will was made, Walter lacked the capacity to understand and recollect the nature and situation of his property and his relations to persons having claims on his estate whose interests would be affected by a will;

c. the alleged will presented has no handwriting made by Walter and fails to express Walter's intention;

d. the alleged will presented was based on the hearsay testimony of after the fact, surprise witnesses presented for Appellee at bench trial;

e. the alleged will presented bears no valid signature of Walter;

f. there were no legitimate witnesses to the alleged will's origin;

g. the alleged will presented doesn't describe any of the many items belonging to Walter's estate;

h. two of Walter's apparent heirs, their children and a great grandson are left out completely without mention;

i. Walter's family and rightful heirs contested the validity of the instrument presented by Appellee as Walter's alleged will,

j. neither Appellee nor her counsel, both uninterested parties, provided any family or friends of the deceased to corroborate the claims in the instrument alleged to be the deceased's will,

2. The medical records of WALTER M. GREY indicate a history of acute, chronic and significant cognizant impairment and loss of memory, which precludes Walter from signing a will due to a significant lack of capacity, and which negates the need for Appellant to prove undue influence. See: *Estate of Lightfield*, 351 Mont. 426, 432; 213 P.3d 468; 2009 MT 244 - Mont: Supreme Court 2009

“¶30. As we conclude the District Court did not err in holding that the August 11, 2003, holographic will is invalid because Aileen did not have testamentary capacity, it is not necessary to discuss whether it was the result of undue influence.”

3. Appellee, and notary friend, Derek Chappell, have committed a fraud on the District Court by;

- a. Lying under oath about Walter's physical and mental fitness,
- b. lying under oath about knowing each other previously,
- c. having no other witnesses around when notarizing a will,
- d. “open notarizing” 8 of Walter's titles with no transfers of interest to buyers, thereby nullifying said notaries,

e. Notary and Witness, Derek Chappell, admitting under oath to notarizing an incomplete, unwitnessed Power of Attorney (POA), which Chappell knew: Walter couldn't see to read; and that, said POA hadn't been read to Walter, which POA was used to withdraw most of Walter's account funds the day after his social security check was deposited.

f. Notary and Witness, Derek Chappell, notarizing his own witness signature on Walter's alleged last will and testament.

4. Appellant is entitled to costs and fees and a hearing to determine reasonableness of the same as requested in Docs. 52, 53 with exhibits A, B, C, D.

VII. Standard of Review

1. The Supreme Court should review the District Court's admittance of an improperly executed will by a non-interested party for an abuse of discretion and not following the law. See; (1) *Estate of Brooks* 279 Mont. 516, 521 (Mont. 1996), (2) *Estate of Oscar W. Craddock* 530 P.2d 483 (Mont. 1975), (3) *Estate of Birkeland* 164 Mont. 94, 97, 519 P.2d 154 (Mont. 1974), (4) *In re Bragg's Estate* 106 Mont. 132, 141 (Mont. 1938), (5) *Estate of French* 351 P.2d 548 (Mont. 1960), (6) *In re Van Voast's Estate* 127 Mont. 450, 459 (Mont. 1953), (7) *In re Irvine's Estate* 114 Mont. 577, 600 (Mont. 1943).

2. The Supreme Court should review the District Court's Findings of Fact regarding the validation of the instrument alleged to be Walter's will as: getting the

facts wrong for an abuse of discretion due to basing a decision on one side of a story that is fraught with uncorroborated hearsay, inaccuracies, and contradictions by Appellee, Derek Chappell and Appellee's counsel, and not following the law regarding what constitutes a valid will, especially an alleged will from a non-interested party. *Estate of Oscar W. Craddock*, 530 P.2d 483 (Mont. 1975).

Harmon v. Fiscus Realty, Inc., 2011 MT 232, ¶ 7, 362 Mont. 135, 261 P.3d 1031.

3. The Supreme Court should review the District Court's Conclusions of Law regarding the competency of Walter as erroneous and an abuse of discretion for errantly sustaining an objection to the admittance of the authentic, signed and dated medical reports submitted at trial detailing Walter's acute, chronic and years long history of significant, cognitive impairment, loss of memory, and concerns of his own dementia. See *In the Matter of the Estate of Bodin* (1965), 144 Mont. 555, 560, 398 P.2d 616, 619, see also *Appendix 1, 2 & 3*.

4. The Supreme Court should review the District Court's Conclusions of Law regarding the competency of Walter as erroneous for errantly considering conflicting and perjurious testimony from Appellee and witness Derek Chappell as well as the other medically untrained witnesses regarding Walter's mental and physical fitness, who had never met Walter prior to the dated instrument alleged to be Walter's will.

VIII. Argument

1. Walter's family relied on the law at § 72-2-522, 523, MCA et seq. to protect their father's estate from such an unnatural, objectionable, non-compliant instrument presented with no standing, witnesses, property description, handwriting, signatures, mention of heirs or other substance from Walter M. Grey to indicate his intent or a duly executed will.

2. Respectively, the Montana Supreme Court has ruled as follows:

Estate of Oscar W. Craddock 530 P.2d 483 (Mont. 1975)

"In interpreting Montana's probate laws, the Court has held the proponent of a will must make a prima facie showing that the proposed will was executed in conformity with statutory requirements.

While the law clearly establishes the procedures to be followed in the probate of a will, the record fails to disclose whether or not there was compliance with those requirements."

In re Silver's Estate, 98 Mont. 141, 38 P.2d 277;

In re Bragg's Estate, 106 Mont. 132, 76 P.2d 57.

"Here, the requirement that the holographic will be entirely in the testator's handwriting is the determinative factual issue. Section 91-108, R.C.M. 1947."

Estate of Brooks 279 Mont. 516, 521 (Mont. 1996)

"Estate of Weidner does not support Bruce's position here that the March 21, 1995, document can be admitted to probate where it indisputably was not duly executed as required by § 72-2-522, MCA. The number of attesting witnesses who must testify in a contested will proceeding pursuant to § 72-3-309, MCA, is an entirely different question from whether the purported will met the requirements for a duly executed will under § 72-2-522, MCA. Neither § 72-3-309, MCA, nor Estate of Weidner varies, or could vary, the separate and distinct statutory requirements for a duly executed will, which must be established by the proponent of the will."

In re Bragg's Estate 106 Mont. 132, 141 (Mont. 1938)

"In construing a statute and determining its proper application and effect, this court has repeatedly held that all that is required is that it be substantially

complied with. "While the requirements of the statutes as to the formalities in executing a will must be scrupulously followed in all essential particulars, and with substantial precision, it has very generally been held that substantial compliance therewith is sufficient, especially where there is no suggestion of fraud, deception, undue influence, or mental incapacity. 106 Mont. 132, 164 - The Montana supreme court has heretofore demanded that all the prescribed statutory steps in executing a will be fulfilled. 106 Mont. 132, 139-140 - True, it has often been held that the statute relating to the execution and acknowledgment of a will must be strictly construed."

Estate of French 351 P.2d 548, 137 Mont. 228 (Mont. 1960)

"In construing a statute and determining its proper application and effect, this court has repeatedly held that all that is required is that it be substantially complied with. 'While the requirements of the statutes as to the formalities in executing a will must be scrupulously followed in all essential particulars, and with substantial precision, it has very generally been held that substantial compliance therewith is sufficient, especially where there is no suggestion of fraud, deception, undue influence, or mental incapacity'".

In re Van Voast's Estate 127 Mont. 450, 459 (Mont. 1953)

"The right to make testamentary disposition of property depends entirely upon the will of the legislature. It may withhold or grant the right, and, if it grants it, it may make its exercise subject to such regulations and requirements as it pleases. It may declare the rules which must be observed, touching the execution and authentication of the instruments necessary to indicate the testator's intention and make a compliance with them mandatory. In re Noyes' Estate, 40 Mont. 178, 185, 105 P. 1013; In re Hauge's Estate, 92 Mont. 36, 39, 9 P.2d 1065."

In re Irvine's Estate 114 Mont. 577, 600 (Mont. 1943)

"The rule of liberal construction does not excuse the lack of substantial compliance with the statutory requirement that a holographic will must be dated.

Williams v. Swords 129 Mont. 165, 170; 284 P.2d 674 (Mont. 1955)

"The purpose of our statute prescribing the formalities that must be observed in executing a will is to prevent simulated and fraudulent writings from being probated and used as genuine.

3. Walter's doctor at the Kalispell Veterans Administration, Sefi Noble, M.D.

and the examining physician at the Kalispell Logan Health medical center, Valerie

Stine, M.D., both diagnosed Walter with acute, chronic, significant cognizant impairment, confusion, severe loss of memory, diabetes, multiple head injuries, overall poor condition and even Walter himself was concerned of his own dementia onset, **Appendix #3**, which constitutes a significant lack of capacity:

4. The test for determining testamentary capacity was set forth in: ***the Matter of the Estate of Bodin (1965), 144 Mont. 555, 560, 398 P.2d 616, 619***, as follows:

"A testator is competent if he is possessed of the mental capacity to understand the nature of the act, to understand and recollect the nature and situation of his property and his relations to persons having claims on his bounty whose interests are affected by his will. The "testator must have sufficient strength and clearness of mind and memory to know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and the nature of the act which he is about to perform, and the names and identity of the persons who are to be the objects of his bounty, and his relation towards them."

5. On the evening of January 31, 2023, Appellant visited Walter, at which time, Walter couldn't describe: where he lived, any of his property or where any of it was located, also he could not recite his own address or phone number to Appellant. Walter was then completely unable to take care of his business or personal affairs; so, how could he have described or comprehended any of his many properties alleged to have been granted on a will allegedly signed by him earlier that day?

- *It is a prerequisite to the creation of a will that the testator be of sound mind., i.e., mentally competent. § 72-5-521, MCA.*

6. Judge Ulbricht stated in the January 19, 2023, ORDER that Zane failed to show Appellee exercised undue influence over his father. ***Doc. 41, COL, 7.***

7. However, the Montana Supreme Court states in: *Estate of Lightfield, 351 Mont. 426, 213 P. 3d 468 - Mont: Supreme Court 2009*:

“¶30. As we conclude the District Court did not err in holding that the August 11, 2003, holographic will is invalid because Aileen did not have testamentary capacity, it is not necessary to discuss whether it was the result of undue influence”.

8. Ultimately, Appellee did exercise undue influence over Walter by:

a. controlling the charging and use of Walter's cell phone;

b. controlling keyed access to Walter's mailbox and mail located at Appellee's place of employment in a multi-unit mailbox at 3220 Hwy 93 S in Kalispell (Treweek Mini Storage); *Tr. 1, p. 72, L 14-16, Doc. 39, p. 16, ¶45.*

c. controlling the security gated, keypad access to his home inside the Treweek mini storage facility as the only security personnel at Treweek mini storage, thereby controlling Walter's communication and visits. *Tr.1, p., 74, L1;*

d. attending Walter's doctor visits at the Veteran's Administration and Logan Health Center introducing herself as Walter's wife even though they were not married, and she is married to another person;

e. without proof, falsely alleging to Walter's doctors at the VA and Logan Health Center that Appellant constantly harasses Walter and Appellee by telephone and text message as indicated in Walter's medical records from both agencies yet never once reported any such harassment to the police;

f. falsely stating to Sheriff's Deputy Richardson and Chris Bishop of Adult Protection Services at Walter's home, whom Appellant contacted to check on his father's well-being, that Appellant was threatening and harassing them constantly by phone and text, without proof or example of any kind;

g. never leaving the room or being more than a few feet away whenever Appellant or anyone else visited Walter's home, *Doc. 39, p. 14, L 17*;

h. constantly monitoring Walter's phone calls coaching him through every call on speakerphone as complained of by Walter's daughter, Corie Russell in *Doc. 39, p. 5, ¶18.- p. 12, ¶37, L. 16, 17, 18*;

i. sexual predation and being twenty-six years younger than Walter, who had been alone 13 years prior, which is two years younger than Walter's youngest son, Zane Grey, Appellant, see also *Appendix #5*.

Respectively, the Montana Supreme Court has ruled: *Estate of Maricich, 145 Mont. 146, 161, 400 P.2d 873, 881*, which states:

"The law in the cases concerning undue influence places upon the contestant the burden of proof in showing substantial evidence of undue influence. In determining this issue on undue influence, we may consider:

- (1) Confidential relationship of the person attempting to influence the testator [donor];*
- (2) The physical condition of the testator [donor] as it affects his ability to withstand the influence;*
- (3) The mental condition of the testator [donor] as it affects his ability to withstand influence;*
- (4) The unnaturalness of the disposition as it relates to showing an unbalanced mind or a mind easily susceptible to undue influence; and*

(5) The demands and importunities as they may affect the particular testator [donor] taking into consideration the time, the place, and all the surrounding circumstances."

9. Appellee even manipulated and influenced the District Court at *Tr. 1, p. 53* as Appellee wasn't involved in the purchase, down payment, monthly payments nor was she ever listed on the Whitefish bank account, or any other of Walter's bank or utility accounts, from which Walter made payments on the loan he secured with twelve thousand dollars down payment on land purchased in Libby, Montana, which property was found for him by Appellant.

10. Apparently, Appellee had been setting the stage for the taking of Walter's estate the entire four and a half years Walter allowed Appellee to live in his home because Appellant located, while serving as P.R., estate properties hidden from P.R. at Appellee's family's addresses in Kalispell and in her own rented, locked storage units at her place of employment where Walter resided and became incapacitated January 27, 2023 till his death on March 10, 2023.

11. Walter had no liking for Appellee's family nor they for him and they never made appearances to Walter's property until the day he died, March 10, 2023, the same day Appellee put her name on the Buyer line of all Walter's titles at the DMV in Kalispell despite having no lawful right to do so. *DMV Title Snapshots Doc. 67, Ex. A, Appendix #6.*

12. Not a single property of Walter's is named or described in the instrument Appellee and counsel presented as Walter's will, *Doc. 11*, pages 1-4, the fourth page of which could have been written by anyone and appears to be a forgery when compared to *Appendix #4*. See: *Estate of Lightfield, 213 P.3d 468 - Mont:*

Supreme Court 2009:

"§28 Testamentary capacity requires the testator be aware of three elements: (1) the nature of the act to be performed, (2) the nature and extent of the property to be disposed of, and (3) the objects of his or her estate."

13. Even the land Appellant found for his father to build on in Libby, Montana, so he could be closer to Appellant, fell victim to Appellee's undue influence and manipulation of Walter, which Appellee became interested in as joint tenant with right of survivorship late 2019, while not having any responsibility for the down payment, loan or bank accounts involved in the purchase which Walter took on alone. Respectively, the Montana Supreme Court ruled in: *Estate of Tennant, 714 P. 2d 122 – (1986)*, the court states:

"It should also be pointed out that this Court in Patterson v. Halterman (1973), 161 Mont. 278, 505 P.2d 905, held that the tests for undue influence which are pertinent to wills are also pertinent to deeds".

14. Walter's family relied on the law at § 72-2-522,523, MCA to protect their father's estate from such an objectionable, non-compliant, unnatural instrument presented with no standing, witnesses, property description, handwriting, signatures or other substance from Walter M. Grey to indicate his intent.

15. Only Appellee and her notary friend Derek Chappell, who lied about knowing one another among other things, claim to have witnessed Appellant's father and lifelong best friend give all his estate to a stranger in an alleged will which doesn't describe a single item in a one hundred fifty-four-thousand-dollar estate, which is undervalued even in *Doc. 31, Supplemental Inventory*.

16. Walter and his family's' constitutionally protected right to equal protection of the law in at least the *Montana Constitution at Article 2, section 4* and further in the *14th Amendment of the U.S. Constitution* has been violated by the probate proceeding, *DP 23-80*, in the 11th Judicial District Court of Kalispell.

17. Judge Ulbricht cited hearsay Rule "804" as precedent for allowing Appellee to continue making up stories about Walter's intentions for his estate, about conversations between Appellant and his father, about Walter's titles, about the purpose of the Libby land, about Walter's retirement plans, which were hearsay testimony contradicting Walter's actual wishes before and after his death. *Tr. #2, p.54, L17-18*.

18. One hundred fifty-four thousand dollars in unjust enrichment favoring Appellee from Walter's estate is the incentive for some great acting in accord with hearsay exceptions Rule 803, which contains 24 exceptions to Rule 802 "no hearsay allowed", and 804, some of which are very questionable, essentially turning a Court of fact and law into a court of public opinion and after the fact hearsay.

19. Judge Ulbricht stated, in the denial of Appellant's Motion to Alter or Amend Judgment, the second instrument alleged to be Walter's undated, handwritten will wasn't validated implying it wasn't used to determine "clear and convincing evidence of Walter's intent", *Doc. 61, p.2, note 1*, but refers to it as predating the first instrument by "undisputed testimony" from Appellee, *Doc 41, p.2 ¶9*, and further as page 4 of the Last Will and Testament, *Tr. #2 p.41, L1*, and *Tr. #2, p.51, L12 as "Exhibit A, p. 1-4"*.

20. However, Appellant and family have contested and disputed the implication of a will by Walter existing before and after the March 22, 2023, presentation of the instrument alleged by Appellee to be Walter's will.

21. Since Appellee has been personal representative of the estate, she has significantly reduced the assessed values of the properties listed in the inventory list presented in *Doc. 64* and even deleted several properties owned by the estate which are listed in the *DMV snapshots, Doc. 67, Ex. A*, and the uncontested *Doc. 31, Supplemental Inventory List*, filed by ZANE GREY, as PR., which indicates fraud by Appellee as personal representative.

22. When a will presented by a stranger of a family is contested by the family of the deceased and doesn't pass muster with the laws it should never have standing in a court of competent jurisdiction regardless of the public opinions or hearsay after the fact, as shown in *VIII Argument, ¶1 above*.

23. In accord with § 72-3-632 MCA, Appellant was entitled to expenses incurred as requested in *Doc. 18* and to a hearing under § 72-3-634 MCA in the District Court to determine the reasonableness of the costs and fees requested in *Doc. 53 with ex. A, B, C, D*, which were denied/unanswered by the District Court.

. We also review a district court's denial of costs for an abuse of discretion.

Hansen v. Granite Co., 2010 MT 107, ¶ 55, 356 Mont. 269, 232 P.3d 409. An abuse of discretion occurs when the court acts arbitrarily without conscientious judgment or exceeds the bounds of reason. Harmon v. Fiscus Realty, Inc., 2011 MT 232, ¶ 7, 362 Mont. 135, 261 P.3d 1031.

IX. Conclusion

For the reasons stated above and in the interests of justice, law and order, this Court should reverse the District Court's Judgment in favor of Appellant/Walter's family, remand this case back to the Probate Court for an order to return all of the properties listed in *Doc. 31, Supplemental Inventory List* to Walter's Estate with Zane Grey recognized as the Personal Representative, or, for any estate properties that have been liquidated by Appellee, grant Appellant restitution by judgment against Appellee for the total amount of the Estate value in *Doc. 31*. Further, this court should order the adjudication of the matter of Personal Representative's costs including Appellant's fees and costs incurred as Personal Representative from March 14, 2023, through January 19, 2024, as detailed in *Doc's. 52, 53 with*

exhibits A, B, C, D.

Respectively, because it should be apparent to this court that Appellee and Appellee's friend Derek Chappell committed criminal acts related to this case against both Appellant and the State, at the debt of justice, this court should notify the Attorney General of said crimes and order their investigation and prosecution of the same.

Respectfully submitted by  on May 14, 2024.
ZANE GREY, Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have filed the Appellant's Opening Brief, MT Supreme Court case number DA 24-0133, and have served a true and correct copy, by depositing said copy into the U.S. mail, postage prepaid, addressed to the following: JOHN M. WAGNER, attorney for, Appellee TAMARA A. SCHMITT, to the address of record listed below;

WAGNER LAW FIRM
P.O. Box 4840
Whitefish, MT 59937

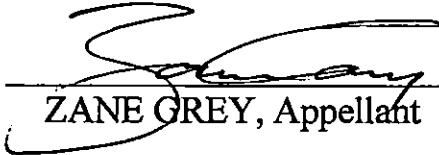
DATED this 14th day of May 2024.


ZANE GREY, Appellant

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies that this brief is in compliance with the 30-page, 10,000-word limit and contains 6480 words not including the cover sheet, pages 1, 2, 3, certificates or Appendix and contains 27 pages not including the cover sheet, pages 1, 2, 3, certificates or Appendix.

DATED this 14th day of May 2024.


ZANE GREY, Appellant