

**FILED**

01/15/2025

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 24-0670

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

January 15, 2025,

Supreme Court No.  
DA 24-0670

IN THE MATTER OF THE  
ESTATE OF ROSEMARY E. COLVER, deceased.

**FILED**

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Clerk of Supreme Court  
State of Montana

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**APPELLANT'S BRIEF**

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COLVER LAND TRUST, BRUCE W. LARSEN AS CO-TRUSTEE,  
APPELLANT; ESTATE OF ROSEMARY E. COLVER, GRETCHEN LARSEN  
AS CO-PERSONAL REPRESENTATIVE, APPELLEE.

ON APPEAL FROM MONTANA TWENTIETH JUDICIAL DISTRICT COURT,  
SANDERS COUNTY, CAUSE NO. DP-17-16, DEPT. NO. 2

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Attorney for Appellee

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### **C. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Did the District Court abuse its discretion in granting summary judgment to the Appellee in this case, to wit:

1. Was the District Court's interpretation of the law, upon which the summary judgment was based, correct?
2. Did the District Court err in ruling that the terms of the Decedent's Will, rather than the terms of Colver Land Trust, control as to the disposition of the Sanders County real property?
3. Did the District Court err in denying to the Appellant the equitable relief of constructive trust under the facts of this case?

**D. STATEMENT OF THE CASE**

The Statement of the case from the opening of the probate (5-1-17) through the Notice of Filing of the Appeal (12-9-24) is presented as the Sanders County District Court Roa Listing.

Roa Listing  
DP-45-2017-0000016-IT

Date	Filing #	Action
<b>In the Matter of the Estate of ROSEMARY E COLVER</b>		
12/09/2024	72.00	Notice of Filing Supreme Court No. DA 24-0670
11/18/2024	71.00	Judgment
11/15/2024	70.00	Notice of Filing Supreme Court No. DA 24-0670 DC Record Received
11/15/2024	69.00	Notice of Filing Supreme Court No. DA 24-0670
11/15/2024	68.00	Notice of Entry of Judgment 19688 \$50.00
11/15/2024		Proposed Judgment 19688 \$50.00
11/14/2024	67.00	Certificate of Service (Filed By St. Peter, Donald on behalf of LARSEN, GRETCHEN )
11/01/2024	66.00	Affidavit of Gretchen Larsen (Filed By Counts, Makayzia on behalf of LARSEN, GRETCHEN )
10/31/2024	65.00	Reply in Support of Motion for Attorney Fees (Filed By Counts, Makayzia on behalf of LARSEN, GRETCHEN)
10/31/2024	64.00	Order Vacating Hearing
10/29/2024	63.00	Order Granting Gretchen Larsen's Motion for Summary Judgment and Denying Bruce Larsen's Motion for Summary Judgment
10/23/2024	62.00	Order for Expedited Briefing
10/22/2024	61.00	Order Setting Hearing
10/22/2024	60.00	Exhibit 4 - 5 to Brief in Opposition to Motion for Attorney Fees (Filed By Stusek, Thomas on behalf of LARSEN, BRUCE )
10/22/2024	59.00	Exhibit 4 to Brief in Opposition to Motion for Attorney Fees (Filed By Stusek, Thomas on behalf of LARSEN, BRUCE )
10/22/2024	58.00	Exhibits 1 - 4 to Brief in Opposition to Motion for Attorney Fees (Filed By Stusek, Thomas on behalf of LARSEN, BRUCE )
10/22/2024	57.00	Brief in Opposition to Motion for Attorney Fees (Filed By Stusek, Thomas on behalf of LARSEN, BRUCE )
10/16/2024	56.00	Proposed Order Granting Petitioner's Affidavit of Costs and Attorney Fees
10/16/2024	56.00	Motion for Attorney Fees (Filed By Counts, Makayzia on behalf of LARSEN, GRETCHEN)
10/07/2024	55.00	Response to Requests for Production (Filed By Stusek, Thomas)
10/02/2024	54.00	Order Granting Petitioner Gretchen Larsen's Motion to Compel
09/17/2024	53.00	Notice of Filing Mediator's Report (Filed By St. Peter, Donald on behalf of LARSEN, GRETCHEN )
07/18/2024	52.00	Final Supplemental Briefing to Motion for Summary Judgment (Filed By St.Peter, Donald Craig on behalf of LARSEN, GRETCHEN)
07/17/2024	51.00	Supplemental Brief (Filed By Stusek, Thomas on behalf of LARSEN, BRUCE)
06/17/2024	50.00	Order Vacating Hearing and Order for Further Briefing
05/13/2024	49.00	Reply in Support of Motion to Compel (Filed By St. Peter, Donald Craig on behalf of LARSEN, GRETCHEN )
04/30/2024	48.00	Order Resetting Hearing
04/26/2024	47.00	Response to Motion to Compel (Filed By Stusek, Thomas)
04/24/2024	46.00	Motion to Compel and Brief in Support (Filed By St. Peter, Donald Craig on behalf of LARSEN, GRETCHEN)
03/27/2024	45.00	Order
03/27/2024	44.00	Order for Settlement Conference
03/27/2024	43.00	Judge Assignment Manually Changed Due to (Department 2 Retiring and Judge Larson assuming Jurisdiction)
03/25/2024	43.00	Order Continuing Hearing
8:25 AM		of 3
		1/8/2025

Roa Listing  
DP-45-2017-0000016-IT

Date	Filing #	Action
<b>In the Matter of the Estate of ROSEMARY E COLVER</b>		
03/20/2024	42.00	Notice (Filed By Owen, Molly on behalf of )
03/18/2024	41.00	Response to Discovery Requests (Filed By Stusek, Thomas on behalf of Bruce Larsen)
02/08/2024	40.00	Sur-Response Brief (Filed By Stusek, Thomas on behalf of LARSEN, BRUCE )
01/29/2024	39.00	Order
01/25/2024	38.00	Order Resetting Hearing
01/25/2024	37.00	Notice to the Court
01/23/2024		Proposed Order
01/23/2024	36.00	Response to Motion for Leave (Filed By Stusek, Thomas on behalf of LARSEN, BRUCE )
01/22/2024	35.00	Motion for Continuance
01/19/2024	34.00	Order Setting Hearing
01/18/2024		Proposed Order
01/17/2024		Proposed Order
01/17/2024	33.00	Gretchen Larsen's Motion for Leave to File Sur-Reply
01/09/2024	32.00	Reply Brief (Filed By Stusek, Thomas on behalf of )
12/22/2023	31.00	Respondent's Response to Motion for Summary Judgment
12/11/2023	30.00	Motion for Summary Judgment and Brief W/Affidavit
12/11/2023	29.00	Notice of Issue
11/02/2023	28.00	Response to Petition
11/02/2023	27.00	Motion for Summary Judgment and Brief in Support
10/20/2023	26.00	Petition M.C.A. Section 72-3-605
07/17/2023		Hearing result for Hearing held on 07/18/2023 10:00 AM: Vacated Appointment of Personal Representative
07/17/2023		Email Sent Date: 07/17/2023 04:14 pm To: don@stplawoffices.com; makayzia@stplawoffices.com and: stuseklawfirm@yahoo.com File Attached: ORDER.pdf Name of Document: Order
07/17/2023	25.00	Order
07/13/2023	24.00	Stipulation to Re-Appointment of Co-Personal Representatives and Request to Vacate Hearing
05/24/2023		Email Sent Date: 05/24/2023 08:24 am To: stuseklawfirm@yahoo.com; makayzia@stplawoffices.com and: bigideacompany@aol.com File Attached: ORDERCONTINUINGHEARING.pdf Name of Document: Order Continuing Hearing
05/24/2023	22.00	Hearing Scheduled (Hearing 07/18/2023 10:00 AM) Appointment of Personal Representative
05/24/2023	21.00	Hearing result for Hearing held on 06/06/2023 10:00 AM: Hearing Rescheduled. Appointment of Personal Representative
05/23/2023	23.00	Order Continuing Hearing
05/22/2023	22.00	Motion for Continuance
05/22/2023	21.00	Notice of Appearance
05/22/2023	20.00	Filing Appearance Paid by: Thomas J. Stusek Receipt number: 0017520 Dated: 5/22/2023 Amount: \$70.00 (Credit card) For: LARSEN, BRUCE (other party)
04/19/2023	20.00	Notice of Rescheduled Hearing
04/17/2023		Email Sent Date: 04/17/2023 08:14 am To: bigideacompany@aol.com; don@stplawoffices.com and: makayzia@stplawoffices.com File Attached: ORDERCONTINUINGHEARING.pdf Name of Document: Order Continuing Hearing

8:25 AM 2 of 3 1/8/2025

Email Sent Date: 05/24/2023 08:24 am To: stuseklawfirm@yahoo.com; makayzia@stplawoffices.com and: bigideacompany@aol.com File Attached: ORDERCONTINUINGHEARING.pdf Name of Document: Order Continuing Hearing  
Hearing Scheduled (Hearing 07/18/2023 10:00 AM) Appointment of Personal Representative

Roa Listing  
DP-45-2017-0000016-IT

Date	Filing #	Action
<b>In the Matter of the Estate of ROSEMARY E COLVER</b>		
04/17/2023		Email Sent Date: 04/17/2023 09:15 am To: stuseklawfirm@yahoo.com File Attached: ORDERCONTINUINGHEARING.pdf Name of Document: Order Continuing Hearing
04/14/2023	19.00	Order Continuing Hearing
04/14/2023		Hearing Scheduled (Hearing 06/06/2023 10:00 AM) Appointment of Personal Representative
04/14/2023		Hearing result for Hearing held on 04/17/2023 10:00 AM: Hearing Continued Appointment of Personal Representative
04/14/2023	18.00	Re Court Hearing for Cause 2 Dept. No. DP 17-16
04/12/2023	16.00	Motion to Reschedule Hearing
04/12/2023	17.00	Motion to Appear via Zoom
04/05/2023	15.00	Lis Pendens
03/23/2023	14.00	Motion to Reschedule Hearing
03/16/2023	13.00	Notice of Hearing
03/06/2023		Filing: Appearance Paid by: LARSEN, BRUCE (other party) Receipt number: 0017270 Dated: 3/6/2023 Amount: \$70.00 (Check) For: LARSEN, BRUCE (other party)
03/06/2023	12.00	Response to Request for Hearing
03/02/2023		Hearing Scheduled (Hearing 04/17/2023 10:00 AM) Appointment of Personal Representative
03/02/2023		Email Sent Date: 03/02/2023 04:58 pm To: Karla@stplawoffices.com; don@stplawoffices.com and Makayzia@stplawoffices.com File Attached: ORDERSETTINGHEARING.pdf Name of Document: Order Setting Hearing
03/02/2023	11.00	Order Setting Hearing
02/21/2023	10.00	Request for Hearing
02/21/2023	9.00	Petition for Appointment of Personal Representative to Administer Probate
02/21/2023		Case Status Changed: reopened
02/21/2023	16.00	Filing: Probate / Formal And Informal Paid by: St. Peter Law Offices, P.C. Receipt number: 0017238 Dated: 2/21/2023 Amount: \$100.00 (Check) For: LARSEN, GRETCHEN (other party)
06/20/2018	8.00	Receipt of Distribution
05/18/2018		Case Status Changed: Closed
05/18/2018	7.00	Personal Representative's Sworn Statement to Close Estate
05/18/2018	6.00	Notice of Final Account
08/18/2017		Filing: Certification With A Seal Paid by: Thompson & McCall PLLC Receipt number: 0010188 Dated: 8/18/2017 Amount: \$4.00 (Check) For: LARSEN, GRETCHEN (other party)
07/12/2017	5.00	Notice of Publication
05/25/2017	4.00	Notice to Creditors
05/01/2017	3.00	Letters of Appointment Issued (Bruce Larsen and Gretchen Larsen)
05/01/2017	2.00	Order for Informal Probate and Appointment of Co-Personal Representatives
05/01/2017	1.00	Application for Informal Probate and Appointment of Co-Personal Representatives with Last Will and Testament of Rosemary E. Colver
05/01/2017		Filing: Probate / Formal And Informal- Paid by: THOMPSON & MCCALL PLLC Receipt number: 0009721 Dated: 5/1/2017 Amount: \$100.00 (Check) For: LARSEN, BRUCE (other party)
05/01/2017		New Case Filed
05/01/2017		Other party: LARSEN, GRETCHEN Attorney Retained MAGGIE MCCALL
05/01/2017		Other party: LARSEN, BRUCE Attorney Retained MAGGIE MCCALL
05/18/2017	7.00	Notice of Final Account
05/18/2017	3.00	Notice of Final Account
05/18/2017		Filing: Certification With A Seal Paid by: Thompson & McCall PLLC Receipt number: 0010188 Dated: 8/18/2017 Amount: \$4.00 (Check) For: LARSEN, GRETCHEN (other party)
07/12/2017	5.00	Notice of Publication

## **E. STATEMENT OF THE FACTS**

1. Rosemary Colver executed the irrevocable Colver Land Trust in 1999, with Bruce W. Larsen and Karin Lance as co-trustees (Exhibit 1);
2. Rosemary's Red Lodge property was deeded to such trust by Quitclaim Deed executed on February 23, 1999 and recorded on June 3, 1999 as Document No. 289910 (Exhibit 2); a U.S. Gift Tax Return (Form 709) was filed with the IRS;
3. The trust sold such real estate to Richard and Janet Stout on September 3, 2003, netting \$292,977.92 to the trust (Exhibit 3);
4. The trust beneficiaries, at such time, added the following "Acknowledgment" to the trust: "Notwithstanding and irrespective of the language in the Trust that states that '(u)pon completion of such a sale, the proceeds thereof shall be distributed to the Trust beneficiaries; and, if all real property is sold, the Trust shall be terminated', we herein agree that in lieu of distribution of such proceeds, such sale proceeds can be utilized by the Co-Trustees to acquire additional, replacement property, which property will be acquired by, and be held in the same of, the trust, subject to all the provisions thereof;" (underlineation added)
5. Trust beneficiaries, including Gretchen Larsen, signed such Acknowledgment dated 8-30-04 (Exhibit 4);

6. The trust thereupon acquired replacement (substitution) property as Rosemary's residence (Tract A of COS #1357) in Boyd, Carbon County, MT (see Exhibit 5);
7. Such replacement property was sold by the Trust on January 10, 2011. However, in 2010, prior to closing on the sale of the Boyd property, Rosemary and her husband Dick had located a suitable replacement residence in Sanders County and purchased such as their primary residence and in their joint names. Richard Colver provided a portion of the funds, with the balance provided by a mortgage loan (Exhibits 6 & 9);
8. Upon the subsequent sale of the Boyd, Carbon County property a few months later, Rosemary informed the trustees that she needed the funds to re-pay Dick and pay-off the mortgage indebtedness on the Sanders County property. [Section Six of the 1999 Trust specifically allows this: "If trustee makes any advances of money on account of this trust (e.g. to pay-off a mortgage loan); see also M.C.A. Sections 72-38-815(1)(a) and 72-38-816(18)]. Accordingly, upon direction of the co-trustees, the net funds of the Boyd real estate sale (\$209,857.93) were directed from the title company into Rosemary's checking account at Altana Federal Credit Union, to be used to satisfy the Sanders County property's indebtedness. See Exhibit 7;

9. Upon repayment of his funds, Richard quitclaimed his interest in the Sanders County property to Rosemary. Although the 1999 Trust specified that “replacement property... be held in the name of the Trust”, Rosemary mistakenly failed to deed this property to the Colver Land Trust. Thus, such real property remained in Rosemary’s name until her death. It thus incorrectly and inequitably appeared to be a probate asset, subject to disposition pursuant to the terms of the Fifth paragraph of her Last Will and Testament. See Last Will and Affidavits of co-trustees, Exhibits 8 and 9.

## **F. STATEMENT OF STANDARD OF REVIEW**

When a case is disposed of below on Motion for Summary Judgment before a judge sitting without a jury and no testimony is taken as the facts are relatively uncontested, the scope of review is much broader than in other appeals. The Supreme Court is free to make its own examination of the entire case and reach a conclusion in accordance with its findings. *Shimsky v. Valley Credit Union*, 208 Mont. 186, 676 P.2d 1308 (1984), *McCain v. Batson*, 233 Mont. 288, 760 P.2d 725 (1988), *In re Estate of Pelzman*, 261 Mont. 461, 863 P.2d 1019 (1993).

Both parties moved the District Court for summary judgment, the material facts in the case being undisputed. The District Court granted Gretchen Larsen's Motion. Bruce Larsen, as co-trustee of the Colver Land Trust, requests that the Supreme Court reverse the District Court's decision and grant summary judgment to him. *Duensing v. Traveler's Co.*, 257 Mont. 376, 849 P.2d 203 (1993), *In re Estate of Lgendorf*, 262 Mont. 123, 863 P.2d 434 (1993), *Swark v. Chrysler Ins. Corp.*, 282 Mont. 376, 938 P.2d 631 (1997).

## **G. ARGUMENT SUMMARY**

In the instant case, the 1999 irrevocable Colver Land Trust was affected by a mistake of fact when, upon the 2011 satisfaction of mortgage indebtedness (on substitution property) with trust funds, Rosemary failed to deed the substitution Sanders County property to the such Trust.

M.C.A. Section 72-38-415 provides that “(t)he Court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor’s intention if it is proved by clear and convincing evidence what the settlor’s intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.”

A 2004 Acknowledgment was a mutual understanding of the trust beneficiaries that the Carbon County real property, or replacement property acquired with the proceeds of sale of the Carbon County property, “will be acquired by, and be held in the name of, the Trust, subject to all provisions thereof.” Gretchen Larsen is incorrect when she argues that the testamentary intent of Rosemary Colver, decedent, should control the disposition of the replacement real estate property. Rosemary Colver’s intention as to the disposition of the trust’s real property, OR ANY REPLACEMENT REAL PROPERTY REFLECTIVE OF A “MERE SUBSTITUTION OF ASSETS”, was irrevocably expressed in the 1999 Colver Land Trust, and should control. See, generally, M.C.A. Section 72-38-415,

“Reformation of Wills on the Ground of Mistake”, 130 U. Pa. L. Rev. 521 (1982); Restatement (Third) of Property, Section 12.1 (Reformation of inter-vivos instruments to correct a mistake of law or fact is a long-established remedy); *In re Estate of McClure*, 385 Mont. 130, 381 P.3d 566 (2016), where the trustee, upon first spouse’s death, failed to fund a portion of the estate into an irrevocable UCST; upon the second death, the Court corrected this mistake by ordering such trust to be funded; *In re Estate of McDermott*, supra; ... Where, through a mistake of fact, title to, and apparent ownership of, property belonging to one person is obtained by another, a constructive trust: (1) ordinarily arises in favor of the rightful owner of the property, *Connecticut General Life Ins. Co. v. Merkel*, 90 Wis. 2d 126, 279 N.W. 2d 715 (Ct. App. 1979); 90 CJS, Trusts, Section 183; 3 Scott on Trusts, Section 466; (2) charges the other to reconvey the property to the rightful owner. Annotation at 12 ALR 2d, at 963.

The proceeds of the sale of the Boyd real property were held by Rosemary in constructive trust for her five children, the remainder beneficiaries of the irrevocable 1999 Colver Land Trust. M.C.A. Section 72-38-123. She was loaned such proceeds by the co-trustees to pay-off the debt (a mortgage note and a loan from Richard Colver) on the substitution Sanders County property; however, she never repaid the loan by deeding such property to the trust. Gretchen Larsen argues that “(t)he Sanders Property was never transferred to the Trust by Rosemary

Colver.” This, however true, is irrelevant as to the application of the constructive trust remedy, as it was inequitable for such money, or the substituted Sanders County real property, to be retained and testamentarily disposed of by Rosemary instead of being used in repayment to the Colver Land Trust. This is a classic example of unjust enrichment. The Sanders County property is not an estate asset; rather, it is a trust asset subject to administration and disposition pursuant to the terms of the 1999 irrevocable trust. M.C.A. Section 72-38-123.

The District Court made its decision upon the following:

(1) There is no dispute that the Sanders Property, the subject of this litigation, was purchased before the Boyd Property sold.

Irrelevant; the purpose money mortgage was paid-off, 6 months later, with proceeds of the sale of the Boyd property, which were loaned to Rosemary for such purpose;

(2) It is also undisputed that the Sanders Property was held solely in Rosemary’s name.

Irrelevant; she held such substituted property in constructive trust for the benefit of the Colver Land Trust.

(3) It is undisputed that Rosemary did not transfer title of the Sanders Property to the Trust.

This is the “mistake of fact” alleged by Bruce Larsen.

(4) Here, the Will of the Decedent is the last Will of the Decedent.

Ok, but irrelevant to the ultimate decision hereinunder.

(5) Bruce signed the Application for Informal Probate and Appointment of Co-Personal Representative and acknowledged that the Will admitted to probate is valid.

Bruce's actions, as co-P.R. of the estate, cannot bind, to their detriment, the legal rights of the beneficiaries of the Colver Land Trust. M.C.A. Section 72-38-411. Besides, as Bruce Larsen has stated by Sworn Affidavit, he did not know, nor did estate attorney McCall explain to him, the difference between an intervivos trust (irrevocable Colver Land Trust executed in 1999) and a testamentary trust (Rosemary E. Colver Trust which is alleged to be the residual beneficiary of his mother's estate). So, when he questioned Maggie to ascertain that the real property would be deeded from the estate to the trust, he assumed she was referring to the 1999 trust. (Exhibit 8)

(6) Rosemary's mental capacity at the time of the execution of the valid Will is not at issue.

Irrelevant, although due to advanced age, there is evidence that Rosemary was subject to undue influence by Gretchen, the only one of the children who lived in proximity to her (Exhibit 9).

(7) Section Fifth of the Will specifically devises Decedent's property at 7711 MT HWY 200, Plains, Montana 59859 in trust to her Trustee, for the benefit of her husband and her daughter, Gretchen.

Irrelevant, because she could not devise property that she did not equitably own.

The Court in its opinion recites all of Bruce Larsen's arguments, but never addresses them. For example:

1. The Court never explains what happened to the corpus in the 1999 irrevocable Colver Land Trust;
2. The Colver Land Trust, as Seller, received the proceeds of the 2011 sale of the Boyd property. The co-trustees, under the authority of M.C.A. Section 72-38-816(18), loaned such money to Rosemary to permit her to pay-off the underlying mortgage indebtedness on the Sanders County property (acquired 6 months earlier) WITH THE IMPLICIT UNDERSTANDING THAT SHE WOULD THEN DEED THE SANDERS COUNTY PROPERTY TO THE COLVER LAND TRUST IN REPAYMENT of such loan. Thus, this case is one of both constructive trust (unjust enrichment) and debtor/creditor relationship (equitable mortgage; Rosemary's failure to repay the \$209,857.93, loaned to her by the Colver Land Trust, that she used to satisfy Sanders County property indebtedness);

3. The Court never explained how Rosemary could gift the property to an inter vivos trust in 1999, then devise the same property, or directly traceable substitute property, by testamentary disposition (Will) in 2017.

The Court's summary decision does not sufficiently address the equitable principles underlying this case. Indeed, it fails to address the unjust enrichment (constructive trust and unpaid loan) issues altogether!

## **H. ARGUMENT**

**I. THE 1999 COLVER LAND TRUST, AN IRREVOCABLE TRUST, IS THE LEGAL OWNER OF THE CARBON COUNTY REAL ESTATE ORGINALLY DEEDED TO IT AND ALL REPLACEMENT (“SUBSTITUTION”) PROPERTY.**

With advanced age and related health issues, Rosemary E. Colver created an irrevocable trust in order to divest herself of her real estate asset. (Exhibit 1). This was her primary trust purpose; thus, her Red Lodge real property was duly deeded to such Trust to commence running of the 36 month Medicaid disqualification period (Exhibit 2). [Note: Medicaid qualification rules were much less stringent in 1999. A number of persons, including Rosemary, wished to avail themselves of such rules which, at the time, allowed a person to irrevocably convey assets to a “Medicaid qualifying trust”, while retaining a lifetime interest (such as continuing occupancy of a personal residence) therein. Upon the running of the 36 month “look-back” period, the corpus of the trust would not need to be spent-down before application could be made for Medicaid assistance. This effectively preserved the asset for ultimate distribution to children, which was Rosemary’s intent. See *Schneidecker v. Montana DPHHS*, 404 Mont. 407, 490 P.3d 87 (2021). See also 21 American Law Reports 4th 729, *Eligibility for Welfare Benefits as Affected by Claimant’s Status as Trust Beneficiary*.]

Such 1999 trust was expressly established with a view to Medicaid eligibility in the event that Rosemary, at some point, would become a resident of a nursing

home facility. The Court only needs to review the *Schneidecker* case for a complete understanding of the law in this regard and an understanding of Rosemary's donative intent. 42 U.S.C. 1396(d) (3) (B) provided that if there are any circumstances under which payment from the trust could be made to or for the benefit of the Trustor, the portion of the corpus from which, or the income of the corpus from which, payment could be made shall be considered a "countable" resource. If the trust's principal is not available because, under the trust, there are no circumstances through which Trustor could access its principal, except via loan (which in fact occurred in this case), then its corpus is not a "countable" resource. In *Schneidecker*, as in our case, the trust was irrevocable by its terms. Should the trust corpus (real estate) be sold, the sale proceeds must, by law, remain in the trust. The mere ability to live in a residence owned by a trust, however, does not grant the person residing therein access to the trust's corpus. The residence itself, or the proceeds of a sale thereof, is a trust asset. It may be sold for FMV or rented, thereby adding to the trust's ability to generate income through rent collected for use or occupancy [See generally, *Lane v. Caler*, 370 Mont. 30, 299 P.3d 827 (2013)]; but, any such income would be a countable resource, *Schneidecker*, at pp. 420 and 421.

The original trust property (Red Lodge, Carbon County) was sold in 2004 (Exhibit 3). The seller was the Colver Land Trust, whose co-trustees executed all

sale-related documents. The sale proceeds were used to purchase the Boyd property (Exhibit 5). “When real property held in trust is sold, the sale results in a mere substitution of assets, with the proceeds being held by the trustee... just as the land was originally held.” 76 AmJur 2d, Trusts, Section 495: *Sale, Conveyance, Transfer, Gift or Exchange of Trust Property; Carnahan v. Johnson*, 127 Ohio App. 3d 195, 711 N.E. 2d 1093 (1998), *Gillam v. Gillam*, 66 Ohio App. 2d 55, 419 N.E. 2d 1121 (1979).

## II. THE COLVER LAND TRUST WAS NEVER MODIFIED OR TERMINATED DURING ROSEMARY COLVER’S LIFETIME.

Where the settlor makes no reservation in the language to amend or revoke a trust, he or she may not unilaterally revoke the trust. *In re Guardianship of Lombardo*, 86 Ohio St. 3d 600, 716 N.E. 2d 189 (1999). Reservation of a life interest to a trustor is not inconsistent with a sufficient present divestiture by the trustor of his or her title to property to create a trust. *In re Shapley’s Deed of Trust*, 353 Pa. 499, 46 A. 2d 227, 164 A.L.R. 877 (1946).

M.C.A. Sections 72-38-410 and 72-38-411 through -414 provide the circumstances under which an irrevocable trust can be terminated. The only section that applies to our facts in 72-38-411, which states in pertinent part, as follows:

- (1) An irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries even if the modification or termination is inconsistent with a material noncharitable purpose of the trust.

(2) An irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. An irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

(3) Upon termination of a trust under subsection (1) or (2), the trustee shall distribute the trust property as agreed by the beneficiaries.

(4) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (1) or (2), the modification or termination may be approved by the court if the court is satisfied that:

- a. If all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
- b. The interests of a beneficiary who does not consent will be adequately protected.

The Colver Land Trust was never modified or terminated pursuant to the above

and, “where a valid voluntary trust has been created, and no power or revocation has been reserved, the trust cannot be revoked by the settlor without the consent of all beneficiaries”. *Lucas v. Velikanje*, 2 Wash. App. 888, 471 P.2d 103 (Div. 3, 1970). It has even been held that an active trust may not be terminated, even with the consent of all beneficiaries, if a material purpose of the settlor remains to be accomplished. *In re Estate of Brown*, 148 Vt. 94, 528 A. 2d 752 (1987); *Univ. of Maine Foundation v. Fleet Bank of Maine*, 817 A.2d 87 (Me. 2009). Rosemary’s concerns re Medical qualification, a major trust purpose, remained the same during her lifetime. At no time did the co-trustees and all five of the beneficiaries consent

to a trust termination; in fact, a 2004 Acknowledgement was executed to confirm such. (Exhibit 4) Obviously Rosemary would not have so consented, as her Medicaid eligibility concerns would have been even greater in 2011 than in 1999. Thus, the trust's purpose and effect continued throughout Rosemary's lifetime.

The common law is designed to uphold the terms of a validly-created trust. Neither malfeasance nor wrongful conversion will lapse or terminate a trust or discharge the trustee. *Bradbury v. Nagelhus*, 132 Mont. 417, 319 P.2d 503 (1957). Similarly, the Uniform Trust Code, subsection (b), codified as M.C.A. Section 72-38-412(2), addresses the test for termination or modification by unanimous consent of the beneficiaries without the concurrence of the settlor. The rules on trust termination in subsections (a)-(b), M.C.A. Section 72-38-411(1) and (2), carry forward the *Clafin* rule, first stated in the famous case of *Clafin v. Clafin*, 20 N.E. 454 (Mass. 1889). See West's Montana Code Annotated, 2022 Cumulative Annual Supplementary Pamphlet, Official Comments at pp. 331-335; See Annotations to Montana Code annotated, 2022, pp. 1110-1114.

76 AmJur 2d, at Section 72-78, addresses the general issue of termination of a trust as follows:

1. A trust cannot be terminated by the consent, contract, transfer, or conveyance of beneficiaries unless all beneficiaries have given their consent to such, Section 74;

2. Where a valued voluntary trust has been created, and no power of revocation has been reserved, the trust cannot be revoked by the settlor without the consent of all beneficiaries, 76 AmJur 2d, Section 75; *In re Guardianship of Lombardo*, supra.

It would appear that, with no revocation of the 1999 trust, and with no intention to revoke the trust, as to the real property, explicitly manifested in Rosemary's Will, the 1999 trust continues to be the equitable owner of the real property. To allege that the real property is owned by the estate, and the testamentary trust contained therein, would violate Rosemary's original intention that each of her five children, upon her death, would equally share in trust proceeds. (Gretchen, as the youngest, would assumedly out-live her siblings. Granting her a life estate in the realty will effectively deny the other four children of any lifetime benefit of the trust corpus.)

With the establishment of the 1999 trust, and contrary to Gretchen Larsen's legal position, Rosemary Colver irrevocably divested herself of the Trust property, proceeds of the sale thereof, or substituted assets. She no longer had the ability to direct the ultimate disposition of the trust property, AS A MATTER OF LAW. Rather, the trust property was held by the co-trustees for the benefit of the five remaindermen beneficiaries, subject to Rosemary's life estate. The 2004 Acknowledgement, signed by Gretchen, was merely a recognition by the trust

beneficiaries of the fact that Rosemary needed a personal residence during her lifetime, and that trust corpus could be sold and substituted to satisfy such need.

The replacement Boyd, Carbon County property was thus acquired by and held in the name of the Colver Land Trust.

Pursuant to M.C.A. Section 72-38-411, Bruce W. Larsen and Karin Lance, as co-trustees of the 1999 trust, did not have the authority to terminate or modify such trust by irrevocably giving the corpus back to Rosemary without the “consent of the settlor and all beneficiaries”. Such consent was never requested of, or given by, the trust beneficiaries. Rather, pursuant to Section Six of such trust and M.C.A. Section 72-38-816(18), the transfer of funds (from the Trust’s sale of the Boyd property) to Rosemary was a mere loan of money to allow her to pay-off the mortgage indebtedness on the substitution Sanders County property equitably owned by the 1999 trust.

### III. THE SANDERS COUNTY REAL PROPERTY IS “SUBSTITUTION” PROPERTY.

Technically, the Sanders County real property was purchased in 2010 by Richard Colver and Rosemary E. Hampton-Colver, with funds from a mortgage note and a loan from Richard Colver, before the Carbon County property was sold some six months later (see Exhibit 9).

The sale of the Boyd property closed on January 11, 2011; net sale proceeds were loaned by the Colver Family Trust to Rosemary on February 1, 2011 to repay Dick Colver and satisfy the underlying mortgage note on the Sanders County property (Exhibit 6). Thus, Gretchen Larsen's statement that "the Sanders Property was never purchased with the proceeds from the Boyd Property and is not substitution property" is simply not supported by the following facts as to dates and amounts:

- The 1-11-11 Boyd property sale was estimated to net \$210,160.00 and in fact netted \$209,857.93;
- \$209,857.93 was loaned to Rosemary pursuant to M.C.A. Section 72-38-816 (10) and deposited on 1-27-11 into Rosemary's checking account;
- Rosemary repaid the funds used to purchase the Sanders County property to Dick Colvin and the mortgage lender on February 1, 2011 (Exhibit 7);
- Rosemary was indebted to the Colver Land Trust in the amount of \$209,857.93, which loan she never satisfied because she neglected to convey the Sanders County property to the trust.

The dates and amounts are not a mere coincidence. They clearly show that the Boyd sale proceeds were used to purchase the Sanders County property (see *Schneidecker, Lane v. Caler, Carnahan v. Johnson*). This scenario is analogous to a reverse Section 1031 exchange, where the replacement property is purchased

before the exchanged property is sold. Notwithstanding such, the IRS regards the replacement property as “substituted” property within the context of IRC Section 1031 and the Regulations thereunder. See IRS Rev. Proc. 2000-37.

The Sanders County “substitution” property was an asset that should have been deeded to and held by, the 1999 Trust. Query: If the subject real property was indeed an estate asset, as Gretchen alleges, why didn’t Dick, as surviving spouse with children from a prior marriage, claim a spousal elective share of the estate pursuant to M.C.A. 72-2-232?

#### IV. THE MONTANA SUPREME COURT HAS BROAD AND FLEXIBLE JURISDICTION TO GRANT REMEDIAL RELIEF WHERE JUSTICE OR GOOD CONSCIENCE REQUIRES IT. MONTANA CONSTITUTION, ARTICLE V, SECTION 2.

Generally speaking, Courts of equity exercise a broad and flexible jurisdiction to grant remedial relief where justice or good conscience requires it. *Alexander v. Hamilton*, 525 N.W. 2d 41 (S.D. 1994). Equity will not permit unjust enrichment. See 30A, Corpus Juris Secundum, Equity, Section 100; *Fox v. Andorra Acres, Inc.*, 7 Chest. 172 (P.A.C.P. 1956). It is a fundamental principle of equity that no one shall be allowed to be enriched unjustly at the expense of another by reason of an innocent mistake of law or fact entertained by both parties. *In re Bratt*, 257 Wis. 447, 43 N.W. 2d 817 (1950). A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty

to convey it to another on the ground that her acquisition or retention of the property would constitute unjust enrichment. *Young v. Lowery*, 221 P.3d 1006 (Alaska 2009). Fraud is not required for a court to impose a constructive trust; courts may impose this equitable remedy in broader circumstances. *Matter of Gilbert Miller Testamentary Credit Shelter Trust and Estate of Miller*, 2020 WL 2111250 (Wash. Ct. App Div 1, 2020).

“(A)though equitable discretion is not governed by fixed principles and definite rules, implicit in the exercise of equitable discretion is conscious judgment directed by law and reason and looking to a just result.” *In re Estate of Hope*, 390 N.J. Super. 533, 916 A.2d 469 (App. Div. 2007).

“A court of equity has the jurisdiction to grant remedies necessary to establish, protect, and exercise the essential equitable relief required.” *Voedisch v. Town of Wolfboro*, 136 N. H. 91, 612 A2d 902 (1992)... “Equity looks at the entire matter and grants or denies relief as good conscience dictates.” *In re Estate of Moukalled*, 269 Mich. App. 708, 714 N.W. 2d 400 (2006).

“Equitable remedies will be available, however, when there is not adequate remedy at law, and if sufficient grounds to invoke equity, such as mutual mistake... are present” *AED, Inc. v. KDC Investments, LLC*, 155 Idaho 159, 307 P.3d 176 (2013).

V. ROSEMARY COLVER HELD THE SANDERS COUNTY REAL PROPERTY IN CONSTRUCTIVE TRUST FOR THE BENEFICIARIES OF THE COLVER LAND TRUST.

When Rosemary Colver received, on January 27, 2011, the proceeds from the sale of the Boyd property to pay-off the indebtedness on the Sanders County property, she held such proceeds in CONSTRUCTIVE TRUST for the beneficiaries of the Colver Land Trust. If a person holds property under an invalid conveyance, and the property is sold, the person holds the consideration received therefor in constructive trust for the benefit of the true equitable owner of the property. *In re Peterson's Estate*, 12 Wash. 2d 686, 123 P.2d 733 (1942).

Black's Law Dictionary, 6th ed., defines a constructive trust as follows:

1. *Constructive trust* is a trust raised by construction of law, or arising by operation of law, as distinguished from an express trust. Wherever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity, the court will immediately raise a *constructive trust*, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who in equity are entitled to the beneficial enjoyment.

Constructive trusts do not arise by agreement or from intention, but by operation of law... Actual fraud is not necessary, but such a trust will arise whenever circumstances under which property was acquired made it inequitable that it should be retained by him who holds the legal title. Constructive trusts have been said to arise through the application of the doctrine of equitable estoppel, or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done, and such trusts are also known as "trusts ex maleficio" or "ex delicto" or "involuntary trusts" and their forms and varieties are practically without limit, being raised by courts of equity whenever it becomes necessary to prevent a failure of justice. (underlineation added)

2. As stated by the Montana Supreme Court in *Matter of Estate of Cooney*, 398 Mont. 166, 174, 454 P.3d 1190 (2019): Constructive trusts arise when the title holder to property is subject to an equitable duty to convey it to another because the title holder would be unjustly enriched if permitted to retain the property. Section 72-38-123, M.C.A.; *In re Estate of Erickson*, 2017 MT 260, para. 32, 389 Mont. 147, 406 P.3d 1; *Volk v. Goeser*, 2016 MT 61, para. 49, 382 Mont. 382, 367 P.3d 378 (2016); see 76 Am Jur. 2d, Trusts, Section 169: (“A constructive trust arises when equity so demands; it is an equitable remedy imposed by the courts but only in the absence of an adequate remedy at law.”) Equity principles afford courts broad discretion to impose constructive trusts “despite any lack of wrongdoing by the person holding the property.” *Volk*, supra, para. 45 (citing *N. Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24, para. 29, 368 Mont. 330, 396 P.3d 450; *In re Jurgens*, 620 B.R. 115 (2020)).

Gretchen Larsen alleges that “(t)he problem with (Bruce Larsen’s) argument in that the Sanders property is not a Trust asset and never was a Trust asset, and the analysis ends there.” But it does not end there, as Montana law specifically recognizes, under these circumstances, application of the equitable remedy of “constructive trust”. See M.C.A. Section 72-38-123. Again, when Rosemary Colver was loaned the proceeds of the sale of the Boyd property, she received such as both a debtor and, as to substituted property, “a trustee for the parties who in

equity are entitled to the beneficial enjoyment”. Such parties in this case are the original five beneficiaries, in equal shares, under the terms of the 1999 irrevocable trust. Rosemary, in equity, cannot take back the proceeds of the sale of the trust corpus and use it, either directly or indirectly, to purchase property in her own name, and then dispose of such in a manner inconsistent with the terms of the original gift transfer to the Colver Land Trust.

The impact of Section 72-38-123 is that “such a (constructive) trust will arise whenever circumstances under which the property was acquired made it inequitable that it should be retained by him who holds the legal title”. Through a mistake of fact, Rosemary held legal title to the Sanders County property at her death, and thereafter disposed of such by Will, in a manner that was inequitable to the owners of the beneficial interests in the original 1999 irrevocable trust.

See *In re Estate of McDermott*, 310 Mont. 435, 51 P.3d 486 (2002), Constructive Trust Created for Proceeds of Sale of Residence-Unjust Enrichment: A father conveyed a residence to one of his sons. When sale of the property was later contemplated, two daughters contested the retention of the sale proceeds by the son, asserting that the property had been conveyed to the son in order to provide an estate for another child who had suffered a serious brain injury in an automobile accident about one year prior to the conveyance of the property. The District Court imposed a constructive trust on the proceeds of the residence, and

the son appealed. The Supreme Court affirmed. Although a constructive trust may be imposed because the titleholder obtained the title by fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act, a constructive trust may also be imposed in cases in which a title holder innocently obtained title to property but would be unjustly enriched if allowed to retain the title. Here, conveyance of the property to the son supported the creation of a constructive trust, as the son would have been unjustly enriched if allowed to keep the proceeds from sale of the residence. 2020 Annotations to Montana Code Annotated Section 72-38-123, Vol. 12, P. 1070; *Volk v. Goëser*, supra.

The California 2nd District Appellate Court, in *Higgins v. Higgins*, 11 Cal. App. 5th 648, 217 Cal. Reports 3d 691 (2017), has stated that three conditions must be shown to impose a constructive trust: (1) a specific identifiable property interests; (2) the plaintiff's right to the property interest; (3) the defendant's acquisition or detention of the property interest by some wrongful or mistaken act. All of such conditions exist in our case!

When imposing a constructive trust, the court must consider whether the trust constitutes the appropriate measure of unjust enrichment. A party's constructive trust encompasses property only if in equity and conscience the property belongs to another party. *LeMond v. Yellowstone Dev., LLC*, 375 Mont. 402, 336 P.3d 345 (2014). The 1999 trust provides, upon sale of the trust corpus, for equal

distribution of its property to the five children. In 2004 Gretchen freely signed a document acknowledging the trust's ability to purchase "replacement property" that Rosemary would continue to use as her home, "which property will be acquired by, and held in the name of, the Trust, subject to all the provisions thereof." Upon Rosemary's death, the original real property, or replacement/substitution real property, was to be sold with the proceeds distributed in equal 1/5th shares. To give effect to Gretchen's alleged testamentary life estate in such property would effectively deny the other four children their rightful inheritance. (Again Gretchen, being the youngest, will assumedly outlive all of her siblings.) This is not what was intended when the 1999 trust was created.

Gretchen Larsen, in her Sur-Reply Brief, presented three points that she considers to be significant, to wit:

1. The Sanders property was purchased before the Boyd Property was sold;
2. A Constructive Trust is not a Remedy for Unjust Enrichment;
3. The Statute of Limitations acts as a time bar.

To each of such Bruce Larsen responds as follows:

1. The Sanders County property was purchased in June 2010; the Boyd property was sold in January 2011. This fact, however is quite irrelevant for the following reasons:

M.C.A. Section 72-38-106 provides that the common law of trusts and principles of equity supplement this chapter. Such law/principles are generally stated in the following:

- a. When imposing a constructive trust, the Court must consider whether the trust constitutes the appropriate measure of unjust enrichment... a party's constructive trust encompasses property only if in equity and conscience the property belongs to the party. *LeMond v. Yellowstone Dev., LLC*, supra.
- b. Establishment of a constructive trust depends only on a showing that the titleholder would be unjustly enriched if permitted to retain the title... The District Court properly exercised its power to make compensatory adjustment and to fashion appropriate relief according to the ordinary principles of equity. *LeFeber v. Johnson*, 351 Mont. 75, 209 P.3d 254 (2009). See also *Flood v. Kalinyaprak*, 319 Mont. 280, 84 P.3d 27 (2004) and *Anderson v. Woodward*, 350 Mont. 343, 207 P.3d 329 (2009).

A constructive trust may also be imposed in cases in which a titleholder innocently obtained title to property but would be unjustly enriched if allowed to retain the title. *In re Estate of McDermott*, supra. Rosemary used the proceeds of the sale of trust property to satisfy the debt on the Sanders County property,

acquiring “clear” title in the process. Such real property should have, at that time, been deeded to the Colver Land Trust.

76 AmJur2d, “Trusts”, Article IV. Trusts by Operation of Law, Constructive Trusts, Sections 169-205 provides as follows:

A “constructive trust” is an implied trust arising by operation of law to satisfy the demands of justice or to prevent a failure of justice. A constructive trust is properly imposed when one has acquired legal title to property under such circumstances that she may not in good conscience retain the beneficial interest. Under the Third Restatement of Restitution and Unjust Enrichment, at Section 55(1), if a defendant is unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant or in violation of the claimant’s rights, the defendant shall be declared a constructive trustee, for the benefit of the claimants, of the property in question and its traceable product. A constructive trust arises to service equitable needs. The purpose of a constructive trust is to convey property, unfairly held by one party, to the party to whom it justly belongs. *Tupper v. Roan*, 349 Or. 211, 243 P.3d 50 (2010). A grantee of property under an invalid conveyance or transfer becomes a constructive trustee of the property for the benefit of the (equitable) owner thereof. *Connecticut General Life Ins. Co. v. Merkel*, 90 Wisc. 2d 126, 279 N.W. 2d 715 (Ct. App. 1979). The consideration paid or property purchased therewith by the Grantor is to be deemed as held in trust for the grantee. See 90 CJS Trusts, Section 184; See also *In re Peterson’s Estate*, supra.

In our case, Rosemary Colver in 1999, irrevocably gifted real property with a net value of some \$293,000 to the Colver Land Trust. With the sale by the trust of the Cooney replacement property in February of 2011, Rosemary was loaned the sale proceeds, as constructive trustee, and used such funds to repay both a mortgage note and a loan from Dick Colver. He thereupon quitclaimed this interest in the Sanders County property to her. At such time, Rosemary was a

constructive trustee, for the benefit of the beneficiaries of the Colver Land Trust, as to the proceeds of the sale of the Boyd property. She used such proceeds to pay-off the purchase-money mortgage on the Sanders County property. The “traceable product” of the original Red Lodge property is the Sanders County property; indeed, such was the only real estate asset held by Rosemary at the time of her death. Such property could not be recognized as an estate asset, and Rosemary could not make a contrary testamentary disposition thereof. Rather, such asset had to be returned to the Colver Land Trust, the equitable owner thereof. “When real property held in trust is sold, the sale results in a mere substitution of assets, with the proceeds being held by the trustee.” *Williams v. Jackson*, 107 U.S. 478, 25 S. Ct. 814 (1883).

2. A constructive trust is indeed a remedy for unjust enrichment. In this case, the Estate of Rosemary E. Colver has been unjustly enriched by an asset that equitably belongs to the Colver Land Trust. Gretchen Larsen argues that: “neither Rosemary nor Gretchen have been unjustly enriched... The outcome of the Sanders Property disposition is ultimately identical. It is not inequitable for the property to pass through Rosemary’s testamentary trust because the Real property will still ultimately pass to the beneficiaries of the Colver Land Trust which is in line with the decedent’s ultimate goal of both the Trust and her Will. The only difference being the timing of receipt of that real property.”

Timing, however, is critical in this case for the following reasons:

- a. Gretchen ignores both the effects of inflation and the “time value of money”. As a general rule, money invested at 10% will double every 7 years. Receiving \$60,000 in 20 years is very different than receiving such amount at the present time;
  - b. The Colver Land Trust provides that Rosemary and Dick Colver would have a life estate in the gifted real property. Upon the expiration of such life estates, the trust assets would be distributed in equal one-fifth shares to the five trust remaindermen. Such language appearing in an irrevocable trust cannot be modified by a subsequent testamentary instrument without the approval of the original trust beneficiaries. See M.C.A. Sections 72-38-410 and -411 through -414. Gretchen is the youngest of the five siblings, and assumedly will outlive the others. Granting her a life estate in the property will effectively mean that Rosemary’s other children will receive nothing during their lifetimes. This is not what Rosemary wanted when she established the Colver Land Trust.
3. The “traceable product” of the Trust’s sale of the Boyd property is the Sanders County real property.

4. A CONSTRUCTIVE TRUST IS A FORM OF RELIEF, NOT AN INDEPENDENT CAUSE OF ACTION. See 90 CJS, Trusts, Section 11; see also *Matter of Miller Credit Shelter Trust and Estate of Miller*, supra. A statute of limitations is a bar to a cause of action, not a bar to a form of relief. M.C.A. Sections 27-2-101 and -102. In Montana, the controlling case in this area is *In re Marriage of Moss*, 293 Mont. 500, 977 P.2d 322 (1999), followed in *U.S. v. Nava*, 404 F.3d 1119 (CCA 9, 2005). The Court in Moss held that the Statute of Frauds and the Statute of Limitations are not applicable to constructive trusts. Constructive trusts are an equitable remedy that arise by operation of law, and the statute of limitations “must not be construed to prevent any trust from arising by operation of law.” *Moss*, at 509. Thus, neither M.C.A. Section 70-20-101 nor 27-2-202 were found to be applicable as a bar to this equitable remedy.

## **I. CONCLUSION & RELIEF SOUGHT**

The District Court, under either of the following principles:

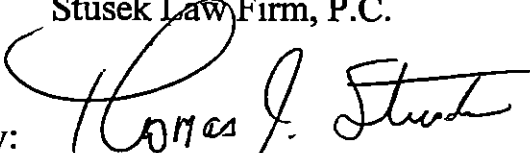
1. Unjust enrichment; or
2. Failure to repay a section 72-38-816(18) loan, should apply a theory of unjust enrichment/equitable mortgage and rule that the Estate held the Sanders County property in constructive trust for the beneficiaries of the Colver Land Trust.

Such a ruling would seem to be mandated by this Court's decision in *Matter of Estate of Cooney*, supra, where this Court felt that constructive trusts arise when the title holder to property (Rosemary) is subject to an equitable duty to convey it to another (Colver Land Trust) because the title holder would be unjustly enriched if permitted to retain the property. Accordingly: (1) the decision of the District Court should be reversed; (2) Bruce Larsen, as co-trustee of the Colver Land Trust, should be granted summary judgment.

Dated this 15th day of January, 2025.

COLVER LAND TRUST  
Bruce W. Larsen, co-trustee  
Karin Lance, co-trustee  
Stusek Law Firm, P.C.

by:



Thomas J. Stusek