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NO. A10-1768

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State of Minnesota  
**In Court of Appeals**

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In re:

Guardianship of Jeffrey DeYoung

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**APPELLANT'S BRIEF, ADDENDUM AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

LEGAL ISSUES ..... 1

    I. WHETHER THE EXISTING GUARDIAN’S ADMISSION THAT SHE DELEGATED THE MOST SIGNIFICANT PORTIONS OF HER DUTIES AS LISTED IN MINNESOTA STATUTES SECTION 524.5-313 TO THE PROTECTED PERSON’S CARE PROVIDER WAS A SUFFICIENT BASIS UPON WHICH TO REPLACE HER AS GUARDIAN ..... 1

    II. WHETHER APPELLANT PROVED THAT SHE WOULD BE THE “BEST QUALIFIED AND MOST SUITABLE PERSON” TO BE THE PROTECTED PERSON’S GUARDIAN..... 1

STATEMENT OF THE CASE ..... 2

STATEMENT OF THE FACTS ..... 2

STANDARD OF REVIEW ..... 11

ARGUMENT..... 11

    I. THE EXISTING GUARDIAN’S ADMISSION THAT SHE DELEGATED THE MOST SIGNIFICANT PORTIONS OF HER DUTIES AS LISTED IN MINNESOTA STATUTES SECTION 524.5-313 TO THE PROTECTED PERSON’S CARE PROVIDER WAS A SUFFICIENT BASIS UPON WHICH TO REPLACE HER AS GUARDIAN..... 11

    II. WHETHER APPELLANT PROVED THAT SHE WOULD BE THE “BEST QUALIFIED AND MOST SUITABLE PERSON” TO BE THE PROTECTED PERSON’S GUARDIAN..... 18

CONCLUSION ..... 27

CERTIFICATION OF BRIEF LENGTH ..... 29

ADDENDUM

APPENDIX

## TABLE OF AUTHORITIES

### CASES

<i>In re Guardianship of Kowalski</i> , 478 N. W. 2d 790 (Minn. App., 1991).....	1, 11
<i>In re Guardianship of Stanger</i> , 299 Minn. 213, 215, 217 N.W.2d 754, 755 (1974) .....	11
<i>In re Guardianship of Wells</i> , 733 N.W. 2d 506, 512 (Minn. App. 2007).....	1, 11, 12, 26
<i>Shambaugh v. Wolk</i> , 302 N.J. Super. 380, 695 A.2d 382 (1996) .....	17

### STATUTES

Minnesota Statutes Section 524.5-309 .....	1, 18
Minnesota Statutes Section 524.5-309, Subdivision (b) .....	12
Minnesota Statutes Section 524.5-309, Subdivision (c).....	13
Minnesota Statutes Section 524.5-313 .....	1, 11, 12, 18
Minnesota Statutes Section 524.5-313 (c) (2) .....	13, 18
Minnesota Statutes Section 524.5-313 (c) (6) .....	17
Minnesota Statutes Section 525.551, Subdivision 5 .....	11
Uniform Guardianship and Protective Proceedings Act.....	11, 12

## LEGAL ISSUES

**I. WHETHER THE EXISTING GUARDIAN'S ADMISSION THAT SHE DELEGATED THE MOST SIGNIFICANT PORTIONS OF HER DUTIES AS LISTED IN MINNESOTA STATUTES SECTION 524.5-313 TO THE PROTECTED PERSON'S CARE PROVIDER WAS A SUFFICIENT BASIS UPON WHICH TO REPLACE HER AS GUARDIAN.**

How issue was raised in Trial Court: Petition for Appointment of Successor Guardian. (Add.6; A.52).

Trial Court's Ruling: Trial Court held that it was not.

How issue was preserved for appeal: Appealed from Order Denying Petition. (Order Denying Petition, Add.1; A.13; Notice of Appeal, A.1).

Apposite Cases and Statutory Provisions: Minnesota Statutes Section 524.5-313; *In re Guardianship of Kowalski*, 478 N. W. 2d 790 (Minn. App., 1991); Minnesota Statutes Section 524.5-309.

**II. WHETHER APPELLANT PROVED THAT SHE WOULD BE THE "BEST QUALIFIED AND MOST SUITABLE PERSON" TO BE THE PROTECTED PERSON'S GUARDIAN.**

How issue was raised in Trial Court: Petition for Appointment of Successor Guardian. (Add.6; A.52).

Trial Court's Ruling: Trial Court held that Appellant did not so prove.

How issue was preserved for appeal: Appealed from Order Denying Petition. (Order Denying Petition, Add.1; A.13; Notice of Appeal, A.1).

Apposite Cases and Statutory Provisions: *In re Guardianship of Wells*, 733 N.W. 2d 506, 512 (Minn. App. 2007); *In re Guardianship of Kowalski*, 478 N. W. 2d 790 (Minn. App., 1991); Minnesota Statutes Section 524.5-309.

## **STATEMENT OF THE CASE**

Jeffrey DeYoung is the son of Mary and David DeYoung. He has been under guardianship for a number of years as the result of disabilities. Ms. DeYoung served and filed a Petition to Appoint Successor Guardian on September 2, 2009, requesting that she be appointed as the successor Guardian for Jeffrey DeYoung. A trial was held on June 1, 2010 and June 28, 2010. Referee Bruce Kruger was the hearing officer. An Order denying Ms. DeYoung's Petition was filed on August 6, 2010, signed by Referee Kruger and Judge Jay M. Quam stating that Ms. DeYoung had not established that there are grounds for removing the current Guardian and that she had not proven that she would be the best qualified and most suitable person to be Jeffrey's Guardian.

## **STATEMENT OF THE FACTS**

This appeal results from a dispute as to whether the Protected Person's Professional Guardian was fulfilling the obligations of that office and whether the Protected Person's mother would be a more natural and better Guardian for him, providing him with less restrictive alternatives and better care in general.

There are three separate transcripts in this matter as the result of three different court reporters being present on the two days of trial. We use the "DeGrood Transcript" when citing to the Transcript of the testimony occurring on the morning of June 1, 2010, the "Johnson Transcript" to refer to the testimony occurring on the afternoon of June 1, 2010, and the "Otterness Transcript" in reference to the June 28, 2010 Transcript.

Jeffrey DeYoung, the Protected Person who is the subject of this action, is the son of Mary and David DeYoung. He was born on January 3, 1985. He suffers from severe

version of autism. He is non-verbal. He can use a communication board and point to “yes” and “no”, but needs to be paying attention whenever a question is asked. He can be aggressive. (DeGrood Transcript, p. 8, ll. 1-23). He can be very expressive – he laughs and hugs people, cries at times and sometimes simply withdraws. Interpreting his responses can be difficult at times. (DeGrood Transcript, p. 88, ll. 3-7).

Jeffrey suffers from a number of medical conditions, including osteoporosis, constipation, a tendency to ear infections, skin conditions and sensitivity to some foods. (DeGrood Transcript, p. 8, ll. 3-7). He is 6 feet 4 inches tall (DeGrood Transcript, p. 28, l. 15) and currently weighs approximately 168 pounds (DeGrood Transcript, p. 32, l. 23). Jeffrey is a very social person and likes to visit with his friends and relatives. (DeGrood Transcript, p. 87, ll. 21-22). He attends Chrestomathy, a sheltered workshop, five days per week.

Jeffrey lived with his parents until they separated in 1994. (DeGrood Transcript, p. 6, l. 19). He lived with his mother for the next 10 years, from 1994 until February of 2004, when he transitioned to the Pathways to Community group home in which he currently resides. (DeGrood Transcript, p. 6, ll. 12-25).

In the ten-year period Ms. DeYoung had Jeffrey at home, she scheduled all of his additional care, scheduled and took him to all of his medical treatments and arranged all of his activities and social events. (DeGrood Transcript, p. 57, ll. 2-18).

Ms. DeYoung testified that she made the decision to transition Jeffrey to a group home because she felt he would have more opportunities in a group home than she would ultimately be able to provide him. She stated:

A. I wanted him to have more activities and I also needed to be able to work full-time. And I wanted him to make that transition before I was too old (to) help him with that transition. I wanted him to be well-adjusted and to be with other peers close to his age and that had a lot of activities.

Q. What do you mean by activities, as an example?

A. Well, when he lived with me we tried get him out swimming. He was on a bowling league. We did weekend rides, he had adaptive rec programs in which he could participate with other peers.

Q. And you thought that would happen differently when he was in the group home?

A. I thought he would do that and possibly more because that's what the group home promised me, that they would drive the guys to games together and get him out in the community.

(DeGrood Transcript, p. 7, ll. 5-21. Language in parentheses added for clarification).

Ms. DeYoung, acting pro se, filed (and later served) a Petition for Appointment of Successor Guardian, requesting that she be appointed in place of Jeffrey's Professional Guardian on September 2, 2009. (Add.6; A.52). Jeffrey's Professional Guardian was and is Ayanel Guardian Solutions, LLC. The person acting as his Guardian is Annette Kuhnley. In her Affidavit filed with her Petition, Ms. DeYoung cited Ms. Kuhnley's failure to respond to concerns about Jeffrey's medical care, her restriction of Jeffrey's access to Ms. DeYoung and others and her failure to monitor Jeffrey's care at the group home as the basis for her request to replace Ms. Kuhnley as Jeffrey's Guardian. (A.35).

Ms. DeYoung testified that she explained her concerns about Jeffrey's care to Ms. Kuhnley on a number of occasions. At their original meeting she discussed several of her concerns. (DeGrood Transcript, p. 11, ll. 6-19). She subsequently sent Ms. Kuhnley

a letter explaining her concerns about the fact that her access to Jeffrey was restricted to one and one half hours per week without any reasonable explanation. (Ex. 37; A.78; DeGrood Transcript, p. 15, ll. 16-25 and p. 16, ll. 1-15). She requested the right to attend Jeffrey's medical appointments and procedures. She requested a listing of Jeffrey's clothing and personal effects so that she could ascertain if there were things he needed that she could purchase for him. (DeGrood Transcript, pp. 18-19). She discussed specific medical issues with Ms. Kuhnley, including Jeffrey's weight.

While in the care of the group home, Jeffrey's weight had gone down to 157 pounds. (DeGrood Transcript, p. 28, ll. 7-13). His day program, Chrestomathy, sent a note to the group home stating that it would make a vulnerable adult report if the size of his lunches was not increased. (DeGrood Transcript, p. 32, ll. 3-12). His weight did increase after Ms. DeYoung gave notice of her Petition. (DeGrood Transcript, p. 32, ll. 19-20).

Ms. DeYoung's access to Jeffrey has very slowly increased, but is still restricted. (DeGrood Transcript, p. 20, l. 19 through p. 22, l. 6). She testified that her weekday access was effectively denied when she obtained employment that required her to work until 6:00 p.m., since Ms. Kuhnley has refused to allow her access at Jeffrey's group home, and doesn't allow her to return him later than 7:15 p.m., which would only leave her approximately an hour to pick Jeffrey up, take him somewhere and return him. She also testified that Ms. Kuhnley reduced her Sunday access time by two hours, apparently because Jeffrey grabbed someone's glasses after Ms. DeYoung returned him one Sunday. (DeGrood Transcript, p. 22, l. 1 through p. 23, l. 9; Ex. 13, A.76).

Ms. DeYoung testified that Ms. Kuhnley never provided a schedule of activities, she never provided a report in regards to Jeffrey's discretionary expenditures and she didn't provide the clothing inventory until a few weeks before the hearing. (DeGrood Transcript, p. 24, l. 19 through p. 25, l. 10). Ms. Kuhnley admitted that she didn't provide those items to Ms. DeYoung. (Otterness Transcript, p. 31, ll. 4-10). In fact, when she commented that Ms. DeYoung had not asked for the schedule of activities as much lately, she admitted that could be because Ms. DeYoung had requested it numerous times since Ms. Kuhnley's appointment and had not received a response. (Otterness Transcript, p. 32, ll. 5-10).

Ms. Kuhnley testified that she is paid \$60.00 per month to be Jeffrey's Guardian (Otterness Transcript, p. 22, ll. 3-14) and, understandably, attempts to limit the time she spends on Jeffrey to two hours per month. She testified to a balancing act – if she spends one half of an hour speaking with Ms. DeYoung about Jeffrey's health issues, that leaves her with less time to spend with Mr. DeYoung, Jeffrey or Pathways to Community. (Otterness Transcript, p. 51, ll. 22-25 through p. 52, ll. 1-3).

Ms. Kuhnley testified that she had granted Ms. DeYoung all of the access she had requested. (Otterness Transcript, p. 22, l. 21 through p. 23, l. 2). However, when questioned about the restrictions to which Ms. DeYoung had objected, she stated as follows:

Q: But isn't it true that Miss DeYoung would like to visit Jeffrey at the group home?

A: I suppose she would.

Q: Isn't -- and you're aware that she's not allowed to see Jeffrey at the group home; is that correct?

A: That's correct.

Q: And you don't consider your decision to prevent her from entering the group home a restriction?

A: I answered this question in terms of time, I guess. I did not have in my mind the restriction that she couldn't enter the home.

Q: Okay. Miss DeYoung asked to have Jeffrey later than 7:15 on her visits on weeknight; is that correct?

A: Yes.

Q: And you refused that?

A: You know, she made it clear that sometimes time is limited with traffic and that sort of thing. We had tried to accommodate that.

Q: Are you saying that you in fact have allowed her to have Jeffrey later than 7:15 on a weeknight?

A: If -- if traffic is -- is like that, then -- it just happens. I've just requested that Miss DeYoung try to return Jeffrey by 7:15.

Q: So you're saying a few minutes otherwise is acceptable, but basically you refuse to extend it past 7:15?

A: Right. Jeffrey's bedtime is 8 o'clock, and he needs some time too [sic] transition into his bedtime routine.

Q: Is there a reason why his bedtime would have to be 8 o'clock?

A: None that I'm aware of.

(Otterness Transcript, p. 23, l. 7 through p. 24, l. 12).

Ms. Kuhnley also testified that the fact that Ms. DeYoung was not allowed to drop by the group home at any time to see Jeffrey, aside from not being allowed in, was not

something she considered as a restriction. (Otterness Transcript, p. 24, ll. 13-19).

Ms. Kuhnley testified that she had no knowledge of whether or not Jeffrey's group home allowed anyone to make an unscheduled visit. (Otterness Transcript, p. 25, ll. 15-19). She went on to state the following:

Q: Jeffrey is non-verbal; is that correct?

A.: Yes.

Q: He can't write notes or anything?

A: No.

Q: So if no one can show up at the group home without an appointment, how does anyone know for sure that nothing inappropriate is actually happening?

A: I don't know if anyone can --

(Otterness Transcript, p. 25, l. 20 through p. 26, l. 2)

Ms. Kuhnley testified that summaries of Jeffrey's medical information she provided in her Answers to Interrogatories were provided by the staff at the group home and not by her. She said she did not compare it to the actual medical records and had no idea if it was correct or not. (Otterness Transcript, p. 26, l. 3 through l. 17).

Ms. Kuhnley also testified that it wasn't inappropriate for Ms. DeYoung to receive Jeffrey's medical information on a contemporaneous basis, and said that she had requested that the group home provide that information to her and signed releases so that they could, although she herself had never provided Ms. DeYoung with contemporaneous information. However, Ms. Kuhnley testified that she was fully aware of the fact that the group home did not provide Ms. DeYoung with any information, and she knew that Ms.

DeYoung would not know when to ask for it if she was never told when Jeffrey was receiving treatment. (Otterness Transcript, p. 27, l. 15 through p. 28, l. 14).

Q: So she had to somehow magically know that something had happened with Jeff before and specifically request it from you before you'd provide her with medical information?

A: Yes.

(Otterness Transcript, p. 28, ll. 15-19).

At the request of the group home, Jeffrey's mother and father are not allowed to attend Jeffrey's medical appointments unless the Guardian allows them to. She has not allowed them to. Because the group home refuses to communicate with her, Ms. DeYoung can only obtain medical information by requesting medical records. If she desires to ask the doctor any questions, she must schedule an appointment with him. The appointment costs her \$100.00, and the medical records involve a per page charge.

(DeGrood Transcript, p. 29, l. 12 through p. 31, l. 18).

Ms. DeYoung noticed and reported to Ms. Kuhnley that one of Jeffrey's fingers was misshapen and seemed to cause him pain. After many months that fact was brought to the attention of the doctor and he ordered an x-ray. The x-ray technician took the x-ray of the wrong hand. After ordering the records, Ms. DeYoung noticed it was the wrong hand and reported it. Neither the group home nor Jeffrey's Guardian noticed that the x-ray was of the wrong hand. (Otterness Transcript, p. 26, l. 18 through p. 27, l. 7).

Ms. Kuhnley also admitted that Ms. DeYoung brought to her attention the fact that Jeffrey's medical records said he was to get a medical test which he had never received. Ms. Kuhnley contacted Jeffrey's doctor to ascertain why a medical test he had

recommended had not been done. The recommendation for the test showed up in Jeffrey's medical records, but not in the medical summary provided by the group home. Again, it was only through Ms. DeYoung's review of the medical records that this was noticed and acted upon.

Ms. Kuhnley admitted that one of Ms. DeYoung's main concerns has been the delay in getting recommended medical or dental treatment or tests. (Otterness Transcript, p. 41, l. 18 through p. 42, l. 23). She admitted that Ms. DeYoung had recently expressed concern about Jeffrey being consistently tired, and that he had subsequently been taken to Urgent Care from his day program with an ultimate diagnosis of pneumonia. She had no idea if either Mr. DeYoung or Ms. DeYoung were informed as to that fact. (Otterness Transcript, p. 42, l. 24 through p. 44, l. 6).

Ms. Kuhnley testified that Jeffrey has seemed very healthy to her throughout her appointment, even though he has suffered from pneumonia, internal bleeding of an undetermined cause, and osteoporosis during that period of time. (Otterness Transcript, p. 46, l. 5 through p. 47, l. 14).

Ms. Kuhnley also admitted that any information she received that would justify a restriction on Ms. DeYoung's access came originally from Michelle Sipple, an employee of the group home. (Otterness Transcript, p. 50, l. 21 through p. 51, l. 1).

There was very little testimony relating to anything that Ms. DeYoung has done that should have caused Jeffrey any negative effect. A more detailed discussion of that testimony is in the Argument below.

## STANDARD OF REVIEW

The appointment of a guardian is within the discretion of the probate court and the reviewing court will not interfere with the exercise of this discretion except in the case of clear abuse. *In re Guardianship of Stanger*, 299 Minn. 213, 215, 217 N.W.2d 754, 755 (1974).

A party opposing the appointment of a person with priority under the Uniform Guardianship and Protective Proceedings Act must establish by the preponderance of the evidence that appointment is not in the best interests of the ward. *In re Guardianship of Wells*, 733 N.W. 2d 506, 512 (Minn. App. 2007).

## ARGUMENT

**I. THE EXISTING GUARDIAN'S ADMISSION THAT SHE DELEGATED THE MOST SIGNIFICANT PORTIONS OF HER DUTIES AS LISTED IN MINNESOTA STATUTES SECTION 524.5-313 TO THE PROTECTED PERSON'S CARE PROVIDER WAS A SUFFICIENT BASIS UPON WHICH TO REPLACE HER AS GUARDIAN.**

Although the standard for review is abuse of discretion, that does not give the court free rein to discount the evidence presented at the trial. One of the most commonly cited cases pertaining to this question is *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. App., 1991). The *Kowalski* court referred to Minn. Stat. Sec. 525.551, subd. 5, which specifically directed the court to make a finding that appointment of the person chosen as guardian was in the best interests of the ward, and then went on to define the factors to be considered in the best interest determination. It ultimately concluded:

While the trial court has wide discretion in guardianship matter, this discretion is not boundless. The Minnesota guardianship statutes are specific in their requirement that factual findings be made on a guardian's qualifications. The statutes also consistently require the input of the ward where possible. Upon review of the record, it appears the trial court clearly abused its discretion in denying Thompson's petition and naming Tomberlin guardian instead.

Although those specific statutes were repealed by the enactment of the Uniform Guardianship and Protective Proceedings Act in 2003, Appellant has been unable to find a case that holds that those same requirements do not apply under the new law. In *In re Guardianship of Wells*, 733 N.W.2d 506 (Minn. App., 2007) the court held that the "replacement" statute, 524.5-309, at subdivision (b), required making specific findings as to best interests of the ward and the basis for selecting a person with a lower statutory priority than the Appellant.

Minnesota Statutes Section 524.5-313 defines both the powers and the responsibilities of guardians. In relevant part it states:

- (c) The court may appoint a guardian if it determines that all the powers and duties listed in this section are needed to provide for the needs of the incapacitated person. The court may also appoint a guardian if it determines that a guardian is needed to provide for the needs of the incapacitated person through the exercise of some, but not all, of the powers and duties listed in this section. The duties and powers of a guardian or those which the court may grant to a guardian include, but are not limited to:

- (1) the power to have custody of the ward and the power to establish a place of abode within or outside the state, except as otherwise provided in this clause. The ward or any interested person may petition the court to prevent or to initiate a change in abode. ....

- (2) the duty to provide for the ward's care, comfort, and maintenance needs, including food, clothing, shelter, health care, social and recreational requirements, and, whenever appropriate,

training, education, and habilitation or rehabilitation. . . . . Failure to satisfy the needs and requirements of this clause shall be grounds for removal of a private guardian, but the guardian shall have no personal or monetary liability;

...

(6) the duty and power to exercise supervisory authority over the ward in a manner which limits civil rights and restricts personal freedom only to the extent necessary to provide needed care and services;

Pursuant to the statute, the guardian is responsible for provision of all of the ward's needs. In Jeffrey's case, Ms. Kuhnley is responsible. Although it is apparent that Ms. Kuhnley would not be responsible for the direct provision of all of the care Jeffrey requires, the statute does not grant the guardian the power to delegate all of her responsibilities to another party. And, even if it did, the law makes it clear that if a guardian could delegate these responsibilities to another, it couldn't be delegated to the ward's care provider. Minnesota Statutes Section 524.5-309, Subdivision (c) shows the one entity that cannot be appointed as a guardian for a ward except under very specific circumstances. It reads as follows:

(c) Any individual or agency which provides residence, custodial care, medical care, employment training or other care or services for which they receive a fee may not be appointed as guardian unless related to the respondent by blood, marriage, or adoption.

Pathways to Community, the group home in which Jeffrey resides, provides his residence, custodial care, medical care and other services. It provides his "care, comfort and maintenance needs, including food, shelter, health care, social and recreational requirements". Minn. Stat. Section 524.5-313 (c) (2). In Jeffrey's case the testimony established that Ms. Kuhnley has delegated her responsibilities

as Guardian almost entirely to Pathways to Community.

Ms. Kuhnley was informed of several issues pertaining to Jeffrey's health and care in general by Ms. DeYoung. (DeGrood Transcript, p. 11, ll. 6-19; p. 15, ll. 16-25; p. 16, ll. 1-15; pp. 18-19; p. 28, ll. 7-13; p. 32, ll. 3-12 and 19-20; Ex. 37; A.78). Because Jeffrey is non-verbal and questionably capable of any clear method of communication, Ms. Kuhnley is fully aware that any information she would receive about Jeffrey would come either from his group home, his day program or friends or relatives of Jeffrey who visit him. However, she took no action to encourage any communication from the only people on that list who were not being paid to perform his care – Jeffrey's friends and family. In fact, she actively discouraged such communication by agreeing to limit Jeffrey's access to friends and family.

As an example, Ms. Kuhnley admitted that she limited Jeffrey's access to Ms. DeYoung on weeknights because of the group home's statement that Jeffrey's bedtime was 8:00 p.m. even though she knew of no reason why his bedtime would have to be 8:00 p.m. (Otterness Transcript, p. 22, l. 21 through p. 23, l. 2). She agreed to the group home's decision to bar Ms. DeYoung from Jeffrey's residence without question. She signed Answers to Interrogatories swearing to the correctness of the Answers, but admitted that she had no idea if the medical information contained in those Answers was correct – that she simply swore to the information provided to her by the group home without checking it against the medical provider's records. (Otterness Transcript, p. 26, ll. 3-17).

Ms. Kuhnley admitted that she was aware that the group home did not provide Ms. DeYoung with any information, even though Ms. Kuhnley herself had requested that it provide Ms. DeYoung with medical information. She acknowledged that Ms. DeYoung had no way of knowing whether Jeffrey was receiving medical treatment or not because of the failure on the part of the group home to follow Ms. Kuhnley's request. (Otterness Transcript, p. 27, l. 15 through p. 28, l. 19).

Ms. Kuhnley acknowledged that neither she nor the group home noticed that Jeffrey had received incorrect medical treatment on one occasion and that Jeffrey had failed to be scheduled for recommended medical treatment on another occasion. It was Ms. DeYoung, who had to obtain copies of the medical records and spend \$100.00 to speak with Jeffrey's doctors to know anything, who informed them of the incorrect medical treatment and of the failure to schedule recommended medical treatment. (Otterness Transcript, p. 26, l. 18 through p. 27, l. 7).

Ms. Kuhnley admitted that Jeffrey had been taken to Urgent Care on an emergency basis after Ms. DeYoung had expressed repeated concerns about how tired he seemed, and that he had a diagnosis of pneumonia. She admitted that she had no idea whether or not either of Jeffrey's parents were informed of that fact. She said Jeffrey always seemed very healthy to her, but admitted that he had suffered from pneumonia, internal bleeding of an undetermined cause, a rectal

fissure and osteoporosis. (Otterness Transcript, p. 42, l. 24 through p. 44, l. 6 and p. 46, l. 5 though p. 47, l. 14).

It is hard to imagine what more of her responsibilities she could delegate to the group home. However, what is perhaps of greater concern, based on the level of delegation already existing and the fact that Jeffrey cannot communicate, is the fact that the Guardian has no idea if anyone is ever allowed in the group home without making a prior appointment. She didn't even consider the requirement of previous notice before appearing at the group home a restriction. (Otterness Transcript, p. 25, l. 15 through p. 26, l. 2).

Jerry Mellum, Senior Planning Analyst at Hennepin County Disability Services, testified that restrictions on access of parents to group homes is uncommon. He stated that most group homes have open access.

Q: The group home in this matter had said that it (restrictions on access) is to protect the privacy of the residents. Is that in your experience a valid objection or basis for restriction?

A: Again, it's unusual. Most group homes have open access. Parents, relatives, friends come and go as they please. You know, if they're satisfied that they will comply with the regulations, things like that, that they need to be aware of, but again, often open access, picnics in the summer, parties, whatever.

(DeGrood Transcript, p. 59, ll. 3-13. Language in parentheses added for clarification).

Although Appellant found no Minnesota cases dealing specifically with the rights of access of a parent to an adult child under guardianship, a New Jersey

case, *Shambaugh v. Wolk*, 302 N.J. Super. 380, 695 A.2d 382 (1996) did discuss the issue at great length, and stated:

Mutual consent to association between mother and adult daughter invokes the fundamental freedom and right of each to achieve and enjoy reciprocal access to one another. These fundamental rights to freedom of association and privacy, found within the First and Fourth Amendments to our Constitution, and applied to the states through the Fourteenth Amendment, are protected from abridgment by Congress or any state.

It went on to state:

While no statute yet enacted has specifically addressed this right (consensual visitation between a mother and her adult daughter), the absence of legislative expression on this issue ought not be construed as anything other than our legislature's deference to those First Amendment freedoms and Fourth Amendment "zone of privacy" and its traditional understanding of the limitations thus placed upon all state' authority to minimize these freedoms through legislation. (Language in parentheses not in opinion).

Although the Appellant has been granted limited access to Jeffrey, that access is severely limited. As several witnesses stated, Jeffrey is a social person and enjoys interactions with family and friends. The limitation by the Guardian of his access to his mother results in the additional limitation of his access to the people connected to her. It is clearly a violation of Jeffrey's fundamental rights.

Section (c) (6) of Minnesota Statutes Section 524.5-313 states that the Guardian is to exercise supervisory authority over the ward in a manner which limits the ward's civil rights and restricts his personal freedom only to the extent necessary to provide needed care and services. Jeffrey's Guardian has limited his civil rights and personal freedom to have access to his mother and others without any necessity, rather for the convenience of the group home. Jeffrey's Guardian

has delegated her responsibilities as Guardian to the care provider in contravention of Minnesota Statutes Section 524.5-313.

The Court found “Although Mary DeYoung has shown that life is not perfect at Chowen Home and Ayanel could at times have been a bit more responsive, she has not established that there are grounds for the removal of Ayanel. (Add.1; A.13). This finding is clearly contrary to the evidence in the case. The issue is not whether Jeffrey’s life at the group home is perfect. The issue is whether the Guardian is fulfilling her responsibilities under the statute, not relying on the group home to make all of the significant decisions for Jeffrey’s life. Minnesota Statutes Section 524.5-313 (c) (2), establishes that there is a sufficient basis for removal of the Guardian.

**II. WHETHER APPELLANT PROVED THAT SHE WOULD BE THE “BEST QUALIFIED AND MOST SUITABLE PERSON” TO BE THE PROTECTED PERSON’S GUARDIAN.**

Minnesota Statutes Section 524.5-309 is entitled “Who may be Guardian:

Priorities”. It reads as follows:

(a) Subject to paragraph (c), the court, in appointing a guardian, shall consider persons otherwise qualified in the following order of priority:

- (1) a guardian, other than a temporary or emergency guardian, currently acting for the respondent in this state or elsewhere;
- (2) an agent appointed by the respondent under a health care directive pursuant to chapter 145C;
- (3) the spouse of the respondent or a person nominated by will or other signed writing executed in the same manner as a health care directive pursuant to chapter 145C of a deceased spouse;
- (4) an adult child of the respondent;
- (5) a parent of the respondent, or an individual nominated by will or other signed writing executed in the same manner as a health care

directive pursuant to chapter 145C of a deceased parent;

(6) an adult with whom the respondent has resided for more than six months before the filing of the petition;

(7) an adult who is related to the respondent by blood, adoption, or marriage; and

(8) any other adult or a professional guardian.

(b) The court, acting in the best interest of the respondent, may decline to appoint a person having priority and appoint a person having a lower priority or no priority. With respect to persons having equal priority, the court shall select the one it considers best qualified.

(c) Any individual or agency which provides residence, custodial care, medical care, employment training or other care or services for which they receive a fee may not be appointed as guardian unless related to the respondent by blood, marriage, or adoption.

Appellant obviously has priority as Jeffrey's mother. Although the court has the right to decline to appoint a person who has a higher priority, it must show that the decision to do so was in the ward's best interests, and must make findings to that effect. The court's findings in this matter were inadequate.

There are obvious reasons for the statute to establish these priorities. Although Appellant is clearly extremely disappointed by the Guardian's failure to fulfill her statutory obligations to Jeffrey, she understands that the Guardian has a difficult job. The current Guardian is not related to Jeffrey in any manner, had never set eyes on him before she became involved in this matter and gets paid only \$60.00 per month to be Jeffrey's Guardian, which means she attempts to limit the time she spends on anything involving Jeffrey to two hours per month. If she speaks with Ms. DeYoung for ½ an hour a month, that means that she has to limit her conversation with the group home, visits to Jeffrey, review of medical records or anything else by a half an hour per month. (Otterness Transcript, p. 22, ll. 3-14 and p. 51, l. 22 through p. 52, l. 3). She does this

job for a living, and it would be very difficult to make a living at it if she spent more time with each ward.

Appellant also acknowledges the critical value of professional guardians in situations in which the ward has no family or acquaintance who is willing and able to serve in that capacity. This, however, is not one of those situations. Ms. DeYoung is able and willing to serve as Jeffrey's Guardian. Ms. DeYoung's qualifications involve more than just the fact that she is Jeffrey's mother.

Jerry Mellum is a Senior Planning Analyst at Hennepin County Disability Services. (DeGrood Transcript, p. 55, ll. 21-25). He has been in that field of employment for 30 years and previously worked in care facilities for people with developmental disabilities. He was staff at a day program for eight years and program director for several years. He worked with Hennepin County for ten years, and for Hennepin County in this capacity for ten years. (DeGrood Transcript, p. 61, ll. 14-23). Mr. Mellum testified that Jeffrey and Ms. DeYoung were some of the first people to participate in a Consumer Directed Community Support program in Hennepin County. (DeGrood Transcript, p. 56, ll. 4-12). Mr. Mellum explained what a Consumer Directed Community Support program is:

- A: Consumer Directed Community Support is a service of all waivers and alternative care program. It's a service that allows people who choose to, to hire their own staff, set a rate of reimbursement within a range, take customary and reasonable, to write their plan, to actually be the employer if they choose to, at several levels. It's a program that generally people that are more competent or able to do, they could allow hire somebody called a support person if they needed additional help and assistance.

Q: How did Miss DeYoung do with the program?

A: She did really well. She was one of the first people involved. I was really impressed with her there were no red flags at all. She wrote a plan and was competent. She knew her son really well. You know, it went well. It was an in-home service where she could direct her services herself.

(DeGrood Transcript, p. 57, ll. 2-18).

He went on to say:

A. I think that she (Mary) as a very knowledgeable parent. She attended many of the community trainings that were offered through the County. That's something that we often encourage people to do. ...

Q. And in your experience in dealing with Mary, what do you see as her weakness?

A. I don't see any apparent weaknesses. I see her as a typical parent. A parent that is an advocate, a parent that is knowledgeable of her son, a parent that cares for her son and as evidenced by seeking out a new program ten years ago, using the waiver, being informed about it, to the point that she was writing her own plan, hiring her own staff, setting a rate, seeking alternate kinds of therapies that were available in the general public.

(DeGrood Transcript, p. 59, l. 16 through p. 60, l. 13. Language in parentheses added for clarification).

Ms. DeYoung took the guardianship course offered by Volunteers of America, attended many conferences and trainings pertaining to people with autism, worked as a caregiver for autistic children and obtained training for that job. She was a foster care provider for an autistic and non-verbal child for nearly 5 years. (DeGrood Transcript, p. 36, l. 16 through p. 38, l. 4).

Michael Stern, the father of three children who suffer from different severity levels of autism and possessor of a Master's Degree in rehabilitation psychology testified that he employed Ms. DeYoung to assist in caring for his children. He described the

various and intensive care his children would sometimes need. He said Ms. DeYoung dealt with all of it and he was confident leaving his children in her care. (DeGrood Transcript, p. 69, l. 17 through p. 70, l. 1). He went on to discuss the problems in dealing with non-verbal children, particularly in the context of figuring out what might be causing them pain. When asked whether there is any difference between the average parent and a parent of an autistic child in relation to medical treatment, he said:

A. Yes.

Q. What is that?

A. You are, when you're a parent of a child with a severe disability, you are dealing with it all the time. You have to account for it all the time. You live with it. You want to be aware of what is happening medically. You want to be on top of it, and try to, at least for me, to try to get ahead of it as much as you can.

(DeGrood Transcript, p. 71, ll. 13-24).

Mr. Stern went on to say that there was nothing he knew of that would cause him concern about Ms. DeYoung's appointment as Jeffrey's Guardian and that he believed there would be great benefit to Jeff in it. (DeGrood Transcript, p. 71, l. 25, through p. 72, l. 10). When asked if he would hire Ms. DeYoung today to care for his sons, he responded "Of course." (DeGrood Transcript, p. 73, l. 8).

Karen Brandon testified that she had worked with Ms. DeYoung and Jeffrey as a care attendant from the time Jeffrey was seven until he was 19 and has seen him on multiple occasions since that time and has traveled with them. (DeGrood Transcript, p. 81, l. 13 through p. 82, l. 18). She testified to Ms. DeYoung's efforts to involve Jeff in the community, and how much he enjoyed it. She testified that she had been to doctor's

appointments with Ms. DeYoung and Jeffrey, and that she never saw her have any problem with the doctors or staff, that they were always very receptive to her. (DeGrood Transcript, p. 82, l. 20 through p. 85, l. 8). When asked if she thought Ms. DeYoung would be a good Guardian for Jeffrey she said:

- A. I am frankly distraught that she hasn't been the guardian this entire time because she's the most knowledgeable on Jeff. She's the most loving and caring and has the most of, she's the one that would be the biggest advocate for Jeff to have the best life that he possibly could. And she, as I mentioned, she was always on top of his medical situation, she's always on top of getting him out in the community and doing activities and letting him see his family and friends basically every week if not more often. ...

(DeGrood Transcript, p. 88, l. 19 through p. 89, l. 4).

Jane Palmer, Ms. DeYoung's sister and Jeffrey's aunt, testified to the limitation in her access to Jeffrey since he moved to the group home, since Ms. DeYoung is not often allowed to take Jeffrey to Nebraska. (DeGrood Transcript, p. 104, l. 13 through p. 105, l. 20). She testified to the decline in Jeffrey's appearance and cleanliness since he has been in the group home, his loss of weight and muscle tone. (DeGrood Transcript, p. 106, l. 13 through p. 107, l. 3). She testified to Ms. DeYoung's experience and accomplishments and what Ms. DeYoung could give to Jeffrey as his Guardian. (DeGrood Transcript, p. 107, l. 16 through p. 108, l. 4).

There was very little testimony relating to anything that Ms. DeYoung has done that should have caused Jeffrey any negative effect.

Mr. DeYoung testified that he sees Jeffrey at the group home for about an hour and a half one night per week. (Johnson Transcript, p. 33, ll. 14-23). He testified that he

has had some concerns about the care Jeffrey receives in the group home, but the group home has eventually dealt with those concerns. (Johnson Transcript, p. 36, l. 7 through p. 37, l. 10). He testified that he was opposed to Ms. DeYoung being Jeffrey's Guardian, because Ms. DeYoung "has a difficult time dealing with people that she disagrees with." (Johnson Transcript, p. 38, l. 21 through p. 22, l. 1). He gave no example of any situation in which Ms. DeYoung made a bad choice for Jeffrey other than possibly expressing herself in a less than diplomatic manner.

Michelle Sippel, the director of the group home in which Jeffrey resides, testified as to an event in which Ms. DeYoung allegedly made Jeffrey cry by calling his aunt and saying something that included the word "torture". Although Ms. DeYoung's and Ms. Brandon's description of that event are similar, their descriptions vary significantly from Ms. Sippel's (DeGrood Transcript, p. 35, l. 3 through p. 36, l. 8 and p. 86, l. 12 through p. 87, l. 4), even Ms. Sippel's description of the event did not merit the result. The result was that Ms. Sippel decided that Ms. DeYoung should be prevented from ever again entering the group home in which her son resides, a decision she communicated to the Guardian and which the Guardian enforced.

Ms. Sippel testified to other restrictions that she requested as the result of reports that she made to Adult Protection alleging such things as Jeffrey came back from visiting Ms. DeYoung with bruises. None of these reports even rose to the level at which Adult Protection spoke with Ms. DeYoung, and all were dismissed. (Johnson Transcript, p. 7, l. 11 through p. 13, l. 16).

Ms. Sippel testified that she had requested that Ms. DeYoung be restricted from attending Jeffrey's medical appointments because she took up too much of the doctor's time asking him questions about Jeffrey's medical care. (Johnson Transcript, p. 19, ll. 6-18). However, Karen Brandon testified that she had attended medical appointments with Ms. DeYoung before Jeffrey went into the group home, and there was never a negative response to Ms. DeYoung by the doctor or the staff, that their response was, in fact, totally the opposite. (DeGrood Transcript, p. 84, l. 17 through p. 85, l. 8).

Ms. Sippel testified that the group home does a summary of Jeffrey's medical treatment, which is only provided to the Guardian if the Guardian requests it, and that summary wasn't provided to Ms. Kuhnley until Ms. DeYoung brought her Petition herein. (Johnson Transcript, p. 22, ll. 15-17 and p. 21, ll. 17-22). She admitted that she did not provide the summary to Ms. DeYoung. She admitted that there were calendars of activities the residents participated in that she could have provided to Ms. DeYoung when Ms. DeYoung requested it, but that she had not done so. (Johnson Transcript, p. 24, ll. 12-15). She does not "correspond" with Ms. DeYoung. Ms. Sippel made it utterly apparent that she does not care for Ms. DeYoung, although did not testify to any reasonable basis for her antagonism. She freely and without apparent qualm admitted to intentionally denying Ms. DeYoung medical information and information pertaining to Jeffrey's activities.

Ms. Sippel also shocked Ms. DeYoung by stating that she had already confirmed that Jeffrey would not be allowed to continue his residence at Pathways to Community if Ms. DeYoung was appointed as his Guardian, even though Ms. DeYoung was willing to

work with the group home to see if they could work out their differences for Jeffrey's benefit. (Johnson Transcript, p. 31, ll. 1-3).

Although Ms. Sippel testified that there weren't lots of other group homes for autistic people (Johnson Transcript, p. 31, ll. 14-16), she eventually admitted that she didn't know if there were or not. (Johnson Transcript, p. 32, ll. 7-9). Mr. Mellum, who works in the field, testified:

A: I know there's a lot. I know there's openings. I know that many group homes have three people when they can serve four people. I know that many providers are offering respite to try to fill those homes so they're financially sound. I sit by the waiver coordinator, so I can ask in -- in 10 minutes what the -- how many openings there are, but I don't know right now.

(Otterness Transcript, p. 66, ll. 18-25).

He also stated that the group home is required by law to give Jeffrey 60 days notice if they want him out. (Otterness Transcript, p. 63, ll. 20-22).

In *In re Guardianship of Wells*, 733 N.W. 2d 506, 512 (Minn. App. 2007), the court held that a party opposing the appointment of a person with priority under the Uniform Guardianship and Protective Proceedings Act must establish by the preponderance of the evidence that appointment is not in the best interests of the ward. None of the evidence submitted in this matter established in any manner whatsoever that the appointment of Jeffrey's mother as his Guardian would be in anything but his best interests. It is true that at least one employee of the group home in which he resides does not care for Ms. DeYoung. But the law specifically prevents such an employee from having the control to effectively punish the people that question the quality of the

care that employee provides. The Guardian in this case allowed that employee to have that control. This court cannot allow that situation to continue, and it will continue if Ms. DeYoung is not appointed as Jeffrey's Guardian.

### **CONCLUSION**

Jeffrey DeYoung is autistic and non-verbal. He does not have the ability to clearly express himself when he feels pain or when he is hurt. He could not tell anyone if he was neglected. His mother, the Appellant herein, cared for him for 19 years, and thought she was arranging for a better life for him when she arranged for him to reside in his current group home. She has tried to work out her issues with the group home's treatment, or lack of treatment, of Jeffrey through the Guardian, and the Guardian has largely done nothing, other than possibly communicating her concerns to the group home without follow up. Jeffrey has suffered extreme variations in weight and a lack of follow through on medical issues. His contact with friends and family is extremely limited. He lives in a residence in which no one could say if or when anyone had been allowed to visit without prior notice, including his Guardian. The Guardian has delegated her responsibilities for supervision of his needs to the care provider in contravention of the law.

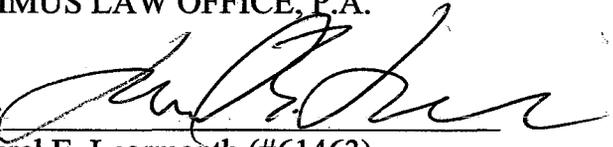
Ms. DeYoung is fully familiar with Jeffrey's medical issues. She has educated herself in the symptoms of autism and the treatments available. She has educated herself as to the role of Guardian. She has proven that she is fully able to act as Jeffrey's Guardian in every capacity. The only thing that she may have done to cause anyone any

concern is, possibly, advocate for her son in an assertive manner. She is his mother, that is part of her job. She is the best qualified person to be Jeffrey's Guardian.

Appellant respectfully requests that the Court's Order be reversed.

Respectfully submitted,

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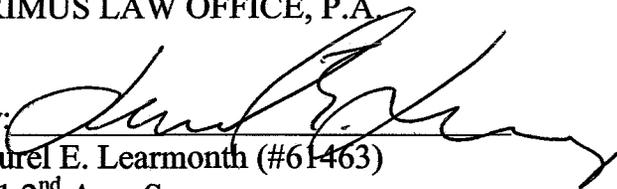
Dated: December 21, 2010

**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this Brief conforms to the requirements as set forth in Minnesota Rules of Civil Appellate Procedure 132.01. The length of the Brief is 7,834 words. The Brief was prepared using Microsoft Word 2007. The Brief contains 13 point Times New Roman font.

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