

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

LISA COLE
Appellant,

v.

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

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

APPELLANT LISA COLE'S REPLY TO APPELLEE'S RESPONSE BRIEF

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BACKGROUND

There are two threshold issues where the district court committed reversible error;

- 1) **Notice:** Cole was never provided notice of the hearing to appoint Yocum as personal representative of her daughter's estate, denying her the right to due process. The fact that she was **not given notice** of the hearing is undisputed.
- 2) **Conflict of Interest:** It is clear the personal representative's motivation to file the Amended Petition to Bar Cole from Inheriting from her daughter's estate was influenced by her simultaneous representation of Mythias Cole, who would become beneficiary of the estate if Lisa Cole were disinherited. The district court committed a reversible error by not addressing these two threshold issues, which should have resulted in Yocum being removed as personal representative and making her petition to disinherit Cole void ab initio.

Lisa Cole first received notice of Yocom's petition to bar her from inheriting when that petition was sent to a former address, collected by a neighbor, who then told Lisa about the document. This was in January 2022. (Yocom was appointed PR on November 23, 2020, and has never attempted to contact Cole in person.) Cole's first actions were to file a statement of her inability to pay court costs and fees on January 13, 2022, and seek to hire counsel. Cole's counsel, Christopher

Froines made an appearance on January 27, 2022, and immediately sent a letter to PR's counsel, Danielle Shyne notifying her about the conflict of interest she and Yocom had by simultaneously representing Mythias Cole, one of Lisa's children, while at the same time pursuing the petition to disinherit Cole which would have made Mythias a beneficiary of the estate. (January 31, 2022, Appendix O)

Cole's counsel sent another letter on February 8, 2022, again stating that the personal representative had a clear conflict of interest. (February 8, 2022, Appendix P) Both letters included the ethics opinion from the Montana office of Professional Responsibility that confirmed an attorney cannot represent both a wrongful death action for decedents survivor and the decedent's estate. (Ethics Opinion #860218, Appendix P)

On February 14, 2022, Yocom filed an Amended Petition for Guidance from the District Court, requesting the District Court determine whether or not she had an impermissible conflict of interest existed. (Dkt. #29)

On February 22, 2022, Cole filed a Motion For Removal and Substitution of The Personal Representative Based On The PR's Conflict Of Interest. (Dkt. #36) The District Court did not rule on either of these motions regarding conflict of interest, and the DC's Findings and Conclusions do not address the "conflict" issue Cole raised early in this case other than to say, "*Lisa Cole's motions are denied.*" on the final page of its Order.

Issue number two of Appellant's Opening Brief is whether or not the district court erred in denying Lisa Cole's Motion to Remove Sunny Yocom For Cause. Yocom's response brief does not address this issue, and any contrary argument is conspicuously absent from her response brief. This is because the denial of Cole's right to due process in the appointment of Yocom as the personal representative of her daughter's estate is indefensible.

Had the District Court ruled on the conflict issue and the issue of Cole not being provided notice of the appointment of Yocom as personal representative, Yocom's appointment would have been void ab initio, and this litigation regarding Lisa Cole not inheriting would not have occurred.

Article II, Section 17 of the 1972 Montana Constitution is identical to the provision in the 1889 Constitution which states; **"No person shall be deprived of life, liberty or property without due process of law."**

In this case, Cole was denied notice of the appointment of Sunny Yocom as personal representative of her daughter's estate, which amounts to the denial of her right to due process. The district court did not address this issue, other than to state, *"Ms. Cole's complaints about the estates failure to notify her of these proceedings are without merit because she was represented by counsel."* (FF 32) As noted in the appellant's opening brief, this is a false statement. Plaintiff's counsel did not make an appearance or represent Cole in this matter until January 27, 2022, (Dkt.

21) well over a year after Yocum was appointed as personal representative and Cole was not represented by any attorney prior to that date. (An argument could be made that both Danielle Shyne and Yocom had an obligation to act in Lisa Cole's best interests as the sole beneficiary of her daughter's estate.)

Yocom argues that Cole could not have been appointed PR based on the DC's FF #32 where the court seems to have made the decision that Cole could not be PR, without even hearing evidence or testimony on the matter. Even if Cole was not appointed in Yocom's place, her removal would have allowed a different third-party to be appointed, someone that did not have the obvious conflict of interest that Yocom had by representing Cole's son Mathias in a battle about who would be the beneficiary of the Estate.

FACTUAL ERRORS IN APPELLEE'S RESPONSE BRIEF

Before arguing the substance of appellee's response brief, it is necessary to point out all of the false statements in the appellee's statement of the case and statements of fact and, statements of argument contained in Yocom's Response Brief.

Appellee states, "*at the pre-trial mandatory mediation, mediator and former Judge Fagg determined that Cole mediated in bad faith*" and reported the same to *district court.*" (Appellee's Brief at Pg. 6)(See also the Court's FF #8 &CL #26)

There was no evidence presented about how Cole supposedly mediated in bad

faith. The Mediation Report is clear hearsay, and it was error for the DC to let the hearsay influence its opinions of Cole. At the hearing, the DC did mention that the judge had known the mediator since he was 17, and they had attended law school together. (Trans. 27:18-29:25)

The mediation between the parties was **not** mandatory mediation, it was voluntary between the parties, and at the mediation, the personal representative (Yocum) was representing Lisa Cole's children, who were not beneficiaries of the estate, against Cole. (The DC did not issue a ruling on the PR's Motion for Sanctions Dkt. #89 or Cole's crossclaim for attorney fees Dkt. #91)

Yocom states, "*the sad fact is that three of Cole's other children testified that Cole abandoned M.A.C. in the six months preceding M.A.C.'s death, abandoned, abused and neglected M.A.C. and her brother in the year's leading up to the abandonment.*" (*Id.* at, pg. 6) Again, this is a misstatement of the testimony, Mythias Cole did testify regarding some occurrences between himself and his mother, but no one testified that M.A.C. was "*abandoned, abused or neglected.*" The DC made these inferences from reading the DPHHS entries in Exhibit 3, which were almost exclusively unsubstantiated, don't even identify the complaining party (according to the Regional Director Jennifer Hoerauf) and clearly hearsay.

Yocom claims; “*the district court stated that after the initial hearing, either counsel could have requested time to take additional testimony.*” (*Hearing transcript pg. 244*). “*Cole and her counsel never made that request.*” (*Id.* at Pg. 6)(see also allegations Pg. 9 ¶ 11) Following the hearing on May 23, 2023, motions were fully briefed on June 30, 2023, and on August 1, 2023, Cole filed a Notice of Issue and Request for Hearing. (Dkt 98) On December 20, 2023, Cole filed another Request for Hearing, reminding the Court of its statements it would discuss the necessity of additional witnesses in the case. (Dkt #100) Even though the DC said it would conduct additional hearings upon request, it did not. Appellee’s statement that Cole did not request the opportunity for additional testimony is not true.

Yocom states; “*despite a subpoena being served upon Cole to appear in person at the hearing [May 23, 2023] she failed to appear for the hearing.*” (Appellee’s Stmt. of Facts, pg. 8 ¶9) Cole was never served with a subpoena to appear at the May 23, 2023, hearing. This is a point of contention that was never resolved by the district court, but which the DC used in its findings and conclusions. Yocum’s counsel emailed a copy of a subpoena for Cole to appear to her counsel who immediately responded that he was not accepting the subpoena, and that it needed to be served in accordance with Rule 45 of the Montana Rules of Civil Procedure. Cole’s counsel never agreed to accept the subpoena on Cole’s behalf and made that fact clear to Yocum’s counsel numerous times. (See email

string with Walter Clapp attached as Appendix M) Cole would gladly have appeared at the hearing if the court had allowed her to appear remotely, but Cole was the only person the court required to appear in person.

Yocom claims that regarding the probate; Cole “declined to become involved.” (Id. at pg. 6 ¶3) This is a misstatement of Sean Cosgrove’s testimony. Cosgrove’s affidavit states, “*I explained there would need to be the filing of legal documents and participation at hearings, I explained that I had written to her and repeatedly tried to reach her by phone. I left her with my business card. I never heard back from Lisa Cole.*”

Yocom claims; “*the insurers attorney contacted the Gallatin County Clerk of Court who provided him with a name of a public administrator, Sunny Rae Yocum, who was thereafter appointed.*” (Id. at Pg. 8 ¶4) Although, Yocum likes to refer to herself as a *public administrator*, that is an elected position and there is no evidence that Yocum was acting as public administrator or was a substitute public administrator or had ever talked to the actual public administrator, who was at the time, the Clerk of District Court. There was no need to hurry in appointing a PR. Montana law only requires that a probate to be opened within 3 years of the date of death. When Yocom received the \$100,000 insurance check on December 7, 2020, it sat on her desk for 4 months until it was deposited on April 15, 2021. It was not until a year after the settlement check was received (December 2021) that Yocom

filed her motion to allow her client Mythias to inherit from the Estate in place of his mother Lisa Cole.

Appellee' s Arguments

ISSUE 1: Failure to present verified pleadings.

Yocom argues; *“Cole presented no witnesses...she failed to establish standing or any other facts necessary to plead her case.”* (App. Response pg. 17) Here, the burden is on Yocum to show by **clear and convincing evidence** that immediately before Cole’s daughter’s death, her parental rights could have been terminated, pursuant to MCA § 72-2-125. Yocum did not meet her burden, as clearly shown by the testimony at the evidentiary hearing.

Because they had no evidence or testimony against Cole, they are now arguing that Cole’s response to Yocum’s petition to disinherit Cole was not verified. As argued in appellant’s opening brief, this is harmless error. The court had in-person testimony, and Yocum’s Amended Petition to disinherit Cole was likewise not verified. As noted in Appellant’s opening brief, Yocum’s Amended Petition was nothing like the original petition and the fact that it was unverified makes that Amended Petition moot based on Yocum’s own argument.

ISSUE 2: Appellant’s argument that Cole’s parental rights could have been terminated without the State initiating a child welfare action.

Appellee notes that at the evidentiary hearing, Ms. Hoerauf, the director of Montana Department of Health and Human Services testified; “*We would not be able to terminate parental rights of a parent without filing what we call a dependent/neglect action, and in none of these cases did they meet the criteria because we did not investigate the birth mother’s home.*” (App. Br. Pg. 19)

Hoerauf also testified that none of the other unsubstantiated allegations against Cole were ever investigated other than one in 2004, and no dependency of neglect actions were ever initiated by the State.

Yocom concedes that no State action was pending immediately prior to MAC’s death. (App. brief, pg. 19) The district court’s interpretation that Hoerauf’s testimony could in some way mean that Cole’s parental rights could be terminated is clear error.

Cole cannot find, and Yocom has not offered any cases or examples where a person’s parental rights were terminated without involvement of DPHHS. The DC’s findings and conclusions do not reference any statutory authority that would allow the DC to act unilaterally to terminate parental rights. As explained in argument section 1 of Appellant’s brief g. 18, the 2024 case of **In RE Matter of RN**, 2024 MT 115, this Court held that; “*when the State withdrew it’s petition for*

termination[of parental rights] the district court had no right to prosecute a petition for termination [of parental rights]”. Jennifer Hoerauf, the Regional Director of DPHHS testified as follows:

The complaints listed on Exhibit 3 could have been called in and reported by anyone for any reason. (May 23, 2023, hearing transcript pg. 91:3)

“We [DPHHS] would not be able to determine parental rights just on the onset of the case. It’s usually a long process that takes several months to years to make a determination to file for termination.” *Id.* at pg. 86:1

In regards to termination of parental rights, “very rarely would I say that it’s abandonment only.” *Id.* at pg.86:23

When asked; “...*and if a parent was homeless and doing drugs, and abandon their kids in the foreign state or let’s say in states, and a report was received, and the kids were just living on the street CPS and do an investigation terminate potential—parental rights potentially?*” Hoerauf responded;

THE WITNESS: So I think that's a more complex question than what is being asked. **If all those circumstances were there,** and we investigated, and we determined that the children were living on the streets and were unsafe, we would then follow --we would then initiate a what we call a dependent/neglect action. We would have to have a show cause. **We would have to have an adjudication in front of a district court judge to make that determination to support that.** We would then offer parents

treatment plans and services in order to work toward reunification. **If all those efforts failed** during the duration of time and at a period of, I mean, some of our cases go on for four years. **It's difficult to say that we would meet the level of termination. We would not be able to terminate parental rights just on the onset of the case.** It's usually a long process that takes several months to years to make a determination to file for termination. (Hearing transcript Pg.84-Pg.86 Ln.5

Hoerauf said; Lisa Cole was never investigated about the 2019 complaint.

Id. at 78:25

Even though Mykhia was living with her sister, Hoerauf stated; “*we would not be able to terminate prior rights of the parent without filing what we call a dependent/neglect action, and in none of these cases didn’t meet the criteria because we did not investigate the birth mother’s home.*” *Id.* at 80:7

At time of Mykhia is death in March 2020, there were no proceedings initiated anywhere but how are off was aware of the terminate Cole’s parental rights. *Id.* at 80:17.

Hoerauf stated “*I will affirm that there is statements, based on reports called in, that she [Cole] was looking after children returned to her care.*” *Id.* at 81:13

Granting someone guardianship does not grant termination of parental rights. *Id.* at 82:1.

ISSUE 3: The District Court made an error when it appointed Sunny Rae Yocom as personal representative.

Yocom argues, “*Cole waived those rights [to notice of the hearing to appoint Yocom PR 11.23.2020] when she did not appear for the evidentiary hearing in this matter and failed to request a subsequent evidentiary hearing offered by the district court in this matter.*” (Appellee’s brief, pg. 20)(Evidentiary hearing 5.23.2023)

The hearing to appoint Yocom as personal representative occurred 2 1/2 years prior to the May 23, 2023, evidentiary hearing. It is undisputed that Cosgrove, attorney for the insurance company, could not possibly have given Lisa Cole notice of the hearing which occurred in November 2020, the only time he met with her on June 1, 2020, when no personal representative had been selected, and the hearing was not even scheduled on the docket until October 2020.

Yocom argues, “*Cosgrove and Yocom are not required to provide further notice of the hearing to Cole under MCA § 72-3-221.*” This assertion by Yocom contains no supporting citation and is simply untrue. The Rules for providing notice to all interested parties are well established and inflexible for a reason, to promote the due process rights of all parties. (See Appellants Opening Brief Pg. 19 and Cole’s Motion, and Superseding Motion to Remove PR. (DKT. #'s 36 & 86)

Yocom argues, “*Cosgrove went beyond the demand of the law and met with Cole in person to discuss the necessity of probate.*” It is undisputed that Cosgrove only met with Cole one time, June 1, 2020. The hearing testimony also shows that neither Yocom nor Cosgrove made any further attempts to contact Cole about the hearing or for a full year after Yocom had been appointed as personal representative. MCA § 72-3-122(1) allows three years for a probate to be filed, there was no need for Cosgrove to rush to file this probate, and he actually had no authority to do so. A fact the District Court should have noticed.

Yocom next argues that Cole did not have priority to be appointed as personal representative. (Appellee’s brief, pg. 24) Yocom relies on the District Court’s Findings of Fact (pg. 12, ¶ 32) but that is wholly speculative, as no evidence was taken on that matter. Even if Cole had not been appointed as personal representative, someone else would have been, someone without the obvious conflict of interest Yocom had by representing Cole’s son Mythias in a proceeding against her.

ISSUE 4: Appellee’s arguments that the District Court’s findings and conclusions were not clearly erroneous.

Yocom states, “*A subpoena was served upon Cole’s attorney for Cole to appear at the hearing...*” and “*...The District Court ordered Cole to appear in person for the hearing scheduled for May 23, 2023.*” (Appellee’s brief, pg. 26)

Both of these statements are untrue, Cole was never served with a subpoena, a copy of the subpoena was merely sent to Cole's attorney, who immediately responded to Yocum's counsel that the subpoena was not being accepted for service. (See email string Appendix M) At the hearing, the District Court specifically stated that it had not ordered Cole to appear, but if she was going to appear, she had to appear in person. (Trans. Pg. 238)

Yocum states, "*...the department refused to forcibly return MAC to Cole, despite their knowledge of her wanting her children returned.*" (Appellee's brief, pg. 30)

The law enforcement notes from Exhibit 3 actually state; '*Law enforcement did not give children's location to birth mother.*' " (**Trans pg. 57**)

Yocum states, "*Cole asserts reporting her concerns to CPS and law enforcement was a manifestation or firm intention to resume care of MAC. In order for a parent to manifest a firm intention to resume care, that intention must be made to both the child and the individual having physical custody of the child.*" In support, Yocum cites MCA § 14-3-102(1)(a)(ii). This is a misstatement of the law, and no such statute exists.

Yocum states that Cole failed to provide any evidence that she spoke with MAC or Samara or of resuming care to MAC. Yocum's Exhibit 3 has numerous phone calls from Cole trying to have her child returned to her, it also details Cole's

plan for having Mykhia returned to her by Christmas and Jennifer Hoerauf confirmed the DPHHS records showed an indication of Cole wanting her child returned to her. (Trans. Pg. 81:13)

ISSUE 5: Yocom argues the district court did not abuse its discretion when admitting evidence.

Yocom makes numerous false statements in her argument on this issue. Yocom argues; “*The district court admitted evidence contained in Exhibit 3 over Cole’s objection...(Exhibit 3, the department CPS reports, are public records and reports that are **factual findings**, resulting from an investigation pursuant to the authority granted to the child and family services to make and create reports.*” And “*These reports were admitted after they were **authenticated** by the department officials who have knowledge of the case. It is not the statements in the documents that influence the court, but the sheer volume of the reports, the facts of which were verified independently by the department, Phoenix, Sierra, and Mythias.*”

These, so called ‘reports’ contained in Exhibit #3 are not “factual findings.” Hoerauf testified that anyone could call in and make a report for any reason. (Trans. 91:33) Yocom also argues that; “*these reports were admitted after they were authenticated by a department official who had knowledge of the case.*” (Pg. 36) It is clear by looking at Exhibit 3 that none of these so-called reports were substantiated except one in 2004. Because anyone can call in and make a report for

any reason the supposedly “reports” are inadmissible hearsay and should not have been relied upon by the district court.

It is very clear that the district court relied on Exhibit 3 when making its findings and conclusions, and there is no rebuttable presumption in favor of Yocum. Her burden was to show by clear and convincing evidence that there is some basis to terminate Cole’s parental rights. A burden she did not carry.

For example, the court in explaining its Findings of Fact #23 stated; “*the DPHHS interviewed MAC during investigation. MAC stated that she and Matthias believed the only reason Lisa Cole wanted her [and] Matthias back was for their Social Security benefits.*” This type of statement doesn’t even come close to meeting the burden of clear and convincing evidence. What is true is that Mykhia’s Social Security benefits were transferred to her sister only 3 months after she started living with her. That is certainly not grounds to terminate parental rights.

ISSUE 6: The District Court abused its discretion in denying Lisa Cole’s request to appear remotely from her home in Northern Oklahoma at the May 23, 2023, evidentiary hearing.

There is no legal requirement for witnesses to appear in person at an evidentiary hearing as the DC admitted. (Trans. 239:23) Cole argues that the refusal to allow her to testify remotely violated, “the fundamental fairness of due process that she is entitled to...”. In response, Yocum argues, “*that if Cole was*

allowed to testify remotely that they would be denied the right to cross-examine Cole in person, citing 611(e).” Yocum apparently does not realize that the rule she cites along with the case, **State v Stroemmen** apply only in criminal cases.

Here, Cole was denied the right to testify at the evidentiary hearing for no apparent reason. When the Court discussed the matter at the evidentiary hearing, the Court confirmed that Lisa Cole was not even required to attend the hearing, but for some reason the Court order required that if she did attend, it would have to be in person. The two positions are inconsistent, violating Cole’s right to fundamental fairness and due process and were an abuse of discretion on the part of the District Court.

CONCLUSION

The District Court was obviously influenced by and relied on hearsay evidence contained in the DPHHS reports. (Yocom’s Ex. 3), which contained unsubstantiated reports from unknown persons. The Court also relied on unsubstantiated hearsay allegations of bad faith mediation, and service of a supposed subpoena. There was no admissible evidence that Cole had abandoned her daughter. The District Court relied one hundred percent on hearsay and that is reversible error.

The only real meaningful testimony was from Jennifer Hoerauf, the regional director of DPHHS who stated there was never any past actions by DPHHS against

Cole and based on all the records and all the information she had, the State was not contemplating any termination actions. Even if Cole's elder daughter had been granted guardianship, that guardianship would not have terminated Cole's parental rights.

The statute, MCA §72-1-125 is vague and ambiguous, it contains no burden of proof. If this Court adopts the District Court's interpretations of the statute, every estate pertaining to a minor will have to perform the analysis of whether or not the parental rights could have been terminated.

The most disturbing aspect of the case is the District Court's lack of concern about Cole's right to due process. In the appointment of Yocum as personal representative of her daughter's estate, it is clear that Cole did not have notice of the application or the hearing and that her right to due process was denied. The District Court also denied Cole's right to appear at the evidentiary hearing for no apparent reason. The District Court's reasoning that Cole didn't need to appear, but if she wanted to appear and testify, she had to travel thousands of miles and appear in person, is inconsistent and prejudicial.

At the very beginning of this case, Cole made the District Court aware of the conflict Yocum and her lawyer had by representing Cole's son Mythias and the Estate of MAC simultaneously. Obviously Yocum was influenced by her

representation of Mythias, why else would it take a year to file a petition to disinherit Cole?

The right to parent is a fundamental right granted by the Montana Constitution. The District Court relied on inadmissible hearsay evidence which is reversible error.

The district court allowed Yocum to be appointed personal representative in violation of Cole's constitutional right to due to process. The district court further failed to follow the rules of civil procedure confirming that Cole had notice prior to conducting the hearing appointing Yocum as personal representative. These are reversible errors.

The district court failed to address the serious conflict of interest resulting in breach of fiduciary duty on the part of Yocum. These are all reversible errors by the district court.

Lisa Cole respectfully requests this Court find the district court committed reversible error by appointing Sunny Rae Yocum as personal representative without giving Cole prior notice; that this Court find the District Court committed reversible error by not removing Yocum as personal representative based on a serious conflict of interest; and that this Court find the District Court committed reversible error by relying on inadmissible hearsay evidence in its Findings of Fact and Conclusions of Law.

RESPECTFULLY submitted this 13th day of September 2024.

FROINES LAW OFFICE, PC

By: /s/ Christopher W. Froines
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//

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, Montana Rules of Appellate Procedure, I certify this Opening Brief is printed with a proportionately spaced Times New Roman text, typeface of 14 points, is double spaced and the word count does not exceed 5,000 words, excluding the Table of Contents, Table of Authorities, the Certificate of Service and the Certificate of Compliance.

DATED this 13th day of September 2024.

/s/ Christopher W. Froines
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CERTIFICATE OF SERVICE

The undersigned certifies that on 13th day of September 2024, a true and accurate copy of **APPELLANT LISA COLE'S REPLY TO APPELLEE'S RESPONSE BRIEF** was served on the following by means designated below:

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APPENDIX

Appendix M - Last email Re: Subpoena

Appendix N - MAC Subpoena – Lisa Cole

Appendix O - 2022.01.30 Ltr to DShyne re MAC Estate_01312022

Appendix P - Conflict letter to Shyne 02082022 with Opinion 860218

CERTIFICATE OF SERVICE

I, Christopher W. Froines, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 09-13-2024:

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