

NO. A08-1696

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.*


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**BRIEF OF RESPONDENTS'**

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## STATEMENT OF THE ISSUES

1. Is a finding in July of 2003 in a Conservatorship action that a grantor has been restored to capacity where the standard for restoration was a demonstration of an ability to delegate decision-making to a third party determinative *per se* of the question of whether that grantor possessed capacity to execute a gift deed on August 4, 2003?

The trial court found that the standard for restoration of capacity is not the same standard as capacity to execute a gift deed.

*List of the most apposite cases:*

- *Young v. Otto*, 57 Minn. 307, 59 N.W. 199 (1894)
- *Trimbo v. Trimbo*, 47 Minn. 389, 50 N.W. 350 (1891)

2. Did the Appellant in this case prove by clear and convincing evidence that the gift deed at issue was delivered?

The trial court found that the Appellant failed to prove that the gift was delivered.

*List of the most apposite cases:*

- *Oehler v. Falstrom*, 273 Minn. 453, 142 N.W.2d 581 (1966)

3. Was the gift deed at issue in this case accepted by the donee?

The trial court found that the donee did not accept the gift deed or waived the gift.

*List of the most apposite cases:*

- *Stribling v. Fredericks, Clark & Co.*, 219 N.W.2d 93 (Minn. 1974)
- *Chastek v. Souba*, 93 Minn. 418, 101 N.W. 618 (1904)

- *Babbitt v. Bennett*, 68 Minn. 260, 71 N.W. 22 (1894)
- *Kessler v. Kruidenier*, 174 Minn. 434, 219 N.W. 552 (1928)

4. Is the trial court obliged to abrogate its duty to make credibility determinations of the witnesses and evidence presented to it, or must it credit all testimony from all witnesses even in the case of conflicting evidence?

The trial court made credibility determinations of the witness and exhibit evidence in this case as it is required to do and those credibility determinations are supported by the record.

*List of the most apposite rules:*

- Minn. R. Civ. P. 52.01

*List of the most apposite cases:*

- *Engebretson v. Comm'r of Pub. Safety*, 395 N.W.2d 98 (Minn. Ct. App. 1986)

5. Did the court error in awarding Vance F. Gellert and Carl A. Gellert the attorney's fees incurred by them in pursuing an action to invalidate this deed and recapture this asset for the probate?

The award of attorney's fees for Vance F. Gellert and Carl A. Gellert is authorized by Minn. Stat. § 524.3-720.

*List of the most apposite statutes:*

- Minn. Stat. § 524.3-720

*List of the most apposite cases:*

- *Distributors Supply Co. v. Comm'r of Pub. Safety*, 395 N.W.2d 98 (Minn. Ct. App. 1986)

### STATEMENT OF THE CASE

This case is related to a probate action between these parties. Marie Moldenhauer (“Decedent”) died on October 23, 2006 in Dakota County, Minnesota. A Petition for Formal Probate of Will and Formal Appointment of Personal Representative was filed in Dakota County District Court in November of 2006 by Decedent’s daughter, Lilli Ann Eginton (“Ms. Eginton”) asking that the court allow probate of a Will dated September 5, 2003. Objections to the Petition were timely filed by Decedent’s only other living children, Vance F. Gellert and Carl A. Gellert, and a Court Trial was held pursuant to those objections on August 6-9, 2007, before the Honorable Richard Spicer (the “Probate Matter”).

On October 18, 2007 the Honorable Richard Spicer ordered that the Petition for Formal Probate of the September 5, 2003 Will be denied for a lack of testamentary capacity, and the probate of the estate should proceed under the laws of intestate succession. This order was appealed by Appellant Charles William Eginton and was argued before this court November 4, 2008. *In re Estate of Moldenhauer*, No. A08-26 (Minn. Ct. App. Jan. 27, 2009). This court affirmed the trial court’s decision on all grounds on January 27, 2009. (Supp. App. 1)

The present action (herein the "Real Estate Matter") concerns the validity of the deed executed by Decedent on August 4, 2003 which transferred Decedent's homestead to Decedent and Ms. Eginton in joint tenancy. Vance F. Gellert and Carl A. Gellert brought an action during the pendency of the Probate Matter challenging this deed. Ms. Eginton's husband Charles William Eginton ("Mr. Eginton") was joined as a party in the Real Estate Matter solely because of his status as Ms. Eginton's husband.

Trial on the Real Estate Matter occurred on February 6, 2008. By stipulation, all evidence in the Probate Matter was deemed submitted and admitted in the Real Estate Matter. After a one day Court Trial, in an Order dated May 23, 2008, the Honorable Richard Spicer ordered that the Deed at issue was invalid for the following reasons:

1. The grantor lacked capacity to make a gift by deed when she executed it.
2. Delivery of the deed was never proven, and even if delivered the evidence showed that the deed was not accepted by the donee.

Subsequently, Appellant Charles William Eginton made a motion for Amended Findings of Fact, Conclusions of Law and Order for Judgment. This motion was denied.

On July 10, 2008 Vance F. Gellert and Carl A. Gellert made a motion in the Probate Matter seeking an award of attorney's fees incurred in the Real Estate Matter. By an Order dated August 4, 2008, the Honorable Richard Spicer awarded Vance F. Gellert attorney's fees of \$28,283.51 and Carl S. Gellert attorney's fees of \$13,253.69 to be paid out of Decedent's Estate.

Appellant Charles William Eginton now seeks relief in this court from the court's May 23, 2008 Order in the Real Estate Matter and the August 4, 2008 Order concerning fees. Ms. Eginton, who was the donee of the contested deed, has not appealed any of the trial court's Orders.

### **STATEMENT OF THE FACTS**

Decedent Marie M. Moldenhauer lived in her home until she fell and broke her hip on February 6, 2001 (Tr.1 390).<sup>1</sup> Decedent was showing short-term memory loss for at least two years prior to the date she fell (Tr.1 386-388, 359, 394, 401, 477, 479, 632).

After the hip fracture, Decedent was hospitalized and underwent corrective surgery. She lived in two nursing homes until returning to her home on November 18, 2001 (Tr.1 482).

In February 2001, while Decedent was at Good Samaritan Nursing Home, the nursing home told the family at a care conference that a conservator was needed. (Tr.1 462).

Decedent, however, did not understand or appreciate her need for professional care or the need for a conservatorship. (Tr.1 396). Ms. Eginton filed a petition to be appointed conservator and after a hearing on April 9, 2001 was appointed. (Tr.1 Ex. 4, 7).

Shortly before her Petition could be heard by the Court, Ms. Eginton and her attorney and long-time friend (Tr.1 90) Paul Leutgeb (Mr. Leutgeb) became concerned that a will might exist that gave a disproportionate share of Decedent's estate to Ms.

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<sup>1</sup> App." references are to Appellant's Appendix. Supp. App. references are to Respondent's Supplemental Appendix. Respondents reference Transcripts and Exhibits from the Probate Matter as "Tr 1" and Transcripts and Exhibits from the Real Estate Matter as "Tr.2."

Eginton's brother and Decedent's son, Carl A. Gellert. Ms. Eginton and Mr. Leutgeb arranged for Decedent to sign a will on April 3, 2001. (Tr.1 383, 397-402, Ex. 14).

During the days immediately preceding and following the signing of this Will, Decedent's nursing home records indicate that she still suffered from dementia. (Tr.1 Ex. 52, 53).

Following the return to her home, Decedent had live-in staff for approximately twenty-two (22) hours of the day, until her death on October 23, 2006. (Tr.1 641). Ms. Eginton provided the primary care for the first month. (Tr.1 440). Thereafter, Ms. Eginton hired a single caregiver, Luz Marina Gomez, who stayed with Decedent during the day, and a rotating staff of caregivers who stayed overnight. (Tr.1 301, 601-611). At first, after April 10, 2001, Ms. Eginton was conservator for Decedent. (Tr.1 102). In December, 2001 however Ms. Eginton was removed as conservator, in part for failure to comply with a court order, and a neutral conservator was appointed. (Tr.1 417, Ex. 23). Decedent was under conservatorship until July, 2003 and all of her financial transactions, except for small birthday and Christmas checks, were handled by the neutral conservator. (Tr.1 108, 140, 417, 419).

On June 17, 2003, a Petition for Restoration of Capacity was filed by Ms. Eginton and Decedent. A hearing on the Petition was held on July 28, 2003. Evidence was produced by Ms. Eginton and Mr. Leutgeb suggesting that Decedent should be restored to capacity in light of her asserted improvement in functioning. (Tr.1 115-117, 128, Ex. 25, 26, 27). Among the items that were used to justify this Petition were a report from

Decedent's treating physician, Dr. Valerie Evje, (Dr. Evje) dated February 7, 2003, based on an office visit Dr. Evje had with Decedent on January 16, 2003 (Tr.1 Ex. 26) and a psychological report from Dr. Shepherd Myers, (Dr. Myers) dated March 7, 2003 (Tr.1 Ex. 27).

Mr. Leutgeb's letter to and discussion with Dr. Evje show that he sought to establish that Decedent had the capacity to delegate her care to the party of her choice, not that he desired Dr. Evje to establish the decedent's testamentary capacity or capacity to make gifts. (Tr.1 116, Ex. 25). Dr. Evje's letter to the court in support of Decedent's restoration to capacity stated just that: "In my opinion, I believe she has the adequate capacity for delegation of the care of her finances and physical affairs to a party of her choice and would understand that delegation." (Tr.1 Ex. 26).

During the probate trial, Dr. Evje testified that Decedent was suffering from progressive dementia in February 2003 (Tr.1 25), that she was a vulnerable adult (Tr.1 20), that she was not capable of taking care of her own financial affairs in February 2003 (Tr.1 25), and that she suffered a marked mental decline between February and July 2003 (Tr.1 48). Dr. Evje was shown the court visitor's report of July 12, 2003 and the transcript of the hearing held July 28, 2003, (she had seen neither document before this litigation) and recalled an office visit by Decedent on July 17, 2003. Based on this evidence, Dr. Evje testified that in July of 2003 Decedent was no longer capable of supervising someone to whom she had given power of attorney. (Tr.1 48). In her expert

opinion, Dr. Evje would not have written the February 2003 letter in July of 2003 because Decedent's functioning had deteriorated so markedly. (Tr.1 43).

Dr. Shepherd Myers performed a Mini-Mental Status Examination (MMSE) on Decedent in March 2003. (Tr.1 37, 213). He did not have an ongoing professional relationship with Decedent, but only saw her one time to perform the MMSE. He did not have access to all her medical records, but only the referral summary from Dr. Evje. (Tr.1 199). He believed in 2003, based on the limited information given him by Mr. Eginton and his own testing, that Decedent's dementia was not progressive. (Tr.1 190). As with Dr. Evje, at the probate trial Dr. Myers was only asked to determine if Decedent could make decisions concerning delegation. (Tr.1 189). In addition, he was told by Mr. Eginton that the purpose of the assessment was to determine whether the Decedent's conservatorship could be modified, not whether it should be terminated. (Tr.1 199). He did not ask Decedent any questions designed to assess her testamentary capacity or capacity to make gifts. (Tr.1 195-196). At the probate trial, after a review of the Decedent's medical records, which he had not seen previously, the Court Visitor's report, and other documents, Dr. Meyers testified that he was mistaken when he reported that Decedent's dementia was not progressive, and that he believes now that her dementia was progressive in February 2003. (Tr.1 213). He testified that he apparently tested her at a "peak of improvement" in her long mental decline from progressive dementia. (*Id.*).

Evidence that decedent did not have the capacity to formulate the intent to

make a gift by deed on August 4, 2003, includes the Court Visitor's Report dated July 12, 2003 signed by Mary Davies. (Tr.1 Ex. 28). Decedent's lack of orientation in time and space and inability to remember information required for testamentary capacity is extensively documented in the Probate Court's Findings of Fact Conclusions of Law and Order for Judgment affirmed by this court. (Finding 21, Findings of Fact Conclusions of Law and Order for Judgment dated October 18, 2007, App. 0097-00110 at 0103; *In re Estate of Moldenhauer*, No. A08-0263, slip op. at 4 (Minn. Ct. App. Jan. 27, 2009)(Supp. App. 1).

The hearing for restoration of capacity proceeded on July 28, 2003, with no objection by Vance F. Gellert or Carl A. Gellert, since they had not received notice of the filing of the petition or hearing. (Tr.1 639). Nothing was said to the court about any plan to have Ms. Moldenhauer execute a will or make a gift of a major asset. (Tr.1 Ex. 30, 31). Perhaps because of the failure to disclose the real purpose behind the Petition to Restore Capacity and the failure to notify Vance F. Gellert or Carl A. Gellert of the hearing, the Petition was granted and Decedent was restored to capacity on July 28, 2003. (Tr.1 125). This hearing was an *ex parte* or default hearing due to the admitted failure of Mr. Leutgeb to provide Respondents with notice of the hearing.

The decedent's lack of capacity to execute a gift deed is also shown by the transcript of the hearing for restoration of capacity, and the accompanying audio tape. (Tr.1 Ex. 30, 31). The transcript and audio tape from the restoration hearing paint a clear picture of

incapacity to make a gift or execute a will a mere month prior to execution of the Will and a week prior to the execution of the gift deed. The Decedent was unable to answer non leading questions relating to why the hearing was occurring, and the nature and extent of her assets. (Finding No. 22 of the Findings of Fact, Conclusion of Law, and Order for Judgment dated October 18, 2008, App. 0097-0110 at 0103-0104).

On July 30, 2003, just two days after the hearing on the restoration of capacity, Ms. Moldenhauer executed a power of attorney appointing Ms. Eginton as her attorney in fact. (Tr.1 125, 439; Tr.2 27, Ex. 113). Mr. Leutgeb testified that he did not remember being involved in the granting of the power of attorney, even though he is listed as the person who drafted it and he notarized it. (Tr.1 125, Ex. 113; Tr.2 24-28, 93, Ex. 113). All of the facts cited above were before the Court of Appeals when it made its decision to affirm the trial court's finding of a lack of capacity. That order also noted that there was evidence of Decedent's incapacity for a period of time beginning in 2001 and extending through September 2004, when the final conservatorship was instituted. *In re Estate of Moldenhauer*, No. A08-0263, slip op. at 4 (Minn. Ct. App. Jan. 27, 2009)(Supp. App. 1). This Court's findings that the trial court correctly found that the Decedent lacked testamentary capacity now controls this case.

Following the restoration to capacity, Ms. Eginton wrote out virtually all checks, and performed all financial and legal functions for Decedent through this Power of Attorney with two notable exceptions. (Tr.1 439-441; Tr.2 132, 154). The exception at

issue here is that on August 4, 2003 Ms. Moldenhauer signed a deed transferring title to her homestead to herself and Ms. Eginton in joint tenancy. (Tr.1 126; Tr.2 24, Ex. 106).

The only persons, other than Decedent, present when the August 4, 2003 deed was executed were Mr. Leutgeb and Ms. Eginton. (Tr.2 87, 143). There was no consideration for this deed. It was drafted by Mr. Leutgeb. (Tr.1 126, 262; Tr.2 28, 119). Mr. Leutgeb oversaw the execution of the deed and the execution on the same date of all documents necessary to record this deed. (Tr.2 32-35, 144, Ex. 107, 109, 110). After execution, Mr. Leutgeb took possession of the deed. (Tr.1 275; Tr.2 89, 144-145). All of these actions were undertaken by Mr. Leutgeb as Ms. Moldenhauer's attorney. (Tr.2 28). Neither Mr. Leutgeb nor Ms. Eginton knew the legal standard for capacity to make a gift of the house. (Tr.1 97, 167-168; Tr.2 65, 73-75).

Subsequently, Mr. Leutgeb went to the Torrens Office in Dakota County. (Tr.1 275; Tr.2 92). In addition to the Deed and the other documents like a Certificate of Real Estate, which is prepared solely to record a Deed, he also had with him certified copies of documents including death certificates and marriage licenses necessary to establish marital status and name changes. (Tr.2 32-34). However, Mr. Leutgeb is not willing to admit that he went to the Torrens Office to try to record the deed. (Tr.1 275-276, 282-283; Tr.2 35-36). Mr. Leutgeb does admit that he was informed at the time that he went to the Torrens Office that the deed was not recordable due to a variance between the legal description in the deed and the legal description used by the Assessor's Office. (Tr.2 36,

39, 44). At trial it was established that, due to a peculiarity of West St. Paul Ordinances, in fact the deed was recordable. (Tr.2 76, 158-159).

The discrepancy in the legal description was due to a failure to transfer a sliver of property when Ms. Moldenhauer and her husband purchased the Property. (Tr.1 280; Tr.2 36, 39, Ex. 105). The main parcel and the sliver each is evidenced by a separate Certificate of Title making the mistake very understandable. (Tr.2 34, 41-42, Ex. 112, 114). Instead of proceeding to remedy the title defect that he had uncovered, Mr. Leutgeb put the deed in his file cabinet. (Tr.2 58, 61). Mr. Leutgeb testified that, at his direction, the deed was left in his possession and remained in his possession until delivered to Marnie DeWall, the attorney representing Mr. Eginton in January, 2007 just before the hearing in the Real Estate Matter. (Tr.2 69, 76-77).

On September 5, 2003, the Will that is the subject of the Probate Matter was signed by Decedent. (Tr.1 Ex. 1). This Will was also drafted by Mr. Leutgeb and made a specific gift of the homestead to Ms. Eginton. (Tr.1 93, 95, 167). Mr. Leutgeb testified that the reason why the will made a specific gift of a property that had allegedly already been transferred into joint tenancy with Ms. Eginton (and therefore was no longer a probate asset if Ms. Eginton survived Decedent) was that by making the transfer under a will Ms. Eginton would get a stepped up basis. (Tr.1 264; Tr.2 63-65). It was his understanding that if the house was transferred by joint survivorship under a gift deed, the donee did not get a stepped up basis. (*Id.*). Mr. Leutgeb's description of the decision to

make the specific gift in the will makes it sound like a decision was made to abandon or withdraw the gift deed. (Tr.1 264-265, 274-277). Ms. Eginton also has testified that the deed was abandoned. (Tr. 2 120-121).

Sometime in the late spring of 2004, Vance F. Gellert and Carl A. Gellert learned that the hearing on restoration had occurred in July 2003 and an Order entered. (Tr.1 644). Vance F. Gellert tried to discuss the situation with Ms. Eginton. (Tr.1 652). Failing in that effort, he filed, *pro se*, Petitions for Appointment of a Conservator and Guardian. (Tr.1 656-657).

A hearing was held on September 13, 2004, on Vance F. Gellert's Petitions. (Tr.1 455, 656-657). At the hearing on September 13, 2004, the court ordered that Ms. Eginton be appointed Conservator and Guardian for Decedent. (Tr.1 602-603). Ms. Eginton remained in these roles until Decedent's death at home on October 23, 2006.<sup>2</sup> As conservator, Ms. Eginton handled all of Decedent's financial affairs. (Tr.1 439-440, Ex. 42-43, 48).

Ms. Eginton has also admitted to strained relations with her brothers. (Tr.1 378-380). Mr. Leutgeb is an attorney and purported to represent Decedent in this transaction and in the drafting of the two wills but he had also represented Ms. Eginton, not insignificantly, in some nasty fights with Carl and Vance Gellert, and has been her husband's best friend for over fifty years. (Tr.1 103, 114, 122, 148, 278, 410-411; Tr.2

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<sup>2</sup> The Trial on the Probate Matter also included the Second Conservatorship file. (Tr 1 1-3). It was stipulated that all evidence from the Probate Matter was also evidence in the Real Estate Matter. (Tr.2 Ex. 102).

28, 119). Mr. Leutgeb has admitted that he did not like Carl and Vance Gellert. (Tr.1 121-122, 130).

Ms. Eginton had Decedent sell her cabin on July 7, 2004 and subsequently claimed this was Decedent's decision. (Tr.1 448-453; Tr.2 150). However, the tape of a conversation that Decedent had with her son Carl A. Gellert on July 24, 2004 demonstrates that she lacked capacity to form a decision to do this or to remember that she had done it. (Tr.1 361-362; Ex. 38, 40).

There is evidence in the financial records from 2003-2007 that Ms. Eginton has told different stories to different people and entities at different times and admitted deceiving her mother in 2000 about the revocation of a power of attorney. (Tr.1 393; Ex. 94, 95, 96, 97, 98). As additional evidence that Ms. Eginton lacks the ability to accurately assess her mother's level of functioning, Ms. Eginton, even after hearing the tape of the July 2003 hearing, still insisted that her mother's "strong voice" was a clearer indication of Decedent's purported capacity than her obvious confusion and inability to answer non-leading questions. (Tr.1 430-433).

In addition to the testimony of the two physicians who saw Decedent in 2003, other neutral evidence supports the idea that Decedent lacked the capacity to execute a gift deed in August, 2003. In the months preceding the execution of the September Will and the August Deed, Decedent routinely could not remember that the caregivers, including Luz Marina Gomez, were being paid and thought instead they were helping her

because they were kind. (Tr.1 335-337). Nor could Decedent remember that Ms. Eginton and her family were being paid for what they did. (Tr.1 66-69). This payment included payment for time spent, as well as lump sum withdrawals for which no accounting has been furnished and the payment of \$10,000 to Mr. Leutgeb and \$5,000 to Mr. Eginton on the day of the hearing on Vance F. Gellert's petition for a conservator. (Tr.1 Ex. 60-86; Tr.2 127-128).

Even Ms. Eginton does not support her own position. Ms. Eginton testified that in September 2003 when the Will was executed, the Decedent was unable to recall her assets without being "reminded," that it was necessary that Ms. Eginton repeat to Decedent several times over a period of the few months prior to the execution of the 2003 Will what her assets were, and that each time Decedent was told, she was "incredulous" asking, "I really have that much?" (Tr.1 447-448). Ms. Eginton testified that Decedent probably did not know the extent of her financial holdings or what she owned at the time of the execution of the September 2003 Will. (Tr.1 447). She also testified that her mother's capacity was the same in August as it was in September. (Tr.2 136). Contrary to statements in Appellant's Brief, Luz Marina Gomez also testified that Decedent did not know much about money. (Tr.1 318, 346, 353-354).

In contrast, Vance F. Gellert testified that during August, 2003, Decedent did not have the requisite capacity to execute a gift deed. Vance F. Gellert testified that during 2003 his mother never asked about specific grandchildren by name, and only seemed to

remember people when they were in her physical presence. (Tr.1 640-641). Decedent never mentioned to Vance F. Gellert that she had transferred title to the house to herself and Ms. Eginton in joint tenancy. (Tr.2 170).

When Ms. Eginton filed her inventory and two subsequent accountings in the probate she listed the homestead as solely owned by Ms. Moldenhauer. (Tr.1 Ex. 42, 43, 48; Tr.2 122, 146). The last accounting was filed in mid April of 2007 after the contested Probate Matter and the Real Estate Matter had already begun. (Tr.1 Ex. 48). All expenses relating to the house were paid by Ms. Moldenhauer, including compensating Ms. Eginton and her husband Mr. Eginton for repairs and improvements to the house. (Tr.1 Ex. 43, 48, 74, 75, 76, 79; Tr.2 150, 154-155). When Ms. Eginton filed her Petition in the Probate Matter she also listed the house as a probate asset. (Answer of Lilli Ann Eginton, Para.4). Ms. Eginton testified that in her opinion the house always belonged to her mother. (Tr.2 122, 124). She also testified her mother always felt the house was hers. (Tr.2 140). The existence of the Deed at issue here was not disclosed until it was disclosed by Mr. Leutgeb as part of the discovery in the in the Probate Matter and it was only after this that Ms. Eginton amended her Petition to list the house. (Tr.2 123-125).

After the trial in the Probate Matter, the court entered an Order appointing Christopher Lehmann as Personal Representative. Counsel for Vance F. Gellert, on behalf of both Respondents, wrote a letter to Christopher Lehmann asking him to undertake to continue the Real Estate Matter and recapture the house for the Probate.

(Memorandum attached to Order dated November 20, 2007, App. 0093-0094 at 0094). Christopher Lehmann asked the court for guidance and the court entered an Order that Respondents should remain as Plaintiffs. (Memorandum attached to Order dated November 20, 2007, App. 0093-0094 at 0094).

The Real Estate Matter was tried on February 6, 2008. On May 23, 2008 the Court entered Findings of Fact, Conclusions of Law and Order for Judgment determining that the Warranty Deed dated August 4, 2003 was invalid due to the Grantor's lack of capacity, and that the Deed was never delivered, or, if delivered, was not accepted by Ms. Eginton. (Conclusions of Law 1-4, 9-15 of the Findings of Fact, Conclusions of Law and Order for Judgment dated May 23, 2008, App. 0016-0044 at 0028). Because of the invalidity of the Deed, the homestead is properly titled in the name of Marie M. Moldenhauer, f/k/a Marie Gellert. Ms. Eginton, and her husband Appellant, being in physical possession of the house, were ordered to immediately transfer possession to Christopher Lehmann, the personal representative of the Estate of Marie M. Moldenhauer. Vance F. Gellert and Carl A. Gellert were awarded their costs and disbursements and an award of attorney's fees to Vance F. Gellert and Carl A. Gellert was reserved to be determined in the Probate Matter. (Order for Judgment 1-5, of the Findings of Fact, Conclusions of Law and Order for Judgment dated May 23, 2008 App. 0016-0044 at 0029).

By a motion dated July 10, 2008 Vance F. Gellert and Carl A. Gellert asked the court to award them attorney's fees incurred in the Real Estate Matter. (App. 80-82). In an Order dated August 4, 2008, the trial court awarded Vance F. Gellert attorney's fees of \$28,283.51 and Carl A. Gellert attorney's fees of \$13,353.69. (App. 0093-0094 at 0093).

### **STANDARD OF REVIEW**

A reviewing court does not retry the facts. *In re Estate of Lange*, 398 N.W.2d 569, 572 (Minn. Ct. App. 1986). Rather, this court examines the record to determine whether the facts are sufficient to support the trial court's ruling. Minn. R. Civ. P. 52.01. Lack of capacity to make a gift is a question of fact, and a probate court's findings of fact shall not be set aside unless clearly erroneous. *In re Estate of Anderson*, 384 N.W.2d 518, 520 (Minn. Ct. App. 1986); *In re Estate of Olsen*, 357 N.W.2d 407, 411 (Minn. Ct. App. 1984). Findings of fact are clearly erroneous if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Estate of Congdon*, 309 N.W.2d 261, 266 n. 7 (Minn. 1981).

### **SUMMARY OF ARGUMENT**

Appellant contends that the district court erred in finding that Decedent lacked capacity to execute a gift deed on August 4, 2003. This court on January 27, 2009 held that Decedent lacked testamentary capacity from July 2003 until after September 2003. Perhaps in recognition that none of the credible evidence or testimony supports his position, Appellant relies heavily on a supposed presumption that the termination of

Decedent's conservatorship in July, 2003 requires a "*per se*" finding that Decedent had capacity to make a gift by deed in August, 2003. The Court of Appeals has already rejected this argument with respect to testamentary capacity. Appellant also argues that the trial court failed to rely on Ms. Eginton and Mr. Leutgeb's testimony. Appellant cites no authority for his "*per se*" rule and the Court of Appeals held that the trial court's decisions about credibility are without error. Appellant does not properly characterize the correct legal standards for gifting capacity or recognize the effect of the trial court's determination of the credibility of the witnesses. The standard for removal of a conservatorship at the time of the restoration hearing shared little with the standard to establish gifting capacity and the trial court was correct in refusing to conflate the two standards. Finally, Appellant argues that there is no authority for the award of the attorney's incurred in the Real Estate Matter. According to Appellant, Minn. Stat. § 524.3-720 cannot justify the award of attorney's fees unless the attorney's fees were incurred in a probate action or were incurred solely for the benefit of the estate.

### ARGUMENT

- I. **THE TRIAL COURT PROPERLY DETERMINED THAT MARIE M. MOLDENHAUER LACKED CAPACITY TO EXECUTE A GIFT DEED ON AUGUST 4, 2003.**
  - A. **The Trial Court Correctly Applied the Correct Test for Establishing Capacity to Execute a Gift Deed.**

A deed, like a will, can be challenged on the grounds that the grantor lacked capacity to execute the deed. *Younggren v. Younggren*, 556 N.W. 2d 228, 233-34 (Minn.

Ct. App. 1996). Generally, a person is considered competent to execute a deed if he has “enough mental capacity to understand to a reasonable extent the nature and effect of what he is doing.” *Id* at 232. Where, as here, the deed is a gift, the standard of capacity required for valid execution is higher than that for making a will. *Restatement (Third) of Property: Wills and Other Donative Transfers*, § 8.1 cmt.d (1999). The donor must have the mental capacity necessary to make a will, and additionally, the donor must also be capable of understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor. *Id.* § 8.1 (c).

A venerable Minnesota case considered the issue of capacity to make gift transfers and concluded that the standard for gift transfers is at least as demanding as the testamentary standard. In *Young v. Otto*, 57 Minn. 307, 59 N.W. 199 (1894), within a short time prior to the Decedent’s death the Decedent executed two “Bills of Sale” that gifted the Decedent’s assets and also a will that disposed of most of the rest of his assets. In connection with a jury instruction concerning the test of capacity or want of capacity in which the court used the testamentary capacity standards to describe the capacity to execute the bills of sale, the Supreme Court said,

This is conceded to be a proper test of capacity to execute a will. But it contains several elements not required in a test of capacity to execute an ordinary single contract. This is not a case, however, or an ordinary single contract. ...It is apparent from the evidence that the three instruments disposed of all, except trifling and inconsiderable items, of William Otto’s property; that all were executed when he expected to die in a short time and in anticipation of death, and for the purpose of making final disposition of property with a view to that event. All are to

be taken therefore as parts of one transaction and having one purpose in view, -to make disposition of his property in anticipation of death. In such a case, the test of capacity must be the same whether the party attempts to make disposition of his property entirely by will or entirely by ante mortem transfers or both. As applied to an attempt to make a disposition of his property in either of those ways, the test of capacity stated by the court is the proper one. *Id.* at 200.

In *Trimbo v. Trimbo*, 47 Minn. 389, 50 N.W. 350 (Minn. 1891), which considered deeds given in return for liens and maintenance agreements, the trial court said, "Such a disposition of property is in a sense testamentary in its nature, and the mental capacity of the party in such cases should be determined by substantially the same rules as would govern had the disposition been by will." *Id.* 50 N.W. at 392. It is well-established that capacity to execute a will or deed involves three elements:

1. The testator must understand the nature, situation, and extent of her property;
2. The testator must understand the claim of others on her bounty or remembrance; and,
3. The testator must have the ability to hold these concepts in her mind long enough to form a rational judgment concerning them.

*Congdon*, 309 N.W.2d at 266; *In re Estate of Healy*, 243 Minn. 383, 386, 68 N.W.2d 401, 403 (1955). The test is whether the testator had sufficient active memory to collect in her mind and comprehend, *without prompting*, the condition of her property, her relations to her children who may properly be her beneficiaries, and the effect of her will, and to hold these things in her mind a sufficient length of time to form a rational

judgment in relation to them. *In re Estate of Jenks*, 291 Minn. 138, 142-43, 189 N.W.2d 695, 697 (1971) (emphasis added).

In deciding whether a testator or grantor possesses requisite testamentary capacity, courts may consider four supplemental factors in addition to the three elements which establish the definition of testamentary capacity:

1. The reasonableness of the property distribution;
2. The testator's behavior within a reasonable time before and after the will was executed;
3. A prior adjudication of testator's capacity; and,
4. Expert testimony about the testator's mental and physical condition.

*Anderson*, 384 N.W.2d at 520.

Marie M. Moldenhauer signed the deed on August 4, 2003, and on September 5, 2003 signed the will that has been ruled invalid due to lack of capacity. During that time, Ms. Moldenhauer was diagnosed with persistent dementia and demonstrated her lack of capacity on numerous occasions in various ways. Mr. Leutgeb, the attorney who drafted and supervised the execution of both the will and the deed, failed to ascertain whether Ms. Moldenhauer understood the nature and extent of her property on either occasion. (Tr.1 132; Tr.2 31, 70). His testimony is that he did not even know the legal requirements for capacity to execute either document. (Tr.1 97-98, 132-133; Tr.2 65, 74-75). The appellate court has already affirmed the trial court's conclusion of law that Marie Moldenhauer lacked capacity to execute a will on September 5, 2003. *In re Estate of*

*Moldenhauer*, No. A08-0263, slip op. at 3 (Minn. Ct. App. Jan. 27, 2009)(Supp. App. 1).

Applying the definition of testamentary capacity described above, the trial court in the Probate Matter found:

At the time of the Will signing on September 5, 2003, Decedent did not know the nature, situation, and extent of her property [;] Decedent did not understand the claims of others on her bounty or the names of her grandchildren [; and] Decedent could not hold the concepts of the nature, situation, and extent of her property and the claims of others on her bounty in her mind long enough to form a rational judgment concerning them. (Findings 45 and 46, Findings of Fact, Conclusions of Law and Order for Judgment dated October 18, 2007, App. 0097-0110 at 0109).<sup>3</sup>

There is no credible evidence that her condition was in any way different on August 4, 2003 from her condition in July 2003 or September 2003, and this court in its decision specifically noted that credible evidence of incapacity extended from July 2003 through September 2003, also covering the date of execution of the deed. (Supp. App. 4).

**B. The trial court's determination of witness credibility is entitled to due regard, and the mere existence of evidence which, if believed, might lead to a different finding of fact is not grounds for a reversal.**

Mr. Eginton's fractured argument that Decedent had capacity to execute a deed on August 4, 2003 depends principally on the testimony of Mr. Leutgeb and Ms. Eginton. The trial court found that neither is a reliable witness, here as well as in the Probate Matter, and this finding was held to be without error by this court in the Probate Matter. (Supp. App. 3). It is almost entirely within the trial court's discretion to determine the credibility of witnesses. The trial court properly exercised its role as a fact finder and

made credibility determinations about the witnesses. Its findings concerning various witnesses' credibility are amply supported in the record. The existence of testimony which, if believed, may conflict with the trial court's findings is not grounds for reversal when evidence also exists which supports those findings.

Findings of fact by the trial court cannot be disturbed unless they are clearly erroneous, and due regard must be given to the trial court judge's determination of the credibility of witnesses. Minn. R. Civ. Pro. 52.01 (2006). When the resolution of disputed facts rests significantly with an assessment of the credibility of witnesses, there is no justification for an interference with a trial court's determination of which witnesses to believe absent lack of evidentiary support or a firm conviction that a mistake has been committed. *In re Estate of Balafra*, 293 Minn. 94, 98, 198 N.W.2d 260, 262 (1972). When the lower court is the trier of fact, its findings on disputed questions are entitled to the same weight that is given to jury findings, and will not be disturbed simply because a reviewing court might view the evidence differently. *Tonka Tours Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985). The trial court is free to disregard witnesses' testimony based on a judgment of credibility, as long as the trial court could reasonably have made the findings that it did. *See Engebretson v. Comm'r of Pub. Safety*, 395 N.W.2d 98, 100 (Minn. Ct. App. 1986); *see also State v. Miller*, 659 N.W.2d 275, 279 (Minn. Ct. App. 2003) (stating that "the weight and believability of witness testimony is an issue for the district court"); *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996) (stating that

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<sup>3</sup> All of these fact determinations were affirmed by this court in the Probate Case.

considerable deference is due the district court's credibility determinations because it is in a superior position to evaluate such matters.)

The court acted entirely within its discretion, indeed its duty, when it made credibility determinations concerning the witnesses' testimony. There is significant evidence in the record which supports the trial court's credibility determinations, including this court's holding in the Probate Matter, since all of the evidence in the Probate Matter was received in the Real Estate Matter. Additional evidence submitted in the Real Estate Matter again supports the trial court's credibility determinations. The only persons who have testified that Decedent did have capacity to execute the gift deed on August 4, 2003 were found by the trial court not to be credible. Ms. Eginton and Mr. Leutgeb were motivated to have decedent make this gift in order to benefit Ms. Eginton. As the direct beneficiary of such a transfer, Ms. Eginton's motivation is self evident. Both Ms. Eginton and Mr. Leutgeb demonstrated on several occasions that they, at best, lacked the ability to accurately assess decedent's level of functioning or, at worst, were so motivated by their own agenda that they ignored the issue of decedent's level of functioning. They unduly influenced Decedent to execute a will on April 3, 2001, six days before a hearing at which Decedent was declared incompetent. Ms. Eginton's actions in connection with selling the lake property in 2004 when her mother was incapable of remembering the sale are also an indication Ms. Eginton could not recognize her mother's significant impairment.

There were many instances that could reasonably lead the trial court to question the credibility of Mr. Leutgeb and Ms. Eginton. In spite of his total lack of memory of preparing and presenting a power of attorney to Decedent immediately after the restoration hearing in July 2003, a very significant legal document, Mr. Leutgeb claims to have an excellent memory of the events surrounding the signing of the August 4, 2003 deed, just five days later. Mr. Leutgeb claims excellent recollection of only those events that benefit the Egintons. His memories of other events from the same time period are consistently foggy. This does not make for a creditable witness.

In addition, Mr. Leutgeb was asked in his deposition if he had produced all documents in his possession, relating to Decedent's affairs, before trial in the Probate Matter, and he indicated he had. (Tr.1 168; Tr.2 68-69). However, just days before trial of the Real Estate Matter, on February 6, 2008, he produced new and significant information regarding his trip to the Dakota County Recorder's office. (Tr.2 69-70).

In addition to his lack of creditability, the trial court noted that Mr. Leutgeb did not know the elements of testamentary or gifting capacity at the time of the signing of the will or the deed, both of which documents he prepared. (Finding 24, Findings of Fact, Conclusions of Law and Order for Judgment dated October 18, 2007, App. 0097-0110 at 0105; Finding 22, Findings of Fact, Conclusions of Law and Order for Judgment dated May 23, 2008, App. 0016-0044 at 0022; Tr.1 131, 167-168).

All of the findings of the court concerning the witnesses' testimony are supported

by the evidence. Because of all of these questionable circumstances, including the lack of credibility in the Probate Matter, it was entirely reasonable for the trial court to find that the testimony of Ms. Eginton and Mr. Leutgeb was not credible. Given the extensive findings of fact calling into question the credibility of Ms. Eginton and Mr. Leutgeb, the law that such findings can only be disturbed unless they are clearly erroneous, and the significant amount of evidence that supports the credibility determinations, the trial court's determination of the facts of this case should not be disturbed.

Appellant claims that the testimony of Luz Marina Gomez supports his view of Decedent's capacity. However, Ms. Gomez' testimony, as a whole, supports the view that Decedent did not understand the items she owned in this world. This court noted in the Probate Appeal that much of this witness' testimony was probative only of the Decedent's ability to engage in day-to-day activities and was not helpful in determining the Decedent's testamentary capacity. *In re Estate of Moldenhauer*, slip op. at 3 (Supp. App. 3).

**C. Expert testimony establishes Decedent's lack of capacity.**

Finally, a court can examine expert testimony to help determine whether a Decedent possessed gifting capacity. All three neutral experts – Dr. Evje, Dr. Meyers, and Mary Davies through her report – all opined directly or indirectly that Decedent was suffering from progressive dementia; the doctors both testified to a serious decline in Decedent's mental functioning between February/March of 2003 and July of 2003 based

upon her medical records and their own observations. (Tr.1 212-214, Ex. 25, 28, 30, 35).

The testing done in February of 2003 showed that Decedent was, at that time, capable of delegating decisions as to care of her affairs, but that even in February of 2003 she was unable to keep her own checkbook, pay bills, understand her finances, etc. (Tr.1 66-97, 335-337, 439-441, 447-448; Tr.2 132, 154). By July, at the time of Ms. Davies' report, the Decedent was suffering from severe short-term and long-term memory loss and was unable to perform even simple mental tasks. (Tr.1 28). The reports and testimony of the experts support the trial court's findings of the Decedent's lack of capacity. This court specifically noted in the Probate Appeal that the experts' evidence supported the trial court's finding that Decedent lacked capacity from July 2003 through September 2003. *In re Estate of Moldenhauer*, No. A08-0263, slip op. at 4 (Minn. Ct. App. Jan. 27, 2009) (Supp. App. 4).

**D. The Cases Cited by Appellant Are Not Dispositive.**

Perhaps in recognition of the factual weaknesses of his argument, Appellant claims that the Order Restoring Decedent to capacity compels a *per se* apparently irrebuttable presumption that Decedent had capacity to execute a gift deed on August 4, 2003. This argument was specifically rejected by this court in the Probate Appeal. *In re Estate of Moldenhauer*, slip op. at 3-4 (Supp. App. 3-4).

In addition, no cases cited by Appellant invalidate the legal standards used by the trial court to determine that the August 4, 2003 deed was invalid. Appellant's use of

*dicta*<sup>4</sup> and citations to cases that did not involve gift deeds makes it appear more difficult for a court to find a person did not have capacity to make a gift deed than is the case. In fact, according to Appellant's cases, a party who is asserting a valid gift must prove the requisite elements by clear and convincing evidence. *McCulloch v. McCulloch*, 435 N.W.2d 564, 568 (Minn. Ct. App. 1989).

Appellant places emphasis on the medical testimony presented in the hearing for restoration to capacity, likening the medical testimony facts presented here to the facts presented in the cases of *McEleney v. Donovan*, 119 Minn. 294, 138 N.W. 306 (1912), and *Younggren v. Younggren*, 556 N.W. 2d 228 (Minn. Ct. App. 1996). (Appellant's Brief p.32). While there was medical testimony both in this matter and those cited cases, the nature of the testimony there could not be more different from the medical testimony here. In *McEleney*, the medical testimony regarding capacity came from "his attending physician, present at that time, and another physician of his acquaintance, who saw him at about the days on which the deeds were executed . . ." and the doctors testified "to his mental competency to transact his business." 138 N.W. at 307. There was similar testimony in *Younggren*, "[T]he doctor testified that *at the time respondent signed the power of attorney and the warranty deed* he was 'completely competent.'" 556 N.W.2d at

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<sup>4</sup>*Lidstrom v. Mundahl*, 310 Minn. 1, 246 N.W.2d 16 (1976) which did not involve a gift deed, found only that a motion to dismiss was properly granted. The propositions for which Appellant cited this case are *dicta*. *Macklett v. Temple*, 211 Minn. 434, 1 N.W. 2d 415 (1941) did not involve a gift deed, the deed was being attacked by the grantor and the holding of the case was only that the evidence supported the court's findings. *Id.* at 417. *Fritz v. Fritz*, 377 N.W. 20 (Minn. App. 1985) did not involve a gift deed. The consideration for the deed in question was a family maintenance agreement, a device that the court observed has not been commonly used for 30 years. The proposition for which this case was cited is *dicta* in that the court held that there had been no substantial failure of consideration. *Fisher v. Schefers*, 656 N.W. 2d 592 (Minn. App. 2003) involved a sale to a bona fide third party and

232. (emphasis added).

In the present case, we have no contemporaneous medical examinations in August of 2003 establishing the competency of Marie M. Moldenhauer. Instead, both testifying doctors indicated she had progressive dementia, and based on medical records and other evidence, had declined from the time of their office visits with her in January and March to the time of the deed signing, five to seven months later. (Tr.1 39, 43, 48,63, 213). Nor is it without significance that Marie M. Moldenhauer's score of 22 on the MMSE administered by Dr. Myers is lower than one of her MMSE scores while in the nursing home, at the time of the establishment of the first conservatorship. (Tr.1 212; Tr.1 Ex. 53, excerpts from Nursing Home Records/Mini Mental Status Report dated 6/11/01). Further, the reports sought by Mr. Leutgeb from both doctors from January and March of 2003 only addressed the narrow question of the Decedent's competency to delegate her affairs to others so her guardianship could be terminated. This medical testimony is not supportive of Appellant's position that Decedent had capacity to execute a deed on August 4, 2003.

In *Trimbo v. Trimbo*, 47 Minn. 389, 50 N.W. 350 (1891), the Court was very impressed with the total lack of any fraud or undue influence, the consistency of the deed with a prior estate plan and testimony of disinterested witnesses. All these elements are

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the holding of the case is that there was sufficient evidence to sustain the court's findings. *Id.* at 597.

lacking in the present case.<sup>5</sup>

The closest we come to neutral contemporaneous evidence supports the trial court's finding of lack of capacity. Decedent's visit with Court visitor Mary Davies in mid-July of 2003 and Decedent's failure to answer simple questions at her restoration to capacity hearing just seven days prior to the signing of the deed in question both demonstrate Decedent's lack of gifting capacity. These contemporaneous events support the doctors' views that Decedent's dementia was progressive.

Because the July 28, 2003 hearing was an *ex parte* or default hearing since the Respondents were not given notice of the hearing, the findings of that hearing are less important than the transcript and tape recording of the hearing, which show the lack of gifting capacity of Decedent.

## **II. THE EVIDENCE ESTABLISHES THAT EITHER THE DEED WAS NEVER DELIVERED OR THAT IT WAS NOT ACCEPTED.**

Gifts have additional requirements to which wills are not subject. In order to have a completed gift, in addition to demonstrating gifting capacity, the following elements must also be present: (1) delivery, (2) intention to make a gift on the part of the donor, and (3) the owner's absolute disposition of the gift. *Oehler v. Falstrom*, 273 Minn. 453, 456-57, 142 N.W. 2d 581, 585 (1966). The gift must be established by clear and convincing evidence. *Id.* A deed signed but not delivered before the death of the grantor

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<sup>5</sup> Appellant states that the Trial Court found that there was no undue influence. (Appellant's Brief p.5, 7). This overstates the Trial Court's conclusion. The Trial Court found only that undue influence was *not* proven to the clear and convincing standard. Here there was evidence of undue influence, but the secrecy with which the parties acted prevented clear and convincing evidence being present.

is void. *Sauter v. Dollman*, 46 Minn. 504, 504-05, 49 N.W. 258, 258-59 (1891).

Delivery is a question of fact. *In re Estate of Savich*, 671 N.W. 2d 746, 750 (Minn. Ct. App. 2003). See, *Ingersoll v. Udendahl*, 136 Minn. 428, 162 N.W. 525, 526 (1917). In order for the complete delivery of the gift, the donee must accept the gift offered by the donor. *Babbitt v. Bennett*, 68 Minn. 260, 263-64, 71 N.W. 22, 23 (1897); *Kessler v. Kruidenier*, 174 Minn. 434, 436, 219 N.W. 552, 553 (1928).

Appellant argues that the elements of delivery are only surrender of control of the deed and intent to convey. However, they also concede that since this is a gift deed it is also necessary that the grantor was dispossessed of right to the property.

Although Appellant argues that the law does not require physical delivery to the grantee, the cases he relies on give the Court no guidance here.<sup>6</sup> In *Cloutier v. Charest*, 208 Minn. 453, 294 N.W. 457 (1940), the grantee paid the requested consideration to the grantor who was also her mother. The grantor then handed over the deed but immediately grabbed it back; or, in the Mother's alternative version of the facts, the grantee became enraged and tore up the deed. As the Court said delivery was a fact issue and the findings of the trial court that the deed was delivered were fairly sustained. *Id.* at 457-458.

In *Barnard v. Thurston*, 86 Minn. 343, 90 N.W. 574 (1902) the deed was signed by the decedent and his wife and delivered to the person who drafted the deed to be delivered to the grantee. When the person who drafted the deed could not find the

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<sup>6</sup> Appellant has cited numerous cases for legal propositions without providing adequate factual background. In order to properly refute these citations, it will unfortunately be necessary to provide the facts of these cases

grantee that day, he left it with the wife to give to the grantee and she promised to do so. Once the grantee, who was a surrogate son to the decedent and his wife, knew about the deed, he asked the wife for it several times and she told him there was no hurry and he was sure of getting it. After the death of her husband she refused to deliver it and it subsequently turned out she had destroyed it.

In *Ingersoll v. Odendahl*, 136 Minn. 428, 162 N.W. 525 (1917), the decedent deeded his property to his daughter and only heir just before he died, apparently to avoid taxes; the daughter would receive the property regardless of whether the deed was valid or not. The only issue in the case was whether the administrators of the estate could claim the property in order to get paid. Also in this case, it was uncontested that the deed was delivered to an agent with instructions to record it, in contrast to the current case where Mr. Leutgeb denies he was instructed to record it or even that he tried to.

In *Kessler v. Von Bank*, 144 Minn. 220, 174 N.W. 839 (1919), the decedent and his wife executed deeds to the decedent's daughter in the decedent's bedroom when the decedent was dying. Once the deeds were executed they were put in a valise and returned to decedent's closet. The decedent's wife was barred from testifying in court about decedent's instructions. After decedent's death, his widow and the grantee/daughter recorded the deed and the grantee/daughter conveyed part of the property back to her stepmother. The actions of the decedent's widow and daughter were held to demonstrate delivery and the grantee's acquiescence.

In *Chastek v. Souba*, 93 Minn. 418, 101 N.W. 618 (1904), the Court found sufficient evidence that a father intended to deliver a deed in part because the father treated the land as though it was the son's property. Here we have the exact opposite. Ms. Eginton never took possession of the property and treated it during her mother's life and the initial stages of probate as if it was her mother's sole property.

*Stribling v. Fredericks, Clark & Co.*, 219 N.W.2d 93 (Minn. 1974) is also a very interesting case in the current context. It holds that no gift is made if the grantor is not dispossessed of rights in the property. In the current case, this deed had no effect, was not even recorded against Torrens Property and Marie M. Moldenhauer's will a month later made a specific devise of the property. Under the *Chastek* and *Stribling* analyses, no gift was made.

In this case, the testimony is Ms. Eginton was present when the deed was signed but did not take possession of the deed. (Tr.1 275; Tr.2 87-89, 143-145). Instead, she left it with Mr. Leutgeb, the attorney who at that time represented her mother. (Tr.2 28). Mr. Leutgeb's testimony is that, after it was signed, the deed was delivered to him for "safe keeping." (Tr.2 31, 89). It is possible that leaving a deed with the grantor's attorney with instructions to record it can constitute delivery but given Mr. Leutgeb's testimony that he never tried to record it, it does not appear this principle applies. At the first trial in this matter, Mr. Leutgeb testified that his trip to the courthouse was not in order to record the deed. At the present trial, he softened his position but never admitted he tried to record it.

This vacillation undercuts the Appellant's reliance on the cases cited.

It is now without dispute that during his visit to the Dakota County Courthouse in August of 2003, Mr. Leutgeb was told that the deed he had prepared did not properly convey Decedent's entire homestead. Even after his testimony at two trials, it is still unclear why Mr. Leutgeb, if the deed really had been delivered, did not then proceed to remedy the title defect or tell Ms. Eginton to do so. Instead he left that to someone else to correct in the future and proceeded to draft a will that made a specific devise of the property. Appellant argues that drafting the will constitutes an affirmation of Decedent's intent to dispossess her of full ownership. (Appellant's Brief p.45). In fact, it demonstrates that even Mr. Leutgeb felt Decedent still owned the property and could make a specific gift of it. If all legal requirements for a gift deed had been met, the will was a nullity. If, however, the deed had not been delivered, the grantor still had the power to "take the deed back" and make a gift in the will.

Alternatively, Ms. Eginton's testimony indicates either she did not accept the deed or abandoned the deed. Ms. Eginton admits she did not disclose the alleged transfer in the inventory and in two accountings that she subsequently filed in her mother's second conservatorship. Ms. Eginton also testified that she listed the house, the subject of the supposed deed, as an asset of Decedent in the initial Probate Petition, not as a joint asset. Interestingly, the Appellant totally fails to address the legal effect of these actions in his brief. If Ms. Eginton did not waive or abandon this deed, her actions constitute fraud on

the Court by a fiduciary. Instead, we submit all of these actions further confirm Ms. Eginton's view, that the house remained her mother's. (Tr.2 124, 140). Appellant under his own cited cases must establish the elements of a gift deed by clear and convincing evidence. This Appellant has failed to do.

In her answer to the complaint in the Real Estate Matter, Ms. Eginton has attempted to justify listing the house in the conservatorship because her mother still owned a partial interest. However, the documents filed in the Conservatorship and Probate Court always included the whole value of the house, and never reflected in any way a partial interest. She admits listing the house in the Probate Matter Petition but claims that was fixed by her amendment of the Petition. However, an amendment does not change the admission inherent in the first pleading. *In re Disciplinary Action Against Perry*, 494 N.W.2d 290, 294 (Minn. 1992). Further, Ms. Eginton has testified that no gift tax return was filed in 2003. (Tr.2 132). She also testified that she believes she saw a tax-return questionnaire from Decedent's accountant asking about gifts worth more than \$10,000 that year and she did not inform the accountant of this deed. (Tr.2 132-135).

Subsequent to the August 4, 2003 deed, Decedent paid for all real estate taxes, insurance and upkeep on the house with no contribution by Ms. Eginton. Decedent even compensated Ms. Eginton and her husband for any chores or repairs that they performed on the house. (Tr.1 Ex. 43, 48, 74, 75, 76, 79; Tr.2 150, 154-155).

In addition, the attorney who drafted the deed has testified that he was to hold the

deed until it was determined whether Ms. Eginton would get the house under a specific bequest in a will as yet undrafted. (Tr.1 264-265, 274; Tr.2 63-65). Apparently, the deed was to be used only if the gift of the house failed. Retaining a power like this to decide to use or not use the deed is fatal to the idea that delivery had happened. It is questionable whether such a scheme is effective. Under Mr. Leutgeb's theory, the delivery of the deed, necessary to complete the transaction, would thus happen only after Marie M. Moldenhauer's death. Under Minnesota law, delivery of a deed after death is not effective. *Sauter v. Dollman*, 46 Minn. 504, 504, 49 N.W. 258, 258 (1891); *In re Estate of Savich*, 671 N.W.2d 746, 750 (Minn. Ct. App., 2003). The states that have considered schemes similar to the one described by Mr. Leutgeb suggest that the attempt to use a deed in this way is invalid. See *Westlaw's Causes of Action 2<sup>nd</sup> Series, Cause of Action to Invalidate Deed for Failure of Delivery*, 5 COA 2d 471 §10, 13.

**III. VANCE F. GELLERT AND CARL A. GELLERT ARE ENTITLED TO AN AWARD OF THE ATTORNEY'S FEES THAT THEY INCURRED IN RECAPTURING THE HOUSE FOR THE BENEFIT OF THE PROBATE ESTATE.**

Minn. Stat. §524.3-720 provides in part:

*...When after demand the personal representative refuses to prosecute or pursue a claim or asset 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. (Emphasis added)*

Vance F. Gellert and Carl A. Gellert are interested persons as defined by law because they are the sons of Marie M. Moldenhauer, and heirs-at-law of the Decedent. As required by the statute, Vance F. Gellert and Carl A. Gellert asked the personal representative to prosecute this claim. The personal representative declined to do so. In the end, as a result of the litigation started by them, the homestead was successfully recaptured as part of the Decedent's estate. All the elements required by the statute to recover attorney's fees have been met.

Appellant argues that Minn. Stat. § 524.3-720 does not apply because the Section is entitled "Expenses in Estate Litigation" and the Real Estate Matter was not brought in the Probate Court or as part of the Probate Matter. (Appellant's Brief p.20-21). This is a clever, albeit technical argument. However, the sentence that is being relied on for the award of attorney's fees clearly applies to more than probate actions. The statute states that the interested person must take some action to recover an asset; it does not require litigation in probate court. There are many situations where interested person may be engaged in litigation to recapture assets or to benefit estates that would not be brought in probate court. If an asset that allegedly belongs to the estate was held by a company in bankruptcy, litigation would occur in bankruptcy court. If the person having possession of an asset were in another state, an action to recover that asset would be brought in a court of general jurisdiction in that state. *In re Estate of Torgerson*, 711 N.W 2d 545 (Minn. Ct. App. 2006) is not authority for the limitation appellant wishes to place on this

statute because it involved a will contest and the first sentence of the statute. It is the second sentence that is at issue here. The plain meaning of Minn. Stat. § 524.3-720 is that, if after seeking first to have a personal representative take some action, an interested person takes the action and recaptures assets or otherwise benefits the estate, attorney's fees may be awarded. Which forum that action is taken in is not delineated.

In addition, Minnesota law specifically prohibits the assertion that statute captions may be relied on as authoritative. As Minn. Stat. § 645.51 says: "The headnotes printed in boldface type before sections and subdivisions in editions of Minnesota Statutes are mere catchwords to indicate the contents of the section or subdivision and are not part of the statute."

The historic explanation of where the caption came from also negates Appellant's argument that the caption is meaningful. As noted in Appellant's Brief, Minnesota has adopted the Uniform Probate Code and this is the identical title to the corresponding section of the Uniform Probate Code. *Uniform Probate Code* § 3-720 (amended 1993), 8 U.L.A. 184 (1995). However, Minnesota has also made some changes in the Uniform Probate Code and this section contains one of those changes. The first sentence of Minn. Stat. § 524.3-720 is similar to the provisions of the Uniform Probate Code but the sentence at issue here does not appear in the Uniform Probate Code. So, any significance to the section title is minimal.

Appellant also argues that because the Gellert brothers' action resulted in a benefit

to themselves, no fees can be awarded because the statute requires a benefit to the estate, as distinguished from a personal benefit. As the trial court noted, of course the Gellerts' actions resulted in benefit to themselves. Since recovery is limited to interested persons, that will always be true in any probate action. But also the trial court noted, the recapture benefits all the heirs equally, by enlarging their respective inheritances as heirs. (Order and Partial Judgment dated August 4, 2008 App. 0093-0094 at 0094). The intent of the statute would be eviscerated if the Appellant here was allowed to argue, as he appears to do, that unless the Gellert brothers acted disinterestedly they cannot recover.

Furthermore, a grammatical analysis of the language that Appellant relies on as barring attorney's fees in the present case does not support his position. The clause "as such, as distinguished from the personal benefit of such person" follows and modifies the provision "when, and to the extent that, the services of an attorney for any interested person contribute to the benefit of the estate," not the provision "prosecute or pursue and recover such fund or asset for the benefit of the estate." So, the second sentence of Minn. Stat. § 524.3-720 allows an award of attorney's fees after demand on the personal representative to an interested person (1) when the action of the interested person results in the capture of an asset for the benefit of the estate, or (2) when the action of the person otherwise results in a benefit to the estate separate from the benefit to the person.

*In re Estate of Van Den Boom*, 590 N.W. 2d 350 (Minn. Ct. App. 1999) is an example of the latter situation. Van Den Boom, a son of the decedent, initiated litigation

which resulted in bills that otherwise would have been paid by the estate not being paid and so the widow would end up paying them personally. This allowed decedent's children to receive their statutorily mandated remainder interest in the homestead free of the claims of creditors. This action was of benefit to the estate because it allowed a controversy to be resolved in a way consistent with Minnesota law. Obviously, the son's share was thereby preserved but the court held that this result did not bar his recovery of attorney's fees.

*In re Estate and Trust of Anderson*, 654 N.W.2d 682, 689 (Minn. Ct. App. 2002) also involved a request for attorney's fees under this "other benefit" clause because the interested person asking for fees had not been successful in her attempt to keep the liquid assets of the trust at their highest level possible. *Id.* at 689. In *In re Estate of Jeruzal*, 151 N.W.2d 788 (Minn. 1967) the fees that were disallowed were due to an unsuccessful attempt by an heir to recapture assets. In *In re Estate of Weisburg*, 72 N.W.2d 363 (Minn. 1955) the fees that were disallowed were fees incurred by the personal representative and had nothing to do with recapturing assets. In the present case, however, the Gellert brothers' actions have resulted in the recapture of an asset and attorney's fees can be awarded under the statute without considering whether the persons recapturing the assets were also benefited.<sup>7</sup>

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<sup>7</sup> Minn. Stat. § 524.3-720 does still require the court to balance the fees against the estate's benefit even if the fees are for recapturing assets. The statute includes a provision limiting attorney's fees to be "commensurate with the benefit to the estate from the recovery so made or from such services." Here the expenditure was \$41,991.25 and resulted in the recapture of an asset valued at \$208,000.

That this is the correct analysis is also supported by the history of this statute. In 1974 Minnesota adopted the Uniform Probate Code. Laws. 1974 C. 442 Art. 3. In the statute adopted in 1974, §524.3-720 only provided for recovery of fees by a personal representative or nominated personal representative. In 1975, before this statute went into effect, the Probate Code was substantially changed to incorporate many provisions of Minnesota law that had existed prior to the adoption of the Uniform Probate Code.

Minnesota's prior probate code had included a provision providing:

...Where upon demand the representative refuses to prosecute or pursue a claim or asset of the estate or a claim is made against him on behalf of the estate and any party interested shall then by his own attorney prosecute or pursue and recover such fund or asset for the benefit of the estate, such attorney shall be allowed such compensation. Minn. Stat. § 525.49 (1971).

When the Minnesota Probate Code was modified in 1975, this sentence was added to § 524.3-720. However, a new clause, "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," was also added. So, it stands to reason that the clause "as such, as distinguished from the personal benefit of such person" modified only the clause that immediately preceded it and that this entire new phrase was meant to stand together grammatically. Since this "other benefit" clause could cover very broad situations, it makes sense that it was perceived as needing more limitation than the situation where an interested party recovers assets for an estate.

Finally, Appellant's numerous citations to foreign court decisions are of limited

helpfulness in interpreting the Minnesota statute. None of the cases cited were decided in states having statutes similar to the Minnesota's statute. As noted, Minnesota's amendment to the UPC makes it unique.

To the extent that these cases are addressing equitable principles that predate the UPC, and may not be extinguished by the adoption of the Minnesota statute, the holdings in half of the cases cited actually do not support Appellant's position because fees were awarded.<sup>8</sup> Of the cases cited by Appellant where fees were denied, none dealt with the recapture of assets.<sup>9</sup> In this matter, *In re Estate of Brown*, 83 Ohio App. 3d 540, 615 N.W.2d 319 (1992), *In re Estate of Rohrich*, 496 N.W.2d 566 (N.D. 1993), *In re Keller*, 65 Ohio App. 3d 650, 584 N.E. 2d 1312 (1989), and *Becht v. Miller*, 279 Mich. 629, 273 N.W. 294 (1937) which are heavily relied on by Appellant are particularly damaging to Appellant. In *In re Estate of Brown*, 83 Ohio App. 3d 540, 615 N.W.2d 319 (1992), there were two sisters/devisees under the will. One sister successfully defended the estate against an attack by the other heir and sister who claimed that certain assets were not

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<sup>8</sup> *In re Keller*, 65 Ohio Ct. App. 3d 650, 584 N.E.2d 1312 (1989); *In re Estate of Brown*, 83 Ohio App. 3d 540, 615 N.W.2d 319 (1992); *In re Estate of Rohrich*, 496 N.W.2d 566 (N.D. 1993); *Dent v. Foy*, 214 Ala. 243, 107 So. 210 (1926); *Becht v. Miller*, 279 Mich. 629, 273 N.W. 294 (1937); *In re Estate of Wright*, 132 Ariz. 555, 647 P.2d 1153 (1982).

<sup>9</sup> *In re Gratton's Estate*, 298 P. 231 (Or. 1931) was an estate where there already was a Personal Representative and did not involve the recapture of assets. *Statler v. Dodson*, 195 W. Va. 646, 466 S.E. 2d 497 (1995) involved the issue of whether a child was an heir and did not involve the recapture of assets. In *Householter v. Householter*, 160 Kan. 614, 164 P.2d 101 (1945) there was not even an estate because it was a partition action. The partition action did require an interpretation of a previously probated will but the "interested party" was unsuccessful in his attempt to get the interpretation that he wanted. *In re Estate of Lewis*, 93 P.3d 605 (Colo. App. 2004) involved the interpretation of the will. *In re Estate of Evarts*, 166 P.3d 161, (Colo. App. 2007) involved a dispute as to whether or not there was a will. *Merchants & Planters Bank v Myers*, 644 S.W.2d 683 (Tenn. Ct. App. 1982), was a case where there was a personal representative and the issue was the proper calculation of the widow's elective share.

really probate assets and belonged to her. The personal representative had been asked to defend the estate and refused to act. The appellate court awarded the defending sister her attorney's fees. The discussion cited by Appellant about motivation is in the context of rejecting the trial court's analysis that the fees had to be incurred for the exclusive benefit of the estate. Nor did the court in *Brown*, hold as claimed by Appellant that "for the benefit of the estate" requires a recovery that increases the share of the beneficiary "compared to what they would have received" otherwise. (Appellant's Brief p.25). The court in *Brown* said that the share of the beneficiary, *as beneficiary*, has to increase. *Id.* at 321. If fees were recoverable under equitable principles in *Brown*, they should also be recoverable here. Under the principles of *Brown*, that Ms. Eginton is the one from whom the asset needed to be recaptured does not defeat the recovery of fees.

In *In re Estate of Rohrich*, 496 N.W.2d 566 (N.D. 1993), the court awarded attorney's fees based on equitable principles for the attorney of one child/heir who succeeded in recapturing assets from the other two heirs. In *In re Keller*, 65 Ohio App. 3d 650, 584 N.E. 2d 1312 (1989), the court awarded attorney fees under equitable principles for the attorney representing two heirs in recapturing assets being wasted by the personal representative. In *Becht v. Miller*, 279 Mich. 629, 273 N.W. 294 (1937), the attorney representing two heirs recaptured assets by making objections to the accounts of the Personal Representative, who also was an heir.

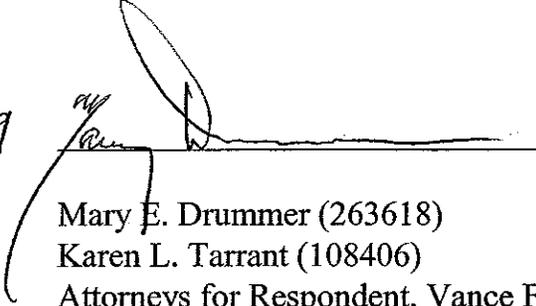
Most importantly, the Minnesota case cited, *Distributors Supply Co. v. Shablow*, 92 N.W. 2d 83, 88-89 (Minn. Ct. App. 1958) was decided under the Minnesota Statute which contained the language about recapture of assets that was added to the UPC language in 1975, as discussed above. The court in *Distributors Supply* awarded fees even though the action of the creditor's attorneys principally benefited their client. The award, however, was limited by the trial court and the appellate court closely analyzed the alleged recovery of assets to make sure that the items recaptured actually were probate assets. Thus, *Distributors Supply* supports the idea that the benefit to the estate is sufficiently clear when assets are recaptured and the additional language is not needed to prevent abuse. The foreign jurisdiction cases cited by Appellant also support the idea that in determining who is benefited, the court under the old equitable principles looked at what was recaptured, not whether the person from whom it was recaptured got less after the recapture or whether the interested person had a selfish reason for trying to recapture the asset.

### CONCLUSION

The deed signed by Decedent on August 4, 2003, is invalid due to lack of capacity, and failure of delivery or lack of acceptance of delivery. Since the attorney's fees incurred by Vance F. Gellert and Carl A. Gellert have resulted in the recapture of an asset for the Decedent's Estate, they are entitled to an award of their attorney's fees under Minn. Stat. § 524.3-720.

Respectfully submitted;

DATED: January 30, 2009



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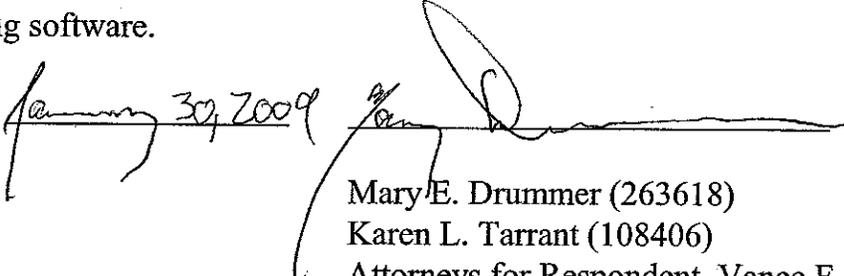
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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the brief served in the above-entitled matter on January 30, 2009, 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 950 lines and 12,150 words. This brief was prepared using Microsoft Word 2002 word processing software.

DATED: January 30, 2009

  
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