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Recent Decisions Affecting the Montana Practitioner

LEGAL SHORTS

RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

1. *WATKINS V. LACOSTA*[1]

In *Stanley L. and Carolyn M. Watkins Trust v. Lacosta* (hereinafter *Watkins Trust*), the Montana Supreme Court ruled, in a matter of first impression, that an estate planning attorney may owe a duty to non-client beneficiaries of an estate plan.

In either late 1991 or early 1992, Carolyn Watkins retained Susan Lacosta, an estate and tax planning attorney, to draft an estate plan for Carolyn and her husband Stanley.[2] In January 1992, Carolyn and Stanley signed their wills and a Trust agreement, entitled "The Stanley L. and Carolyn M. Watkins Revocable Trust Agreement" (the Trust).[3] The Trust included a direct bequest to Steve Williamson, Stanley's stepson, upon the death of the survivor of Carolyn and Stanley.[4] However, Lacosta neither discussed the estate plan with Stanley nor did she meet with him.[5] The wills and Trust documents were instead sent with Carolyn; they were signed outside the presence of the witnesses and any notary public.[6]

1. 2004 MT 144, 321 Mont. 432, 92 P.3d 620.
2. *Id.* ¶ 6.
3. *Id.* ¶ 7.
4. *Id.* ¶ 6.
5. *Id.* ¶ 7.
6. *Id.*

When Stanley died in 1992, his will was admitted to probate, but Lacosta did not reveal to Carolyn that the will had not been properly executed pursuant to Montana Code Annotated section 72-2-522.[7] Lacosta also failed to disclose that the Trust became irrevocable when Stanley died.[8]

Stanley's stepson Steve began his own estate planning in 1995, and he met with Lacosta to clarify the Trust's provisions.[9] She informed Steve that the Trust was revocable; however, Lacosta later informed Carolyn that the Trust was actually irrevocable.[10] Carolyn eventually contacted another attorney to inquire about the Trust.[11] After spending hours deciphering it, the attorney determined that there were defects in the estate plan, and he disclosed this fact to Steve and the other Trust beneficiaries.[12]

Steve was the personal representative of Stanley's estate, and in 1997 he, both personally and as the personal representative of Stanley's estate, and the Trust, filed a complaint against Lacosta for legal malpractice.[13] They alleged that Lacosta's actions damaged them because they enabled an attack on Stanley's will and the Trust.[14] Lacosta moved for summary judgment.[15] The Eleventh Judicial District Court granted Lacosta's motion on the basis that the statute of limitations had began running when Stanley's will was admitted to probate in 1992, and thus the action was untimely.[16] The district court also held that the plaintiffs did not have standing, because they were not Lacosta's clients, and that the action was barred by *res judicata*, equitable estoppel, and judicial estoppel.[17]

Justice James C. Nelson, writing for the court, reversed the district court's grant of summary judgment to Lacosta on *de novo* review.[18] The court first considered whether the appellants had standing to bring a legal malpractice action against

7. *Watkins Trust*, ¶ 8.
8. *Id.*
9. *Id.* ¶ 10.
10. *Id.*
11. *Id.* ¶ 12.
12. *Id.* ¶¶ 12-13.
13. *Watkins Trust*, ¶ 14.
14. *Id.*
15. *Id.* ¶ 15.
16. *Id.*
17. *Id.*
18. *Id.* ¶¶ 16, 54.

Lacosta.[19] The court acknowledged that since Stanley had been a client of Lacosta, and because the estate stands in the shoes of the decedent, Stanley's personal representative had standing to bring a malpractice action.[20] The court went on to state that whether the Trust was a client or a non-client beneficiary was a factual issue that must be determined through trial.[21] The court noted that the Trust may be a client "based upon the legal services provide by Lacosta to the Trust and its Trustees, services which involved Trust assets and transactions."[22]

Next, the court considered whether Steve, as a non-client beneficiary, personally had standing to bring a legal malpractice action against Lacosta.[23] Steve claimed that because he was a beneficiary of the estate plan, he had standing to bring the action, even if he was not Lacosta's client.[24] The issue of whether an attorney owes a non-client beneficiary any duty was a matter of first impression in Montana.[25] The court looked to other jurisdictions for the majority rule. Those jurisdictions indicate that named beneficiaries have standing in actions against drafting attorneys,[26] and a "duty to a third party is implied because that is the mutual intent of the attorney and client."[27]

The court also looked at Montana case law and found it to be consistent with a finding of a duty owed to a non-client.[28] Previous case law recognizes liability to non-clients in other contexts, including accounting firms and professional engineers being liable to non-clients.[29] Additionally, it was noted that the Montana Supreme Court has stated in the past that a test balancing multiple factors may be used "in deciding the duty owed by attorneys to non-clients in estate planning,"[30] which

19. *Watkins Trust*, ¶ 17.

20. *Id.* ¶ 19 (citing Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So.2d 1378, 1380 (Fla. 1993)).

21. *Id.* ¶¶ 20, 23.

22. *Id.* ¶ 20.

23. *Id.* ¶ 21.

24. *Id.*

25. *Watkins Trust*, ¶ 21

26. *Id.* (citing Blair v. Ing, 21 P.3d 452 (Haw. 2001); 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 32.4 (5th ed. 2000)).

27. *Id.* ¶ 21 (citing 4 MALLEN, *supra* note 26, § 32.4).

28. *Id.* ¶ 22.

29. *Id.* (citing Thayer v. Hicks, 243 Mont. 138, 793 P.2d 784 (1990); Jim's Excavating Serv. v. HKM Assoc., 265 Mont. 494, 878 P.2d 248 (1994); Turner v. Kerin & Assoc., 283 Mont. 117, 938 P.2d 1368 (1997)).

30. *Id.* (citing Rhode v. Adams, 1998 MT 73, ¶ 17, 288 Mont. 278, ¶ 17, 957 P.2d

indicates that such a duty exists. However, whether Steve actually had standing in *Watkins Trust* was a factual issue that must be determined at trial, and therefore the court held that summary judgment was not allowed.[31]

The court also held that this action was not barred by the statute of limitations.[32] For legal malpractice actions, "the statute of limitations does not begin to run until both the 'discovery rule' and the 'accrual rule' have been satisfied."[33] The "discovery rule" is set forth in Montana Code Annotated section 27-2-206, and it begins the statute of limitations when the negligent act is discovered.[34] The "accrual rule" is provided for in Montana Code Annotated section 27-2-102(1)(a) and (2), and it begins the statute of limitations when all elements of a claim, including damages, have occurred.[35] Lacosta argued that the statute of limitations could begin running no later than 1992, when Stanley's will was admitted to probate.[36] However, the court held that the three year statute of limitations did not begin to run until 1995, and thus this action, filed in 1997, was executed timely.[37] The court came to this conclusion due to the fact that the appellants incurred no damages until 1995, and thus the "accrual rule" was not satisfied until that year.[38] Regarding the "discovery rule," the court held that summary judgment would not be appropriate because there were factual issues to be decided, including the complexity of the Trust, which may have prevented the appellants from discovering any defect.[39]

Watkins Trust should cause both estate attorneys and beneficiaries in Montana to take note. Estate attorneys may now owe a duty to those other than their clients. This decision also opens the doors to non-client beneficiaries who seek to recover damages by alleging negligence against attorneys who represented the beneficiaries' decedents.

-Kathryn J. Bell

1124, ¶ 17).

31. *Watkins Trust*, ¶ 23.
32. *Id.* ¶ 53.
33. *Id.* ¶ 40.
34. *Id.* (citing MONT. CODE ANN. § 27-2-206 (2003)).
35. *Id.* (citing MONT. CODE ANN. § 27-2-102(1)(a) and (2)).
36. *Id.* ¶ 50.
37. *Watkins Trust*, ¶ 53.
38. *Id.* ¶ 52.
39. *Id.* ¶ 47.

2. *LOCKHEAD V. WEINSTEIN* [40]

In *Lockhead v. Weinstein*, the Montana Supreme Court partially overruled *In re Estate of Goick* [41] and held that a client is bound by a settlement agreement entered into by his or her attorney, even if the agreement is not filed with the clerk of court or entered upon the court's minutes.[42]

After having his federal suit dismissed for lack of jurisdiction, Brian Lockhead sued Debra Weinstein in state court for defamation, intentional and negligent infliction of emotional distress, malicious prosecution, and actual malice.[43] During a September 23, 2002 telephone conversation, the parties' attorneys agreed to settle the case.[44] Weinstein's counsel prepared and faxed a proposed release to one of Lockhead's attorneys two days later.[45] On September 27, 2002, Lockhead's attorney replied in a letter, stating that they agreed with the terms of the General Release and that "Brian Lockhead accepts the settlement offer for the sum of $7,500."[46] Weinstein's counsel wrote to Lockhead's counsel on the same day, stating that he had prepared and signed a stipulation for dismissal and ordered a settlement check.[47] Two weeks later, Lockhead's attorney called Weinstein's attorney to advise that Lockhead refused to settle.[48]

Weinstein moved to compel settlement.[49] In support, she submitted her counsel's affidavit, the September 27, 2002 letters, the unsigned general release, a copy of the settlement check, and the stipulation to dismiss signed by her counsel.[50] The district court granted Weinstein's motion, reasoning that Lockhead agreed to the terms of the settlement and Montana Code Annotated section 37-61-401(1)[51] did not apply.[52]

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40. 2003 MT 360, 319 Mont. 62, 81 P.3d 1284.
41. 275 Mont. 13, 909 P.2d 1165 (1996).
42. *Lockhead*, ¶ 22.
43. *Id.* ¶ 2.
44. *Id.* ¶ 3.
45. *Id.*
46. *Id.* ¶ 4.
47. *Id.*
48. *Lockhead*, ¶ 4.
49. *Id.* ¶ 5.
50. *Id.*
51. MONT. CODE ANN. § 37-61-401(1) (2001) provides:
(1) An attorney and counselor has the authority to:
(a) bind his client in any steps of an action or proceeding filed with the clerk or entered upon the minutes of the court and not otherwise;

On appeal, the Montana Supreme Court agreed with Weinstein's reliance on *Hetherington v. Ford Motor Co.*[53] Under *Hetherington*, a party to a settlement agreement is bound to the agreement if he has 1) manifested assent to the agreement's terms and 2) has not manifested an intent not to be bound by that assent.[54] Lockhead attempted to distinguish *Hetherington* because there was no evidence that Lockhead met with his attorney, authorized him to accept, or wanted to agree.[55] The court rejected this argument, noting that Lockhead authorized his attorney to write "Brian Lockhead accepts" and that his attorney's September 27 letter indicated that Lockhead reviewed and approved the general release.[56] These facts evidenced both Lockhead's agreement to the settlement and his attorney's authority to accept the settlement.[57]

The court also rejected Lockhead's argument that the September 27 letter was only an "agreement to agree."[58] In *Hetherington*, the court wrote, "[a] party's latent intention not to be bound does not prevent the formation of a binding contract."[59] In determining that the agreement in the September 27 letter was enforceable, the court stated that Lockhead's argument was "precisely the 'latent intention' argument we rejected in *Hetherington*."[60]

Lockhead also unsuccessfully relied on *Bar OK Ranch, Co. v. Ehlert*[61] and *Marta Corp. v. Thoft*.[62] Lockhead relied on both *Bar OK Ranch, Co.* and *Marta Corp.* for the proposition that the settlement was not enforceable because there was no evidence that he attended or participated in settlement negotiations.[63] The Montana Supreme Court rejected this argument, stating that in both *Bar OK Ranch, Co.* and *Marta Corp.* attendance

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(b) receive money claimed by his client in an action or proceeding during the pendency thereof or after judgment unless a revocation of his authority is filed and, upon the payment thereof and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

52. *Lockhead*, ¶ 5.
53. 257 Mont. 395, 849 P.2d 1039 (1993).
54. Lockhead, ¶ 12 (citing Heatherington, 257 Mont. at 397, 849 P.2d at 1042).
55. *Id.* ¶ 12.
56. *Id.*
57. *Id.*
58. *Id.* ¶ 13.
59. *Hetherington*, 257 Mont. at 399, 849 P.2d at 1042.
60. *Lockhead*, ¶ 13.
61. 2002 MT 12, 308 Mont. 140, 40 P.3d 378.
62. 271 Mont. 109, 894 P.2d 333 (1995).
63. *Lockhead*, ¶¶ 14-15.

and participation in settlement negotiations was only evidence of an agreement to settle, not a requirement.[64] In this case, the affidavit of Weinstein's counsel, the September 27 letter from Lockhead's attorney, and Lockhead's concession that his attorney spoke on his behalf were evidence of Lockhead's agreement.[65]

Lockhead's final argument was that he was not bound by the settlement because the settlement agreement was not filed with the court clerk or entered upon the court's minutes.[66] Lockhead cited Montana Code Annotated section 37-61-401(1) and *In re Estate of Goick*[67] in support of his argument.[68] In *Goick*, the court quoted Montana Code Annotated section 37-61-401(1) and observed that the settlement agreement at issue in the case had not been filed with the clerk or entered into the minutes.[69] Based at least partially on these observations, the court affirmed the district court's denial of a motion to compel settlement.[70]

Here, in rejecting Lockhead's argument, the Montana Supreme Court noted that its literal interpretation of Montana Code Annotated section 37-61-401(1) in *Goick* was inconsistent with prior case law.[71] The court briefly examined the history of Montana Code Annotated section 37-61-401(1) and concluded that a literal interpretation of the statute does not make sense and would lead to absurd results.[72] As a result, the court overruled *Goick* to the extent that it required settlement agreements to be filed with the clerk or entered into the court's minutes.[73]

In *Lockhead*, the Montana Supreme Court makes clear that it is not going to let parties avoid settlement agreements based on technicalities. The court notes that a literal interpretation of Montana Code Annotated section 37-61-401(1) would mean that "an attorney's authority to bind a client would depend entirely

64. *Id.*
65. *Id.* ¶ 14.
66. *Id.* ¶ 16.
67. 275 Mont. 13, 909 P.2d 1165 (1996).
68. *Lockhead*, ¶ 16.
69. *Goick*, 275 Mont. at 23, 909 P.2d at 1171.
70. *Id.*
71. *Lockhead*, ¶ 22.
72. *Id.* ¶¶ 17, 22 (agreeing with the Court's previous statements in State v. Nelson, 251 Mont. 139, 141, 822 P.2d 1086, 1087 (1991); State v. Turlock, 76 Mont. 549, 563, 248 P. 169, 175 (1926); Bush v. Baker, 46 Mont. 535, 546, 129 P. 550, 553-54 (1913)).
73. *Id.* ¶ 22.

on whether the attorney received funds."[74] The court desires to avoid such absurd results. Now, if a party enters into a settlement agreement that meets the requirements set forth in *Hetherington* and examined in subsequent cases, the party will be bound by the agreement. Parties cannot escape otherwise valid settlement agreements simply because they are not filed with the clerk of court or entered into the court's minutes.[75]

- *Michael Manning*

3. *STATE V. STONE*[76]

In a case of first impression, *State v. Stone* presented three issues to the Montana Supreme Court. First, whether preventing needless suffering and death of animals constitutes an exigent circumstance justifying the warrantless search of a defendant's property. Second, whether the warrantless search of the defendant's residence was permissible as a probation search. Finally, whether the district court imposed an illegal sentence upon the defendant.

Clifford Lee Stone ran an animal zoo, housing several of the animals in cages on his property.[77] In November 2001, a neighborhood boy who sporadically helped Stone maintain the animals ventured on to Stone's property at his behest to help care for the animals.[78] The boy witnessed several dead rabbits being consumed by other starving rabbits and told his father what he had seen, prompting the father to contact the sheriff's office.[79] The responding officers proceeded onto the property and saw the dead and starving rabbits.[80] Upon further inspection, the officers discovered dogs and cats without food or water living in kennels on the premises.[81] The officers became concerned for the well-being of the animals observing "that the animals were starving to death."[82] After seeing to the needs of the animals, the officers were informed that Stone was a probationer and kept animals inside his residence as well.[83] The officers

74. *Id.*
75. *Id.*
76. 2004 MT 151, 321 Mont. 489, 92 P.3d 1178
77. *Id.* ¶¶ 5-6.
78. *Id.* ¶¶ 7-8.
79. *Id.* ¶¶ 8-9.
80. *Id.* ¶ 9.
81. *Id.*
82. *Stone*, ¶ 10.
83. *Id.* ¶¶ 10-11.

contacted Stone's probation officer and were given permission to enter the house.[84] The officers entered the house and assisted the remaining animals.[85]

Stone was charged with four felony counts of animal cruelty, one misdemeanor count of animal cruelty and one misdemeanor count of child endangerment.[86] The trial court denied Stone's motion to suppress the evidence obtained from the search of his property on the grounds that it was an unreasonable search and seizure.[87]

In resolving whether the exigent circumstances exception applies to situations of threats to animal life, the Montana Supreme Court looked to the law of other states and determined that several jurisdictions had applied the exception in similar situations.[88] The court found that the officers were acting out of concern for the welfare of the animals.[89] This finding was followed by an examination of the animal cruelty statute as it read at the time of the violation.[90] The court determined that Montana has a strong public policy to aid animals mistreated by people and that this policy is exemplified through the legislative history of Montana Code Annotated section 45-8-211 and the legislature's subsequent adoption of further animal protection measures.[91] The court concluded that "the prevention of needless suffering and death of the animals on Stone's property created exigent circumstances justifying the warrantless search

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84. *Id.* ¶ 11.

85. *Id.*

86. *Id.* ¶ 12.

87. *Id.*

88. *Stone*, ¶¶ 21-31, citing Tuck v. United States, 477 A.2d 1115 (D.C. 1984); State v. Bauer, 379 N.W.2d 895 (Wis. 1985); People v. Thornton, 676 N.E.2d 1024 (Ill. 1997); Pine v. State, 889 S.W.2d 625 (Tex. Ct. App. 1994), *cert. denied*, Pine v. Texas, 516 U.S. 914 (1995).

89. *Id.* ¶ 33.

90. *Id.* ¶ 35, (citing MONT. CODE ANN. § 45-8-211(1)(b), (c)(i)-(ii) (2001)). The statute provides in part:

> (1) A person commits the offense of cruelty to animals if without justification the person knowingly or negligently subjects an animal to mistreatment or neglect by:
>
> (b) carrying or confining any animal in a cruel manner;
>
> (c) failing to provide an animal in the person's custody with:
>
> (i) food and water of sufficient quantity and quality to sustain the animal's normal health; or . . . .
>
> (iii) in cases of immediate, obvious, serious illness or injury, licensed veterinary or other appropriate medical care.

91. *Id.* ¶¶ 36-37.

for and rescue of the animals."[92] The court held that the trial court did not err in denying Stone's motion to suppress and that the officers warrantless entry onto and search of Stone's property was justified given the exigent circumstances and probable cause present.[93]

Noting that Stone was on probation and therefore had a reduced privacy interest, the court analyzed the search of Stone's house under the reasonable cause standard for probation searches.[94] The court found that Stone's probation officer once summoned to the scene and apprised of the situation had reasonable cause to believe that Stone was violating his probation by committing criminal offenses of cruelty to animals inside his house.[95] Stone's probation officer gave permission to the law enforcement officers to enter Stone's house and, thus, the court found the warrantless entry to be a justifiable probation search.[96] The court held that the trial court did not err in denying Stone's motion to suppress the evidence seized from his house.[97]

The State conceded that the sentence imposed on Stone was illegal, exceeded the statutory maximums, and that the sentence was subject to review even though Stone did not object at the time of sentencing.[98] Stone was sentenced to five years on each count of his felony animal cruelty charge to run concurrently.[99] After reviewing the statute,[100] the court held that the sentence exceeded the statutory parameters, reversed the trial court's sentence and remanded the case for resentencing.[101]

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92. *Id.* ¶ 39.

93. *Id.* On appeal, Stone conceded that the officers had probable cause to be on his property. *Id.* ¶ 19.

94. *Stone*, ¶ 41, citing State v. Burke, 235 Mont. 165, 171, 766 P.2d 254, 257 (1988) (holding that a probationer has a reduced privacy interest because they are aware that their activities will be scrutinized).

95. *Id.* ¶ 42.

96. *Id.*

97. *Id.*

98. *Id.* ¶ 45, citing State v. Lenihan, 184 Mont. 338, 602 P.2d 997 (1979) (holding that the Montana Supreme Court should review sentences that exceed the statutory mandates).

99. *Id.* ¶¶ 43-44.

100. MONT. CODE ANN. § 45-8-211(2)(a) (2001). The statute provides in part:

> (a) A person convicted of a second or subsequent offense of cruelty to animals shall be fined not to exceed $1,000 or be imprisoned in the state prison for a term not to exceed 2 years, or both.

101. *Stone*, ¶ 48.

This case marks the rare recognition by the Montana Supreme Court of a new although narrow exigent circumstance justifying a warrantless search. Previously, an exigent circumstance was deemed to exist only "if the situation at hand would cause a reasonable person to believe that prompt action is necessary to prevent physical harm to an officer or other person, the destruction of relevant evidence, the escape of a suspect, or some other consequence improperly frustrating law enforcement efforts."[102] *State v. Stone* offers hope and uncertainty for prosecutors and law enforcement officials. While the decision indicates a willingness on the part of the Montana Supreme Court to expand the list of exigent circumstances which would justify a warrantless search it also creates further confusion as to what will qualify as an exigent circumstance in the future.

-Jeffrey D. Perkins

4. *IN THE MATTER OF A.S.*[103]

In the Matter of A.S. addresses whether parents have a due process right to effective assistance of counsel in proceedings to terminate parental rights.[104] This issue was one of first impression for the Montana Supreme Court.[105]

M.S. was the natural mother of A.S.[106] Shortly after birth, A.S. tested positive for cocaine, and M.S. tested positive for marijuana.[107] Following a search of M.S.'s home, additional drugs and drug paraphernalia were found.[108] Due to the search and drug test results, the Montana Department of Health and Human Services (HHS) was awarded temporary legal custody of A.S. on June 15, 2001.[109] Following a hearing in which A.S. was adjudicated a youth in need of care, HHS's temporary custody was extended for six months.[110] A treatment plan was approved for M.S., which she consequently failed to comply with on several levels.[111] On October 9, 2002, over a year after being

102. *Id.* ¶ 18, citing State v. Wakeford, 1998 MT 16, ¶ 24, 287 Mont. 220, ¶ 24, 953 P.2d 1065, ¶ 24.
103. 2004 MT 62, 320 Mont. 268, 87 P.3d 408.
104. *Id.* ¶¶ 3, 13.
105. *Id.* ¶ 13.
106. *Id.* ¶ 1.
107. *Id.* ¶ 4.
108. *Id.*
109. *A.S.*, ¶¶ 4-5.
110. *Id.* ¶ 5.
111. *Id.* ¶¶ 5-7.

awarded temporary legal custody of A.S., HHS filed a petition to have M.S.'s parental rights terminated.[112]

The district court conducted a hearing on the petition on January 7, 2003.[113] On January 21, 2003, the district court issued findings of fact and conclusions of law, terminating M.S.'s parental rights as to A.S.[114] Shortly thereafter, on January 23, 2003, M.S. appealed the district court's decision to the Montana Supreme Court.[115]

On appeal, M.S. claimed to have been denied effective assistance of counsel.[116] M.S.'s assertion was based on the fact that her court-appointed counsel failed to subpoena witnesses to testify on her behalf at the termination hearing.[117] In a unanimous opinion, written by Justice Regnier, the court stated that it is firmly established in Montana that a natural parent's right to care and custody of his or her child is a fundamental liberty interest requiring fundamentally fair procedures[118] so that a parent must be afforded a right to counsel at a termination proceeding.[119] However, in this case, the court recognized that it had yet to address the issue of whether or not such counsel must be effective.[120] Thus, the court initially addressed whether M.S. was entitled to receive effective assistance of counsel at the termination proceeding.[121]

The Montana Supreme Court noted that other states have addressed similar issues, and held that parents have a right to effective assistance of counsel in termination proceedings.[122] The court stated that a similar issue had been addressed in *Kane v. Miller*.[123] In *Kane*, the court had addressed whether a mother, whose parental rights had been terminated, had a cause of legal malpractice against her court-appointed counsel.[124] The

112. *Id.* ¶ 8.
113. *Id.*
114. *Id.*
115. *A.S.*, ¶ 8
116. *Id.* ¶ 11.
117. *Id.*
118. *Id.* ¶ 12 (citing Matter of A.S.A., 258 Mont. 194, 197, 852 P.2d 127, 129 (1993) (citations omitted); *In re* A.C. 2001 MT 126, ¶ 20, 305 Mont. 404, ¶ 20, 27 P.3d 960, ¶ 20).
119. *Id.* (citing *In re* Custody of M.W., 2001 MT 78, ¶ 25, 305 Mont. 80, ¶ 25, 23 P.3d 206, ¶ 25; *In re* A.F.-C., 2001 MT 283, ¶ 42, 307 Mont. 358, ¶ 42, 37 P.3d 724, ¶ 42).
120. *Id.* ¶ 13.
121. *A.S.*, ¶ 13.
122. *Id.* ¶¶ 14-16 (citations omitted).
123. *Id.* ¶ 17 (citing Kane v. Miller, 258 Mont. 182, 852 P.2d 130 (1993)).
124. *Id.* ¶ 18 (citing *Kane*, 258 Mont. at 187, 852 P.2d at 133).

issue of whether a parent is entitled to effective legal assistance was not specifically addressed.[125] However, by evaluating the adequacy of the mother's legal representation at her termination proceeding, it was implicit that she was entitled to effective representation.[126] Thus, the court concluded that parents have a right to effective assistance of counsel in termination proceedings.[127]

Following its conclusion in regard to the requirement of effective counsel, the court proceeded to determine the appropriate standard by which to gauge whether counsel has indeed been effective.[128] In criminal proceedings, the court applies a two-prong test from *Strickland v. Washington*.[129] However, in a prior proceeding the court determined that the *Strickland* test is not applicable to civil proceedings involving involuntary commitment.[130] The court based its prior decision on the fact that "the standard under *Strickland* simply does not go far enough to protect the liberty interests of individuals . . . ."[131] In the present case, the court similarly found that the *Strickland* test does not go far enough to protect the liberty interests of individuals who stand to lose their parental rights.[132] Thus, the *Strickland* test was not applied to test the claims of ineffective counsel arising out of termination proceedings.[133]

After declining to apply a general standard for legal malpractice, the court elected to formulate a standard specifically tailored to the instant issue.[134] To evaluate effectiveness of counsel in cases involving the termination of parental rights, the court set out the following non-exclusive factors:

> (1) Training and experience. Specifically, whether counsel has experience and training in representing parents in matters and proceedings under Title 41, Chapter 3, Part 6, Montana Code Annotated, and whether counsel has a verifiably competent

125. *Id.*

126. *Id.* ¶ 19.

127. *A.S.*, ¶ 20.

128. *Id.* ¶ 21.

129. *Id.* (citing Strickland v. Washington, 466 U.S. 668 (1984)).

130. *Id.* ¶ 22 (citing *In re* K.G.F., 2001 MT 140, ¶ 33, 306 Mont. 1, ¶ 33, 29 P.3d 485, ¶ 33).

131. *Id.* ¶ 22 (citing *K.G.F.*, ¶ 33).

132. *Id.* ¶ 23.

133. *A.S.* ¶ 23.

134. *Id.* ¶ 24.

> understanding of the statutory and case law involving Title 41, Chapter 3, Montana Code Annotated, and of termination proceedings brought under Title 41, Chapter 3, Part 6, Montana Code Annotated; and
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> (2) Advocacy. This inquiry includes whether counsel has adequately investigated the case; whether counsel has timely and sufficiently met with the parent and has researched the applicable law; whether counsel has prepared for the termination hearing by interviewing the State's witnesses and by discovering and reviewing documentary evidence that might be introduced; and whether counsel has demonstrated that he or she possesses trial skills, including making appropriate objections, producing evidence and calling and cross-examining witnesses and experts.[135]

The court then applied the benchmark factors to M.S.'s case by noting her counsel had originally been prepared to represent M.S. at a termination hearing set for October 22, 2002.[136] When the hearing was re-scheduled for January 7, 2003, counsel admittedly neglected to place the re-scheduled termination hearing on his calendar.[137] He requested a continuance in order to re-subpoena the witnesses he had subpoenaed at an earlier hearing.[138] Counsel also attempted to admit letters written by the missing witnesses.[139] The district court denied counsel's request for a continuance, and disallowed the letters as hearsay.[140] The hearing was then concluded as scheduled.[141]

Based on the chronology of events, and using the factors established above, the court determined that counsel was not adequately prepared for the hearing.[142] Counsel did not zealously advocate for M.S., and such advocacy was not beyond his means as he had been prepared to represent M.S. at the October 22nd hearing.[143]

Finally, the court addressed whether M.S. was prejudiced as a result of counsel's ineffectiveness.[144] M.S. asserted that she was prejudiced by counsel's failure to subpoena witnesses to

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135. *Id.* ¶ 26 (citing NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 22-23 (1995); *K.G.F.*, ¶¶ 70-89).

136. *Id.* ¶ 29.

137. *Id.*

138. *Id.*

139. *A.S.*, ¶ 29.

140. *Id.*

141. *Id.*

142. *Id.* ¶ 30.

143. *Id.*

144. *Id.* ¶ 31.

testify on her behalf.[145] However, the witnesses subpoenaed were slated to testify as to M.S's conduct during her pregnancy and prior to the time A.S. was removed from her care.[146] Such information was no longer relevant to M.S.'s case because the relevant issue at the termination hearing was whether M.S. had completed her treatment plan.[147] Thus, testimony regarding M.S.'s conduct during her pregnancy, and prior to the time A.S. was removed, was irrelevant to the district court's ultimate ruling.[148]

The court concluded that although M.S. did not receive effective assistance of counsel, she did not suffer prejudice as a result of counsel's ineffectiveness.[149] The decision of the district court terminating M.S.'s parental rights to A.S. was affirmed.[150]

Although the district court's termination of M.S.'s parental rights remained undisturbed in the end, *In the Matter of A.S.* firmly establishes that effective legal counsel is a minimum requirement for a parent facing parental termination actions. Furthermore, for the first time, criteria of training, experience, and advocacy skills necessary to an attorney's effective representation in parental rights termination cases have now been established in Montana jurisprudence.

-Megan Heahlke

5. *CAMPBELL V. GARDEN CITY PLUMBING & HEATING, INC.*[151]

In *Campbell v. Garden City Plumbing & Heating, Inc.*, the Montana Supreme Court held that the plaintiff could not prove sexual discrimination in a same-sex sexual harassment case because he did not produce evidence that his co-workers acted with a discriminatory motive based on his gender.[152]

In February of 1999, Travis Campbell started work for Garden City Plumbing and Heating (Garden City).[153] Throughout the course of his employment, he was periodically subjected to vulgar and sexually explicit comments made by

145. *A.S.*, ¶ 32.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* ¶ 33.
150. *Id.*
151. 2004 MT 231, 322 Mont. 434, 97 P.3d 546.
152. *Id.* ¶¶ 24-25.
153. *Id.* ¶ 5.

other Garden City employees.[154] While such behavior was sometimes directed toward other employees, Campbell, as the newest member of the plumbing crew, "was barraged with offensive sex-themed comments."[155] The comments included his much larger foreman telling Campbell that he turned down sex with his wife because he knew he could have sex with Campbell and often stated that he was going to "butt fuck" Campbell.[156] Further, in one instance, the foreman straddled a ditch in which Campbell was digging, motioned to his crotch, and told Campbell that he "was the 'perfect height' for giving him pleasure."[157] Campbell finally asked one of his supervisors if he could turn in another male co-worker for sexual harassment.[158] The supervisor's response was that Campbell could file a complaint, but "he would probably not live to testify."[159] Campbell began calling in sick, then finally quit work at Garden City because of the harassment.[160]

Campbell then filed a Charge of Discrimination with the Montana Department of Labor and Industry, alleging his co-workers and superiors had discriminated against him because of his sex.[161] The Department of Labor held a hearing in which it found that the "[c]ourse, vulgar, sexually-explicit taunting actually occurred," and that "the number of them and the degree of vulgarity and violence embodied with them" wore on Campbell and caused him to fear that the threatened incidents might occur.[162] However, the Department dismissed the petition, and Campbell appealed to the Montana Human Rights Commission, which affirmed the Department's dismissal.[163] Finally, Campbell filed a petition in the Fourth Judicial District Court, Missoula County, for judicial review of the Human Rights Commission's decision.[164] The district court affirmed the decision, agreeing with the hearing examiner that "'Campbell failed to prove that his harassers either were hostile toward men

154. *Id.* ¶¶ 5, 9.
155. *Id.* ¶ 6.
156. *Id.* ¶ 31 (Leaphart, J., dissenting).
157. *Campbell*, ¶ 31 (Leaphart, J., dissenting).
158. *Id.* ¶ 7.
159. *Id.*
160. *Id.* ¶ 8.
161. *Id.* ¶ 4.
162. *Id.* ¶¶ 4, 9.
163. *Campbell*, ¶ 4.
164. *Id.* ¶¶ 1, 4.

generally or acting out sexual desires toward him.'"[165] Campbell appealed to the Montana Supreme Court, arguing that the hearing officer, the Human Rights Commission, and the district court had erred in deciding Campbell was not discriminated against because of his sex.[166]

The Montana Supreme Court first noted that the issue of same-sex sexual harassment was a matter of first impression in Montana jurisprudence.[167] However, the court recognized that the U.S. Supreme Court had conclusively determined that same-sex sexual harassment claims were within the provisions of Title VII of the Civil Rights Act of 1964 when it decided the case of *Oncale v. Sundowner Offshore Services, Inc.*[168] The court reasoned that reference to *Oncale* was appropriate to Campbell's claim since the Montana Human Rights Act, Title 49, Montana Code Annotated, are parallel to the provisions of Title VII.[169] In so doing, the court adopted the holding of *Oncale* to Montana.[170]

In Montana, two basic forms of sexual harassment may violate prohibitions against workplace discrimination, the first being quid pro quo and the second being hostile work environment harassment.[171] Campbell's claim fell into the second category in alleging a hostile working environment.[172] The court opined that a plaintiff claiming sexual harassment via a hostile work environment must establish a prima facie case through the proof of four essential elements:[173]

1. the plaintiff must be a member of a protected class (male or female);
2. the plaintiff must show that the offensive conduct amounted to actual discrimination because of sex and that the motivation behind the discrimination was clearly based on the plaintiff's sex;
3. the plaintiff must show that the harassment was unwelcome; and
4. the plaintiff must show that the claimed sexual harassment

165. *Id.* ¶¶ 4, 22.
166. *Id.* ¶ 2.
167. *Id.* ¶ 11.
168. *Id.* (citing Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75 (1998)).
169. *Campbell*, ¶¶ 11-12.
170. *Id.* ¶ 11.
171. *Id.* ¶ 15 (citing Beaver v. Mont. Dep't of Natural Res. & Conservation, 2003 MT 287, ¶ 29, 318 Mont. 35, ¶ 29, 78 P.3d 857, ¶ 29).
172. *Id.*
173. *Id.*

> was so severe or pervasive that it altered the conditions of his employment and created an abusive working environment.[174]

The court determined that Campbell easily met requirements one and three because he fell within the protected class of male, and he demonstrated that the harassment was unwelcome.[175] However, the court determined that Campbell fell short of proving a case of sexual harassment because he could not meet the second requirement, which required proof of some discriminatory motive that was based on his sex.[176] The court stated that a plaintiff must "'prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination . . . because of . . . sex.'"[177] In short, "a plaintiff must prove the motivation behind the discrimination was clearly based on the plaintiff's sex."[178]

The court did agree with Campbell's argument that "neither proof of sexual desire nor proof of sexual stereotyping is required to establish discrimination based on sex."[179] Campbell attempted to prove his claim by asserting that his co-workers' actions discriminated against him as a man because the comments directed toward him were the sort that would be especially degrading to a heterosexual male.[180] But the court stated that Campbell had confused the fourth prima facie element of his claim with the second by "claiming that proof of an intimidating work environment constitutes proof of discrimination because of sex."[181]

The court turned again to the Supreme Court's decision in *Oncale* where it "warned that Title VII was not to be denuded into a 'general civility code' . . . [by] mistak[ing] ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'"[182] In deciding that Campbell had failed to prove his claim, the court stated:

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174. *Id.* ¶¶ 16-19.
175. *Campbell*, ¶ 20.
176. *Id.* ¶ 21 (citing Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 81 (1998)).
177. *Id.* ¶ 17 (quoting *Oncale*, 523 U.S. at 81).
178. *Id.* (citing *Oncale*, 523 U.S. at 81).
179. *Id.* ¶ 21.
180. *Id.* ¶ 22.
181. *Campbell*, ¶ 24
182. *Id.* ¶ 23 (citing *Oncale*, 523 U.S. at 81).

> It cannot be gainsaid that the conduct perpetrated upon Campbell by his coworkers, and allowed by management, was infantile and decidedly pusillanimous. Yet, while it is unfortunate that Campbell was subjected to such puerile conduct, Campbell did not prove that the conduct rose to the level of discrimination based on sex.[183]

Because the court held that Campbell failed to prove that his co-workers harassed him because of his sex, it declined further analysis of the fourth element and affirmed the district court.[184]

Justice Leaphart dissented in this case, joined by Justices Nelson and Cotter.[185] Justice Leaphart recognized that the plaintiff would have to meet the four requirements, but questioned the majority's decision that Campbell did not meet the second requirement.[186] He illustrated his point with examples of some of the behavior to which Campbell was subjected.[187] Justice Leaphart stated that the Garden City employees' behavior was anything but "ordinary socializing in the workplace"; rather, he thought a threat by a 225-pound man to have nonconsensual anal sex with a man half his size demonstrated motive of gender-based discrimination on its face.[188] Justice Leaphart stated that if such egregious behavior does not rise to the level of same-sex sexual harassment, he questioned what amount of sexually explicit, hostile and abusive conduct a person must endure in the workplace before relief is warranted.[189] Justice Leaphart would have reversed the district court's decision and allowed Campbell to pursue a case of sexual harassment in furtherance of good public policy.[190]

Although the same-sex sexual harassment claim in *Campbell* was unsuccessful, *Campbell* serves to establish for the first time in Montana jurisprudence the essential prima facie proof elements necessary for a plaintiff to sustain a discrimination claim based on same-sex sexual harassment resulting in a hostile work environment.

-Jessica J. Penkal

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183. *Id.*

184. *Id.* ¶¶ 25-26.

185. *Id.* ¶¶ 27-34 (Leaphart, J., dissenting).

186. *Id.* ¶¶ 28-29 (Leaphart, J., dissenting).

187. *Campbell*, ¶ 31 (Leaphart, J., dissenting); *see also* textual information related to *supra* notes 6-7.

188. *Id.* ¶ 32 (Leaphart, J., dissenting).

189. *Id.* ¶¶ 32-33 (Leaphart, J., dissenting).

190. *Id.* ¶¶ 32-34 (Leaphart, J., dissenting).