

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0341

IN THE MATTER OF THE ESTATE OF

CORBIN DAMJANOVICH,

Deceased.

OPENING BRIEF OF APPELLANT

On appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Cause No. DP-56-2024-0058
The Honorable Mary Jane Knisely presiding

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STATEMENT OF THE ISSUE

1. Whether the holographic document appointing "Tracy Barlow to be the executor of my estate," and "overseeing the disbursement of funds," and giving her the right to take "maintenance fees" read in the light of unchallenged testimony that the document's author wanted his children to be the exclusive heirs to his estate can be read in a manner to disinherit the testator's children and transform the executor into the sole heir.

STATEMENT OF THE CASE

On February 6, 2024, Corbin Damjanovich passed. Corbin is survived by his two children: Nicolette, age 24, and Derek, age 22. On February 16, 2024, Tracy Barlow and Carl Openshaw filed an Application for Informal Appointment of Personal Representatives in Intestacy. Barlow is Corbin's sister, and Openshaw is Corbin's cousin.

On October 30, 2024, Barlow and Openshaw petitioned the district court to probate the Estate and sought confirmation as personal representatives. To their Petition, Barlow and Openshaw attached a document signed by Corbin on December 9, 2015. On December 9, 2015, Nicolette was 14 years old, and Derek was 13 years old.

In their petition, Barlow and Openshaw alleged the December 9, 2015, handwritten document was Corbin's holographic will. They additionally alleged Corbin's will granted a general power of appointment to Barlow, and as powerholder she was the sole beneficiary of the Estate's assets.

On November 13, 2024, pursuant to § 72-3-308, MCA (2023), Nicolette objected to the filing of the December 9, 2015, document on the ground that it lacked the necessary testamentary intent, and therefore, the Estate was partially intestate. Nicolette also contested Barlow’s position that she was the sole beneficiary of the Estate under a general power of appointment.

On February 25, 2025, the district court held an evidentiary hearing and heard arguments on the Petition for Formal Probate of Will, Determination of Testacy and Heirs, and Confirmation of Appointment of Personal Representatives. On May 9, 2025, the district court admitted the December 9, 2015, handwritten document as Corbin’s will. The district court held that the December 9, 2015, holographic will created “a power of appointment exercisable by Tracy Barlow.” The district court also appointed Barlow as the personal representative of the Estate.

On May 12, 2025, Nicolette, through counsel, appealed the district court’s May 9, 2025, order.

STATEMENT OF THE FACTS

On October 30, 2024, Barlow and Openshaw filed a Petition for Formal Probate of Will, Determination of Testacy and Heirs, and Confirmation of Appointment of Personal Representatives. (Petition for Formal Probate, Dkt. 10). To their petition, Barlow and Openshaw attached a December 9, 2015, handwritten

document signed by Corbin. On December 9, 2015, Nicolette was 14 years old, and Derek was 13 years old. (Nicolette's Findings of Fact, ¶ 4, p. 2, Dkt. 39).

The document states:

I Corbin Damjanovich being of sound mind would like it to be acknowledged that in the event of my death I would like my sister Tracy Barlow to be the executor of my estate. It is my wish that she would over seeing the disbursement of funds, such as investments, pensions, life insurance policies and or cash and assets. I would like it to be up to her discretion how to and when to divide and disburse cash and assets. It will also be at her discretion to take maintenance fees. (Last Will and Testament of Corbin Damjanovich, Dkt. 11).

In their Petition, Barlow and Openshaw alleged the December 9, 2015, document was Corbin's holographic will. (Petition for Formal Probate, ¶¶ 6-7, p.2, Dkt. 10). On November 13, 2024, Nicolette objected to the filing of the December 9, 2015, document. (Objection to Petition for Formal Probate, Dkt. 16). Nicolette argued that the December 9, 2015, document lacked the required testamentary intent. (Objection to Petition, pp. 4-7, Dkt. 16). Additionally, Nicolette objected to Barlow's proclamation that she was the devisee of the Estate. Nicolette argued she and Derek were the only heirs and devisees of the Estate. (Objection to Petition, pp.7-8, Dkt. 16).

On February 25, 2025, the district court heard arguments and held an evidentiary hearing on the Petition for Formal Probate of Will, Determination of

Testacy and Heirs, and Confirmation of Appointment of Personal Representatives.

At the hearing, counsel for Barlow stated the Court had three options regarding Corbin's Estate considering the December 9, 2015, document.

1. That Corbin died completely testate, meaning the will has a valid appointment of who is in charge of Corbin's Estate, and it has a valid disposition of his property.
2. Pursuant to § 72-3-315, the Court could determine Corbin died partially testate and partially intestate. Under this scenario, the will contained a valid appointment with Barlow as the personal representative, but the will only disposed of some or all his property.
3. Under the third option, Barlow's counsel submitted Corbin's Estate was intestate. (HT, 10).

Nicolette responded that the December 9, 2015, handwritten document should be admitted as a will for the purposes of appointing Ms. Barlow as personal representative of the Estate, but the Estate was intestate. (HT, 76:21-25,77:17-23). The Estate was intestate because the December 9, 2015, document lacked the necessary testamentary intent.

Corbin owned the following real property at the time of his passing.

1. 410 Howard Ave, Billings, Montana
2. 410 ½ Howard Ave, Billings, Montana
3. 379 Jefferson St., Billings, Montana
4. 3248 Drury Lane, Billings, Montana
5. 7766 Oberg Ln, Shepherd, Montana

6. Ambush Rd., Roundup, Montana (District Court's Findings of Fact, App. 3).

The testimony at the hearing established that Corbin intended that his Estate's assets go to Nicolette and Derek. (HT, 32:9-15; 33:3-9; HT 42:4-15; 56). No one testified, and no evidence was offered that Corbin wished Barlow to receive any of the Estate's assets.

The district court accepted Barlow's position that the December 9, 2015, document was Corbin's holographic will. The district court ruled the language of the December 9, 2015, document granted a general power of appointment to Barlow and thereby the December 9, 2015, document met the required testamentary intent for a valid holographic will. (District Court's Conclusions of Law, 29-31, 43, App. 12, 15; Order, 3, 6, App. 16). With the district court's May 9, 2025, Order, Barlow is the sole beneficiary of the Estate, to the exclusion of Nicolette and Derek.

STANDARD OF REVIEW

A district court's conclusions of law are reviewed to determine whether the interpretation of the law is correct. A district court's findings of fact are reviewed to determine if they are clearly erroneous. A district court's findings are clearly erroneous if not supported by substantial credible evidence, if the court has misapprehended the effect of the evidence, or if a review of the record leaves the

Montana Supreme Court with the definite and firm conviction that a mistake has been made. *In re S.S.*, 2022 MT 75, ¶ 12, 408 Mont. 238, 507 P.3d 1161.

SUMMARY OF THE ARGUMENT

The district court erred when it held a power of appointment can create testamentary intent. A power of appointment cannot create the required testamentary intent needed to establish a holographic writing as a valid will. Additionally, the district court erred when it granted a general power of appointment exercisable by Barlow.

Under Montana law, Nicolette and Derek are the only heirs of their father's Estate. Therefore, Nicolette requests the Montana Supreme Court hold the district court erred when it held a power of appointment created testamentary intent. Nicolette requests the Montana Supreme Court remand this matter back to the district court with the instruction that Nicolette and Derek, as Corbin's children, are the rightful heirs of the Estate's assets.

ARGUMENT

- 1. The December 9, 2015, holographic document fails to dispose of the Estate's assets, and therefore the Estate is partially intestate.**

A will in Montana is a document which states a decedent's intentions for the Estate's property upon passing. *Matter of Estate of Unruh*, 204 Mont. 524, 526, 665 P.2d 782, 783 (1983). The district court concluded that the December 9, 2015,

document was Corbin's holographic will. The district court relied on Montana's three elemental test to determine whether Corbin's writing passed as a holographic will: 1. The testator must be at least eighteen years of age and of sound mind; 2. The document must be in the handwriting of the testator and signed by the testator; and, 3. The testator must have testamentary intent; the document must dispose of the Estate's property after death. (District Court Order, Conclusions of Law, ¶ 9, App. 8).

The district court cited *In re Estate of Lambert*, 2006 MT 229, 333 Mont. 444, 143 P.3d 426, and *In re Estate of Ramirez*, 264 Mont. 33, 869 P.2d 263 (1994) to hold Corbin's December 9, 2015, document was his holographic will. The facts in *Lambert* and *Ramirez* are distinguishable from this matter.

In re Estate of Ramirez, 264 Mont. 33, 869 P.2d 263 (1994), the issue was whether two signed letters by the Decedent Julian Ramirez constituted his holographic will. Mr. Ramirez wrote two letters detailing his intent to devise his estate. In the first letter, he wrote:

Im gonna stay with mom and help her out mom did alot of things for me she paid off my car and always got me out of jail thats why I think mom should have everything if anything ever happens to me I also think she should have nicolas because Elaine doesnt take care of him but mom will take care of him. *In the Matter of the Estate of Ramirez*, 264 Mont. 33, 34-35, 869 P.2d 263 (1994).

In the second letter, he told his sister the following:

Im so tired of living I wish I could just kill myself If anything ever does happen to me or I do something to myself tell mom I want her to have everything of mine. *Id.* at 35.

Mr. Ramirez died of an automobile accident on September 21, 1992. He left one child, Nicholas. *Id.* at 35. Betty Ramirez, decedent's mother, filed a petition for formal probate of a will, determination of testacy and heirs, and appointment of a personal representative. *Id.* at 35. She attached to the petition Mr. Ramirez' letters. *Id.*

Nicholas, through his attorney, objected to the admission of the will. After making findings of fact and conclusions of law, the district court denied the admission of the letters as a holographic will. *Id.*

The *Ramirez* Court reversed the ruling of the district court. The *Ramirez* Court held because Julian made a specific devise in his letters, the letters qualified as holographic will. The Court held:

On its face, it is abundantly clear that Julian's second letter to "tell mom I want her to have everything of mine" indicates his intent that his property should pass to his mother upon his death.

We therefore reverse the order of the District Court and remand this case to the District Court for admission of the proposed will of Julian Ramirez to probate. *Id.* at 37.

In re Estate of Lambert, 2006 MT 229, 333 Mont. 444, 143 P.3d 426, the decedent, Mark Lambert, died in a car accident on May 27, 2004, in Sweetgrass

County. Lambert was from Alabama, travelling to Yellowstone Park for a job. He was survived by three children, and his mother, Charlotte. Joshua was one of Lambert's children. Joshua opened an estate in Alabama. An Alabama court appointed Joshua as the personal representative of Mark's estate. *Lambert*, 2006 MT 229, ¶¶ 5-6.

Charlotte found Mark's will. Mark signed his handwritten will in Fulton County, Georgia, in December of 1999. The will named Charlotte as the executor of his Estate. Charlotte filed a Petition for Formal Probate of Will, Determination of Testacy and Heirs, and Appointment of Personal Representative in Silver Bow County. Charlotte stated jurisdiction in Silver Bow County was based on the possibility of a wrongful death action. *Id.* at ¶ 7. Joshua filed a motion to dismiss, arguing the Montana court lacked jurisdiction and the Montana law rendered the handwritten will invalid. *Id.* at ¶ 8. The district court held the holographic document met the requirements under Montana law for a holographic will and dismissed Joshua's motion. Joshua appealed. *Id.* at ¶ 8.

The *Lambert* Court analyzed Lambert's holographic document under Montana's three element test used to prove a holographic writing as a will. Regarding the third element, the *Lambert* Court held testamentary intent must be present in the document to dispose of the property. Mark's handwritten document

contained eleven pages in which he detailed his wishes to distribute the property. Therefore, the *Lambert* Court affirmed the district court's ruling. *Id.* at ¶¶21-23.

A will, for it to be valid, must contain *animus testandi*. *In re Van Voast*, 127 Mont. 450, 266 P.2d 377, this Court defined *animus testandi* as:

‘Animus testandi is not the purpose to make a will but to direct the posthumous disposition of property. ‘The animus testandi * * * consists of an intention * * * to make some positive disposition of property * * * to take effect in no way until the testator's death.’ Gardner on Wills, p. 15, § 4; *In re Johnson's Will*, 181 N.C. 303, 305, 106 S.E. 841, 842. ‘The essence of a testamentary disposition of property is that it be merely a declaration of the testator's intention as to what shall take place after his death.’ (Citations Omitted). *In re Van Voast Estate*, 127 Mont. 450, 453, 266 P.2d 377, 378–79 (1954),

The December 9, 2015, document states:

I Corbin Damjanovich being of sound mind would like it to be acknowledged that in the event of my death I would like my sister Tracy Barlow to be the executor of my estate. It is my wish that she would over seeing the disbursement of funds, such as investments, pensions, life insurance policies and or cash and assets. I would like it to be up to her discretion how to and when to divide and disburse cash and assets. It will also be at her discretion to take maintenance fees.

Unlike the writings in *Ramirez* and *Lambert*, the December 9, 2015, document lacked the necessary testamentary intent because the document does not identify who receives the Estate's property. The district court acknowledged in its Conclusion of Law 29 that Corbin did not identify the heirs of his Estate. The

district court wrote: “The language of Decedent’s Will does not name any heirs, but rather appoints Ms. Barlow as executor and directs that she has the discretion as to how and when to disburse his assets.” (District Court Order, Conclusions of Law, 29, App. 12).

The district court solved the lack of testamentary intent by holding the power of appointment created the required testamentary intent. In its Conclusion of Law 30, the district court cited *In re Estate of Kuralt*, 2000 MT 359, ¶ 17, 303 Mont. 335, 15 P.3d 931, for the rule “Montana courts are guided by the bedrock principle of honoring the intent of the testator.” (District Court Order, Conclusions of Law, ¶ 30, App. 12). In its Conclusion of Law 31, the district court wrote “. . . it can best give effect to Decedent’s intent by adopting Petitioner’s argument that Decedent’s Will creates a power of appointment in favor of Tracy Barlow.” (District Court Order, Conclusion of Law, ¶ 31, App. 12). In its Conclusion of Law 43, the district court concluded “that a determination that Decedent’s Will created a power of appointment in Ms. Barlow is the best way for this Court to give effect to the ‘bedrock principle’ in Montana that the testator’s intent is to be honored wherever possible.” (District Court Order, Conclusions of Law, ¶ 43, App. 15).

A will, if valid, can create a power of appointment, but a power of appointment cannot create the required testamentary intent for a will to be valid.

This is so because “[a] power of appointment is not an absolute right of property, nor is it an estate, for it has none of the elements of an estate.” (Citation Omitted). *BMO Harris Bank N.A. v. Towers*, 2015 IL App (1st) 133351, ¶ 28, 43 N.E.3d 1131.

In Montana, a will must meet all the requirements of Montana law before a power of appointment can exist. Section 72-7-201, MCA (2023) states:

- (1) A power of appointment is created only if:
 - (a) the instrument creating the power:
 - (i) is valid under applicable law; and
 - (ii) except as otherwise provided in subsection (2), transfers the appointive property; and
 - (b) the terms of the instrument creating the power manifest the donor's intent to create in a powerholder a power of appointment over the appointive property exercisable in favor of a permissible appointee.

The official comments to § 72-7-201 begins: “An instrument can only create a power of appointment if, under applicable law, the instrument itself is valid.” “Thus, for example, a will creating a power of appointment must be valid under the law applicable to wills” § 72-7-201.

Therefore, the district court’s Conclusion of Law 43 is incorrect when it concluded “that a determination that Decedent’s Will created a power of appointment in Ms. Barlow is the best way for this Court to give effect to the ‘bedrock principle’ in Montana that the testator’s intent is to be honored wherever

possible.” (District Court Order, ¶ 43, App. 15). The district court erred when it failed to analyze whether under Montana law the December 9, 2015, document established the necessary testamentary intent before addressing the power of appointment issue.

While the December 9, 2015, document states Barlow will be the personal representative of the Estate, the December 9, 2015, writing does not state who will receive the Estate’s assets, thereby lacking the necessary testamentary intent.

Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs. § 72-2-111, MCA (2023). In addition, § 72-3-315, MCA (2023) states “. . . if it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect.”

If there is no surviving spouse, the estate passes to the decedent’s descendants by representation. § 72-2-113(1)(a), MCA (2023). Therefore, with no spouse, Nicolette and Derek, as Corbin’s children, are the only heirs of Corbin’s Estate. Nicolette requests this Court remand this matter to the district court with instructions the Estate is partially intestate, and the only heirs and beneficiaries of the Estate are Nicolette and Derek.

2. With the district court granting a general power of appointment to Barlow, Nicolette and Derek have been disinherited, which Corbin never intended or wished.

Barlow, now as a general powerholder, has the authority to appoint all the Estate's assets to herself, effectively disinheriting Nicolette and Derek. In Barlow's December 4, 2024, Response to Nicolette's objections to the Petition for Formal Probate, counsel for Barlow argued that the December 9, 2015, document created a general power of appointment in favor of Ms. Barlow, under which she was the sole beneficiary of the Estate.

As an initial matter, a petition to formally probate the decedent's Will is pending before this Court. If the Court grants the petition and agrees that the decedent's Will creates a general power of appointment in favor of Barlow, the Barlow, as the powerholder, will become the sole beneficiary of the Estate. (Petitioners' Response to Nicolette Damjanovich's Objection to the Petition for Formal Probate, Dkt. 20, p. 8, ¶ 30).

Here, Nicolette will be an heir (a person entitled to property under the rules of intestacy) and have an ongoing property interest in the Estate only if the Court determines that Corbin died intestate. If the Court admits the decedent's Will to probate and determines that Barlow has a general power of appointment, Barlow and the person or persons in whose favor she exercises the power of appointment are the sole beneficiaries. (Petitioners' Response to Nicolette Damjanovich's Objection to the Petition for Formal Probate, Dkt. 20, p. 9, ¶ 34).

Nicolette's counsel argued to the district court that if it granted a general power of appointment to Barlow, Nicolette and Derek are, by law, entitled to nothing from the Estate. (HT, 75:18-25; 76:1-5.)

While the district court erred when it held a power of appointment created the necessary testamentary intent in the December 9, 2015, document, the district court also committed error as a matter of law when it granted to Barlow a general power of appointment. The district court failed to analyze the reason for and the implications of a general power of appointment. This was a critical error because without understanding what a general power of appointment means, the result is just what happened in this matter. The only rightful heirs of the Estate, Nicolette and Derek, are not entitled to the Estate's assets.

Generally, the power of appointment is created in trusts to build flexibility into the estate plan and to achieve or avoid certain tax consequences.

Restatement (Third) of Property, Division VI, Modern Use of Powers of Appointment.¹ The donor creates the power of appointment in a powerholder.

§72-7-102(4)(14), MCA (2023). The power of appointment allows the powerholder to act in a nonfiduciary capacity to designate a recipient of an ownership interest in the appointive property. §72-7-102(13), MCA (2023). The

¹ Montana enacted the “Uniform Powers of Appointment Act” on October 1, 2015. When the proposed Uniform Power of Appointment Act was presented to the Senate Judiciary Committee on February 17, 2015, as Senate Bill 253, those who introduced the bill and spoke in favor of it that Montana had little law on power of appointments, and the bill assist in ending confusion in Montana the purpose of a power of appointment and certainly over the creation of a power of appointment. The comments in support of SB 253 may be heard at:

https://bills.legmt.gov/#/bill/20151/LC2107?open_tab=status

appointee is the person to which the powerholder makes an appointment of appointive property. §72-7-102(1), MCA (2023).

The power of appointment is either a general or nongeneral power. A general power of appointment enables the powerholder to exercise the power in favor of one or more of the following: the powerholder, the powerholder's estate, the creditors of the powerholder, or the creditors of the powerholder's estate, regardless of whether the power is also exercisable in favor of others. §72-7-102(6), MCA (2023); *See* Official Comments to § 72-7-101, MCA (2023). A nongeneral power of appointment--sometimes called a “special” power of appointment--cannot be exercised in favor of the powerholder, the powerholder's estate, the creditors of the powerholder, or the creditors of the powerholder's estate. §72-7-102(10), MCA (2023); *See* Official Comments to § 72-7-101, MCA (2023). A general power is created unless the terms of the instrument manifest a contrary intent. § 72-7-203, MCA (2023).

The key characteristic of a special or nongeneral power of appointment is that it restricts the donee's ability to appoint the property to themselves, their estate, their creditors, or the creditors of their estate. *Estate of Conroy*, 67 Cal. App. 3d 734, 739, 136 Cal. Rptr. 807, 819 (1977). Under a special power of appointment, the donee can only appoint the property to a specified class of individuals or entities designated by the donor. *Leach v. Hyatt*, 244 Va. 566, 568, 423 S.E.2d 165,

167 (1992). This restriction ensures that the power is used in a manner consistent with the donor's intent and the specified limitations. Therefore, a special power of appointment must identify the powerholder, the appointee(s), and the appointive property. § 72-7-102(5)(16), MCA.

Addressing the power of appointment issue, the district court looked to other jurisdictions for guidance. The district court wrote:

As the parties have noted, and as the Court's own research reveals, there appear to be no reported decisions in Montana discussing or analyzing whether certain language used in a will may be properly considered as creating a power of appointment. Accordingly, this Court must look to authority from other jurisdictions to resolve the issue. (District Court Order, Conclusions of Law, ¶ 37, App. 13-14).

The district court examined and relied on the holding in *Lanham v. Fleenor*, 164 Idaho 355, 429 P.2d 1231 (2018), and *Matter of Estate of Rosen*, 86 Mass. App. Ct. 793, 23 N.E.3d 116 (2014) to grant to Ms. Barlow a “power of appointment exercisable by Tracy Barlow.” (District Court Order, App. 14-15).

The *Lanham* decision concerned whether an attorney committed malpractice while representing the son of the decedent. Thomas, the son of the Decedent, contended his father's will did not properly dispose of all the Estate's property because the will failed to contain a residuary clause. The district court ruled against Thomas. Thomas' attorney failed to timely file an appeal. Therefore, Thomas brought a malpractice claim. *Lanham*, 164 Idaho at 357- 358. The trial

judge found the malpractice claim would not have been successful because the decedent created a general power of appointment, which allowed Decedent's friend, Gordon, to dispose the property left in the Estate's residuary. *Id.* at 360.

The *Lanham* Court, affirming the district court's order, held the malpractice claim would have failed because the father had created a valid general power of appointment which disposed of any property left after he made specific devises. The compelling fact for a general power of appointment to the *Lanham* Court was the decedent expressly disinherited his son. The *Lanham* Court wrote:

The fact that Gordon also clearly and unequivocally disinherited Thomas in the Will supports the conclusion that Gordon intended to convey a general power of appointment to Judd and that he did not want the residue go to Thomas. As Gordon wrote in his Will:

Thanksgiving is over and I just wanted to add to this program that my son, Thomas Everett Lanham, 48 years old, has already been given all he needs to have and that I am going to leave \$1 more dollar [sic] against whatever is legal to him and then he is going to be on his own. *Id.* at 365.

Therefore, after disinheriting his son, and making devises in his will, the decedent, the *Lanham* Court held, gave a general power of appointment to Gordon to dispose of what was left in the residual estate. Therefore, even if it was timely filed, the malpractice claim would have been dismissed on the merits. *Id.* at 365-366.

In the *Matter of the Estate of Rosen*, 86 Mass. App. Ct. 793, 23 N.E.3d 116, the Massachusetts Appellate Court addressed whether the language in a will

created a power of appointment. The decedent did not have any children or siblings, and his parents were deceased. *Matter of the Estate of Rosen*, 23 N.E.3d at 118. The decedent granted a general power of appointment to the executrices to dispose of his residual estate. The *Rosen* Court found that the language in Article II of the Will created a general power of appointment.

Article II stated:

“I give the balance of my tangible personal property, including any items not effectively disposed of in accordance with the preceding provisions of this Article, to and among such one or more of my friends (including my Executor) or such one or more charitable organizations described in Sections 170(c) and 2055 of the Code as my Executor shall, in my Executor's absolute and uncontrolled discretion, select.” *Matter of the Estate of Rosen*, 23 N.E.3d 116, Footnote 12.

The district court erred by relying on the holdings in *Lanham* and *Rosen*. Both cases are factually distinguishable than this matter. In each, the decedents made devises in their wills, and after making their devises, granted a general power of appointment to dispose of what was left in the residual estate. Moreover, one decedent disinherited his child and the other had none.

“If the writing contains no clear indication of intent, surrounding circumstances may be considered.” *In re Ramirez*, 264 Mont. at 36. While Corbin failed to state in his December 9, 2015, statement who would receive his assets upon his passing, the evidence offered at the February 25, 2025, hearing firmly established that Corbin intended Nicolette and Derek to receive his entire Estate.

Nicolette testified that her father's wishes were that his assets go to Nicolette and Derek.

Q. Okay. Do you -- let's just talk about it for a minute. The -- the prop -- do you believe your dad wanted you to have his assets?

A. Yes. We talked many times throughout the years about it.

Q. Okay.

A. He definitely wanted Derek and I to help him with the rentals. With the maintenance part of things, and the -- I guess the business side of it. And he wanted us to be ready and prepared for whenever that day -- (Hearing Transcript, 56:13-22).

Brad Makinen was Corbin's good friend. He knew Corbin since they were 10 years old. (HT 32:9-15). Mr. Makinen testified that Corbin wanted Derek and Nicolette to be well taken care of. Corbin wanted his property to go to Nicolette and Derek. (HT 33:3-9; HT 42:4-15).

A power of appointment must implement the intent of the testator. *In re Estate of Fitzsimmons*, 2013 VT 95, ¶ 32, 195 Vt. 94, 86 A.3d 1026. Additionally, a court cannot infer a power of appointment unless there is a clear and unequivocal indication that the grantor intended to create one. *Matter of Estate of Krokowsky*, 182 Ariz. 277, 280, 896 P.2d 247, 250. (Ariz., 1995).

The district court did not state whether the December 9, 2015, document created a general or non-general power of appointment. However, with the district court not declaring whether the power of appointment was general or special, it

granted a general power of appointment to Barlow. § 72-7-203(3), MCA (2023).

Therefore, the district court, whether the district court intended to or not, granted a general power of appointment to Barlow, thereby designating Barlow the sole beneficiary of the Estate to the exclusion of Nicolette and Derek. Corbin wanted Nicolette and Derek to receive his Estate's assets. By granting a general power of appointment to Barlow the district court did not abide by the bedrock principle of honoring Corbin's intent.

The result here should have been the same as the result in the *Estate of Bruner*, 456 Pa. Super. 705, 691 A.2d 530 (Pa. Super., 1997). Decedent Bruner left a handwritten will, which made three bequests. The handwritten will's residuary clause provided that "[a]ny remaining assests [sic] shall be dispenced [sic] by H.R. Fox as agreed by me and H. Fox, personally." Bruner's will also named Fox the executor of the Estate. Fox filed an accounting, in which he proposed to distribute the Estate's residual to himself. The brother of decedent objected. The court appointed an auditor who determined the residuary clause of decedent's Estate was ineffective and that the residue of the estate must past through intestacy. Fox appealed. *Estate of Bruner*, 691 A.2d at 532.

On appeal, Fox argued the residuary clause created a valid general power of appointment in himself. The *Bruner* Court disagreed, holding the will only authorized Fox to distribute the Estate's property in accordance with an agreement

reached between Fox and Bruner. Without such an agreement, the residuary clause did not create a valid general power of appointment in Fox. The *Bruner* Court held:

While no specific words or technical language are necessary to create a general power of appointment, the intention to create such a power must appear from the will as a whole. “[I]n construing a will, we must give effect to the testator's intention, and we can't do that unless we consider *every* feature and *all* of the words of the will.” (Citations Omitted). The language of the residuary clause is on its face insufficient to evince an intent on the part of the testatrix to create a general power of appointment in Fox. Moreover, no other feature or language of the will gives any indication that the testatrix had any particular reason or desire to benefit Fox to the exclusion of her heirs at law. *Estate of Bruner*, 456 Pa.Super. at 712.

“Heirs at law are not to be disinherited unless such intention is clearly manifested and expressed with legal certainty.” *In re Watts' Estate*, 117 Mont. 505, 512, 160 P.2d 492 (1945). Corbin did not intend to disinherit Nicolette and Derek. However, with the district court granting a general power of appointment, Barlow may appoint all the Estate's assets to herself. Nicolette and Derek have been disinherited.

In the December 9, 2015, handwritten document, Corbin stated that he would like his sister, Tracy Barlow, to be the executor of his Estate upon his death. (“I Corbin Damjanovich being of sound mind would like it to be acknowledged that in the event of my death I would like my sister Tracy Barlow to be the executor of my estate.”). He also stated she was to receive a maintenance fee as

executor of his Estate. (“It will also be at her discession to take maintenance fees.”). Corbin never intended that the December 9, 2015, document exclude Nicolette and Derek from his Estate to the benefit of Barlow. However, with the district court granting a power of appointment exercisable by Barlow, the district court did just that.

CONCLUSION

Corbin intended his sister to act as the personal representative of his Estate and no more. All the evidence here establishes that Corbin did not intend to benefit Barlow to the exclusion of Nicolette and Derek. The record supports that Corbin wanted his property to go to Nicolette and Derek.

WHEREFORE, Nicolette requests the Montana Supreme Court hold:

1. The district court erred when it held that a power of appointment can create testamentary intent.
2. Corbin’s Estate is partially intestate.
3. Nicolette and Derek, as Corbin’s children, under Montana’s intestate law, receive the Estate’s assets equally.
4. The December 9, 2015, document does not grant a general power of appointment to Barlow.
5. The December 9, 2015, is a holographic will only for the limited purpose of appointing Barlow as the personal representative of the Estate.

RESPECTFULLY SUBMITTED this 19th day of June, 2025.

/s/ William A. D'Alton

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure,

I certify that this primary brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5622 words excluding Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

DATED this 19th day of June, 2025.

/s/ William A. D'Alton

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CERTIFICATE OF SERVICE

I, William A. D'Alton, hereby certify that I have served true and accurate copies of the foregoing Opening Brief of Appellant Nicolette Damjanovich to the following on June 19, 2025:

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