

**APPLICATION FOR  
DISTRICT COURT JUDGESHIP**

**A. PERSONAL INFORMATION**

1. Full name. Thomas James Pardy
2. Birthdate. [REDACTED]
3. Current home address. [REDACTED]
4. Email address. [REDACTED]
5. Preferred phone number. [REDACTED]
6. Judicial position you are applying for. 13th Judicial District
7. Date you became a U.S. citizen, if different than birthdate. NA
8. Date you became a Montana resident. January 1990

**B. EDUCATIONAL BACKGROUND**

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.  
  
Howard High School, Howard, South Dakota Diploma May, 1981  
  
University of South Dakota, Vermillion, South Dakota, BS, Business Administration  
May, 1989  
  
University of South Dakota, Vermillion, South Dakota, School of Law. First and Second  
year of law school. JD awarded May, 1998  
  
University of Montana, Missoula, Montana, School of Law. Final year of law school.  
May, 1998
10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

### C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

**City of Billings**, Billings, Montana Deputy City Attorney, Civil Attorney, Dec. 2015 - present.

**Pardy Law Firm, P.C.**, P.O. Box 1692, Billings, Montana Attorney/Owner, July 2013 – December 2015.

**Mountain West Bank**, NA, Helena, Montana Staff Attorney, Jun. 2009 – June, 2013.

**Pardy Law Firm, P.C.**, P.O. Box 1692 Billings, Montana Attorney/Owner, Feb. 2003 – June 2009.

**Musselshell County Attorney's Office**, Roundup, Montana Deputy Musselshell/Golden Valley County Attorney, 1/2 time, Nov. 2007 – June 2009.

**Oliver, Pardy & Associates, P.C.**, 208 N. 29th St., Billings, Montana Attorney/Partner, Sept. 1998 – Jan. 2003.

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

U.S. District Court for the District of Montana - 2004  
State of Montana - September 1998

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).

In my capacity as a civil deputy city attorney, I have represented the City of Billings in multiple civil areas including human resources/employment issues, city code enforcement issues, public records issues, contracts, insurance, statutory modification, parks and recreation rules and laws in addition to consulting department heads and council members on the state of the law in a variety of other areas.

My private practice involved both civil and criminal law. I practiced criminal defense law at all levels of Courts including City, Justice, State and Federal Courts. Criminal law comprised approximately 50% of my practice. In the 50% of my practice in the civil law arena, my practice was broken down into approximately 50% family law and the remainder included a variety of areas of civil law including real estate, contracts, banking, human resources and employment, contracts, wills, debtor/creditor and bankruptcy and appeals.

14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).
15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.

As I have been a Deputy City Attorney for the City of Billings for the past seven years, I have not appeared in federal court in that time-frame. My appearances in state court during that timeframe has either been in appeals from municipal court to district court or in responses to petitions for the release of confidential information to other parties involved in civil litigation.

Prior to becoming Deputy City Attorney my involvement in court proceedings in federal and state court was a standard part of my practice. As a private practitioner and a member of the Criminal Justice Act Panel, my federal court participation was very regular. As a member of the panel I was appointed to represent indigent criminal defendants in federal court.

As a staff attorney for Mountain West Bank, I was regularly in federal court on bankruptcy matters and engaged in litigation at the state court level on individual contract and real estate matters.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

None in past ten years.

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

1. What I feel is the most important legal proceeding in which I have participated is a federal criminal case, *U.S. v Strange Owl*, in which I was appointed, as a member of the

CJA panel, to represent a woman who was charged with the murder of her common law husband. My client confessed to the murder. However, she asserted that her confession was false and she was tricked or coerced into confessing.

Prior to this case, experts on false confessions were not recognized or allowed in Montana Federal District Court. I researched and briefed the issue. The Court eventually ruled I was correct and that the expert should be allowed. An expert on false confessions was allowed to testify at my client's trial.

Additionally, we faced multiple forensic experts in the trial. The U.S. Attorney called a number of forensic experts including blood spatter expert, a fingerprint expert, a fabric expert, and a forensic pathologist. Additionally there were a large number of law enforcement and fact witnesses. It was a fascinating five-day trial which ended in a hung jury which voted 11-1 in favor of my client. The U.S. Attorney never pursued the case any further.

2. One of the most complex cases I handled was as a staff attorney for Mountain West Bank. The bank had loaned an individual investor in excess of 4 million dollars for the development and construction of a condominium project. The developer failed to complete the project, ran into financial problems and filed for Chapter 11 bankruptcy. This resulted in my client filing a Motion to Modify the Automatic Stay and to try to have the property removed from the bankruptcy.

In the process of trying to protect the bank, quit claim deeds were drafted for all of the individual units which were secured by Trust Indentures/Deeds of Trust. In so doing, the attorney for the Debtor argued that the bank had created a situation whereby it had, in essence, given up its secured interest.

The case was very complex as a Chapter 11 bankruptcy with dozens of motions being filed by, not only both parties, but by interested others. Additionally, because of the Debtors asserting that the bank had given up its security interest in all the property, they filed a Complaint in what is known as an Adversary Proceeding. An Adversary Proceeding is a federal civil lawsuit filed within a bankruptcy.

Not only did we have a very complicated bankruptcy, we also had a very complicated, high-stakes civil litigation which included a large number of motions, hearing and orders and an eventual trial.

The case was partially settled and remained in Chapter 11 bankruptcy after my departure from the bank.

3. Another important and challenging case for me was a case I handled for friends of mine (Defendants) and which, as my first career appeal, was appealed to the Montana

Supreme Court, *Pense v. Lindsey*. These friends (Defendants) had befriended an elderly lady (Plaintiff) who had no remaining family of her own. For years they treated her as a family member and she treated them the same. The case revolved around a piece of real property given to the Defendants by the Plaintiff as a gift. Said property amounted to 8% of the value of the Plaintiff's total estate. She additionally left the same property to them in her will. Eventually, the Plaintiff became incompetent and, through representatives, filed a four count case in District Court seeking a return of the property.

Three counts were dismissed based upon our (Defendants') Motion for Summary Judgment. One count remained asserting that the Defendants had obtained the property through undue influence or fraud. The District Court found in favor of the Plaintiff and, after appeal, the Supreme Court upheld the decision. What made the case extremely troublesome was that the District Court found no wrongdoing by my clients. Rather the District Court found that Appellants' actions of befriending and assisting Respondent in her daily life, while not constituting "legal intent", "reflected an intensity which [Plaintiff's] particular weakness of mind could not resist." (Court's Order, page 26, lines 3-4). The Court found that the conveyance was made as a result of undue influence exerted by Defendants over the Plaintiff and required them to return the property.

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information. None.
19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke. None.
20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

As a Deputy City attorney for the past seven years, I have been unavailable to represent private clients. However, throughout most of my twenty-five year legal career, I regularly provided pro bono legal services and advice with an emphasis on doing so for my fellow soldiers until my retirement from the military in the fall of 2018.

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession. None.
22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.

I am a US Army veteran. I served in the Army National Guard for over 32 years enlisting in January of 1986 and retiring in October of 2018. During my enlistment I served my country overseas four different times. I attained the rank of First Sergeant and retired as a Master Sergeant. I received an honorable discharge.

I was Trained in demolitions, construction, leadership skills, equipment maintenance, weapons use and tactics and a variety of other tasks relevant to being a soldier in the United States Army. I was trained in level two combatives (hand to hand combat) and was a combatives instructor. I was responsible for leading and training subordinate soldiers. I have received extensive basic and advanced leadership training. I have Operations experience as Joint Operations Center Supervisor.

During my career I was trained in and awarded 5 different military occupational specialties (MOS) including infantry, armor and engineering.

I am qualified as a certified military instructor having received certification in small group leadership and total army instructor training at the 208th Regional Training Institute at Fort Harrison, Montana. I am a certified armor instructor having been certified by the US Army Armor School at Fort Knox, KY. I am a certified infantry instructor having been certified by the US Army Infantry School at Fort Benning, GA.

During Operation Enduring Freedom I served my country overseas in The Republic of Kyrgyzstan four different times from 2004 to 2008.

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled. None.
24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.

I grew up in a rural community where my employment, when not in school, consisted of working farms and ranches. After leaving high school, I spent years working construction. After college and prior to law school I worked in retail management. Finally, I managed my own law firm at two different points in my career. These different types of employment have provided me with a very broad world view and set of experiences faced by many people who would appear before me on the bench.

#### **D. COMMUNITY AND PUBLIC SERVICE**

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each

organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.

Little League Coach for Girls Softball  
ASA Girls Softball Coach  
Little Guy Football Volunteer  
Member Billings Rod and Gun Club

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office. I have held no public offices. I ran unsuccessfully for District Court Judge in 2018.

#### **E. PROFESSIONAL CONDUCT AND ETHICS**

27. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details. No.
28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details. No.
29. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence. No.
30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number). No.
31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details. No.

#### **F. BUSINESS AND FINANCIAL INFORMATION**

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge. No.
33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain. Yes.
34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details. No.

### **G. JUDICIAL PHILOSOPHY**

35. State the reasons why you are seeking office as a district court judge.

I first decided that I wished to become a lawyer and then a judge because that is what my father did. As a kid I listened to my father and his friends who were judges and lawyers talk of their profession and decided that is what I wanted to do. I became a trial lawyer because I wanted to make a difference in the lives of others by championing whatever legal cause or challenge they may have. Being a judge allows one to make a difference in the lives of others on a significantly larger scale than that of an attorney.

Every single day a judge has both the opportunity and the awesome responsibility to deliver justice in a fair, equal and unbiased manner. I can't think of a more fulfilling or rewarding calling than to be able to make life altering decisions on behalf of your fellow citizens who stand before you asking you to pronounce judgment in a fair and equal manner. As a lawyer, I consider becoming a judge the highest calling of my profession.

I consider being a judge as the avenue by which I am best able to give back to and serve my community. I will be the kind of judge who treats everyone with dignity and respect, who provides to everyone a full and fair hearing and who tries to reach a just result. I will be the kind of judge our system and our community depends upon: honest, fair, impartial and independent.

36. What three qualities do you believe to be most important in a good district court judge?

Knowledgeable. To be effective and to serve appropriately, a judge must be knowledgeable and informed. A judge must keep abreast of the law on a constant basis, especially as it applies to a specific case and to a specific set of facts before him or her on any given day. Being a judge requires one to keep abreast of any new statutes and any case law created by higher court decisions. Additionally, a judge needs to be knowledgeable about the

specific facts of any case before him or her on any given day. A judge must ensure that he/she is constantly learning in order to use sound judgment to decide matters before them.

Self-awareness. My initial reaction here is to place impartiality here. However, I have come to conclude that impartiality is a sub-part of self-awareness. I think that self awareness contains so much more of what is required of a judge. Impartiality is not just a character trait or a matter of temperament. It is the ability of being able to identify and recognize your own prejudices so that I am not unduly influenced or swayed by them. As a judge, if I do not have the self-awareness needed to recognize my own prejudices or biases against a party or an issue, my decision could reflect my personal biases instead of serving justice.

Integrity. A judge needs to be honest, ethical, reliable and have a strong moral compass. All of these and more fall under the label of "integrity". It is my position that a judge "works for" the parties to an action and their individual representatives. An effective judge will have the integrity to work toward a just result for the parties involved. It is the job of a judge to do the right thing each and every time. Every day, in every case, a judge has the opportunity and the responsibility to deliver justice. A judge must have the integrity to ensure he or she does just that.

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

The most straightforward answer is that I am a strict constructionist. I believe a judge is required to follow the law, as it is written and has no right to create new law from the bench. If a judge disagrees with a law, passed by the citizens through their duly elected legislators, the judge does not have the authority to decide the legislators were wrong. We have a Supreme Court, lawfully constituted, just for that purpose.

Judges need to use judicial restraint to overcome any desire or propensity they may have to substitute their own opinions or values in the place of the legislators who passed the laws the Court is in place to enforce. There are statutory processes in place for the amendment or replacement of laws. A trial court is not the proper venue for such actions. A judge should have the integrity and character to be able to state, "although I don't agree with this law, it is the law and must be enforced". It is up to an aggrieved party to take the action further and for the Supreme Court to decide the validity or constitutionality of a law.

## H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics. See Below.
39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

**Honorable Ashley Harada**

217 N. 27th Street  
Billings, MT 59101  
(406) 869-8012

**Honorable Randal Spaulding**

506 Main Street  
Roundup, MT 59072  
(406) 323-1701

**Honorable Matthew Wald**

809A East 3rd Ave.  
Columbus, MT 59019  
(406) 322-5406

No. 12-35968  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
In re Muriel J. Simmons,  
Debtor.

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CHRISTY BRANDON,  
Trustee/Appellant

v.

GMAC MORTGAGE, LLC and  
MOUNTAIN WEST FINANCIAL CORP. dba MOUNTAIN WEST BANK, N.A.,  
Creditor/Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION  
HONORABLE DONALD W. MOLLOY  
NO. 9:12-cv-00099-DWM

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**APPELLEE'S BRIEF – MOUNTAIN WEST BANK, N.A.**

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Thomas J. Pardy (MT Bar # 3647)  
Mountain West Bank, N.A.  
1225 Cedar Street  
Helena, MT 59601  
Phone: (406) 449-2265  
Fax: (406) 449-2283  
Email: [thomasp@mtnwestbank.com](mailto:thomasp@mtnwestbank.com)

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed.R.App.P. 26.1, Appellee Mountain West Bank, N.A., states that it has a parent corporation, Mountain West Financial Corp, and that no publicly held corporation owns 10% or more of the company.

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### Statutes

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## **Statement of Jurisdiction**

Appellee Mountain West Bank, N.A. (MWB), agrees with the Statement of Jurisdiction contained in Appellant's Brief.

## **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

Whether MWB's (and GMAC Mortgage's) trust indenture(s) is (are) valid under Mont. Code Ann. §71-1-321 and to be treated as a mortgage, where a conveyance of real property as security for a loan was made to a trustee under the Small Tract Financing Act for the benefit of MWB, even though the secured acreage is larger than the acreage limitations of the Act.

## **STATEMENT OF THE CASE**

Appellee, MWB, agrees with the Statement of the Case set forth in the Appellee, GMAC Mortgage's (GMAC) Brief.

## **STATEMENT OF FACTS RELEVANT TO ISSUE ON REVIEW**

Debtor Muriel J. Simmons filed her petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Montana on September 30, 2011. Appellant Christy L. Brandon was appointed as the Chapter 7 Trustee on October 3, 2011. The bankruptcy estate includes a 77 acre piece of real property located in Clinton, Montana.

MWB claims a security interest in the aforementioned real property by virtue of a trust indenture signed by Simmons and recorded June 16, 2008.

## **SUMMARY OF THE ARGUMENT**

This Court should affirm the decisions of the Bankruptcy Court and District Court. The trust indentures/deeds of trust of both MWB and GMAC secure more than the 40 acres permitted by the Montana's Small Tract Financing Act. In a case where the 40 acre limit is exceeded, the language of §71-1-321 MCA is clear and unambiguous. The plain language of the statute requires the "non-conforming" trust indentures of MWB and GMAC to be treated as mortgages, subject to all laws relating to mortgages. Even though the trust indentures exceed the 40 acre limit of the Small Tract Financing Act, the recording of the trust indentures provide constructive notice of their contents to subsequent purchasers and encumbrancers from the time of their filing.

The public policy behind the Small Tract Financing Act is to promote more financing of homes and business expansion through the use of "security instruments and procedures not subject to all the provisions of mortgage laws." §71-1-302 MCA.

Recognizing the trust indentures of MWB and GMAC as mortgages, and treating them as such, is clearly consistent with said public policy. The failure of the trust indentures of MWB and GMAC to comply with the acreage limitations of the act requires the lenders to foreclose judicially, which is more time consuming,

costly and restrictive than are the provisions of the act allowing for notice and sale foreclosure for “conforming” deeds of trust.

In a case such as this, where the acreage limitation of the act was exceeded, the public (borrower here) got the benefit of the stated public policy with all, and more, protections provided for under the act. By loaning money to a borrower, secured by a trust indenture on property exceeding the 40 acre limit, the lenders have denied themselves any benefit they would be afforded under the act. There is no safe harbor provided by §71-1-321 MCA.

Since Section 71-1-321 MCA was enacted after *Amsterdam Lumber, Inc. v. Dyksterhouse*, 179 Mont. 133, 586 P.2d 705 (1978) was decided, the Montana Supreme Court’s holding in *Amsterdam Lumber* is not controlling in this case. The clear and unambiguous language of §71-1-321 MCA controls over any holding in the previously decided *Amsterdam Lumber* case.

## ARGUMENT

### **I. The Decisions of the Bankruptcy Court and the District Court Properly Applied and Interpreted Montana Code Annotated §71-1-321**

In the underlying adversary proceeding from which this appeal arises, Count II of Appellant’s Complaint alleges the following with regard to MWB’s trust

indenture, which secures approximately 77 acres, which is more than the 40-acre limit within the Small Tract Financing Act:

31. The trust indenture securing the Mountain West Bank interest is defective, not authorized by statute, not to be accorded the status of a mortgage, and in violation of Montana public policy, since it covers acreage in excess of forty acres.

The claims asserted by the Appellant in her Complaint are based completely upon the holding in *Amsterdam Lumber*. In *Amsterdam Lumber*, the Montana Supreme Court determined that a trust indenture that included more acreage than the amount permitted by the Small Tract Financing Act was defective and instead must be treated as an equitable lien or equitable mortgage. *Id.* at 139-40, 709.

Section 71-1-321 MCA should be the sole reason for the Court's denying Appellant's Appeal and upholding the ruling of the Bankruptcy Court and the District Court. Immediately following the 1978 *Amsterdam Lumber* decision the Montana Legislature enacted §71-1-321 MCA in 1979. Said statute states in its entirety:

**71-1-321. Deeds of trust and trust deeds not invalidated**

The Small Tract Financing Act of Montana does not invalidate or preclude the use in this state of instruments, sometimes denominated deeds of trust, trust deeds, or trust indentures, which are not executed in conformity with this part, but in which a conveyance for security purposes is made to a trustee or trustees for the benefit of one or more lenders. Such instruments are considered to be mortgages and are subject to all laws relating to mortgages on real property. Every such instrument, recorded as prescribed by law, from the time it is filed for

record is constructive notice of its contents to subsequent purchasers and encumbrancers.

Not to belabor the obvious, but it is important to note, for emphasis, that *Amsterdam Lumber* was decided prior to enactment of §71-1-321 MCA and all transactions and occurrences in the case now before the Court occurred after enactment of §71-1-321 MCA. The Bankruptcy Court and the District Court correctly applied the unambiguous language of the more recently enacted §71-1-321 MCA requiring the trust indenture of MWB (and that of GMAC) to be treated as a mortgage and therefore foreclosed upon as a mortgage.

The Appellant, in order to succeed in this appeal, must convince this Court to ignore a properly enacted, clear and unambiguous statute. When interpreting Montana statutes, courts are bound by a statute's plain language if they can glean the intent from the words used in the statute. *State v. Merry*, 2008 MT 288, ¶12, 345 Mont. 390, 191 P.3d 428 (citing *Boettcher v. Montana Guar. Fund*, 2007 MT 69, ¶19, 336 Mont. 393, 154 P.3d 629). Since the language of the statute is clear and unambiguous, no review or discussion of any legislative history is necessary. “[T]here is no reason for us to engage in a discussion of the legislative history to construe [a] statute when we have determined that the language of the statute is clear and unambiguous on its face.” *State v. Goebel*, 2001 MT 73, ¶21, 305 Mont. 53, 31 P.3d 335; accord *Connecticut Natl. Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992).

## **II. Montana Code Annotated §71-1-321 Should Not be Limited to Common Law Deeds of Trust**

The Trustee also argues that §71-1-321 MCA should be deemed, by this Court, to only apply to common law deeds of trust. Appellant, in essence, asks this Court to ignore the citations above with respect to statutory interpretation and asks this Court to not only read language not contained within the statute, but to completely ignore the plain language that is contained within the statute. Nowhere in the statute is the term “common law deeds of trust” to be found. Nowhere in the statute is there language with such limitation. Appellant can provide no statutory or case law support for the proposition that would require applying §71-1-321 MCA to only common law deeds of trust. In fact, the actual language contained within the statute does apply directly, on point, to the facts of this case and to the deeds of trust involved.

Appellant’s argument that §71-1-321 MCA only applies to common law deeds of trust and does not apply to MWB’s trust indenture is not supported in any way by any legal authority in the State of Montana. Nowhere in the plain language of §71-1-321 MCA is there a limit placed on the statute such that its application is, or can only be, to common law deeds of trust. Common law deeds of trust are not even mentioned in the statute. A court “must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Natl.*

*Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992).

The statute, §71-1-321 MCA, states in plain language that the Act does not invalidate or preclude the use of such an instrument “sometimes denominated deeds of trust, trust deeds, or trust indentures, which are not executed in conformity with this part, but in which a conveyance for security purposes is made to a trustee or trustees for the benefit of one or more lenders”. The statute states that such instruments are to be considered mortgages and, if recorded, provide constructive notice of their contents to subsequent purchasers and encumbrancers, such as the Appellant in this case.

Every issue having to do with this case is contained within §71-1-321 MCA. The statute is clear, unambiguous and on point. The deeds of trust are considered mortgages and subject to all laws relating to mortgages on real property. Said deeds of trust were required to be recorded as prescribed by law, and they were so recorded.

The whole rationale by the Court in *Amsterdam Lumber*, for the recording of a defective trust indenture to be subordinate to the claims of subsequent encumbrancers and of judgment creditors who extended credit subsequent to the date of the instrument without actual knowledge, was based on the statutes in place at that time. At the time of the loans and execution of the security instruments in

this case (post *Amsterdam Lumber*), such analysis is not required as the recorded deeds of trust are clearly within the current state of public policy and in compliance with the statutes of the state of Montana, more specifically §71-1-321 MCA. Because of the current state of the law in Montana and the existence of §71-1-321 MCA, this case is clearly distinguishable from *Amsterdam Lumber*.

**III. Montana Code Annotated §71-1-321 Should be Applied to This Case Rather Than the Previously Decided *Amsterdam Lumber* Case**

The Appellant repeatedly argues that, irrespective of the enactment of §71-1-321 MCA, *Amsterdam Lumber* should still be applied. However, Appellant can provide no legal basis for establishing such a precedent. In support of her attempt at getting this Court to ignore a properly enacted statute, Appellant argues at page 16 of her brief that:

The *Dyksterhouse* decision has been cited by the Montana Supreme Court, other courts and secondary sources in numerous instances following the enactment of §71-1-321, MCA. *See, Hanson v. Bonner* (1983), 202 Mont. 505, 510, 661 P.2d 421, 423; *O'Connor v. Lewis* (1989), 238 Mont. 270, 275, 776 P.2d 1228, 1231; *Augustine v. Simonson* (1997), 283 Mont. 259, 264, 940 P.2d 116, 119; *In re Miller*, 164 B.R. 644, 649 (Bankr.D.Mont. 1994); *In re North End Timber Productions, LLC*, 2007 WL 4468706, (Bankr.D.Mont. 2007); *In re Steve Cavanaugh Ltd. Partnership*, 2009 WL 3517609, 13 (Bankr.D.Mont. 2009)”

Although the Appellant is correct that the aforementioned cases do cite *Amsterdam Lumber*, none of them cited *Amsterdam Lumber* for the proposition

that *Amsterdam Lumber* controls over the application of §71-1-321 MCA. In none of those cases was there such support. In none of those cases was application of §71-1-321 MCA at issue.

Appellant insists that the interpretation of the statute as decided by the Bankruptcy Court and the District Court somehow creates an inappropriate “Safe Harbor” for defective statutory trust indentures. Requiring judicial foreclosure is far from being a “safe harbor”. Judicial foreclosure, as required by §71-1-321 MCA, of trust indentures on parcels larger than 40 acres is far more burdensome, difficult, time-consuming and costly for a lender than is foreclosure by notice and sale. This is far from being a “safe harbor”.

It is important to note that the public policy portion of the Small Tract Financing Act is “to permit the use of trust indentures for estates in real property of not more than 40 acres.” Mont. Code Ann. §71-1-302. Nowhere does the Act require trust indentures and nowhere does it forbid their use for particular sized parcels of real property. The Act never mentions, nor does it allude to, application of said public policy to invalidating, or recognizing as unsecured, a recorded trust indenture securing more than 40 acres. When a statute that is being interpreted is part of a larger act, the “whole act must be read together and where possible, full effect given to all statutes involved.” *Delaney & Company v. City of Bozeman*, 2009 MT 441, ¶22, 354 Mont. 181, 222 P.3d 618; *Carlson v. City of Bozeman*,

2001 MT 46, ¶15, 304 Mont. 227, 20 P.3d 792. The Statutes (Montana Small Tract Financing Act) actually provide for just this scenario. MWB's trust indenture must be foreclosed as a mortgage.

The Appellant argues that "allowing lenders' defective statutory trust indentures to be treated as mortgages is no penalty or deterrent at all for violating mortgage laws and our declared public policy". Said argument makes two false presumptions. First, the argument presumes that some sort of penalty is required by the act, which it is not. Second, the argument presumes that §71-1-321 MCA does not exist, which it does.

### **CONCLUSION**

The Bankruptcy Court and the District Court correctly determined MWB's trust indenture to be a valid instrument and that it must be treated as a mortgage in accordance with §71-1-321 MCA which is clear and unambiguous. Nowhere, either in the statute or case law of the State of Montana is there a limitation on §71-1-321 MCA such that it can only be applied to common law deeds of trust. There is nothing in Montana Law that would make the provisions of §71-1-321 MCA invalid or inapplicable to the facts of this case. The decisions of the Bankruptcy Court and the District Court should be upheld.

### **STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Local Rule 28-2.6, Trustee/Appellant hereby states that she is aware of no other case in this Court that may be deemed related.

**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation set forth in Fed.R.App.P. 32(a)(7)(B) and the type size and type face requirements of Fed.R.App.P. 32(a)(5) and (6). This brief contains 2,359 words, excluding the parts exempted by Fed.R.App.P. 32(a)(7)(B)(iii), and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

DATED this 1<sup>st</sup> day of April, 2013.

Mountain West Bank, N.A.

By: /s/ Thomas Pardy  
Thomas Pardy

## CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2013, I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the Ninth Circuit Court of Appeals by using the appellate CM/ECF system.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

I further certify that some of the parties of record to this appeal have not consented to electronic service. I have mailed the foregoing document by First-Class Mail, postage prepaid, for delivery within 3 calendar days, to the following:

Gregory W. Duncan  
Law Offices of Gregory W. Duncan  
2687 Airport Road, Suite A  
Helena, MT 59601

DATED this 1<sup>st</sup> day of April, 2013.

Mountain West Bank, N.A.

By: /s/ Thomas Pardy  
Thomas Pardy

## CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

1 APRIL 2023

(Date)

Thomas Parody

(Signature of Applicant)

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A signed original **and** an electronic copy of your application and writing sample must be submitted by

**5:00 p.m. on Wednesday, April, 2023**

**Mail the signed original to:**

Hannah Slusser  
Governor's Office  
P.O. Box 200801  
Helena, MT 59620-0801

**Send the electronic copy to:** [hannah.slusser@mt.gov](mailto:hannah.slusser@mt.gov)