



Stewart Legal Services

# **Montana Educational Seminar Recent Montana Court Decisions**

Presented by: Collyer Church  
September 12, 2014



# PPL Montana, LLC v. Montana

- 2012 U.S. Supreme Court
- Over ruled the Montana Supreme Court and determined that upon its date of statehood a state gains title to the beds of waters then navigable within its borders, subject to the right of the US to control such waters for purposes of interstate and foreign commerce
- US retains title that was vested in it before statehood to land beneath waters not then navigable
- To be navigable a river must be “navigable in fact,” meaning they are used or are susceptible of being used as highways for commerce over which trade and travel occurred



## PPL Montana, LLC v. Montana

- Continued
- are or may be conducted in the customary modes of trade and travel on water at the time of statehood
- To determine riverbed title the USSCt considers the river on a segment-by-segment basis to determine whether the segment in dispute is navigable or not
- Because commerce could not have occurred on segments nonnavigable at the time of statehood, there is no reason to deem those segments as owned by the state
- The starting and ending points of segments depends on conditions that affect navigability



## **PPL Montana, LLC v. Montana**

- Continued
- The state court erred in finding that the segment-by-segment approach does not apply to short interruptions of navigability such as areas where vessels were portaged for even one day to bypass a nonnavigable river segment
- Portage defeats navigability for title purposes and does so in the Great Falls reach
- Court cannot rely on evidence of present-day recreational use of a stretch of river—it must be assessed at the time of statehood for its usefulness for trade and travel



## **PPL Montana, LLC v. Montana**

- Continued
- But, evidence of current recreational use may have a bearing on the susceptibility of commercial use at the time of statehood if watercraft are meaningfully similar to those used in commerce at statehood and the river's condition is not materially different
- The ultimate decision as to disputed stretches is to be determined initially by the Montana courts in light of these principles



# **John Alexander Ethen Revocable Trust v. River Resource Outfitters LLC**

- 2011 Montana Supreme Court
- Early deeds conveyed all land of the grantor west of a creek, or running along the west bank of the creek, which created a meandering boundary along the creek's bank and fluctuates with the course of the creek
- When a surveyor later set pins and shows specific bearings and distances between them in order to be able to define the quantity of property for purchase the meander lines stated to be along the edge of the body of water still control (unless a different intent is shown) and this applies even if shown on a certificate of survey



## Larson v. Richardson

- 2011 Montana Supreme Court
- A legal description originated in 1910 which tied into a fence line, including a “jog” in the fence, may not tie into the existing fence line as in existence today—the bearings, distances and language from the old deed that indicate the fence was in a different location at that time
- In such cases it is necessary to closely examine prior deeds in the chain of title and in the adjoining owners chain as well as other evidence



## Larson v. Richardson

- Continued
- The priority of calls in legal descriptions provide that monuments control over other evidence—but this is not absolute and lower-ranked calls may prevail if the lower-ranked call is more reliable evidence under the circumstances
- Monuments do not prevail over courses and distances if the result would be absurd and one clearly not intended or is otherwise more reliable
- The goal is to determine the original intent of the conveyance as disclosed by the majority of the recovered evidence





## Larson v. Richardson

- Continued
- A fence that establishes a boundary line is a monument as well as a fence as long as it conforms to the true line
- A fence that separates one side of the fence from the other is merely a fence
- MCA 70-20-201, which creates a priority of calls, is a rule of construction that applies only where there is a conflict between parts of a description and there are no other circumstances to determine it
- In cases of prescriptive easements, the element of adversity is not met if use was allowed by a privilege or revocable license or use to accommodate



## Thayer v. Hollinger

- 2013 Montana Supreme Court
- An easement must be clearly and unmistakably communicated on a plat or certificate of survey using labeling or express language and cannot be inferred or implied from unlabeled or undescribed swaths of land
- An easement granted by an express grant must describe the easement with reasonable certainty



# Yellowstone River LLC v. Meriwether Land Fund LLC

- 2011 Montana Supreme Court
- Essential elements of an easement by necessity are unity of ownership, severance and strict necessity, which means no practical access to a public road except across the lands that were in common ownership
- The necessity must exist at the time of severance and at the time of exercise of the easement
- The law reads into the severance an intent to not cut off access to the land remaining after the severance, which intent is presumed (except for federal grants to railroads) and rests upon exceptions to the rule that written instruments speak for themselves



# Yellowstone River LLC v. Meriwether Land Fund LLC

- Continued
- The relevant severance is the one that creates the necessity for an easement
- If the alleged dominant and servient parcels were never held in common ownership, or the severance did not leave the dominant parcel isolated, easement by necessity does not apply
- The easement cannot be based solely on the notion that a tract of land should not be isolated
- The parcel across which the easement is to run must have access to a public road when the properties are divided



## **Roland 1994 v. Davis**

- 2013 Montana Supreme Court
- Abandonment of an easement requires both the actual abandonment of the use of an easement and the intent to abandon—non-use of a ditch easement for at least 31 years, together with the act of building roads impeding use of the ditch by predecessors in interest with no attempt to undo the impediments is enough to establish termination of use
- To establish an easement by implication a party must establish a separation of title, a use that is apparent and continuous at the time a property is divided, and reasonable necessity of the easement for the benefit of the land



# **Watts v. HSBC Bank Trustee 2007 ASAP1**

- 2013 Montana Supreme Court
- The assignee of a mortgage obtains all rights held by the original mortgage holder—an assignment does not create a new lien
- An assignment of a mortgage does not affect its priority even if the assignment is unrecorded



## **Redding v. First Judicial District Court**

- 2012 Montana Supreme Court
- A tenant in common investment is a joint investment in real property where each owner owns an undivided share of the property
- A security is defined broadly as any instrument that might be sold as an investment and includes an investment in a common venture premised on a reasonable expectation of profits derived from the entrepreneurial or managerial efforts of others



## Redding v. First judicial District Court

- Continued
- If there is reasonable expectation of significant investor control, as opposed to passive control, the efforts test is met
- The facts of each case will determine if tenancy in common interests are securities and think about whether the specifics of the transaction fit the above—just buying a property in which to live is not a security





# Redding v. First Judicial District Court

- Continued
- If it appears there might be an issue with a tenant in common investment discuss with your underwriter and consider using a modified exception from Stewart Bulletin SLS 2009014 such as: Any claim, allegation or determination that the interest insured herein, or the underlying transaction involves the sale of a security and/or is in violation of the State or Federal Securities Laws



Stewart Legal Services

# **Montana Educational Seminar 2013 Montana Legislative Summary**

Presented by: Michael Berg  
September 20, 2013



## House Bill 117

- Revisions to the Escrow Business Act
- Changes references from Director to Department
- Removes exemption to escrow business licensing for licensed mortgage brokers, servicers and lenders who provide escrow services for other than residential transactions
- Exempts loan closer who is employed by an exempt financial institution or an independent contractor who only acts as a courier and does not take possession of funds for deposit or disbursement
- New application procedures and fees



## House Bill 117

- Continued
- Must file annually a statement of licensee's financial condition and its transactions and escrow activities
- Department may impose civil penalties up to \$1,000 for each violation plus restitution
- Effective July 1, 2013



## House Bill 245

- County Dedication of Park Land
- The Board of County Commissioners may dedicate county land to the public use as park land
- County may not sell, lease or exchange land dedicated as park land under this section except as provided in 7-16-2324
- This sale provision requires county to compile an inventory of parks, compile a comprehensive plan regarding outdoor recreation and open space and determine that the sale is consistent with those plans
- Get local government approval if within a city



## House Bill 362

- Revise the LLC law to allow for a Series of Members
- Series of Members is a group of the members of an LLC who share interests and have separate rights, powers and duties with respect to property, profits and losses associated with property or obligations and who are specified in the articles of organization or operating agreement of the LLC
- When a foreign LLC files with the SoS it must state whether it has a series of members and whether debts or liabilities of a series of members are enforceable against the LLC as a whole or just against the series of members



## House Bill 362

- Continued
- The articles of organization of the LLC must disclose whether it has any series of members—if it does each such series must set out its operating agreement
- Each series of members must state whether its debts or liabilities are enforceable only against it or other series and the LLC itself
- The operating agreement of the LLC must set forth the rights, powers and duties of each series of members
- The articles of organization or operating agreement should provide whether debts of a series are only enforceable against that series, the LLC or other series



## House Bill 362

- Continued
- Unless articles or operating agreement provide otherwise, management of a series is vested in the members of the series in proportion to their contribution to capital
- A series of members must be wound up at a time stated in articles, event specified in operating agreement, the vote of all members of the series or a decree of judicial termination





## House Bill 469

- Arbitration to Settle Construction Lien
- The parties to a construction lien may agree prior to the creation of the lien or at any time after the lien is created to enter into arbitration if a dispute arises with respect to the lien
- Arbitration can continue even after a bond has been substituted for the lien and released it.



## Senate Bill 18

- Ownership of a Channel or Former Channel of a Navigable River Following an Avulsion
- If a river adjudicated as navigable abandons its channel and forms a new channel after an avulsion, land of old channel belongs to the owner of shores through which the old channel flowed, or if owned by different owners, to the owners on the two sides divided at the middle of the river channel.
- Department of Natural Resources and Conservation determines whether there was an avulsion and abandonment and recommend state and owner exchange quitclaim deeds.



## Senate Bill 18

- Continued
- After exchange of deeds owner notifies Dept of Revenue and Clerk and Recorder of the change in ownership and submit information to update ownership records
- Ownership is unchanged for islands existing before the avulsion occurred and is not wholly surrounded by water after the river abandoned the old channel
- If an avulsion occurs on a river segment not adjudicated as navigable, the owner may seek to clarify title through the Department and a quiet title action
- Avulsion is a sudden and perceptible change in the course of a river that creates a new channel and abandonment of the old channel



## Senate Bill 18

- Continued
- Statute repealed that provides that Montana owns lands in abandoned beds of a navigable stream or lake between the meander lines shown by US survey
- Statute repealed that says if a navigable or non-navigable river carries away by avulsion an identifiable part of a bank and places it on another bank, the owner may reclaim it within one year after new owner takes possession



## Senate Bill 207

- Revising Property Partition Laws for Heirs Property
- Heirs Property is land held in tenancy in common with no agreement governing its partition, one or more cotenants acquired title from a relative and 20% of the interests are held by relatives
- If the court determines the land is heirs property it must be partitioned as provided in the statute and the value determined by appraisal
- A cotenant can buy out the interests of the others
- Partition can in kind or by sale



## Senate Bill 251

- Replacing the Montana Trust Code with the Montana Uniform Trust Code
- Defines “Spendthrift Provision” as a trust term that restrains both voluntary and involuntary transfer of a beneficiary’s interest
- A trust may be created by the transfer of property to a person as trustee during settlor’s life or by will or other disposition taking effect upon his death
- Can also be created by the owner of property declaring that he holds the specific property as trustee.



## Senate Bill 251

- Continued
- Requirements for creation of a trust include capacity of settlor, intention to create a trust, a definite beneficiary or is a charitable trust, the trustee has duties to perform, and the same person is not the sole trustee and sole beneficiary
- A trust must be evidenced by a written instrument signed by the trustee or by the settlor, or their agents, or by operation of law
- If a trust does not contain a spendthrift provision a court may authorize a creditor of a beneficiary to reach his interest by attachment of distributions to beneficiary or other means



## Senate Bill 251

- Continued
- A spendthrift provision must restrain both voluntary and involuntary transfer of beneficiary's interest
- A creditor of beneficiary may not reach the interest until received by the beneficiary
- Whether or not there is a spendthrift provision, during the life of the settlor the property of a revocable trust is subject to the claims of his creditors
- In an irrevocable trust a creditor of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit but subject to any claims arising after death





## Senate Bill 251

- Continued
- Trust property is not subject to the personal obligations of the trustee, even if he becomes insolvent or bankrupt
- Check names of settlor and trustee for liens—discuss any you find with underwriting
- Unless a trust provides that it is irrevocable the settlor may revoke or amend the trust by the method provided in the trust or by delivery of a writing to the trustee if no method is set out
- Settlor's power to revoke, amend, or distribute property may be exercised by an agent to the extent authorized by the terms of the trust



## Senate Bill 251

- Continued
- Cotrustees that can't reach a unanimous decision may act by majority decision
- In case of a vacancy remaining trustees may act
- When a cotrustee is unable to perform his duties and prompt action is necessary remaining trustees may act
- As long as at least one cotrustee remains in office a vacancy need not be filled
- An act by a trustee involving a conflict of interest is voidable unless authorized by the trust, approved by court, the beneficiaries consented to the conduct or ratified it, or released the trustee from liability or predates his trusteeship



## Senate Bill 251

- Continued
- Trustee may delegate duties and powers if prudently done
- Powers of trustees include powers to properly invest and powers conferred by the trust provisions.
- Specific powers include power to exchange, acquire or sell property, borrow money and mortgage property, subdivide, develop and dedicate land, enter into leases, grant options to sell or lease property, make loans out of trust property
- A person who deals with a trustee in good faith is protected from the trustees improper acts



## Senate Bill 251

- Continued
- Instead of providing a full copy of a trust agreement a trustee may furnish a certification of trust with information that a trust exists, identity of settlor, identity of trustee, whether it is revocable or not, whether all cotrustees are required to act, whether it has been revoked or amended
- The recipient of the certification may require for review those parts of the trust agreement designating the trustee and the power to act in a pending transaction but can be liable if he does not act in good faith in demanding the additional information
- A person who acts in reliance on the certification is not liable for so acting



## Senate Bill 251

- Continued—Re Beneficiary Deeds
- Grantee of a beneficiary deed is liable for a claim against transferor's probate estate and statutory allowances to the extent the estate is insufficient to satisfy them to the extent of the value of the nonprobate transfer
- Action for this must be commenced in one year of death



## Senate Bill 316

- Prohibiting Approval of a Subdivision if a Well Encroaches
- Local governing body may not approve a proposed subdivision if the land within a 100 ft radius of the well encroaches into adjoining private property unless the owner of such property authorizes the encroachment



## House Bill 426

- Defeated—Bill would have revised condominium and townhouse ownership laws
- Department of Revenue could not require information in excess of information in documents required to be recorded
- Declaration converting condo to townhouse must be signed by owners of 75% of units regardless of declaration
- Lenders with mortgages on units must be notified of proposed conversion and can respond, otherwise they acquiesce to the conversion
- Title companies must accept and insure all changes in a declaration for the conversion when the legal description is not modified except to now call it a townhouse