

NO. A08-1696

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State of Minnesota  
In Court of Appeals

VANCE F. GELLERT AND CARL A. GELLERT,  
*Respondents,*

v.

LILLI ANN EGINTON, ET AL.,  
*Defendants,*

CHARLES W. EGINTON,  
*Appellant.*

APPELLANT CHARLES W. EGINTON'S BRIEF

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## STATEMENT OF THE ISSUES

1. Minnesota law permits the recovery of attorneys' fees only where a statute, agreement, or other rule provides for the recovery of attorneys' fees. Section 524.3-720 of Minnesota's Uniform Probate Code provides for the recovery of certain attorneys' fees in estate litigation—typically expenses of the personal representative of the estate. Minn. Stat. §524.3-720 contains a narrow exception for the payment of attorneys' fees to an interested party where the interested party contributes to the benefit of the estate, as distinguished from the personal benefit of such interested person. Should this Court reverse the district court's erroneous award of attorneys' fees to Respondents Vance F. Gellert and Carl A. Gellert under the Uniform Probate Code in this civil litigation involving the validity of a deed transferring homestead property in joint tenancy?

The district court awarded attorneys' fees to Vance F. Gellert and Carl A. Gellert in this civil action under Minnesota's Uniform Probate Code, §524.3-720.

*List of the most apposite statutes:*

*Minn. Stat. §524.3-720*

*List of the most apposite cases:*

- *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549 (Minn. 2008);
- *In re Estate of Torgerson*, 711 N.W.2d 545 (Minn. Ct. App. 2006);
- *Distributors Supply Co. v. Shablow*, 92 N.W.2d 83 (Minn. 1958);
- *In re Gratton's Estate*, 298 P. 231 (Or. 1931).

2. The Court restored Marie M. Moldenhauer to capacity on July 28, 2003. As a matter of law, Marie M. Moldenhauer had capacity on July 28, 2003. Approximately one week later, on August 4, 2003, Marie M. Moldenhauer executed a deed conveying her homestead in joint tenancy to herself and her daughter, Lilli Ann Eginton. The district court's Findings of Fact and Conclusions of Law wholly disregard Marie M. Moldenhauer's restoration to capacity and are devoid of specific findings regarding her capacity on August 4, 2003. The Findings of Fact also ignore significant evidence concerning Marie M. Moldenhauer's mental facilities in 2003. Instead, the district court's Findings of Fact and Conclusions of Law erroneously rely on the pre-restoration time period. Should this Court reverse the district court's erroneous determination that Marie M. Moldenhauer lacked capacity to execute a deed on August 4, 2003 and therefore determine the August 4, 2003 deed validly transferred property to Lilli Ann Eginton in joint tenancy?

The district court held that Marie M. Moldenhauer lacked capacity to execute the August 4, 2003 deed.

*List of the most apposite cases:*

- Jasperson v. Jacobson, 27 N.W.2d 788, 792 (Minn. 1947);
- Fisher v. Schefers, 656 N.W.2d 592 (Minn. Ct. App. 2003);
- Macklett v. Temple, 1 N.W.2d 415 (Minn. 1941);
- Younggren v. Younggren, 556 N.W.2d 228 (Minn. Ct. App. 1996).

3. A deed is properly delivered when a grantor surrenders control and intends to convey title. Actual, physical delivery is not a necessary element of deed delivery. A

valid delivery occurs where a deed is delivered and/or received by an agent of either party to the deed. Lilli Ann Eginton was present at the August 4, 2003 execution of the deed and received the executed deed conveying Marie M. Moldenhauer's homestead to her in joint tenancy on that day. Lilli Ann Eginton requested that attorney Paul Leutgeb maintain for safekeeping the original August 4, 2003 deed delivered to her by her mother. Should this Court reverse the district court's erroneous determination that the August 4, 2003 gift deed was never delivered, and even if it was delivered, that it either was never accepted or delivery was waived by Lilli Ann Eginton?

The district court held that the August 4, 2003 deed was not delivered to Lilli Ann Eginton, and even if it had been delivered, it was not a completed gift because Lilli Ann Eginton did not accept it.

*List of the most apposite cases:*

- *In re Estate of Savich*, 671 N.W.2d 746 (Minn. Ct. App. 2003);
- *Ingersoll v. Odendahl*, 162 N.W. 525 (Minn. 1917);
- *Barnard v. Thurston*, 90 N.W. 574 (Minn. 1902);
- *Cloutier v. Charest*, 294 N.W. 457 (Minn. 1940).

## STATEMENT OF THE CASE

This Appeal concerns two primary issues: (1) the district court's award of attorneys' fees to Respondents Vance F. Gellert and Carl A. Gellert in this civil litigation; and (2) the validity and delivery of a deed executed by Marie M. Moldenhauer on August 4, 2003 (the "Deed"). Charles W. Eginton, the husband of Defendant Lilli Ann Eginton and a derivative beneficiary of the Deed at issue, appeals from the Dakota County District Court judgment ordered by the Honorable Richard G. Spicer. Judge Spicer determined that Marie M. Moldenhauer lacked the capacity to execute the August 4, 2003 Deed and further determined that the Deed was not properly delivered, or, even if it had been delivered, it was not a completed gift because Lilli Ann Eginton did not accept it. Charles W. Eginton further appeals from the Dakota County District Court judgment of the Honorable Richard G. Spicer awarding attorneys' fees to Respondents Vance F. Gellert and Carl A. Gellert.

Marie M. Moldenhauer died on October 23, 2006 in Dakota County, Minnesota. (Tr.1 Ex. 88)<sup>1</sup>. Decedent had three living children: Lilli Ann Eginton, Carl A. Gellert, and Vance F. Gellert. (Tr.1 Ex. 88). Prior to her death, Marie M. Moldenhauer owned real property commonly known as 1396 South Smith Avenue, West St. Paul, Minnesota 55118 (the "Property"). (App. 18). On August 4, 2003, Marie M. Moldenhauer executed a Deed gifting the Property to her daughter, Lilli Ann Eginton, and herself in joint

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<sup>1</sup> Appellant utilizes the following citation formats in this brief: (1) App. denotes citations to the appendix submitted herewith; (2) T.1 references citations to the August 6-9, 2007 trial transcript; (3) T.2 references citations to the February 6, 2008 trial transcript and (4) Tr.1 Ex. And Tr.2 Ex. reference exhibits entered into evidence at the August 6, 2007 and February 6, 2008 trials, respectively.

tenancy. (App. 159-160). On September 5, 2003, Marie M. Moldenhauer also executed a will addressing the disposition of her estate (the "Will"). (App. 163-166).

On or about November 21, 2006, Lilli Ann Eginton, daughter and heir of Decedent Marie M. Moldenhauer, filed a petition for probate of the Decedent's September 5, 2003 Will and for appointment as Personal Representative of the Estate of Marie M. Moldenhauer. (App. 97). On or about January 3, 2007 and January 4, 2007, respectively, Carl A. Gellert and Vance F. Gellert, sons of Marie M. Moldenhauer, served and filed objections to the probate of the September 5, 2003 Will, alleging that the Decedent lacked capacity to execute the Will and that the Will was subject to undue influence. (App. 97). Both Carl A. Gellert and Vance F. Gellert also objected to the appointment of Lilli Ann Eginton as personal representative of Marie M. Moldenhauer's estate. (App. 97-98). On January 8, 2007, the Court ordered that the Will matter be scheduled for a contested evidentiary hearing.

At the bench trial conducted from August 6 through August 9, 2007, the Court received extensive exhibit evidence from both parties and heard the testimony of numerous witnesses. On October 18, 2007, the district court issued its Finding of Fact, Conclusions of Law, and Order for Judgment. (App. 97-110). By its October 18, 2007 Order, the Court determined that Marie Moldenhauer lacked sufficient capacity to execute the September 5, 2003 Will, but that she was not unduly influenced in executing this Will. (App. 97-110). As a result, the Court refused to submit the Will to probate. The district court's decision invalidating Marie M. Moldenhauer's September 5, 2003 Will is currently on appeal to this Court as Appellate Court Case Number A08-263.

On or about April 11, 2007, Vance F. Gellert and Carl A. Gellert commenced the declaratory action underlying this appeal against Lilli Ann Eginton and her husband Charles Eginton requesting that the district court find the August 4, 2003 Deed invalid. (App. 1-6). By this action, Plaintiffs sought a declaration proclaiming the Deed invalid and including the homestead in the related probate proceeding referenced above. On February 6, 2008, following the initial contested evidentiary hearing on the Will matter, the district court heard this matter involving the Deed at issue in this appeal. During this hearing, the parties stipulated that all of the testimony and exhibits that were heard or introduced in the previous probate action, In Re the Estate of Marie M. Moldenhauer, Court File No. P-06-10512, were to be considered in this matter by the court as though the evidence had been introduced in the declaratory judgment proceeding. (T.2 8; 10-17; Tr.2 Ex. 102).

During the hearing, Plaintiffs alleged the Deed was invalid on the following grounds: (1) Marie Moldenhauer lacked capacity; (2) the deed was the result of undue influence; (3) the deed was never delivered; and (4) the deed was never recorded. (T.2 5). Lilli Ann Eginton and Charles Eginton defended against these claims by presenting evidence that Marie Moldenhauer had sufficient capacity to execute a deed and that transfer of the deed was not the result of undue influence. Defendants further presented evidence that the deed was properly delivered and accepted by Lilli Ann Eginton. Finally, Defendants provided case law and testimony that supported a finding that a deed does not need to be recorded to be valid.

In an order dated May 23, 2008, the district court found that the August 4, 2003 Deed was invalid due to Marie Moldenhauer's lack of capacity, but that she was not unduly influenced in executing this deed. (App. 16-44). The Court further found that the August 4, 2003 Deed was not delivered and, even if it had been delivered, it was still not a completed gift because Lilli Ann Eginton did not accept it. (App. 16-44). Plaintiffs served a Notice of Filing by mail on May 29, 2008. On July 1, 2008, Charles W. Eginton timely served and filed a Motion for Amended Findings of Fact, Conclusions of Law, and Order for Judgment, or in the alternative, New Trial. (App. 45-64).

On or about July 11, 2008, Plaintiffs served and filed a motion requesting payment of attorneys' fees incurred in bringing the action. (App. 80-86). Defendants objected to this motion on the basis that no statutory authority exists authorizing the court to award attorneys' fees in such a real estate action. (App. 87-92). Defendants asserted that Plaintiffs improperly relied on a section of Minnesota's Uniform Probate Code, Minn. Stat. § 524.3-720, that allows recovery of attorneys' fees in certain probate matters where the fees are expended for the benefit of the estate. (App. 87-92). This statute does not permit recovery of fees in real estate actions brought for the personal benefit of the Plaintiffs. (App. 87-92).

The district court heard these motions on August 4, 2003. On that same day, the district court issued an order denying Charles W. Eginton's Motion for Amended Findings of Fact, Conclusions of Law, and Order for Judgment, or in the alternative, New Trial. (App. 79). The court also issued a separate order that same day awarding the

requested attorneys' fees. (App. 93-96). Plaintiffs served a Notice of Filing by mail on August 7, 2008.

In determining that Marie M. Moldenhauer lacked the capacity to execute the Deed, the district court ignored the presumption of capacity established by the July 28, 2003 Restoration to Capacity Order and disregarded significant probative evidence regarding Marie M. Moldenhauer's mental faculties in 2003. Further, the district court disregarded applicable law and significant evidence regarding the delivery of the deed to Lilli Ann Eginton. Finally, the district court improperly relied on a section of Minnesota's Uniform Probate Code, Minn. Stat. § 524.3-720, in awarding attorneys' fees to Vance F. Gellert and Carl A. Gellert in this civil litigation. As a result, Charles W. Eginton filed this appeal challenging the district court's invalidating of the Deed at issue and award of attorneys' fees to Plaintiffs in this matter.

## STATEMENT OF THE FACTS

### **I. The Years Prior to Execution of the August 4, 2003 Deed.**

Marie M. Moldenhauer resided in her home located at 1396 South Smith Avenue, West St. Paul, MN until she fell and broke her hip on February 6, 2001. (Tr. Ex. 88; App. 32-33). Following the hip fracture, Marie M. Moldenhauer was hospitalized and underwent corrective surgery. (App. 34). She was subsequently transferred to St. Paul's Church home, where she lived until returning to her home on November 18, 2001. (App. 34). Mrs. Moldenhauer suffered diminished capacity in the several months following her fall and broken hip. (App. 34-36). As a result, the nursing home recommended that the family seek to have a conservator appointed for Mrs. Moldenhauer. (App. 33-34). On April 10, 2001, the Court signed an Order appointing Lilli Ann Eginton as conservator of the Person and Estate of Marie M. Moldenhauer ("The First Conservatorship"). (App. 33-34). Subsequently, the Court appointed an independent conservator, Anthony Roszak, to handle Mrs. Moldenhauer's finances. (App. 35-36).

Mrs. Moldenhauer's cognitive functioning drastically improved once she returned to her home in November of 2001. (Tr.1 Ex. 200; T.1 598; 13; 15; 18-20). By the end of 2002, Mrs. Moldenhauer's level of alertness and cognitive functioning had improved so significantly that Paul Leutgeb—long-time attorney and friend of Marie M. Moldenhauer—informed Mrs. Moldenhauer and her family that she could likely be restored to capacity. (T.1 89; 115-116; 126; 254). Mrs. Moldenhauer expressed unhappiness with regard to the lack of communication from Mr. Roszak regarding her finances, and directed Mr. Leutgeb to pursue restoration of capacity on her behalf. (T.1

233-234; 254-255). At the direction of Mrs. Moldenhauer, Paul Leutgeb commenced the restoration to capacity process. (T.1 254-255).

## **II. The Relevant 2003 Time Period.**

### **1. January of 2003.**

In January of 2003, Mrs. Moldenhauer's primary care physician, Dr. Valerie Evje, examined her and noted a significant improvement in cognitive functioning. (Tr.1 Ex. 201; T.1 13; 15; 18-20). During this examination, Mrs. Moldenhauer performed a number of tasks correctly, including recalling the date, president, and spelling words backward. (Tr.1 Ex. 201; T.1 24-25). Mrs. Moldenhauer also properly indicated that she would call 911 in an emergency. (Id.).

Based on this examination, attorney Paul Leutgeb requested that Dr. Evje prepare a letter in support of the restoration to capacity (Tr.1 Ex. 25). On February 7, 2003, Dr. Evje prepared correspondence indicating that Mrs. Moldenhauer's confusion had "dramatically improved," and that despite some limited memory deficit, her mental status also exhibited significant improvement. (Tr.1 Ex. 200). Dr. Evje opined that Mrs. Moldenhauer had adequate capacity to delegate care of her finances and affairs to a party of her choice, and would understand that delegation. (Id.). As late as December 2003, Dr. Eve's notes confirm Marie M. Moldenhauer's capacity. (Tr.1 Ex. 50).

### **2. March of 2003.**

Upon Dr. Evje's recommendation, Dr. Shepherd Myers—a licensed psychologist of approximately eighteen years with experience in assessing the mental functioning of the elderly—examined Mrs. Moldenhauer in March of 2003 for purposes of assessing her

cognitive functioning. Dr. Myers conducted his assessment of Mrs. Moldenhauer over a period of approximately one hour, outside the presence of any family member. (T.1 185-188). Dr. Myers administered several tests during his assessment, including the MMSE (mini-mental status examination), on which Mrs. Moldenhauer scored a 22, the Bender Gestalt test, and the WAIS III test of social reasoning. (Tr.1 Ex. 27; T.1 187-188). During this examination, Mrs. Moldenhauer was able to spell the word “world” backwards, perform three-step verbal commands and write a sentence, and perform simple addition problems. (App. 99; Tr.1 Ex. 27; T.1 189). Based on his interview, behavioral observations, and the results of the tests he administered, Dr. Myers—who is specifically trained in assessing mental capacity—determined that Mrs. Moldenhauer’s mental functioning operated at a level sufficient to allow her to make appropriate determinations regarding her personal care and finances. (Tr.1 Ex. 27; T.1 189-191).

3. Summer of 2003.

Luz Marina Gomez served as Mrs. Moldenhauer’s primary daily caregiver from late 2001 until the date of her death. (T.1 301, 304). Ms. Gomez generally spent approximately nine hours per day, six days per week with Mrs. Moldenhauer. (T.1 34). According to Ms. Gomez, during the 2003 time period—including specifically the summer of 2003—Mrs. Moldenhauer engaged in numerous activities and was active in her own care. Ms. Gomez testified that Mrs. Moldenhauer selected her own clothing and dressed herself, offered to assist (and did assist) in cooking meals, frequently took long walks around the neighborhood, engaged in lively conversation—including discussions about politics, read the newspaper and read to children at the local library. (T.1 302-305;

310-314; 321-322; See also T.1 239; 241). In fact, Mrs. Moldenhauer accompanied Ms. Gomez on a week-long camping trip during the summer of 2003. (T.1 307-308; 310-311). Ms. Gomez believed Mrs. Moldenhauer generally understood her financial assets in 2003. (T.1 346-347).

During the summer of 2003, Lilli Ann Eginton explained her mother's financial status to her on several occasions, and her mother appeared to understand these explanations. (T.1 560-563; 614). Ms. Eginton acknowledged that Mrs. Moldenhauer occasionally asked questions regarding how much money she had and the location of that money, and that she may not have recalled this information from time to time. (Id.). During this time period, it was clear to Lilli Ann Eginton, however, that Mrs. Moldenhauer understood the nature and extent of her assets when this information was explained to her. (Id.) Mrs. Moldenhauer also retained her own checkbook with an approximate balance of \$500, and appropriately wrote checks from this account and balanced the checkbook during 2003. (T.1 547-549).

4. June and July of 2003.

On June 17, 2003, Mrs. Moldenhauer, along with Lilli Ann Eginton, filed a Petition for Restoration of Capacity. (T.1 36). On July 28, 2003, the Court conducted a hearing on Marie M. Moldenhauer's request for restoration to capacity. (Tr.1 Ex. 30, 31). In connection with this hearing, Mrs. Moldenhauer submitted a lengthy handwritten letter to the Court setting forth her desire and the reasons for her request for restoration to capacity. (Tr.1 Ex. 202; T.1 260-261). Counsel for Plaintiffs played a tape of Mrs. Moldenhauer's testimony at the restoration to capacity hearing during the trial on this

matter. (T.1 Ex. 30). Mrs. Moldenhauer's testimony was clear and forceful, suggesting a competent woman expressing her desire for the Court to restore her to capacity so that she could delegate control of her finances to the party of her choice. (Id.).

Based on the evidence presented at the hearing, The Honorable Thomas Lacy restored Marie M. Moldenhauer to capacity. (App. 161-162; Tr. Ex. 30, 31)<sup>2</sup>. This is particularly notable in light of the fact that Judge Lacy also presided over the initial April 9, 2001 hearing pursuant to which Mrs. Moldenhauer was placed under conservatorship. (Tr. Ex. 7). As of July 28, 2003, as a matter of law, Marie M. Moldenhauer possessed to execute a deed.

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<sup>2</sup> Although the Restoration to Capacity hearing and associated events were referenced throughout both the trial conducted on August 6-9, 2007 and the February 6, 2008 trial, the actual Order for Restoration to Capacity was not explicitly entered as an exhibit in either matter. At the August 4, 2008 hearing, the district court did, however, indicate that it believed it had taken judicial notice of the Order during the prior proceedings, and if it had not, it essentially did so at that time. (Transcript of August 4, 2003 hearing, pp. 21-24). Courts will often take judicial notice of matters of public record outside the pleadings, such as information from related proceedings and records in cases before the same court, documents filed with the Secretary of State, meeting minutes, and orders and rules of state agencies filed in the State Register. See Minn. Stat. § 14.37, subd. 1 (requiring courts to take judicial notice of all orders and rules of state agencies published in the state register); Matter of the Welfare of David R. Clausen, Jr., 289 N.W.2d 153, 156 (Minn. 1980) (recognizing propriety of judicially noticing records from the court in which the judge sits); Wheeler v. City of Wayzata, 433 N.W.2d 405, 406 (Minn. 1995) (Judicial notice of Planning Commission meeting minutes); Nelms v. Civil Service Commission of State of Minnesota, 220 N.W.2d 300, 303 (Minn. 1974) (holding that pursuant to statutory authority, court could take judicial notice of an order filed with the Secretary of State). An appellate court may take judicial notice of a fact for the first time on appeal. See Minn. R. Evid. 201(f); Simsek v. Commissioner of Public Safety, 400 N.W.2d 766, 767 (Minn. Ct. App. 1987) (Judicial notice may be taken at any stage in the proceedings, including appeal); Hanks v. Commissioner of Public Safety, No. C4-89-2202, 1990 Minn. App. WL 57521 (Minn. Ct. App. May 8, 1990) (same). If the Court determines it is necessary, Charles W. Eginton hereby requests the Court take judicial notice of the July 28, 2003 Order for Restoration to Capacity.

5. The August 4, 2003 Deed.

Approximately seven days later, Marie M. Moldenhauer executed the Deed at issue in this appeal. (App. 159-160; T.2 81). Marie M. Moldenhauer's attorney and long time friend, Paul Leutgeb, prepared the Deed in accordance with Mrs. Moldenhauer's direction and under the terms specified by Mrs. Moldenhauer (T.2 81-83; 87-89; 101-102). On the day Mrs. Moldenhauer executed the Deed, Mr. Leutgeb reviewed the Deed with her and she confirmed her desire and intent to convey her homestead property in joint tenancy to herself and her daughter, Lilli Ann Eginton. (T.2 70-71; 87-89; 101-102; 142-145; 147). Mrs. Moldenhauer indicated that she desired to transfer her homestead to Lilli Ann Eginton at least in part to reward her for the assistance she and her family provided to allow her to remain in her home. (T.2 82; 87-89; 142). Mr. Leutgeb witnessed and acknowledged the execution of three originals of the Deed on August 4, 2003. (App. 159-160; T.2 31; 58-62; 81-83). At the time Mrs. Moldenhauer executed the Deed, she also executed additional documents necessary to properly convey the Property at issue in joint tenancy, including an Affidavit of Survivorship demonstrating her status as the surviving joint tenant-remainderman of Elmer W. Moldenhauer. (Tr.2 Ex. 107).

Pursuant to the direction of Marie M. Moldenhauer, Paul Leutgeb requested Lilli Ann Eginton's presence during the August 4, 2003 execution of the Deed. (T.2 31; 187-189- 142-143). Following execution of the Deed, Marie M. Moldenhauer either handed Lilli Ann Eginton an original of the Deed directly, or passed it to Paul Leutgeb and requested that he hand the original to Lilli Ann Eginton. (T.2 31;58-62; 87-89; 142-145).

Lilli Ann Eginton accepted the Deed, and then requested Paul Leutgeb maintain for safekeeping the original August 4, 2003 Deed delivered to Lilli Ann Eginton by her mother, and handed Mr. Leutgeb the Deed for this purpose. (T.2 31; 87-89; 142-145). Shortly thereafter, on September 5, 2003, Mrs. Moldenhauer again expressed her desire that the homestead transfer to Lilli Ann Eginton in executing the Will at issue in the related probate proceeding currently on appeal to this Court. (App. 163-166).

### **III. Events following the August 2003 Deed Execution.**

In the spring of 2004, Vance F. Gellert filed a petition for the appointment of a Conservator and Guardian over Marie M. Moldenhauer. (T.1 656-657). On September 13, 2004, the Court ordered Lilli Ann Eginton be appointed Conservator and Guardian over Marie M. Moldenhauer. (See Tr.1 Ex. 88). Due to an apparent mistake, Vance F. Gellert did not attend the September 13, 2004 hearing. (T.1 656-657). Lilli Ann Eginton served as her mother's Guardian and Conservator until the date of her death, October 23, 2006. (See Tr.1 Ex. 88).

## STANDARD OF REVIEW

### **A. Standard of Review As To Attorneys' Fees.**

The determination of whether a party is entitled to attorneys' fees under Minn. Stat. § 524.3-720 is a question of law subject to de novo review. See Becker v. Alloy & Eng'g Co., 401 N.W.2d 655, 661 (Minn. 1987); see also In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405, 422 (Minn. 2003) (question of whether insured entitled to attorneys' fees based on a breach of the covenant of good faith and fair dealing is a question of law reviewed de novo.); Wiegel v. City of St. Paul, 627 N.W.2d 95, 98 (Minn. Ct. App. 2001) (overruled on other grounds) (when determination of appropriateness of attorneys' fees involves construction of a statute, review is de novo).

The determination of what is a reasonable amount of attorneys' fees to award under Minn. Stat. § 524.3-720 is a question of fact that is reviewed under an abuse of discretion standard. In re Estate of Bush, 230 N.W.2d 33, 42 (Minn. 1975); In re Estate of Baumgartner, 144 N.W.2d 574, 580 (Minn. 1966). While it is in the discretion of the district court to determine the amount of allowable attorneys' fees, "it is not within the discretion of the courts to allow anything more than is fair and reasonable." In re Estate of Weisberg, 64 N.W.2d 370, 372 (Minn. 1954). Lower courts have a duty to prevent dissipation of estate assets by not allowing exorbitant fees in administering an estate. Id.; In re Estate of Bush, 230 N.W.2d at 42.

**B. Standard of Review Regarding Validity and Delivery of Deed.**

The findings of fact made by a court sitting without a jury will not be set aside unless clearly erroneous. Minn. R. Civ. P. 52.01; Krueger v. Zoch, 173 N.W.2d 18, 20 (Minn. 1969); Fisher v. Schefers, 656 N.W.2d 592, 594 (Minn. Ct. App. 2003); Younggren v. Younggren, 556 N.W.2d 228, 232 (Minn. Ct. App. 1996), Hay v. Dahle, 386 N.W.2d 808, 810 (Minn. Ct. App. 1986). Conclusions of law are reviewed de novo. Younggren, 556 N.W.2d at 232. Findings of fact are clearly erroneous where the reviewing court is left with the definite and firm conviction that a mistake was made. Gjovik v. Strobe, 401 N.W.2d 664, 667 (Minn. 1987); Fisher, 656 N.W.2d at 594. Where findings of fact are based on conflicting evidence, as in this case, the court will be upheld if there is evidence in the record which, if believed, reasonably supports its findings. Peterson v. Johnston, 254 N.W.2d 360, 362 (Minn. 1977); Hay v. Dahle, 386 N.W.2d 808, 810 (Minn. Ct. App. 1986).

## SUMMARY OF ARGUMENT

The district court improperly relied on Minnesota's Uniform Probate Code, Minn. Stat. § 524.3-720, in awarding attorneys' fees to Plaintiffs Vance F. Gellert and Carl A. Gellert. This improper reliance constitutes reversible error with respect to the award of attorneys' fees. No statutory authority exists authorizing the district court to award attorneys' fees in this real estate action. Further, Minn. Stat. § 524.3-720 does not permit recovery of fees in actions brought for the personal benefit of the Plaintiffs, as Plaintiffs Vance F. Gellert and Carl A. Gellert did in this case.

The record is insufficient to support the May 23, 2008 Findings of Fact, Conclusions of Law, and Order for Judgment entered by the district court regarding the validity of the Deed and cannot support a determination that Marie M. Moldenhauer lacked the capacity necessary to execute a Deed on August 4, 2003. The Court restored Marie M. Moldenhauer to capacity on July 28, 2003. As a matter of law, Marie M. Moldenhauer possessed capacity on that date. Approximately seven (7) days later, on August 4, 2003, Marie M. Moldenhauer executed the Deed at issue.

The district court's order entirely ignores the legal presumption of capacity established by the July 28, 2003 Court Order restoring Marie M. Moldenhauer to capacity. Once the Court restored Marie Moldenhauer to capacity on July 28, 2003, she presumptively had the capacity to execute a deed. Rather than assessing Marie M. Moldenhauer's capacity in and around the August 2003 time period, the findings of fact erroneously focus on the pre-restoration time period and discount significant evidence submitted regarding Marie M. Moldenhauer's mental faculties in 2003. Both the findings

of fact and the record are devoid of credible evidence indicating that on the date Marie M. Moldenhauer executed the August 4, 2003 deed, she lacked the capacity to do so. The findings of fact do not contain specific findings regarding Mrs. Moldenhauer's capacity on August 4, 2003. As a result, the district court incorrectly applied the law regarding capacity to execute a deed to the facts of this case.

Finally, the district court erred in determining that Marie M. Moldenhauer did not deliver the Deed to Lilli Ann Eginton, and even if it was delivered, that it was either never accepted or delivery was waived by Lilli Ann Eginton. Neither the law nor the facts of this case support the district court's Order with respect to delivery. The district court wholly disregarded applicable Minnesota law with respect to delivery of the Deed to an agent of either party. Further, the record is insufficient to support a finding that the Deed was not delivered to Lilli Ann Eginton. The Court therefore incorrectly applied the law regarding delivery to the facts established at the trial of this matter.

## ARGUMENT

### **I. The District Court Erred in Allowing the Payment of Attorneys' Fees to Respondents Vance F. Gellert and Carl A. Gellert From the Estate of Marie M. Moldenhauer.**

The district court's improper award of attorneys' fees to Vance F. Gellert and Carl A. Gellert constitutes reversible error. As a fundamental rule, Minnesota law only permits the recovery of attorneys' fees when a statute, agreement, or other rule provides for the recovery of fees. Dunn v. National Beverage Corp., 745 N.W.2d 549, 554 (Minn. 2008); Barr/Nelson, Inc. v. Tonto's, Inc., 336 N.W.2d 46, 53 (Minn. 1983); In re Rollins, 738 N.W.2d 798, 804 (Minn. Ct. App. 2007); Northfield Care Center, Inc. v. Anderson, 707 N.W.2d 731, 735 (Minn. Ct. App. 2006). In the absence of such a statute, agreement, or other rule, each party bears its own litigation costs, including attorneys' fees. Id. Contrary to the district court's determination, no such statute, agreement, or other rule exists with respect to the civil litigation regarding the Deed at issue in this action.

The district court improperly relied on Minn. Stat. § 524.3-720—a section of Minnesota's Uniform Probate Code—in awarding attorneys' fees to Respondents Vance F. Gellert and Carl A. Gellert. This section, entitled "Expenses in Estate Litigation," (emphasis added) provides as follows:

"Any personal representative or person nominated as personal representative who defends or prosecutes any proceeding in good faith, whether successful or not, or any interested person who successfully opposes the allowance of a will, is entitled to receive from the estate necessary expenses and disbursements including reasonable attorneys' fees incurred. When after demand the personal representative refuses to prosecute or pursue a claim or asset of the estate or a claim is made against the personal representative on behalf of the estate and any

interested person shall then by a separate attorney prosecute or pursue and recover such fund or asset for the benefit of the estate, or when, and to the extent that, the services of an attorney for any interested person contribute to the benefit of the estate, as such, as distinguished from the personal benefit of such person, such attorney shall be paid such compensation from the estate as the court shall deem just and reasonable and commensurate with the benefit to the estate from the recovery so made or from such services.”

Minn. Stat. § 524.3-720.

The district court cites no law in support of its reliance on this section of Minnesota’s Uniform Probate Code to award attorneys’ fees under the circumstances of this case. By its very title, as well as the language of the section itself, this section of Minnesota’s Uniform Probate Code contemplates estate litigation in the context of probate matters, and particularly focuses on the validity of wills. See e.g. In re Estate of Torgerson, 711 N.W.2d 545, (Minn. Ct. App. 2006) (noting public policy under statute [524.3-720] recognizes that estate is benefited when genuine controversies as to validity of will are litigated and finally determined).

The district court’s award of attorneys’ fees to Respondents is based on the wrong rule and is in the wrong forum. This is not a probate matter, nor does it relate to the validity of Marie M. Moldenhauer’s will. Instead, it relates to a separate, independent civil litigation commenced by Respondents in district court to challenge an independent warranty deed relating to the property located at 1396 South Smith Avenue, West St. Paul, Minnesota.

The district court’s allowance of attorneys’ fees under Minn. Stat. § 524.3-720 was further improper because the interested parties brought the actions for their personal benefit. Section 524.3-720 allows payment of an interested person’s attorneys’ fees “to

the extent that, the services of an attorney for any interested person contribute to the benefit of the estate, as such, as distinguished from the personal benefit of such person.” Minn. Stat. § 524.3-720 (emphasis added); see also In re Estate and Trust of Anderson, 654 N.W.2d 682, 689 (Minn. Ct. App. 2002) (court denied payment of beneficiary’s attorneys’ fees out of estate holding that action was brought for beneficiary’s personal benefit, which this section does not allow); Distributors Supply Co. v. Shablow, 92 N.W.2d 83, 88-89 (Minn. 1958) (upheld only minimal award of attorneys’ fees based on finding that estate was not significantly benefited by creditor’s action that recovered some assets to the estate, observing that the creditor’s main objective was to return enough assets to allow full payment of its claim.).

The general rule under this statute and common law is that most estates should only be burdened by payment of the personal representative’s attorneys’ fees. See Distributors Supply Co., 92 N.W.2d at 88-89 (even under this statute the right to allow fees should be cautiously exercised); Merchants & Planters Bank v. Myers, 644 S.W.2d 683, 688 (Tenn. Ct. App. 1982) (in general only attorney’s fees of personal representative should be paid). It is only in “very unusual circumstances” that the attorneys’ fees of a beneficiary should be paid out of an estate. See In re Keller, 584 N.E.2d 1312, 1316, 1318 (Ohio Ct. App. 1989) (probate court is to apply rule allowing payment of a beneficiary’s attorneys’ fees sparingly); In re Estate of Brown, 615 N.E.2d 319, 321 (Ohio Ct. App. 1992) (it is the rare case where an attorney that was employed by a beneficiary benefits the whole estate that his or her attorneys’ fees can be paid out of the estate);

Merchants & Planters Bank, 644. S.W.2d at 688 (it is the exception to the general rule to allow attorneys' fees of beneficiary that were incurred for the benefit of the estate).

The deciding factor of when to allow this exception to the general rule and thereby allow payment of an interested person's attorneys' fees is when the attorney's work was done for the benefit of the estate as opposed to for the personal benefit of the interested person. Distributors Supply Co., 92 N.W.2d at 88-89 ("of paramount importance under this statute is a determination of the benefit to the estate of the services rendered"). The district court essentially ignored this limiting factor when reasoning that there would rarely be an instance when an interested person would not be pursuing an action for their personal benefit and thus held that award of their attorneys' fees was appropriate. Contrary to the analysis in the district court's Order, this reasoning improperly makes the phrase "as distinguished from the personal benefit of such person" superfluous and meaningless. It violates the long-standing rule of construction that courts must interpret statutes in such a way to give meaning to all of its provisions. Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277-78 (Minn. 2000); State v. Johnson, 743 N.W.2d 622, 626 (Minn. Ct. App. 2008).

Rather than just ignore the phrase "as distinguished from the personal benefit of such person," a more appropriate interpretation is that this phrase limits payment of an interested person's attorneys' fees to instances where these fees were incurred for the benefit of all beneficiaries of an estate as opposed to only for the benefit of one or some of the beneficiaries.

This interpretation is consistent with the reasoning that originally spawned this exception. At common law, courts began to allow payment of beneficiary's attorneys' fees under the "common fund" doctrine, which held that it was appropriate to allow attorneys' fees when the attorney's services benefited a class of persons opposed to just a select few individuals. In Estate of Rohrich, 496 N.W.2d 566, 571 (N.D. 1993). This doctrine is based on the rationale that those who are entitled to share in the benefits of an action should bear their share of the burden of its recovery. In re Keller, 584 N.E.2d at 1317; Dent v. Foy, 107 So. 210, 213 (Ala. 1926) ("rule rests upon the natural equity that he who gets the benefits should bear the burden").

This interpretation also promotes the sound public policy of not making the estate bear the costs of disputes among beneficiaries, whose main motivation is to increase their own personal share of an estate. Courts in other jurisdictions have expressed disapproval of payment of fees when the action is one who's primary motivation is feuding beneficiaries and the outcome only impacts the ultimate distribution of the estate among the warring beneficiaries. See In re Gratton's Estate, 298 P. 231, 234 (Or. 1931) (denied payment of attorneys' fees of beneficiary, finding that attack of will was not for the benefit of the estate, but rather to deprive the other beneficiaries of certain property and increase his own share of the estate); Statler v. Dodson, 466 S.E.2d 497, 500 (W. Va. 1995) (services of an attorney were not allowed to be paid out of estate when litigation merely involved a dispute between dueling beneficiaries in adversary proceedings); In re Keller, 584 N.E.2d at 1317 (this limiting requirement encourages protection of estate funds).

In upholding this interpretation, this Court will be in line with numerous courts that have analyzed when an action is “for the benefit of the estate” as opposed to “for the benefit of an interested person.” As recognized by the district court in this matter, in In re Estate of Brown, the Ohio Court of Appeals acknowledged that it is difficult to imagine a situation when a beneficiary would go to the trouble and expense of hiring an attorney for the exclusive benefit of the estate. 615 N.E.2d at 321. Based on this reality, the court determined that the requirement that the attorney’s actions be “for the benefit of the estate” requires that all of the beneficiaries of the estate become entitled to a greater amount of assets from the estate compared to what they would have received without the services of the attorney. Id. Similarly, in In Estate of Rohrich, the North Dakota Supreme Court focused on whether the action only benefited a select group of beneficiaries. 496 N.W.2d at 570-71. The court held that because an attorney employed by a beneficiary usually seeks to benefit only his client and not the entire estate, “regardless of their professed motives or resulting outcome, attorney fees are disallowed.” See also In re Keller, 584 N.E.2d at 1318 (citation omitted) (test of benefit to estate is whether all beneficiaries have become entitled a greater amount of assets than those which they would have received had the attorneys’ services not been rendered and that the legal activity is in a representative rather than in an individual capacity.)

Similarly, the Michigan Supreme Court stated that the general rule is that before the attorneys’ fees of an interested person can be paid out of the estate, the court must find that “the services rendered were beneficial to the estate as a whole rather than to an individual or group of individuals interested therein.” Becht v. Miller, 273 N.W. 294,

297 (Mich. 1937); see also In re Estate of Wright, 647 P.2d 1153, 1157 (Az. Ct. App. 1982) (same); Merchants & Planters Bank, 644 S.W.2d at 688 (same); Householter v. Householter, 164 P.2d 101, 104-05 (Kan. 1945) (denied payment of interested person's attorneys fees out of estate, because interested person "sought to recover for his personal benefit-not for the benefit of all parties incidentally concerned with the litigation"); In re Estate of Lewis, 93 P.3d 605, 609 (Colo. Ct. App. 2004) (when a beneficiary's motive is financial gain for their sole benefit, award of attorneys' fees from estate is inappropriate.); Dent, 107 So. at 214-15 (attorneys fees denied on finding that "the proceeding is essentially personal and adversary as between the heirs, serving to increase the share of one and decrease the share of the other in the estate"); In re Estate of Evarts, 166 P.3d 161, 165 (Colo. Ct. App. 2007) ("In general, when the contest is narrowed to one of personal interest between parties interested in an estate, attorney fees are not allowed.").

Even though Minnesota courts have not affirmatively adopted this interpretation, many decisions in which the courts have analyzed whether or not to allow an interested person's attorneys' fees support this holding. For example, in In re Estate of Van Den Boom, the Minnesota Court of Appeals held that an interested person was entitled to payment of his attorneys' fees because his actions benefited the estate. 590 N.W.2d 350, 354 (Minn. Ct. App. 1999). The action kept a major asset in the estate, which benefited all the beneficiaries. Id. The main individuals or businesses that suffered from the action were creditors who would have been paid with the proceeds of the sale of the asset. Id. Similarly, in In re Estate of Jeruzal, the court denied payment of a beneficiary's

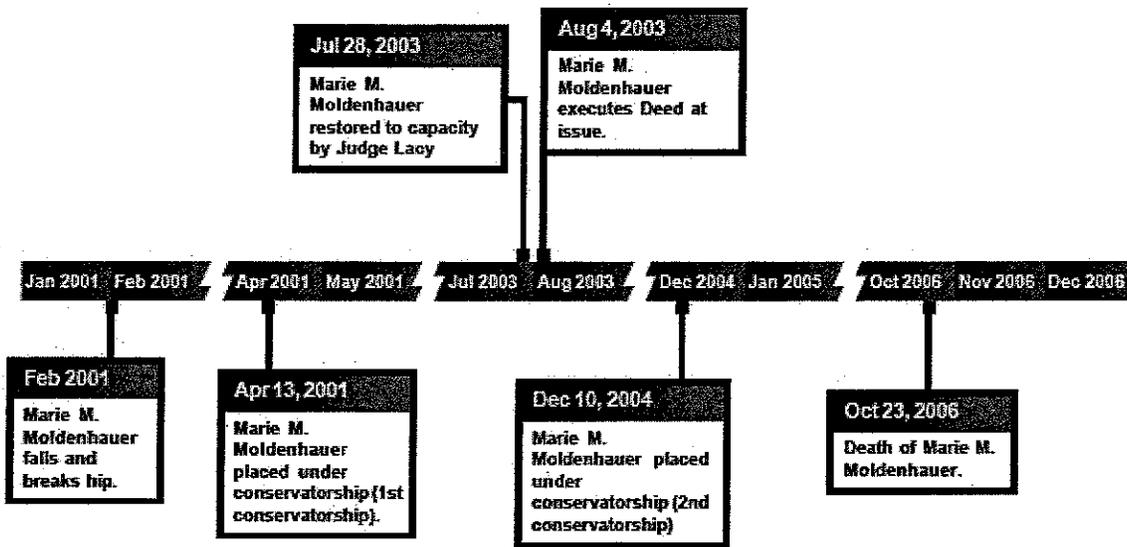
attorneys' fee who had tried to get assets transferred in to an estate. 151 N.W.2d 788 (Minn. 1967). The court held that the action was pursued "from start to finish solely for the personal benefit of" the interested person and was adverse to other persons claiming under the estate. Id., see also In re Estate of Weisberg, 72 N.W.2d 363, 364 (Minn. 1955) (denied award of attorneys' fees that were for sole benefit of administrator and not for benefit of estate).

Based on this interpretation of the limiting phrase in Minn. Stat. § 524.3-720—that an interested person's attorneys' fees should not be paid out of the estate when the action is for the personal benefit of such person—the district court improperly allowed the payment of Vance and Carl Gellerts' attorneys' fees. This action was brought for the personal benefit of the Gellerts as opposed to for the benefit of the estate because it did not benefit all of the beneficiaries to the estate. Rather, it was brought with the sole goal of increasing the Gellerts' share of the estate by reducing the share that Lilli Ann Eginton received. The estate should not be burdened with the expenses incurred from such feuding when all of its beneficiaries have not benefited from it. Therefore, this Court should reverse the lower court's ruling and deny the payment of the Gellerts' attorneys' fees out of the estate.

## **II. The District Court Erred in Invalidating the August 4, 2003 Deed.**

The district court's order fails as a matter of law to overcome the presumption of capacity established by the July 28, 2003 Order restoring Marie M. Moldenhauer to capacity. The district court erroneously relied on evidence from the pre-restoration time period in concluding Marie M. Moldenhauer lacked capacity to execute a deed on August

4, 2003 and failed to make any specific findings regarding Marie M. Moldenhauer’s capacity on the day she executed the Deed at issue in this appeal. For purposes of assessing Marie M. Moldenhauer’s capacity to execute a deed, the relevant time period that the district court should have focused on including the months in and around August of 2003—not events occurring prior to the restoration to capacity or years subsequent to the Will execution. The timeline depicted below highlights the relevant time period the Court should have properly considered in assessing the capacity issue.



**A. As a Matter of Law, Marie M. Moldenhauer Possessed Sufficient Capacity to Execute a Deed on August 4, 2003.**

The district court improperly determined that Marie M. Moldenhauer lacked sufficient capacity to validly transfer her homestead property on August 4, 2003. Under Minnesota law, individuals enjoy a presumption of competence. Jaspersen v. Jacobson, 27 N.W.2d 788, 792 (Minn. 1947). In entering into a transaction, Minnesota law

presumes the person is competent to do so. Fisher v. Schefers, 656 N.W.2d 592, 594 (Minn. Ct. App. 2003). It is a broadly recognized principle that when an individual is restored to capacity, the individual regains that presumption of competence. Doris v. McFarland, 156 A. 52, 56 (Conn. 1931) (When a conservatorship or guardianship is terminated, the ward is presumed competent.); In re Kroll's Estate, 169 N.Y.S.2d 495, 499-500 (N.Y.Sur. 1957) (Once a person is restored to capacity, he or she is free to make any contract desired.); In re Estate of Wellman, 673 N.E.2d 272, 277 (Ill. 1996) (A ward restored to capacity becomes reinvested with the rights he or she lost when adjudicated incompetent.); In re Guardianship of Escola, 534 N.E.2d 866, 870 (Ohio Ct. App. 1987) (Upon restoration to capacity, a ward regains full control over her person and property.); Poling v. City Bank & Trust Co. of St. Petersburg, 167 So.2d 52, 53 (Fla. Dist. Ct. App. 1964) (Upon being declared competent, a person is free to make any agreement he or she desires with other individuals).

As a matter of law, this presumption had to be overcome at trial in order for the court to determine Marie M. Moldenhauer lacked capacity to execute the Deed. The district court, however, entirely disregarded the presumption of capacity established by Court Order on July 28, 2003. The Respondents also failed to overcome this presumption at the trial of this matter. The district court's findings of fact, therefore, do not support defeat of the presumption.

Even if all the findings of fact are taken as true, the district court order failed to account for the legal presumption established by Court Order in 2003. The district court could only overcome the presumption and find a lack of capacity on August 4, 2003—the

date Mrs. Moldenhauer executed the Deed—if the court specifically found she had lost her capacity sometime between July 28, 2003 and August 4, 2003—seven short days later. The district court’s findings of fact fail to do so. Rather, as set forth below, the district court erroneously relied on facts evidencing Mrs. Moldenhauer’s capacity prior to the restoration hearing. Once Marie M. Moldenhauer was restored to capacity, these facts became wholly irrelevant.

Without specific findings of fact regarding Marie M. Moldenhauer’s capacity on August 4, 2003, the district court’s findings of fact do not—and cannot on this record—sufficiently support its ultimate legal conclusion. As a result, this Court should direct as a matter of law in its *de novo* review that the presumption that Marie M. Moldenhauer had sufficient capacity to execute the August 4, 2003 Deed was not overcome and therefore she had capacity.

**B. The District Court Clearly Erred in Determining Marie M. Moldenhauer Lacked the Capacity to Execute the August 4, 2003 Deed.**

The district court erred in two significant respects in determining that Marie M. Moldenhauer lacked capacity to execute the August 4, 2003 Deed. First, the district court erroneously relied on events occurring prior to the restoration to capacity to support its legal conclusion that Marie M. Moldenhauer lacked capacity on August 4, 2003. Second, the district court completely disregarded substantial evidence establishing Marie M. Moldenhauer’s capacity to execute a deed on August 4, 2003. The totality of evidence presented at the district court unequivocally demonstrates Mrs. Moldenhauer’s capacity on August 4, 2003.

**1. Minnesota Legal Standards Regarding Capacity to Execute a Deed by Gift.**

Under Minnesota law, a deed can be validly conveyed as a gift. Lidstrom v. Mundahl, 246 N.W.2d 16, 18 (Minn. 1976). Consideration is unnecessary for a valid conveyance by gift. Id. Real property is effectively transferred as a gift when: (1) the grantor had donative intent; (2) the gift was delivered; and (3) the grantor was dispossessed of rights to the property. McCulloch v. McCulloch, 435 N.W.2d 564, 568 (Minn. Ct. App. 1989); Stribling v. Fredericks, Clark & Co., Inc., 219 N.W.2d 93, 95 (Minn. 1974). The individual seeking to set aside a deed has the burden of proving the facts to justify invalidating the deed. Macklett v. Temple, 1 N.W.2d 415, 417 (Minn. 1941). Cancellation of a conveyance is an extreme remedy, to be applied cautiously. Fritz v. Fritz, 377 N.W.2d 20, 23 (Minn. 1986).

Under Minnesota law, a deed—duly witnessed and acknowledged—is proof that whatever title the grantor had and purported to convey vests in the grantee on the delivery of the deed without any further testimony as to the mental condition of the grantor. Macklett, 1 N.W.2d at 417. A grantor has sufficient capacity to execute a deed if she had enough mental capacity to understand to a reasonable extent the nature and effect of what she was doing. Trimbo v. Trimbo, 50 N.W. 350, 351 (Minn. 1891); Macklett, 1 N.W.2d at 417; Younggren v. Younggren, 556 N.W.2d 228, 232 (Minn. Ct. App. 1996). Minnesota operates under a presumption of competence to enter into a transaction. Fisher v. Schefers, 656 N.W.2d 592, 594 (Minn. Ct. App. 2003). In the absence of fraud or undue influence, mere weakness of intellect, resulting from old age or sickness, is not

a ground for setting aside an executed instrument. Macklett, 1 N.W.2d at 417. Any evidence offered to prove incapacity must relate to the time of the transaction. Trimbo, 50 N.W. at 351; Fisher, 656 N.W.2d at 595. When the incapacity is not continuous, and the act is reasonable and proper in itself, the burden is on the party attacking the deed to show the incapacity at the time it was executed. Id.

Evidence that traditionally weighs heavily in support of a finding of capacity includes the favorable testimony of the grantor's physician as well as testimony from the attorney assisting with execution of the deed. For example, in McEleney v. Donovan, the Court found the grantor had sufficient capacity at the time he transferred a deed to his youngest daughter. 138 N.W. 306, 306 (Minn. 1912). The Court based this finding in part on the testimony of the grantor's attending physician and two different attorneys whom he consulted with about the transaction and whom assisted in the preparation of the deed. Id. Each of these witnesses testified that the grantor had sufficient capacity. Id. This testimony was also corroborated by neighbors, attending nurses and acquaintances. Id. Similarly, in Younggren, the court held that respondent had sufficient capacity to sign a power of attorney and warranty deed based in part on the testimony of his physician and attorney. 556 N.W.2d at 232. Respondent's physician testified that he was completely competent at the time he signed the deed. Id. (He was "alert and oriented while in the hospital. While at the nursing home he was oriented, could rationalize, hold a conversation, reason and was alert in his surroundings."). His former attorney also testified that he was sure the grantor was competent and had received no indication that he did not know what he was signing. Id. at 233.

Further, the Minnesota Supreme Court has recognized that there are circumstances when it is reasonable for a parent to grant a deed in favor of one child to the exclusion of other children. See Trimbo, 50 N.W. at 351. The court has recognized that a preference may exist when one child has stayed at home with the parent or taken on a higher level of care for the parent in their aging years. Id. For example, in McEleney, a father of eight children transferred his home to his youngest daughter one month before he died. 138 N.W. at 306. The father was found to have sufficient capacity to make this transfer. Id. The court recognized that this father had lived with this daughter during the remaining 11 years of his life. Id.

**2. The District Court's Determination that Marie M. Moldenhauer Lacked Capacity Is Not Supported By the Record.**

The district court's order contains extensive findings of fact purporting to support the ultimate determination of incapacity. The majority of the findings, however, relate to Marie M. Moldenhauer's capacity prior to her restoration on July 28, 2003. (App. 16-44)<sup>3</sup>. In fact, many of the findings of fact go back to the 2001 time period, in which all of the parties acknowledge Mrs. Moldenhauer exhibited difficulties with her mental faculties. Marie M. Moldenhauer's capacity prior to the restoration is wholly irrelevant to the issue of whether she had capacity on August 4, 2003. The only time period that is

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<sup>3</sup> The district court's May 23, 2008 Findings of Fact, Conclusions of Law, and Order for Judgment in this matter adopted all of the Findings of Fact contained in its Findings of Fact, Conclusions of Law, and Order for Judgment dated October 18, 2007 in the probate matter. (App. 18, paragraph 1). As a result, Appellants reference Findings of Fact contained in both the Findings of Fact, Conclusions of Law, and Order for Judgment dated October 18, 2007 and May 23, 2008.

relevant to this assessment is the time period between July 28, 2003 and August 4, 2003—and particularly the August 4, 2003 Deed execution date.

Charles W. Eginton and Lilli Eginton strenuously objected to the relevance of this evidence at trial. (See e.g. T.1 509). Despite these objections, the district court orders in both matters rely heavily on the pre-restoration time period. In fact, the first 23 findings—as well as portions of other findings of fact—of the October 18, 2007 Order all contain evidence of Marie M. Moldenhauer’s capacity commencing in 2001 and leading up to the July 28, 2003 time period. (App. 32-39). Similarly, the May 23, 2008 also contains several findings referencing the pre-restoration time period. (App. 3-30). For example, finding of fact 21 in the October 18, 2007 Order addresses a Court Visitor’s report dated July 12, 2003 submitted in connection with the restoration hearing. (App. 37). The May 23, 2008 Order also addresses this Court Visitor’s Report. (App. 19). This report, like the other pre-restoration findings of fact, has no bearing on Marie M. Moldenhauer’s capacity to execute deed on August 4, 2003 in light of the July 28, 2003 restoration.

The remaining findings of fact that profess to support the finding of incapacity are also insufficient to uphold an incapacity determination as to August 4, 2003. Findings of fact 30 and 31 in the October 18, 2007 Order, for example, address the testimony of Dr. Evje and Dr. Myers.<sup>4</sup> (App. 40-41). Notably absent from these findings is any specific testimony that Mrs. Moldenhauer would have lacked capacity on the day she executed the

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<sup>4</sup> The Court should note that the October 18, 2007 Order contains the majority of findings bearing on the capacity issue.

Deed. Furthermore, neither Dr. Evje nor Dr. Myers revoked their pre-restoration observations supporting capacity. The remaining findings of fact addressing the issue of capacity in any manner are so general in nature that they cannot possibly overcome the presumption that Marie M. Moldenhauer had capacity on the day she executed the Deed at issue—August 4, 2003.

Absent such specific findings, the district court's determination is clearly erroneous. Charles W. Eginton and Lilli Ann Eginton requested the district court amend its findings of fact to address the above issues. (App. 45-64). The district court denied this request. (App. 79). Therefore, remand to the trial court for additional findings of fact is futile under these circumstances. This Court should reverse the district court's order finding that Marie M. Moldenhauer had insufficient capacity to execute the August 4, 2003 Deed. In the alternative, this Court should grant a new trial.

**3. The District Court Ignored Substantial Evidence Demonstrating Marie M. Moldenhauer's Capacity on August 4, 2003.**

The district court disregarded the totality of evidence presented at trial in reaching its erroneous conclusion that Marie M. Moldenhauer lacked the capacity to execute the August 4, 2003 Deed. Instead, as set forth above, the district court erroneously focused on the time periods prior to the July 28, 2003 restoration to capacity and selectively relied on incomplete record evidence. The relevant, probative evidence supporting a finding of capacity disregarded by the district court is as follows.

**a. Dr. Valerie Evje.**

Dr. Evje's February 7, 2003 correspondence indicates that Marie Moldenhauer's confusion dramatically improved following her hospitalization for a hip fracture in 2001. (Tr.1 Ex. 200). Dr. Evje expressed her medical opinion that Marie Moldenhauer had adequate capacity for delegation of the care of her finances and physical affairs to a person of her choice and that she would understand that delegation. (Id.)

The district court's findings of fact disregard Dr. Evje's January/February 2003 assessment, and instead rely heavily on Dr. Evje's testimony at district indicating that she may not have recommended restoration to capacity in July of 2003. (App. 40-41). This testimony is apparently based on Dr. Evje's brief examination of Mrs. Moldenhauer in July of 2003, coupled with her review of Mary Davies' July 2003 Visitor's Report (T.1 35-42). Dr. Evje examined Mrs. Moldenhauer for approximately five minutes in July of 2003 in order to resolve issues relating to a duragesic pain patch that persisted in dislodging from Mrs. Moldenhauer's skin. (T.1 587). Although Dr. Evje's notes indicated some degree of confusion exhibited by Mrs. Moldenhauer during this brief visit, Dr. Evje conceded that this confusion could have resulted from withdrawal symptoms relating to the duragesic pain patch. (T.1 15; 35; 54-55). Dr. Evje did not conduct a specific mental status examination at this time. (T.1 36; 41-42).

At trial, counsel for objectors requested that Dr. Evje review Mary Davies' July 12, 2003 Visitor's Report. (T.1 37-39). Based on the contents of the report, Dr. Evje indicated that she may not have recommended restoration to capacity in July of 2003. (T.135-39; Tr. Ex. 28 and 51). Dr. Evje, however, did not discuss this report with Mary

Davies, nor was she present when Mary Davies conducted this assessment. Testimony of several witnesses at trial indicated that Mrs. Moldenhauer often became agitated and withdrawn in the presence of strangers or when badgered with questions during a conversation. (T.1 320; 549-551). This tendency offers a wholly reasonable explanation for the difficulties exhibited by Marie Moldenhauer during her brief visit with Mary Davies. Further, Dr. Evje's December 2003 notes also confirm Marie M. Moldenhauer's sufficient capacity to execute a deed during the 2003 time period, and even after the execution of the August 4, 2003 Deed and September 5, 2003 Will. (Tr. Ex. 50). The district court failed to reflect the totality of Dr. Evje's testimony regarding her 2003 assessments of Marie M. Moldenhauer in its findings of fact.

**b. Dr. Shepherd Myers.**

Dr. Shepherd Myers, an experienced psychologist with significant training in the assessment of mental functioning, conducted a one-hour assessment with Marie M. Moldenhauer on March 4, 2003. (T.1 183; 185-188). Dr. Myers testified that he conducted the assessment of Marie Moldenhauer outside the presence of Charles W. Eginton, who accompanied Mrs. Moldenhauer to the appointment. (T.1 185-188). Dr. Myers' assessment indicates that Mrs. Moldenhauer was able to spell "world" backwards, perform a 3-step verbal command and write a sensible sentence, and perform simple addition problems on a basic test of math. (Tr.1 Ex. 27; T.1 189). Mrs. Moldenhauer scored a 22 on the MMSE (mini mental status exam), a score which Dr. Myers indicated was fairly typical for her advanced age. (Tr.1 Ex. 27; T.1 187-188; 204-205; 214-215). Following his assessment, Dr. Myers concluded that although Marie Moldenhauer

exhibited some short term memory loss, his assessment indicated that her dementia was not degenerative in nature. (Tr.1 Ex. 27). Dr. Myers' assessment concluded that Mrs. Moldenhauer had the functional ability to make provisions for her personal care. (Id.). Dr. Myers' testimony at trial confirmed his findings and assessment regarding his observations with respect to Marie M. Moldenhauer. The district court's findings of fact wholly ignore this in depth assessment of Mrs. Moldenhauer's March 2003 mental faculties.

**c. Luz Marina Gomez.**

Luz Marina Gomez served as Mrs. Moldenhauer's caregiver from late 2001 until the date of her death. (T.1 301, 304). Ms. Gomez typically spent at least eight hours per day with Mrs. Moldenhauer. (T.1 301). During the months in and around August 2003, Ms. Gomez credibly testified that Mrs. Moldenhauer picked out her own clothes, dressed herself, constantly asked whether she could assist Ms. Gomez with her work, assisted in the preparation of simple meals, took frequent walks, engaged in lively conversation—including discussions about politics—read the newspaper, enjoyed watching Judge Judy, read to children at the library, and went on a week long camping trip with Ms. Gomez and her family in the summer of 2003. (T.1. 302-308; 310-314; 321-322; See also T.1 239, 241).

The testimony of Lilli Ann Eginton and Paul Leutgeb (referenced below) is consistent with Ms. Gomez' statements regarding Mrs. Moldenhauer's level of functioning in and around August of 2003 and inconsistent with the testimony provided by Vance and Carl Gellert on this point. During the months surrounding August 2003,

Carl Gellert saw his mother for a couple of hours once per week, and Vance Gellert saw his mother only two to three times per month for a period of a couple of hours. (T.1 316-317; 361, 366; 635, 668). Marina Gomez credibly testified that Marie Moldenhauer would often become withdrawn in the presence of her sons, particularly if they continually badgered her with questions or raised their voices to her in discussing finances. (T.1 149). As Mrs. Moldenhauer's daily caregiver, Marina Gomez is in the best position to offer testimony as to her abilities and activities during the relevant time period—not Vance and Carl Gellert who saw her very infrequently for a few hours at a time. Yet, the district court's findings of fact (in both the May 23, 2008 and October 18, 2007 Orders) completely discount Ms. Gomez' voluminous testimony regarding Marie M. Moldenhauer's activities and level of functioning in and around August of 2003.

**d. Paul Leutgeb.**

Paul Leutgeb, an attorney and long-time friend of Marie M. Moldenhauer, prepared the August 4, 2003 Deed in accordance with Mrs. Moldenhauer's direction and under the terms specified by Mrs. Moldenhauer. (T.2 81-83; 87-89; 101-102). Mr. Leutgeb—who prepared numerous deeds during his tenure as an attorney and understood that a grantor must possess sufficient capacity to properly convey property—testified that on August 4, 2003, he believed Mrs. Moldenhauer displayed mental functioning that was more than sufficient to support the execution of a deed. (See T.2 107). Mr. Leutgeb credibly testified that, based on his longstanding relationship with Mrs. Moldenhauer and his observations regarding her behavior and demeanor, he believed she knew that she was transferring property to Lilli Ann Eginton on that day. (See T.2 107). As a result, he did

not specifically ask Mrs. Moldenhauer capacity-oriented questions prior to her executing the deed on August 4, 2003. (See T.2 107) On the day Mrs. Moldenhauer executed the deed, Mr. Leutgeb did, however, review the contents of the deed with her, and she confirmed her desire and intent to dispose of her property in accordance with terms set forth in the Deed. (T.2 70-71; 87-89; 101-102; 142-145; 147). The district court's findings of fact, again, fail to reflect this testimony from Paul Leutgeb, the only individual to discuss the terms of the 2003 Deed with Mrs. Moldenhauer. In addition, Mr. Leutgeb was one of only two individuals present during the August 4, 2003 execution of the Deed.

**e. Lilli Ann Eginton.**

During the summer of 2003, Lilli Ann Eginton explained her mother's financial status to her on several occasions, and her mother appeared to understand these explanations. (T.1 560-563; 614). Ms. Eginton acknowledged that Mrs. Moldenhauer occasionally asked questions regarding how much money she had and the location of that money, and that she may not have recalled this information from time to time. (Id.). During this time period, it was clear to Lilli Ann Eginton, however, that Mrs. Moldenhauer understood her assets when this information was explained to her. (Id.). Mrs. Moldenhauer also retained her own checkbook with an approximate balance of \$500, and appropriately wrote checks from this account and balanced the checkbook during 2003. (T.1 547-549).

**f. Marie M. Moldenhauer's May 21, 2003 Letter to Judge Lacy.**

In connection with the July 28, 2003 restoration to capacity, Marie M. Moldenhauer submitted a lengthy handwritten letter dated May 21, 2003 (Tr.1 Ex. 202). This correspondence sets forth her desire and the reasons for her request for restoration to capacity. (Id.). The district court's findings of fact completely disregard this significant, probative correspondence, written by Marie M. Moldenhauer.

The district court's findings of fact and corresponding conclusions of law wholly fail to address the totality of the evidence regarding Mrs. Moldenhauer's capacity on August 4, 2003, and as such, should be reversed by this Court. Based upon the district court's incorrect application of the law to the facts of this case, selective and insufficient evidence supporting its findings of fact, and Mrs. Moldenhauer's July 28, 2003 restoration to capacity, Charles W. Eginton respectfully requests this Court reverse the district court's determination of incapacity with respect to the August 4, 2003 Deed.

**III. The District Court Erred in Determining the Deed Was Not Delivered to Lilli Ann Eginton.**

The only finding supported by the evidence and the law is that Marie M. Moldenhauer properly delivered the August 4, 2003 Deed to Lilli Ann Eginton. The district committed two substantial errors in invalidating the Deed for a failure of delivery. First, the district court completely disregarded substantial evidence of delivery to Lilli Ann Eginton. Second, the Court compounded this error by ignoring well-established Minnesota law permitting delivery via an agent of either party to a transaction. To transfer title, a deed must be delivered. In re Estate of Savich, 671 N.W.2d 746, 750

(Minn. Ct. App. 2003) (citing Slawik v. Loseth, 290 N.W. 228, 299 (Minn. 1940)). The only essential elements of delivery are: (1) surrender of control by the grantor; and (2) intent to convey the title. In re Estate of Savich, 671 N.W.2d at 750. The grantor must only show a present, unconditional intention to part with her ownership. Ingersoll v. Odendahl, 162 N.W. 525, 526 (Minn. 1917). No particular ceremony or formality is necessary to complete delivery of a deed as long as there are acts or words which clearly indicate the grantor's intention to part with it. Ingersoll, 162 N.W. at 526; Barnard v. Thurston, 90 N.W. 574, 576 (Minn. 1902).

Actual, physical delivery is not a necessary element. Id.; see also Cloutier v. Charest, 294 N.W. 457, 458 (Minn. 1940) (for a delivery to be legally valid, the deed does not need to be manually handed over by the grantor to the grantee); Barnard, 90 N.W. at 576 (the unconditional delivery of a deed by the grantor to a third party for the grantee is a delivery that is as effectual as if the grantor had delivered it to the grantee). Where the grant imposes no burdens upon the grantee, acceptance by the grantee will be presumed. Ingersoll, 162 N.W. at 526.

For example, in Chastek v. Souba, the question was whether a father had properly delivered a deed to his son, as the father was in possession of the deed at the time of his death. 101 N.W. 618, 618 (Minn. 1904). The court found sufficient evidence that the father intended to deliver the deed. Id. at 619. This finding was supported by the fact that the father treated the land as though it was the son's property. Id.

A valid delivery may also be accomplished by having the deed delivered and/or received by an agent of either party to the deed. Cloutier, 294 N.W. at 458; see also

Kessler v. Von Bank, 174 N.W. 839, 840 (Minn. 1919) (delivery to an agent, stranger, or for recording, is a valid delivery); Ingersoll, 162 N.W. at 526 (delivery to an agent for the grantee is a delivery to the grantee). It is to be “presumed that a third person to whom a delivery is made takes it as the agent or trustee of the grantee.” Ingersoll, 162 N.W. at 526. A person may be an “agent of the grantee even though he has acted as attorney for the grantor in preparing the deed.” Id.

The district court clearly erred in determining the Deed at issue was not delivered to Lilli Ann Eginton, or if delivered, that Lilli Ann Eginton did not accept or waived any gift under the Deed. District court Finding of Fact No. 34 states as follows:

“Paul Leutgeb has also testified that the August 4, 2003 deed was left in his possession, based on his instructions, to be used if the specific gift of the homestead in the will failed for any reason. If the deed was left in Paul Leutgeb’s possession for safekeeping, or to be used only after Marie Moldenhauer’s death, then the deed was not delivered and no gift occurred.”

This Finding of Fact is contrary to both the law on this issue as well as the testimony at trial. The trial testimony of both Paul Leutgeb and Lilli Ann Eginton unequivocally supports a finding of delivery under Minnesota law. Paul Leutgeb testified that he prepared the August 4, 2003 Deed at the direction of Marie M. Moldenhauer and requested Lilli Ann Eginton’s presence during the execution of the Deed. On the August 4, 2003 date of execution, Paul Leutgeb testified that he provided Marie M. Moldenhauer with three originals of the Deed for execution, and Mrs. Moldenhauer executed three originals of the Deed. (T.2 31;58-62; 81-83). Both Paul Leutgeb and Lilli Ann Eginton testified that Marie M. Moldenhauer either handed Lilli Ann Eginton an original of the Deed directly, or passed it to Paul Leutgeb and requested that he hand the original to Lilli

Ann Eginton. (T.2 31; 58-62; 87-89; 142-145). Lilli Ann Eginton and Paul Leutgeb also both testified that Lilli Ann Eginton requested Paul Leutgeb maintain the original August 4, 2003 Deed delivered to Lilli Ann Eginton by her mother for safekeeping, and handed Mr. Leutgeb the Deed for this purpose. (T.2 31; 87-89; 142-145).

The district court's Findings of Fact, however, wholly ignore this significant testimony on the delivery and acceptance issues and instead takes out of context other testimony of Paul Leutgeb regarding the purpose of including the homestead in Marie M. Moldenhauer's will as well.<sup>5</sup> Based on the substantial proof of delivery and acceptance evidenced by the above-referenced testimony—which the district court completely disregarded in its Findings of Fact—district court Finding of Fact No. 34 is contrary to the evidence and constitutes a mistake by the district court. As such, this Court should determine that the failure of the district court to include critical facts on the delivery issue constitutes clear error.

More importantly, not only has the district court erred in failing to recognize these critical facts, it has ignored applicable legal principles permitting delivery (and acceptance) via an agent of either party. Under the well-settled principles of Minnesota law, the fact that Lilli Ann Eginton did not physically possess the Deed at the time of Marie M. Moldenhauer's death in no way invalidates the delivery of the deed. Whether

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<sup>5</sup> With respect to the reference of the Property in the Will, Paul Leutgeb testified that the Property was devised in the Will at a later date for tax purposes. (T.2 63-65; 89-91). In testifying regarding the tax concerns with respect to transfer of the house, Mr. Leutgeb did not, however, testify that he instructed the Deed to remain in his possession—the Deed remained in his possession at the request of Lilli Ann Eginton as set forth above. (T.2 31; 63-65; 87-91; 142-145).

Marie M. Moldenhauer directly handed the executed Deed to Lilli Ann Eginton or asked Paul Leutgeb to do so should have been irrelevant to the district court's delivery analysis—Minnesota law permits delivery by an agent. Similarly, Paul Leutgeb's holding of Lilli Ann Eginton's original, executed Deed does not negate the delivery. Minnesota law permits someone other than the grantee to maintain physical possession of a deed. In fact, a grantor may actually maintain physical possession of the deed, even at the time of death, as long as the Court finds evidence that the grantor intends delivery.

The district court's conclusions of law (and corresponding findings of fact) completely disregard well-established legal principles. First, Finding of Fact No. 34 erroneously indicates that if the deed was left in Paul Leutgeb's possession for safekeeping, or to be used only after Marie Moldenhauer's death, the deed was not delivered. Finding of Fact No. 36 and Conclusions of Law No. 12 further repeat this error. This is simply not the case under Minnesota law. The district court erred by failing to recognize the well-established legal principles relating to delivery of a deed via a third party agent.

Mrs. Moldenhauer manifested her intent to deliver in numerous ways: (1) the request that Lilli Ann Eginton be present during the execution of the Deed; (2) the physical delivery of the Deed directly to Lilli Ann Eginton (or through Paul Leutgeb to Lilli Ann Eginton) on August 4, 2003; and (3) the subsequent reaffirmation of her intent to dispossess herself of full ownership of the homestead as reflected by the September 5, 2003 Will. All of the events unequivocally evidence Marie M. Moldenhauer's delivery of the August 4, 2003 Deed to Lilli Ann Eginton. The district court wholly ignores

relevant testimony and well-established legal principles in determining that the Deed at issue was not “delivered” at the time of Marie M. Moldenhauer’s death. As a result, this Court should reverse the district court’s legal conclusion regarding delivery and determine that the August 4, 2003 was properly delivered and/or accepted. In the alternative, the Court should grant a new trial on this issue. Remanding for additional findings is futile in light of this legal error and the district court’s denial of Charles W. Eginton’s Motion for Amended Findings of Fact, Conclusions of Law, and Order for Judgment.

### **CONCLUSION**

The district court improperly relied on Minnesota’s Uniform Probate Code, Minn. Stat. § 524.3-720, in awarding attorneys’ fees to Respondents Vance F. Gellert and Carl A. Gellert. This improper reliance constitutes reversible error with respect to the award of attorneys’ fees. Based on this error, Charles W. Eginton respectfully requests the Court reverse the lower court determination awarding attorneys’ fees to Respondents.

Further, as a matter of law, the district court fundamentally erred in its failure to recognize the effect of Marie M. Moldenhauer’s July 28, 2003 restoration to capacity. The district court’s findings of fact do not overcome the presumption of capacity established on July 28, 2003. The district court also disregarded significant probative evidence establishing capacity on the date of the Deed execution—August 4, 2003—and wholly failed to make the necessary findings regarding any incapacity on that date.

The district court also erred in determining that Marie M. Moldenhauer did not deliver the Deed to Lilli Ann Eginton, and even if it was delivered, that it was either

never accepted or it was waived by Lilli Ann Eginton. Neither the law nor the facts of this case support the district court's Order with respect to delivery. Due to the district court's legal and factual errors, Charles W. Eginton respectfully requests this Court reverse the district court's determination and conclude Marie M. Moldenhauer possessed sufficient capacity to execute a deed on August 4, 2003. In the alternative, Charles W. Eginton respectfully requests this Court order a new trial on the issues.

DATED: December 29, 2008

**LINDQUIST & VENNUM P.L.L.P.**

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the brief served in the above-entitled matter on December 29, 2008, conforms to the requirements of Minn. R. Civ. App P. 132.01, Subd. 1 and 3, for a brief produced with a Times New Roman font with 13 point type. The length of this brief is 957 lines and 12,096 words. This brief was prepared using Microsoft 2003 word processing software.

DATED: December 29, 2008

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