

NO. A13-1415

State of Minnesota  
**In Court of Appeals**

In re Guardianship and Conservatorship of  
Helen Louise Durand,

*Ward/Protected Person.*

**BRIEF AND APPENDIX OF APPELLANT**

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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 ISSUES

1. A surviving spouse has a right to elect against the will of a deceased spouse if a petition is filed timely and proper notice of a court hearing is given. In the case of a surviving spouse who is a protected person, Minn. Stat. § 524.2-212 provides that a conservator must obtain a court order before filing an elective share petition for the protected surviving spouse, and that this order requires specific findings regarding (a) adequate support for the protected person's needs; and (b) election is consistent with the best interests of the "natural bounty" of the protected person's affection.

**Did the referee err in holding that section 524.2-212 lacks a rational basis and in concluding the statute violates the Equal Protection Clause of the Minnesota State Constitution, thereby allowing the conservator to elect against the will of the deceased?**

The district court granted summary judgment to the conservator. Appellant, who is one of decedent's heirs, his personal representative, and the trustee of decedent's trust, opposed the conservator's motion, arguing that the classification between competent and protected spouses is meaningful, the two groups are not similarly situated, and the Legislature rationally concluded that court oversight of a conservator's decision to file an elective share petition is consistent with court jurisdiction and control over the protected person's estate as well as judicial review of other property decisions made by a conservator on behalf of a protected person.

### **Apposite Authorities:**

Minn. Stat. § 524.2-212.

Minnesota Const., Art. I, § 2.

*In re Welfare of M.L.M.*, 813 N.W.2d 26 (Minn. 2012).

*Sweeney v. Summers*, 571 P.2d 1067 (Colo. 1977).

*In re Robinson's Estate*, 88 Minn. 404, 93 N.W. 314 (1903).

## STATEMENT OF CASE

In November 2010, acting as conservator for protected person Helen L. Durand, Respondent Alternate Decision Makers, Inc. (“ADMI”) followed Minn. Stat. § 524.2-212 and asked the district court for permission to file an elective share petition on Durand’s behalf to pursue her claim against the estate of William F. Krebs, Durand’s deceased spouse. The district court gave ADMI approval and the elective share petition was filed.

ADMI did not provide notice of its motion to Appellant Lynn Krebs-Lufkin, who is one of Krebs’s heirs, the personal representative of the estate and trustee. Krebs-Lufkin eventually learned what ADMI had done, objected, and obtained some relief from this Court in a prior appeal decided in 2012. Upon remand, the district court that had given ADMI permission to proceed with the elective share petition, granted Krebs-Lufkin both discovery and a hearing and held that ADMI’s failure to provide statutorily-required notice was a mistake within the meaning of Minn. R. Civ. P. 60.02.

Just weeks before the long-awaited hearing on ADMI’s elective share petition, ADMI changed course and sought summary judgment because it claims Minn. Stat. § 524.2-212 is unconstitutional under Minnesota’s Equal Protection Clause. This appeal reviews the district court’s decision granting summary judgment to ADMI. (Add.1-8.)<sup>1</sup> Section 524.2-212 requires that before a protected person may elect against the will of a deceased spouse, the conservator must obtain a court order finding, as follows: (1) that the exercise is necessary to provide adequate support for the protected person during

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<sup>1</sup> Materials in the Appellant’s Addendum will be cited as “Add. \_\_\_;” and materials in the Appellant’s Appendix will be cited as “A. \_\_\_.”

probable life expectancy; and (2) the election will be “consistent with the best interests of the natural bounty of the protected person’s affection.” Minn. Stat. § 524.2-212. (Add.9.) The district court concluded that “[the conservator] has demonstrated, beyond a reasonable doubt, Minn. Stat. § 524.2-212 is unconstitutional...” (Add.3.)

The district court’s summary judgment decision will allow ADMI to proceed with its claim against Krebs’s Estate. The parties stipulated to a stay of probate proceedings in Dakota County and the district court approved the stipulation, the Honorable Shawn M. Moynihan, presiding. (A.60-62.) This timely appeal urges the Court to reverse the district court’s decision and remand this matter for the hearing that ADMI has persistently avoided. (A.62-63.)

## STATEMENT OF FACTS

The facts relevant to the legal issue before this Court are not in dispute.

### **A. The Parties.**

Krebes and Durand married on November 7, 1995 at the ages of 76 and 60, respectively. Both Krebes and Durand had been previously married. While they did not have any children together, Krebes and Durand each had children from previous marriages. Krebes had two children, Lynn Krebes-Lufkin and Paul Krebes. Durand had five children, Respondents James, Gregory, Daniel and Paul Durand, and Mary Jo Kattar. The two families did not interact; for instance, neither Krebes-Lufkin nor her brother had met any of Durand's children before Krebes's death. (A.3.)

Krebes-Lufkin cared for her father daily for the last six months of his life; she was with him when he died. (A.3-5.)

### **B. Mr. Krebes Dies In 2009 With A Will And Trust.**

At the time of Krebes's death on October 14, 2009, Krebes's estate was governed by two documents<sup>2</sup> – a Will dated September 3, 2009 and a revocable Trust, last restated on September 3, 2009. (A.25.) The Will designated Krebes-Lufkin as Krebes's personal representative and provided that all personal property and the residue of the probate estate be transferred to the Trust. (A.10-15.) The Trust, known as the Amended and

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<sup>2</sup> After ADMI became Durand's conservator, it claimed that Krebes authored an undated, handwritten note before his death; the note was not witnessed or notarized. It states that Krebes's and Durand's joint accounts pass to Durand upon Krebes's death. (A.33-34.) In stark contrast to this claim, Krebes-Lufkin established that Krebes had closed the joint accounts he shared with Durand and obtained authorizations from Durand to do so. (A.5,8-9.)

Restated William F. Krebs Trust, was to be administered by Krebs-Lufkin, who was also named the Trustee. (A.23.) The Trustee is instructed, upon the death of Krebs, to pay necessary taxes, fees, and expenses, and then to distribute the remainder of the Trust Estate to Krebs's children in equal shares. (A.19.)

**C. The District Court Informally Appoints Krebs-Lufkin As Personal Representative Of The William F. Krebs Estate In 2009.**

On October 20, 2009, Krebs-Lufkin applied for an Informal Probate of the Will and for Informal Appointment of Personal Representative in Dakota County Probate Court. Krebs-Lufkin provided the requisite notice to all interested parties, including Durand, and was appointed personal representative by court order. (A.1-2.)

**D. At The Request Of Durand's Children, The District Court Declares Durand Incompetent In 2010 And Appoints ADMI As Conservator.**

In October 2010 and in response to petitions filed by Durand's children, the Hennepin County Probate Court, the Honorable Jay M. Quam, appointed ADMI as Durand's conservator after finding that Durand was incapacitated as a result of severe alcoholism and dementia. (A.35-39.)<sup>3</sup>

**E. Without Providing Notice To Krebs-Lufkin, ADMI Applies For And Receives Approval To Elect Against The Will.**

Shortly after its appointment, ADMI filed a Petition for Court Authorization to File for Elective Share pursuant to Minn. Stat. §§ 524.2-212, 524.5-411. (A.40.)

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<sup>3</sup> In January 2011 and in response to a petition filed by Durand's children, the district court appointed ADMI as Durand's guardian after finding incapacity. (A.46-49.)

ADMI failed to provide Krebs-Lufkin with statutorily-required notice of its Petition, yet ADMI advised the probate court that all interested persons had received notice. (*Id.*) Because Krebs-Lufkin did not receive notice of the Petition, she did not file an objection. Presumably because no objections were filed, no evidentiary hearing was held, as provided in Minn. Stat. §§ 524.2-212, 524.5-411.

On November 12, 2010, the district court issued an order permitting ADMI to file for an elective share. (A.40-41.) On the very same day, ADMI filed Durand's election against the Will in Dakota County. (A.42-45.) Krebs-Lufkin objected to ADMI's elective share petition.

**F. Krebs-Lufkin Appeals, Seeking To Overturn ADMI's Election Against The Will, And Receives Some Relief.**

Krebs-Lufkin appealed from the order of the Dakota County Probate Court that denied and dismissed her objection to ADMI's elective share petition. *In re Estate of Krebs*, A11-1408, 2012 WL 987310 (Minn. Ct. App. Mar. 26, 2012), *review denied* (Minn. June 19, 2012). The lower court had held that it was bound by the November 12, 2010 Order authorizing ADMI file an elective share petition. *Id.* at \* 1.

The Minnesota Court of Appeals affirmed in part and reversed in part, holding, first, that Krebs-Lufkin was entitled to receive notice of the elective share proceeding in Hennepin County Probate Court. *Id.* at \*3. (“[A]ppellant was entitled to notice of the elective-share proceeding in Hennepin County because she is an ‘interested person.’”); *see also id.* at \*4 (holding appellant is entitled to statutory notice as an “affected

person”). Second, Krebs-Lufkin was not entitled to collaterally attack the November 12, 2010 order in Dakota County District Court. *Id.* at \*2.

**G. Following The Appeal, The District Court Grants Krebs-Lufkin’s Request For An Evidentiary Hearing On ADMI’s Request For Court Approval Of Its Elective Share Petition.**

Following the appellate court’s decision, Krebs-Lufkin filed a Rule 60 motion requesting that Hennepin County Probate Court vacate its November 12, 2010 decision allowing ADMI to file for elective share and hold an evidentiary hearing pursuant to Minn. Stat. §§ 524.2-212, 524.5-411.

On September 27, 2012, the district court, the Honorable Jay M. Quam, presiding, granted Krebs-Lufkin’s Rule 60 motion and ordered that a hearing be conducted. (A.27-28.) The district court determined that (1) Krebs-Lufkin was entitled to notice and an opportunity to be heard at any hearing on an elective share petition; (2) that Krebs-Lufkin had not previously received notice of ADMI’s petition to allow filing of an elective share; and (3) ADMI’s failure to provide notice was a “mistake” within the meaning of Minn. R. Civ. P. 60.02, therefore, Krebs-Lufkin “should be allowed to be heard” regarding ADMI’s request. (A.26-27.) The court also authorized discovery. (A.28.)

The district court did not vacate the November 12, 2010 decision and instead decided that “[a]ppropriate remedies can be ordered at such time as this Court decides whether ADMI is entitled” to file an elective share petition for Durand. (*Id.*) This evidentiary hearing was originally scheduled for December 11, 2012, and then continued to April 22, 2013. (A.27; Add.2.)

**H. Just Weeks Before The Evidentiary Hearing, ADMI Asks The District Court To Grant Summary Judgment By Striking Down Minn. Stat. § 524.2-212 As Unconstitutional.**

On March 25, 2013, ADMI filed a motion for summary judgment seeking an order declaring that Minn. Stat. § 524.2-212 is unconstitutional because it violates Minnesota's equal protection guarantee and that ADMI is entitled to elect against Krebs's Will as a matter of right. (A.29-30.) Krebs-Lufkin opposed the motion, arguing that the statute is based on a meaningful classification and is rationally related to the needs of protected persons.<sup>4</sup> The parties were heard on April 22, 2013, the Honorable Dean Maus, Referee, presiding. (Apr. 22, 2013 Tr. at 1-35.)

**I. The District Court Grants Summary Judgment To ADMI, Allowing The Elective Share Petition To Proceed Without An Evidentiary Hearing Under Section 524.2-212.**

By order entered on June 4, 2013, the referee granted ADMI's motion for summary judgment and allowed ADMI's claim against the estate to proceed. (Add. 1-8.) The referee analyzed section 524.2-212 under Minnesota's three-prong rational basis test after initially determining that the statute creates two classes: spouses who are protected persons and spouses who are not protected persons. (Add.4.) The referee determined that the distinction between the two classes is neither genuine nor substantial and does

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<sup>4</sup> Although not relevant to the constitutional issue, Krebs-Lufkin also established that a genuine issue of material fact exists regarding whether an elective share petition is warranted to provide adequate support for Durand. ADMI submitted an inventory to the district court in 2010 showing Durand's assets are approximately \$917,381; subsequent discovery including ADMI's answers to interrogatories establish that Durand's assets are over \$2 million. (A.52-59.) It is undisputed that Durand's assets were acquired by transfers from Krebs during the marriage.

not provide a natural and reasonable basis for the Legislature's decision to require court approval before a conservator may file an elective petition.

The appointment of a conservator to help spouses unable to make their own financial decisions accounts for and mitigates this difference. When it comes to choosing whether to elect against a will, there is no reasonable justification for treating spouses acting through conservators differently from spouses acting on their own.

(Add.6.)

Second, the referee concluded that there was no reasonable connection between the distinctive needs of protected persons and the statutory provision. Specifically, the referee rejected that the Legislature sought court review prior to filing an elective share petition to protect the economic benefits of surviving spouses. The referee reasoned that “[i]f the legislature was truly concerned about surviving spouses’ heirs benefiting from surviving spouses’ decision to elect against their deceased spouses’ wills, the legislature would have required courts to approve *all* surviving spouses’ elections against wills.”

(Add.5-6, emphasis original.)

Similarly, the referee rejected the possibility that the Legislature sought court approval to ensure that conservators are motivated by the broad needs of the protected person and not solely by financial gain for the protected person's estate, whose financial affairs the conservator manages. The referee stated that “[i]f the legislature was truly concerned about preventing personal gain, the legislature would have required courts to approve *all* surviving spouses’ elections.” (Add.6, emphasis original.)

Third, the referee acknowledged that Minnesota may protect the economic benefits of surviving spouses *and* seek to discourage elective share petitions filed solely

for financial gain. However, “[i]f it does so, [the Legislature] must enact across-the-board legislation rather than legislation impermissibly targeting spouses who are protected persons.” (*Id.*) Because “no rational trier of fact, considering the record as a whole, could find Minn. Stat. § 524.2-212 constitutional,” the referee concluded that “no genuine issues of fact remain” and summary judgment is appropriate. (Add.7.)

## ARGUMENT

### *Summary of Argument*

Minnesota statute provides that, before a conservator may proceed with an elective share petition, it must obtain a court order based on findings that electing against the will is necessary to provide adequate support for the protected person and that election is consistent with the best interests of the “natural bounty” of the protected person’s affection. Minn. Stat. § 524.2-212. This law is based on a reasonable and genuine distinction between protected persons and other spouses, who are not similarly situated. As argued more fully below, protected persons, by clear and convincing evidence, have been adjudicated as unable to manage property and business affairs, leading the court to appoint a conservator. Requiring a court hearing and specific findings before a conservator may file an elective share petition is an important part of Minnesota’s overall statutory scheme to protect vulnerable persons who are unable to manage their own financial affairs.

While Minnesota has not previously examined Minn. Stat. § 524.2-212 under the state’s equal protection clause, appellate courts from other states have examined similar statutes under the federal equal protection clause and upheld those statutes after careful rational basis review. Each court concluded that the state has a legitimate interest in considering the financial needs of the protected person before a conservator files an elective share petition and overrides a decedent’s will.

Minnesota’s statute differs from the Uniform Probate Code and some other states because it directs the court to consider a second factor: the best interests of the “natural

bounty” of the protected person’s affection. The added depth of Minnesota’s statute does not undercut its rational basis; it enhances the state’s goal of protecting vulnerable persons. The two-factor approach adopted by the Minnesota Legislature mandates court review of a protected person’s elective share petition to ensure that the petition does not merely increase the protected spouse’s estate, in the same way that other surviving spouses consider many factors in deciding whether to seek an elective share. In order to honor a deceased spouse’s wishes and promote family relationships, a surviving spouse often declines to file an elective share petition and simultaneously and rationally rejects pecuniary advantages for herself and her heirs. Because the Legislature appropriately has authorized a court to consider factors other than pecuniary gain before approving an elective share petition that contravenes the decedent’s wishes, this Court should reverse the referee’s decision and uphold Minn. Stat. § 524.2-212 under Minnesota’s Equal Protection Clause.

## **I. STANDARD OF REVIEW**

This Court applies *de novo* review to summary judgment decisions and in reviewing the constitutionality of a statute. *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013) (grant of summary judgment); *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 654 (Minn. 2012) (constitutionality of a statute).

This Court will impose a heavy burden upon respondents who are defending the district court’s decision to invalidate a statute as unconstitutional. Every presumption is invoked in favor of the constitutionality of the statute. *Reed v. Bjornson*, 191 Minn. 254, 257, 253 N.W. 102, 104 (1934). Statutes are declared unconstitutional only when

absolutely necessary and after applying extreme caution. *Walker v. Zuehlke*, 642 N.W.2d 745, 750 (Minn. 2002) (quoting *Boutin v. LaFleur*, 591 N.W.2d 711, 714 (Minn. 1999)). Minnesota appellate courts rarely strike down a statute as unconstitutional. *See, e.g., Council of Indep. Tobacco Mfgs. of Am. v. State*, 713 N.W.2d 300, 305-306 (Minn. 2006) (holding “appellants have failed to meet this heavy burden with respect to any of the grounds they assert, we conclude that the statute is constitutional”). In fact, the Minnesota Supreme Court has stated that “we uphold a statute unless the challenging party demonstrates that the statute is unconstitutional beyond a reasonable doubt.” *State v. Craig*, 826 N.W.2d 789, 791 (Minn. 2013) (citing *State v. Yang*, 774 N.W.2d 539, 552 (Minn. 2009)).

**II. THE REFEREE ERRED IN CONCLUDING THAT MINN. STAT. § 524.2-212 VIOLATES THE MINNESOTA CONSTITUTION’S EQUAL PROTECTION CLAUSE.**

**A. Minnesota Statutes Provide A Right Of Election And Circumscribes Its Exercise.**

Minnesota law creates the right of election for the surviving spouse of a decedent who dies domiciled in this state. The statutory right of election has replaced the common law concepts of dower and courtesy, which gave a surviving spouse a right to a decedent’s real estate. Hon. Melvin J. Peterson and Richard Wolfson, *Election Against the Will*, 43 *Bench & B. Minn.* 15 (Oct. 1986) [hereafter “Election”]. The law regarding this right “seeks to steer between ‘overprotection’ and ‘underprotection’” of the surviving spouse. *Id.* The law seeks a middle course between apportioning to the surviving spouse an “unduly large share of decedent’s assets” and denying an “equitable share of assets.”

*Id.* Notably, the elective share is a personal right to the surviving spouse and dies with him or her. *In re Owsley's Estate*, 122 Minn. 190, 201, 142 N.W. 129, 133 (1913). “The rationale is that the elective share is needed for support and when the survivor dies there is no reason to upset the testamentary scheme.” Election at 20.

The surviving spouse who exercises the right of election may take a share in an “amount equal to the value of the elective share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other,” in accordance with the statutory schedule. Minn. Stat. § 524.2-202. The statutory schedule provides, for example, that if the decedent and spouse were married 13 years but less than 14 years, the spouse’s elective share percentage is 42 percent of the augmented estate. *Id.*<sup>5</sup>

The right of election is not without limits. All surviving spouses must initiate timely court proceedings to pursue the right of election. Minn. Stat. § 524.2-211 (proceedings must be initiated by petition within nine months of death or six months after probate of decedent’s will, whichever limitation expires later). Also, all surviving spouses must give notice of a hearing to “persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be affected by the taking of the elective share.” *Id.* “Failure to meet the time limits results

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<sup>5</sup> ADMI claims that Durand would receive a significant share of the augmented estate if ADMI is allowed to file an elective share petition. Durand and Krebes were married 13 years at the time of Krebes’s death, and section 524.2-202 provides an elective share of 42 percent of the augmented estate. Appellant disputes the claim, but the issue is not necessary to this Court’s constitutional analysis of the statute.

in acceptance of the testamentary devise.” Election at 20. Additionally, a court oversees the right of election via a court hearing that results in an enforceable order. Minn. Stat. § 524.2-211(d) (hearing to determine elective share amount and payment).

With regard to protected persons, Minnesota law requires court approval and specific findings before a conservator may pursue an elective share petition on behalf of a protected person.

In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to the protected person’s property are pending, after finding (1) that exercise is necessary to provide adequate support for the protected person during the protected person’s probable life expectancy and (2) that the election will be consistent with the best interests of the natural bounty of the protected person’s affection.

Minn. Stat. § 524.2-212. The legislature last revised this statute in 1985 when it adopted the recommended language of the Uniform Probate Code, which ends after finding (1) regarding adequate support for the protected person. Minnesota added finding (2) that the election be consistent with the best interests of the “natural bounty of the protected person’s affection.” *See generally* Unif. Probate Code, § 2-203, 8 U. L. A. 305 (1998) (pre-1990 version).

Section 524.2-212 is consistent with Minnesota’s common law treatment of probate court jurisdiction over estates of deceased persons and protected persons. In *Ex Rel. Marlin v. Neland*, the Minnesota Supreme Court held that probate court jurisdiction includes the estates of protected persons and the power to determine whether a surviving protected person should elect against the will of a deceased spouse. 30 Minn. 277, 282, 15 N.W. 245, 247 (1883). This early court decision was later embraced by the

Legislature and remains largely intact today in a statutory scheme for protected persons, *see* Minn. Stat. §§ 524.5-402, 410, 411, discussed more fully below.

In sum, Minnesota statutes provide a right of election to the surviving spouse and circumscribe the exercise of that right, both for competent and protected spouses. Court oversight applies to election petitions for all surviving spouses, including protected spouses, although appropriately greater court involvement applies to protected spouses. This statutory scheme does not offend Minnesota's Equal Protection Clause because protected spouses are not similarly situated to other spouses and a rational basis supports the Legislature's decision to require district court approval before a conservator files an elective share petition.

**B. The Referee Erred In Concluding That Section 524.2-212 Treats Similarly Situated Individuals Differently.**

In this case, the referee determined that section 524.2-212 creates an unconstitutional classification because the law treats the right of election differently for protected persons than it does for other spouses. The referee erred because, first and foremost, Minnesota's Equal Protection Clause does not forbid classifications. *See State v. Behl*, 564 N.W.2d 560, 568 (Minn. 1997) (stating that equal protection "does not require the state to treat things that are different in fact or opinion as though they were the same in law"). Instead, equal protection requires that similarly situated individuals are treated similarly in relevant respects. *Id.* Article I, Section 2 of the Minnesota Constitution provides that "[n]o member of this state shall be disfranchised or deprived of

any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.”

This Court will uphold a statute on equal protection grounds if a rational basis supports the classification. *State v. Benniefield*, 678 N.W.2d 42, 46 (Minn. 2004). The “similarly situated” test is a threshold question. *Behl*, 564 N.W.2d at 568. Where a statute treats similarly situated persons similarly, this Court’s analysis ends. *Id.* (upholding statute after applying “threshold question” under similarly situated test). *See also In re Welfare of M.L.M.* 813 N.W.2d 26, 38 (Minn. 2012) (holding equal protection challenge to law fails because appellant did not meet threshold showing that she is “similarly situated in all relevant respects”); *Fosle v Ritchie*, 824 N.W.2d 618, 621-22 (Minn. 2012) (same holding regarding challenge to election law); *State v. Johnson*, 813 N.W.2d 1, 12 (Minn. 2012) (same holding regarding challenge to DNA sample law); *Gluba ex rel. Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 722 (Minn. 2007) (same holding regarding challenge to worker’s compensation law).

This Court may end its analysis of section 524.2-212 after the threshold test because the challenged statute does not treat similarly situated individuals differently. Protected spouses for whom the court has appointed a conservator to handle financial affairs are not similarly situated to other spouses in many material respects. Relevant to this Court’s analysis, protected persons have been legally determined to be unable to manage property and business affairs. First, “‘protected person’ means a minor or other individual for whom a conservator has been appointed or other protective order has been made.” Minn. Stat. § 524.5-102, subd. 14. This definition is incorporated into the

statutes governing the elective share by Minn. Stat. § 524.1-201(43) (“Protected person’ is as described in section 524.5-102, subdivision 14.”). Second, Minnesota law provides that, before an individual is deemed a protected person and a conservator is appointed, the district court must determine, (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”; and (ii) by a preponderance of the evidence, “the individual has property that will be wasted or dissipated unless management is provided.” Minn. Stat. §§ 524.5-401, 524.5-409.

The referee recognized the unique position of the protected spouse, but erroneously concluded that the appointment of a conservator erased the distinction.

The only difference between the classes created by Minn. Stat. § 524.2-212 is that one involves spouses unable to make their own financial decisions while the other involves spouses able to make their own financial decisions. The appointment of a conservator to help spouses unable to make their own financial decisions accounts for and mitigates this difference.

(Add.5.) The referee is mistaken, however, because conservatorship extends the court’s jurisdiction over and powers concerning the estate and financial affairs of the protected person.

In fact, the Legislature has granted the district court exclusive jurisdiction over the estate of a protected person; specifically, Minn. Stat. § 524.5-402 provides the court with “exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this state must be managed, expended, or distributed to or for the use of the protected person ...” In addition to exclusive jurisdiction, Minnesota law gives the district court full power over the estate and business affairs of a protected person and

provides that these powers may be exercised through the conservator. Minn. Stat. § 524.5-410 (upon determination of conservatorship, granting court “all the powers over the estate and business affairs of the protected person which the protected person could exercise if an adult, present, and not under conservatorship or other protective order”). Moreover, the Legislature decided to require a hearing and court approval before a conservator disposes of the protected person’s property in a wide variety of circumstances including gifts, expectant interests, appointments, trusts, plan documents, contracts, insurance policies, joint tenancies, and wills. Minn. Stat. § 524.5-411.

Based on a legal determination of the need for protection, the court’s exclusive jurisdiction over the protected person’s estate, the court’s extensive power over the protected person’s estate and business affairs, and the wide variety of conservator decisions that require court review, a protected spouse is not similarly situated to all other spouses.

The Colorado Supreme Court reached the same conclusion after examining a statutory scheme very similar to Minnesota’s – also modeled on the Uniform Probate Code – and the court upheld its statute requiring court approval before a conservator could file an elective share petition on behalf of a spouse.<sup>6</sup> In *Sweeney v. Summers*, 571 P.2d 1067, 1070 (Colo. 1977), the supreme court rejected an equal protection challenge

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<sup>6</sup> The Colorado statute provided: “In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.” Colo. Rev. Stat. § 15-11-203.

to the statute, in part by concluding that the classification “created by the statute is grounded in the common law [authority to protect the estate of one who is under guardianship] and is therefore not suspect nor arbitrary, but rests upon some ground of difference having a fair and substantial relation to the object of the legislation.” *Id.* In reaching this conclusion, the supreme court relied on the statutory definition of protected person, the required findings before a conservator may be appointed, and the court’s exclusive jurisdiction over the protected person’s estate. *Id.* at 1069-70.

The Montana Supreme Court found Colorado’s analysis persuasive and also rejected an equal protection challenge to Montana’s law requiring court approval before a conservator exercised the right of election on behalf of a protected person.<sup>7</sup> In *Estate of Merkel*, 618 P.2d 872, 875 (Mont. 1980), the supreme court first noted that “State legislatures have traditionally set apart the class which is involved here, delegating the care of incompetent persons to the State.” The court favorably cited *Sweeney’s* discussion of “the entire statutory scheme pertaining to incompetent persons [which] has placed their care ultimately with the State.” *Id.* The court held that Montana’s law is “reasonable and not arbitrary when considered in light of the traditional role of the court with respect to incompetent persons ...” *Id.*

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<sup>7</sup> The Montana statute provided: “In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.” Mont. Code Ann. § 72-2-203.

Based on Minnesota's statutory scheme and persuasive precedent, this Court should conclude that section 524.2-212 rests on a meaningful distinction between two very different classes who are not similarly situated. Protected spouses are unable to manage their business affairs, by definition and pursuant to an actual determination in legal proceedings that impose a rigorous standard of proof. Further, the estate of a protected spouse is under the district court's jurisdiction, which also has complete power over their estate and business affairs. Moreover, the Legislature requires court oversight of a conservator's decision to dispose of a protected persons' property. While the court may act through the conservator, this does not mean that an incapacitated spouse with a conservator is similarly situated to a fully competent spouse who acts independently. The district court's jurisdiction and power over the estate of an incapacitated person set a protected spouse apart from other spouses.

In this appeal, the Court should end its analysis with the threshold determination that protected spouses are not similarly situated to other spouses. *See, e.g., M.L.M.*, 813 N.W.2d at 38; *Fosle*, 824 N.W.2d at 621-22. Because equal protection does not preclude the Legislature from making classifications, and substantial differences exist between protected spouses and other spouses, further equal protection review is not necessary.

**C. The Referee Erred In Concluding That Section 524.2-212 Lacks A Rational Basis Under *Russell*.**

Even assuming protected spouses are similarly situated to other spouses, the Legislature need only have a rational basis for adopting section 524.2-212. This Court will apply a three-pronged test to determine rational basis:

(1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

*State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991). The supreme court has commented that Minnesota’s test is different from the federal test and the court will apply “our stricter standard of rational basis review” at least in some cases. *Id.* at 889 (stricter test applies “where the challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection”).

The sole question under the first *Russell* prong is whether the distinction created by the Legislature between protected persons and other spouses is “manifestly arbitrary” or “genuine and substantial.” *Id.* In all respects relevant to this appeal, the first *Russell* prong is identical to the “similarly situated” test already discussed. The numerous statutory differences between protected persons and other spouses provide “a natural and reasonable basis to justify legislation adopted to peculiar conditions and needs.” *Id.* at 888. Because there are actual differences between protected persons and other spouses, section 524.2-212 passes the first *Russell* prong.

The second and third *Russell* prongs restate the rational basis test in two parts: the classification must be “relevant to the purpose of the law” and the purpose of the statute “must be one that the state can legitimately attempt to achieve.” 477 N.W.2d at 888. The

purpose of section 524.2-212 is a legitimate one – that is, to ensure that (1) the protected spouse’s needs are adequately provided; and (2) that the best interests of the “natural bounty” of the protected person’s affection are considered. By articulating these two considerations for court approval of a conservator’s decision to file an elective share petition, the Legislature has struck an important balance between protecting the spouse and enforcing the testamentary wishes of the decedent.

The rational basis for each of the two statutory considerations will be considered separately.

- 1. Requiring Consideration Of What Is Necessary For The Protected Person’s Adequate Support Is Relevant To The Law’s Purpose And Legitimate For The State To Achieve.**

Comments to the Uniform Probate Code articulate the purpose of section 524.2-212’s first consideration, *i.e.*, the right of election must be “necessary to provide adequate support for the protected person during the protected person’s probable life expectancy.” Minn. Stat. § 524.2-212. The UPC Committee stated that this consideration “assure[s] that part of the elective share is devoted to the personal economic benefit and needs of the surviving spouse, but not to the economic benefit of the surviving spouse’s heirs or devisees.” Unif. Probate Code § 2-212 cmt., 8 U. L. A. 129 (1998).

Providing what is necessary for the adequate support of the protected person is a legitimate government interest that the Minnesota Supreme Court has long recognized must be balanced by the decedent’s intent:

In making such election the court is guided by considerations for the benefit of the lunatic, without regard to what the advantage may be to his heirs. If, in this case, it is found that the effect of an election to waive the provisions of the will will be to divert property from the channel in which the testator intended it to go, and, if the diversion is not required by the wants and circumstances of the widow, the prayer of the bill cannot be granted.

*In re Robinson's Estate*, 88 Minn. 404, 410, 93 N.W. 314, 316 (1903) (reversing district court's decision to elect against will on behalf of protected spouse); *see also In re Wentworth's Estate*, 452 N.W.2d 714, 716 (Minn. Ct. App. 1990) (upholding a district court's decision to deny elective share petition for a protected spouse after finding the estate was sufficient to support her). Other courts have reached the same conclusion. *See, e.g., Merkel*, 618 P.2d at 875-76 (noting that "[t]he statute insures that the spouse will be adequately cared for, thus fulfilling the ultimate purpose of the statute, while denying the spouse only the discretionary income."); *see generally In re Anderson's Estate*, 394 So. 2d 1146, 1147 (Fla. Dist. Ct. App. 1981) ("We hold that the elective share is for the express purpose of caring for the [protected] surviving spouse and not to augment the estate for the benefit of heirs."); *In re Miller Estate*, 21 Pa. D. & C. 2d 441, 443 (Pa. Orph. 1958) ("If the needs of the incompetent are satisfactorily provided for, the court should not authorize an election which would result in diverting the property of the deceased husband from his own heirs or legatee to those of his widow").

In section 524.2-212's first consideration, the Legislature implicitly recognizes that spouses who are of sound mind often choose to respect a deceased spouse's testamentary wishes, regardless of the loss to the survivor's estate. The Colorado Supreme Court observed that "not every widow disregards her husband's last wishes

merely because she would obtain a greater quantum of his estate by so doing; sentiment enters into such situations.” *Sweeney*, 571 P.2d at 1071; *see also Miller Estate*, 21 Pa. D. & C. 2d at 442 (“It is common knowledge that not every widow disregards her husband’s last wishes for the disposition of his property merely because she would obtain a greater quantum of his estate by so doing...and, if...her wants are otherwise adequately supplied, it does not follow, just because such provisions may not be as much as she might elect, that she would file an election to take against his will.”).

Court review of the protected spouse’s financial needs ensures that elective share petitions do not become automatic. A conservator cannot take the place of the court – as the referee appeared to assume – because conservators may be motivated to enlarge the estate of the protected person for reasons that the state does not recognize. The conservator’s motivation was examined in *Estate of Eggleston*, 698 N.W.2d 892, 900 (Mich. Ct. App. 2005), in which the Michigan Court of Appeals upheld the constitutionality of a statute similar to Minnesota’s law.<sup>8</sup> In rejecting an equal protection challenge, the appellate court noted that the statute is “reasonably related to a legitimate governmental purpose.” *Id.* at 899. Specifically, the court held that the statute

acknowledges the difference in motivation and theory for the election by the surviving spouse in the context of a legally incapacitated person. That is, in the case of a legally incapacitated person, the petitioner [here, the conservator] may be motivated by personal gain as opposed to the needs of

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<sup>8</sup> The Michigan statute provides: “In the case of a legally incapacitated person, the right of election may be exercised only by order of the court in which a proceeding as to that person’s property is pending, after finding that exercise is necessary to provide adequate support for the legally incapacitated person during that person’s life expectancy.” Mich. Comp. Laws § 700.2202(5).

the legally incapacitated person. Consequently, the Legislature has provided that the probate court makes the election.

*Id.* The court concluded that Michigan's statute ensures that right of election is "made with regard to need and adequacy and ... not tainted by improper financial motive." *Id.* at 900.

Other states have also held that court consideration of a protected spouse's financial need before approval of an elective share petition is supported by a rational basis and consistent with equal protection. *See Sweeney*, 571 P.2d at 1070 (Colo. 1977) ("The scheme of the statute does not deprive incompetent spouses of any fundamental (constitutional) rights and there is a rational basis to support it."); *Merkel*, 618 P.2d 872, 875-76 (Mont. 1980) ("We find this statute to be reasonable and not arbitrary when considered in light of the traditional role of the court with respect to incompetent persons and when considered in light of the purpose of the statute."). Notably, none of the cases cited above involved even one dissenting opinion.

The referee concluded that because Minnesota's statute differs from other state laws by adding a second consideration, *Sweeney*, *Merkel*, and *Eggleston* should be distinguished. (Add.6.) But decisions from these other jurisdictions establish the constitutional validity of at least half of section 524.2-212. The referee also asserted that "the current version of the UPC provision [for which the statutes were modeled] does not place a greater burden on spouses who are protected persons, presumably because such requirements are unconstitutional." (Add.7). This assertion is incorrect. The current version of UPC § 2-212 does not require court approval, but that is simply because court

approval of the conservator’s decision to file an elective share petition was incorporated in UPC § 5-411, along with specific considerations, *e.g.*, “the financial needs of the protected person.” Unif. Probate Code §§ 5-407(a), (b) and (c), 5-411(a), (b) and (c) 8 U. L. A. 386-87 (1998 & 2013 Supp.) (providing versions from 1982 and 1998/99). The referee mistakenly disregarded persuasive legal authority.

For the same reasons that other courts have uniformly and unanimously concluded that a state may legitimately consider a protected spouse’s financial needs before approving the filing of an elective share petition, this Court should also conclude a rational basis constitutionally supports section 524.2-212.

**2. Requiring Consideration Of The Bests Interests Of The “Natural Bounty” Of The Protected Person’s Affection Is Relevant To The Law’s Purpose And Legitimate For The State To Achieve**

Section 524.2-212’s second consideration provides that the elective share petition is “consistent with the best interests of the natural bounty of the protected person’s affection.” Minn. Stat. § 524.2-212. While not part of the Uniform Probate Code, the second factor is relevant to the law’s purpose because it allows the court to consider those whom the protected person “holds dear.” Election at 20.

In this case, the parties disagree about the meaning of the second consideration, which employs language that is not defined by statute, or court decision, and is rarely used today. Krebs-Lufkin contends that the “natural bounty” of the protected person’s

affection is the dependent children of the protected person.<sup>9</sup> ADMI contends that the statutory language means the protected person's heirs regardless of dependency. Because this is a facial challenge to the constitutionality of section 524.2-212, the exact meaning of this language is not essential to this Court's decision.

In a facial challenge, the challenger asserts that the law "always operates unconstitutionally." *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 339 (Minn. 2011) (quoting *Black's Law Dictionary* 261 (9th ed. 2009); see also *In re McCannel*, 301 N.W.2d 910, 916 (Minn. 1980) (facial challenge "asserts that at least two classes are created by the statute, that the classes are treated differently under the statute, and that the difference in treatment cannot be justified."). A facial challenge to the constitutionality of a statute requires that the challenger "bears the heavy burden of proving that the legislation is unconstitutional in all applications." *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 696 (Minn. 2009). Consequently, without conceding anything, this brief will construe section 524.2-211 consistent with ADMI's position in order to address the facial challenge raised.

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<sup>9</sup> Several legal authorities support Appellant's position. First, when the Legislature revised Minn. Stat. § 524.5-411 in 2003 regarding conservator actions for which court approval is required, the Legislature directed the court to consider, among other things, "the financial needs of the protected person *and the needs of individuals who are dependent on the protected person for support and the interest of creditors.*" (Emphasis added.) Second, court decisions have frequently interpreted "natural bounty" of one's affection as dependent children. See, e.g., *In re Eisner's Will*, 228 N.Y.S.2d 29, 32 (N.Y. Sur. 1962) ("decendent was interested in providing for her sons, the natural bounty of her affection, or their children, should the sons not survive decendent.").

By incorporating a second consideration, the Legislature has deepened the court's review of a conservator's decision to file an elective share petition. The "best interests" analysis is a familiar test because the Legislature has adopted it in many contexts; in fact, the "best interests" of the ward is the standard for substitute decision-making by a guardian and conservator. *In re Conservatorship of Brady*, 607 N.W.2d 781, 784 (Minn. 2000). What is in the heirs' "best interests" is a discretionary decision. *See generally id.* ("the district court's determination of what is in the conservatee's best interests is an ultimate issue deduced from other facts in the record"). And, at common law, Minnesota held a court should exercise its discretion to determine the best interests of the protected spouse in deciding whether to approve an elective share petition. *Robinson's Estate*, 88 Minn. at 412, 93 N.W. at 317.

A court's consideration of the best interests of the protected person's heirs is not accomplished by focusing on pure financial gain. As the Florida Court of Appeals has explained, "[b]est interest is not dependent upon a mere monetary calculation of whether electing to take against the Will yields more than taking under the Will." *In re Estate of Pearson*, 192 So. 2d 89, 91 (Fla. Dist. Ct. App. 1966).

Just as a surviving spouse may waive her election rights in order to honor a deceased spouse's wishes, the best interests of a surviving spouse's heirs do not support increasing the protected spouse's estate where family harmony is destroyed by the elective share petition. *Robinson's Estate*, 88 Minn. at 410, 93 N.W.2d at 316 (surviving spouse may decide whether to elect against will based on "family arrangements"). By adopting a second consideration for the court's review before an elective share petition is

approved, the Legislature has more closely approximated the factors that a surviving spouse is able to and often does consider, which the protected spouse is not. After all, the right of election “is given to her, and not to those who may inherit from her.” *Id.*

The Legislature’s decision to use a dual-factor analysis underscores the importance of court discretion in approving the filing an elective share petition. The Legislature could have made it mandatory to file an elective share petition whenever it was in the pecuniary interest of the surviving protected spouse or her heirs. The current statutory scheme, however, does not make court approval a mathematical exercise and instead articulates two discretionary factors before approval of an elective share petition. This allows the court to greater protect the best interests of the protected spouse.

### **3. The Referee’s Analysis Appears To Accept The Rational Basis Underlying Section 524.2-212.**

The referee disagreed with the means adopted by the Legislature but did not challenge the validity of the Legislature’s goals. For example, regarding the Legislature’s requirement that a court consider the financial needs of the protected person, the referee stated that “[i]f the legislature was truly concerned about preventing personal gain, the legislature would have required courts to approve *all* surviving spouses’ election.” (Add.6, emphasis original.) The referee made nearly the same statement regarding the Legislature’s requirement that a court consider the best interests of the protected person’s heirs. (Add.5.) While both statements are somewhat ambiguous, the referee ultimately recognizes that a rational basis supports the two purposes underlying section 524.2-212 in stating that “Minnesota may legitimately

attempt to achieve either of the purposes discussed above [*i.e.*, benefit to the protected person's heirs and financial need of the protected person].” (Add.6.)

The referee therefore challenged not the rational basis supporting Minn. Stat. § 524.2-212 but the Legislature's decision to accomplish these purposes only for protected spouses and not for all spouses. The referee claimed that Minnesota “must enact across-the-board legislation rather than legislation impermissibly targeting spouses who are protected persons.” (*Id.*) The referee's “all or nothing” position fails to consider the state's legitimate interest in protecting our most vulnerable citizens particularly when disposition of their financial or property interests is at stake. The Legislature has reasonably determined that appointment of a conservator is not sufficient protection for those interests and court review and approval is a necessary additional step not only for elective share petitions but also for many other conservator decisions. Minn. Stat. § 524.5-411.

At bottom, the referee's analysis reflects his disagreement with the Legislature's decision to require court oversight of a conservator's decision to file an elective share petition on behalf of the protected person. Yet it is not a court's role to second-guess the public policy decisions of the Legislature. *See, e.g., Nelson v. Productive Alts., Inc.*, 715 N.W.2d 452, 457 n.5 (Minn. 2006) (“this court has generally been reluctant to undertake the task of determining public policy since this role is usually better performed by the legislature”); *Haskin v. Ne. Airways, Inc.*, 266 Minn. 210, 216, 123 N.W.2d 81, 86 (1963) (“The strong considerations of public policy which would justify a change in the law in this regard are for the legislature and not this court to evaluate.”).

Because important and rational policy objectives are achieved by court review of the elective share petition before it is filed by the conservator, the Court should conclude that section 524.2-212 passes muster under *State v. Russell*'s three-pronged analysis for Minnesota's Equal Protection Clause.

## CONCLUSION

This Court should reverse the referee's decision and reject ADMI's facial challenge to Minn. Stat. § 524.2-212 under Minnesota's Equal Protection Clause. First, equal protection permits the state to use meaningful classifications and, in all respects relevant to this appeal, protected spouses are not similarly situated to other spouses. Simply put, a protected spouse is not able to manage property, business affairs, or an estate, therefore, the challenged statute does not create an impermissible classification. If this Court agrees, it should reverse on this basis alone because this is a threshold determination that demonstrates the statute fully satisfies equal protection.

Second, section 524.2-212 meets the three-pronged rational basis test under *State v. Russell*. The two-factor analysis required by Minn. Stat. § 524.2-212 is relevant and directly connected to the statute's purpose because a court considers whether adequate financial support already exists for the protected person and whether election is in the best interests of the "natural bounty" of the protected person's affections. Both factors are discretionary and necessary so that the court may more closely approximate the decision that a protected spouse would have made – if legally competent to do so. A rational surviving spouse may forgo an elective share petition in order to honor a deceased spouse's testamentary wishes or to promote family harmony. In contrast, a conservator may automatically file an elective share petition to increase the protected person's estate, which is managed by the conservator. By requiring court oversight of a conservator's decision, the Legislature legitimately achieves its stated purpose of

protecting a vulnerable surviving spouse and ensuring that the elective share petition is not pursued with an improper financial motive to the detriment of decedent's intent.

Dated: September 18, 2013.

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant, certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word Word 2003 and contains 8,506 words, including headings, footnotes and quotations.

Dated: September 18, 2013.

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