No._____

In the

Supreme Court of the United States

IN RE THE ESTATE OF EDWARD M. BOLAND,
Deceased,

PAUL BOLAND and MARY GETTEL, as heirs of the Estate of Dixie L. Boland,

Petitioners,

v.

CHRIS BOLAND, BARRY BOLAND, ED BOLAND CONSTRUCTION, INC., AND NORTH PARK INVESTMENTS, LLC,

Respondents.

On Petition For A Writ of Certiorari To The United States Supreme Court From an Appeal to the Supreme Court of the State of Montana

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME I

Thomas E. Towe
Counsel of Record
For Petitioners
PO Box 30457
Billings, MT 59107
(406) 248-7337
towe@tbems.com

APPENDIX
Volume I

App. 1

DA 18-0607

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 236

IN RE THE ESTATE OF EDWARD M. BOLAND,

Deceased,

PAUL BOLAND and MARY GETTEL, as heirs of the Estate of Dixie L. Boland,

Petitioners and Appellants,

v.

CHRIS BOLAND, BARRY BOLAND, ED BOLAND CONSTRUCTION, INC., and NORTH PARK INVESTMENTS, LLC,

Respondents and Appellees.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade,
Cause No. ADP-15-125
Honorable Gregory G. Pinski,
Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Thomas E. Towe, Towe, Ball, Mackey, Sommerfeld, & Turner, P.L.L.P., Billings, Montana

For Appellees:

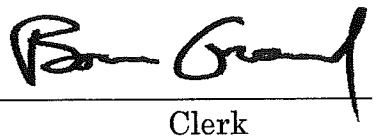
Jason T. Holden, Katie R. Ranta, Faure Holden Attorneys at Law, P.C., Great Falls, Montana

---

Submitted on Briefs: June 5, 2019

Decided: October 1, 2019

Filed:



Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Paul Boland (Paul) and Mary Gettel (Mary), as heirs of the Estate of Edward M. Boland (Estate), appeal the denial of their request to recover assets for the Estate, as well as various other related orders, entered in the Eighth Judicial District Court,

Cascade County. We affirm and restate the issues as follows:

1. *Were Paul and Mary entitled to a hearing on their Petition for Order to Recover Assets?*

2. *Did the District Court correctly conclude that the allegations of bias made against it by Mary and Paul were frivolous?*

3. *Did the District Court err by imposing Rule 11 sanctions against Paul and his attorney?*

4. *Should attorney fees and costs be assessed against Paul and Mary in this appeal?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 This appeal arises from two cases, now consolidated, involving the same underlying probate of the Estate. Ed Boland (Ed) died on December 26, 2014, and was survived by his five children—Barry, Chris, Jacquie, Mary, and Paul—and wife, Dixie Boland (Dixie). Dixie died on January 4, 2016, and her estate is being formally probated.[1] In his Will, Ed

[1] There are also a substantial number of other cases involving the siblings and their parent's estates. In *The Estate of Dixie Boland*, DP-16-0017, Thirteenth Judicial District Court, Yellowstone County, Chris and Barry challenge their mother's Will, drafted by Thomas E. Towe. The court removed Paul and Mary as Co-Personal Representatives. The Will contest is still

nominated his two sons, Chris and Paul, to be Co-Personal Representatives of his Estate.

¶3 Ed founded Ed Boland Construction, Inc., a successful construction company. Chris and Barry, Ed's two oldest sons, worked for Ed Boland Construction, Inc., and now own it together. Chris and Barry also own North Park Investments, LLC, a real estate company. The origins of the instant dispute concern a claim by Paul and Mary that Chris, Barry, and their entities owed substantial sums of money to Ed at the time of his death. Paul and Mary claim the debt owed to the Estate by Chris and Barry was in the form of: (1) unpaid wages, (2) loans, (3) life insurance proceeds, and (4) undervalued stock.

¶4 On November 30, 2017, Paul filed a Petition for Order to Recover Assets (Petition) and a supporting brief and exhibits. The exhibits included: (1) a printout of all transactions made by Ed between 2007 and 2014; (2) correspondence between Barry and the accountant for Ed Boland Construction, Inc., in which it is discussed that an $8,000 liability will be included

---

pending, and Paul and Mary have filed a "pro se" appeal. In *The Estate of Dixie Boland*, DV-15-1560, Thirteenth Judicial District Court, Yellowstone County, Paul and Mary, acting as Co-Personal Representatives, pursued a claim filed by Dixie against Chris alleging that Chris stole money from Dixie's costume shop. In *The Estate of Edward Boland v. Classic Design*, DV-14-852, Thirteenth Judicial District Court, Yellowstone County, there was litigation over a home owned by the Estate of Ed Boland which, although resolved through agreement, was thereafter appealed—twice—and an enforcement action followed to have Jacquie vacated from the home.

on the Estate as owed by Chris and Barry; (3) some notes written by Ed; (4) Chris's responses to some of Paul's discovery requests; (5) a 2017 balance statement from the Estate; and (6) the Ed Boland Construction, Inc., shareholders's agreement demonstrating the total common stock issued as 100 shares.

¶5 Chris opposed Paul's Petition, denying that any money was owed to Ed other than "$8,000 for his 2014 tax liability" and $6,165.91 for a development project, which had already been paid into the Estate account. Paul next sent Chris a demand letter requesting Chris's consent to file a complaint as Co-Personal Representative to recover the funds Chris and Barry allegedly owed the Estate. Not surprisingly, Chris opposed the request and attached 125 pages of exhibits to his response in support of his conclusion that Ed was not owed any money by Chris, Barry, or any of their affiliated entities. These exhibits included: (1) articles of incorporation for Ed Boland Construction, Inc., authorizing, but not issuing, 500 shares; (2) the Ed Boland Construction, Inc., shareholders's agreement demonstrating the total common stock issued as 100 shares; (3) stock certificates demonstrating the amount of shares owned at various times by Chris, Barry, and Ed; and (4) a 72-page report addressing the fair market value of Ed's non-controlling common stock interest in Ed Boland Construction, Inc., prepared by Anderson ZurMuehlen & Co., P.C. This report concluded that, based on the percentage of ownership in Ed Boland Construction, Inc., the value of Ed's interest was $278,100 and, accordingly, the Estate was overpaid

when it received $400,000 for its interest in Ed Boland Construction, Inc.

¶6 Paul filed a Reply in which he asked for a hearing but did not respond in substance to any of the exhibits provided by Chris.

¶7 Pursuant to § 72-3-607, MCA, which requires a personal representative to prepare an inventory of all property owned by the decedent at the time of death within nine months of appointment, Judge Pinski ordered the parties to file inventories with the District Court. However, Judge Pinski expedited the timeline for filing inventories noting "The inventory will be necessary in resolving the Petition for Order to Recover Assets." Judge Pinski required the parties to file inventories within 30 days of his order, which was dated February 2, 2018. Chris filed his inventory on March 2, 2018. Paul filed his inventory on March 8, 2018, after the deadline set forth in the order.

¶8 On March 13, 2018, the District Court issued a written order denying the Petition. The court did not hold a hearing before making its ruling, relying instead on the pleadings and substantial documentation filed in support of the pleadings. In its order, the District Court addressed every asset for which Paul provided details and reasoned largely the same for each item, in that it found there was no evidence to substantiate the existence of any debt owed to the Estate. The District Court concluded there was affirmative evidence indicating the debt did

not exist and no evidence to substantiate the debt did exist. The District Court held, "In summary, the Court is satisfied with the evidence provided by Chris to explain each of the categories challenged by Paul. There are no assets which need to be recovered by the Estate of Edward Boland."

¶9 On April 2, 2018, Paul filed a motion and brief pursuant to M. R. Civ. P. 60(b) requesting that the court set aside its March 13, 2018 order. Paul, through his attorney Thomas E. Towe (Towe), alleged the order contained "three serious errors or mistakes." Paul alleged: (1) he was entitled to a hearing on his Petition; (2) he timely filed his inventory and the court erred in failing to consider it; and (3) the court erred by concluding that a $230,000 payment was made by North Park Investments, LLC, and not by Ed Boland Construction, Inc. Importantly for purposes of this appeal, Paul and Towe averred in their motion that Judge Pinski was biased. We set forth exactly what Towe and Paul represented in their motion:

> **Is there a question of lack of impartiality on the part of the Judge of this Court?**
>
> Paul Boland has raised the question of whether or not the presiding Judge of this case, Judge Pinski, is or can be totally impartial. He fully understands that decisions of the Court cannot be the

> basis of a determination of bias or prejudice. Nevertheless, the 3 huge mistakes made by the Judge in this case seem so obviously in error that a further inquiry may be necessary. Paul is aware that Chris Boland or his corporation has made a significant contribution to Judge Pinski's campaign fund during his election bid. In addition, Paul has seen [ ] Judge Pinski at the Peak, a gymnasium which Chris Boland and his previous attorney, Gary Bjelland, often go to exercise. Paul is not aware of any improper communication regarding this case nor any other indication of impartiality apart from the decisions of the Court, but if there is any such matters it would be appropriate for Judge Pinski to disclose those facts so that a reasonable determination of impartiality can be made. Clearly if there are some facts that may indicate a lack of impartiality, Judge Pinski may want to recuse himself from further participation in this case. See the Supreme Court's insistence that a Judge should disclose circumstances that could potentially cause his impartiality to be questioned. *Draggin' Y Cattle Co., Inc. v. Addink*, 2016 MT 98, ¶ 31, 383 Mont. 243, ¶ 31, 371 P.3d 970. ¶ 31 (2016).

Chris responded that Towe and Paul were making unsubstantiated factual allegations against the court

and that Towe and Paul should be required to provide evidentiary support for their allegations.

¶10 On April 16, 2018, the District Court issued an order in which it advised both parties that it must address the allegations before it could resume acting on the merits of the case. Accordingly, the District Court carefully outlined for Towe the appropriate action available to a party when it believes a tribunal is not impartial: file a bias and prejudice petition pursuant to § 3-1-805, MCA. The court also allowed Towe to supplement his motion with evidence to support his allegations or Towe could withdraw his brief, "with an apology to the Court for impugning its integrity without sufficient factual support."

¶11 On April 25, 2018, Towe and Paul filed a Response of Counsel to Court's order as well as a Fourth Affidavit of Paul Boland. Towe's response did not comply with the court's instructions and essentially reiterated the same allegations. Towe and Paul maintained they never accused Judge Pinski of being biased or prejudiced but were instead concerned with the "appearance of impartiality." Although "bias" and "prejudice" clearly appear in Towe's brief, Towe asserted "the words bias or prejudice do not appear in Paul's Brief." Although acknowledging that Judge Pinski could not be disqualified based on the rulings he made during the proceeding, Paul's affidavit recited the numerous orders Judge Pinski made "which took us by surprise" and had "serious errors."

¶12 Towe never filed a disqualification motion and affidavit pursuant to § 3-1-805, MCA. Additionally, the District Court concluded Towe and Paul's response was neither an apology nor evidence in support of their bias allegations against the court. As a result, the District Court held a show cause hearing on June 21, 2018. At the hearing, Towe was given the opportunity to present additional testimony and argument to substantiate his allegations against Judge Pinski. Towe's additional evidence was witness Young Boland, Paul's wife, who testified they saw Judge Pinski at the Peak Health and Wellness Center on February 7, 2018, when she was there with Paul. Young indicated they saw Judge Pinski talking on the phone and he looked "upset." Judge Pinski did not greet them or say anything to them. In an unsuccessful effort to cast his bias allegations in a different light, Towe represented to the court that he did not assert Judge Pinski was biased but was merely attempting to follow this Court's rulings in *Draggin' Y Cattle Company v. Addink*, 2016 MT 98, 383 Mont. 243, 371 P.3d 970. Towe maintained he was simply "suggesting" the District Court should make any disclosures of bias so that the timeliness of disqualifying Judge Pinski did not become an issue. Towe again claimed that he was "taken aback" by the District Court's unfavorable rulings against his client, Paul.

¶13 The District Court listened to Towe's statement, before admonishing him at length. The court reminded Towe, an attorney with 56 years in practice, that an appeal is the proper avenue for disagreeing with a court's ruling, not levelling

assertions of unethical conduct against the court. Judge Pinski explained that a judge has an "affirmative obligation" under the rules of judicial conduct, requiring judges to make disclosures when there is something to disclose. Judge Pinski explained, "I have nothing to disclose here."

¶14 Following the show cause hearing, but prior to Judge Pinski entering his written order addressing the Rule 11 violations, Paul and Mary filed, on June 29, 2018, a Notice of Appeal. On July 17, 2018, the District Court issued its Findings of Fact and Conclusions of Law Re: Rule 11 and § 37-61-421, MCA (Rule 11 Order). In its Rule 11 Order, the District Court produced campaign donation lists showing that no member of the Boland family ever contributed to Judge Pinski's campaign in any amount. The District Court noted, however, that James Towe, Towe's son, had contributed to Judge Pinski's campaign. The District Court also produced a printout from Peak Fitness, which established that Judge Pinski was not present at Peak Fitness on February 7, 2018, the date Young testified she saw him on his phone. The court stated, "it is difficult for this Court to imagine a more absurd, ludicrous and downright silly allegation of bias and prejudice." The court concluded that by asserting unsubstantiated factual allegations of bias which were meritless and frivolous, Paul and Towe violated M. R. Civ. P. 11 (b) and that attorney fees were appropriate pursuant to § 37-61-421, MCA. Next, the District Court scheduled a sanctions hearing to determine: (1) what sanction suffices to

deter repetition of the conduct or comparable conduct by others similarly situated; and (2) the amount of excess costs, expenses, and attorney fees incurred.

¶15 At the sanctions hearing on September 6, 2018, Towe recognized that he should have investigated further the allegations he made, stating, "I fully acknowledge that we could have and should have investigated those matters that we did raise further." Towe, however, renewed his assertion that he thought he had a legal basis under the Rules of Judicial Conduct and this Court's decision in *Draggin' Y*, to proceed as he did. Towe argued against any sanctions being imposed. Chris urged the court to sanction Towe and Paul, asserting that all probate proceedings in this matter were brought to a standstill based on the actions of Towe and Paul. Chris further maintained Paul was unfit to be Co-Personal Representative and that the levelling of false allegations against the court went to the heart of a personal representative's fiduciary duty to investigate and ensure the accuracy and legitimacy of all matters of estate administration. Chris argued that the court should remove Paul as Co-Personal Representative and further asserted that such an action was within the District Court's jurisdiction, regardless of the pending appeal before this Court. Towe responded that, while he "certainly accepts the court's jurisdiction" to continue with the sanction proceedings, the removal of Paul as Co-Personal Representative went to much of the substance of the probate and, consequently, the District Court did not

have jurisdiction to remove Paul as a Co-Personal Representative.

¶16 The District Court imposed the following sanctions: (1) removal of Paul as Co-Personal Representative; (2) Paul and Towe were held jointly and severally liable for attorney fees in the amount of $13,240.55 payable to Chris and $2,310 payable to Gary Bjelland; and (3) Paul and Towe were held jointly and severally liable for a $2,000 payment to the Cascade County Law Clinic.

¶17 Although Paul and Mary identify the District Court's order denying their Petition as the order from which they appeal, the only error alleged by Paul and Mary respecting the Petition concerns the failure of the District Court to conduct a hearing prior to making its ruling. We think it significant to note that the instant appeal therefore is primarily about the bias allegations made in the motion to set aside the order denying the Petition, the Rule 11 Order, and the sanctions imposed.[2] Towe represents Paul and Mary on appeal. [3]

---

[2] On appeal, Chris argues that since Paul and Mary have been removed as Co-Personal Representatives they have no standing to bring the instant appeal to collect property. This Court's January 2, 2019, Order dismissing Paul and Mary's appeal in their former capacity as Co-Personal Representatives instructs: "Our dismissal, however, is without prejudice to an appeal initiated by Paul Boland and/or Mary Gettel filed in their individual capacity." Therefore, further discussion of standing is unnecessary.

[3] Although both Paul and Mary are Appellants, we will refer primarily to Paul throughout this appeal.

STANDARDS OF REVIEW

¶18 Whether to hold a hearing is a matter left to the district court's discretion. *In re Marriage of Sampley*, 2015 MT 121, ¶ 9, 379 Mont. 131, 347 P.3d 1281. We review a district court's decision not to hold an evidentiary hearing for an abuse of discretion. *Sampley*, ¶ 9. A court abuses its discretion if it acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *Brown v. Brown*, 2016 MT 299, ¶ 11, 385 Mont. 369, 384 P.3d 476. Our review of whether a party was afforded due process is plenary. *In re Marriage of Cini*, 2011 MT 295, ¶ 15, 363 Mont. 1, 266 P.3d 1257.

¶19 We recently adopted a standard of review for analyzing judicial disqualification under the Montana Code of Judicial Conduct. *Draggin' Y*, ¶ 10 (citing *State v. Dunsmore*, 2015 MT 108, ¶ 10, 378 Mont. 514, 347 P.3d 1220. Our "inquiry into disqualification requires an objective examination of the circumstances surrounding" potential judicial disqualification and "an accurate interpretation" of the Montana Code of Judicial Conduct. *Draggin' Y*, ¶ 10; *Dunsmore*, ¶ 10. Accordingly, we review judicial disqualification questions de novo, "determining whether the lower court's decision not to recuse was correct under the Montana Code of Judicial Conduct." *Dunsmore*, ¶ 10; *Draggin' Y*, ¶ 10.

¶20 Our standard of review of a District Court's decision to grant or deny sanctions under Rule 11 is de novo for the district court's determination that the

pleading, motion or other paper violates Rule 11. *Byrum v. Andren*, 2007 MT 107, ¶ 19, 337 Mont. 167, 159 P.3d 1062. We review the district court's findings of fact underlying that conclusion to determine whether such findings are clearly erroneous. If the court determines that Rule 11 was violated, then we review the district court's choice of sanction for an abuse of discretion. *Byrum*, ¶ 19.

¶21 We review a district court's determination to grant attorney fees pursuant to § 37-61-421, MCA, for an abuse of discretion. *Tigart v. Thompson*, 244 Mont. 156, 159-60, 796 P.2d 582, 584 (1990). This Court generally defers to the discretion of the district court regarding sanctions because it is in the best position to know whether parties are disregarding the rights of others and which sanction is most appropriate. *Estate of Bayers*, 2001 MT 49, ¶ 9, 304 Mont. 296, 21 P.3d 3.

DISCUSSION

¶22 *1. Were Paul and Mary entitled to a hearing on their Petition for Order to Recover Assets?*

¶23 Paul argues that he was deprived of his right to due process when the court ruled on his motion without a hearing. We disagree.

¶24 Whether to hold a hearing is a matter left to the discretion of the district court, according to Mont. Unif. Dist. Ct. R. 2©. We cannot find the District Court abused its discretion when it ruled without first conducting a hearing on the Petition. The court

endeavored to consider and rule on Paul's Petition expeditiously, ordering the parties to file inventories within a thirty-day timeframe. Paul filed his inventory late. We also observe that the untimely inventory was deficient in that it contained arguments of counsel (Towe) and "unknown" values for most assets identified. Additionally, Paul failed to adequately respond to the written financial documentation attached to Chris's response with similar documentation that the debt was owing to the Estate and, instead, asked for a hearing. There was ample evidence provided by Chris, the pleadings, and evidence already in the record, upon which the court could base its straightforward determination that the assets Paul sought to recover did not exist. The court did not abuse its discretion in ruling without a hearing.

¶25 Although the decision to grant a hearing is within the discretion of the court, Paul also alleges a due process violation. While due process requires notice and an opportunity for a hearing appropriate to the circumstances of the case, "the process due in any given case varies according to the factual circumstances of the case, the nature of the interests at stake and the risk of making an erroneous decision." *Montanans v. State*, 2006 MT 277, ¶ 30, 334 Mont. 237, 146 P.3d 759. Therefore, due process requirements of notice and a meaningful hearing are "flexible" and are adapted by the courts to meet the procedural protections demanded by the specific situation. Two factors that counsel in favor of an evidentiary hearing are whether the court must resolve a dispute of material fact or weigh the

credibility of witnesses. *Sampley*, ¶ 12; *Harrington v. Energy W. Inc.*, 2015 MT 233, ¶ 11, 380 Mont. 298, 356 P.3d 441.

¶26 Here, the factual circumstances of the case, the nature of the interests at stake, and the risk of making an erroneous decision weigh in favor of deciding the matter without a hearing. *Montanans*, ¶ 30. The factual circumstances are that the parties disagree about the existence of a debt owed to the Estate in the form of unpaid dividends, wages, undervaluation of stock, and life insurance proceeds. Very simply, Paul believed Chris and Barry owed their father money at the time he died and wanted them to pay that money back to the Estate.

¶27 The nature of the interest, the existence of a debt, is easily evaluated with written documentation. Paul had ample opportunity to provide documentation, affidavits, or other evidence establishing the existence of a debt, but failed to do so. Paul failed to adequately prepare and timely file an inventory, despite the court's willingness and efforts to rule on Paul's motion quickly.

¶28 Additionally, the decision Judge Pinski was charged with making was straightforward—whether there was a debt evidenced by written documentation or other evidence that Chris, Barry, or their business entities owed to Ed at the time of his death. While Paul submitted a Brief in Support of his Petition and a Reply Brief attempting to persuade the District Court that Ed was owed substantial sums in the form of loans, unpaid wages, undervalued stock, and life

insurance proceeds, Paul made no effort to provide the court with timely and adequate written documentation—such as an inventory. Paul's *arguments* are clear from where the alleged source of funds emanate and why the amounts documented by Chris and Barry are inaccurate. However, noticeably absent from all of his pleadings is any evidence substantiating the existence of a debt owing to Ed. Paul offers no evidence actually supporting the existence of the alleged debt. He offers notes in his father's handwriting, but these notes are largely illegible and not probative of the existence or inexistence of the debt. This Court concludes that the decision before the District Court was simple. Therefore, the risk of making an erroneous decision was low. *Montanans*, ¶ 30.

¶29 Finally, there is no genuine "dispute of material fact," as Paul and Mary have produced nothing that contradicts the evidence produced by Chris. Indeed Paul and Mary have not asserted on appeal that the District Court's order denying the Petition was substantively in error. Accordingly, after reviewing the evidence in this matter, the factual circumstances of the dispute, the nature of the interests at stake, and the risk of making an erroneous decision, this Court concludes Paul was afforded adequate due process in the District Court's resolution of his Petition, and the court did not err in ruling on Paul's Petition without a hearing.

¶30 *2. Did the District Court correctly conclude that the allegations of bias made against it were frivolous?*

¶31 Paul and Towe argue they merely "suggested two concerns" to direct Judge Pinski's inquiry into whether he had anything to disclose that would affect his impartiality. Paul and Towe argue their actions align with the procedure set forth by this Court's ruling in *Draggin' Y.*

¶32 The 2008 Montana Code of Judicial Conduct "establishes standards for the ethical conduct of judges and judicial candidates." *Reichert v. State*, 2012 MT 111, ¶ 41, 365 Mont. 92, 278 P.3d 455 (quoting M. C. Jud. Cond., Preamble [3]). "Rule 2.12 of the Montana Code of Judicial Conduct and §§ 3-1-803, and -805, MCA, governs judicial disqualification." *Draggin' Y*, ¶ 18. "We adopted the ABA Model Code of Judicial Conduct in 2008 in part because it would allow us to consider a well-developed body of case law from other jurisdictions." *Dunsmore*, ¶ 16 (citing *In the Matter of the 2008 Montana Code of Judicial Conduct*, AF 08-0203 (Dec. 12, 2008)).

¶33 Rule 2.12 of the Montana Code of Judicial Conduct states: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." "Impartial," "impartiality," and "impartially" are defined in the terminology section to

mean "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." M. C. Jud. Cond. Terminology Comment 5 to Rule 2.12 states: "A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."

¶34 Section 3-1-803, MCA, provides that "Any justice, judge, justice of the peace, municipal court judge or city court judge *must not* sit or act in any action or proceeding" when the judge is a party, or has an interest in the proceeding; when a relationship exists between the judge and either a party or any attorney or member of a firm of attorneys; or when the judge was counsel or a judge in a lower court which rendered the decision on appeal. (Emphasis added). The existence of any circumstance set forth in § 3-1-803, MCA, mandates that the judge not preside in the action. Paul and Towe did not allege any circumstance which would invoke the provisions of § 3-1-803, MCA.

¶35 In contrast, § 3-1-805, MCA, entitled "Disqualification for Cause," allows a party to any proceeding to request a different judge when the party "files an affidavit alleging facts showing personal bias or prejudice of the presiding judge . . . ." Section 3-1-805, MCA, is "limited in its application to judges presiding in the district courts, justice of the peace courts, municipal courts, small claims courts,

and city courts." The statute sets forth timeframes in which the motion must be filed and a procedure for resolving the disqualification request before another district judge. Section 3-1-805, MCA, as Judge Pinski recognized, is the method by which a party may seek disqualification of a judge because of a belief by the party that the judge is biased and partial and the party will not have its case heard by a fair and impartial tribunal. The affidavit requirement serves the important purpose of ensuring that the party does, in fact, harbor a belief and reason which substantiates that the judge cannot be fair and impartial. Section 3-1-805, MCA, requires that the party "file an affidavit alleging *facts* . . . ." (Emphasis added).

¶36 Section 3-1-805, MCA, is the statutory remedy which protects a party's fundamental interest in his or her trial proceeding in front of a fair and impartial tribunal. In the absence of either: (1) a disqualification order by a different judge following a disqualification proceeding, or (2) the presiding judge's decision to recuse for reasons stated in the Montana Rules of Judicial Conduct, a judge has an equally strong duty not to recuse when the circumstances do not require recusal. *Laird v. Tatum*, 409 U.S. 824, 837, 93 S. Ct. 7, 15 (1972) (a judge "has a duty to sit where not disqualified, which is equally as strong as the duty to not sit where disqualified."). Accordingly, the procedure set forth in § 3-1-805, MCA, protects both significant and weighty interests by ensuring that a party's belief the tribunal is biased is resolved before a different judge and, in the absence of disqualification, that the presiding

judge continue with the proceeding. A court's adherence to § 3-1-805, MCA, ensures there are no warrantless delays and that the issue of an impartial tribunal is clearly and effectively addressed. Judge Pinski correctly required Towe and Paul to file a disqualification motion pursuant to § 3-1-805, MCA, or provide a factual basis from which he could assess whether recusal was necessary. Absent either occurring, he had an equal duty to sit when not disqualified. *Laird*, 409 U.S. at 837, 93 S. Ct. at 15.

¶37 Significantly, when a disqualification proceeding is commenced by filing a motion and affidavit pursuant to § 3-1-805, MCA, the determination of whether a judge should be ordered disqualified is guided by the Montana Code of Judicial Conduct, particularly M. C. Jud. Cond. 2.12. In *Draggin' Y*, the disqualifying information was discovered after the trial court had rendered its decision but prior to the case being appealed. *Draggin' Y*, ¶ 9. The impartiality of the presiding judge was raised on appeal through briefing. *Draggin' Y*, ¶ 9. This Court concluded that the facts substantiating disqualification of the presiding judge should have been disclosed to the parties by the judge. *Draggin' Y*, ¶ 16. We, accordingly, allowed the disqualification request to proceed and followed the procedure set forth in § 3-1-805, MCA, remanding the case for a disqualification proceeding to occur before another district judge. *Draggin' Y*, ¶ 32. Here, although Towe was gratuitously made aware of this procedure by the District Court, he did not file a disqualification motion and supporting affidavit pursuant to § 3-1-805, MCA, to have a disqualification

proceeding before a different district judge. Instead, Towe and Paul continued to "suggest" Judge Pinski might be biased and should examine whether he had anything to disclose. Although a specific procedure existed for the removal of Judge Pinski based on a perceived bias and partiality, Towe and Paul failed to avail themselves of this statutory remedy or to provide Judge Pinski with evidence to support their suggestion that he consider recusing.

¶38 Here, in contrast to *Draggin' Y*, there was nothing for Judge Pinski to disclose and no reason his "impartiality might reasonably be questioned." M. C. Jud. Cond. 2.12. Chris never donated to Pinski's campaign and Pinski was never at Peak Fitness on the date in question. The allegations made by Towe and Paul were without any basis in law or fact, frivolous, and impugned the integrity of the court. Despite admitting that his allegations were unfounded, Paul still argues, even on appeal, that the District Court erred in "treating a request for disclosure as set forth in *Draggin Y Cattle Co.*, as a Motion for Disqualification for Bias or Prejudice Under Rule 2.3." Towe and Paul misconstrued *Draggin' Y* to Judge Pinski, as a basis to justify their inexcusable actions, and again attempt to do so here. Although Towe and Paul clearly questioned the impartiality of Judge Pinski, they attempt to color it by disingenuously arguing they merely "asked Judge Pinski if he had anything to disclose that would affect his impartiality" and then misconstrue this Court's decision in *Draggin' Y* as legal authority to support their allegations. Towe and Paul allege that by treating his inquiry as an allegation of bias or

prejudice under § 3-1-805, MCA, instead of a "disqualification pursuant to Rule 2.12," Judge Pinski committed "fatal error." Presumably, the "fatal error" is the unfavorable ruling Judge Pinski made when he denied Paul's Petition, although on appeal Towe and Paul have not raised any error respecting the Petition, other than the court's failure to hold a hearing.

¶39 Judge Pinski correctly stated the law when he carefully laid out the options Towe and Paul had if they believed Judge Pinski was biased against them. The District Court was aware that the allegations had not been properly submitted as an affidavit under § 3-1-805, MCA, and instructed Paul accordingly. In fact, the District Court ordered Paul to take any of three actions, one of which would have been to file under § 3-1-805, MCA, "and follow the process outlined in that statute." An alternative was to substantiate the allegations, presumably so that Judge Pinski could assess whether recusal was necessary. The final alternative was a meaningful apology to the court. Towe and Paul elected not to follow any of the court's advice and continued in their attempt to misconstrue the law and manipulate the court.

¶40 It is abundantly clear to this Court that Towe and Paul were attempting to control and manipulate the way the District Court handled Towe's unsubstantiated bias allegations. Allowing an attorney to make baseless inquiries into a judge's impartiality because that judge has made adverse rulings would result in chaos in the courts, impugn

the integrity of the judge, render meaningless a judge's commitment to impartially decide cases, and completely undermine public confidence in the judiciary. "Schemes to drive a judge out of a case . . . should not be allowed to succeed." *State v. Ahearn*, 137 Vt. 253, 271, 403 A.2d. 696, 707 (1979). Therefore, a lawyer or party who acts deliberately and with the intent to cause the judge to become biased and prejudiced against him or her is not entitled to have the judge disqualified.[4]

¶41 This Court concludes the District Court did not err by treating the allegations made by Towe and Paul against Judge Pinski as allegations of bias or prejudice and then instructing Towe and Paul to take one of three courses of action upon which the court could determine whether disqualification proceedings should be commenced. The allegations were false and made without any evidentiary support. Judge Pinski correctly observed that he had "nothing to disclose. And your continued impunity of me and making a mockery of this court and the judiciary of the State of Montana, . . . should [cause you to] be ashamed of yourself."

---

[4] *See, e.g., State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (Ariz. 1983) (defendant was not entitled to have trial judge disqualified from resentencing him where defendant admitted sending judge unsolicited goods from mail-order forms); *People v. Page*, 702 N.Y.S.2d 552 (Co. Ct. 2000) (judge's viewing of defendant's post-verdict disturbance in courtroom did not warrant judge's disqualification from sentencing); *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 644, 940 P.2d 134 (Nev. 1997) (lawyer supported judge's opponent in election and subsequently argued that judge had an express or implied bias against her; motion for disqualification denied).

¶42 *3. Did the District Court err by imposing Rule 11 sanctions against Paul and his attorney?*

¶43 The District Court imposed specific sanctions jointly and severally on Towe and Paul pursuant to M. R. Civ. P. 11 and § 37-61-421, MCA, including: (1) removal of Paul as Co-Personal Representative; (2) holding Towe and Paul jointly and severally liable for attorney fees in the amount of $13,240.55 payable to Chris and $2,310 payable to Gary Bjelland; and (3) holding Towe and Paul jointly and severally liable for a $2,000 payment to the Cascade County Law Clinic.

¶44 Towe and Paul argue that because the Notice of Appeal was filed on June 29, 2018, the District Court did not have jurisdiction to remove Paul as Co-Personal Representative because its Rule 11 Order, entered July 17, 2018, was filed after the Notice of Appeal. Paul also argues the District Court erred in sanctioning them pursuant to M. R. Civ. P. 11 and § 37-61-421, MCA, and that the sanctions imposed are "inappropriate and overly severe."

¶45 First, we consider the question of jurisdiction. The District Court issued its order denying Paul's Petition on March 13, 2018. Paul filed a motion and brief in support to set aside the order dated March 13, 2018, pursuant to M. R. Civ. P. 60(b), alleging Judge Pinski was biased and prejudiced. Following further pleading on the Rule 60(b) motion, the District Court conducted a show cause hearing on June 21, 2018. However, the District Court's written Rule 11 Order

was not issued until July 17, 2018. Prior to Judge Pinski entering his written Rule 11 Order, and eight days after the show cause hearing, Towe and Paul filed the instant appeal on June 29, 2018. They maintain that when Judge Pinski entered his Rule 11 Order on July 17, 2018, the court did not have jurisdiction to decide a substantive matter of probate because they had filed their Notice of Appeal.[5]

¶46 When a notice of appeal is filed from a district court order, in most cases jurisdiction of the district court passes to this Court. *Powers Mfg. Co. v. Leon Jacobs Enters.*, 216 Mont. 407, 411, 701 P.2d 1377, 1380 (1985) (citation omitted). After notice has been filed, the district court retains jurisdiction only to correct clerical errors and jurisdiction over ancillary

---

[5] Montana Rule of Appellate Procedure 6(4)(e) provides, in pertinent part:

> In estate, guardianship, and probate matters, the following orders are considered final and must be appealed immediately, and failure to do so will result in waiver of the right to appeal:
>
> . . . . .
>
> An order refusing, allowing, or directing the distribution of any estate or part thereof, or the payment of a debt, claim, legacy, or distributive share.

On June 29, 2018, Towe and Paul filed a Notice of Appeal from the District Court's order denying their Petition. The order decided whether a debt was owing to the Estate and should be paid. The order was an order "refusing . . . the payment of a claim" and thus was a final order pursuant to M. R. App. P. 6(4)(e).

matters, as well as some jurisdiction over matters involving an appeal such as undertaking of costs, stay of judgment, and matters involving transcript on appeal. *Powers*, 216 Mont. at 411-12, 701 P.2d at 1380 (citations omitted). (*See also Powder River Cnty. v. State*, 2002 MT 259, ¶ 27, 312 Mont. 198, 60 P.3d 357).

¶47 However, an appeal can only be taken from a final judgment or special order made after final judgment. M. R. App. P. 1. "A final judgment is one which constitutes a final determination of the rights of the parties; any judgment, order or decree leaving matters undetermined is interlocutory in nature and not a final judgment for purposes of appeal." *Powder River Cnty.*, ¶ 28. (citing *In the Matter of B.P.*, 2000 MT 39, ¶ 15 298 Mont. 287, 995 P.2d 982); *see also Howard Gault & Son, Inc. v. First Nat. Bank of Hereford* (Tex. Civ. App. 1975), 523 S.W.2d 496, 498 (noting that "A judgment is considered final only if it determines the rights of the parties and disposes of all of the issues involved so that no future action by the court will be necessary in order to settle and determine the entire controversy.").

¶48 Here, when Paul filed his Rule 60(b) motion, he extended the period in which the District Court had jurisdiction. Additionally, Paul, by interjecting the issue of prejudice, bias, and the court's erroneous rulings, together with the District Court's decision to impose sanctions, necessitated that the sanctions be imposed before the judgment could be considered final for purposes of appeal. Removal of Paul as a Co-Personal Representative was a sanction imposed by

the District Court. Accordingly, the District Court had jurisdiction to enter its Rule 11 Order.

¶49 Having resolved the issue of jurisdiction, we turn to the appropriateness of the sanctions imposed by the District Court. Rule 11 requires that when an attorney signs a pleading, the attorney has read it and to the "best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . ," the pleading is not "being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." M. R. Civ. P. 11. The "factual contentions must have evidentiary support . . . ," and the "legal contentions [must be] warranted by existing law . . . ." M. R. Civ. P. 11. *See generally D'Agostino v. Swanson*, 240 Mont. 435, 784 P.2d 919 (1990); *Morin v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 146, 370 Mont. 305, 302 P.3d 96.

¶50 This Court has little difficulty concluding Towe and Paul violated Rule 11 in several significant ways. First, Towe and Paul alleged Judge Pinski was biased and prejudiced without any evidentiary basis. The standard for determining whether a pleading has a sufficient factual or legal basis is reasonableness under the circumstances. *D'Agostino*, 240 Mont. at 445, 784 P.2d at 925 (citation omitted). Towe certified and signed his pleading that, pursuant to M. R. Civ. P. 11(b), and "to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances [ ]" "Chris Boland or his corporation has made a significant contribution to Judge Pinski's campaign." There was no

evidentiary support in this allegation whatsoever since Chris had not made a campaign contribution to Judge Pinski's campaign. Further, Towe and Paul conceded their allegations lacked sufficient evidentiary support when Towe stated: "I fully acknowledge that we could have and should have investigated those matters that we did raise further." The same is true with respect to the alleged Peak Fitness encounter. Assuming failure to greet a litigant in a pending case could even be a basis for disqualification, Judge Pinski was not present at the facility when the "encounter" supposedly happened. We conclude the pleading was frivolous and lacked any possibility of evidentiary support.

¶51 We also conclude the pleading was presented for an improper purpose. "The standard for determining whether a party acted with an improper purpose is also an objective one, that is, reasonableness under the circumstances." *D'Agostino*, 240 Mont. at 445, 784 P.2d at 925. "This Court will give the district courts wide latitude to determine whether the factual circumstances of a particular case amount to frivolous or abusive litigation tactics, for . . . the district court has tasted the flavor of the litigation and is in the best position to make these kinds of determinations." *D'Agostino*, 240 Mont. at 446, 784 P. 2d at 926. Here, the District Court held, "Mr. Towe and Mr. Boland's false and misleading comments were clearly presented for an improper purpose; *to wit* to harass the Court for issuing a ruling contrary to their position and to cause unnecessary delay." From this Court's review of the record, we conclude the District Court's finding that

the allegations made by Towe and Paul were for the improper purpose of harassing and intimidating the District Court into reconsidering its adverse rulings against Paul and were not clearly erroneous. The District Court correctly concluded that Towe and Paul violated Rule 11. Further, none of the District Court's findings of fact underlying that conclusion are clearly erroneous. *Byrum*, ¶ 19.

¶52 Next, we consider the District Court's choice of sanction. We review a district court's determination to grant attorney fees pursuant to § 37-61-421, MCA, for an abuse of discretion. *Bayers*, ¶ 9. This Court generally defers to the discretion of the district court regarding sanctions because it is in the best position to know whether parties are disregarding the rights of others and which sanction is most appropriate. *Bayers*, ¶ 9; *McKenzie v. Scheeler*, 285 Mont. 500, 506, 949 P.2d 1168, 1172 (1997). Based on our review of the record, we conclude that the District Court did not abuse its discretion regarding attorney fees.

¶53 To begin, the District Court sanctioned Towe and Paul by requiring them to pay attorney fees, as well as a sum to the Cascade County Law Clinic. These sanctions were imposed pursuant to § 37-61-421, MCA, as well as M. R. Civ. P. 11. Section 37-61-421, MCA, provides:

> An attorney or party to any court proceeding who, in the determination of the court, multiplies the proceedings in any case unreasonably and vexatiously

> may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct.

The District Court found that because of frivolous bias allegations, more pleadings were required to be filed by Chris and Barry, a show cause hearing was necessary, the case was delayed, and the cost of litigation was needlessly increased. The District Court concluded, "Paul's false and misleading comments unreasonably and vexatiously multiplied the proceedings." This Court affirms the District Court's imposition of attorney fees pursuant to § 37-61-421, MCA.

¶54 We also conclude that the imposition of attorney fees was an appropriate sanction pursuant to Rule 11. Towe violated Rule 11. If a pleading is signed in violation of M. R. Civ. P. 11, the district court "shall impose . . . an appropriate sanction." *Morin*, ¶ 38. The purpose of Rule 11 is to discourage dilatory or abusive tactics and to streamline the litigation process by lessening frivolous claims or defenses. *Morin*, ¶ 38. Monetary sanctions should not be viewed simply as a fee-shifting device because the "more important goal is punishment for wasteful and abusive litigation tactics in order to deter the use of such tactics in the future." *Morin*, ¶ 38 (citing *D'Agostino*, 240 Mont. at 444-45, 784 P.2d at 925). Here, the District Court evaluated the reasonableness of attorney fees under the seven factors set forth by this Court in *Plath v. Schonrock*, 2003 MT 21, ¶ 36, 314 Mont. 101, 64 P.3d 984. We

find the District Court's analysis of attorney fees under those factors set forth in its Rule 11 Order sufficient. Here, the District Court was justified in imposing attorney fees as punishment for Towe's and Paul's wasteful and abusive litigation tactics.

¶55 Next, we determine whether the District Court abused its discretion by removing Paul as Co-Personal Representative pursuant to Rule 11 and § 72-3-526(2)(a), MCA, pertaining to removal for cause. This Court has given broad authority to district courts to remove personal representatives so long as the grounds for such removal are "valid and supported by the record." *In re Estate of Robbin*, 230 Mont. 30, 33, 747 P.2d. 869, 871 (1987). A personal representative is a fiduciary who has a duty to "settle and distribute the estate of the decedent . . . as expeditiously and efficiently as is consistent with the best interests of the estate." Section 72-3-610, MCA. Section 72-3-526(2)(a), MCA, provides: "Cause for removal [of a personal representative] exists: when removal would be in the best interests of the estate" or when the personal representative has disregarded an order of the court, has mismanaged the estate, or failed to perform any duty pertaining to the office. *In re Estate of Townsend*, 243 Mont. 185, 188, 793 P.2d 818, 820 (1990). The applicable standard is whether the district court has abused its discretion. *Townsend*, 243 Mont. at 188, 793 P.2d at 820.

¶56 In its Rule 11 Order, the District Court set forth its rationale for removing Paul as a Co-Personal Representative as follows:

> The Court's broad discretionary authority to fashion Rule 11 sanctions includes the ability to remove a personal representative who files false and frivolous pleadings with the Court. Here, as evidenced by his lack of judgment in filing false and frivolous pleadings, Paul Boland failed to act with care and prudence, he failed to act expeditiously, and he failed to act in the best interests of the estate in prosecuting this litigation.

¶57 The record supports removal of Paul as Co-Personal Representative of the Estate. The pleadings, testimony, and extensive litigation and harassment show a pattern of hostility towards opposing counsel and the District Court on the part of Paul and Towe. Their out-of-bounds conduct has produced a multitude of cases, repetitive motions, unnecessary delay and costs, factual contentions lacking in evidentiary support, and legal maneuvers unwarranted by existing law.

¶58 This Court agrees that removal of Paul as Co-Personal Representative is in the best interest of the Estate. Already the probate of the Estate has been delayed more than a year by the false and unsubstantiated allegations of bias and the ensuing litigation with which the District Court, Chris, and

Barry became embroiled. This Court concludes that removal of Paul was necessary to ensure an expeditious settlement and closure of the Estate, and the District Court did not abuse its discretion in sanctioning and removing Paul as Co-Personal Representative.

¶59 *Should attorney fees and costs be assessed against Paul and Mary in this appeal?*

¶60 Chris and Barry assert they are entitled to attorney fees and costs incurred for responding to this appeal. Under M. R. App. 19(5) this Court:

> may, on a motion to dismiss, a request included in a brief, or sua sponte, award sanctions to the prevailing party in an appeal, cross-appeal, or a motion or petition for relief determined to be frivolous, vexatious, filed for purposes of harassment or delay, or taken without substantial or reasonable grounds. Sanctions may include costs, attorney fees, or such other monetary or non-monetary penalty as [this Court] deems proper under the circumstances.

¶61 In determining whether an appeal is frivolous and unreasonable, we generally assess whether the arguments were made in good faith. *Sorenson v. Massey-Ferguson, Inc.*, 279 Mont. 527, 531, 927 P.2d 1030, 1033 (1996); *Wolf's Interstate Leasing & Sales,*

L.L.C. v. Banks, 2009 MT 354, ¶ 13, 353 Mont. 189, 219 P.3d 1260. Throughout this dispute, Paul and Towe have given little credence to the rules that govern professional conduct and, respecting Towe, their duty of candor to the tribunal. They have displayed significant disdain for the judicial process and have sought to manipulate and abuse it to their own benefit. In doing so, they have continued the pattern of vexatious and frivolous litigation they displayed in the District Court before this Court. Significantly, this appeal has not been about whether the District Court erred in the substance of its order denying Paul's Petition.

¶62 It is important for the sake of the litigants and for the judicial system that litigation will at some time finally end. *Tipp v. Skjelset*, 1998 MT 263, ¶ 28, 291 Mont. 288, 967 P.2d 787. Moreover, this Court is burdened by a heavy volume of business and the problem is needlessly aggravated when frivolous appeals are taken. *CAN Ins. Co. v. Dunn*, 273 Mont. 295, 302, 902 P.2d 1014, 1018 (1995); *Bragg v. McLaughlin*, 1999 MT 320, ¶ 28, 297 Mont. 282, 993 P.2d 662. This matter could have ended a year-and-a-half ago, had Paul and Towe simply retracted their baseless allegations and issued a meaningful apology to the District Court. Instead they chose to continuously reassert their allegations, wasting the time and resources of this Court, opposing counsel, and the Estate. They continued to embark on a pattern of hostile litigation with Judge Pinski, opposing counsel, Chris, and Barry. We conclude this constitutes an abuse of the appellate process and frivolous, vexatious litigation. Accordingly, this is a

proper case in which to impose sanctions for a frivolous appeal pursuant to M. R. App. P. 19(5). We, therefore, remand to the District Court for a determination of the Plaintiffs' reasonable costs and attorney fees incurred on appeal.

CONCLUSION

¶63 The District Court did not err in denying the Petition for Order to Recover Assets without a hearing. Nor did the District Court err by determining that the circumstances alleged by Towe and Paul requiring Judge Pinski's disqualification were frivolous, without any evidentiary support, and were made in violation of Rule 11. The District Court had jurisdiction to sanction Paul and Towe, and the sanctions imposed by the District Court were appropriate. This Court awards attorney fees and costs on appeal to Chris and Barry. We affirm the District Court's orders and remand for proceedings consistent with this Opinion.

/S/ LAURIE McKINNON

We concur:

/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JAMES JEREMIAH SHEA

Justice Beth Baker, concurring.

¶64 I write to make an additional observation. Even if Paul and his attorney had evidence that Chris made a contribution to Judge Pinski's campaign for

election to the District Court,[6] a person's financial contribution to a judicial candidate within the limits prescribed by law would not, without more, give rise to a disqualification motion. Montana has chosen to elect its judges, and campaign finance is an ordinary and lawful part of running for office. The State's contribution limits for individual candidates for statewide office are low—presently, $360 per election. Admin. R. M. 44.11.227(1)(b) (2019); § 13-37-216, MCA. The Ninth Circuit U.S. Court of Appeals recently upheld Montana's small-dollar limits against a First Amendment challenge. *Lair v. Motl*, 873 F.3d 1170 at 1172, 1179, 1181, 1184 (9th Cir. 2017) (holding that the limits were closely drawn to further the state's important interest in preventing actual or perceived quid pro quo corruption, Montana had shown that the risk of quid pro quo corruption was not illusory, and the contribution limits were narrowly focused, as they did not prevent contributors from affiliating with candidates of their choosing or candidates from raising the money needed for effective campaigning), *cert. denied, Lair v. Mangan*, 139 S. Ct. 916 (2019). Nothing in the Court's Opinion today should be taken to suggest that Paul's motion was meritless for lack of evidence alone.

¶65 Since the Supreme Court's decision in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 884, 129 S. Ct. 2252, 2263–64 (2009), holding that due process

---

[6] Through counsel, Paul alleged in his Rule 60(b) motion that Chris "or his corporation" contributed to Judge Pinski's campaign, but corporate contributions to a candidate are prohibited by law. Section 13-35-227, MCA.

required a judge to recuse himself in a case where a party's financial support of his campaign had a "significant and disproportionate" influence, other states have adopted amendments to their rules governing judicial conduct and disqualification to address campaign contributions. Particularly given the proliferation of independent expenditures following the Court's ruling in *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010), it would be useful for this Court to review its rules and consider changes that could provide guidance to litigants and judges in determining whether and under what circumstances disqualification or recusal should be considered.

/S/ BETH BAKER

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 18-0607

IN RE THE ESTATE OF EDWARD M. BOLAND,

Deceased,

PAUL BOLAND and MARY GETTEL, as heirs of the Estate of Dixie L. Boland,

Petitioners and Appellants,

ORDER

v.

CHRIS BOLAND, BARRY BOLAND, ED BOLAND CONSTRUCTION, INC., and NORTH PARK INVESTMENTS, LLC,

Respondents and Appellees.

Appellants, Paul Boland and Mary Gettel, by and through their counsel, Thomas Towe, have filed a Petition for En Banc Rehearing. Appellees have filed a response.

Pursuant to Section IV, Paragraph 2, of the Montana Supreme Court Internal Operating Rules, "Any petition for rehearing shall be considered by

those justices hearing the case in the first instance." This case was decided by a five-justice panel. Thus, the decision for or against rehearing shall be made by the same five-justice panel which rendered the decision. There is no provision in this Court's internal operating rules allowing for an en banc rehearing petition to be filed.

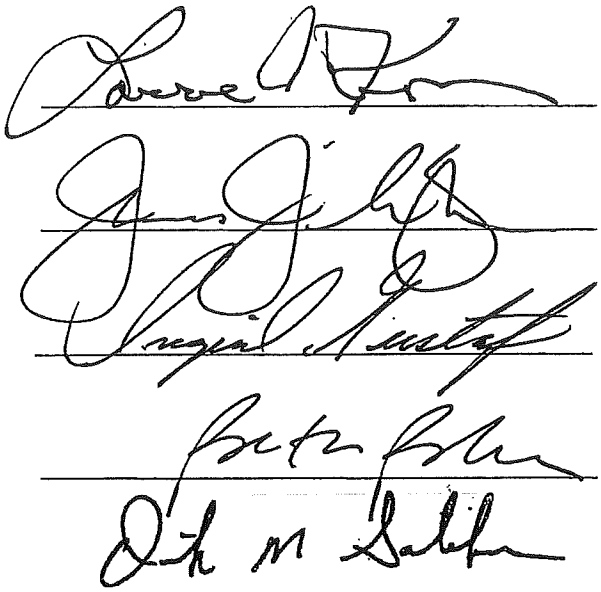
This Court rendered its Opinion in the above entitled action on October 3, 2019. The Appellants have also filed a petition for rehearing. This Court will consider a petition for rehearing presented only upon the following grounds: that the Court overlooked some fact material to the decision; that the Court overlooked some question presented by counsel that would have proven decisive to the case; or that the Court's decision conflicts with a statute or controlling decision not addressed by the Court. M. R. App. P. 20(1)(a).

Upon review of the Appellants' Petition, this Court determines that none of the conditions listed in M. R. App. 20(1)(a) have been met.

IT IS ORDERED that the Appellants' petition for rehearing is DENIED.

IT IS FURTHER ORDERED that the Clerk of this Court give notice of this Order to all counsel of record and to the Honorable Gregory G. Pinski, Presiding Judge.

DATED this 5th day of November, 2019.



Justices

MONTANA EIGHTH JUDICIAL DISTRICT
COURT, CASCADE COUNTY

IN THE MATTER OF OF: EDWARD M. BOLAND, Deceased.	) Cause No. ADP-15-125) ORDER DENYING) PETITION FOR) ORDER TO RECOVER) ASSETS

This matter comes before the Court on a Petition for Order to Recover Assets, which was filed by Co-Personal Representative Paul Boland on November 30, 2017. Co-Personal Representative Chris Boland responded on December 22, 2017. Paul Boland replied on January 22, 2018. A Notice of Issue was filed on January 29, 2018, in accordance with Local Rule 7B. The Court ordered the co-personal representatives to file an estate inventory on February 2, 2018. Chris Boland filed an inventory on March 2, 2018, in which he indicated Paul Boland refused to approve the inventory before filing it. Paul Boland did not separately file an estate inventory, thereby violating the Court's February 2, 2018, Order to File Inventory. The matter is ripe for decision.

Background. Paul Boland asks the Court to order Chris Boland, Barry Boland, and their businesses, Ed Boland Construction, Inc. and North Park Investments, LLC, to return several items to the Estate of Edward Boland. Paul seeks to recover $270,000 for what he contends is the remainder of the fair market price for the buyout of Ed's shares in Ed

Boland Construction, Inc, and challenges as unconscionable the stock buyout of Ed's shares following his death. He seeks the 2014 dividend from Ed Boland Construction, Inc. which was never paid to Ed. He seeks to recover loan proceeds, or a certificate of deposit received in lieu of the loan proceeds, from Chris and Barry Boland for the money given to them by Ed to purchase shares in Ed Boland Construction, Inc. Paul seeks to recover from North Park Investments, LLC, a possible loan made to the business and possible profit sharing agreement.[1] Paul requests to act without Chris's approval or to appoint a special administrator; this particular request is held in abeyance pending the hearing on the cross-motions to remove co-personal representative.

Discussion. Section 72-3-606(2), MCA, imposes the following duty on a personal representative: "The personal representative shall. . . take all steps necessary for the management, protection, and preservation of the estate in the personal representative's possession. The personal representative may maintain an action to recover possession of property[.]" The issue for the Court is to decide with each category of challenged assets whether the asset exists and belongs to the estate.

1. $270,000 for fair market buyout of Ed's shares in Ed Boland Construction, Inc.

---

[1] The Petition for Order to Recover Assets lists several other categories of assets Paul wants returned to the estate. However, the brief in support of the petition provides details to only the assets listed above. The Court will not consider the additional categories raised in the Petition because Paul does not provide factual or legal support for his requests.

Paul contends the estate was underpaid for Ed's shares in Ed Boland Construction, Inc. The source of the contention is Paul believes Ed was issued 132 shares in the company, while Chris claims Ed was issued 26.4 shares in the company. Both parties agree Ed held a 26.4% stake in the company. The confusion arises because one document claims there were 500 shares in the company, while other documents claim there were 100 shares total. The Court has examined the issue and concludes there were only 100 shares of Ed Boland Construction, Inc. stock ever issued. The shareholder agreement and the amendment to it outline the procedure for purchasing Ed's shares. Ed Boland Construction, Inc., held a life insurance policy on Ed for $400,000. Upon Ed's death, the $400,000 from the life insurance policy was used to purchase Ed's shares of Ed Boland Construction, Inc. The value of Ed's shares in the company was less than the $400,000 purchase price; therefore, the Estate of Ed Boland is not owed additional funds for the purchase by Ed Boland Construction, Inc. of Ed's shares to the company. The estate inventory shows the $400,000 as an asset of the estate. The Court concludes there is no additional asset to be recovered from the sale of Ed Boland's stock in Ed Boland Construction, Inc.

2. Challenge to purchase Ed Boland's stock as unconscionable.

Paul challenges the purchase by Ed Boland Construction, Inc. of Ed's shares in the company as unconscionable. Although Paul does not define his use of the word unconscionable or provide legal authority for his position, it is clear from the briefing

that Paul believes the sale was unconscionable because the price was too low. The amendment to the shareholder's agreement provides that if the value of Ed's shares is greater than the $400,000 life insurance proceeds, then the company will pay into Ed's estate the amount necessary to pay full value for Ed's shares. The shareholder agreement specifically sets the purchase price of the stock in 2014 as $5,072.65. Ed's 26.4 shares of stock are valued by the shareholder agreement at $133,917.96. By invoking the concept of conscionability, Paul seeks to have the shares valued at their fair market value instead of at the shareholder agreement value. Dan Vuckovich, CPA, performed an independent valuation of Ed's stock in Ed Boland Construction, Inc. Mr. Vuckovich determined the fair market value of Ed's shares is $278,100. Therefore, the Court concludes the purchase by Ed Boland Construction, Inc. of Ed's shares for $400,000 was not unconscionable. There is no additional asset to recover related to the valuation of Ed's shares in Ed Boland Construction, Inc.

3. 2014 dividend from Ed Boland Construction, Inc.

Paul seeks to recover the 2014 dividend from Ed Boland Construction, Inc., which he claims was never paid to Ed. Chris responded by producing a spreadsheet showing payments made by Ed Boland Construction, Inc. to Ed. In 2014, Ed received a $230,000 payment from the corporation. Chris explained $140,000 of this payment consisted of Ed's 2014 dividend. Paul does not counter this evidence. Based on the evidence presented, the Court concludes Ed was paid his 2014 dividend during his lifetime. The proceeds of the dividend were likely in his TOD

account at Prairie Mountain Bank, which had a balance of $180,000 at death. The 2014 dividend is not an asset the Estate of Edward Boland needs to recover.

4. Loans to Chris and Barry, or a certificate of deposit, for purchasing shares

Paul contends Chris and Barry owe loans to Ed for funds he advanced in order to allow them to purchase shares in Ed Boland Construction, Inc. Chris responds the loans were settled several years before Ed's death when Ed accepted a $100,000 certificate of deposit from Ed Boland Construction, Inc. in exchange for the amount owed on the loans. Paul has not provided any evidence to contradict Chris's proffered explanation. The Court does not know if the $100,000 cd is in existence today or if Ed spent the funds during his lifetime. Paul changed the locks on Ed's house in 2015 and did not submit an inventory to the Court. It seems plausible to the Court that evidence related to the cd may exist in the house, but it is Paul's own fault for failing to inventory the assets in the home that this evidence has not been uncovered (if it exists there). The Court concludes there are no loans to Chris and Barry made by Ed that were in existence at the time of his death, and the $100,000 cd is not an estate asset because there is no proof it exists today. There is nothing for the Estate of Edward Boland to recover.

5. Possible loan and profit sharing agreement with North Park Investments, LLC

Paul contends Ed may have made a loan to North Park Investments, LLC, which is a business owned by Chris and Barry. Paul also contends Ed may have had

some form of profit sharing agreement with North Park Investments, LLC. The profit sharing agreement is described in Ed's will, and there is no evidence before the Court that the business is not abiding by the agreement. Chris acknowledges there was a loan made by Ed to the business, but the business repaid the loan before Ed's death. Again, it is plausible that evidence showing the loan as repaid may exist in Ed's belongings in his house, but Paul did not inventory the items in the house. Based on the lack of evidence presented to the Court, the Court concludes there is no asset for the estate to recover from North Park Investments, LLC.

In summary, the Court is satisfied with the evidence provided by Chris to explain each of the categories challenged by Paul. There are no assets which need to be removed by the Estate of Edward Boland. The Petition for Order to Recover Assets is **denied.**

It is so ordered.

DATED this 13 day of March, 2018.

/s/ Gregory G. Pinski
GREGORY G. PINSKI,
DISTRICT COURT
JUDGE

cc: Jason Holden
Thomas Towe, PO Box 30457, Billings, MT 59107-0457

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 18-0370

IN RE THE ESTATE OF EDWARD M. BOLAND,

Deceased,

PAUL BOLAND and MARY GETTEL, Co-Personal Representatives of the Estate of Dixie L. Boland,

Petitioners and Appellants,

v.

ORDER

CHRIS BOLAND, BARRY BOLAND, ED BOLAND CONSTRUCTION, INC., and NORTH PARK INVESTMENTS LLC.,

Respondents and Appellees.

Appellees Chris Boland, Barry Boland, Ed Boland Construction, Inc., and North Park Investments, LLC, through counsel, have filed a Notice to Court and Request to Dismiss or in the Alternative Stay Proceedings. Appellees' motion is opposed by Appellants Paul Boland and Mary

Gettel, and their attorney, Thomas E. Towe. The parties have submitted briefs in support of their positions, which we have considered.

This appeal involves two cases arising from the same underlying probate. In Cause No. DA 18-0370 Appellants appeal the District Court's decision denying their petition to recover assets. The appeal in Cause No. DA 18-0607 concerns sanctions- imposed by the District Court individually against Paul Boland and his attorney, Thomas E. Towe. Appellees' Request to Dismiss is directed only to the District Court's order denying their petition to recover assets, Cause No. DA 18-0370. Appellees maintain that since the filing of this appeal, Paul Boland and Mary Gettel have been removed as co-personal representatives of the Estate of Dixie Boland by the Thirteenth Judicial District Court in an order dated November 26, 2018. Appellees argue that the removal of Paul Boland and Mary Gettel as co-personal representatives terminates their authority to represent the Estate in any pending or future proceeding. Conversely, Appellants argue that they have a meritorious claim and that "[a]n appeal should not be dismissed merely because the parties bringing the appeal no longer have authority to bring it." Appellants contend that Paul Boland and Mary Gettel, as direct beneficiaries, have a right to continue the appeal and that, consequently, they "plan to move" this Court for permission to be added as Petitioners and Appellants.

Pursuant to § 72-3-521, MCA, "[t]ermination

[of appointment as a personal representative] ends the right and power pertaining to the office of personal representative as conferred by this code or any will ... " The statutory provision expressly provides that removal of a personal representative "terminates the personal representative's authority to represent the estate in any pending or future proceeding." Thus, by the order entered November 26, 2018, Paul Boland and Mary Gettel no longer have the authority to represent the Estate in this appeal. As this appeal is brought in their capacity as co-personal representatives, and we have not been given notice that the present personal representative is substituted as a party and intends to prosecute the appeal, we conclude Appellants' appeal in Cause No. DA 18-0370 must be dismissed. Our dismissal, however, is without prejudice to an appeal initiated by Paul Boland and/or Mary Gettel filed in their individual capacity. We observe that when this appeal was initiated Paul Boland and Mary Gettel both were co-personal representatives and had the authority to represent the Estate. Therefore, should an appeal be filed in their individual capacities, the deadlines set forth in M. R. App. P. 4 will begin from the date of this order.

Accordingly,

IT IS HEREBY ORDERED that Appellees' motion to dismiss the Appellants' appeal in Cause No. DA 18-0370 is GRANTED, without prejudice;

IT IS FURTHER ORDERED that the time

deadlines set forth in M. R. App. P. 4 are to begin from the date of this order should an appeal of the same order be initiated by either Paul Boland or Mary Gettel in their individual capacity.

The Clerk of the Supreme Court is directed to provide a copy of this Order to all counsel of record.

DATED this 2nd day of January, 2019.

Chief Justice

Justices