

FILED

06/13/2024

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 24-0230

# APPENDIX A

## DC FOF Dkt 103

**MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT**  
**GALLATIN COUNTY**

IN RE THE ESTATE OF

DP-20-137C

Honorable Judge John C. Brown

M.A.C.,

Deceased minor.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE:  
PETITIONER'S MOTION FOR  
APPROVAL TO BAR PARENT  
FROM INHERITING**

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This matter having come before the call of the Court on *Petitioner's Motion for Approval to Bar Parent from Inheriting* and *Petitioner's Amended Petition for Guidance from District Court* based on based on Mont. Code Ann. §§ 72-2-125 and -124 and the Court having duly reviewed the testimony of the parties, the arguments of Counsel, all pleadings and having thoroughly researched and being fully informed of the law regarding this matter doth hereby FIND and ORDER as follows:

FINDINGS OF FACT

1. The decedent, Mykhia Athelia Rae Ann Cole ("M.A.C."), was born on October 10, 2008 and died March 13, 2020 at age 11 years due to a motor vehicle wreck which also killed her adult sister and severely injured her brother. The decedent and her brother, also a minor, were residing with their older sister, Samara, at the time of her death.
2. At the time of her death, M.A.C. did not reside with any parent and was enrolled in school as an unaccompanied youth. M.A.C.'s father, Edmond Ellis Cole, predeceased M.A.C. on May 20, 2017.

3. An estate was opened for M.A.C. as an informal probate. The Insurer's attorney sought out the decedent's mother, Lisa Cole, to serve as the Personal Representative. Lisa Cole refused to become involved in this Estate.
4. As a result, the Insurer's attorney spoke with the Clerk of Court and Public Administrator and was provided a name for a substitute Personal Representative.
5. Sunny Rae Yocom, a professional fiduciary, was appointed as a stand-in Public Administrator Personal Representative ("PR") on November 23, 2020 in Informal Probate.
6. In December 2021, the PR filed a Petition to preclude Ms. Cole from inheriting from M.A.C.'s estate pursuant to 72-2-125 MCA.
7. Mr. Froines appeared as counsel on behalf of Lisa Cole, and numerous motions have been filed and briefed. Lisa Cole has not submitted any verified pleadings.
8. Mediation on this matter took place on March 29, 2023. Lisa Cole failed to mediate in good faith. The Court has the mediation report on file.
9. An evidentiary hearing was held May 23, 2023 on the issues of the Estate's Petition and Amended Petition to Bar Lisa Cole from Inheriting. Ms. Cole was also provided the opportunity to present evidence in support of her Motion to Remove the PR, as well as her "Superseding" Motion to Remove the PR. Despite a Subpoena being served upon Lisa Cole to appear in person at the hearing, she failed to appear for the hearing.
10. Lisa Cole has an extensive history with DPHHS, starting in 2001, including 16 CPS reports. DPHHS reports that Lisa Cole also financially exploited an elderly person and absconded with \$18,000.00.
11. Lisa Cole has a history of drug use in the home, unstable housing, criminal and exploitative behaviors, unsafe relationships, transient lifestyle and a general history of inability to parent. Lisa Cole tested positive for amphetamines when she gave birth to M.A.C.'s brother, Mythias.

12. Prior to September 2019, M.A.C. and her mother moved from Hingham to Helena then to Alabama and then to Colorado where they were living in a car before Ms. Cole abandoned her children with third parties.
13. 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.
14. Up until August 2019, Ms. Cole was verbally and physically abusive to both M.A.C. and Mythias. Ms. Cole threw coffee on Mythias. Ms. Cole hit Mythias with a baseball bat while under the influence of methamphetamine. Ms. Cole also attempted to hit Mythias with her car while under the influence of muscle relaxers.
15. In early September of 2019, due to Lisa Cole's housing instability and medical and mental health instability, M.A.C.'s brother Mythias asked his other sibling, Phoenix Nivens, to pick he and M.A.C. up from Colorado. Thereafter he and M.A.C. began residing with their older sister Samara in Bozeman, MT.
16. In or around early September 2019, Phoenix retrieved Mythias and M.A.C. from Colorado.
17. Ms. Cole was aware Phoenix was taking the children back to Montana and willfully surrendered them.
18. 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.
19. M.A.C. and Mythias moved in with their half-sibling Samara Yanny in Bozeman, MT. Samara Yanny became M.A.C.'s physical custodian. In early December 2019, Samara became the Social Security representative payee for M.A.C..
20. In September 2019, M.A.C. started school at Hyalite Elementary in Bozeman, MT. M.A.C. was enrolled as an "unaccompanied youth".
21. Ms. Cole spoke with M.A.C. occasionally on the phone, but never visited her in person. Ms. Cole did not provide emotional or financial support to M.A.C. Ms. Cole did not manifest to M.A.C. and Samara a firm

intention to reestablish custody of M.A.C. Instead, she made repeated tentative plans, but repeatedly failed to follow through.

22. In late December 2019, Lisa Cole reported Samara to DPHHS and law enforcement. After conducting a thorough investigation, DPHHS concluded M.A.C. was safe with Samara, and refused to return M.A.C. back to Ms. Cole.
23. DPHHS interviewed M.A.C. during the investigation. M.A.C. stated that she and Mythias believed 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.
24. In January 2020, Samara Yanny filed a Petition for Guardianship of M.A.C., as cause number DG 20-4B in this Eighteenth Judicial District Court.
25. In February 2020, M.A.C. was still lacking dental care because of Ms. Cole's refusal to give Samara permission for a Guardianship.
26. On March 6, 2020 Samara moved the Court for leave to serve Ms. Cole with the Petition for Guardianship by publication because she could not be located. Attached to Samara's motion was her affidavit which states "MAC's natural mother is Lisa Cole. Therein after called Lisa. Lisa's birth date is June 11, 1972. I believe that Lisa has no fixed address, that she intermittently resides in Miles City, Montana. Lisa has not had MAC in her care since September 2019. MAC has told Lisa that she does not want to live with her until she shows her that she is stable mentally and financially. Additionally, Lisa has not paid any form of financial support towards the care of MAC since September 2019. . . I have made a diligent inquiry into finding the location of Lisa for the purpose of serving her with papers related to my petition and supporting documents. To date I have been unable to locate her exact whereabouts. A Custer County Sheriff attempted service on Lisa to no avail. Because I am unable to locate Lisa, I feel it is necessary to serve her by publication so that I may

proceed with this action in an effort to maintain custody of my half sister in Montana.” (Transcript of 5/23/23 hearing, tty. Of Sierra Yanny, pg.171, ln.15 – pg. 172, ln.13.)

27. On March 12, 2020, District Judge McElyea ordered that Ms. Cole be served by publication for M.A.C.’s Guardianship.
28. The next day, March 13, 2020, Samara Yanny, M.A.C., and Mythias were in an automobile accident.
29. Samara and M.A.C. were killed in the automobile accident.
30. As a result of the automobile accident, M.A.C.’s Estate recovered \$100,000.00 through a wrongful death insurance claim. This \$100,000 settlement is the only asset of M.A.C.’s Estate.
31. During the time M.A.C. resided with Samara, Ms. Cole failed to manifest any firm intention to resume care of M.A.C. or Mythias, to Phoenix, Sierra or Samara.
32. Any finding of fact stated in the following Conclusions of Law is hererby incorporated into these Findings of Fact.

### **CONCLUSIONS OF LAW**

1. This Court has continuing jurisdiction of this matter, and venue is proper in Gallatin County.
2. This Court sits in law and equity in this matter. § 72-1-104, MCA.
3. The Montana Supreme Court has repeatedly “held that equitable issues are a matter of discretion resting with the District Court and will be sustained unless an abuse of discretion is shown.” *Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 56, citing *Ruegsegger v. Welborn*, 237 Mont. 317, 321, 773 P.2d 305, 308 (1989).
4. Equity is meant to help avoid a multiplicity of suits (Bray and Miller, “Getting into Equity”, N.D. Law Review, pg. 1781.) And Equity is invocable when "patterns of opportunism or other sources of mischief that - being patterned - invited supplemental lawmaking." (Id., 1785.)

5. “Inheritance from or through a child by either natural parent or the parent's kindred is precluded unless that natural parent has openly treated the child as the parent's and has not refused to support the child.” § 72-2-124(3), MCA.
6. Montana Code Annotated §72-2-125 states as follows: “Parent barred from inheriting in certain circumstances. (1) A parent is barred from inheriting from or through a child of the parent if: (a) the parent's parental rights were terminated and the parent-child relationship was not judicially reestablished; or (b) the child died before reaching 18 years of age and there is clear and convincing evidence that immediately before the child's death the parental rights of the parent could have been terminated under law of this state other than this code on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child. (2) For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is treated as if the parent predeceased the child.” § 72-2-125, MCA.
7. § 72-1-104, MCA requires that §§ 72-2-124 and -125 be read together. Equity supplements any gaps between the two.
8. “Clear and convincing evidence is more than a mere preponderance of the evidence, and requires evidence that is definite, clear and convincing. It does not mean unanswerable or conclusive evidence or evidence beyond a reasonable doubt.” *Thibodeau v. Bechtold*, 2008 MT 412, ¶ 23, 347 Mont. 277, 198 P.3d 785.
9. Parental rights may be terminated in numerous ways in Montana. For example, parental rights may be terminated by the court upon a finding of parental unfitness, abandonment, abuse or neglect of the child, or through adoption proceedings. § 42-26-608(1)(c) MCA; § 41-3-609 MCA; § 42-2-607 MCA.
10. To terminate the parent-child legal relationship, the district court must determine that one of the six circumstances in § 41-3-609(1), MCA, exists. *Matter of D.H.*, 264 Mont. 521, 526, 872 P.2d 803, 806 (2004).

11. There need not be a determination that a minor be adjudicated as a youth in need of care prior to termination of parent rights. *In the matter of M.J.W.*, 961 P.2d 105, 1998 MT 142 (1998).
12. Under § 41-3-102(7)(e), MCA, abandonment occurs when the parent or other person responsible for the child's welfare abandons the child by leaving the child under circumstances that make reasonable the belief that the parent or other person does not intend to resume care of the child in the future or willfully surrenders physical custody for a period of 6 months and during that period does not manifest to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child. *In re M.J.W.*, 961 P.2d 105, 1998 MT 142 (1998).
13. The Montana Supreme Court has clarified that "abandonment is retrospective in nature, and requires evidence from the past to support a reasonable belief that the parent has left a child under circumstances indicating that the parent does not intend to resume care of the child." *Id.* 23.
14. "Physical neglect" is defined as either a: failure to provide basic necessities, including but not limited to appropriate and adequate nutrition, protective shelter from the elements, and appropriate clothing related to weather conditions, or failure to provide cleanliness and general supervision, or both, or exposing or allowing the child to be exposed to an unreasonable physical or psychological risk to the child. § 41-3-102 (20), MCA.
15. "Physical or psychological harm to a child" is defined as: The harm that occurs whenever the parent or other person responsible for the child's welfare: inflicts or allows to be inflicted upon the child physical abuse, physical neglect, or psychological abuse or neglect . . . causes . . . or otherwise fails to supply the child with adequate food or fails to supply clothing, shelter, education, or adequate health care, though financially able to do so or offered financial or other reasonable means to do so; (v) exposes or allows the child to be exposed to an unreasonable risk to the child's health or welfare by failing to intervene or eliminate the risk; or (vi) abandons the child. § 41-3-102 (21)(a)(i)-(v), MCA.



16. Nonsupport (§ 45-5-621, MCA), assault on a minor (§ 45-5-212, MCA), endangering welfare of children (§ 45-5-622, MCA), and criminal child endangerment (§ 45-5-628, MCA) are all crimes which Ms. Cole could have been convicted of leading up to her abandonment of M.A.C.
17. While not binding upon this Court, the ruling in *Estate of Nuttbrock*, 2000 ML 3513, 2000 Mont Dist. Lexis 1413, is certainly persuasive. In this Montana Sixth Judicial District Court case, the Decedent died intestate after being struck by an automobile. Mother had previously terminated her parent and child relationship and made no claim upon the Estate. Father left Decedent and his brother with Father's parents when very young. While Father served in the military and the military provided some financial support to the children on his behalf, Father had a minimal "almost nonexistent" *Id.* relationship with the children. Father later remarried, the military allotment ceased, and he never again provided support for his sons. District Judge Nels Swandal found that beginning in September 1968 once Father remarried and the Navy allotment previously paid to Grandmother on behalf of his sons ceased, Father failed to meet his affirmative obligation to support and educate his children. "Non-support is synonymous with a refusal to support in this situation, because Father had an affirmative legal and moral obligation to support his children. *State Dept. of Revenue v. Hubberd*, 720 P.2d 1177 (Mont. 1988). Occasional gifts do not constitute support. *Dunlap v. Moody*, 479 S.E. 2d 456 (GA.App. 1966). In *Nuttbrock*, Judge Swandal found "It was the Father's obligation to affirmatively require the children to live with him or to at least be actively involved in their lives and support them. He did neither..."
18. In similar fashion, the Montana Supreme Court in *In Re Estate of Farnum*, 224 Mont. 304, 730 P.2d 391 (1986) ruled that a father who had no meaningful relationship with his now deceased 12-year-old daughter was not entitled to bring a wrongful death action on her behalf. The mother in that case, who was permitted to bring the wrongful death action, was also found to have been correctly allocated \$95,000 of the wrongful death proceeds while father was allocated \$0. "The father further argues that both parents should share any

award for the wrongful death of a minor child. That is generally true. However, here the evidence before the court demonstrated that only the mother could reasonably be expected to suffer damages including loss of consortium, mental anguish and loss of future support.” *Id.* Pg. 6. From these examples, it is clear that the Court must look to the actual relationship, or lack thereof, between parent and child and not at inheritance as a right bestowed by giving birth to progeny.

19. This Court also finds persuasive support in the application of substantially similar disinheriting statutes from other states. In *McKinney v. Richitelli*, 357 N.C. 483, 586 S.E.2d 258, the Supreme Court of North Carolina found that a father who had no relationship with his child was properly barred from benefitting via inheritance from that child’s death citing the North Carolina statute which is substantially similar to that which is at issue in this Montana case. Specifically, North Carolina’s statute as cited in that case required interpretation of N.C.G.S. 31A-2, “Acts barring rights of parents,” which provided “Any parent who has willfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the children’s estate and all right to administer the estate of the child ....” While the McKinney case required the North Carolina court to examine additional facts and law not at issue here, the application of the statute precluding inheritance by an abandoning parent is the same. In that case, the father had perhaps an even stronger defense, so to speak, for his lack of support as he was incarcerated for most of the child’s life. Ms. Cole has no such “defense” in this matter because she was not incarcerated, and she willfully abandoned her children and failed to provide support.

20. Ms. Cole has attempted to circumvent the application of the Montana statutes in this matter through her “Superseding Motion to Remove Sunny Yocum as Personal Representative.”

21. Pursuant to § 72-1-103(25) “‘Interested person’ includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. The term also includes persons having priority for appointment as personal

representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.”

22. “A person interested in the estate may petition for removal of a personal representative for cause at any time.” § 72-3-526, MCA (emphasis added). Petitions and Responses to Petitions must be verified. *See* § 72-1-310(1)(b) & (2)(b).
23. “No person is qualified to serve as personal representative who is ... (2) a person whom the court finds unsuitable in formal proceedings.” § 72-3-501, MCA.
24. Pursuant to Montana Rule of Civil Procedure 61, titled “Harmless Error,” this Court “...must disregard all errors and defects that do not affect any party’s substantial rights.”
25. Ms. Cole is not an “interested person” in the Estate in this matter as the law requires that she be barred from benefitting from the tragic death of M.A.C. who she had abandoned.
26. Clear and Convincing evidence shows that Ms. Cole has a history of abandonment, neglect, and other issues documented by DPHHS, M.A.C.’s school records, and testimony presented by M.A.C.’s siblings and counselors. Ms. Cole refused to become involved in this Estate and as a result, a stand-in Public Administrator PR was appointed. Ms. Cole then participated in mediation in bad faith. Finally, Ms. Cole failed to appear at the hearing to present evidence of her alleged attempts to recover custody of M.A.C. and Mythias or of her good character in general. These facts weigh against any inequities claimed by Ms. Cole.
27. Ms. Yocum, the Personal Representative, was properly appointed. The PR complied with her duty to determine the proper heirs. The PR has complied with her requirement to settle and distribute the estate of the decedent in accordance with this code. § 72-3-610, MCA. The Montana Probate Code required the PR to determine whether Ms. Cole should be barred from inheriting because there is clear and convincing evidence that M.A.C. died before reaching the age of 18 and that

immediately before M.A.C.'s death, Ms. Cole's parental rights could have been terminated under Montana law on the basis of abandonment and neglect. § 72-2-125, MCA.

28. Ms. Cole abandoned M.A.C. Ms. Cole willfully surrendered physical custody of M.A.C. for more than six months while never manifesting to M.A.C. or to Samara, M.A.C.'s physical custodian, a firm intention to resume physical custody or to make other permanent legal arrangements for M.A.C. § 41-3-609(b) MCA. Ms. Cole left M.A.C. under circumstances that made it reasonable for her caretaker to believe that Ms. Cole did not intend to resume care of M.A.C. § 41-3-609(b) MCA. Ms. Cole (1) abandoned M.A.C. in a dangerous situation when M.A.C. was living in a car in Colorado, (2) then willfully surrendered physical custody of M.A.C. for more than six months, and (3) never manifested to any person responsible for M.A.C.'s welfare, any firm intention to resume physical custody or make other permanent legal arrangements for the care of M.A.C. § 41-3-102(i),(ii), MCA; § 41-3-609(b) MCA.
29. Ms. Cole also neglected M.A.C. Ms. Cole exposed M.A.C. to unreasonable physical and psychological harm by (1) abandoning her, (2) by failing to provide basic necessities such as education or adequate health care, and (3) by exposing M.A.C. to unreasonable risk to her health and welfare of M.A.C. § 41-3-102 (21)(a) (iv)-(vi), MCA. Ms. Cole failed to provide shelter to M.A.C. from at least June 2019 until her death in March 2020. Ms. Cole failed to provide education or health care to M.A.C. from at least June 2019 until her death in March 2020.
30. Finally, Ms. Cole failed and refused to support M.A.C..
31. Ms. Cole has failed to file any verified pleading. The Estate filed a Verified Petition to disinherit Ms. Cole. Ms. Cole failed to file a verified response, as required § 72-3-526, MCA and § 72-1-310(1)(b). She filed a number of motions. None of them were verified, and she failed to appear to testify or verify her motions. Her unverified motions must be thereby denied. Even if the motions were verified, they fail on the merits due to her clear and convincing neglect, abandonment, and abuse of M.A.C.

32. Ms. Cole's complaints about the Estate's failure to notify her of these proceedings are without merit because she was represented by counsel. Moreover, "[n]o person is qualified to serve as personal representative who is ... a person whom the court finds unsuitable in formal proceedings." § 72-3-501(2), MCA. Based on the foregoing Conclusion of Fact, this Court finds that even if Ms. Cole had filed a verified petition to remove the current PR and to have this Court appoint her as PR, this Court would have disqualified her as PR. Any notice error to Lisa Cole is harmless.
33. The Estate presented clear and convincing evidence that Ms. Cole's parental rights could have been terminated pursuant § 72-2-125, MCA. (emphasis added). Ms. Cole failed to appear and testify, and thereby failed to present evidence sufficient to refute the termination.
34. Inheritance from or through a child by either natural parent or the parent's kindred is **precluded** unless that natural parent has openly treated the child as the parent's and has not refused to support the child. **§ 72-2-124, MCA.** The Estate presented clear and convincing evidence that Lisa Cole refused to support M.A.C., and that she stole M.A.C.'s social security benefits, and that she abandoned M.A.C.. Ms. Cole presented no testimony or evidence that she supported M.A.C. and did not steal from M.A.C. Ms. Cole shall be treated as predeceased during the distribution of M.A.C.'s Estate and is no longer an Interested Party in this Estate with Standing. § 72-2-125, MCA. requires M.A.C.'s intestate estate to be distributed as if her mother, Ms. Cole, had predeceased her. M.A.C.'s estate should be distributed in accordance with § 72-2-113(1)(c) MCA. The evidence introduced at the hearing leads the reasonable fact finder to conclude that there is clear and convincing evidence that in the six months prior to M.A.C.'s death Lisa Cole abandoned M.A.C. or lacked the resources to parent such that her parental rights could have been terminated on the basis of nonsupport, abandonment, abuse, neglect, and other actions or inactions of the parent toward the child.
35. Ms. Cole is no longer an interested party in this matter, and no longer has standing to seek redress with this Court. § 72-1-103(25), MCA. M.A.C. did not have a spouse or descendants. M.A.C.'s father, Edmond Ellis

Cole, predeceased M.A.C. on May 20, 2017. If there is no surviving descendant or parent of M.A.C., M.A.C.'s estate passes to the descendants of the decedent's parents or either of them by representation. § 72-2-113(A), MCA. M.A.C.'s siblings shall inherit equally under § 72-2-117, MCA.

**WHEREFORE**, it is hereby ordered:

1. Lisa Cole shall be treated as predeceased for purposes of standing, M.A.C.'s estate distribution, and intestacy.
2. Lisa Cole's Motions are denied.
3. Lisa Cole no longer has standing to challenge these proceedings in District Court.

**SIGNED AND DATED ELECTRONICALLY BELOW.**

APPENDIX B

**District Court Order**

**5.10.22**

CLERK OF DISTRICT COURT  
GALLATIN COUNTY  
MONTANA

2023 MAY 10 PM 4:52

FILED

BY W DEPUTY

**MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,  
GALLATIN COUNTY**

IN RE THE ESTATE OF  
M.A.C.

Deceased Minor

Cause No. DP-20-137C

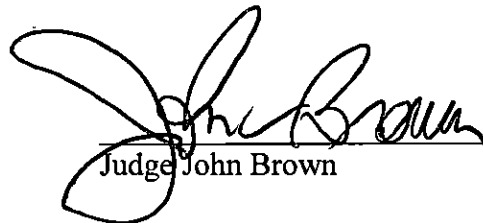
Honorable Judge John Brown

**ORDER**

Upon *Lisa Cole's Motion for Witnesses to Appear Remotely*, and Personal Representative Sunny Rae Yocom's *Response to Lisa Cole's Motion for Witnesses to Appear Remotely*, and good cause appearing,

IT IS ORDERED that Lisa Cole must appear in person to the hearing scheduled for May 23, 2023; other witnesses may appear remotely via electronic means which will be emailed to counsel.

DATED this 10 day of May, 2022.

  
\_\_\_\_\_  
Judge John Brown

Cc: Walter Clapp  
Christopher Froines



# APPENDIX C

## **Fagg Mediation**



Russ Fagg and Associates, P.L.L.C.  
1004 Division St.  
P.O. Box 176  
Billings, MT 59103  
(406) 855-0224  
rfagg@icloud.com  
russfagglaw.com  
*Russ Fagg*  
*Ali Hurley*

March 29, 2023

Walter Clapp, via email  
Chris Froines, via email  
Danielle Shyne, via email  
Robyn Jacks, via email

Re: Mediation for Estate of M. A. C. —Invoice

Dear Walter and Chris:

I am disappointed we did not get this case settled. Chris, as I told you and your client during the mediation, I think you have not accurately evaluated the downside to your case. I urge you to reconsider splitting the remaining money 6 ways—in this way Lisa and her children would all walk away with something. Otherwise, only the attorneys will win. I know this is uncharacteristically blunt language, but I do want to see this small amount of money not benefit the family. Also enclosed in my report to the Court.

In any case, my invoice is:

3/27/23: Read Mediation Statements, exhibits, and statutes on point: 1.3 hours;

3/29/23: Mediation: 1.5 hours.

Total: 2.8 hours at \$275/hour = \$770 due. I understand the estate is going to pay this bill.

Thank you,

  
Russ Fagg

**22 year State Judge and Certified Mediator specializing in litigation resolution:**  
*Mediation, Arbitration, Private Judging, Legal Representation, Settlement Conferences, Summary Jury Trials, and Mini-Trials*

Russ Fagg  
Russ Fagg and Associates, PLLC  
1004 Division St.  
Billings, Mt. 59101  
(406) 855-0224  
[rfagg@icloud.com](mailto:rfagg@icloud.com)

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT  
GALLATIN COUNTY, MONTANA

IN RE THE ESTATE OF M.A.C.:

Case No. DP 20-137C

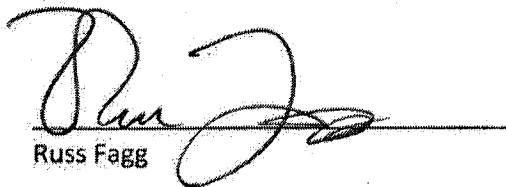
Deceased Minor,

Judge John Brown

MEDIATOR'S REPORT

Mediator Russ Fagg appears before the Court, and reports this case was mediated March 29, 2023, and, unfortunately the case **did not settle**. The Mediator was disappointed the mother of the children did not consider her children's well-being more in the mediation.

Dated this 29th day of March, 2023.



Russ Fagg

Cc: Chris Froines, via email  
Walter Clapp, via email  
Dainelle Shyne, via email

# Chris Froines

**From:** Russ Fagg  
**Received:** Wed 3/29/2023 12:32 PM  
**To:** Chris Froines; Walter Clapp; Danielle Shyne; Robyn Jacks  
**Cc:**  
**Subject:** Estate of M.A.C.  
**File:** Cole, Lisa 22003  
**Attachments:** 2023-03-29 13-30.pdf

Counsel,

On further reflection, please see the Mediator's Report which will be sent to the Court.

Russ

Russ Fagg and Associates, PLLC  
Specializing in Litigation Resolution  
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Christopher W. Froines

Printed: Tue 5/14/2024 9:49 AM

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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT  
GALLATIN COUNTY, MONTANA

IN RE THE ESTATE OF M.A.C.:

Case No. DP 20-137C

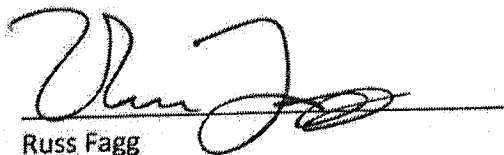
Deceased Minor,

Judge John Brown

MEDIATOR'S REPORT

Mediator Russ Fagg appears before the Court, and reports this case was mediated March 29, 2023, and, unfortunately the case **did not settle**. The Mediator further reports in his opinion Lisa Yanny (mother of M.A.C.) did not negotiate in good faith.

Dated this 29th day of March, 2023.



Russ Fagg

Cc: Chris Froines, via email  
Walter Clapp, via email  
Dainelle Shyne, via email

APPENDIX D

**Cole Proposed FOF  
re PR Guidance  
Petition to DC**

Christopher W. Froines  
FROINES LAW OFFICE, P.C.  
Century Plaza Building  
3819 Stephens Ave., #301  
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Fax: 877.688.4696  
chris@froineslawoffice.com  
*Attorney for Lisa Cole*

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT  
GALLATIN COUNTY

<b>IN RE THE ESTATE OF</b>  <b>M.A.C.,</b>  <i>Deceased Minor.</i>	Cause No.: DP-20-137C Dept. No.: 3  <b>LISA COLE’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR PERSONAL REPRESENTATIVE’S AMENDED PETITION FOR GUIDANCE FROM THE DISTRICT COURT</b>
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**PROPOSED FINDINGS OF FACT**

1. At all times relevant to this case, Sunny Rae Yocom was not acting as a “Public Administrator.” (Pg. 185:23 through Pg. 188).<sup>1</sup>
2. Yocom was appointed as Personal Representative (PR) at a hearing before this Court on November 23, 2020. (Docket #6)
3. The Respondent Lisa Cole, mother of the deceased and sole beneficiary of the estate was not given notice of the hearing. (Pg. 194:8-12)

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<sup>1</sup> All references to transcript are to the May 23, 2023, Evidentiary Hearing

4. At the November 23, 2020, hearing, Shawn Cosgrove and Yocom represented to the Court that Lisa Cole had been given notice of that hearing. (Pg. 195:6-15) (11/23/2020 hearing trans. Pg. 14:9-18)
5. Respondent Lisa Cole did not contact Yocom until she became aware of this Petition to have her disinherited which was sent to her via US Mail at her home in Miles City MT.
6. MCA §72-2-125 does not require the personal representative to sue any beneficiary to determine the status under that statute.
7. Mykhia Cole died before reaching the age of 18 years. She was born on October 10, 2008, and died on March 13, 2020, in an automobile collision.
8. Prior to August of 2019, Mykhia lived with her mother Lisa Cole. The petitioners did not present any evidence about the living conditions in Alabama with Mykhia and her mother Lisa Cole. (Pg. 137:15-20)
9. While in Alabama, Lisa Cole took care of her son Mythias Cole and her daughter Mykhia Cole. (Pg. 137:15-20)
10. Petitioners presented no reliable testimony to support her allegations that Lisa Cole purchased prescription medications for another person without a prescription in the presence of Mythias and Mykhia.
11. In the summer of 2019, Cole took MAC and Mythias to Colorado where Lisa Cole began having medical issues resulting in a hysterectomy (Transcript Pg. 143:25-Pg.144:10)
12. Lisa Cole, Mythias, and Mykhia were in Colorado for about a week, looking for a place to live when Cole became sick. (Transcript, Pg. 149:19-21)



13. While living in Colorado, Cole, Mythias, and Mykhia would obtain showers and part-time housing from friends. (Transcript, Pg. 127:1-4)
14. The petitioners did not present any evidence to support her allegations that Cole was verbally or physically abusive to Mykhia Cole.
15. On or about September 2019, Phoenix Nivens, brother of Mythias and Mykhia Cole, who was already in Colorado, picked Mythias and Mykhia up and transported them to Bozeman, Montana. This was done with consent of Lisa Cole (Transcript, Pg. 157:11-13)
16. Phoenix Nivans had been living in Colorado prior to picking up Mythias and Mykhia Cole. (Pg. 137 Ln. 18-20)
17. Phoenix was allowed to transport Mythias and Mykhia to Montana with Lisa Cole's consent due to her health issues. (Pg. 157:11-13)
18. Upon arrival in Bozeman, Mykhia and Mythias lived with their sister, Samara Yanny.
19. In late November/early December of 2019, Cole returned to Montana, living in Miles City. (Exhibit 3 Pg. 1)
20. Mykhia's brother and sister Sierra and Mathias testified that Lisa Cole had weekly phone conversations with her daughter Mykhia, and Samara did try to make sure that contact between Cole and Mykhia was maintained. (Pg. 160:6-8) (Pg.142:17-25)
21. In December 2019, Lisa Cole contacted Child Protective Services in Montana, and informed them she was in the process of trying to get Mykhia back to live with her and that her daughter Samara 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. Birthmother indicates she wants the children back, but sis is refusing to tell birth mother where she lives.”* (Hoerauf Pg. 55:23 - Pg. 56:3).

22. 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).
23. In August 2019, Mykhia was attending elementary school in Bozeman, MT.
24. Under Montana statute MCA § 20-5-501, while Mykhia was living with her sister Samara, Samara had the right to consent to educational services and to medical care for Mykhia without superseding any parental rights regarding the child. Samara was, at that time a “caretaker/relative” (MCA § 20-5-501(4)(a)).
25. On March 13, 2020, Samara and Mykhia were both killed in a car accident in which Samara was the driver.

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

26. The estate of Mykhia Cole (MAC) was entitled to the policy limits for insurance on the car in which she was a passenger in the amount of \$100,000.00 which was the only asset of her estate.
27. Petitioners have not provided any evidence that immediately prior to Mykhia's death that Lisa Cole's parental rights were in the process of being terminated by any state agency or court.
28. Petitioners have not presented any evidence to substantiate their claim that Lisa Cole's parental rights regarding Mykhia Cole could have been terminated under MCA § 72-2-125. (Hoerhauf Pg. 80:17 - Pg. 86:24)
29. Petitioners have not presented any evidence that Lisa Cole's parental rights could have been terminated in the months leading up to Mykhia's death under any basis including abandonment, neglect or other actions or lack of actions towards the child, Mykhia.
30. The burden of proof under MCA § 72-2-125 is clear and convincing evidence, which is more than a mere preponderance of the evidence and requires evidence that is definite, clear, and convincing.
31. 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.

(Hoerhauf Pg. 85:18 - Pg. 86:21)

32. Petitioners have not presented any evidence which meets the threshold to terminate Cole's parental rights under MCA § 41-3-609. (Hoerhauf Pg. 86:1-2)
33. Jennifer Hoerauf is a Regional Administrator for Montana Child and Family Services. 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)
34. An investigation into Mykhia's living arrangements by DPHHS did not cross the threshold for investigating or meet the definition of abuse and neglect. (Transcript, Pg. 57:21 - Pg. 58:3 and, Pg. 60:1-3, Pg. 62:16-17, Pg. 81:17-21, Pg. 90:6-7)
35. Phoenix Niven testified that when he picked up his brother and sister in Colorado, Lisa Cole "gave him permission to take the children up to stay with their sister" (Pg. 127:9-10) Phoenix Nivens knew nothing about the arrangements between Lisa Cole and her daughter Samara regarding Mykhia living with them until she addressed and recovered from her medical issues. (Pg. 129:24 - Pg. 130:2) Sierra Yanny had no information regarding the

arrangements between Samara and Lisa Cole regarding Mykhia's living arrangements. (Pg. 139:2-6)

36. Petitioners presented no evidence that Mykhia was under "physical" or "psychological" harm. Neither term appears anywhere in the hearing transcript.
37. In investigating abuse or neglect, Child and Family Services made a determination this case did not cross their threshold to substantiate or file a report, as there was no evidence to support a claim of neglect (Exhibit 3, Pg. 1) (Pg. 60:1-3)
38. Mykhia talked with her mother on a weekly basis while she was living with her sister Samara (Pg. 142:17-25) Because of Lisa Cole's medical issues, she and Samara were collectively trying to establish the best person to take care of Mykhia at that time due to Cole's medical issues (Pg. 143:21 - Pg. 144:5)
39. Mythias Cole testified that when he and his sister were picked up by their brother Phoenix and taken to live with their sister Samara, it was the agreement that their mother, Lisa Cole had with their sister Samara (Pg. 157:11-13) Mythias has/had no firsthand information about the agreement between Samara and Lisa Cole regarding Mykhia living with Samara. Mythias also recalls Mykhia talking with her mother quite frequently on the phone (Pg. 160:2-8)

40. Jennifer Hoerauf testified that their investigation into Mykhia Cole's living situation in the months preceding her death did not cross the threshold for investigation or meet the definition of abuse and neglect (Pg. 57:21 - Pg. 58:3) "The kids were determined to be safe with adult sibling and..." (Pg. 59:7-8)
41. Immediately before Mykhia's death no dependency neglect cases or cases attempting to terminate Lisa Cole's parental rights had been opened. (Hoerauf Pg. 81:7-8)
42. On numerous occasions, Lisa 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.) The Montana Code § 20-5-502 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)
43. The evidence presented by the petitioners shows an intent by Lisa Cole to resume care of her child Mykhia by making phone calls to the child on a

regular basis and contacting Child Protective Services to have her child returned to her. (Testimony of Mathias Cole, Sierra Yanni & Libby Hansen)

44. Cole asked her daughter Samara to watch over her daughter while she was attending to serious medical issues. During that time, Mykhia's social security payments were transferred to Samara as a payee and Samara had the powers under MCA § 20-5-501 to give care and education for her sister. (Exhibit 6)
45. Lisa Cole contacted Child Protective Services and requested their assistance in having Mykhia returned to her after her medical issues had been resolved. (Transcript Pg. 55:23 - Pg. 56:3)
46. Lisa Cole called her daughter Mykhia at least once a week. (Sierra Yanni, Pg. 142:20-25)
47. In December of 2019, Lisa Cole contacted Child Protective Services to have them assist in locating her daughter. (Reports contained in Exhibit 3)
48. Petitioners presented no evidence about the living situation of Lisa Cole and her daughter Mykhia in Alabama.
49. Petitions presented no evidence that Lisa Cole abandoned Mykhia at an unrelated individual's home in Colorado.
50. Phoenix Nivens, who was residing in Colorado on or about August 2019 took Mythias and Mykhia to live with their sister Samara in Bozeman, Montana with their mother's consent. (Pg. 127:9-11)

51. In or around September 2019, Phoenix Nivens drove Mythias and Mykhia from Colorado to their sister's home in Bozeman, Montana.
52. Phoenix Nivens Mythias and Mykhia to Bozeman, MT with their mother's consent. In September 2019 Lisa Cole was having medical issues which required her hospitalization.
53. Beginning September 2019 Mykhia lived with her sister Samara at her home in Bozeman, Montana.
54. Lisa Cole told Cassandra Salway from Child Protective Services that she owned a home in Hingham, Montana and had told Samara she would have Mythias and Mykhia back in her care by Christmas. (Exhibit 3, Pg. 1)
55. November 5, 2019, Report notes that Lisa Cole contacted DPHHS and requested assistance in contacting her son and daughter who were living with another sister who refused to disclose their location. (Exhibit 3, Pg. 1)
56. The intake assessment form received on 11/5/2019 by Cassandra Salway states that, "*BM is seeking to reunite with her daughter and son and the older daughter is refusing to disclose their location.*" The report notes that Lisa Cole has a home in Hingham, MT and intends to take the children there. (Exhibit 3, Pg. 1)



57. Mykhia lived with her sister Samara in Bozeman, MT from September 2019 until their deaths in March 2020 under conditions which Child Protective Services determined to be safe and well cared for. (Pg. 59:14-18)
58. Beginning in November 2019, Lisa Cole made efforts to contact her daughter Mykhia, including contacting Child Protective Services to request assistance and continuing weekly phone calls with her daughter. (Exhibit 3)
59. No abuse or neglect proceeding, or any other type of proceeding was ever initiated against Lisa Cole which could have resulted in termination of her parental rights. (Hoerauf 81:7-8)
60. “A parent’s right to the care and custody of a child is a fundamental liberty interest.” (MCA 20-5-501)
61. No proceedings to terminate Lisa Cole’s parental rights were ever initiated immediately before Mykhia’s death. (Hoerauf 81:7-8)
62. Lisa Cole kept in constant contact with her daughter through weekly phone calls while attending to her own medical issues. (Pg 142:22-25)
63. Cole maintained regular contact with Mykhia from September 2019 through March 2020 and was attempting to make arrangements for permanent reunification. (See Exhibit 3, Pg. 1) (Sierra, 142:20-25)
64. Petitioners have not produced any clear and convincing evidence of neglect and the term does not even appear in the hearing transcripts.

65. Cole kept in constant contact with her daughter, Mykhia while she was residing with her sister, Samara. (Sierra 142:20-25)
66. All testimony presented shows that Mykhia had food, shelter, clothing, education, and medical services during the time she was living with her sister, Samara. (Hoerauf 59:7-8 & Van Vuren 46:8-15)
67. Libby Hansen testified that she had no personal knowledge of the agreement between Samara and her mother, Lisa Cole regarding Samara caring for Mykhia. (Pg. 110:19-23)
68. Libby Hansen did not know that Lisa Cole had had a hysterectomy in September 2019 (Pg. 111:10-11)
69. Libby Hansen testified that Mykhia had been talking with her mother by phone and had talked about attending a Veteran's Day musical program with Mykhia. (Pg. 111:13-18)
70. Libby Hansen testified that it is common for children staying with other relatives other than their parents. (Pg. 114:11-16)
71. Libby Hansen testified that Mykhia had a good relationship with her mother including regular communications. (Pg. 117:11-13)
72. Mike Van Vuren is the assistant deputy superintendent of Bozeman Public Schools.

73. Van Vuren testified that Mykhia 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 Lisa Cole as Mykhia’s custodial parent, even though she was living with her sister Samara at the time. (Pg. 45:20-46)
74. Mr. Van Vuren had no information about the petitioner’s allegations that Mykhia was abandoned, abused, or neglected. Mr. Van Vuren made no reports or complaints to Child Protective Services or any other agencies or individuals regarding Mykhia Cole.

### **ATTORNEY’S FEES**

75. During the November 23, 2020, hearing, Sunny Rae Yocom was appointed as conservator for Mythias Cole.
76. If Lisa Cole is disinherited, Mythias Cole, who is Yocom’s client, and whom she still manages money for, becomes a beneficiary of his sister’s estate.
77. Between the time the Motion for Hearing was submitted on October 21, 2020, and November 23, 2020, hearing, Yocom made no attempts to contact Lisa Cole (Pg. 198:12-21)

78. After receiving the settlement check on or about December 7, 2020, Yocom made no efforts to contact Lisa Cole (Pg. 199:22- Pg. 200:8)
79. Yocom received the \$100,000.00 settlement check on or about December 7, 2020, and did not deposit the \$100,000.00 settlement check until April 15, 2021. (Cole's Exhibit D)
80. Yocom testified she filed the petition to disinherit Lisa Cole because, "It was getting to the end of that probate expiration date... she felt that disinheriting the mother is what they needed to do...." (Pg. 206:1-7)
81. Yocom testified that she did not feel that [disinheriting] Lisa Cole is equivalent to ceasing parental rights. (Pg. 207:8-10)
82. 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)
83. 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.**"
84. 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)

85. 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)

86. Yocom testified that it would not be in the best interest of the trust to spend money to try and locate Lisa Cole, the sole beneficiary of Mykhia's estate.

(Pg. 221:15-16)

### **CONCLUSIONS OF LAW**

1. The Court finds that the Petitioners have not presented clear and convincing evidence that:
  - (1) Cole abandoned MAC in Colorado or Montana.
  - (2) Cole abandoned her daughter for a period of more than six months.
  - (3) Cole did not intend to transfer custody or make permanent arrangements for MAC's care.
2. Montana law requires that DPHHS has been unsuccessful in reuniting parent and child before parental rights can be terminated.

3. The Yocom does not allege that DPHHS was ever involved or questioned Cole's parenting of MAC in the six months preceding her death.
4. Under the intestacy statutes in Montana, M.A.C.'s mother Lisa Cole is the sole beneficiary of M.A.C.'s estate. (MCA 72-3-502)
5. In Montana, parental rights are a fundamental right and should never be taken away without substantive due process.
6. "Section 41-3-609, MCA, establishes the criteria for termination of parental rights. Subsection (1)(d) provides that a district court may use its discretion to terminate parental rights when DPHHS has shown by clear and convincing evidence that "the parent has subjected a child to any of the circumstances listed in 41-3-423(2)(a) through (2)(e)." Section 41-3-609(1)(d), MCA. The involuntary termination of parental rights to the child's sibling constitutes one of those circumstances as long as "the circumstances related to the termination of parental rights are relevant to the parent's ability to adequately care for the child at issue." Section 41-3-423(2)(e), MCA. This statute frees DPHHS from making further efforts to reunify the family once the statutory elements are met. Section 41-3-423(2)(a) through (e), MCA."
7. "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)
8. 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 (Mont. 2016)*

9. In Montana, parental rights can only be terminated by those criteria set forth in MCA § 41-3-609, and termination of parental rights can *only* be made by District Court when DPHHS has shown by clear and convincing evidence that “the parent has subjected a child to any of the circumstances listed in MCA § 41-3-423 2(a) through 2(e).
10. Prior to Mykhia’s death there were no complaints to DPHHS were made, and there were no cases brought by any social services agency against Lisa Cole which could have resulted in the termination of her parental rights.
11. This court has the equitable power to order attorney fees when justice so requires. **In re Support of K.F.** (1988), 232 Mont. 326, 331, 756 P.2d 460, 463 Further, § 37-61-421, MCA, authorizes a district court to award attorney fees, costs, and expenses against “[a]n attorney or party ... who ... multiplies the proceedings in any case unreasonably and vexatiously....” See also **In re Marriage of Rager** (1994), 263 Mont. 361, 366, 868 P.2d 625, 628. (See

also) **In re Estate of McDermott**, 2002 MT 164, 310 Mont. 435, 51 P.3d 486 (Mont. 2002)

12. Yocum's testimony at the hearing confirms that she had no factual basis for claiming that Lisa Cole's parental rights could have been terminated.
13. Yocom's discovery response sums up how she treated Lisa Cole and the reason she filed the Petition to disinherit her: **"Based on the information I had at the time, I thought mom had other ongoing issues, would not appear, and the costs would be minimal, and we could maintain maximum value for Ms. Cole's children,"** (Pg. 212 Ln. 7-11)
14. Cole was forced to effectively defend the Estate herself, while Yocom prosecuted Cole with her own money.
15. Although she had a copy of the DPHHS report (Ex. 3), Yocom failed to contact anyone at that office to inquire about termination of Lisa Cole's parental rights. Yocom did not provide any clear and convincing testimony at the hearing to support her contention that Lisa Cole's parental rights could have been terminated immediately prior to Mykhia's death.
16. Yocum and her attorney filed a petition to have Cole disinherited and then could not even defend that petition, having to hire an additional attorney.



17. Yocom's reason for filing the Petition was that she thought Lisa Cole would not appear and the other children would get the money.
18. Yocum has spent estate money on litigation while at the same time claiming that she could not spend any of the estate money to locate Lisa Cole, the sole beneficiary.
19. Yocum misled the court by claiming that she was a "public administrator," and that notice of the hearing to appoint her as PR had been given to Lisa Cole when it clearly had not.
20. Lisa Cole was forced to hire an attorney to pay with her own money while Yocum misused funds from the estate to pursue a frivolous claim.
21. This court sits in equity, and equity demands an award of attorney fees to Lisa Cole based on Yocum's negligence, breach of fiduciary duty and frivolous litigation.
22. Yocom and her various attorneys must disgorge all estate money spent on this litigation, and Cole should be awarded her reasonable attorney fees and costs incurred against Yocom.

Respectfully submitted this 30<sup>th</sup> day of June 2023.

FROINES LAW OFFICE, PC  
/S/ Christopher W. Froines  
Christopher W. Froines, Attorney  
*Attorney for Lisa Cole*

## **ORDER**

This Court finds the petitioners have not presented clear and convincing evidence which would lead this Court to believe that immediately before the death of Mykhia Cole, Lisa Cole's parental rights could have been terminated. The Petitioners' Amended the Petition For Guidance From The District Court to treat Lisa Cole as predeceased effectively disinheriting her from the estate of her daughter Mykhia Cole is **DENIED**.

This Court sits in equity. Cole's request for an award of her reasonable attorney fees and costs incurred in defending the petition and removing Yocom as PR, against Yocom and that all money expended by the Estate be returned is hereby **GRANTED**.

Counsel for Lisa Cole shall submit to the Court an accounting of its attorney's fees and supporting affidavit within 10 days of the date of this order. Yocom is hereby ordered to return all the money she disbursed as PR to the Estate, along with interest.

SO ORDERED this \_\_\_\_ day of \_\_\_\_\_ 2023.

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Judge John Brown

Cc: Chris Froines  
Danielle Shyne  
Walter Clapp

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of June 2023, I delivered a true and correct copy of  
**LISA COLE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR PERSONAL  
REPRESENTATIVE'S AMENDED PETITION FOR GUIDANCE FROM THE DISTRICT COURT**, via  
method indicated:

**Hard copies of the foregoing filing will only be sent via email.  
If you wish to receive a hard copy, please notify our office.**

☐ Via email

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# **APPENDIX E**

## **PRs Proposed FOF re Petition to Bar Cole from Inheriting**

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT  
GALLATIN COUNTY

IN RE THE ESTATE OF <b><u>M.A.C.</u></b> , Deceased Minor.	Cause No. <u>20-137C</u>  <b>PERSONAL REPRESENTATIVE’S PROPOSED FINDING OF FACTS AND CONCLUSIONS OF LAW ON PETITIONS TO BAR LISA COLE FROM INHERITING</b>
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PETITIONER, Sunny Rae Yocom as Public Administrator Personal Representative of the above-named Estate, submits her Proposed Findings of Fact and Conclusions of Law for the evidentiary hearing on *Petitioner for Approval to Bar Parent from Inheriting* and *Petitioner’s Amended Petition for Guidance from District Court* based on based on Mont. Code Ann. §§ 72-2-125 and -124.

**I. FINDINGS OF FACT**

**a. M.A.C.’S DEATH**

- i. M.A.C. was born on October 10, 2008. (*Petition for Approval to Bar Parent from Inheriting*, pg.2, ¶ 1.)
- ii. M.A.C. died on March 13, 2020. (*Id.*)

iii. M.A.C. was 11 years old when she died. (*Id.*)

**b. M.A.C.'S LIVING SITUATION WHEN SHE PASSED**

i. At the time of her death, M.A.C. did not live with any parent and was admitted to her school as an unaccompanied youth. (*Transcript of 5/23/23 hearing, tty. of Mike Van Vuren, pg.37, ln.21 -25; Exhibit 1 admitted at hearing, pg. 137.*)

ii. M.A.C.'s father, Edmond Ellis Cole, predeceased M.A.C. on May 20, 2017. (*Petition for Approval to Bar Parent from Inheriting, pg.6, ¶ 31.*)

**c. PROCEDURAL POSTURE**

i. The decedent was entitled to insurance proceeds, and the insurer's attorney sought out the decedent's mother, Lisa Cole, to establish this Estate. (*Aff. of Attorney Cosgrove, Exhibit 10 admitted at hearing, pg. 2, ¶ 5- pg. 3, ¶ 10.*)

ii. Lisa Cole refused to become involved in this Estate. (*Id.*)

iii. As a result, the Insurer's attorney spoke with the Clerk and Public Administrator and was provided a name for a stand in Public Administrator PR, Sunny Rae Yocom. (*Aff. of Attorney Cosgrove, Exhibit 10 admitted at hearing, pg. 3, ¶ 11-12.*)

iv. Sunny Rae Yocom, a professional fiduciary, was appointed as a stand in Public Administrator Personal Representative ("PR") on November 23, 2020 in Informal Probate. (*Docket 6.*)

v. The PR filed a Petition to disinherit Ms. Cole in December 2021. (*Docket 12.*)

- vi. Mr. Froines appeared on behalf of Lisa Cole, and numerous motions have been filed and briefed. Lisa Cole has not submitted any verified pleadings.
- vii. Mediation on this matter took place on March 29, 2023. Lisa Cole failed to mediate in good faith. The Court has the mediation report on file.
- viii. An evidentiary hearing was held May 23, 2023 on the issues of the Estate's Petition and Amended Petition to Bar Lisa Cole from Inheriting. Ms. Cole was also provided the opportunity to present evidence in support of her Motion to Remove the PR, as well as her Superseding Motion to Remove the PR. Despite a Subpoena being served upon Lisa Cole to appear in person at the hearing, she did not appear for the hearing.  
*(Transcript of 5/23/23 hearing, pg.237, ln.16 – pg.242, ln.3.)*

**d. LISA COLE'S ABANDONMENT, NEGLECT, AND ABUSE OF M.A.C.**

- i. Lisa Cole has an extensive history with DPHHS, starting in 2001.  
*(Transcript of 5/23/23 hearing, tty. of Jennifer Hoerauf, pg. 49-91; quoting Exhibit 3 admitted at hearing.)* Lisa Cole has a history of 16 CPS reports. *(Id., pg. 71, ln.5-6; quoting Exhibit 3 admitted at hearing, pg. 38.)* DPHHS reports that Lisa Cole financially exploited an elderly person and absconded with \$18,000.00. *(Id., ln.13-16; quoting Exhibit 3 admitted at hearing, pg. 38.)*
- ii. Lisa Cole has a history of drug use in the home, unstable housing, criminal and exploitative behaviors, unsafe relationships, transient lifestyle and a general history of inability to parent; Lisa Cole tested positive for amphetamines when she gave birth to Mythias. *(Transcript of 5/23/23*

*hearing, tty. of Jennifer Horeauf, pg.56, ln.3-5; pg.63, ln.6-8; quoting Exhibit 3 admitted at hearing, pg.34; pg.63, ln.14-17; quoting Exhibit 3 admitted at hearing, pg. 34; pg. 64, ln.10-19; quoting Exhibit 3 admitted at hearing, pg. 35; pg.69, ln.23-25; quoting Exhibit 3 admitted at hearing, pg. 36-37; pg.70, ln.6-7; quoting Exhibit 3 admitted at hearing, pg. 36-37; pg.72, ln.9-10; quoting Exhibit 3 admitted at hearing, pg. 58; pg.76, ln.9-13; quoting Exhibit 3 admitted at hearing, pg. 72; tty. of Mythias Cole, pg.150, ln.4-8; pg.151, ln.23-25.)*

- iii. Prior to September 2019, M.A.C. and her mother moved from Hingham to Helena then to Alabama and then to Colorado where they were living in a car. *(Transcript of 5/23/23 hearing, tty. Jennifer Horeauf, p.64, ln.10-14; quoting M.A.C. in Exhibit 3 admitted at hearing, pg. 35, tty. of Mythias Cole, pg.148, ln.17-pg.150, ln.3.)*
- iv. 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 abscesses. *(Transcript of 5/23/23 hearing, tty. of Jennifer Horeauf, pg.65, ln.9-18; quoting M.A.C. in Exhibit 3 admitted at hearing, pg. 35; pg. 66, ln.9-12; quoting Exhibit 3 admitted at hearing, pg. 35.)*
- v. Up until August 2019, Ms. Cole was verbally and physically abusive to both M.A.C. and Mythias. Ms. Cole threw coffee on Mythias. Ms. Cole hit Mythias with a baseball bat while coming down off of Methamphetamine. Ms. Cole attempted to hit Mythias with her car while



on muscle relaxers. (*Transcript of 5/23/23 hearing, tty. of Jennifer Horeauf, pg.70, ln.9-12; quoting Exhibit 3 admitted at hearing, pg. 37; tty. of Mythias Cole, pg.155-156.*)

- vi. In September of 2019 due to Lisa Cole's housing instability and medical and mental health instability, M.A.C.'s brother Mythias asked his other sibling Phoenix Nivens to pick he and M.A.C. up and thereafter he and M.A.C. began residing with their sibling Samara. (*Transcript of 5/23/23 hearing, tty. of Mythias Cole, pg.149, ln.22-25, tty. of Phoenix Nivens, p.126, ln.10-15.*)
- vii. In or around August 2019, Phoenix picked up Mythias and M.A.C. from Colorado. (*Transcript of 5/23/23 hearing, tty. of Phoenix Nivens, p.126, ln.15-20.*)
- viii. Ms. Cole was aware Phoenix was taking the children back to Montana and willfully surrendered them. (*Transcript of 5/23/23 hearing, tty. of Phoenix Nivens, p.127, ln.5-14.*)
- ix. Ms. Cole continued to receive M.A.C. and Mythias' Social Security benefits, but failed to forward those fund or apply those fund to M.A.C. or Mythias starting no later than August 2020. (*Transcript of 5/23/23 hearing, tty. of Sunny Rae Yocom, pg.176, ln.15-pg.181, ln.8; Exhibit 4 admitted at hearing.*)
- x. M.A.C. and Mythias moved in with their half-sibling Samara Yanny. And Samara Yanny became M.A.C.'s physical custodian and Social Security representative payee. (*Id., Transcript of 5/23/23 hearing, tty. of Jennifer*

*Horeauf, pg.74, ln.8-9; quoting Exhibit 3 admitted at hearing, pg. 61; tty. of Phoenix Nivens, pg.126, ln.14-22.)*

- xi. In September 2019, M.A.C. started school at Hyalite Elementary in Bozeman, MT. M.A.C. was listed as an “unaccompanied youth”. *(Transcript of 5/23/23 hearing, tty. of Mike Van Vuren, p.42, ln.7-9; quoting Exhibit 2 admitted at hearing, pg. 1.)*
- xii. Ms. Cole did speak with M.A.C. on the phone, but never visited in person. Ms. Cole did not provide emotional or financial support. Ms. Cole did not manifest to M.A.C. and Samara a firm intention reestablish custody of M.A.C. Instead, she made tentative plans which she did not keep. *(Transcript of 5/23/23 hearing, pg.111, ln.12-21; quoting Exhibit 1 admitted at hearing, pg. 134; tty. of Sierra Yanny, pg.142, ln.17-pg.143, ln.7; pg.145, ln.19-pg.146, ln.11; tty. of Mythias Cole, pg.150, ln.16-pg.151, ln.3; pg.160, ln.6-12.)*
- xiii. Lisa Cole called DPHHS and the police on Samara. After conducting a thorough investigation, DPHHS concluded M.A.C. was safe with Samara and refused to place M.A.C. back with Ms. Cole. *(Transcript of 5/23/23 hearing, tty. of Jenmifer Horeauf, p.59, ln.7-18; quoting Exhibit 3 admitted at hearing, pg. 33.)*
- xiv. DPHHS interviewed M.A.C. during this time. M.A.C. stated that she and Mythias believed the only reason Lisa Cole wanted her back was for the Social Security money. Mykhia called her mom a pill popper. *(Transcript*

*of 5/23/23 hearing, tty. of Jennifer Horeauf., p.64, ln.15-18; quoting Exhibit 3 admitted at hearing, pg. 35.)*

- xv. In January 2020, Samara Yanny filed a petition for guardianship of M.A.C., which was DG 20-4B in this Eighteenth Judicial District Court. *(Transcript of 5/23/23 hearing, pg.173, ln.24-pg.174, ln.3.)*
- xvi. In February 2020, M.A.C. was still lacking dental care based on Ms. Cole's refusal to give Samara permission for a Guardianship *(Transcript of 5/23/23 hearing, tty. of Sierra Yanny, pg.144, ln.22-pg.145, ln.7.)*
- xvii. On March 6, 2020 Samara filed a motion for service by publication because Ms. Cole could not be located. *(Transcript of 5/23/23 hearing, tty. Of Sierra Yanny, pg.172, ln.4-13.)* Attached to her motion was an affidavit which states "MARC's natural mother is Lisa Cole. Therein after called Lisa. Lisa's birth date is June 11, 1972. I believe that Lisa has no fixed address, that she intermittently resides in Miles City, Montana. Lisa has not had MARC in her care since September 2019. MARC has told Lisa that she does not want to live with her until she shows her that she is stable mentally and financially. Additionally, Lisa has not paid any form of financial support towards the care of MARC since September 2019. . . . I have made a diligent inquiry into finding the location of Lisa for the purpose of serving her with papers related to my petition and supporting documents. To date I have been unable to locate her exact whereabouts. A Custer County Sheriff attempted service on Lisa to no avail. Because I am unable to locate Lisa, I feel it is necessary to

serve her by publication so that I may proceed with this action in an effort to maintain custody of my half sister in Montana.” (*Transcript of 5/23/23 hearing, tty. Of Sierra Yanny, pg.171, ln.15 – pg. 172, ln.13.*)

- xviii. On March 12, 2020, Judge McElyea ordered service by publication for M.A.C.’s Guardianship. (*DG-20-4B, Order for Service by Publication.*)
- xix. The next day, Samara Yanny, M.A.C., and Mythias were in a car accident. (*Transcript of 5/23/23 hearing, tty. of Mythias Cole, pg.151, ln.9-12.*)
- xx. Samara and M.A.C. died in the car accident. (*Transcript of 5/23/23 hearing, pg.173, ln.11-12.*)
- xxi. As a result of the car accident, M.A.C.’s estate was awarded \$100,000.00 through the insurance claim. This asset is the only asset of M.A.C.’s Estate. (*DC-20-137C, Petition for Approval to Bar Parent from Inheriting, pg.3, ln.5-6.*)
- xxii. The Estate established that if Lisa Cole inherited this money, she would use the money for pharmaceuticals, and it was implied may die from drug overdose. (*Transcript of 5/23/23 hearing, tty of Mythias Cole, pg.161, ln.20-24.*)
- xxiii. Ms. Cole never manifested any firm intention to resume care of M.A.C. or Mythias, to Pheonix, Sierra or Samara. (*Transcript of 5/23/23 hearing, tty. of Phoenix Nivens, pg.127, ln.12-14; tty. of Mythias Cole, pg.150, ln.22- pg.151, ln.4.*)
- xxiv. The evidence introduced at trial lead the reasonable fact finder to conclude that there is clear and convincing evidence that in the six months prior to

M.A.C.'s death Lisa Cole abandoned M.A.C. or lacked the resources to parent such that her parental rights could have been terminated on the basis of nonsupport, abandonment, abuse, neglect, and other actions or inactions of the parent toward the child.

## **II. CONCLUSIONS OF LAW**

- a. This Court has continuing jurisdiction of this matter.
- b. This Court sits in law and equity in this matter. § 72-1-104, MCA.
- c. The Montana Supreme Court has repeatedly "held that equitable issues are a matter of discretion resting with the District Court and will be sustained unless an abuse of discretion is shown." *Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 56, citing *Ruegsegger v. Welborn*, 237 Mont. 317, 321, 773 P.2d 305, 308 (1989).
- d. Equity is meant to help avoid a multiplicity of suits (Bray and Miller, "Getting into Equity", N.D. Law Review, pg. 1781.) And Equity is invocable when "patterns of opportunism or other sources of mischief that - being patterned - invited supplemental lawmaking." (Id., 1785.)
- e. "Inheritance from or through a child by either natural parent or the parent's kindred is precluded unless that natural parent has openly treated the child as the parent's and has not refused to support the child." § 72-2-124(3), MCA.
- f. "Parent barred from inheriting in certain circumstances. (1) A parent is barred from inheriting from or through a child of the parent if: (a) the parent's parental rights were terminated and the parent-child relationship was not judicially reestablished; or (b) the child died before reaching 18 years of age and there is

clear and convincing evidence that immediately before the child's death the parental rights of the parent could have been terminated under law of this state other than this code on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child. (2) For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is treated as if the parent predeceased the child.” § 72-2-125, MCA.

- g. § 72-1-104, MCA demands that §§ 72-2-124 and -125 be read together, and equity supplement any gaps between the two.
- h. “Clear and convincing evidence is more than a mere preponderance of the evidence, and requires evidence that is definite, clear and convincing. It does not mean unanswerable or conclusive evidence or evidence beyond a reasonable doubt.” *Thibodeau v. Bechtold*, 2008 MT 412, ¶ 23, 347 Mont. 277, 198 P.3d 785.
- i. Parental rights may be terminated in numerous ways in Montana. For example, parental rights may be terminated by the court upon a finding of parental unfitness, abandonment, abuse or neglect of the child, or through adoption proceedings. § 42-26-608(1)(c) MCA; § 41-3-609 MCA; § 42-2-607 MCA.
- j. To terminate the parent-child legal relationship, the district court must determine that one of the six circumstances in § 41-3-609(1), MCA, exists. *Matter of D.H.*, 264 Mont. 521, 526, 872 P.2d 803, 806 (2004).
- k. There need not be a determination that a minor was adjudicated as a youth in need of care prior to termination of parent rights. *In the matter of M.J.W.*, 961 P.2d 105, 1998 MT 142 (1998).

- l. Under § 41-3-102(7)(e), MCA, abandonment occurs when the parent or other person responsible for the child's welfare abandons the child by leaving the child under circumstances that make reasonable the belief that the parent or other person does not intend to resume care of the child in the future or willfully surrenders physical custody for a period of 6 months and during that period does not manifest to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child. *In re M.J.W.*, 961 P.2d 105, 1998 MT 142 (1998).
- m. The Montana Supreme Court has clarified that "abandonment is retrospective in nature, and requires evidence from the past to support a reasonable belief that the parent has left a child under circumstances indicating that the parent does not intend to resume care of the child." *Id.* 23.
- n. "Physical neglect" is defined as either a: failure to provide basic necessities, including but not limited to appropriate and adequate nutrition, protective shelter from the elements, and appropriate clothing related to weather conditions, or failure to provide cleanliness and general supervision, or both, or exposing or allowing the child to be exposed to an unreasonable physical or psychological risk to the child. § 41-3-102 (20), MCA.
- o. "Physical or psychological harm to a child" is defined as: The harm that occurs whenever the parent or other person responsible for the child's welfare: inflicts or allows to be inflicted upon the child physical abuse, physical neglect, or psychological abuse or neglect . . . causes . . . or otherwise fails to supply the

child with adequate food or fails to supply clothing, shelter, education, or adequate health care, though financially able to do so or offered financial or other reasonable means to do so; (v) exposes or allows the child to be exposed to an unreasonable risk to the child's health or welfare by failing to intervene or eliminate the risk; or (vi) abandons the child. § 41-3-102 (21)(a)(i)-(v), MCA.

- p. Nonsupport (§ 45-5-621, MCA), assault on a minor (§ 45-5-212, MCA), endangering welfare of children (§ 45-5-622, MCA), and criminal child endangerment (§ 45-5-628, MCA) are all crimes which Ms. Cole could have been convicted of leading up to her abandonment of M.A.C.
- q. Pursuant to § 72-1-103(25) "'Interested person' includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. The term also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. **The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.**" (Emphasis Added.)
- r. "A person interested in the estate may **petition** for removal of a personal representative for cause at any time." § 72-3-526, MCA (emphasis added). Petitions and Responses to Petitions must be verified. *See* § 72-1-310(1)(b) & (2)(b).
- s. "No person is qualified to serve as personal representative who is ... (2) a person whom the court finds unsuitable in formal proceedings." § 72-3-501, MCA.



- t. Pursuant to Montana Rule of Civil Procedure 61, titled “Harmless Error,” this Court “...must disregard all errors and defects that do not affect any party’s substantial rights.”

### **III. APPLICATION OF FACTS TO LAW**

#### **a. The Equities weigh against Lisa Cole.**

- i. Clear and Convincing evidence shows Ms. Cole has a history of abandonment, neglect, and other issues documented by DPHHS, M.A.C.’s school records, and testimony presented by M.A.C.’s siblings and counselors.
- ii. Ms. Cole refused to become involved in this Estate and as a result, a stand in Public Administrator PR was appointed.
- iii. Ms. Cole participated in mediation in Bad Faith.
- iv. Ms. Cole failed to appear at the hearing to present any evidence of her good character.
- v. These facts weigh against any inequities expressed by Ms. Cole.

#### **b. The Personal Representative complied with her duty to determine the proper heirs.**

- i. The PR has complied with her requirement to settle and distribute the estate of the decedent in accordance with this code. § 72-3-610, MCA.
- ii. The Montana Probate Code required the PR to determine whether Ms. Cole should be barred from inheriting because there is clear and convincing evidence that M.A.C. died before reaching the age of 18 and immediately before M.A.C.’s death Ms. Cole’s parental rights could have been terminated under Montana law on the basis of abandonment and neglect of M.A.C. § 72-2-125, MCA

#### **c. Lisa Cole abandoned M.A.C.**

- i. Ms. Cole willfully surrendered physical custody of M.A.C. for more than six months while never manifesting to M.A.C. or the physical custodian a firm intention to resume physical custody or make other permanent legal arrangements for M.A.C. § 41-3-609(b) MCA.
- ii. Ms. Cole left M.A.C. under circumstances that made it reasonable for the caretakers to believe that she did not intend to resume care of M.A.C. § 41-3-609(b) MCA.
- iii. Ms. Cole (1) abandoned M.A.C. in a dangerous situation when M.A.C. was living in a car in Colorado, (2) then willfully surrendered physical custody of M.A.C. for more than six months, and (3) never manifested to any person responsible for M.A.C.'s welfare, any firm intention to resume physical custody or make other permanent legal arrangements for the care of M.A.C. § 41-3-102(i),(ii), MCA; § 41-3-609(b) MCA.

**d. Lisa Cole neglected M.A.C.**

- i. Ms. Cole exposed M.A.C. to unreasonable physical and psychological harm by (1) abandoning her, (2) failing to provide basic necessities such as education or adequate health care, and (3) exposed M.A.C. to unreasonable risk to the health and welfare of M.A.C. § 41-3-102 (21)(a)(iv)-(vi), MCA.
- ii. Ms. Cole failed to provide shelter to M.A.C. from at least June 2019 until her death in March 2020.
- iii. Ms. Cole failed to provide education or health care to M.A.C. from at least June 2019 until her death in March 2020.

**e. Lisa Cole has failed to file any verified pleading.**

- i. The Estate filed a Verified Petition to disinherit Lisa Cole. Lisa Cole failed to file a verified response, as required § 72-3-526, MCA and § 72-1-310(1)(b). Lisa Cole has filed a number of Motions. None of them have been verified, and she failed to appear to testify or verify her motions. Her unverified Motions must be thereby denied. Even if they were verified, they fail on the merits due to her clear and convincing neglect, abandonment, and abuse.

**f. Lisa Cole could not have been PR and Any Failure to Notify Lisa Cole is Harmless Error.**

- i. Lisa Cole's complaints about the Estate's failure to notify her of these proceedings are without merit because she is here, represented by counsel.
  - ii. Moreover, "[n]o person is qualified to serve as personal representative who is ... a person whom the court finds unsuitable in formal proceedings." § 72-3-501(2), MCA. Based on the foregoing Conclusion of Fact, this Court finds that even if Lisa Cole had filed a verified petitioned to remove the current PR and to have this Court appoint Lisa Cole be the PR, this Court would have found she is unsuitable to be PR.
  - iii. Any notice error to Lisa Cole is harmless.
- g. There is sufficient evidence that Lisa's parental rights could have been terminated immediately prior to M.A.C.'s death.**

- i. The Estate provided clear and convincing evidence that Lisa Cole's parental rights could have been terminated pursuant § 72-2-125, MCA. (emphasis added).
  - ii. Lisa Cole failed to testify, and provided no evidence sufficient to refute that her parental rights could not have been terminated.
- h. Lisa Cole did not meet her burden of proof to show that she openly treated the child as the parent's and did not refuse to support the child.**
  - i. Inheritance from or through a child by either natural parent or the parent's kindred is **precluded** unless that natural parent has openly treated the child as the parent's and has not refused to support the child. § 72-2-124, MCA
  - ii. The Estate presented ample evidence that Lisa Cole refused to support M.A.C., and prima facia evidence that Lisa Cole stole from M.A.C.
  - iii. Lisa Cole presented no testimony or evidence that she did support M.A.C., and did not steal from M.A.C.
- i. Lisa Cole shall be treated as predeceased during the distribution of M.A.C.'s estate, and is no longer an Interested Party in this Estate with Standing.**
  - i. § 72-2-125, MCA. requires M.A.C.'s intestate estate to be distributed as if her mother, Ms. Cole, had predeceased her. M.A.C.'s estate should be distributed in accordance with § 72-2-113(1)(c) MCA.
  - ii. Ms. Cole is no longer an interested party in this matter, and no longer has standing to seek redress with this Court. § 72-1-103(25), MCA.
  - iii. M.A.C. did not have a spouse or descendants.

- iv. M.A.C.'s father, Edmond Ellis Cole, predeceased M.A.C. on May 20, 2017.
- v. If there is no surviving descendant or parent of M.A.C., M.A.C.'s estate passes to the descendants of the decedent's parents or either of them by representation. § 72-2-113(A), MCA.
- vi. M.A.C. has five surviving siblings and half-siblings.
- vii. M.A.C.'s siblings shall inherit equally under § 72-2-117, MCA.

**WHEREFORE**, it is ordered:

- 1. Lisa Cole shall be treated as predeceased for purposes of standing, M.A.C.'s estate distribution, and intestacy.
- 2. Lisa Cole's Motions are denied.
- 3. Lisa Cole no longer has standing to challenge these proceedings in District Court.

DATED this \_\_\_\_\_ day of June, 2023.

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**Honorable Judge John Brown**

/s/ Walter D. Clapp  
Walter D. Clapp  
Honor Coin Law, PLLC  
*Co-Counsel for Sunny Rae Yocom*

**Certificate of Service**

I hereby certify that on the 30th day of June, 2023, a copy of Petitioner's Proposed FOF and COL re Petition to Disinherit was served upon counsel of record by the following method(s):

\_\_\_\_\_ Hand Delivery  
\_\_\_\_\_ U.S. Mail, First Class  
\_\_\_\_\_ Overnight Delivery Service  
\_\_\_\_\_ Fax  
\_\_\_\_\_ 1 Email

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/s/ Walter D. Clapp

# **APPENDIX F**

## **MCA 20-5-501**

MCA Contents / TITLE 20 / CHAPTER 5 / Part 5  
/ 20-5-501 Purpose -- leg...

# Montana Code Annotated 2023

TITLE 20. EDUCATION

CHAPTER 5. PUPILS

Part 5. Enrollment of Pupil by Caretaker Relative

## Purpose -- Legislative Intent -- Parental Rights -- Definitions

### **20-5-501. Purpose -- legislative intent -- parental rights -- definitions.**

(1) The legislature recognizes that the rights of parents to the custody and control of a child are based upon liberties secured by the United States and Montana constitutions and that a parent's rights to that custody and control of a child are therefore normally supreme to the interests of other persons. The legislature also recognizes a growing phenomenon in which absent or otherwise unavailable parents have temporarily surrendered the custody and care of their children to a grandparent or other relative for lengthy periods of time. Regardless of the purpose of the absence, a child willfully surrendered to a relative for an extended time period still has the same needs as a child in the care of its parents. In this situation, a caretaker relative assumes responsibilities for the child but has no legal right of control over the child, a situation that interferes in the caretaker relative's ability to perform routine functions of child rearing, including tending to the educational and educationally related medical needs of the child. It is therefore the purpose of the legislature in these instances to protect the rights of a child granted by Article II, section 15, of the Montana constitution by granting a caretaker relative limited authority for a child left in the relative's care.



(2) It is the intent of the legislature that a caretaker relative given the responsibility of caring for a child with little or no warning and without any other provision having been made for the child's care, such as the appointment of a guardian or the provision of a power of attorney, be granted authority to enroll the child in school, discuss with the school district the child's educational progress, and consent to an educational service and to medical care for the child related to an educational service without superseding any parental rights regarding the child.

(3) This part is not intended to affect the rights and responsibilities of a parent, legal guardian, or other custodian regarding the child, does not grant legal custody of the child to the caretaker relative, and does not grant authority to the caretaker relative to consent to the marriage or adoption of the child or to receive notice of a medical procedure, including abortion, not consented to by the relative, if notice is required by law, for the child except as expressly provided in this section.

(4) For the purposes of this part, the following definitions apply:

(a) "Caretaker relative" or "relative" means an individual related by blood, marriage, or adoption by another individual to the child whose care is undertaken by the relative, but who is not a parent, foster parent, stepparent, or legal guardian of the child.

(b) "Caretaker relative educational authorization affidavit" or "affidavit" means an affidavit completed in compliance with **20-5-503**.

(c) "Health care provider" means a person who provides medical care.

(d) "Medical care" means care by a health care provider, for which parental consent is normally required, for the prevention, diagnosis, or treatment of a mental, physical, or dental injury or disease.

(e) "Parent" means a biological parent, adoptive parent, or other legal guardian of the child whose parental rights have not been terminated.

**History: En. Sec. 1, Ch. 442, L. 2007.**



# **APPENDIX G**

## **MCA 41-3-609**

MCA Contents / TITLE 41 / CHAPTER 3 / Part 6  
/ 41-3-609 Criteria for ter...

# Montana Code Annotated 2023

TITLE 41. MINORS

CHAPTER 3. CHILD ABUSE AND NEGLECT

Part 6. Parent-Child LegalRelationship Termination --  
Reinstatement

## Criteria For Termination

**41-3-609. (Temporary) Criteria for termination.** (1) The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence, except as provided in the federal Indian Child Welfare Act or the Montana Indian Child Welfare Act provided for in Title 41, chapter 3, part 13, if applicable, that any of the following circumstances exist:

(a) the parents have relinquished the child pursuant to **42-2-402** and **42-2-412**;

(b) the child has been abandoned by the parents;

(c) the parent is convicted of a felony in which sexual intercourse occurred or is a minor adjudicated a delinquent youth because of an act that, if committed by an adult, would be a felony in which sexual intercourse occurred and, as a result of the sexual intercourse, the child is born;

(d) the parent has subjected a child to any of the circumstances listed in **41-3-423**(2)(a) through (2)(e);

(e) the putative father meets any of the criteria listed in **41-3-423**(3)(a) through (3)(c); or

(f) 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.

(2) In determining whether the conduct or condition of the parents is unlikely to change within a reasonable time, the court shall enter a finding that continuation of the parent-child legal relationship will likely result in continued abuse or neglect or that the conduct or the condition of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care. In making the determinations, the court shall consider but is not limited to the following:

(a) emotional illness, mental illness, or mental deficiency of the parent of a duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child within a reasonable time;

(b) a history of violent behavior by the parent;

(c) excessive use of intoxicating liquor or of a narcotic or dangerous drug that affects the parent's ability to care and provide for the child; and

(d) present judicially ordered long-term confinement of the parent.

(3) In considering any of the factors in subsection (2) in terminating the parent-child relationship, the court shall give primary consideration to the physical, mental, and emotional conditions and needs of the child.

(4) A treatment plan is not required under this part upon a finding by the court following hearing if:

(a) the parent meets the criteria of subsections (1)(a) through (1)(e);

(b) two medical doctors or clinical psychologists submit testimony that the parent cannot assume the role of parent within a reasonable time;

(c) the parent is or will be incarcerated for more than 1 year and reunification of the child with the parent is not in the best interests of the child because of the child's circumstances, including placement options, age, and developmental, cognitive, and psychological needs; or

(d) the death or serious bodily injury, as defined in **45-2-101**, of a child caused by abuse or neglect by the parent has occurred.

(5) If a proceeding under this chapter involves an Indian child and is subject to the federal Indian Child Welfare Act or the Montana Indian Child Welfare Act, a qualified expert witness is required to testify that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. (*Terminates June 30, 2025--sec. 55, Ch. 716, L. 2023.*)

**41-3-609.** (*Effective July 1, 2025*) **Criteria for termination.** (1) The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence, except as provided in the federal Indian Child Welfare Act, if applicable, that any of the following circumstances exist:

(a) the parents have relinquished the child pursuant to **42-2-402** and **42-2-412**;

(b) the child has been abandoned by the parents;

(c) the parent is convicted of a felony in which sexual intercourse occurred or is a minor adjudicated a delinquent youth because of an act that, if committed by an adult, would be a felony in which sexual intercourse occurred and, as a result of the sexual intercourse, the child is born;

(d) the parent has subjected a child to any of the circumstances listed in **41-3-423(2)(a)** through (2)(e);

(e) the putative father meets any of the criteria listed in **41-3-423(3)(a)** through (3)(c); or

(f) 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.

(2) In determining whether the conduct or condition of the parents is unlikely to change within a reasonable time, the court shall enter a finding that continuation of the parent-child legal relationship will likely result in continued abuse or neglect or that the conduct or the condition of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care. In making the determinations, the court shall consider but is not limited to the following:

(a) emotional illness, mental illness, or mental deficiency of the parent of a duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child within a reasonable time;

(b) a history of violent behavior by the parent;

(c) excessive use of intoxicating liquor or of a narcotic or dangerous drug that affects the parent's ability to care and provide for the child; and

(d) present judicially ordered long-term confinement of the parent.

(3) In considering any of the factors in subsection (2) in terminating the parent-child relationship, the court shall give primary consideration to the physical, mental, and emotional conditions and needs of the child.

(4) A treatment plan is not required under this part upon a finding by the court following hearing if:

(a) the parent meets the criteria of subsections (1)(a) through (1)(e);

(b) two medical doctors or clinical psychologists submit testimony that the parent cannot assume the role of parent within a reasonable time;

(c) the parent is or will be incarcerated for more than 1 year and reunification of the child with the parent is not in the best interests of the child because of the child's circumstances, including placement options, age, and developmental, cognitive, and psychological needs; or

(d) the death or serious bodily injury, as defined in **45-2-101**, of a child caused by abuse or neglect by the parent has occurred.

(5) If a proceeding under this chapter involves an Indian child and is subject to the federal Indian Child Welfare Act, a qualified expert witness is required to testify that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

**History:** En. Sec. 6, Ch. 420, L. 1981; amd. Sec. 7, Ch. 15, L. 1985; amd. Sec. 3, Ch. 388, L. 1985; amd. Sec. 2, Ch. 599, L. 1991; amd. Sec. 3, Ch. 439, L. 1993; (5)En. Sec. 2, Ch. 369, L. 1995; amd. Sec. 20, Ch. 458, L. 1995; amd. Sec. 166, Ch. 480, L. 1997; amd. Sec. 8, Ch. 514, L. 1997; amd. Sec. 13, Ch. 516, L. 1997; amd. Sec. 1, Ch. 395, L. 1999; amd. Sec. 17, Ch. 566, L. 1999; amd. Sec. 1, Ch. 44, L. 2003; amd. Sec. 17, Ch. 504, L. 2003; amd. Sec. 5, Ch. 349, L. 2005; amd. Sec. 40, Ch. 716, L. 2023.

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# **APPENDIX H**

## **MCA 53-21-116**

MCA Contents / TITLE 53 / CHAPTER 21 / Part 1  
/ 53-21-116 Right to be p...

# Montana Code Annotated 2023

TITLE 53. SOCIAL SERVICES AND INSTITUTIONS

CHAPTER 21. MENTALLY ILL

Part 1. Treatment of the Seriously Mentally Ill

## Right To Be Present At Hearing Or Trial -- Assignment Of Counsel

**53-21-116. Right to be present at hearing or trial -- assignment of counsel.** The person alleged to be suffering from a mental disorder and requiring commitment has the right to be present and the right to counsel at any hearing or trial. If the person is indigent or if in the court's discretion assignment of counsel is in the best interest of justice, the judge shall order the office of state public defender, provided for in **2-15-1029**, to immediately assign counsel to represent the person at either the hearing or the trial, or both.

**History:** En. 38-1309 by Sec. 9, Ch. 466, L. 1975; amd. Sec. 9, Ch. 546, L. 1977; R.C.M. 1947, 38-1309(part); amd. Sec. 4, Ch. 376, L. 1987; amd. Sec. 18, Ch. 490, L. 1997; amd. Sec. 7, Ch. 583, L. 2003; amd. Sec. 58, Ch. 449, L. 2005; amd. Sec. 38, Ch. 358, L. 2017.

**APPENDIX I**

**MCA 72-1-301**

MCA Contents / TITLE 72 / CHAPTER 1 / Part 3  
/ 72-1-301 Notice -- meth...

# Montana Code Annotated 2023

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS

CHAPTER 1. UNIFORM PROBATE CODE GENERAL PROVISIONS

Part 3. Notices, Parties, and Representation Generally

## Notice -- Method And Time Of Giving

**72-1-301. Notice -- method and time of giving.** (1) If notice of a 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 or the person's attorney if the person has appeared by attorney or requested that notice be sent to the person's attorney. Notice must be given:

(a) by mailing a copy of the notice at least 14 days before the time set for the hearing by certified mail or ordinary first-class mail addressed to the person being notified at the post-office address given in the person's demand for notice, if any, or at the person's office or place of residence, if known;

(b) by delivering a copy of the notice to the person being notified personally at least 14 days before the time set for the hearing; or

(c) if the address or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing the notice in a weekly paper once a week for 3 consecutive weeks and, if in a newspaper published more often than once a week, by publishing on at least 3 different days of publication. There must be at least 10 days from the first to the last day of publication, both the first and last day being included.

(2) The court for good cause shown may provide for a different method or time of giving notice for any hearing.

(3) Proof of the giving of notice must be made on or before the hearing and filed in the proceeding.

**History:** En. 91A-1-401 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 516, L. 1975; R.C.M. 1947, 91A-1-401; amd. Sec. 2307, Ch. 56, L. 2009.

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**APPENDIX J**

**MCA - 72-2-12**

MCA Contents / TITLE 72 / CHAPTER 2 / Part 1  
/ 72-2-125 Parent barred...

# Montana Code Annotated 2023

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS  
CHAPTER 2. UPC -- INTESTACY, WILLS, AND DONATIVE TRANSFERS  
Part 1. Intestate Succession

## Parent Barred From Inheriting In Certain Circumstances

**72-2-125. Parent barred from inheriting in certain circumstances.** (1) A parent is barred from inheriting from or through a child of the parent if:

(a) the parent's parental rights were terminated and the parent-child relationship was not judicially reestablished; or

(b) the child died before reaching 18 years of age and there is clear and convincing evidence that immediately before the child's death the parental rights of the parent could have been terminated under law of this state other than this code on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child.

(2) For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is treated as if the parent predeceased the child.

**History: En. Sec. 12, Ch. 313, L. 2019.**

**APPENDIX K**  
**MCA 72-3-507**



MCA Contents / TITLE 72 / CHAPTER 3 / Part 5  
/ 72-3-507 Appointment ...

# Montana Code Annotated 2023

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS

CHAPTER 3. UPC -- PROBATE AND ADMINISTRATION

Part 5. Personal Representative Appointment Priorities,  
Bond, and Termination

## Appointment Of One Not Having Priority

**72-3-507. Appointment of one not having priority.** Appointment of one who does not have priority, including priority resulting from renunciation or nomination determined pursuant to **72-3-504**, may be made only in formal proceedings. Before appointing one without priority, the court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment and that administration is necessary.

**History:** En. 91A-3-203 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 223, L. 1977; R.C.M. 1947, 91A-3-203(5).

# **APPENDIX L**

**MCA 72-3-526**

MCA Contents / TITLE 72 / CHAPTER 3 / Part 5  
/ 72-3-526 Termination of...

# Montana Code Annotated 2023

TITLE 72. ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS

CHAPTER 3. UPC -- PROBATE AND ADMINISTRATION

Part 5. Personal Representative Appointment Priorities,  
Bond, and Termination

## Termination Of Appointment -- Removal For Cause

**72-3-526. Termination of appointment -- removal for cause.** (1) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice must be given by the petitioner to the personal representative and to other persons as the court may order. Except as otherwise ordered as provided in **72-3-617**, after receipt of notice of removal proceedings, the personal representative may not act except to account, to correct maladministration, or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of or under the control of the personal representative being removed.

(2) Cause for removal exists:

(a) when removal would be in the best interests of the estate; or

(b) if it is shown that a personal representative or the person seeking the personal representative's appointment intentionally misrepresented material facts in the proceedings leading to the appointment or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of the office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

(3) Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing self-appointment or appointment of the personal representative's nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this state to administer local assets.

**History:** En. 91A-3-611 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-611; amd. Sec. 2345, Ch. 56, L. 2009.

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