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You Say Its Your Birthday... But Could You Prove It?

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You say it's your birthday ... but could you prove it?

Both Montana Rules of Evidence and Common Law provide practical work-arounds for proving a person's birthdate when it is relevant in a legal proceeding

By Cynthia Ford

The annual photo calendars I make for my long-suffering family enable me to annotate specific dates. Thus, Sept. 1 says "Mom's Birthday Month!;" Sept. 10 says "Time to shop for Mom's presents;" Sept. 25 "Cake should be chocolate with white frosting;" and Sept. 29[1]: "MOM'S BIRTHDAY!" But is Sept. 29 really my birthday? Could I prove that in court? How? Surprisingly, this subject has required significant contortion in various evidentiary doctrines.

The Problem

Rule 602 requires personal knowledge by a witness before testifying. "A witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The hearsay rule, 802, is the flip side of the same concept: if the basis of a person's testimony is a statement by another person, the testimony is inadmissible. "Hearsay is not admissible except…" Both rules express the same preference for direct communication to the jury by the person who actually perceived the event and can recount it, under oath and observation. Most of all, the hearsay rule guarantees an opportunity to expose inaccuracies (or downright lies) through cross-examination, "'the greatest legal engine ever invented for the discovery of truth.'"[2]

I have always "known" my birthdate, but how? No doubt, I was there at the birth, but try as I might, I[3] remember nothing about it, much less the date on which it occurred. As a newborn, even if a person had some dim memory of the process[4] it is impossible to think that s/he popped out, looked up at the clock, and then used barely-opened eyes to check the calendar on the wall. Thus, by definition, the birthday girl herself fails the personal knowledge requirement and a foundation objection should succeed per Rule 602.

If I am not a qualified witness as to my birthdate, who is? The only people with actual knowledge of the date and time of a baby's birth are those adults who were present at the event. For sure, my mother was and remembered it well (as I do the births of my two children). The medical personnel involved in the delivery could also testify from their personal knowledge, but probably don't retain specific details as to each of the hundreds of babies they help deliver. In 1954 (I just turned 63, I think), fathers were not present in the delivery room, but could at least testify as to the date on which they first saw their newborn, and perhaps give a lay opinion per Rule 701 that that was the date of birth.

So, to prove a person's birthdate when it is relevant (or essential)[5] in a legal proceeding, your best bet to avoid any evidence objection is to call the person's birth mother. Pragmatically, this simple solution may not be so simple. Where the mother is dead (sadly, as is my own) or unknown (per older adoption practices) it is impossible to call the mother. Even where she is known and alive, she may be across the country or hostile. Last of all, the jury has limited patience, and may begrudge the time spent on establishing a fact that jurors (and all regular people) regard as a non-issue.

The Fix

Fortunately, the law is not an ass,[6] after all. Even before the adoption of the Montana Rules of Evidence, state law pro-

1 I know you are reading this after Sept. 29, but don't despair: you can still catch me next year, if you calendar now. I like my chocolate dark…

2 John H. Wigmore, quoted in *Lilly C. Virginia*, 527 U.S. 116 (1999).

3 Apparently a few people think they do, but so far most scientific sources indicate that the development of the brain makes this extremely unlikely or impossible. My basis for the previous sentence is a 10-minute Internet search, using the highly technical term "memory of birth." As with all things Google, I could have spent hours, if not days, reading each of the articles posted there but I did not.

4 See fn. 3.

5 Statutory rape is the quintessential criminal charge where proof of the ages of the defendant and victim are key. See, MCA 45-502. On the civil side, it might be tasteless, but Jim Carey's cross-examination of his own client in "Liar, Liar" proves the point: https://www.youtube.com/watch?v=1jQP0Y2T2OQ

6 This phrase is usually attributed to Charles Dickens, in "Oliver Twist" (1838), but apparently was first published by George Chapman in a play in 1654. See, http://www.phrases.org.uk/meanings/the-law-is-an-ass.html.

vided and continues to provide several practical work-arounds which incorporate into the law of evidence easy and pragmatic methods of proving a person's birthdate.

A. Common Law

In 1898[7], only nine years after statehood, the Montana Supreme Court affirmed a conviction of "rape upon a child of less than 16 years" by her father, Bowser. The defendant argued that the victim's testimony as to her own age was inadmissible hearsay. The Court rejected this view, largely on practical grounds:

> Recent authorities hold that the age of a prosecuting witness alleged to be under the age of consent may be proved by her own testimony. Underh. Cr. Ev. § 342; Whart. Cr. Ev. § 236; *People v. Ratz*, 115 Cal. 132, 46 Pac. 915; *Bain v. State*, 61 Ala. 75. The fact that the witness derived her knowledge of her age from statements of her parents, or family reputation, does not make it inadmissible. Persons of the age of discretion, and many who are of even tender years, know enough of themselves to state their ages with intelligence and accuracy. Such testimony is often essential to prove age, and for this reason it is competent; being excepted from the rules generally excluding hearsay evidence.

Bowser also argued that he should have been allowed to test the basis of the victim's knowledge of her birth, apparently through voir dire before she gave her direct testimony, but lost that one too:

> [C]ounsel make a point upon the ruling of the court denying their request to interrogate the prosecutrix concerning her knowledge of the fact of her age. But, although the leave to examine the witness was denied while she was testifying in response to questions put to her by the county attorney, it appears that upon cross–examination defendant's counsel had full opportunity to test her knowledge of her age, and did test it, and thereafter moved to strike out all of the testimony of the witness concerning her age, because it was hearsay. The ruling of the court was correct, and no prejudice was done to appellant's rights.

In *State v. Vinn*,[8] Vinn was convicted of statutory rape of his stepdaughter. The girl, Florence, testified for the prosecution as to her age, saying that she was 17 on the date of the event charged (another part of the case deals with the admissibility of several similar uncharged events). The defense disputed her personal knowledge:

> She was questioned further as to the sources of her knowledge, and stated that her mother had told her of the date of her birth. She also stated that she had seen the certificate of her baptism, which recited the date of her birth. It was objected that this evidence was not admissible, because it was hearsay…

The Montana Supreme Court affirmed the admission of the victim's testimony about her age, despite her lack of personal knowledge, invoking both *Bowser* and common law from other states, which also was based largely on necessity:

The fact that the witness derived her knowledge of her age from statements of her parents, of family reputation, does not make it inadmissible. Persons of the age of discretion, and many who are of even tender years, know enough of themselves to state their ages with intelligence and accuracy**. Such testimony is often essential to prove age, and for this reason it is competent, being excepted from the rules generally excluding hearsay evidence.** (Emphasis added)

The court also was untroubled by Florence's testimony that she had seen a baptismal certificate, which showed her birthdate. Acknowledging that the certificate itself was probably inadmissible, the court nonetheless found the victim's testimony about the contents of the certificate proper:

> It may be conceded… that the baptismal record was not admissible to prove the date of the witness' birth, though it recited this date. (Citations omitted)…The result of the examination, however, was not to introduce the contents of the certificate, but to disclose to the jury how, in part, the witness obtained her knowledge. If the person whose age is in question may prove it by his own testimony, the fact that he gains his knowledge from the statements of his parents or from family reputation does not render his testimony inadmissible. *State v. Bowser*, supra; *People v. Ratz*, 115 Cal. 132, 46 Pac. 915. He certainly cannot have personal knowledge of the circumstances attending his birth, nor of its date. Neither do we see how such testimony can be rendered incompetent by the fact that the same knowledge has also been gained by the reading of writings in possession of the family and preserved as records of family history.

In the same case, Florence's mother, wife of and witness for the defendant, testified that Florence was in fact over 18 on the critical date. There apparently was no objection to this evidence, because as we have seen above, the mother had the requisite personal knowledge. However, on rebuttal, the prosecutor called several rebuttal witnesses to prove that on other occasions, the mother had told them that Florence was under 18. The Montana Supreme Court did not differentiate between the possible uses of these prior inconsistent statements, but found no problem with their admission, and the defense apparently did not ask for an instruction limiting the out-of-court statements to impeachment rather than proof of

7 *State v. Bowser*, 21 Mont. 133, 53 P. 179 (1898).

8 50 Mont. 27, 144 P. 773 (1914).

the fact they asserted.[9]

One of the witnesses who testified that Mrs. Vinn had told her Florence was under 18 was the Fergus County Superintendent of Public Schools. The superintendent's testimony went further, and established the foundation for admission of a school registration document. The judge overruled the defense hearsay objection, and again was affirmed on appeal, under the public records exception: "The document was a public record required by law to be kept by this officer. … It was admissible as prima facie evidence of the facts therein stated."

State v. Newman[10] is to the same legal effect as *Vinn* and is a colorful depiction of Butte America in 1930. Chief Justice Callaway's recitation of the facts is one of the gems of Montana jurisprudence:

> The story the transcript tells smacks rather of the early day mining camps than of the Montana of the present era. Defendant, once before a convict, ran a dance hall called the Bowery, where he sold whisky over a "lunch–counter," and provided dancing girls who worked upon a percentage basis. The success of the girls depended upon the number of drinks they persuaded their partners to buy. The evidence respecting the conduct of defendant's place might serve to bring to the minds of the oldsters the warning note of the well–known ballad of the early '90s, in which the singer, after narrating that such things were done and said on the Bowery, declared he would never go there any more!

According to the state's evidence, defendant employed prosecutrix to work at the lunch counter in the Bowery, but quickly transferred her to the dance floor, although he knew that she was but sixteen years of age He insisted upon her drinking whisky whenever her partner called for drinks at the bar —which was at the end of each dance. One night when she was intoxicated defendant took her from the dance floor to his bedroom where he raped her. The bedroom was connected with the kitchen which adjoined the dance hall. Twice again he did that. Then he came to stand before a bar himself, the probability of which he might, with the exercise of a little sense, have foreseen—the bar of justice, and he must now take what it dispenses.

In *Newman*, the convicted rapist was the 16-year-old girl's employer, rather than a family member. The family testified consistently for the prosecution that she was 16. Despite their lack of personal knowledge, the defendant did not object to the testimony of age from the victim or her sister. The only issue on appeal seems to be the admission of the baptism certificate produced by the mother, to resolve her confusion about the exact month of her daughter's birth, but the defendant failed to object to its admission.

Prosecutrix and her married sister testified that prosecutrix was 16 years of age when the alleged offense was committed, and that she would not be 17 until Jan. 31, 1930. The sister said she had told defendant before prosecutrix went to work for him that the girl was only 16. The mother of prosecutrix, who spoke English imperfectly, said the girl was 16, was born in 1913, but was confused as to the month. On cross–examination the witness said she had a paper at home showing when prosecutrix was born. During a recess, the paper was procured, and, upon redirect examination, it was offered; counsel for defendant saying, "We admit it in evidence." The document was a certificate of baptism, dated Feb. 13, 1913, in which it was recited that prosecutrix was born Jan. 30, 1913. It may be that the certificate would have been excluded had proper objection been made (*State v. Vinn*, 50 Mont. 27, 144 P. 773), but defendant's counsel, having consented to its admission, cannot now urge error.

B. Montana Rules of Evidence

The hearsay exceptions in Montana Rules of Evidence 803 and 804 codify several methods of proving a person's birthdate, and thus age, some of which are oral and others documentary. The key to using these tools is to recognize the inherent hearsay problem before trial, and then prepare to either avoid it (by calling the mother, see above) or provide the foundation corresponding to the applicable hearsay exception.

803(4): Statements for purposes of medical diagnosis or treatment…. These usually consist of statements by a patient to a health care provider, who then testifies about those statements. The Montana Commission Comment observes: "The guarantee of trustworthiness is provided by the patient's motivation for proper diagnosis and treatment." The rule limits the subjects of these statements, but includes statements of "medical history," which seems to include statements of a patient's age so long as "reasonably pertinent to diagnosis or treatment." There are no Montana cases applying this exception to a statement about a patient's age, but if the witness/health care provider testifies that they[11] needed the age to diagnose or treat the patient, this exception should work. Here is a sample foundation:

Q: Who are you?

A: I am the doctor who treated V.

Q. As part of your ordinary treatment, do you take a medical history from your patient?

A. Yes, always; it is the standard practice for all doctors.

Q. In this case, did you need to know the age of V in order to treat her appropriately?

A. Yes.

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9 Now, the MRE would allow these prior inconsistent statements as substantive proof that Florence was indeed 17, not 18. MRE 801(d)(1) provides: "A statement is not hearsay if: (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony." This is one of the areas in which Montana differs significantly from the FRE version, which allows a prior inconsistent statement for substantive purposes only if the statement "was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition," not the case in Vinn.

10 88 Mont. 558, 294 P. 377 (1930).

11 It is hard for me to use the plural "they" when I am clearly talking about a single witness, but old dogs do learn new tricks, and one of my former students recently wrote convincingly about the need to abandon gender-specifying pronouns. For a better explanation, see, e.g., https://www.washingtonpost.com/news/wonk/wp/2016/01/08/donald-trump-may-win-this-years-word-of-the-year/?utm_term=.a81fd9f76573

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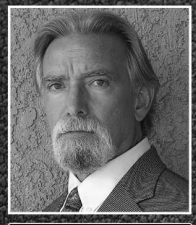

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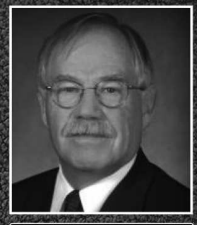

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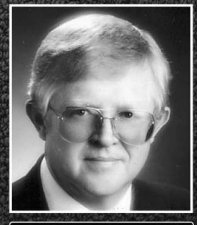

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Q. Why?

A. Because….

Q. Did you explain why you needed to know how old V was to her/her mother (depending on who transmitted the information)?

A. Yes.

Q. What did V/mother say when you asked how old she was?

A. She said she was 13.

803(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

The only Montana case that applies this exception dealt with a death certificate, where the court held that the certificate was admissible to prove the death, but that the information that the decedent was a passenger (rather than the driver, as the defendant contended) should have been redacted. *State v. Gould*.[12] Montana law requires registration of live births[13], as well as deaths, so this subsection should apply equally to birth certificates offered to prove the date of birth. Under an identical federal version of 803(9), the 9th Circuit held that a Mexican birth certificate (properly authenticated[14], an entirely different issue) was admissible in a criminal case where the defendant was convicted of being a deported alien found in the United States, although the issue apparently was location rather than date of birth. *U.S. v. Palomares-Munoz*.[15]

803(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

The Montana Evidence Commission commented that this is a specialized form of the 803(6) "business records" exception, but stronger: [religious records have the] "same guarantees of trustworthiness as the records admitted under Exception (6). This guarantee is enhanced by the unlikelihood of false information being provided to religious organizations." The federal Advisory Committee Note discusses explicitly the use of church baptism certificates to prove age:

However, both the business record doctrine and Exception [paragraph] (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge*, 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity.

This ACN thus seems to authorize use of a baptism certificate, including any included statement as to the baptisee's birth, to prove birthdate in addition to baptism date. Because church records are not self-authenticating, the proponent will need to call a foundation witness to admit a religious record, to testify both as to its authenticity and to the foundation facts of a religion which keeps records:

Q. Who are you?

A. I am a minister/rabbi/imam etc. in the church/temple/mosque etc. of …

Q. Is that a religious organization?

A. Yes.

Q. Does your organization keep regular records of its religious ceremonies and activities?

A. Yes.

Q. Do these records include records of the births in members' families, including the dates of those births?

A. Yes.

Q. Do you believe that these records are accurate?

A. Yes.

Q. Do your records include a record of the birth of V?

A. Yes.

Q. Can you identify Exhibit A?

A. Yes, I can.

Q. Is that an accurate photocopy of a record in your organization's files?

A. Yes.

Q. Whose birth record is it?

A. V's.

Q. I offer Exhibit A. May I publish an enlargement for the jury?

Q. According to your record, Exhibit A, what is the date of birth of V?

A. Sept. 29, 1954.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

This subsection is similar to the preceding one, but deals with certificates of events (ceremonies or sacraments), rather than simply religious records of personal or family history facts. Its guarantee of trustworthiness is similar to the public records and vital statistics exceptions but: "goes beyond those exceptions in the area of sacrament and so expands Montana law. Note the certification procedure requires authentication. See Rule 902." MT Commission Comment. In the context of proving birthdate/age, this exception seems to apply to religious ceremonies performed at birth, or other sacraments administered at specific ages such as Christian baptism and confirmation or bar and bat mitzvah in the Jewish religion. I could not find any Montana case applying this subsection.

The necessary foundation and authentication for the bar mitzvah example would be:

Q. Who are you?

12 216 Mont. 455, 704 P.2d 20 (1985).

13 50-15-221. Birth registration.

14 Birth certificates are self-authenticating under M.R.E. 902, so if you obtain the necessary certification from the public office which holds them, you should be able to admit these as exhibits without any witness.

15 5 Fed.Appx. 709, 2001 WL 219951.

A. I am the rabbi of Temple Sinai.

Q. Is that a religious organization?

A. Yes, it is a Jewish temple.

Q. Do the rules or practices of your religion authorize you to perform ceremonies or sacraments?

A. Yes.

Q. Does your religion issue certificates to reflect these ceremonies or sacraments?

A. Yes.

Q. Are these certificates issued at or near the time the ceremony or sacrament occurs?

A. Yes.

Q. Is a bat mitzvah one of these ceremonies?

A. Yes.

Q. Does a bat mitzvah occur at a certain age?

A. Yes, at 13.

Q. Do you recognize Exhibit B?

A. Yes.

Q. What is Exhibit B?

A. A certificate of bat mitzvah for V, dated Oct. 1, 1967, issued by Temple Sinai. This is a photocopy of the certificate we have in our files.

Q. And does Exhibit B show the date of the bat mitzvah of V?

A. Yes, Sept. 30, 1967.

Q. Does Exhibit B make any statement as to the birthdate of V?

A. Yes, it does.

Q. What is the date of V's birthday, according to the bat mitzvah certificate?

A. Sept. 29, 1954.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

The Montana Evidence Commission commented that (13) is identical to FRE 803(13), and with Montana law prior to adoption of the MRE, observing further: "The guarantee of trustworthiness is provided by the unlikelihood that a false family record would exist." The Commission cited a 1915 case, In re Colbert's Estate[16], in which a mutilated family Bible was admissible, even though neither the trial judge nor the Supreme Court thought it bore much weight:

The learned trial judge in receiving it said:

"I will admit it in evidence. What weight I will give it is a matter for future consideration. I don't like the looks of it."

With this attitude we are in entire accord. The admissibility of a family Bible containing a family tree or record does not depend upon authorship or authenticity of the entries; but upon the fact that it is the family Bible and record, recognized as such by those with whose genealogy or pedigree it is concerned (*People v. Ratz*, 115 Cal. 132, 46 Pac. 915*; Jones v. Jones*, 45 Md. 144), and for the same reason neither chronological order nor superficial integrity can be a condition to its reception, whatever effect these circumstances may have upon its probative value. So, in view of the testimony of Mrs. Beedy that these entries were made by persons who are now dead and that the Bible and record have always been recognized in the family of Mrs. Clement as their family Bible and record, we think it was admissible, though as a factor in respondents' case it may be worse than worthless.

153 P. at 1026. I have not found any cases on this issue decided since the M.R.E.

I do have, maybe ghoulishly, an urn containing the remains of my dear departed Irish wolfhound, Fiona, which states "Best huge[17] dog ever, made it to 14 years old!" Under 803(18), the second half of this inscription would be admissible, because it states a fact "concerning personal history." I could use it to prove that Fiona[18] lived 14 years. The first half, the opinion "best huge dog," does not qualify because it is an opinion, not a statement of fact, even though it is inscribed on an urn. The exact evidence would be something like:

Q. Who are you?

A. Cynthia Ford.

Q. Did you have a dog named Fiona?

A. I did, about 40 years ago.

Q. Do you remember how old she was when she died?

A. Not exactly. I think she was pretty old, but I have forgotten exactly how old.

Q. Do you have Fiona's ashes?

A. Yes, I can't bring myself to give them up, even though it's been years. I guess I should see someone about that.

Q. Do you keep the dog's ashes in an urn?

A. Yes, I do, and I brought it here today.

Q. Is exhibit A the urn itself?

A. Yes.

Q. Is there an engraving on the urn, Exhibit A?

A. Yes.

Q. Does that engraving state a historical fact as to Fiona's age?

A. It does.

Q. Move the admission of Exhibit A.

J. Admitted.

Q. Please read to the jury the second half of the inscription on the urn.

A. "Made it to 14 years old!"

This out-of-court statement, offered to prove the dog lived for 14 years, is admissible even though it is hearsay, because of 803(13).

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce or dissolution of marriage, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

Under this subsection, a wide variety of witnesses may testify to a person's birthdate (and other personal facts) by recounting the reputation in a designated group about that fact. The Montana rule is identical to the federal rule, and the Montana Commission Comments quote the federal Advisory

16 51 Mont. 455, 153 P. 1022 (1915).

17 Our household also includes a mid-sized Golden Retriever and a tiny Norwich terrier, so this distinction is critical to save offense.

18 I do recognize the argument that "family" might not include pets, but I will leave that discussion to my fabulous colleague, Professor Stacey Gordon, who has much more expertise in animal law.

Notes, which in turn quote Wigmore:

The guarantee of trustworthiness of this and other reputation exceptions that follow is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one". Advisory Committee's Note, 56 F.R.D. supra at 317, quoting 5 Wigmore, Evidence, Section 1580 at 444.

The commission noted but accepted the expansion of this rule from the common law, which restricted such evidence to family members, to associates and community members. The topic of this testimony likewise was broadened beyond marriage to include today's subject, birth, and several other facts.

By analogy to other uses of reputation evidence, the witness needs to be a member of a group in which the reputation is known. This could be the birthday girl herself, or any other member of the group, so long as the witness can establish that there is such a reputation and what it is. Here, for example, let's use the victim's brother:

Q. Who are you?

A. I am V's brother.

Q. In your family, does everyone have a belief as to V's birthday?

A. Yes, we all know when it is and celebrate it then every year.

Q. Would you call that a reputation within the family?

A. I guess so.

Q. What is the reputation in your family as to V's birthday?

A. That she was born on Sept. 29, two years before me, so 1954.

Although only a few offices regularly celebrate workers' birthdays, if V is employed at one of those, any of her coworkers could testify similarly:

A. I am the accounting supervisor at EJ, Inc., and I have worked there for five years.

Q. How many other employees are there?

A. Fifteen.

Q. Is V one of them?

A. Yes.

Q. At EJ, Inc., do you celebrate each other's birthdays?

A. Yes; we like to think of ourselves as a kind of family.

Q. What is the reputation at your office about when V's birthday is?

A. Do you mean when do we celebrate V's birthday?

Q. Yes.

A. On Sept. 29.

Q. Is there a reputation for how old V is, what year she was born?

A. She just turned 63, so 1954. We had 63 candles on the cake.

Again, I could not find any Montana Supreme Court cases applying this subsection — maybe you will be the first to use it in some case where age is disputed.

MRE 804 provides several other exceptions to the hearsay rule, but these can be used only if the declarant who said "X was born on Sept. 29, 1954" is unavailable to testify in person. Rule 804(a) lays out non-exclusive examples of unavailability, including death or illness. Once you have proven that the declarant can't be a witness, section 804(b)(4) comes into play for establishing a birthdate:

> (4) Statement of personal or family history.
> (A) A statement concerning the declarant's own birth, adoption, marriage, divorce or dissolution of marriage, legitimacy, relationship by blood, or family history, even though the declarant had no means of acquiring the personal knowledge of the matter stated; or
> (B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

The Montana Evidence Commission Comments note that MRE 804(b)(4) is substantially identical to the federal version, and observes:

The distinction between 803(19) and this exception is that Rule 803(19) allows the same subject matter to be proven by reputation evidence while this exception relies upon the declaration of an unavailable witness to prove the same type of facts. The guarantee of trustworthiness for this exception is identical to that found for Rule 803(19). … In addition, it is quite natural for persons to discuss family history among members of the family or close friends and it is highly unlikely that falsehood would be repeated in this context.

The unavailable declarant can be the subject herself, under (A), or someone else either in the subject's family or very close to the family (B). The test is not whether the declarant had personal knowledge of the birthdate, but whether she was "likely to have accurate information" of the date.

I did not find any Montana cases applying MRE 804(b)(4), although there are some federal and other state cases out there that might be persuasive if you had the first Montana case. However, the text of the rule itself provides sufficient guidance for the foundation requirements for this hearsay exception. The witness is someone who heard the declarant state the subject's birthday. Under A, the declarant was the birthday girl herself. The witness is anyone who heard the birthday girl say what her birthday was.

Q. Did you ever hear V say what her birthdate was?

A. Yes, a million times.

Q. Is V here in the courtroom today?

A. No.

Q. Do you know why not?

A. Yes, she is in the hospital in labor with her first baby.[19] I drove her there myself this morning. OR Yes, she died last year. [This is necessary to show unavailability under 804(a)].

Q. What did V tell you about her birthdate?

19 This basis for unavailability under Rule 804(a), pregnancy, will actually be the subject of another, much shorter, Evidence Corner column soon.

A. She was born on Sept. 29, 1954.

Under 804(b)(4)(B), the out of court declarant was someone other than the birthday girl, who was either in the family or sufficiently close to the family that the declarant would likely have accurate knowledge of the birthday, perhaps an old family friend. The witness is anyone who heard the declarant state the birthday of the subject:

Q. Are you related to V?

A. No, but I knew her brother, Ben.

Q. Do you know why Ben is not in the courtroom for this trial?

A. Yes, he is dead.

Q. Did Ben ever tell you what V's birthdate was?

A. Yes. He said she was born on Sept. 29, 1954.

Non-hearsay: two more ways to skin the cat: defendant's own admission and observation of jury

In the 2014 case of *State v. Ghostbear*,[20] defendant was convicted of sexual assault. The victim was his girlfriend's daughter. After the verdict, the trial judge concluded that the prosecution had failed to establish the age differential between defendant and victim which would trigger a felony, rather than misdemeanor, penalty. The state appealed, and the Supreme Court reversed and remanded for sentencing as a felony,[21] even though the jury did not make a specific finding of the ages of the defendant and victim. The majority described the evidence at trial:

> While Ghostbear contends and the District Court determined that there was no evidence of his age and the age of the victim, the record shows otherwise. The State correctly notes that during trial the District Court admitted into evidence a recording and a transcript of an interview of Ghostbear by a law enforcement officer. Early in that interview Ghostbear stated that his date of birth was in 1977, making him 34 years old at the time of the offense.
> In addition, in that same interview Ghostbear acknowledged that the victim was just turning age 8, making her age 7 at the time of the alleged offense. The victim also testified that she was age 8. The jury heard this evidence and was able to corroborate the respective ages of Ghostbear and the victim because each of them testified at trial. The jurors were entitled to infer from what they observed that the ages of Ghostbear and the victim were as he acknowledged them to be in the admitted interview. The jurors were instructed that they could consider "the appearance of the witnesses on the stand."
> The jurors saw, and therefore could consider, the appearance of Ghostbear as a mature man and the victim as a child. Ghostbear does not point to any contrary evidence of age in the record nor does he argue that there was any conceivable way that the jury could fail to conclude that the victim was under the age of 16 and that Ghostbear was more than 3 years older. Ghostbear does not contend that the respective ages were in any way contested during the trial.

The concurring justices opined that the judge had committed error with regard to charging the jury on the elements of the crime, but then concluded that the error was harmless:

A.T. testified that she was eight years old at the time of trial, making her six or seven at the time of the offense. In Ghostbear's interview with law enforcement, a recording of which was played at trial, he acknowledged that A.T. was just turning eight. In addition, he stated that his date of birth was in 1977, making him 33 or 34 at the time of the offense. At trial, Ghostbear was asked, "Did you drink when you were a kid?" to which he responded, "No, ... I didn't have a drink of alcohol until I was 18 years old."

> The evidence of A.T.'s age and Ghostbear's age was uncontroverted. The evidence established that A.T. was roughly six or seven at the time of the offense and Ghostbear was three or more years older than A.T. Indeed, no rational trier of fact could have concluded that A.T. was over 16 years old or that there was less than a three-year age difference between A.T. and Ghostbear.

This case demonstrates that if approximate age or a differential in ages is all that is necessary, rather than an exact date, the jury may simply consider the appearance of the witnesses as they testify. To make sure this is clear, the party using this route should propose a jury instruction based on Ghostbear, to the effect that "As well as any other evidence on the issue of age, you are entitled to infer from what you observed during the trial the age(s) of _____."

Lastly, the admission of Ghostbear's own statement as to the age of the victim by his opponent, the prosecution, also escaped the hearsay rule and substantively established her age. MRE 801(d)(2)(A) provides, as sort of a magic wand, that an out-of-court statement offered to prove what it asserts is not hearsay, even though it otherwise exactly fits the definition of hearsay in 801(c), if that statement was made by the opposing party:

A statement is not hearsay if…

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement…

The Montana Commission comment notes that this subsection is identical to the FRE. The federal Advisory Committee Note specifically provides that personal knowledge by the party-opponent declarant of the fact asserted is NOT required for admission of his statement:

> No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken

20 376 Mont. 500, 338 P.3d 25, 2014 MT 192

21 Justices McKinnon and Baker concurred in the result.

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Birthday, from page 19

> with the apparently prevalent satisfaction with apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.the results, calls for generous treatment of this avenue to admissibility.

Thus, even if Ghostbear's lack of actual personal knowledge about the birthdate of the victim would preclude his live testimony at trial about her age (unless one of the routes explored above applied), it does not bar admission of his out-of-court statement on the subject, so long as his opponent offers that statement. The lesson here is to scour the information in your case to see if, anywhere, your opponent has acknowledged the age or birthdate which you must establish. If so: consider that a present, whether it is your birthday or not.

Conclusion

Consider this column my birthday present to you, whenever your birthday is and however you "know" that. See you next month, when we will all be a bit older.

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