Office 406-765-2200

S. Thomas Darland

Fax 406-765-2201

Attorney at Law
548 W. Boundary
P.O. Box 335
Plentywood, Montana 59254-0335

3
Date 2-16-05
SB 435

February 14, 2005

TELEFAX MESSAGE

TO: SENATOR SAM KITZENBERG

Helena, Montana

Fax Number 1-406-444-4875

RE: A BILL FOR AN ACT ENTITLED: " AN ACT PROVIDING FOR PROBATE OF A NONDOMICILIARY DECEDENT'S WILL THAT IS FILED AND NOT PROBATED IN A COURT IN THE DOMICILIARY STATE; AMENDING SECTIONS 72-3-203, 72-3-212, AND 72-3-301, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

Dear Senator Kitzenberg:

Thank you so very much for your expeditious and very valuable assistance in the above endeavor. We also greatly appreciate the excellent work of Attorney Valencia Lane of the Legislative Services Division.

As you know, I am acting as the spokesman of sorts for a group of lawyers in our County interested in the passage of this Bill. I am **not** pretending to be some probate authority or expert. We are extremely pleased and grateful for the consideration and support of this bill by the Chairman of the Senate Judiciary Committee.

We hope that the following information will be of some help to you and the Chairman in understanding the problem and the advantages of this legislation.

We are not proposing any kind of major revision to the Uniform Probate Code of Montana. We believe that this bill is a minor adjustment that serves to fill a void in our law that leads to unnecessary costs in the administration of testate estate property located in Montana.

THE PROBLEM

Here, with a minimum amount of "legalese" and technicalities, is the simplified version of the scenario this bill addresses:

* A person ("decedent") who is a resident of a state other than Montana dies leaving a will.

* The original copy of the decedent's will is filed in a court in the decedent's home state merely for the purpose of having it on public record, but, because there is no need to do so, it is not probated there i.e. determined and declared by a court to be the valid last will and testament of the decedent nor is a personal representative appointed in the home state. This is a common occurrence in some community property states, for example, and it generally was never anticipated to take the will beyond its "filed only status".

* At death, the decedent leaves in his sole name some sort of property interest in Montana.

* It appears that the Montana property can not be transferred to those entitled to it under the decedent's will until the will is probated by a court.

What is the most efficient way of getting the Montana property transferred to the parties who are to receive it according to decedent's will?

As a private attorney whose practice for over 52 years has included estate and property matters, I have encountered this situation numerous times. Typically, the out-of-state decedent's Montana interests involve land or oil and gas minerals and royalties. In our area, this problem is seen frequently for the reason that the decedent is commonly a former Montana resident who has moved to another state or the decedent is a non-resident who acquired Montana property through inheritance from a Montana resident.

THE SOLUTION UNDER CURRENT LAW

It would seem that the most direct way to transfer the Montana property to the parties entitled to it under the will would be to simply initiate a probate proceeding in a Montana Court to have the decedent's will declared a valid instrument. Under our present statutes, however, it appears {unless we have overlooked something} that a probate action requires either the original copy of a will

or an authenticated copy of a will previously probated in another jurisdiction. (Sections 72-3-203(1)(a), 72-3-213(3), and 72-3-301(1)(c) MCA) In the scenario described above, neither of these documents is available. The original copy of the will must stay in the possession of the court in the decedent's home state where it is filed and can not be withdrawn. An authenticated copy of the filed will does not meet the requirement, for the reason that the will has not been probated in the decedent's state of residence.

Because in this instance an original probate proceeding can not be filed in Montana, the only solution to the problem appears to be found in the Uniform Probate Code's provision for an "ancillary" administration of a decedent's estate. (Title 72, Chapter 4, MCA) Under this procedure, a decedent's personal representative appointed in the decedent's home state may, through a filing of specified documents with a Montana District Court, acquire the authority in Montana to transfer the decedent's Montana property to the proper parties. (Section 72-4-303 MCA) But before this ancillary procedure can be taken advantage of, there must be filed in a court in the decedent's home state the appropriate proceedings to appoint a personal representative, which we assume intends that the will was also admitted to probate in the home state. Otherwise there would be no "legal instrument" (admitted will) upon which to base the distribution of property to Devisees in Montana. These proceedings in the decedent's state of residence require an attorney licensed to practice in that state, while the services of an attorney licensed to practice in Montana must be obtained to handle the ancillary procedure.

While this "solution" is offered under the current law, it involves two filings for two separate proceedings by two different attorneys in two courts in two states.

With all due respect to the members of my profession, I am compelled by honesty to observe that two lawyers cost more than one. It appears that the current means of transferring the Montana property increases the expense and prolongs the time involved in accomplishing something that could be done more economically.

THE PROPOSED SOLUTION

My experience and the experiences of the other local attorneys assisting with this bill, leads us to conclude that there would be a savings of time and money for the decedent's family if the Montana courts were allowed to accept for probate in this state an authenticated copy of the unprobated will filed in the decedent's home state.

This bill provides this solution by allowing the probate in Montana of a will of a non-resident decedent that is filed, but not probated, in the decedent's "domiciliary" or home state. (Section 1) Under the amendment, a probate proceeding can be initiated here when the application is accompanied by an authenticated copy of the decedent's will. (Section 2 and 4) The copy presented must have an authenticated certificate of its legal custodian in the resident state that it is a "true copy" and that the will has been filed and not submitted for probate in the court in decedent's home state.

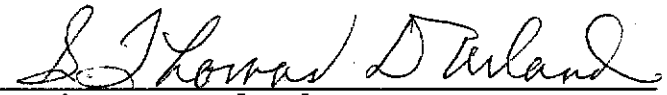
The Act's certification requirement insures the authenticity of the will, in that the custodian in the home state must verify that the original will is filed there and that the document is an accurate copy of the original will. The acceptance of the authenticated copy of the unprobated will represents no reduction of the standard of proof for authenticity as authenticated copies of probated wills from other jurisdictions are currently acceptable under the statutes for estate proceedings here. (Sections 72-3-203(1)(a) and 72-3-213(3) MCA Authenticated copies of unprobated wills from other jurisdictions can already be filed in our courts in those instances where the other jurisdiction does not provide for probate. (Sections 72-3-213(4) and 72-3-316 MCA). The certificate required by the Act meets the standard for self-authentication of documents found in Montana law governing the admission of evidence. (Rule 902(4), Montana Rules of Evidence)

If you need further information, please let me know.

Please disregard my earlier comments furnished to you because this letter, for all practical purposes, supersedes all prior letters, etc.

With sincere thanks, I remain,

Sincerely,



S. Thomas Darland

STD/sw

Hard Copy mailed by Priority Mail To:
Senator Sam Kitzenberg
Montana Senate
P.O. Box 200500
Helena, Montana 59602-0500