

**IN THE SUPREME COURT OF THE STATE OF MONTANA**  
**No. DA 24-0230**

LISA COLE  
*Appellant,*

v.

IN RE; THE ESTATE OF M.A.C.  
A Deceased Minor  
*Appellee.*

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*On Appeal from the Montana Eighteenth Judicial District Court*  
*Cause No. DP-20-137C*  
*Hon. John Brown, Presiding*

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**APPELLANTS' OPENING BRIEF**

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## **STATEMENT OF THE ISSUES**

1. Could Cole's parental rights even be terminated without the State initiating a child-welfare action?
2. Did the District Court err when it appointed Sunny Yocom Personal Representative of the Estate and again in denying Lisa Cole's Motion to Remove Sunny Yocom for Cause based on her conflict of interest?
3. Were the District Court's Findings of Facts clearly erroneous due to the District Court's misapprehending the effect of the evidence and the lack of credible and admissible evidence supporting them?
4. Did the District Court err in admitting hearsay evidence, and then incorrectly relying on the hearsay in its Findings and Conclusions?
5. Did the District Court abuse its discretion in denying Lisa Cole's request to appear remotely from her home in Arkansas at the May 23, 2023, evidentiary hearing without explanation, while granting all the other requests for remote appearance?
6. Was the lack of verification on pleadings submitted by both parties simply a harmless error?

## **STATEMENT OF THE CASE**

In September of 2019 Mykhia Cole (11 years old) was living with her mother Lisa Cole (herein after Cole) in Colorado. Cole became sick with endometriosis

which required medical treatment, including a hysterectomy. The decision was made for Cole's son Phoenix to transport Mykhia to her 25-year-old sister Samara's house in Bozeman, while Cole was in the hospital, and during her recovery. The decision was made between Cole and Samara based on would be in Mykhia's best interest. (Hearing Trans. Pg 143:21) Following the move Mykhia was enrolled in elementary school in Bozeman. Libby Hansen, the school counselor documented in her notes that during this time Mykia often spoke with her mother on the phone, and missed her mother during the time Mykhia was staying with her sister. (Ex. 1 Pg. 134)

By November, Cole had recovered from her surgery and had moved back to Montana. She asked Samara to send Mykhia back to her, but Samara would not tell Cole where she was living. Cole called DPHHS asking for help in being reunited with her daughter on November 5, 2019 (Ex. 3 Pg. 1), twice on December 31, 2019 (Ex. 3 Pgs. 11,19, 29, 58,) and on February 3, 2020 (Ex. 3 Pg. 60) always requesting help with being re-united with her daughter Mykhia.

Before she could be reunited with her mother Mykhia Cole and her sister Samara Yanny died in an automobile accident where Samara was the driver, on March 13, 2020. Their brother, Mythias Cole was also severely injured and spent the next 4-6 weeks in the hospital in Salt Lake City. (Pg. 150 Ln. 1-9) Cole stayed with her son Mythias every day he was in Salt Lake City hospital. When Mythias

Cole was released from the hospital, he went to live with Cole at her home in Miles City, Montana. (Pg. 159:10-25).

On June 1, 2020, only two months after Cole had lost her two daughters in the car accident, Shawn Cosgrove, a Billings attorney representing Bristol West Insurance Co. approached Cole at her home in Miles City about opening a probate to receive liability insurance proceeds in the amount of \$100,000 for Mykhia's Estate. After Cosgrove left Cole's home that day, he never attempted to contact Cole again. (*See Cosgrove Affid.*, Ex. 10 Pg. 2 ¶8 & 10.)<sup>1</sup>

Cosgrove represented a debtor to the Estate (Bristol West) and had no legal standing to open a probate for Mykhia's Estate. Cosgrove chose to seek out a third-party to act as personal representative and open the probate himself, without giving Cole notice of the probate or the hearing to open her daughter's Estate. (Cosgrove Affidavit Ex. 10 ¶ 11.)

In October, Cosgrove met with Sunny Rae Yocom (hereinafter Yocom) a professional Social Security payee, who had never acted as a personal representative (PR) before, to prepare and file legal documents to open a probate for Mykhia's Estate. The documents were filed on October 21, 2020, (Dkt #3), and a hearing was set for November 23, 2020. (Ex. 10, Cosgrove Affidavit ¶ 12, Dkt #4) (Trans. 197:9- 198:21)

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<sup>1</sup> All references to exhibits are from the May 23, 2023, evidentiary hearing before Judge John Brown.

Because Yocom was a stranger to the Estate and acting as a private fiduciary, she did not have priority for appointment as PR under MCA § 72-3-507. Yocom claimed that she was acting in the capacity of a Public Administrator, but as the Court noted at the evidentiary hearing, the Gallatin County Public Administrator at that time was Jennifer Brandon, the duly elected Clerk of Court. Yocom admits she has no documents authorizing her to act as a Public Administrator. (Pg.186-187)

Because Yocom did not have any priority to be appointed PR, the provisions of MCA § 72-3-507 governing the appointment of one not having priority apply.

The Order setting the November 23, 2020, hearing was issued on October 23, 2020. (Dkt #4) Statutes require that before a formal proceedings hearing required by MCA § 72-3-507 are held, ***“Proof of the giving of notice must be made on or before the hearing and filed in the proceeding”*** (MCA § 72-1-301) No such proof was ever filed with the Court, and Yocom’s testimony confirms Cole was never given notice of the hearing. (Trans.194:3, 197:9-23, 198:16-21)

It is undisputed from Cosgrove’s affidavit, (Ex. 10) that the only time he ever spoke with Cole was June 1, 2020. At that time, Cosgrove had not even met with Yocom and could not have given Cole notice of a hearing that was not set until October 23, 2020, approximately five-months later.

It is clear Yocom and/or Cosgrove mis-represented to the Court that Cole had been provided notice of the November 23, 2020, hearing thus denying Cole her right to due process. (See 11.23.2020 Hearing Trans.)

Yocom received the insurance settlement check from Cosgrove on December 7, 2020. Over four months later she finally deposited the \$100,000 check into the Estate account on April 15, 2021. After receiving these funds, the personal representative made no meaningful attempt to contact Cole. Yocom did, however, have numerous contacts with Cole's son, Mythias Cole because she was his court appointed conservator, creating a serious conflict of interest for Yocom.

On December 13, 2021, over a year after she had been appointed as personal representative of the Estate, and Conservator for Mythias Cole, Yocom filed a petition for approval to bar Cole from inheriting from her daughter's Estate. (Dkt. #12) At the same time the petition was filed, Yocom was representing Mythias Cole as his conservator, meaning if Cole were disinherited, Mythias would then be the beneficiary of the Estate. To make matters worse, the Estate attorney Danielle Shyne (hereinafter Shyne) was also representing Mythias Cole in an emancipation proceeding. Both attorney Shyne and Yocom have conflicts of interest and should have been removed from their duties administering the Estate once they filed the petition to disinherit Cole.



Respondent emphatically denies all the allegations made against her by the PR, a person Plaintiff has never met. The allegations that Cole intended to terminate her parental relationship with her daughter are unsupported, false and just cruel in light of the death of her two daughters. There is no legal precedent for what the Petitioner is attempting to do by terminating the Respondents parental rights following the death of her two daughters under MCA § 72-2-125.

Cole's counsel finds no case where parental rights have been deemed terminated or parent has been barred from inheriting except in circumstances where DPHHS was previously involved. Indeed, the case of **In re J.B.**, 2016 MT 68, 383 Mont. 48, 368 P.3d 715 requires that DPHHS has been unsuccessful in reuniting parent and child before parental rights can be terminated.

Yocom has not produced any evidence which would support her efforts to terminate Cole's parental rights. The Petitioner's allegations of abandonment are unsupported. Under the intestacy statutes in Montana, Mykhia's mother Lisa Cole is the sole beneficiary of her estate. Yocom was influenced by her representation of Mythias Cole who stands to inherit if Cole's parental rights are deemed terminated by this Court.

At the hearing, Yocom made the following statements showing her bias in favor of Lisa Cole's children:

Yocom testified, “I asked Danielle [Shyne] what the law would allow me to do, and she counseled me saying that we could go about this by disinheriting her (Cole) and then **making sure that the remaining siblings would have an equal share of the Trust.**” (Pg. 208:20-24)

When asked whether she takes into consideration people who are not beneficiaries of the estate when making decisions, Yocom answered, “**I guess I see them [Lisa Cole’s children] all as beneficiaries of the estate, not just the mother.**” (Pg. 209:3-4)

When asked why she filed the petition to disinherit Cole Yocom testified; “Based on the information I had at the time, I thought Mom had other ongoing issues, would not appear, the costs would be minimal, and we would **maintain maximum value for Ms. Cole’s children.**” (Pg. 212:7-11)

When asked, “Throughout this proceeding you have been advocating for the children, who are really strangers to the estate; isn’t that right?” Yocom responded, “**I don’t feel that they are strangers to the estate.**” (Pg. 214:13-17)

Yocom also advocated for Cole’s children at the settlement conference (See Appendix C)

In Montana, parental rights are a fundamental right, and cannot be terminated without substantive due process. MCA § 41-3-609

*“A parent's right to the care and custody of a child constitutes a fundamental liberty interest that must be protected by fundamentally fair procedures. In re*

**D.B. and D.B.**, 2007 MT 246, ¶ 17, 339 Mont. 240, ¶ 17, 168 P.3d 691, ¶ 17. Proceedings to terminate parental rights must meet due process requisites guaranteed by the Montana and United States Constitutions. **In re A.N.W.**, 2006 MT 42, ¶ 34, 331 Mont. 208, ¶ 34, 130 P.3d 619, ¶ 34. *Fundamental fairness and due process require that a parent not be placed at an unfair disadvantage during the termination proceedings. In re A.N.W., ¶ 34.* **In re Custody and Parental Rights of A.P.**, 2007 MT 297, 172 P.3d 105, 340 Mont. 39 (Mont. 2007)

There is only one way to terminate parental rights in Montana.

*Under § 41–3–609(1)(f), MCA, a court may terminate parental rights upon a finding, established by clear and convincing evidence, that the child is an adjudicated youth in need of care and **both** of the following exist:*

*(i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and*

*(ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time. In re J.B.*, 2016 MT 68, 383 Mont. 48, 368 P.3d 715.

Lisa Cole had a specific agreement with her daughter, Samara Yanny, that she would take care of Mykhia for a short period of time until Cole had recovered from her surgery and at that time Mykhia would rejoin her. Yocom has not produced any evidence or testimony to dispute this fact. Because Samara Yanny died in the same car crash as Mykhia, the only credible testimony regarding this short-term living arrangement is Cole. There is no admissible testimony that Cole had abandoned her daughter. Mykhia's sister, Sierra, testified: *"I do know that their goal collectively amongst them(Cole and Samara) was to try to establish who would be the best person to take care of Mykhia and at that time it was my sister"*. (Trans 143:21)

Because the Yocom did not meet the requirements of MCA § 41-3-609 1(f) to show that Mykhia was adjudicated as a youth in need of care Cole's parental rights could not have terminated under Montana Law.

Unfortunately, Cole does not have a good relationship with her seven children, two of which are now deceased. It is also clear the allegations made by the PR in her Petition originated with some of those children who seek to be beneficiaries of their sister's Estate. The PR has an obligation to represent the Estate, not these other siblings. The fact that the PR is suing her own client, i.e., Cole who is the beneficiary under well-established Montana probate law, is highly unusual and motivated by outside individuals, who are not her client.

### **STATEMENT OF THE FACTS**

1. In the summer of 2019, Cole, Mykhia and Mythias were living in Colorado with their mother Lisa Cole when she began having medical issues resulting in a hysterectomy (Transcript Pg. 143:25-Pg.144:10)
2. On or about September 2019 their brother, Phoenix Nivens, picked Mythias and Mykhia up and transported them to Bozeman, Montana. This was done with Cole's consent. (Transcript, Pg. 157:11-13)
3. Mykhia's brother and sister, Sierra and Mathias, testified that Cole had weekly phone conversations with her daughter Mykhia. Sierra Yanny and Mythias Cole both

testified that her mother did try to make sure that contact between Cole and Mykhia was maintained. (Pg. 160:6-8) (Pg.142:17-25) (Pg. 160 Ln. 2-8)

4. Jennifer Hoerauf is a Regional Administrator for Montana Child and Family Services (DPHHS). Jennifer testified that during interviews, Lisa Cole told the interviewer that she had a hysterectomy in September and had allowed [SIS] Samara to take the children since then. *“BM indicates she wants the children back, but [SIS] is refusing to tell BM where she lives.”* (Pg. 55:23 - Pg. 56:3)
5. In November 2019, Lisa Cole contacted DPHHS, and informed them she was in the process of trying to get Mykhia back to live with her and that her daughter refused to give Lisa Cole the location of where they were living.<sup>2</sup> *“birth mother reported that she had had a hysterectomy in September and allowed sister take care of children since then. Birth mother indicates she wants the children back, but sis is refusing to tell birth mother where she lives.”* (Hoerauf 55:23 - Pg. 56:3).
6. Lisa Cole repeatedly contacted DPHHS requesting assistance in getting her child back. Lisa Cole wanted Mykhia to live with her again. *“Birth mother would now like to resume parenting, but adult sibling will not return the children or notify birthmother where they are residing.”* (Hoerauf Pg. 62:16-19).
7. Under Montana statute MCA § 20-5-501, while Mykhia was living with her sister, Samara had the right to consent to educational services and to medical care for

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<sup>2</sup> Citation to Exhibit 3

Mykhia without superseding any parental rights regarding the child. Samara was, at that time a “caretaker/relative”, as defined by (MCA § 20-5-501(4)(a)).

8. In Montana, parental rights may only be terminated by the Court finding parental unfitness, including abandonment, abuse and/or neglect of the child. Parental termination hearings must be brought by Montana DPHHS or Child Protective Services. (MCA § 41-3-609) The process often takes years. (Hoerauf Pg. 85:18 - Pg. 86:21)
9. An investigation into Mykhia’s living arrangements by DPHHS did not meet the threshold for further investigation or meet the definition of abuse and neglect. (Hoerauf, Pg. 57:21 - Pg. 58:3 and, Pg. 60:1-3, Pg. 62:16-17, Pg. 81:17-21, Pg. 90:6-7)
10. On numerous occasions, Cole expressed her intent to have Mykhia return to living with her after her medical issues had been resolved. (See Exhibit 3, Notes from various interviewers.)
11. MCA § 20-5-501 recognizes a growing phenomenon in which absent, or otherwise available parents have temporarily surrendered the custody and care of their children to a grandparent or other relative for lengthy periods of time. The statute gives these caretakers the power to perform routine functions, including tending to educational and educationally related medical needs of the child. The statute is not intended to affect the rights and responsibilities of the parent... (MCA § 20-5-501)

12. On November 5, 2019, Cole told Cassandra Salway from Child Protective Services that she owned a home in Hingham, Montana and told Samara she would have Mythias and Mykhia back in her care by Christmas. (Exhibit 3, Pg. 1)
13. Mykhia's sister Sierra was asked; *"Do you have any information, or you don't know about what arrangements your mother and your sister[Samara] had about Mykhia's care of getting her back with your mom or anything like that then?"* She replied, *"I do know that their goal collectively amongst them was to try to establish would be the best person to take care of Mykhia and at that time it was my sister."* (Trans. Pg 143 Ln. 16)
14. No abuse or neglect proceeding, or any other type of proceeding was ever initiated against Cole which could have resulted in termination of her parental rights especially immediately before Mykhia's death. (Hoerauf 81:7-8)
15. Mike Van Vuren is the assistant deputy superintendent of Bozeman Public Schools, and was previously the Principal at Hyalite Elementary, the school Mykhia attended. (Trans. 36:3-10)
16. Van Vuren testified that Mykhia was classified as an *"unaccompanied youth"* which allowed her older sister to register her for school, this occurs when they are not living with their custodial parent. It is not uncommon for a school district to have multiple students identified as *"unaccompanied youth."* (Pg. 42-43) Mr. Van Vuren

viewed Cole as Mykhia's custodial parent, even though she was living with her sister Samara at the time. (45:20-46)

17. There is no evidence that Cole refused to become involved in the Estate as the District Court's Findings and Conclusions state. (Cosgrove affidavit Ex.10, pg. 2 ¶5 & Pg.3 ¶10.)
18. There is no evidence that Yocom was appointed as a stand in Public Administrator. (Pgs. 12-16, and Pgs. 185-195.)
19. Cole was not served with a subpoena to appear at the May 23, 2023, evidentiary hearing. No acknowledgement or affidavit of service for any subpoena to Lisa Cole were ever filed with the District Court.<sup>3</sup>
20. Lisa Cole's attorney Christopher W. Froines first started representing her on January 27, 2022, she was not represented at the time of the hearing to appoint Yocom as PR on November 23, 2020. (Dkt #21)

### **SUMMARY OF THE ARGUMENT**

Jennifer Hoerauf is the Regional Administrator for Child and Family Services in Montana. She was questioned at the evidentiary hearing on May 23, 2023, regarding the possibility of Lisa Cole's parental rights being terminated immediately prior to Mykhia's death. She testified ;

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<sup>3</sup> Although the Court says that Cole was served a subpoena for the hearing via email in its Findings and Conclusions (FF#9), the Court did not rule on Yocom's Motion for Sanctions asking the Court to find the service of the subpoena by email to Cole's counsel was effective. (Dkt. #89)



Q. (By Walter Clapp) That's fine. And if a parent was homeless and doing drugs, and abandoned their kids in a foreign state or let's say in state, and a report was received, and the kids were just living on the street, could CPS then do an investigation and terminate potential -- parental rights potentially?

MR. FROINES: Objection. Calls for speculation. THE COURT: I'll overrule. She can answer if she can.

**THE WITNESS:** So I think that's a more complex question than what is being asked. **If all those circumstances were there,** and we investigated, and we determined that the children were living on the streets and were unsafe, we would then follow --we would then initiate a what we call a dependent/neglect action. We would have to have a show cause. **We would have to have an adjudication in front of a district court judge to make that determination to support that.** We would then offer parents treatment plans and services in order to work toward reunification. **If all those efforts failed** during the duration of time and at a period of, I mean, some of our cases go on for four years. **It's difficult to say that we would meet the level of termination. We would not be able to terminate parental rights just on the onset of the case.** It's usually a long process that takes several months to years to make a determination to file for termination. (Hearing transcript Pg.84-Pg.86 Ln.5) (Emphasis added)

This statement from the regional director of the agency charged with protecting children in Montana makes it clear that even if all the allegation the PR has made against Lisa Cole were true, her parental rights could not have been terminated immediately preceding Mykhia Cole's death.

Based on the statements of the regional administrator for child and family services, there is no evidence that any state agency would ever have filed a petition to terminate Cole's parental rights, and absent such a petition, the District Court had no authority to find that Cole's parental right could have been terminated

The District Court erred in admitting, and then relying on unsubstantiated hearsay statements contained in old DPHHS reports that date back to 2001 in the District Court's Findings and Conclusions.

The District Court also failed to acknowledge its own errors in appointing the PR without first confirming that notice had been given to the mother of the deceased, denying her due process rights. (See Cole's Superseding Motion to Remove the PR, Dkt #86)

The PR should have been removed based on the serious conflict of interest Yocom had, representing Mythias Cole at the same time she sought to disinherit Cole, which would have made Mythias a beneficiary of the Estate.

The District Court refused to let Cole appear remotely at the evidentiary hearing, a denial of her right to fundamental fairness, due process and right to be present at all phases of the proceedings. **In re A.N.W.**, 130 P.3d 619, ¶34 2006 MT 42, 331 Mont. 208 (See Motions and Order Dkt. #'s 81, 83, 84 & 88)

The District Court's Findings and Conclusions are filled with factual errors about the evidence presented. For example, at the Court's Conclusions #32, the Court states" *Ms. Cole's complaints about the Estate's failure to notify her of these proceedings are without merit because she was represented by counsel.*" This is simply untrue. The hearing to appoint Yocom was conducted on November 23, 2020

(Dkt. #5). Cole's attorney did not make an appearance until January 28, 2022, almost two years later, and was not representing her prior to that time. (Dkt. #21).

The District Court has also conflated the burden of proof. At conclusion #34 the Court writes; *"Ms. Cole presented no testimony or evidence that she supported M.A.C. and did not steal from M.A.C."* Theft is not an issue in this case, and the burden of proof is on Yocom to show by Clear and Convincing evidence, that Cole's parental rights could have been terminated.

Another mis-leading entry by the District Court was at Conclusion #20, where the District Court wrote, *"Ms. Cole has attempted to circumvent the application of the Montana statutes in this matter through her "Superseding Motion to Remove Sunny Yocom as Personal Representative."* The DC discussed this Superseding Motion numerous times during the May 23, 2023, hearing, instructing the PR to file a response and setting a briefing schedule. ( 244:13-247:21) The DC even discussed having a second hearing on the Superseding Motion once it was fully briefed. Cole requested a second hearing, but the DC did not respond to her request. (Dkt. #98 August 1, 2023)

A review of the transcripts of the November 23, 2020, and May 23, 2023, hearings, the record, and the District Court's Findings and Conclusions will certainly leave this Court with the definite conviction that a mistake has been made.

## **STANDARD OF REVIEW**

The standard of review for the interpretation of a statute is a question of law, reviewed de novo. **In RE U.A.C.** 2022 MT 230, 410 Mont. 493, 520 P.3d. 295.

The standard of review of the District Courts Findings of Fact and Conclusions of Law is de novo. In this case, de novo review applies to the District Court's denial of Lisa Cole's Superseding Motion to Remove the Personal Representative for Cause and the PR's Amended Motion to Bar Lisa Cole from Inheriting.

We review a district court's conclusions of law de novo to determine whether they are correct. **Giambra v. Kelsey**, 2007 MT 158, ¶ 28, 338 Mont. 19, 162 P.3d 134 (citations omitted).

This Court reviews mixed questions of law and fact de novo. **Stop Over Spending Mont. v. State**, 2006 MT 178, ¶ 10, 333 Mont. 42, 139 P.3d 788 (citation omitted). Mixed questions of law and fact are presented to this Court when the historical facts of a case are admitted or established, the applicable law is undisputed, and the issue is whether the facts satisfy the statutory standard. **Stop Over Spending Mont.**, ¶ 10 (citations omitted).

The Standard of Review of the District Court's decision to admit hearsay evidence is the abuse of discretion standard. The question of admissibility of testimony under a hearsay exception is left to the sound discretion of the trial court. We will not overrule a district court's decision that a hearsay exception applies absent an abuse of discretion. **State v. Hamby**, 1999 MT 319, ¶ 13, 297 Mont. 274, 992 P.2d 1266.

We review a District Court's evidentiary rulings for an abuse of discretion. The District Court has broad discretion in determining the admissibility of evidence. Notwithstanding this deferential standard, however, judicial discretion must be guided by the rules and principles of law; thus, **our standard of review is plenary to the extent that a discretionary ruling is based on a conclusion of law.** In such circumstances, we must determine whether the court correctly interpreted the law. **In re T.W.**, 2006 MT 153, ¶ 8, 332 Mont. 454, 139 P.3d 810 (internal citations omitted).

¶ 13 We review a district court's findings of fact regarding a child custody ruling to determine if the findings are clearly erroneous. **A finding is clearly erroneous if it is not supported by substantial credible evidence, if the court misapprehended the effect of the evidence, or if a review of the evidence leaves this Court with a definite and firm conviction that a mistake has been made.** *Albrecht v. Albrecht*, 2002 MT 227, ¶ 8, 311 Mont. 412, 56 P.3d 339. *Puccinelli v. Puccinelli*, 2012 MT 46, 272 P.3d 117, 364 Mont. 235

The District Court's decision to deny Cole the ability to appear remotely at the evidentiary hearing is reviewed for an abuse of discretion. "We review evidentiary rulings for abuse of discretion." *State v. Bonamarte*, 2009 MT 243, ¶ 13, 351 Mont. 419, 213 P.3d 457.

### **ARGUMENT**

#### **1. Could Cole's parental rights be terminated without the State initiating a child-welfare action?**

The statute in question, (MCA § 72-1-125) implicates a fundamental right. *"The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."* *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054 2060, 147 L.Ed.2d 49 (2000). Thus, this statute is subject to strict scrutiny review. *Polasek*, ¶ 15 (We apply "close scrutiny" to "any infringement on a person's right to parent a child."). *Kulstad v. Maniaci*, 2009 MT 326, ¶115, 352 Mont. 513, 220 P.3d 595 (Mont. 2009)

In the case **In RE the Matter of RN**, 2024 MT 115, decided May 28, 2024, this Court discussed who may file and prosecute a petition for the termination of

parental rights. This Court accepted supervisory control from the District Court, striking the petition to terminate the mother's parental rights because, as this Court wrote:

*“Only an attorney for the state – the county attorney, attorney general or an attorney hired by the County can initiate and prosecute a case of child welfare action under Title XLVIII. When the department filed its motion to dismiss, it in essence withdrew its petition for termination and neither the district court, nor this court has the authority to order or compel the department to re-file or prosecute its petition for termination.”* (id. ¶ 20) This Court also noted, *“A parent has a fundamental liberty interest in the care and custody of their child.”* (**Matter of RN**, Id. At ¶17)

Based on the statement of the regional administrator for child and family services, (Hoerauf Pg. 49-90) there is no evidence that any state agency would ever have filed a petition to terminate Cole's parental rights, and absent such a petition, the District Court had no authority to find that Cole's parental right could have been terminated. (Id.)

**2. Did the District Court err when it appointed Sunny Yocom Personal representative of the Estate and again in denying Lisa Cole's Motion to remove Yocom for cause based on her conflict of interest.**

In Montana, the probate process is governed by the Montana Probate Code, which sets out the rules and procedures that must be followed when administering a deceased person's estate. Due process is a constitutional right that ensures that individuals are treated fairly and justly in legal proceedings.

If someone fails to follow the Montana Probate Code when administering an estate, it could be considered a violation of due process. This is because the Probate Code establishes the legal requirements that must be followed in order to ensure that the estate is properly administered and that the rights of all interested parties are

protected. MCA § 72-1-301(1) states: “*if notice of the hearing on any petition is required and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person...*” And; MCA § 72-1-301(3) states: “*(3) Proof of the giving of notice **must** be made on or before the hearing and filed in the proceeding.*”

As the mother of the deceased and her only living parent, Cole was undeniably a “interested person” as defined by the Probate Code. A person who is applying to become a personal representative must give notice of the application to all interested persons. This notice **must** be given prior to the hearing on the application, and it must include the time and place of the hearing. If notice is not given to all interested parties, the appointment of the personal representative can be challenged on the grounds that it was made without proper notice. MCA § 72-1-301 (1) & (3).

If the appointment of a personal representative is found to be void ab initio due to a failure to give proper notice, all actions taken by the personal representative are also void. This can include any distribution of assets, payment of debts, or other actions taken by the personal representative. (Such as the Petition to Disinherit Cole) It is therefore critical that all interested parties are given proper notice of any application for appointment as personal representative to ensure that the appointment is legally valid, and all actions taken by the personal representative are binding.

The transcript of the hearing for the appointment of personal representative held November 23, 2s misled the Court into believing that Mykhia’s mother, Lisa Cole, consented to the appointment of Yocom as personal representative. On page

14, line 9 of the November 23, 2020, transcript, the Court asks Mr. Cosgrove if notice was given, to which he states, “*it was.*” The Court then asks, “*and nobody else didn’t have any objections?*” Mr. Cosgrove replied, “*no, the primary person of course is the mother, and the last address I had for the mother was just north of Miles City and, in fact I visited with her there at that time and have not been able to identify any address for her since.*” Not having an address for Cole did not absolve Yocom or Cosgrove of their statutory notice requirements to her.

Mr. Cosgrove’s answer to the Court’s question about objections is mis-leading. Mr. Cosgrove never asked Lisa Cole if she wanted to be appointed as PR, nor did he or Yocom request a waiver or consent to the appointment of Yocom from Cole. Had Cole received the required notice of the hearing, she would have objected to the appointment of Yocom as personal representative. If the Court had been aware that Cole had not consented to Yocom’s appointment and had not waived her priority to be appointed PR of the Estate or had checked the docket to see if the required proof of notice had been filed, the Court would presumably have held a hearing at which Lisa Cole could attend. MCA § 72-3-507

**3. Were the District Court’s findings of facts clearly erroneous due to the District Court’s misapprehending the effect of the evidence and the lack of credible and admissible evidence supporting them?**

**FF 9.** The District Court states: “*Despite a subpoena being served upon Lisa Cole to appear in person at the hearing, she failed to appear for the hearing.*” This statement is directly contrary to what the DC said at the hearing where the DC said,



*“That even though she [Cole] wanted to appear by Zoom, I wanted her in person, but that I didn't order her -- I ordered that she shall appear in person. She's not here, but she has a right not to be here. My order was more in the context if she was going to be at the hearing she had to be here in person.” (239:19-25)*

**FF13.** The District Court states: *“Since at least July 2019, Ms. Cole failed to provide medical care for M.A.C. and objected to a guardianship that resulted in M.A.C. being unable to receive dental care. This led M.A.C. to suffer painful dental abscesses.”*

There was no testimony that Cole failed to provide medical care for her daughter. Montana statutes specifically allowed Mykhia’s sister Samara, to get her medical care. (MCA § 20-5-501(2) ) The statement that Mykhia had dental abscesses was taken from a random statement made by Yocum, and her proposed findings and conclusions (Appendix E, pg. 4:iv) are not supported by the evidence. (Trans. 208:12)

**FF14.** The District Court states, *“that up until August of 2019, Ms. Cole was verbally and physically abusive to M.A.C. and Mythias.”* There is no evidence in the record that Cole was ever physically abusive to her daughter. The allegations of abuse to Mythias were made by Mythias and are irrelevant to Cole’s treatment of her daughter. (Trans Pg. 147-161)

**FF18.** The District Court states, *“Ms. Cole continued to receive Social Security benefits for M.A.C. and Mythias after they departed Colorado but failed to apply those*

*funds to M.A.C. or Mythias.*” This is a false statement. The only reference in the record to Social Security benefits is that Mykhia’s benefits were transferred to her sister Samara, for Mykhia’s benefit. (Transcript Pg. 66:24)

**FF 22.** Here, the district court states, “*After conducting a thorough investigation, DPHHS concluded MAC was safe with Samara and **refused** to return M.A.C. back to Ms. Cole.*” This is a misstatement of the evidence. Even if Exhibit 3 was not hearsay, it only states; “*at the time law enforcement did not provide Samara’s current address to Cole.*” It does not state that DPHHS ‘*refused*’ to return M.A.C. back to her mother. (Page 14 of Ex. 3 states: Summary of Allegations: SIS is refusing to return children to BMR.)

**FF29.** Here the district court states, “*Ms. Cole failed to provide shelter to MAC from at least June 2019 until her death in March 2020. Ms. Cole failed to provide education or healthcare to MAC from at least June 2019 until her death in March 2020.*” This Conclusion of Law by the District Court conflicts with the evidence and other findings made by the District Court. At finding of fact #20, the DC states Mykhia was enrolled in school in September 2019. A fact substantiated by testimony of the Superintendent of Hyalite Elementary School in Bozeman, MT Mike Van Buren. (36:16)

**FF30.** “*Ms. Cole failed and refused to support MAC.*” There is no testimony in the record to support this Conclusion of Law. Mykhia’s sister, Samara, was

appointed as her Social Security payee in November 2019. There was no testimony regarding the agreement between Cole, and her daughter Samara, regarding her temporary care of Mykhia while Cole was in the hospital, and no evidence that Cole refused to support her daughter.

**FF31.** Here the Court states, “*During the time MAC resided with Samara, Ms. Cole failed to manifest any firm intention to resume care of MAC or Mythias, to Phoenix, Sierra or Samara.*” Exhibit 3, the DPHHS reports, repeatedly show they were contacted by Cole seeking return of her daughter in November and December of 2019, and February 2020.

**4. Did the district court err in admitting hearsay evidence, and then incorrectly relying on the hearsay in its findings and conclusions?**

The District Court erred when it admitted and then relied upon unsubstantiated DPHHS reports over Cole’s objections. This Court addressed the issue in the case **In Re Swan**, 173 Mont. 311, 567 P.2d 898 (1977) and **Puccinelli v. Puccinelli**, 2012 MT 46, ¶17 272 P.3d 117, 364 Mont. 235.

¶ 17 We have previously addressed the admissibility of hearsay evidence in a custody hearing. **In re Swan**, 173 Mont. 311, 567 P.2d 898 (1977). In **Swan**, various reports were prepared by State social services workers addressing the mother's ability to care for her children, the children's adjustment to foster care, and various police reports. While these reports were available at the time of the hearing—a hearing at which State social workers testified—they were not offered into evidence by the State. These reports contained written hearsay that did not fall under any recognized exception to the hearsay rule. Nonetheless, **the court reviewed the reports and expressly referenced them in its ruling** granting permanent custody of the Swan children to State social services. In reversing the district court, we stated:

As to written hearsay contained in the reports submitted to the court, this jurisdiction has long followed the rule that **unsworn statements made out of court with no opportunity afforded to confront the writer and question him as to their veracity are hearsay.**

**Unsworn reports where there is no right to cross-examine come within the hearsay rule and are inadmissible.** *Swan*, 173 Mont. at 314–15, 567 P.2d at 900–01

¶18 Similarly, in *In re Moyer*, 173 Mont. 208, 567 P.2d 47 (1977), the mother of the children argued that a report submitted to the court by State Child Welfare **Services contained hearsay statements that were prejudicial to her and which had strongly influenced the court's decision** to award permanent custody of the children to the State. We acknowledged that “It is true that a judge violates due process requirements if he bases his child custody order on statements in a welfare department report without requiring the authors of the report to testify at a hearing and be subject to cross-examination.” *Moyer*, 173 Mont. at 211, 567 P.2d at 49. We continued, however, that “In a civil case ... which is tried before the court without a jury, there is a presumption that the trial judge has disregarded all inadmissible evidence in reaching his decision.” *Moyer*, 173 Mont. at 211, 567 P.2d at 49. We noted that the mother/appellant in *Moyer* had not rebutted this presumption, nor had she shown that the court had based its decision on this inadmissible evidence. We therefore held that absent any evidence that the district court had considered the inadmissible evidence, the district court's ruling would stand. In contrast to the situation in *Moyer*, here the District Court affirmatively relied on the inadmissible evidence. *Swan* at ¶ 17.n (Emphasis added)

There is no doubt that the District Court relied on the DPHHS reports which are undisputedly hearsay. The following Findings of Fact by the District Court were based solely on hearsay evidence which was objected to at the time it was admitted.

**FF10.** “*Lisa Cole has an extensive history with DPHHS, starting in 2001, including 16 CPS reports that Lisa Cole also financially exploited an elderly*

Prior MT CPS Report ID	Report Received	Status	Substantiated
181310	10/12/2004	Closed	Y
234339	12/11/2007	Closed	N
274207	07/27/2010	Closed	N
292550	10/19/2011	Closed	N
295209	12/20/2011	Closed	N
300663	04/13/2012	Closed	N
332386	03/05/2014	Closed	N
336006	05/13/2014	Closed	N
337055	06/03/2014	Closed	N
342858	10/07/2014	Closed	N
347036	01/05/2015	Closed	N
347439	01/12/2015	Closed	N

2, DPHHS Intake & Assessment, Nov. 5, 2019, (Pg. 146) Report ID 456030)

*person and absconded with \$18,000.*” Exhibit 3 is the DPHHS reports compiled by known and unknown persons, none of whom testified to the veracity of the statement at the hearing. A review of Exhibit 3 shows that it clearly meets the definition of hearsay evidence that is not admissible. The question before the District Court was what had happened in the 6 months before Mykhia’s death, not alleged incidents dating back to 10 years before she was born. A review of Ex. 3 shows that all but one of the alleged incidents are unsubstantiated, and the one dates back to 2004.

**FF 8 & CL 26.** District Court included statements that; *“Lisa Cole failed to mediate in good faith”*, and *“The Court has the mediation report on file.”*

Mediations are by their nature confidential. The mediator’s report by itself is hearsay that the District Court relied on in formulating its opinion of Cole. The mediator violated MCA § 26-1-813 in making such a statement, and the entire correspondence with the mediator is attached at appendix C. These documents show that Yocom was more concerned about Cole’s children than she was about lawfully distributing the Estate. (See discussion of the mediation at hearing 26:18-29:25)<sup>4</sup>

**FF11.** The DC states: *“Lisa Cole has an extensive history with DPHHS, starting in 2001, including 16 CPS reports...”* This District Court finding is solely

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<sup>4</sup> Although the Court maintains that Cole mediated in bad faith, the Court did not rule on Yocom’s Motion for Sanctions asking the Court to find that Cole mediated in bad faith. (Dkt. #89)

based on hearsay (Ex. 3). The statements are not relevant to the questions before the court and do not relate in any way to Lisa Cole's care of her daughter and clearly influenced the District Court.

**FF 23.** The DC states: "*DPHHS interviewed M.A.C. during the investigation. M.A.C. stated that she and Mythias believed that the only reason Lisa Cole wanted her and Mythias back was for their Social Security Benefits. M.A.C. called her mom a pill popper.*" These are hearsay statements, relied upon by the DC, that have no relevance to whether Cole abandoned her daughter. These hearsay statements only serve to prejudice the DC against Cole.

**FF 25.** Here the court states; "*In Feb. 2020, MAC was still lacking dental care because of Ms. Cole's refusal to give Samara permission for a guardianship.*" In addition to being hearsay, there is no testimony that supports this finding. The DPHHS report Exhibit 3, pg. 1, specifically states that, "*Cole will give consent to medical care over the phone.*"

**5. Did the district court abuse its discretion in denying Lisa Cole's request to appear remotely from her home in Norman, Oklahoma at the May 23, 2023, evidentiary hearing without explanation, while granting all the other requests for remote appearance?**

The District Court granted the requests for anyone to appear remotely at the evidentiary hearing, except the request from Lisa Cole (Dkt #88). Based on the pleadings and Cole's Affidavit of Inability to Pay Court Costs and Fees, (Dkt. #15) the DC knew Cole did not have the ability to travel that great distance from her

home in Oklahoma for the hearing. The denial of Cole's request to appear remotely was without explanation, and it denied her the fundamental fairness and due process that this Court has held she is entitled to. **In re V.F.A.**, 2005 MT 76, ¶ 6, 326 Mont. 383, ¶ 6, 109 P.3d 749, ¶ 6.

**6. Was the lack of verification on pleadings submitted by both parties, harmless error?**

The DC claims that Cole's Superseding Motion is void because is not a verified petition. (DC's Findings #7 & Conclusions #31 & 32) While it is true the superseding motion is not verified, Yocom's Amended Petition to Disinherit Cole was also not verified. (8:5-10)

Yocom initially filed a petition to disinherit Lisa Cole. (Dkt. #12) That document was verified. Yocom then filed an Amended Petition for Guidance from the District Court which was not verified. (Dkt. #29) Danielle Shyne represented to the Court at the hearing on May 23, 2023, that the Amended Petition for Guidance from the District Court was the same as the original Petition for Approval to Bar Parent from Inheriting, and it is not. The amended petition contained new sections entitled "*Statement of the Case*," "*Discussion*," "*Abandonment*," "*Neglect*," and "*Conclusion*", and includes sixty-five (65) new paragraphs that were not in the original Petition for Guidance From the Court.

Although Mr. Clapp told this court that the original verification applied to the amended document because it was the **same**, there are numerous new allegations of fact contained in the amended document which are not verified.

The court has conducted an evidentiary hearing at which evidence has taken under oath. This testimony supersedes the allegations in the amended petition and the Cole's response, and the failure of these documents to be verified is harmless error. (See DC discussion Trans. Pg. 7-12)

### **CONCLUSION**

MCA § 72-2-125 has never been used for the purpose the PR is attempting here. The statute is vague and ambiguous without a clear description of what the term "could have been terminated" means. The District Court has clearly applied the "well anything could happen" interpretation which would make the statute apply to virtually any circumstance or set of facts.

The more reasonable approach would be to apply the statute in light of the fact that the head of DPHHS has testified that there were no ongoing investigations of Cole or her daughter at the time of her death, that a successful termination of Cole's parental rights under the circumstances were highly unlikely and DPHHS had determined only a month before her death, that Mykhia was safe and well cared for.

The District Court clearly formulated a bias against Cole based on unsubstantiated DPHHS reports dating back 20 years which are hearsay and should



never have been relied upon by the Court. The PR did not present any evidence, much less clear and convincing evidence, that Cole had abandoned her daughter. Cole and her daughter Samara were both thinking of Mykhia's best interests when they agreed that Mykhia would stay with her sister while her mother recovered from surgery. A child staying with family members is so common that Montana has statutes addressing that exact situation. (MCA § 20-5-501)

This Court should review the evidence presented de novo and issue its own determination that the District Court erred, and the PR has not met her burden of showing that Coles parental rights could have been terminated, and that the PR should have been removed, based on the lack of due process and a conflict of interest.

## **ATTACHMENTS/APPENDICES**

Appendix A – Opinion of the District Court

Appendix B – Order (Dkt #88) Denying Lisa’s Motion to Appear Remotely

Appendix C – Correspondence from Russ Fagg

Appendix D – Cole’s Proposed Findings and Conclusions

Appendix E – PR’s Proposed Finding of Facts and Conclusions

Appendices F-L – MCA Statutes Cited

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11, Montana Rules of Appellate Procedure, I certify this Opening Brief is printed with a proportionately spaced Times New Roman text, typeface of 14 points, is double spaced and the word count does not exceed 10,000 words, excluding the Certificate of Service and the Certificate of Compliance.

DATED this 13th day of June 2024.

/s/ Christopher W. Froines  
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## **CERTIFICATE OF SERVICE**

The undersigned certifies that on 13th day of June 2024, a true and accurate copy of **Appellant's Opening Brief** was served on the following by means designated below:

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