

NO: A120660

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

**In Re: Guardianship and Conservatorship of:**

**Jeraldine J. Pates,**

**Respondent.**

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**BRIEF AND APPENDIX OF RESPONDENT DAVID YOUNKIN**

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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).

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## STATEMENT OF LEGAL ISSUES

- I. Whether the district court erred in appointing a conservator for Jeraldine J. Pates?

The District court appointed a conservator of the estate.

### Apposite Statutes/Cases

1. Minn. Stat. Sec. 524.5-401
2. Minn. Stat. Sec.
3. *Conservatorship of Lundgaard*, 453 N.W. 2d 58 (Minn. App. 1990)

- II. Whether the district court erred by appointing David Younkin as conservator instead of Abraham Younkin under Minn. Stat. Sec. 524.5-413?

The district court appointed David Younkin as conservator instead of Abraham Younkin.

### Apposite Statutes/Cases

1. Minn. Stat. Sec. 524.5-413
2. *Conservatorship of Lundgaard*, 453 N.W. 2d 58 (Minn. App. 1990)

- III. Whether the district court erred by granting limited protective powers over the person under Minn. Stat. Sec. 524.5-310?

The district court granted protective powers over Jeraldine J. Pates to David Younkin.

### Apposite Statutes/Cases

1. Minn. Stat. Sec. 524.5-310

2. Minn. Stat. Sec. 524.5-401

IV. Whether the district court erred by not ordering a cost bond for the conservator?

The district court directed that no cost bond was required.

**Apposite Statutes**

1. Minn. Stat. Sec. 524.5-413

2. Minn. Stat. Sec. 524.5-415

## STATEMENT OF THE CASE

This appeal is based on an Order issued from the Isanti County District Court on February 23, 2012, by the Honorable P. Hunter Anderson. The Order results from a trial on January 24, 2012 on the matter of a petition for guardianship and conservatorship over Jeraldine J. Pates (Mrs. Pates).

Respondent, David Younkin, filed a petition dated October 20, 2011 for guardian and conservator of his mother, Mrs. Pates. The petition was objected to by her son, Abraham Younkin, and daughter, Linda Towler (Objectors). Objectors asked the court to alternatively appoint Abraham Younkin as guardian and conservator and contended, *inter alia*, that Abraham was entitled to priority by law. Following a trial lasting one day, the District Court granted the petition for conservatorship and appointed David Younkin as conservator with no bond. A-5 (Order No. 2). The District Court found Mrs. Pates “is quite easily influenced and has taken actions that appear to be against her wishes or at least against her interests.”

A-4 (Findings of Fact No. 4). The Court also found:

Petitioner is the most qualified to serve as Conservator. Objectors’ decision to have the Respondent remove her money from the bank and then keep the money in an undisclosed location shows that they are not the best choice to serve as Conservators. . . . Further, Objectors have been secretive and Objector Towler has been the subject of a lawsuit by Respondent regarding an unpaid loan. There have also been many changes made to Respondent’s estate planning documents, including a change that would eliminate the Petitioner as a heir.

Respondent appears to not have intended to eliminate Petitioner as an heir. It appears to the court that she was subject to some for(m) (sic) of influence from Objectors to make such a change.”

A-4 (Findings of Fact No. 5).

The Court noted it considered the positions of the Court Visitor and Mrs. Pates’ neurologist, Dr. Rosenbloom, who recommended appointment of a guardian but found the Respondent had not proven by clear and convincing evidence that Mrs. Pates was incapacitated and in need of a guardian at the time. A-5 (Findings of Fact No. 1). The Court, however, granted a Protective Arrangement under Minnesota Statute Section 524.5-310(b) and accorded David Younkin limited protective powers to be exercised after consultation with the other siblings:

- a. To select medical professionals to see the needs (of) (sic) Ms. Pates. This power is to be exercised only after conferring with Ms. Pates and considering her reasonable wishes.
- b. To make and attend all medical appointments.
- c. To make arrangements for Ms. Pates to attend all medical appointments.
- d. To make decisions regarding the residence of Ms. Pates after consulting with Ms. Pates and considering her reasonable wishes and providing notice to the other siblings of any intent to change Ms. Pates (sic) residence.

A-5-6 (Conclusion of Law No. 3 and Order No. 4). The Court appointed David Younkin as Conservator over Mrs. Pates with all of the powers under

Minn. Stat. Sec. 524.5-417, subd. C (1-6). A-5 (Order No. 2, 3). This appeal followed.

### **STATEMENT OF FACTS**

#### ***Jeraldine Pates***

Respondent Jeraldine Pates (Mrs. Pates) is 84 years old and the mother of six, including David Younkin, Dale Younkin, Daniel Younkin, Linda Towler, Douglas Younkin, and Abraham Younkin. A-9-10 (Petition). Her spouse is deceased. Mrs. Pates lives alone in an apartment at Riverwood Village, a senior living facility in Cambridge, Minnesota. *Id.*; T-128, 32.

#### ***Alzheimer's Diagnosis***

On February 23, 2011, Mrs. Pates was seen by Dr. Michael H. Rosenbloom, a board-certified neurologist specializing in dementia and Alzheimers disease care at the Health Partners Neurology Clinic in St. Paul, Minnesota. Ex. 3; A-17-31. Dr. Rosenbloom works for HealthPartners Center for Dementia and Alzheimers Care and has completed a fellowship at the UCSF Memory and Aging Center focusing on Alzheimers disease. Ex. 1; A-15. David Younkin's wife, Patricia, arranged the appointment and transportation for Mrs. Pates and attended the office visit. T-66. Dr. Rosenbloom diagnosed Mrs. Pates with mild probable Alzheimer's disease after thorough physical and neurological tests were conducted. Ex. 3; A-17-

24. Objective medical evidence supporting this finding included a cognitive assessment test where Mrs. Pates failed to recall words given to her after five minutes, had trouble with orientation, and forgot conversations. *Id.* Additional objective medical evidence supporting the diagnosis of Alzheimer's disease included the results of a brain MRI. *Id.* Dr. Rosenbloom suggested a prescription of Aricept, a medication for Alzheimer's disease. *Id.*

Mrs. Pates had follow up visits with Dr. Rosenbloom on April 28, 2011 and October 11, 2011. *Id.*; A-25-31. After performing similar neurological tests on October 11, 2011, Dr. Rosenbloom's impression was that "[t]here is evidence of progression from her decline on neuropsychological screening that would be expected for the disease." *Id.*; A-31. Dr. Rosenbloom prescribed Aricept for Mrs. Pates to take daily on the October 11, 2011 office visit. *Id.* Dr. Rosenbloom submitted a Physician's Statement in Support of Petition for Guardianship dated July 28, 2011, in which he stated that he is of the opinion that Mrs. Pates is in need of guardian. Ex. 2; A-16. Evidence included forgetting conversations, forgetting to pay bills, becoming lost, forgetting grandchildren, and failing a neuropsychological screening. *Id.* Dr. Rosenbloom gave a poor prognosis with expectations of continued decline over time. *Id.*

Mrs. Pates went to the Five County Mental Health Center on June 29, 2011 for a diagnostic assessment. Ex. 16; A-76-77. There was no formal testing performed for a mental health diagnosis. *Id.*

***Estate planning by Mrs. Pates on April 13, 2010***

On April 13, 2010, Mrs. Pates was taken to meet with an attorney that was arranged by one or both of the Appellants, Abraham Younkin and Linda Towler, and she executed her Last Will and Testament on April 13, 2010. A-32 (Ex. 4). The Will nominated Abraham Younkin and Linda Towler as co-trustees of the residuary trust and co-personal representatives. Ex. 4; A-33. It excluded David Younkin as a beneficiary of her estate. *Id.*; A-33, 36. Mrs. Pates also signed a Trust Agreement naming Abraham Younkin and Linda Towler as co-trustees. Ex. 10; A-52 (Trust Agreement of 4/13/10). The Trust Agreement excluded David Younkin as a beneficiary to receive a distribution upon the death of Mrs. Pates. *Id.*; A-53-54. Additionally on April 13, 2012, Mrs. Pates executed a Health Care Directive naming Abraham Younkin and Linda Towler as her agents to make health care decisions. Ex. 8; A-45 (HCD of 4/13/10). Mrs. Pates also signed a durable power of attorney naming them as her attorneys-in fact. *See* Ex. 6; A-41 (revocation of power of attorney on 3/11/11 previously signed 4/13/10).

***Estate planning changes made by Mrs. Pates on March 11, 2011***

On March 11, 2011, David and Dale Younkin took Mrs. Pates to see her previous attorney, Scott Timm, in Waconia, Minnesota, where Mrs. Pates executed several estate planning documents revoking and changing the documents prepared on April 13, 2010. T-42. The power of attorney dated April 13, 2010 was revoked and replaced by a new power of attorney of March 11, 2011 naming David Younkin as first attorney-in-fact and Dale Younkin as successor attorney-in-fact. Ex. 6, Ex. 7 (Power of Attorney of 3/11/11); A-41-42. Her Health Care Directive was amended to name David Younkin and Dale Younkin as her health care agents. Ex. 9; A-51 (Amendment No. 1 of 3/11/11 to Health Care Directive). Mrs. Pates's Trust Agreement was amended on March 11, 2011 to name David and Dale as co-Trustees and include David as a beneficiary. Ex. 11; A-64 (Amendment No. 1 of 3/11/11 to Jeraldine J. Pates Trust Agreement). Mrs. Pates's Will was also amended with Codicil Number 1 to Will of Jeraldine J. Pates. Ex. 5; A-39. The Codicil substituted provisions of the Will and named David and Dale Younkin as co-trustees of the residual trust and named them as co-personal representatives. Ex. 5; A-39-40 (Codicil of 3/11/11). The provision excluding David Younkin as a beneficiary was revoked. *Id.* None

of Mrs. Pates's children were omitted as beneficiaries in this Codicil to her Will.

***Estate planning changes made by Mrs. Pates on July 18, 2011.***

On July 18, 2011, Mrs. Pates was taken to an attorney arranged for by Abraham Younkin, and she executed a new power of attorney naming Abraham Younkin and Linda Towler as co-attorneys-in-fact and revoking the power of attorney that appointed David Younkin and Dale Younkin as attorneys-in-fact. Ex. 19; A-89 (POA of 7/18/11); A-92. On that same date, she signed a new Health Care Directive appointing Linda Towler and Abraham Younkin as her health care agents. Ex. 20; A-93 (HCD of 7/18/11, p.1).

***Estate planning changes made by Mrs. Pates on September 12, 2011.***

Again, Mrs. Pates was taken to an attorney arranged for by Abraham Younkin, and her Trust Agreement was amended on September 11, 2011 by revoking the amendments of March 11, 2011 and nominating Abraham Younkin as Trustee. A-96 (Second Amendment to the Trust Agreement of Jeraldine J. Pates of 9/12/11). The amendment excluded David Younkin and Dale Younkin as beneficiaries. *Id.* A new Last Will and Testament was signed by her on the same date and included a self-proving affidavit. Ex. 18; A-81 (Will of 9/12/11); A-87. The Will nominated Abraham Younkin as

Trustee of the residual Trust and Personal Representative of the estate. A-82. The Will excluded David Younkin and Dale Younkin as beneficiaries. A-85 (para. 6.3).

***Court Visitor's Meeting with Mrs. Pates on November 23, 2011.***

On November 23, 2011, Joyce Wallace, LSW, the Court Visitor, conducted a private interview with Mrs. Pates at her residence at Riverwood Village. Ex. 14; A-67-72. The Court Visitor observed that Mrs. Pates “could not provide this Visitor with correct dates, her address, names of neighbors nor the names of all her grandchildren.” *Id.*; A-70. Mrs. Pates told the Court Visitor her daughter, Linda, moved her to her current apartment without telling her. *Id.* Additionally, Mrs. Pates was unclear as to who was serving as Attorney in Fact for her and was unaware she had a Health Care Agent. *Id.* The Court Visitor stated in her Conclusions that “(i)t does appear that Jeraldine has significant problems with her memory and needs the assistance of others in order to live safely and receive necessary services, as well as manage her finances.” *Id.* The court visitor recommended Mrs. Pates needed a guardian and conservator. A-71.

***David Younkin***

David Younkin is the eldest son of Mrs. Pates and lives in Fridley, Minnesota. A-9, 68. David has a degree in social science from St. Cloud

State University and about 40 post-graduate credits. T-28. David has run his own woodworking business for 25 years and currently has twelve employees. *Id.* Additionally, David served in the military for the Marine Corps and has over 20 years of experience as a police officer in the State of Minnesota. *Id.*

Over the past few years, Mrs. Pates has stayed with David while on at least two occasions for health related issues. T-25. On one of those occasions, Mrs. Pates stayed with David for five months after a back surgery she had. *Id.* Additionally, Mrs. Pates stayed in David's home for periods of several days to a week at a time in the two years previous to the trial. T-55. David is concerned that Mrs. Pates is unable to take care of her own health needs and testified regarding a recent occasion in which Mrs. Pates was unable to identify what medications in her residence were for or when she needed to take several of them. T-18.

Additionally, David is concerned that Mrs. Pates is unable to handle her finances. T-19. Recently, Mrs. Pates withdrew approximately \$92,000 from her bank account and its whereabouts were not disclosed at the time of trial. T-92; T-102. There has been at least one instance where Mrs. Pates had her phone service disconnected due to her not paying her phone bill. T-11.

David testified that he believed his brother, Abraham, and sister, Linda, were intending to put Mrs. Pates on welfare. T-27. David testified he sought to serve as conservator and guardian to “protect [Mrs. Pates’] financials . . . and to protect her physical health” and that he is most qualified and experienced for that responsibility. T-27-28.

***Abraham Younkin***

Abraham Younkin is the youngest child of Mrs. Pates. T-98. Prior to the court proceedings, Abraham was involved with his mother removing approximately \$92,000 from her bank account. T-92; T-101. Abraham refused to testify as to the location of the \$92,000. T-102-103. The location, security, or even the existence of the \$92,000 was unverified at the time of trial. Abraham was unaware of FDIC insurance and that it would cover banks for a loss of the amount in question. T-103-104.

When Mrs. Pates was moved to Cambridge, Abraham did not seek the counsel or input of several of his siblings and they were unaware she had been moved. T-96; T-104-105. Abraham testified that he arranged to see the attorney in 2010 regarding the will and power of attorney and health care directive which gave Abraham and his sister, Linda, power of attorney and appointed them as health care agents and also excluded David Younkin from as a beneficiary. T-107-108; Ex. 4; Ex. 8; Ex. 10.

### ***Linda Towler***

Linda Towler borrowed \$70,000 from her mother, Mrs. Pates, around 2001. Linda had about \$41,800 remaining on her debt and the Mrs. Pates eventually brought a lawsuit against Linda, which went to arbitration where she was order to pay Mrs. Pates \$35,000 plus interest. T-77-78; T-109-111. After the lawsuit, Linda testified she did not talk to Mrs. Pates for nine years. T-111.

Linda's brother, Dale, testified that there was a conversation where Linda indicated she wanted to "take \$90,000 and put it in cash so if [Mrs. Pates] goes in a nursing home, then Medicaid won't get that, and she will go on welfare after her money has been used up and they won't know about that money." T-79. Linda testified that she has no knowledge of where the \$92,000 that was withdrawn from Mrs. Pates' account is and does not care to know about it. T-123-124.

### ***Testimony of Jeraldine Pates***

Mrs. Pates testified that she believed all of her children were beneficiaries to inherit from her estate in her current will. T-132-133. At the time of the testimony, David and Dale Younkin were excluded from her last will and testament. A-96. Mrs. Pates expressed that she believed she

did not need a conservator or guardian, but would prefer Abraham if the court found she needed a conservator or guardian. T-128.

### **STANDARD OF REVIEW**

The Court of Appeals reviews the decision by the District Court regarding the best interest of the respondent under an abuse of discretion standard. *See In re Conservatorship of Brady*, 607 N.W. 2d 781, 784 (Minn. 2000). In reviewing findings of fact, the Court of Appeals may not set aside the probate court's findings unless they are clearly erroneous, giving due regard for the probate court's determinations regarding the credibility of witnesses. *In re Conservatorship of Lundgaard*, 453 N.W. 2d, 58, 60-61 (Minn. App. 1990); Minn. R. Civ. P. 52.01; *In re Conservatorship of T.L.R.*, 375 N.W. 2d 54, 58 (Minn. Ct. App. 1985).

In appointing a conservator, the court has broad powers in appointing a conservator. *In re Conservatorship of Lundgaard*, 453 N.W.2d 58, 63 [citing *Schmidt v. Heveisen*, 347 N.W.2d 62, 64 (Minn. Ct. App. 1984)]. The court may interfere with this discretion only in the case of a clear abuse. *Id.* [citing *In re Guardianship of Stanger*, 299 Minn. 213, 215, 217 N.W.2d 754, 755 (1974); *In re Conservatorship of Kocemba*, 429 N.W.2d 302, 306 (Minn. Ct. App. 1988)].

## ARGUMENT

### **I. THE DISTRICT COURT PROPERLY APPOINTED A CONSERVATOR.**

#### **1. There Was Sufficient Evidence to Support the Appointment of a Conservator.**

The District Court appointed David Younkin as Conservator over Mrs. Pates with all the rights and powers under Minn. Stat. Sec. 524.5-417, subd. C (1-6). Order, No. 3, A-5. The Court noted that a limited conservatorship was not appropriate because Respondent was a vulnerable adult and in need of protection from the influence of others. *Id.*

In all cases the court shall make specific written findings of fact, state separately its conclusions of law, and direct entry of an appropriate judgment or order. *In re Conservatorship of Lundgaard*, 453 N.W. 2d, 58, 61 (Minn. App. 1990). In this case, the District Court has fulfilled these requirements.

In its Order appointing a conservator, the District Court found, in part, that:

The Respondent is unable to manage property and business affairs because of an impairment in here (sic) ability to receive and evaluate information or make decisions, even with the use of appropriate technological assistance. And the Respondent has property which will be dissipated without proper management and funds are needed for the support, care, education, health, and welfare of the Respondent and that protection is necessary or desirable to obtain money.

See Finding of Fact No. 3, A-3.

Sufficient evidence was offered at trial to provide clear and convincing evidence of the need for an appointment of a conservator for

Mrs. Pates. The Trial Court's Order includes the following findings of fact:

(Mrs. Pates) has recently allowed family members to have access to and custody of a significant amount of her cash, rather than keeping it in a bank to earn interest. She has demonstrated that she is vulnerable to being taken advantage of, especially in financial matters. Her verbal working and calculation skills are abnormal due to her memory loss and Alzheimer's disease. She has missed payment on at least one bill. She has recently made changes in her estate planning and expressed a lack of knowledge of how such changes were made. It appears that she is easily influenced by individuals in decisions she has made regarding her assets, her estate planning, and regarding the sale of her home.

See Finding of Fact No. 3, A-3.

These findings of fact meet the requirements of Minn. Stat. Sec. 524.5-401(2)(i), which requires that the trier of fact determine by clear and convincing evidence that the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions. The probate court has broad powers in appointing a conservator. *In re Conservatorship of Lundgaard*, 453 N.W.2d 58, 63 [citing *Schmidt v. Heveisen*, 347 N.W.2d 62, 64 (Minn. Ct. App. 1984)]. The court may interfere with this discretion only in the case of a clear abuse. *Id.* [citing *In re Guardianship of Stanger*, 299 Minn.

213, 215, 217 N.W.2d 754, 755 (1974); *In re Conservatorship of Kocemba*, 429 N.W.2d 302, 306 (Minn. Ct. App. 1988)].

The sum of \$92,000.00 that was withdrawn by Mrs. Pates constitutes a significant amount of money. This was turned over to the custody of Abraham Younkin, who not only kept it out of the bank, but refused to disclose for the Court in his testimony where the money was held or even to offer any evidence that it was secure and protected. T-102, 103. Several years prior to this proceeding, Mrs. Pates needed to bring suit against Appellant Linda Towler in order to recover a significant sum that was owed to her. The report of Joyce Wallace, LSW, the Court Visitor, states that Mrs. Pates has significant problems with her memory and needs the assistance of others to manage her finances. *See A-67, 70*. The numerous changes that Mrs. Pates has made in her estate planning documents appear to have been influenced by whom she was with at the time and who arranged for her to meet with an attorney. It is noteworthy that when Mrs. Pates has omitted any of her children as beneficiaries of her estate, including the most recent revision to her estate planning, this has occurred when she was with either Abraham Younkin or Linda Pates. When testifying at trial, Mrs. Pates stated that she has provided for all of her children in her Will, and that she loves all of her children. T-131. She was not aware in her testimony that she had

omitted any of her children in her Will. T-132, 133. Clearly, there is clear and convincing evidence that Mrs. Pates is unable to manage property and business affairs because of an impairment in her ability to receive and evaluate information or make decisions.

The Trial Court's findings also meet the requirements of Minn. Stat. Sec. 524.5-401(2)(ii), which requires that the court is to determine "whether by a preponderance of the evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health and welfare of the individual ... and that protection is necessary or desirable to obtain or provide money." *See* Minn. Stat. Sec. 524.5-401(2)(ii). The Trial Court adequately described that a significant amount of her cash was given over to family members, rather than keeping it in a bank to earn interest. The Trial Court's determination that this constitutes dissipation is appropriate and is within the discretion of the Court, especially in light of the fact that Mrs. Pates has demonstrated that she is vulnerable to being taken advantage of, especially in financial matters. With such a significant amount of cash purportedly being kept in a location that Abraham Younkin refused to disclose to the Court, the risk of it being lost, destroyed, or unaccounted for was present.

**2. Mrs. Pates' Identified Needs Cannot Be Met By Less Restrictive Means, Including Use of Appropriate Technological Assistance.**

The District Court's Finding of Fact No. 4 did not use the precise wording contained in Minn. Stat. Sec. 524.5-409, subd. 1(a)(3), but the plain meaning of the Court's finding conforms with the intent of this statute. The Court stated that "No appropriate alternative to Conservatorship exists that is less restrictive of Respondent's civil rights and liberties including the use of appropriate technological assistance." *See* Finding of Fact No. 4, A-3,4. The Court's finding was reinforced with its observation that "It is clear that Respondent is quite easily influenced and has taken actions that appear to be against her wishes or at least against her best interests." A-3,4. This finding is based on the facts set forth in Finding of Fact No. 3, A-3.

**II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN APPOINTING DAVID YOUNKIN AS CONSERVATOR.**

The District Court properly exercised its discretion in appointing David Younkin as Conservator instead of Abraham Younkin. Minnesota Statute Sec. 524.5-413 sets forth the priorities for who may be appointed Conservator. It provides the following order of priorities:

- a) Except as otherwise provided in paragraph (d), the court, in appointing a conservator, shall consider persons otherwise qualified in the following order of priority:

- (1) a conservator, guardian of the estate, or other like fiduciary appointed or recognized by an appropriate court of any other jurisdiction in which the protected person resides;
  - (2) a person nominated as conservator by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if the respondent has attained 14 years of age and at the time of the nomination had sufficient capacity to express a preference;
  - (3) an agent appointed by the respondent to manage the respondent's property under a durable power of attorney;
  - (4) the spouse of the respondent;
  - (5) an adult child of the respondent;
  - (6) a parent of the respondent;
  - (7) an adult with whom the respondent has resided for more than six months before the filing of the petition;
  - (8) an adult who is related to the respondent by blood, adoption, or marriage; and
  - (9) any other adult or a professional conservator.
- (b) A person having priority under paragraph (a), clause (1), (4), (5), or (6), may designate in writing a substitute to serve instead and thereby transfer the priority to the substitute.
- (c) The court, acting in the best interest of the protected person, 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.

This Statute gives priority to an agent appointed by the respondent in a conservatorship proceeding under a durable power of attorney.

However, the Statute specifically provides that:

The court, acting in the best interest of the protected person, 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.

Minn. Stat. Sec. 524.5-413(c). Again, on appeal, the Court of Appeals may interfere with its discretion only in the case of a clear abuse. *In re Conservatorship of Lundgaard*, 453 N.W.2d 58, 63 [citing *In re Guardianship of Stanger*, 299 Minn. 213, 215, 217 N.W.2d 754, 755 (1974); *In re Conservatorship of Kocemba*, 429 N.W.2d 302, 306 (Minn. Ct. App. 1988)].

The District Court set forth its reasons for finding that David Younkin is the most qualified to serve as Conservator, and why Abraham Younkin and Linda Towler would not be appropriate choices to serve as Conservators, as follows:

5. Petitioner is the most qualified to serve as Conservator. Objectors' decision to have the Respondent remove her money from the bank and then keep the money at an undisclosed location shows that they are not the best choice to serve as Conservators. The money could be earning interest in the bank where it is protected and insured rather than sitting unprotected at presumably a residence. Further, Objectors have been secretive and Objector Towler has been the subject of a lawsuit by the Respondent regarding an unpaid loan. There have also been many changes made to the Respondent's estate planning documents, including a change that would eliminate the Petitioner as an heir. Respondent appears to not have intended to eliminate Petitioner as an heir. It appears to the court that she was subject to some for(m) (sic) of influence from the Objectors to make such a change. In any event, the Respondent is clearly susceptible to influence in changing her estate planning documents and having his power belong to the Conservator will eliminate such problems.

While Respondent's desire in the matter was considered the court cannot find that Respondent's best interest would be served by allowing the Objectors to serve as Conservators.

6. The Conservator, David Younkin, is the most suitable and best qualified among those individuals available and willing to discharge the trust and is not excluded from appointment pursuant to Minn. Stat. 524.5-413(d).

Findings No. 5 and 6. A-4. While Mrs. Pates had appointed

Abraham Younkin and Linda Towler as her attorneys-in-fact in her most recent Power of Attorney, and she had indicated in her testimony that she preferred Abraham Younkin to be her Conservator, the District Court is granted discretion to decline to appoint a person having priority and to appoint a person having a lower priority or even no priority. The District Court has done this, and has set forth sufficient findings to support this decision. While Appellants have put forth a great deal of discussion regarding the issue of undue influence and testamentary capacity, this case is not about testamentary capacity. The District Court's Order has merely stated that Mrs. Pates has been subject to "some for[m] of influence" by the Appellants in making changes to her estate planning, and that she is susceptible to such influence. Finding of Fact 5; A-4; T-132, 133. The issue of "undue influence" was neither a part of the District Courts decision nor was it an issue at trial and should

not be considered upon appeal. These findings adequately set forth the factual basis for the court's decision.

**III. THE DISTRICT COURT PROPERLY GRANTED PROTECTIVE POWERS UNDER MINNESOTA STATUTE SECTION 524.5-310.**

**1. The District Court's Order Granting Limited Powers Was Legally Sound and Was Supported by Sufficient Evidence and Findings.**

The District Court concluded that Minn. Stat. Sec. 524.5-310 allows the court to treat the application for Guardianship as an application for a protective order. A-5. The Court's findings to support this conclusion are as follows:

Respondent needs assistance selecting and arranging her doctors and her appointments. Respondent also needs assistance with transportation to and from these appointments and needs to have another individual with her at her appointments. Further, it is not clear whether Respondent made the decision to relocate to Cambridge on her own but it is clear that other than the Objectors none of her children were aware of her relocation. Since Petitioner is prone to the influence of whoever makes a suggestion to her Petitioner needs assistance with any decisions to change her residence. Petitioner shall be granted the ability to oversee these matters. While Respondent requests the Objectors be granted any powers ordered by the court, the court has granted Petitioner the powers of conservatorship, therefore it makes sense that Petitioner be given this additional limited protective power as well.

Finding 2, A-2,3.

While the District Court found that Mrs. Pates was not sufficiently incapacitated to require a guardianship, it did set forth sufficient findings establishing the need for a protective arrangement to assist her in several areas of her life.

**2. The District Court Properly Applied Minnesota Statute Section 524.5-310.**

The District Court properly applied the protective arrangement language of the Minnesota Statutes to create limited protective powers over Mrs. Pates. The protective powers statute provides in part:

Upon petition and after notice and hearing, the court may appoint a limited or unlimited conservator or make any other protective order provided in this part in relation to the estate and affairs of: ...

(2) any individual ... if the court determines that, for reasons other than age:

(i) by clear and convincing evidence, the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with the use of appropriate technological assistance ... .

*See* Minn. Stat. Sec. 524.5-401.

Appellants are making the argument that this statute only applies to conservatorship powers. However, a careful analysis of this statute shows that the statute is not limited to only conservatorship powers. The statute states that the court may make any other protective order in relation to the estate and affairs of any individual, if the court determines that the individual is unable to manage business affairs because of an impairment in

the ability to receive and evaluate information or make decisions. The District Court's findings state the need for assistance to be provided to Mrs. Pates in selecting and arranging her doctors and her appointments, as well as with transportation. The Court also cited the finding that "(s)ince Petitioner is prone to the influence of whoever makes a suggestion to her Petitioner needs assistance with any decisions to change her residence." *See* Finding 2, Order, A-2. The Court was clearly thinking of these areas of Mrs. Pates's life in which she is in need of assistance in making its order for protective powers. They deal with the affairs of Mrs. Pates. The provisions of Minn. Stat. Sec. 524.5-401 properly include the powers that the District Court was contemplating in granting protective powers. The District Court properly found that "the Respondent needs some assistance with certain matters and the court finds that ... a protective care arrangement would sufficiently address these issues and would be less restrictive than an appointment of a Guardian." *See* Finding 1, Order, A-2.

Furthermore, the protective powers are not unlimited in scope. The District Court limited the powers to the following affairs of Mrs. Pates:  
Petitioner, David L. Younkin is hereby granted the following limited protective powers to be exercised after consultation with the other siblings:

- a. To select medical professionals to see the needs (of) (sic) Ms. Pates. This power is to be exercised only after conferring with Ms. Pates and considering her reasonable wishes.
- b. To make and attend all medical appointments.
- c. To make arrangements for Ms. Pates to attend all medical appointments.
- d. To make decisions regarding the residence of Ms. Pates after consulting with Ms. Pates and considering her reasonable wishes and providing notice to the other children of any intent to change Ms. Pates residence.

A-5,6.

Because these protective powers are limited in scope and they deal with the affairs of Ms. Pates, the District Court properly acted within its discretion in granting them.

### **3. The District Court Properly Granted Protective Powers to David Younkin.**

The District Court noted that Mrs. Pates requests the Objectors be granted any powers ordered by the court. However, because “the court has granted Petitioner (David Younkin) the powers of conservatorship, therefore it makes sense that Petitioner be given this additional limited protective power as well.” *See* Finding 2, Order, A-2,3. In light of the animosity exhibited by the Objectors toward David Younkin, which the District Court was able to observe at trial, as well as the actions of Mrs. Pates while subject to the influence of the Objectors, it was apparent that it would be a very

difficult task for David Younkin to be able to work with Abraham Younkin if they were to each have powers over Mrs. Pates. The Court very appropriately made the determination that it makes sense that David Younkin be given the limited protective powers, since he was being appointed as Conservator. While Mrs. Pates indicated her preference for Abraham Younkin, the District Court properly exercised its discretion in declining to appoint a person having higher priority, if doing so would be in the best interest of the protected person.

**IV. THE DISTRICT COURT PROPERLY ACTED WITHIN ITS DISCRETION IN NOT ORDERING A BOND FOR THE CONSERVATOR.**

The District Court ordered that no bond shall be required of the Conservator. A-5. While Minn. Stat. Sec. 524.5-413(d) states that a bond shall be required for estates that are expected to be in excess of \$10,000.00, there is a conflict between this and Minn. Stat. Sec. 524.5-415. This statute states the following:

The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the conservatorship according to law, with sureties as it may apply.

Minn. Stat. Sec. 524.5-415.

By the use of the word “may”, the wording of this statute clearly means that the requirement of a bond is optional and within the discretion of the court.

Furthermore, this statute only deals with the issue of a bond, and is in fact entitled "Bond", whereas the provision of Minn. Stat. Sec. 524.5-413 which addresses the bond requirement is included with the provisions dealing with qualifications and priorities for appointment of a conservator. The District Court properly applied the law as stated in Minn. Stat. Sec. 524-5-415, and in doing so the result will be to save the estate of Mrs. Pates the cost of a bond. David Younkin has demonstrated that he is a competent and trustworthy individual, and the District Court may very well have taken this into account in not requiring a bond.

**CONCLUSION**

For these reasons, the District Court's Order appointing David Younkin as Conservator of Jeraldine J. Pates and granting him protective powers over her person should be affirmed.

RESPECTFULLY SUBMITTED,

**FLOWER & SCHUTZ, PLC**

Dated: June 18, 2012



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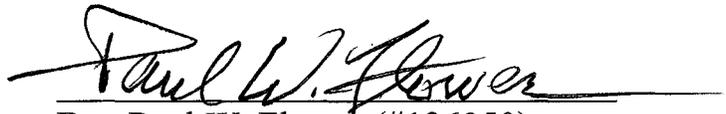
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## CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this Brief complies with the typeface requirements and word count limitation of Minnesota Rule of Civil Appellate Procedure 132.01, subd. 3, and contains 5,986 words. The following word processing software was used to prepare this Brief: Microsoft Word 2007.

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