

1 David M. Ortley  
District Court Judge, Department 4  
2 Flathead County Justice Center  
920 South Main Street, Suite 310  
3 Kalispell, Montana 59901  
4 (406) 758-5906

5 IN THE ELEVENTH JUDICIAL DISTRICT COURT  
6 FLATHEAD COUNTY, MONTANA

7 Heritage Place, Inc., ) Cause No. DV-11-430(D)  
Plaintiff, )  
8 vs. )  
9 ) Order On Defendant's Motion for  
Jerry A. Jarrell, ) Summary Judgment  
10 The Estate of Dena Mae Jarrell, )  
Defendants. )

11  
12  
13 This matter is before the court for consideration of defendant Jerry Jarrell's Converted Motion  
14 for Summary Judgment. Oral argument was not requested and does not appear necessary.  
15 Having considered the motion and briefs in support and opposition thereto, along with the  
16 record and proceedings herein, the court enters the following order:

17 Defendant Jerry A. Jarrell's motion for summary judgment is GRANTED.

18  
19 **Memorandum**

20 This is an action to collect a debt. Heritage Place, Inc., ("Heritage") alleges that Defendants  
21 owe \$15,967.99 in expenses incurred by Dena Mae Jarrell at Heritage's facility, a nursing  
22 home, together with interest, costs, and attorney's fees pursuant to the parties' contract.  
23 Heritage alleges that Jerry Jarrell is liable for the debt under the following theories: 1) Jerry  
24 was Dena Mae Jarrell's attorney in fact and thus had a fiduciary duty to pay her debts; 2) Jerry  
25 is contractually liable for the debt because he signed Heritage's Admissions Agreement and  
26 affirmed on several occasions that he was obligated to pay for the care of his mother; 3) as  
27 Dena Mae Jarrell's son, Jerry had a duty to pay her debt. Defendant Jerry Jarrell initially  
28 moved to dismiss for failure to state a claim upon which relief could be granted but the motion

1 was converted to one for summary judgment pursuant to Montana Rule of Civil Procedure  
2 12(d). The motion is now ripe.

3  
4 Jerry argues that he cannot be sued personally for his mother's debt. He admits that he was  
5 Dena Jarrell's attorney in fact and did sign the Admission Agreement admitting Dena to the  
6 nursing home, but he asserts that he signed it only as Dena's "Agent/Responsible Party." Jerry  
7 asserts that a fiduciary duty to pay Dena Jarrell's debts out of his own pocket was not created  
8 by virtue of his power of attorney over Dena and he never agreed to be liable for that debt,  
9 either individually or as a guarantor, in writing or orally. The Agreement specifically stated:  
10 "The Agent is not a guarantor of the Resident's obligation to the Facility." Admission  
11 Agreement, ¶ 1.2 (attached to Notice of Filing Fugitive Document, doc. no. 5). Jerry asserts  
12 further that Heritage is prohibited by Montana and federal law from requiring family members  
13 to guarantee payment for its residents. He states that any alleged oral promise to pay the debt  
14 could not have created an enforceable agreement because such promises are required to be in  
15 writing. Jerry argues as well that Montana's filial support statutes do not permit third party  
16 private causes of action without a written agreement to pay and he contends that such a cause  
17 of action would violate the due process guarantees in Mont. Const. art. II, §§ 4 and 17.

18 Heritage responds that a creditor has the right to inquire and explore whether an attorney in  
19 fact acted outside his statutory obligations because § 28-10-702, MCA, provides that an agent  
20 incurs personal responsibility under the agency relationship when those acts are wrongful in  
21 their nature. Heritage asserts that promises to pay may be enforceable in some instances and  
22 that the admission contract signed by the defendant as an agent allows the further pursuit of the  
23 claim against the defendant. Further, the Montana Code provides that "the promise of an adult  
24 child to pay for necessities previously furnished to that parent is binding." § 40-6-2 14, MCA.  
25 Heritage argues that Jerry's promise to pay accordingly need not be in writing.

26 Jerry replies that the Complaint does not allege an independent wrongful act but only alleges  
27 that a debt is owed. Wrongful acts must be independent of the agency relationship but no  
28 wrongful acts outside the scope of Jerry's agency are alleged in the Complaint. *Crane Creek  
Ranch, Inc., v. Cresap*, 2004 MT 351, ¶ 13, 324 Mont 366, 103 P.2d 535 (2004).

1 Jerry argues that Rule 11 requires reasonable inquiry to determine whether or not a wrongful  
2 act has occurred *prior* to filing suit, not after, and the use of litigation to establish whether a  
3 wrongful act occurred that would justify the cause of action is thus improper. To Heritage's  
4 defense of its second cause of action, Jerry maintains that Heritage's contract claim is not  
5 actually based on the parties' Admissions Agreement but is a statutory liability claim based on  
6 an alleged oral promise with the result that the Contract's provision for attorney fees or costs  
7 cannot apply. Jerry reiterates that promises to pay another person's debt must be in writing  
8 and that: 1) if the alleged oral promises were made after the admissions contract was signed,  
9 the debt was incurred solely by Dena, and Jarrell's later oral promise to pay Dena's debt falls  
10 within the general statute of frauds; 2) if the alleged oral promises were made at the time of  
11 admission, the promise must constitute a guarantee of Dena's promise to pay for the services  
12 provided to her and would thus be barred by the statute of frauds for guarantees.

13 Finally, to Heritage's argument that children have a duty to maintain their indigent parents,  
14 Jerry replies that the statutory bases for this argument are unenforceable in this case because  
15 Montana and federal laws prohibit guarantees of nursing home debt, they do not create a  
16 private cause of action for creditors and, to the extent they are interpreted to allow creditors to  
17 sue individuals without a written agreement between the two, they are unconstitutional. In the  
18 absence of statutory duty, Montana does not recognize a common law duty requiring that an  
19 adult child support a needy parent.

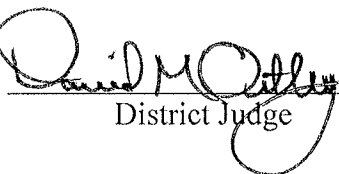
20 Summary judgment is appropriate when the moving party demonstrates both the absence of  
21 any genuine issues of material fact and entitlement to judgment as a matter of law. *Albert v.*  
22 *City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704. Once the moving party has  
23 met its burden, the non-moving party must present substantial evidence essential to one or  
24 more elements of the case to raise a genuine issue of material fact. *Styren Farms, Inc. v. Roos*,  
25 2011 MT 299, ¶ 10, 363 Mont. 41, 265 P.3d 1230.

26 It is undisputed that Jerry indicated in the Admissions Agreement that he was not a voluntary  
27 guarantor but was an agent/responsible party. As such, he "[was] not a guarantor of the  
28 Resident's obligation to the Facility." Admission Agreement ¶ 1.2. Although Ronald

1 Gersack, administrator of Heritage's facility, states in an affidavit that he told Jerry the bill for  
2 his mother would have to be paid and that he has "a long-standing practice of making clear  
3 who would be responsible for the bill" (Gersack Aff. ¶¶5, 7, 12) Montana and federal law  
4 clearly bar nursing homes from requiring a third party, like Jerry, to guarantee payment as  
5 condition for either the admission or continued stay of a patient. See § 50-5-1104, MCA  
6 (stating that Montana adopts 42 U.S.C. 1395i-3(a) and 1396r(a), as implemented by  
7 regulation); 42 USC Sec. 1395i-3(c)(5)(A)(ii), 42 USC 1396r (c)(5)(A)(ii) and 42 CFR  
8 483.12(d)(2) (providing that nursing facilities may not require a third party guarantee of  
9 payment to the facility as a condition of admission (or expedited admission) to, or continued  
10 stay in, the facility).

11 With respect to Heritage's argument that Jarrell had an independent obligation to maintain his  
12 mother to the extent of his ability under § 40-6-214, MCA, it is a canon of statutory  
13 construction that a particular intent will control a general one that is inconsistent with it. § 1-2-  
14 102, MCA. The specific prohibitions on nursing homes soliciting payment from third parties  
15 accordingly trump the more general language of § 40-6-214, MCA. Jerry is correct that  
16 promises to answer for the debt of another must generally be in writing. §§ 28-2-903(1)(b) and  
17 28-11-104, MCA. Although § 28-11-105, MCA, provides some narrow exceptions, Heritage  
18 does not identify how Jerry's alleged oral agreement fits into any of them and it is simply not  
19 the Court's job to conduct legal research on a party's behalf or develop a legal analysis that  
20 may lend support to the position the party advances. See *Broadwater Development v. Nelson*,  
21 2009 MT 317, ¶ 43, 352 Mont 401, 219 P.3d 492. Judgment as a matter of law is consequently  
22 appropriate on Heritage's claims that Jerry Jarrell is personally liable for the debt incurred by  
23 Dena Mae Jarrell.

24 July 2, 2013

25   
26 \_\_\_\_\_  
27 District Judge

28 Pc: Peter F. Carroll  
Sol Lovas