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Recent Decisions Affecting the Montana Practitioner

LEGAL SHORTS

RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

I. *STATE V. BARNABY*[1]

A. Introduction

In 2004, Peter Barnaby was convicted of operating a clandestine methamphetamine laboratory in Lake County.[2] Barnaby appealed the district court's denial of his motion to suppress evidence. He claimed the police lacked probable cause for the search warrant.[3] The Montana Supreme Court upheld the district court, and arguably significantly changed Montana's warrant application procedure.

The warrant application to search Barnaby's home contained information that related primarily to Barnaby's accomplice, June Sheridan.[4] That information included Sheridan's efforts to obtain the ingredients to make methamphetamine[5] and her expertise to manufacture it.[6] Sheridan stole ingredients from the local Target store,[7] and purchased other ingredients from a pharmacy and hardware store.[8] The application also described Sheridan's habits and where she spent her time.[9]

Barnaby's only connection to the application was Sheridan's presence at his home and the odd happenings around his prop-

1. *State v. Barnaby*, 142 P.3d 809 (Mont. 2006).
2. *Id.* at 812.
3. *Id.*
4. *Id.* at 812–14.
5. *Id.* at 813.
6. *Id.* at 812–13.
7. *Barnaby*, 142 P.3d at 813.
8. *Id.*
9. *Id.* at 814.

erty.[10] A concerned citizen saw Sheridan's vehicle back up to Barnaby's home, and observed Barnaby and Sheridan unload the contents of the car's trunk intentionally shielded by tarps.[11] The application also noted that a fire constantly burned in Barnaby's yard, and unusually busy traffic occurred at all hours of the day and night.[12]

As a catch-all of sorts, the warrant application concluded by stating that "all of the persons mentioned in the application had given reliable information in the past" and had been proven reliable "with corroborating information that resulted in arrests from the information they provided."[13]

Barnaby and Sheridan both moved to suppress the evidence obtained during the search based on a lack of probable cause to issue the warrant.[14] Barnaby's central argument[15] was that most of the information contained in the application "pertained solely to Sheridan, and that such information did not provide probable cause to search his residence."[16] To determine the outcome, the Court reviewed case precedent regarding Montana's search and seizure warrant requirements.

B. Reesman *Test*

State v. Reesman[17] set forth a three-step test to determine "whether an informant's information is sufficient to establish probable cause."[18] The first question in the test is whether the informant is anonymous. If so, the informant's information must be independently corroborated.[19] If the informant is not anonymous, then the second question in the test is whether "the informant's information [is] based on his or her personal observation of the described criminal activity."[20] If the information is not based on personal observation, "then again independent corroboration is

10. *Id.*
11. *Id.*
12. *Id.*
13. *Barnaby*, 142 P.3d at 814.
14. *Id.*
15. Barnaby's appeal also pointed out that the date and address on the warrant application were incorrect, errors the Court held were typographic and harmless. *Id.*
16. *Id.* at 815.
17. *State v. Reesman*, 10 P.3d 83 (Mont. 2000).
18. *Id.* at 89.
19. *Id.*
20. *Id.*

required."[21] If the information is based on the informant's personal observations, then the final question is whether the informant is a reliable source.[22]

Reliability breaks down into three categories: information from a confidential informant; an admission against interest; and information from a concerned citizen.[23] If a confidential informant has provided "reliable and accurate information to officers in the past," no further corroboration is needed.[24] Likewise, if the information is gleaned from an admission against an informant's own interest, further corroboration is unnecessary.[25] Finally, if a concerned citizen provides the information, and "the information provided demonstrates a sufficient degree of the nature of the circumstances under which the incriminating information became known," then no further corroboration is needed.[26] If the informant meets none of these descriptions, he is deemed an unreliable source, and the police must independently corroborate the information.[27]

Rather than completely overruling *Reesman*, the *Barnaby* majority stated that it was "simply overrul[ing] an unduly restrictive rule that never should have been imposed under the long-established and flexible totality of the circumstances test."[28] The majority stated, "[w]e simply determine that the proposition set forth in *Reesman* that independent police work represents the only method of corroboration under the totality of the circumstances test is wrong as a matter of law."[29]

Instead of overruling *Reesman* outright, the majority worked around the "unduly restrictive rule."[30] To do this, it looked at the warrant application as a whole and rejected Barnaby's "divide and conquer" approach of dissecting the application and piecing it back together.[31] The majority explained that Barnaby's proposed rigid totality of the circumstances test "conflicts with [the Court's] approach by forcing a judicial officer to apply a strict test to evaluate

21. *Id.*
22. *Id.*
23. *Reesman*, 10 P.3d at 89–90.
24. *Id.* at 89.
25. *Id.* at 90.
26. *Id.*
27. *Id.*
28. *State v. Barnaby*, 142 P.3d 809, 818–19 (Mont. 2006).
29. *Id.* at 818.
30. *Id.* at 819.
31. *Id.* at 817–18.

each element in a warrant separately."[32] The majority rejected Barnaby's approach, and stated that, because probable cause "poses a fluid concept,"[33] rigid rules are not "easily reconcil[ed] . . . with the flexibility of the totality of the circumstances test."[34]

In Barnaby's situation, the application contained "highly credible" evidence that Barnaby's friend, Sheridan, was involved in the production of methamphetamine and was present at Barnaby's residence.[35] Consequently, although no single report "on its own, satisf[ied] the *Reesman* criteria," the other information in the application "provid[ed] a basis for finding probable cause in this case."[36]

C. *Justice Cotter's Dissent*

Justice Cotter dissented from the majority's affirmation of the district court's denial of Barnaby's motion to suppress.[37] Justice Cotter's dissent argued that the majority "stretch[ed] the 'flexible' totality of the circumstances test beyond its intended limit" and "abandon[ed] a clear guideline . . . in favor of no guidelines at all."[38]

Justice Cotter's primary argument related to the warrant application's "sparse and unreliable information" linking Barnaby to the methamphetamine production in his home.[39] By abandoning *Reesman*'s guidelines, Justice Cotter argued that the Court allowed for "uncertainty and randomness" in police officers' evaluations of "the sufficiency of their evidence to justify the issuance of a warrant."[40]

D. *Justice Nelson's Dissent*

Justice Nelson "respectfully, but vigorously, dissent[ed]" to the majority's probable cause analysis.[41] Justice Nelson's strong-

32. *Id.* at 818.

33. *Id.* (citing *Ill. v. Gates*, 462 U.S. 213, 232 (1983)).

34. *Barnaby*, 142 P.3d at 822.

35. *Id.* at 819. The Court recognized that "Sheridan's mere presence at the house does not amount to sufficient probable cause to search Barnaby's residence"; it is but one piece of the puzzle. *Id.* at 817.

36. *Id.* at 819.

37. *Id.* at 821 (Cotter, J., dissenting). Because Justice Cotter would have reversed the district court as to this issue, she did not reach other issues addressed by the majority. *Id.*

38. *Id.* at 823.

39. *Id.* at 822.

40. *Barnaby*, 142 P.3d at 823.

41. *Id.* at 823 (Nelson, J., dissenting).

est argument was the warrant application's lack of foundational facts demonstrating its reliability and basis.[42] He agreed with Justice Cotter that the Court's decision was "an astonishing (and, notably, unsolicited) sea change in the law of search and seizure in Montana."[43]

Justice Nelson discussed the background law of probable cause.[44] In summary, Justice Nelson pointed out that the Montana Supreme Court has defined probable cause as "the point at which the individual's interest in privacy must yield to the governmental interest in investigating criminal behavior by searching for incriminating items."[45] Although probable cause has been considered a fluid concept, a reasonable ground for belief of guilt is still required.[46] Justice Nelson also noted that, "[i]mportantly, the determination of probable cause in this context is to be made by a 'neutral and detached judicial officer.' "[47] Without this check on "zealous officers," people's homes become subject to search on the whim of police officers.[48]

Following his discussion of probable cause, Justice Nelson analyzed the totality of the circumstances test.[49] Justice Nelson specifically discussed how veracity, reliability, basis of knowledge, and independent corroboration work within the totality of the circumstances test.[50] The first three factors "are all highly relevant in determining the value" of the application.[51] A magistrate is to view all the signs of reliability, and cannot find probable cause based on affidavits that are "purely conclusory."[52] Justice Nelson noted that "it is not the number of statements, tips or events that is determinative . . . , it is the probative force of one, some or all of them."[53]

This is precisely where the majority went wrong, according to Justice Nelson. A judge cannot assess the reliability of a tip without facts on which to base the credibility of the tip.[54] Justice Nel-

42. *Id.* at 824, 829, 831.
43. *Id.* at 824; *see id.* at 823 (Cotter, J., dissenting).
44. *Id.* at 826–27 (Nelson, J., dissenting).
45. *Id.* at 826 (quoting *State v. Sundberg*, 765 P.2d 736, 739 (Mont. 1988)).
46. *Barnaby*, 142 P.3d at 826.
47. *Id.* at 827 (quoting *Ill. v. Gates*, 462 U.S. 213, 240 (1983)).
48. *Id.*
49. *Id.* at 827–29.
50. *Id.* at 829–31.
51. *Id.* at 829 (quoting *Gates*, 462 U.S. at 230).
52. *Barnaby*, 142 P.3d at 831.
53. *Id.* (quoting *State v. Valley*, 830 P.2d 1255, 1258 (Mont. 1992)).
54. *Id.*

son observed that the officer who authored the warrant application provided none of the "underlying circumstances from which the informant(s) reached the conclusion that Sheridan was operating a meth lab at Barnaby's residence."[55] How and where did these informants get their information? Were they nosy neighbors or utility employees?[56] Justice Nelson stated that tips are not suddenly credible just because "we can dream up reasonable scenarios" for an informant's basis of knowledge.[57]

Justice Nelson carefully examined each assertion contained in the warrant application to determine whether there was indeed probable cause to search Barnaby's home for evidence of manufacturing methamphetamine. According to Justice Nelson, probable cause would not have existed in this case. Justice Nelson vigorously dissented from the majority, perhaps to prevent the courts from "becom[ing] foot soldiers in the war on drugs at the expense of their independent role as guardians of the Constitution."[58]

E. Conclusion

The interplay that took place among the Justices in the *Reesman* decision becomes further muddled in *Barnaby*. In *Reesman*, Justice Nelson wrote the majority opinion, and specially concurred in response to Justice Regnier's concurring opinion and Chief Justice Turnage's dissent.[59] Justice Regnier argued that police corroboration, although "a reliable method," was not the only means possible to corroborate information.[60] He stated, "I fear this requirement diverts the judicial officer's attention from the more important question . . . whether [the detective] presented sufficient information for the judge to accredit the confidential informant's report."[61] Likewise, Chief Justice Turnage dissented from the majority opinion's conclusion that "corroboration for a search warrant can only be sufficient if it is the result of police investigation."[62]

The argument whether police corroboration is the only sufficient means of corroboration began in *Reesman* and was seem-

55. *Id.* at 840.
56. *Id.* at 840–41.
57. *Id.* at 841.
58. *Barnaby*, 142 P.3d at 849.
59. *State v. Reesman*, 10 P.3d 83, 93–99 (Mont. 2000) (Regnier, J., concurring).
60. *Id.* at 94. *See also Barnaby*, 142 P.3d at 819.
61. *Reesman*, 10 P.3d at 94 (Regnier, J., concurring).
62. *Id.* at 99 (Turnage, C.J., dissenting) (citations omitted).

ingly resolved in *Barnaby*.[63] Justice Regnier's concurring argument and Chief Justice Turnage's dissenting argument in *Reesman* became the majority opinion in *Barnaby*.[64]

Did *Barnaby* "abandon a clear guideline . . . in favor of no guidelines at all"[65] and affect "an astonishing . . . sea change in the law of search and seizure in Montana"?[66] Or did *Barnaby* "simply overrule an unduly restrictive rule"?[67] Only time will tell whether the *Barnaby* majority's more flexible solution to *Reesman*'s corroboration limitation will prove to fit better with the flexibility of the totality of the circumstances test used in assessing probable cause in warrant applications. After *Barnaby*, police officers' search warrant applications must still satisfy the totality of the circumstances test regarding probable cause, but police corroboration is no longer the only means available to provide a basis of reliability in informants' information.

—Rennie L. Stichman

II. *STATE v. MCGOWAN*[68]

State v. McGowan addressed the narrow issue of whether a breath alcohol concentration test administered fifty minutes after the defendant's vehicle was stopped is sufficient evidence to support a jury conviction for DUI Per Se.[69]

The defendant, Dennis McGowan, was pulled over by Officer Gary Herbst on October 20, 2003, at approximately 11:50 p.m. for speeding.[70] While speaking with McGowan, Herbst noticed an alcohol odor coming from McGowan's vehicle.[71] Herbst observed McGowan moving slowly, speaking deliberately and slurring his words slightly.[72] Based on his observations, Herbst decided to conduct a DUI investigation.[73]

63. *See id.* at 93–99; *Barnaby*, 142 P.3d at 818.

64. *Barnaby*, 142 P.3d at 818.

65. *Id.* at 823 (Cotter, J., dissenting).

66. *Id.* at 824 (Nelson, J., dissenting).

67. *Id.* at 819.

68. *State v. McGowan*, 139 P.3d 842 (Mont. 2006).

69. *Id.* at 843; Mont. Code Ann. § 61-8-406 (2005) (defining DUI Per Se as driving a vehicle with an alcohol concentration in excess of 0.08).

70. *McGowan*, 139 P.3d at 842.

71. *Id.*

72. *Id.*

73. *Id.*

When Herbst first asked McGowan if he had consumed alcohol that evening, McGowan admitted to drinking approximately five beers.[74] Herbst then administered two physical field sobriety tests, both of which McGowan failed.[75] After a portable breath test indicated the presence of alcohol in McGowan's system, Herbst arrested McGowan for driving under the influence of alcohol.[76]

Herbst transported McGowan to the detention center and read him Montana's implied consent law, which provides, "a person who operates or is in actual physical control of a vehicle upon the ways of the state open to the public effectively consents to a test of their blood or breath for the purpose of determining any measured amount or detected presence of alcohol in their body."[77] If an officer has particularized suspicion that a person operating a motor vehicle is intoxicated, the officer may administer a preliminary screening test to estimate the alcohol concentration.[78] If a person is subsequently arrested for DUI, the officer must then administer another blood or breath test at an approved location to determine the amount of alcohol present in the person's system, pursuant to Montana Code Annotated § 61-8-402(2)(a)(i).[79]

At the detention center, McGowan consented to a breath test on an Intoxilyzer 5000 breathalyzer.[80] Herbst followed the required procedure, observing McGowan for the mandatory fifteen minute deprivation period, and administering the test at approximately 12:40 a.m.[81] At this time, about fifty minutes after McGowan's stop, the Intoxilyzer 5000 indicated that McGowan's blood alcohol concentration was 0.092.[82]

The State charged McGowan with DUI in violation of Montana Code Annotated § 61-8-401, with DUI Per Se, in violation of Montana Code Annotated § 61-8-406, and with speeding.[83] The Helena City Court judge convicted McGowan of speeding and DUI Per Se in a bench trial on November 18, 2004.[84] Upon his convic-

74. *McGowan*, 139 P.3d at 842–43.
75. *Id.* at 842–43.
76. *Id.* at 843; Mont. Code Ann. § 61-8-401 (2005).
77. *Id.* at 843–44 (citing Mont. Code Ann. § 61-8-402).
78. *Id.* at 844.
79. *Id.*; Mont. Code Ann. § 61-8-402(2)(a)(i).
80. *McGowan*, 139 P.3d at 843.
81. *Id.*
82. *Id.*
83. *Id.*; Mont. Code Ann. §§ 61-8-401, -406.
84. *McGowan*, 139 P.3d at 843.

tion, McGowan appealed for a new trial in district court, where a jury trial was held on March 14, 2005.[85] At the close of the State's case, McGowan moved for judgment of acquittal, arguing that the State did not prove beyond a reasonable doubt that his blood alcohol concentration was 0.08 or more at the time he was driving.[86] The district court denied the motion and the jury found McGowan guilty of DUI Per Se.[87]

McGowan's primary argument on appeal to the Court was that the Intoxilyzer 5000 did not prove his blood alcohol concentration while he was in actual control of his vehicle.[88] According to Montana's DUI Per Se statute, it is "unlawful . . . for any person to drive or be in actual physical control of . . . a noncommercial vehicle upon the ways of this state open to the public while the person's alcohol concentration, as shown by analysis of the person's blood, breath, or urine, is 0.08 or more . . . ."[89] McGowan further argued that, because the DUI Per Se statute omits language to indicate that the analysis is "taken within a reasonable time after the alleged act," law enforcement must determine a person's alcohol concentration at the time he or she was actually driving, not—as in McGowan's case—fifty minutes after driving.[90]

McGowan argued that, since the test was taken fifty minutes after he was pulled over, the results were an inaccurate measure of his blood alcohol level when he was driving.[91] He emphasized that a person's alcohol concentration rises for an unknown period of time after the consumption of alcohol ends, making it reasonable that his alcohol concentration was higher fifty minutes after being stopped.[92] The State contended that it presented sufficient evidence for a jury to find that McGowan's blood alcohol concentration was in excess of 0.08 at the time of his stop.[93]

Writing on behalf of the Court, Justice Morris noted that it is not possible for police to administer a test while a suspect is actually driving.[94] Thus, a reasonable interpretation of the DUI Per Se statute allows admission of breath tests administered within a

85. *Id.*
86. *Id.*
87. *Id.*; Mont. Code Ann. § 61-8-406.
88. *McGowan*, 139 P.3d at 843.
89. Mont. Code Ann. § 61-8-406(1)(a).
90. *McGowan*, 139 P.3d at 843.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 844.

reasonable amount of time after a suspect has been driving.[95] Justice Morris held that this interpretation reflected the Montana Legislature's intent in enacting the statute.[96]

In support of this interpretation of the statute, the Montana Supreme Court cited decisional law from other jurisdictions.[97] It found similar reasoning in a number of jurisdictions that "recognize the impossible burden that requiring retrograde extrapolation evidence would place on the [S]tate."[98] "Retrograde extrapolation" is the technique used by some experts "[to] estimate alcohol concentration at some earlier time based on the test results at some later time."[99] Based on the results of the Intoxilyzer 5000's determination of McGowan's blood alcohol concentration, the Court held that the State presented the jury with sufficient evidence to find that McGowan committed the offense of DUI Per Se.[100]

Justice Nelson dissented,[101] arguing that language from the DUI statute was incorrectly read into the DUI Per Se statute.[102] He argued that clear and unambiguous language in the DUI Per Se statute indicated the Legislature intended that the measurement of a person's alcohol concentration should correlate to when the person was driving.[103]

Justice Nelson contended that the use of retrograde extrapolation would not unduly burden the State.[104] He was not persuaded by the results of the test taken fifty minutes after McGowan was driving, and concluded that the lack of evidence, viewed in conjunction with the language of the DUI Per Se statute, was insufficient to support the verdict, warranting reversal.[105] In closing, Justice Nelson urged the majority to "[i]nterpret

95. *Id.* at 844–45.

96. *McGowan*, 139 P.3d at 844 (citing *Wild v. Fregein Constr.*, 68 P.3d 855 (Mont. 2003)) ("We presume the legislature would not pass meaningless legislation and we seek to harmonize statutes . . . so as to give effect to each.").

97. *Id.* at 845–46. The Court reviewed cases from Pennsylvania, Texas, and New Hampshire.

98. *Id.* at 846.

99. *Id.*

100. *Id.* at 845.

101. *Id.* at 846 (Nelson, J., dissenting).

102. *McGowan*, 139 P.3d at 846–47 (Nelson, J., dissenting).

103. *Id.* at 847.

104. *Id.*

105. *Id.*

the statute *as it is written* and let the branch of government that wrote the legislation rewrite and fix the offending language."[106]

Justice Nelson's dissent eloquently illustrates the need to make both Montana's DUI and DUI Per Se statutes more clear and consistent. If the Montana Legislature further clarifies what constitutes a "reasonable amount of time," fewer defendants will base appeals on this issue, and detainee and defendant rights may be better protected. But the Montana Supreme Court had little legislative guidance when it held that conducting a breath test fifty minutes after the initial detention time was reasonable. Until the Montana Legislature clarifies Montana Code Annotated § 61-8-406, Montana practitioners should be aware that, under current law, a "reasonable amount of time" could be a relatively long time.

—*Jennifer A. Giuttari*

III. *In re Estate of Bovey*[107]

In *Bovey*, the Montana Supreme Court considered a chapter of Montana's version of the Uniform Probate Code (Code) for the first time. In deciding the case, the Court interpreted a section of the Code providing guidance for when an adopted child is part of a class for purposes of intestate succession.[108] The Code stipulates that "an adopted individual is not considered the child of the adopting parent [for purposes of intestate succession] unless the adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent."[109]

The appellant, Lisa Bovey, claimed that as an adopted daughter of a trust's beneficiary, she was entitled to the trust's residue.[110] The creator of the trust at issue, Sue Bovey, executed a will in 1984, creating the trust for her son, Ford Bovey.[111] Sue died in October 1988.[112] The residuary clause of the trust read:

> Upon the death of my son, Ford, this trust shall terminate and all of the then remaining accrued and unpaid income and all of the

106. *Id.* at 849.
107. *In re Est. of Bovey*, 132 P.3d 510 (Mont. 2006).
108. Mont. Code Ann. § 72-2-715 (2005).
109. *Id.*
110. *Bovey*, 132 P.3d at 513.
111. *Id.* at 512.
112. *Id.*

> then remaining principal of this trust shall be distributed, outright, and free of trust, in equal shares, to my then living heirs-at-law.[113]

Ford and Lisa met in 1979 when Lisa's mother, Sharon McGregor, began dating Ford.[114] Sharon, along with Lisa and Lisa's brother, moved into Ford's house in 1982 when Lisa was thirteen years old.[115] Ford supported Lisa financially while she lived in his home.[116] Lisa's mother was often away from home, as she worked full-time for one of Ford's businesses.[117] While Lisa was living at Ford's home, he introduced her as his daughter to others and mentioned adopting her.[118] There was no other evidence of Ford's intent to adopt Lisa until after Sue's death.[119]

After Lisa lived in Ford's home for approximately two years, the Montana Department of Family Services placed her in foster care in December 1984, since Ford was drinking heavily at the time and Lisa's mother worked and was rarely home.[120] Lisa returned to Ford's home for sixteen days in June 1985, before running away.[121] She was later returned to foster care.[122] A July 9, 1985 placement order "found that continuing to reside in Ford's home would be detrimental to Lisa's welfare, and that she was not under the care and supervision of a suitable adult and had no proper guidance to provide for her physical, moral and emotional well-being."[123]

Ford and Sharon married in July 1986, after Lisa turned eighteen and graduated from high school.[124] Ford adopted Lisa in 1993.[125] Sharon and Ford divorced in 1997.[126]

Ford asked Lisa to help him in his recovery from open-heart surgery and spoke to an adoption attorney about his affection for Lisa.[127] However, since Sue's death in 1988, Ford had repeatedly expressed to his trust officer his intentions to adopt someone for

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113. *Id.*
114. *Id.*
115. *Id.*
116. *Bovey*, 132 P.3d at 512.
117. *Id.*
118. *Id.* at 513.
119. *Id.*
120. *Id.* at 512.
121. *Id.*
122. *Bovey*, 132 P.3d at 512–13.
123. *Id.* at 513.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

the purpose of exercising control over the residue of the trust.[128] He mentioned several people, including Lisa, in this context, and later told a family friend he had adopted Lisa to prevent his relatives from getting the residue of Sue's trust after Ford's death.[129]

The trial court held that Lisa was not entitled to the trust's residue,[130] interpreting the statute to mean that Sue's intent was relevant in determining whether Lisa was a regular member of Ford's household.[131] The following language from the official comment led to the trial court's holding that Sue's intent was relevant:

> The general theory of subsection (c) [§ 72-2-715(3)] is that a transferor who is not the adopting parent of an adopted child would want the child to be included in a class gift as a child of the adopting parent only if the child lived while a minor, either before or after the adoption, as a regular member of the household of that adopting parent.[132]

On appeal, the Montana Supreme Court held that the trial court's interpretation was incorrect. According to the Court, Sue's intent was determined by the law of intestate succession: "Where it is determined that the child was a regular member of the household of the adopting parent, the legislature has declared that the testator intended for that child to be included in a class gift for children of the adopting parent."[133] Rather than analyze Sue's intent, the Court's "only function is to determine the factual issue of whether Lisa, while a minor, was a regular member of Ford's household."[134] The Court then set out to analyze whether Lisa had met this qualification.

The Court considered the section of the California Probate Code that Montana Code Annotated § 72-2-715(3) was modeled after.[135] The commission comment to section 21115 of the California Probate Code "precludes the adoption of a person (often an adult) solely for the purpose of permitting the adoptee to take under the testamentary instrument of another."[136]

In *Estate of DeLoreto*, the California Court of Appeals held that the statute should be strictly construed so as to "discourage

128. *Bovey*, 132 P.3d at 513.
129. *Id.*
130. *Id.*
131. *Id.* at 514.
132. Mont. Code Ann. § 72-2-715 off. cmt. (2006).
133. *Bovey*, 132 P.3d at 516.
134. *Id.*
135. *Id.* at 514.
136. Cal. Prob. Code Ann. § 21115 off. cmt. (West 2007).

adoptions made for the purpose of becoming beneficiaries of the estates of unsuspecting testators."[137] The policy was first discussed in *Estate of Pittman*, where the same court held that children who are adopted as adults should generally be excluded from class designations, but should be included in the class when they had been taken into the adoptive parent's home as a minor and reared by the adoptive parent.[138] The *Pittman* court reasoned that "[a]dult adoptees coming within the exception should therefore be deemed to come within the class unless it is shown that the purpose of the adoption was to diminish or defeat the income and remainder interests of other beneficiaries 'for purposes of financial gain or as a spite device.' "[139]

After considering official comments to both the Montana and California statute and relevant California case law, the Montana Supreme Court concluded that the statute's language—"regular member of the household of the adopting parent"[140]—indicates the legislature's intent to require "more than simple residence for a time at the adopting parent's home."[141] Courts must examine the relationship between the parties and conclude the relationship was "that of a household, a familial relationship," in order to satisfy the statute.[142] Further, the underlying policy of the statute (to discourage trust beneficiaries from adopting children for the sole purpose of defeating the remainder interests of other beneficiaries) requires that courts consider evidence of such conduct when determining whether the statute was satisfied.[143]

In holding that Lisa, while a minor, was not a regular member of Ford's household, the Court relied on evidence surrounding Lisa's stay at Ford's house. The Court found that any relationship that existed between Lisa and Ford was "outweighed by the lack of any familial relationship between the two while Lisa was a minor, and because Ford's true intent in the adoption [was] to circumvent Sue's will."[144]

In a dissent joined by Chief Justice Gray, Justice Rice criticized the majority for over-playing the policy background and ig-

137. *Est. of DeLoreto*, 13 Cal. Rptr. 3d 513, 517 (Cal. App. 2d Dist. 2004).

138. *Est. of Pittman*, 163 Cal. Rptr. 527, 531 (Cal. App. 4th Dist. 1980).

139. *Id.* (citing Edward C. Halbach, *The Rights of Adopted Children under Class Gifts*, 50 Iowa L. Rev. 971, 988 (1965)).

140. Mont. Code Ann. § 72-2-715(3) (2005).

141. *Bovey*, 132 P.3d at 515.

142. *Id.* at 515 n. 4.

143. *Id.* at 516.

144. *Id.*

noring the facts, stating, "[t]he Court attempts to stretch the policy considerations which drove the enactment of the general rule into a directive to interpret narrowly the rule's already narrow exception."[145] The dissent also disagreed with the majority's characterization of California case law. The dissent reasoned that the policy set forth in *Pittman* was "for the purpose of adopting the rule itself, not to guide an assessment of the relationship between the adopting parent and the child."[146] In fact, the *Pittman* court decided that adult adoptees were excluded from the class because no evidence was introduced to show the adoptees had ever lived with the adopting parent as minors.[147]

The dissent distinguished *DeLoreto*, stating that reliance on policy statements made in *DeLoreto* was

> misleading for two reasons: (1) *DeLoreto* used 'strict application' to reject expansion of the statute to adopted adults who had never resided with the adopting parent (not the issue here); and (2) the 'strict application' rule was *not* used by *DeLoreto* to require a narrow interpretation of the exception allowing adopted children to demonstrate their membership of the household as minors (the issue here).[148]

The dissent interpreted the statute to require a more objective review of the facts surrounding the adoptor and adoptee's relationship, because "the statute does not require that [the adoptee] prove that she and [the adoptor] had established a relationship in the nature of a child-parent relationship."[149] In determining that Lisa was a regular member of Ford's household, the dissent focused on the four years Ford and Lisa were acquainted during her teens, that she lived in Ford's home for two of those years, and Ford's monetary support of Lisa for over two years.[150]

The majority's approach to this case of first impression will lead to inconsistent results. Its interpretation of the language "regular member of the household of the adopting parent," requires courts to engage in a subjective analysis of a case's facts to determine whether the adopting parent and the adoptee, while a minor, had a "familial relationship."[151] The dissent's approach provides for a more uniform, objective analysis of the circum-

145. *Id.* at 517 (Rice, J. & Gray, C.J., dissenting).
146. *Id.*
147. *Bovey*, 132 P.3d at 517 (Rice, J. & Gray, C.J., dissenting) (citing *Est. of Pittman*, 163 Cal. Rptr. 527, 531 (Cal. App. 1980)).
148. *Id.* (Rice, J. & Gray, C.J., dissenting).
149. *Id.* at 520.
150. *Id.* at 518–19.
151. *Id.* at 515 (majority).

stances surrounding the minor adoptee's living situation. The dissent's approach is also more faithful to the rules of statutory interpretation, which require examination of the statute's plain language. The language in this statute does not require demonstration of a parental relationship. The dissent's approach allows for more uniform results and predictability for families who find themselves in situations similar to the Bovey's situation.

—Ashley A. Griffith