

NO. A06-1500

State of Minnesota
In Court of Appeals

GUARDIANSHIP OF JEAN A. WELLS

Nancy J. Frey,

Appellant,

and

Diane L. Vandermolen, Jean A. Wells, and
Frank Sutherland/Sutherland Fiduciary, Inc.,

Respondents.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

- I. WHETHER THE DISTRICT COURT FAILED AS A MATTER OF LAW TO CORRECTLY INTERPRET MINNESOTA STATUTES SECTION 524.5-309 TO PROVIDE FOR THE PRESUMPTION THAT NANCY J. FREY BE APPOINTED AS HER MOTHER'S GUARDIAN?**

District Court Ruling

The District Court ruled that prior case law gave him the discretion to determine the best interests of respondent Jean Wells. The District Court did not assign weight to the priorities in the statute.

Key Legal Authority

Minnesota Statutes § 524.5-309.

Minnesota Statutes § 145C.

- II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN APPOINTING A THIRD-PARTY STRANGER AS GUARDIAN WHEN IT IS UNDISPUTED THAT A FAMILY MEMBER, NAMED IN A HEALTH CARE DIRECTIVE, IS A SUITABLE GUARDIAN?**

District Court Ruling

The District Court denied Appellant Nancy Frey's appointment as guardian because it perceived that animosity between Frey and her sister, Diane Vandermolen, had the potential to cause aggravation to Wells should it escalate.

Key Legal Authority

Guardianship of Kowalski, 478 N.W.2d 790, 792-93 (Minn. Ct. App. 1991), review denied Feb. 10, 1992.

STATEMENT OF THE CASE

Nancy J. Frey ("Frey") filed in the Probate Division of the Washington County District Court, Tenth Minnesota Judicial District (the "Court"), a petition dated September 29, 2005, seeking to be appointed guardian for her mother Jean A. Wells ("Jean Wells" or "Wells"). (Appellant's Appendix ("A.A.") at 8-10.) The matter was assigned to the Honorable B. William Ekstrum.

The Court scheduled a hearing on Frey's petition for November 22, 2005. (A.A. at 11.) Less than a week before the hearing, Diane L. Vandermolen ("Vandermolen"), Wells' other daughter, filed written objections dated November 16, 2005. (A.A. at 11-16.) Due to Vandermolen's objections, the hearing on Frey's petition was continued to February 21, 2006. (A.A. at 17.)

Shortly before the hearing, on or about February 16, 2006, Vandermolen filed a petition dated February 15, 2006. (A.A. at 18-21.) That petition requested the Court appoint Vandermolen as guardian and conservator. (A.A. at 22.) The Court found that Vandermolen's petition was untimely, but allowed her to proceed anyway on the guardianship issues. (Transcript of Feb. 21, 2006 Hearing (hereafter "Tr.") at 40.)

By its order dated March 17, 2006, the Court denied Frey's petition to be appointed guardian. (A.A. at 45-49.) Although neither Vandermolen nor Frey sought the appointment of a third-party guardian, the Court appointed Frank Sutherland/Sutherland Fiduciary, Inc. as guardian. (A.A. at 48.)

On March 24, 2006, Frey served notice of filing the order to interested persons. (A.A. at 50.) On April 24, 2006, Frey brought a Motion for Amended Findings or New Trial. The Court scheduled a hearing on Frey's motion for May 23, 2006. (A.A. at 54-55.) By its order dated

July 10, 2006, the Court denied Frey's motion for a new trial and denied her motion for amended findings except on the sole issue of the qualifications and fitness of Frank Sutherland/Sutherland Fiduciary, Inc. as guardian for Wells. (A.A. at 88-93.) This appeal follows.

STATEMENT OF THE FACTS

Background

Jean A. Wells ("Wells" or "Jean Wells") is an 84-year-old widow suffering from dementia as a result of Alzheimer's Disease. (A.A. at 12: Physician's Statement; Tr. at 6.) She now resides in the memory care unit of Boutwell's Landing long-term care facility in Stillwater. (A.A. at 8: Frey's Petition ¶ 2; Tr. at 6.) She and her late husband Wallace Wells ("Wallace Wells") raised two surviving children in the Twin Cities: Nancy and Diane, who are now adults with their own families. (Tr. at 26-29, 67.) Wallace Wells died last year on August 8th. (Tr. at 7, 44.) Nancy, now known as Nancy J. Frey ("Frey"), still resides in the Twin Cities area north of Stillwater in Hugo. (Tr. at 5.) Diane, now known as Diane L. Vandermolen ("Vandermolen"), lives on the East Coast in New Jersey. (Tr. at 41.)

The Hearing

Before the hearing, a Court Visitor met with Jean Wells and concluded she lacked capacity to voice an opinion on who should be appointed. (A.A. at 13: Visitor's Report.)

Wells did not attend the hearing. (Tr. at 4.) Wells was represented at the hearing by a court-appointed attorney, Richard Ilkka ("Ilkka"), but no guardian ad litem was appointed to investigate her best interests. (Id.) Ilkka reported to the Court that Wells' appearance at the hearing was excused by a statement from Wells' physician. (Id.) Ilkka did not question any of the witnesses nor did he call any witnesses. (Tr. at 18, 24, 40, 73, 80-81.)

At the hearing, it was assumed that Wells was incapacitated. (A.A. at 12, 13: Physician's Statement, Visitor's Report; Tr. at 6.) The sole issue for the Court was whether to appoint Frey or Vandermolen to be guardian. (A.A. at 10, 14-15, 22: Frey's Petition ¶ 10, Objections, Vandermolen's Petition ¶ 11; Tr. at 14, 58.)

The Court received testimony from Frey, (Tr. at 5-24); Ronald Gerck, a 27-year friend of Wallace and Jean Wells, (Tr. at 25-40); Vandermolen, (Tr. at 41-72); and Vandermolen's husband, Tony Vandermolen, (Tr. at 73-80). No medical experts testified at the hearing.

It was undisputed at the hearing that:

As Wallace and Jean Wells aged, Frey assisted them by taking them to doctors' appointments, buying them groceries, cooking meals, cleaning their house, filling up their car, trimming their trees, mowing their lawn, and shoveling their walk. (Tr. at 7, 9-10.) Frey gave her father a kidney ten years ago. (Tr. at 10.)

Jean Wells asked Frey to be responsible for her if she ever became incapacitated. (Tr. at 7-8.)

Wallace Wells asked Frey to be responsible for Jean Wells if she ever became incapacitated. (Tr. at 7.)

In early 2005 Wallace Wells retained a lawyer with respect to his and Jean Wells' plans for their estate and other affairs. (Tr. at 15.) Jean Wells, on March 14, 2005, executed a Health Care Directive naming Frey as her health care agent to make medical and abode decisions for her if she was unable to do so for herself. (A.A. at 1; Tr. at 9.) Vandermolen was named an alternate if Frey was unable or unwilling to serve. (Id.)

In the months before Wallace Wells died, Frey cared for her mother in Frey's home in Hugo. (Tr. at 10, 43.)

Frey was appointed trustee of a trust for Jean Wells' benefit and continues to serve in that capacity. (Tr. at 13, 17-18.)

After Wallace Wells died, Jean Wells was admitted to Boutwell's Landing, which is close to Frey's home in Hugo, on August 19, 2006. (Tr. at 10.) Wallace Wells was still alive when the decision was made to admit Jean Wells to Boutwell's Landing. (Tr. at 53.)

Both Frey and Vandermolén visited Boutwell's Landing before their mother was admitted there. (Tr. at 11, 53.)

Between August 2005 and the hearing in February 2006, Frey visited her mother more than 100 times, brought her treats and items that she needed. (Tr. at 10, 11.) Frey bought all her medicine, took her to doctors' appointments, regularly met with nursing staff and attended care conferences. (Tr. at 10, 12-13.)

The only independent witness at the hearing, Ronald Gerk ("Gerk"), testified that Wallace and Jean Wells looked to Frey to take care of their affairs. (Tr. at 30-31.) He testified that Frey was excellent as a caregiver because she has a positive attitude, is very well organized and disciplined, works very hard and is "smart at things." (Id.) He testified that both Wallace and Jean Wells wanted Frey to handle each of their affairs and had wanted that for many years. (Id.)

No testimony was taken that Frey jeopardized her mother's care in anyway. To the contrary, Vandermolén admitted that Frey would be qualified as guardian for their mother. (A.A. at 29, 69: Young's Correspondence, Opposition to Motion.) Counsel for Vandermolén stated that there was no concern that Frey would have taken any steps as guardian which would have jeopardized Wells' well-being. (Transcript of May 23, 2006 Hearing at 9.)

There was some testimony at the hearing about *Vandermolén's* care for her mother, including the allegation that she had taken her mother to New Jersey and had left her alone, despite her dementia, on a beach. (Tr. at 20-24, 32-34.) Other testimony concerned *Vandermolén* leaving her mother in a parking lot while she did some shopping. (Tr. at 34-35.) There is no similar testimony about improper care by *Frey*. Gerk explained that *Vandermolén* had exhibited "many instances of mental and emotional problems" over the years. (Tr. at 29). He said that to the extent there was a conflict in the relationship between Frey and Vandermolén

it is “basically one sided. Nancy [Frey] has a need to protect her mother as she stated here.” (Tr. at 30.)

After the hearing, Vandermolen, Frey and Wells, through Ilkka, submitted memoranda to the Court on the issue of who was to be appointed guardian. (A.A. at 23-44.)

Frey argued that she should be appointed because (1) she was appointed by Wells through a Health Care Directive, (2) the only testimony at the hearing, from Gerk and from Frey, was that Wells wanted Frey to serve in that capacity; (3) she lives near Wells, (4) she is Wells’ adult child, (5) Wells lived with Frey from December 2004 until August 2005, (6) Frey was already handling her mother’s affairs, and (7) there was no evidence that Frey was unsuitable as a guardian. (A.A. at 35-40: Mason’s Correspondence.)

Vandermolen argued that Frey and she had a “strained” relationship. (A.A. at 32: Proposed Findings of Fact ¶ 8.) As a result, she said Frey had not provided her with information about Wells or allowed her input into Wells’ care. (Id.) Vandermolen argued that it is not in Wells’ best interests “that either of the daughters exclude the other in decisions concerning Wells or be in a position to exclude the other in such decision-making.” (A.A. at 33: Proposed Conclusions of Law ¶ 6.) Vandermolen did not argue that her mother’s wellbeing had been jeopardized by anything Frey had done or would do or that Frey had a strained relationship with Wells. To the contrary, Vandermolen’s proposed Conclusions of Law state: “Both Frey and Vandermolen are suitable guardians of Wells.” (A.A. at 32: Proposed Conclusions of Law ¶ 2.)

Without prior notice to the other parties, Ilkka recommended that an unrelated third-party, Frank Sutherland (“Sutherland”), be appointed as guardian. (A.A. at 27: Proposed Order ¶ 1.) Ilkka gave no indication that he had spoken with Wells or done an independent investigation to determine Wells’ wishes. There was no testimony on Mr. Sutherland. Ilkka’s

recommendation was contrary to Wells' express wishes as set forth in the Health Care Directive and in the testimony of Gerk and of Frey, which was undisputed at the hearing. He relied on testimony that he contended showed Frey had withheld medical information from Vandermolen, (A.A. at 26: Proposed Findings of Facts ¶ 8; Tr. at 54-57), and that Frey's husband, Brett Frey, had been forced to call the police when Vandermolen would not leave Frey's residence upon request, (A.A. at 26: Proposed Findings of Fact ¶ 9; Tr. at 22). Ilkka did not contend that any action by Frey had jeopardized her mother's well-being. He argued merely that the conflict between the two sisters "is not in the best interest of the Respondent and *has the potential* to cause Respondent *aggravation and anxiety should it escalate.*" (A.A. at 26: Proposed Findings of Fact ¶ 9 (emphasis added).) Since there was no testimony by medical professionals, Ilkka's statements about the sisters' relationship having the potential to cause aggravation and anxiety is argument rather than fact.

The Court's Decision

In its decision, the District Court observed that Frey "regularly visits the Respondent and has been involved in health care issues regarding the Respondent." (A.A. at 46: Findings of Fact ¶ 8.) He observed that Vandermolen, who resides in New Jersey, visited Wells "less frequently than Nancy J. Frey and has not been involved in health care issues regarding Respondent." (A.A. at 46-47: Findings of Fact ¶¶ 7-8.)

The Court made no findings that Frey's care for her mother had been inadequate in any way. The Court adopted Ilkka's findings almost verbatim. (A.A. at 26, 46-47: Proposed Findings of Fact ¶¶ 8-9, Findings of Fact ¶¶ 8-9.) Thus, the Court found that it would not be in Wells' best interest that Frey be her guardian because there was "animosity" between the two sisters that was "long-standing and is not likely to dissipate in the indefinite future." (A.A. at 47:

Findings of Fact ¶ 9.) As to the harm to Wells, the Court stated only that the conflict between the two sisters, if it continued, had “the *potential* to cause the Respondent aggravation *should it escalate*.” (*Id.* (emphasis added).) The Court, therefore, appointed a third-party stranger who did not appear at the hearing and about whom no testimony had been taken. (A.A. at 48: Order ¶ 1.)

Following the decision, Frey asked the Court for Amended Findings or New Trial. (A.A. at 51-52: Motion.) In part, she argued that the Court failed to apply Minnesota Statute Section 524.5-309(a), which establishes priorities for selection of a guardian. (A.A. at 58-60: Frey’s Memorandum.) She argued that a sufficient reason must exist for the Court to ignore the statutory priorities or the priorities are rendered meaningless. (*Id.*) While Vandermolen opposed Frey’s Motion, she reiterated that she “does not contend that Frey would take poor physical care of Wells. Vandermolen believes that both she and Frey are suitable as guardians.” (A.A. at 69: Opposition to Motion.) Thus, it was undisputed that Frey would be suitable as a guardian.

The District Court denied Frey’s Motion. (A.A. at 89-90: Order ¶¶ 1-2.) The Court’s Memorandum states that the statute gives the District Court discretion to appoint a non-family member when there is a family dispute. (A.A. at 91.) The District Court relied upon three cases, all of which predate the Minnesota Uniform Guardianship and Protective Proceedings Act – In re Guardianship of Strom, 205 Minn. 399, 405, 286 N.W. 245, 249 (Minn. 1939), In re Conservatorship of Edwards, 390 N.W.2d 300, 305 (Minn. Ct. App. 1986), and Schmidt v. Hebeisen, 347 N.W.2d 62, 64 (Minn. Ct. App. 1984), in which the courts upheld the appointment of a non-family member where the ward’s well-being would be jeopardized by appointment of a family member. (*Id.*) None of these cases involved a Health Care Directive. The District Court also cited to this Court’s recent unpublished decision in In re Limited Guardianship of McDonald, in which the Court overruled the presumptions in the Health Care Directives Act,

after respondent's physician testified the proposed guardian, who had been named in a Health Care Directive, "is not able to understand and manage [McDonald's] condition." No. A05-1647, 2006 WL 1806364, *3 (Minn. Ct. App. 2006) (noting the physician's testimony characterizing the proposed guardian as "paranoid and suspicious, angry and combative, prone to rant and rave about past injustices, and unable to reasonably communicate about [McDonald's] care."). (Id.)

ARGUMENT

This case is about self-determination. It is undisputed that Wells expressed her preference that her daughter, Nancy J. Frey, serve as her guardian, should that ever become necessary. The most formal expression of Wells' preference was through her appointment of Frey to be her health care agent, under the Minnesota Health Care Directives Act, which operates as a matter of law to be a nomination to serve as guardian. Here, however, the District Court has thwarted Wells' expressed preference by substituting its judgment for that of Wells. The District Court erroneously concluded that "longstanding animosity" between Frey and Vandermolen was sufficient reason to ignore Wells' preferences.

The District Court's decision, if permitted to stand, eviscerates the Minnesota Health Care Directives Act. It means that no parent in Minnesota can nominate a child to serve as guardian as long as some other child or family member could contest the appointment at any future time. While the District Court's goal that all family members get along is laudable, neither the Minnesota United Guardianship and Protective Proceedings Act nor the Health Care Directives Act lists lack of family harmony as a reason for ignoring a principal's nomination, through a formal legal document, of a guardian. Unless this Court reverses the District Judge, the Health Care Directives Act will cease to have meaning for any Minnesota families whose members disagree. Such a decision would permit rogue children to thwart the wishes of their

parents simply by creating a dispute with their siblings. The Legislature did not require family harmony as a prerequisite for a Health Care Directive and nor should this Court.

I. WHETHER THE DISTRICT COURT FAILED AS A MATTER OF LAW TO CORRECTLY INTERPRET MINNESOTA STATUTES SECTION 524.5-309 TO PROVIDE FOR THE PRESUMPTION THAT NANCY J. FREY BE APPOINTED AS HER MOTHER'S GUARDIAN?

The Minnesota Legislature has expressed a strong preference, through the Health Care Directives Act and through the Minnesota Uniform Guardianship and Protective Proceedings Act, that individuals shall have the power and ability to select a person to make health care decisions on their behalf, should they become incapacitated. Minn. Stat. §§ 145C.-1 et seq.; Minn. Stat. § 524.5-309. The District Court, however, misconstrued these priorities, holding instead that the statute awarded it essentially unfettered discretion to determine the best interest of the proposed ward. This Court reviews a district court's statutory interpretation *de novo*. In re Conservatorship of Foster, 547 N.W.2d 81, 84-85 (Minn. 1996). Because the District Court has ignored the plain language of the statute, the Court's decision denying the appointment of Frey should be reversed.

As applied in this case, the strong presumption that an individual has the right to make decisions about his or her own health care is rooted in the statutes. Minnesota Statutes Section 524.5-309(a) emphasizes that a person who has been selected by a principal as a health care agent shall receive priority in the appointment of a guardian. The statute was enacted in 2003 when Minnesota adopted the Uniform Guardianship and Protective Proceedings Act. See 2003, Minn. Laws, ch. 12, pt. 3, § 33. The statute reads as follows:

[T]he court, in appointing a guardian, *shall consider* persons otherwise qualified *in the following order of priority*:

- (1) a guardian, other than a temporary or emergency guardian, currently acting for the respondent in this state or elsewhere;

(2) an agent appointed by the respondent under a health care directive pursuant to chapter 145C;

(3) the spouse of the respondent or a person nominated by will or other signed writing executed in the same manner as a health care directive pursuant to chapter 145C of a deceased spouse;

(4) an adult child of the respondent;

(5) a parent of the respondent, or an individual nominated by will or other signed writing executed in the same manner as a health care directive pursuant to chapter 145C of a deceased parent; and

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

Minn. Stat. § 524.5-309(a) (emphasis added).

The statute also allows the Court to decline to appoint a person having priority, or to appoint a person having lower priority or no priority, if it determines such an appointment to be in the best interest of the respondent. Minn. Stat. § 524.5-309(b). The Legislature did not define the best interests nor did it specify what type of condition would justify ignoring the priorities in the statute.

The statute establishes that, with the exception of a guardian who has already been appointed, an individual named as a health care agent pursuant to Chapter 145C shall have the highest priority in the Court's consideration. Under the Health Care Directives Act, a principal is permitted to appoint another person to make health care decisions for him or her in a period of incapacity. The statute provides that unless the principal states otherwise, a Health Care Directive, by itself, is considered a nomination of a guardian. Minn. Stat. §§ 145C.07, subd. 2; 524.5-309(a)(2). Thus, the Legislature demonstrated its strong preference that an individual's selection of an agent for purposes of health decisions not be overlooked or easily thwarted.

The Health Care Directives Act provides a statutory presumption. Under it, the person appointed to be a health care agent is “**presumed** to be acting in good faith, **absent clear and convincing evidence to the contrary.**” Minn. Stat. § 145C.10(c) (emphasis added). The statute defines “good faith” as meaning “**acting in the best interests of the principal.**” Minn. Stat. § 145C.01, subd.1(a). Thus, under the Health Care Directive statute, a health care agent is presumed to be acting in the best interest of the principal, absent clear and convincing evidence to the contrary.

Of the six priorities for appointment set forth in the statute, overcoming the presumption of appointing a respondent’s duly appointed health care agent therefore requires a greater showing than the other priorities with the exception of a guardian who has already been appointed. Whereas the other priorities rest on the inherent relationship with or dependence upon another, only by appointing a health care agent under the second priority does the respondent *affirmatively and directly act* in nominating his or her guardian. See Minn. Stat. § 524.5-309(a); Minn. Stat. § 145C.07, subd. 2. Acts of self determination, particularly as they relate to health care, have long been protected as liberty interests under the U.S. Constitution. See *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S. Ct. 1000, 1001 (1891) (stating “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”). Further, under the Minnesota Patients’ Bill of Rights, every resident shall have the right to participate in the planning of his or her health care, *including the right to include a chosen representative.* See Minn. Stat. § 144.651, subd. 10(a) (emphasis added); see also *In re Guardianship of Kowalski*,

382 N.W.2d 861, 865 (Minn. Ct. App. 1986) (“Preference of the ward is an important factor.”), review denied (Minn. 1986).

In this case, the District Court erred in its interpretation of the statute because the Court concluded that it was vested with discretion to determine best interests on its own, without regard to the statutory scheme listing six priorities or the cross-referenced presumption in the Health Care Directives Act. The two statutes, each separately, require the District Court to make findings beyond simply substituting its judgment for the judgment of a principal who designated a health care agent. With regard to the Health Care Directives Act, the District Court was required to follow the statutory presumption that Frey was acting in the best interests of her mother, unless the District Court found clear and convincing evidence to the contrary. With regard to the Uniform Guardianship and Protective Proceedings Act, the statute does not specify the quantum of evidence necessary to defeat the statutory priorities. However, the Legislature, by listing the six priorities, intended Courts to defer to them, otherwise there would be no purpose to listing the six priorities at all.

None of the decisions cited by the Court for the proposition that complete discretion is vested with the district courts supports the notion that the Court may ignore the presumption under the Health Care Directives Act or the priorities under the Uniform Guardianship and Protective Proceedings Act. (See A.A. at 91-92.) Of the four decisions the District Court cited, three predate both the Health Care Directives Act’s passage in 1993 and the Uniform Guardianship and Protective Proceedings Act’s passage in 2003. See In re Guardianship of Strom, 205 Minn. 399, 405, 286 N.W. 245, 249 (Minn. 1939), In re Conservatorship of Edwards, 390 N.W.2d 300, 305 (Minn. Ct. App. 1986); Schmidt v. Hebeisen, 347 N.W.2d 62, 64 (Minn.

Ct. App. 1984).¹ Thus, they provide no guidance on the limits of discretion in the context of the two statutes that control here.

The fourth decision cited by the District Court, In re Limited Guardianship of McDonald, No. A05-1647, 2006 WL 1806364, (Minn. Ct. App. June 29, 2006), does not address the interrelationship between the Health Care Directives Act and the Uniform Guardianship and Protective Proceedings Act nor does it discuss how the Uniform Guardianship and Protective Proceedings Act limits the District Court's discretion. The McDonald case, however, demonstrates the type of misconduct that the statutes require for overturning a respondent's selection of a guardian through a Health Care Directive. In McDonald, the Court found:

(1) McDonald lives in Rochester, Minnesota and the proposed guardian lives in Walnut Creek, California, making it impossible for him to accompany McDonald to medical appointments, attend care conferences, oversee care providers and otherwise timely respond to emergency situations. *Here, Frey and Wells live in the Twin Cities within minutes of each other, and prior to the Court's decision denying her appointment, Frey responsibly attended to her mother's needs.*

(2) McDonald's physician testified that the proposed guardian was unable to understand and manage McDonald's condition and treatment. *Here, the undisputed evidence was that Frey was proficient at handling her mother's condition and treatment.*

(3) McDonald's physician testified that the proposed guardian was "paranoid and suspicious, angry and combative, prone to rant and rave about past injustices, and unable to reasonably communicate to reasonably communicate regarding McDonald's care." *Here, the undisputed evidence is that Frey has always behaved professionally.*

¹ As discussed below in Section II, all of these cases are factually distinguishable. In none of the cases had the respondent nominated a family member to serve as guardian. Thus, to the extent that the courts in these cases upheld appointment of a non-family member where family members could not agree, the courts lacked information on the respondent's preferences, as is the case here.

(4) An Olmsted County adult-protection social worker testified that on two occasions McDonald's proposed guardian "yelled and screamed at her and once hung up on her." *Here, there was no testimony that Frey acted unprofessionally.*

(5) The Olmsted County adult-protection social worker testified the proposed guardian wanted to move McDonald from an assisted-living situation where she was doing well to a condominium without being able to articulate the steps he would take to facilitate such a move. *Here, the undisputed testimony is that Frey, with advice of family members, successfully moved her mother into Boutwells' Landing.*

(6) The Olmsted County adult-protection worker testified that the proposed guardian showed no understanding whether McDonald would be able to afford the \$20,000 per month charge for 24-hour nursing care if she moved back to the condominium. *Here, there is no suggestion Frey lacks an understanding of her mother's financial circumstances.*

(7) The Olmsted County adult-protection worker testified she was concerned that when McDonald was living in the condominium the proposed ward wanted to move him to an assisted living arrangement, and now that McDonald was living in assisted living, he wanted to move McDonald back in the condominium. *Here, there was no evidence the Frey was inconsistent in her handling of her mother's important business.*

Although this is not an exhaustive list of the reasons the Court gave for upholding the appointment of a third party as a limited guardian, it demonstrates that, while not specifically addressing the standards in the Health Care Directives Act and the Uniform Guardianship and Protective Proceedings Act, the Court followed the standards from those statutes. Given the proposed guardian's conduct and attitude, the proposed guardian's failure to understand the medical issues, his lack of judgment and responsibility, his physical distance from the respondent, and the other factors, there was clear and convincing evidence that he was not operating in the respondent's best interests.

Virtually no Minnesota cases – both pre- and post-statute – have favored the appointment of a third party stranger over a family member merely because of a family squabble, without evidence that the proposed family member’s care would in some way be inadequate. For example, in In re Iwen, No. CX -02-1777, 2003 WL 21007240 (Minn. Ct. App. May 6, 2003), the family member failed to follow the respondent’s doctor’s directives, failed to keep the respondent’s prescriptions filled, and failed to inform the respondent’s doctors when she failed to respond to the dosage.

Similarly, in In re Guardianship and Conservatorship of Rhoda, No. A05-657, 2006 WL 771469 (Minn. Ct. App. March 28, 2006), the family member intended to move the respondent from a nursing home to an apartment, which the Court concluded “poses serious risks to his wellbeing,” including a shortage of available nursing staff that could result in him being hospitalized “clearly to his detriment.” Id. at *2-3 (the family member had also alienated the respondent’s nurses to the point they would resign if she were appointed guardian); see also Schmidt v. Hebeisen, 347 N.W.2d 62, 64 (Minn. Ct. App. 1984) (the Court had “a reasonable basis to believe” that the sole family member who was nominated to serve as guardian “had misappropriated funds belonging to the ward.”)²

Decisions in other states are consistent with the interpretation that the priorities in the Uniform Guardianship and Protective Proceedings Act can be overridden only by a showing that the proposed guardian will jeopardize the respondent’s well-being. Even in the absence of presumptions in the Health Care Directives Act, courts in other states have required such a showing before overriding a principal’s selection of an individual to be guardian. For example, in Estate of Gustafson, 308 A.D.2d 305, 307 (N.Y. App. Div. 2003), the Court stated that “[t]he

² There are no allegations that Frey had done any of these things.

established preference for a relative may be overridden by a showing that the proposed guardian-relative **has rendered inadequate care** to the [proposed ward], **has interest adverse** to the [proposed ward] or **is otherwise unsuitable** to exercise the powers necessary to assist the [proposed ward].” See also Estate of Salley, 742 So.2d 268, 271 (Fla. Dist. Ct. App. 1997) (stating that “[w]here a ward’s preference as to the appointment of a guardian is capable of being known, that **intent is the polestar to guide probate judges** in the appointment of their guardian”) (emphasis added); Peter G. Guthrie, Annotation, Priority and Preference in Appointment of Conservator or Guardian for an Incompetent, 65 A.L.R.3d 991, 998 (1975) (stating that “kinship and familial ties are regarded by the courts with particular partiality when they find it necessary to select a guardian . . . [and] such will not be disregarded **except on strong grounds**, the presumption being that one of the next of kin or other relative by blood or marriage . . . is likely to be more solicitous than a stranger would be of the welfare of the incompetent”) (emphasis added).

This is also consistent with the purposes of the Health Care Directive statute, in which the Legislature has given effect to the preferences of the principal absent clear and convincing evidence that the principal has nominated someone not in the principal’s best interest. The commentary to the Uniform Health-Care Decisions Act emphasizes that “in absence of cause,” the uniform statute provides the health care agent will likely be appointed guardian. The mere nomination of the agent, under the Act, “will reduce the likelihood that a guardianship could be used to thwart the agent’s authority.” Unif. Health-Care Decisions Act § 2(g), cmt. (1993).

Here, the District Court noted that it was undisputed that Frey qualifies under priorities (2) and (4) of the Minnesota Uniform Guardianship and Protection Proceedings Act because

Frey was named by Wells in a Health Care Directive and is Wells' adult child.³ There was also no dispute that Frey qualified under priority (6) as Wells had lived with Frey for more than six months before moving to Boutwells' Landing. There was no evidence that the quality of the care that Frey provided her mother during the time, or at any time, was anything other than perfect. Having recognized that Frey qualified under multiple statutory priorities, including under the priority cross-referencing the Health Care Directive statute, the Court erred by assigning no weight to the priorities. The District Court relied entirely on the finding that there was animosity between Frey and Vandermolen, and the Court's speculation it had "*the potential* to cause the Respondent aggravation *should it escalate*."

The District Court's speculation falls far short of establishing, by clear and convincing evidence, that Frey was not acting in her mother's best interest. Such a finding is necessary to overcome the presumption in the Health Care Directives Act. Indeed, there are no findings of inadequate care to Wells by Frey, no findings that Frey's interests were adverse to Wells, and no findings that Frey was unable or incapable of discharging the duties as guardian. To the contrary, the undisputed testimony was that Frey was attentive to her mother, regularly brought her to the doctor, helped her with clothing, and other familial chores. The only person to submit objections to Frey's appointment, Vandermolen, conceded on multiple occasions that she "does not contend that Frey would take poor physical care of Wells. Vandermolen believes that both she and Frey are suitable as guardians." (A.A. at 69.) Therefore, without any finding or evidence to override the presumption of Frey as guardian for her mother, Frey should have been appointed as guardian under Minnesota law.

³ The statute also reflects the Legislature's strong preference for appointment of a family member over a third party stranger. See In re Dahmen's Guardianship, 192 Minn. 407, 410, 256 N.W. 891, 893 (1934) (providing that it is "generally conceded that an appointment which has for its object and purpose the status quo of the family relation is of great importance").

The statute provides no support for the District Court's interpretation that, in the face of a health care directive and the other priorities, the Court can simply appoint a third-party stranger because he is unhappy that two sisters cannot get along and there is some possible chance that their dispute – which may continue whether or not either sister is appointed guardian – may cause unspecified future aggravation. This Court should correctly interpret the statute to carry out its plain meaning and should reverse the District Court based on the undisputed evidence.

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN APPOINTING A THIRD-PARTY STRANGER AS GUARDIAN WHEN IT IS UNDISPUTED THAT A FAMILY MEMBER, NAMED IN A HEALTH CARE DIRECTIVE, IS A SUITABLE GUARDIAN?

Regardless of the legal standard set out in the statute, the District Court abused its discretion in appointing a third-party stranger to act as guardian when it was undisputed that a family member, who was willing to serve, was suitable for the role. The undisputed evidence demonstrated that Frey had long taken care of her mother in exemplary fashion. There was zero testimony that Frey had jeopardized her mother's well-being. The only independent witness had praised Frey's responsible and loving treatment of her mother. The only party to submit a petition opposing Frey had admitted that Frey was a suitable guardian who would not take poor care of her mother. On this record, it was an abuse of discretion to appoint a third-party stranger based on speculation that longstanding animosity between two sisters might result in nonspecific aggravation.

As set forth above, the Minnesota Uniform Guardianship and Protective Proceedings Act establishes the Legislature's priorities for selection of a guardian. With the exception of the first priority, which favors an already appointed guardian, all of the priorities favor individuals either directly or indirectly selected by the respondent, or favor family members. Priority (2) favors an individual selected by the respondent through a formal, legal document, a health care directive.

Priority (6) favors an adult with whom the respondent has lived for six months – in effect, an indirect way of determining the respondent’s preferences. Priorities (3), (4) and (5) favor family members or their designees. All these priorities favor individuals who are familiar with the respondent, know her preferences, and are able to carry out her wishes. None of the priorities favor third-party strangers who lack any such familiarity.

Even ignoring the priorities, however, under the straight “best interest” analysis which the District Court recited in its findings, Frey should have been appointed as her mother’s guardian. The District Court’s reliance on speculation about possible aggravation to appoint a stranger, given the undisputed facts in this case, amounts to abuse of discretion. In re Conservatorship of Foster, 547 N.W.2d 81, 84-85 (Minn. 1996) (abuse of discretion standard); see also In re Conservatorship of Brady, 607 N.W.2d 781, 784 (Minn. 2000) (providing that what is in the ward’s best interests is reviewed for an abuse of discretion).

The District Court provided no description of what standard it used to determine the best interest of Wells. By itself, the failure to explain the reasoning for its decision is a reversible error. In re Conservatorship of Lundgaard, 453 N.W.2d 58, 64 (Minn. Ct. App. 1990). Indeed, a statute that fails to provide standards for adjudicating health care decisions such as this would be constitutionally infirm. See O’Connor v. Donaldson, 422 U.S. 563, 583 (1979) (Burger, C.J. concurring) (stating that “an inevitable consequence of exercising the parens patriae power is that the ward’s personal freedom will be substantively restrained, whether a guardian is appointed to control his property, he is placed in the custody of a private third party, or committed to an institution. Thus, however the power is implemented, due process requires that it not be invoked indiscriminately”); In re Guardianship of Mikulanec, 356 N.W.2d 683, 689 (Minn. 1984) (when state action interferes with a fundamental right, such as that to control one’s

own person, “it cannot be upheld unless it is supported by sufficiently important state interest and is closely tailored to effectuate only those interests”) (quoting Zablocki v. Redhail, 434 U.S. 374, 388, 98 S. Ct. 673, 682 (1978)).

The “best interest” standard typically involves the weighing of burdens and benefits to the ward from an objective point of view. Sara Beth Richardson, Health Care Decision-Making: A Guardian’s Authority, Bifocal (ABA Commission on Law and Aging, Wash., D.C.), Summer 2003, at 1, 7. The Minnesota Uniform Guardianship and Protective Proceedings Act provides the six factors – emphasizing the respondent’s direct and indirectly stated preferences and family ties – to consider. Prior Minnesota law specified a slightly modified list of factors. While the prior statute has been replaced by the Uniform Guardianship and Protective Proceedings Act, its definition of “best interest” remains an instructive guidance. Under prior law, best interest included::

- (1) the reasonable preference of the ward, if the court determines the ward has sufficient capacity to express a preference;
- (2) the interaction between the proposed guardian and the ward; and
- (3) the interest and commitment of the proposed guardian in promoting the welfare of the ward and the proposed guardian’s ability to maintain a current understanding of the ward’s physical and mental status and needs. Welfare includes:
 - (i) food, clothing, shelter, and appropriate medical care;
 - (ii) social, emotional, religious, and recreational requirements; and
 - (iii) training, education, and rehabilitation.

Guardianship of Kowalski, 478 N.W.2d 790, 792-93 (Minn. Ct. App. 1991), review denied Feb. 10, 1992 (citing Minn. Stat. § 525.539, subd. 7, repealed by 2003, Minn. Laws, ch. 12, pt. 5, art. 2, § 8 when the Uniform Guardianship and Protective Proceedings Act was adopted in

Minnesota); see also H.C.S. v. Community Advocacy Project of Alaska, Inc., 42 P.2d 1093, 1099 (Ala. 2002) (stating that the “interests determination will require the court to take into account the closeness of the ward’s relationships to the existing and prospective guardians and conservators. This inquiry gives weight to the substantive values that apparently underlie the statutory priorities for appointing guardians and conservators.”). These factors continue to be appropriate to consider since they are instructive as to what is meant by “best interest.”

This Court, in prior cases, looked for evidence of harm to the respondent before affirming a district court’s decision to appoint a stranger over a family member. For example, In re Iwen, No. CX -02-1777, 2003 WL 21007240 (Minn. Ct. App. May 6, 2003), this Court cited:

- (1) the family member had improperly handled personal hygiene, nutrition and housecleaning (mice excrement was found on the floor and kitchen table, and in the bed of the respondent);
- (2) the respondent was afraid of the nominee,
- (3) the family member had intimidated the respondent’s health aids;
- (4) the family member had failed to follow the respondent’s doctor’s directives;
- (5) the family member had failed to keep the respondent’s medications filled or notify her physicians when she failed to respond to the dosage; and
- (6) there were allegations of that the family member had misappropriated large sums of money, including \$138,000 to purchase a home.

See also In re Guardianship and Conservatorship Rhoda, No. A05-657, 2006 WL 771469 (Minn. Ct. App. March 28, 2006) (the family member’s plan for the respondent “poses serious risks to his wellbeing”); Schmidt v. Hebeisen, 347 N.W.2d 62, 64 (Minn. Ct. App. 1984) (likely misappropriation of funds).

By contrast, where evidence is lacking that the family member will jeopardize the well-being of the respondent, this Court has reversed the appointment of a third-party guardian. In Guardianship of Kowalski, 478 N.W.2d 790, 792-93 (Minn. Ct. App. 1991), review denied Feb. 10, 1992, this Court reversed a District Court's appointment of a third-party guardian in favor of the respondent's longtime lesbian partner. The Court observed that Kowalski's parents and partner had longstanding animosity that resulted in the parents' steadfast opposition to the appointment of the partner. The trial court likened the conflict to "a family torn asunder into opposing camps." However, this Court reversed the district judge's appointment of a neutral because the evidence at the hearing demonstrated that Kowalski preferred her partner to be her guardian and her partner was suitable.⁴ If the same standard is applied here, Frey should be appointed.

All of the above factors for "best interest," as laid out in the prior statute, favor appointment of Frey:

1. As discussed above in the first argument, Wells expressed her preference for Frey in the Health Care Directive. Gerk verified Wells' preference in his testimony as did Frey. Neither of the other two witnesses – Vandermolen nor her husband – contested the testimony that Wells expressed a preference that Frey, a daughter who lives close by, serve as her guardian. Considering all the care and support Frey had previously provided to her parents, Wells' nomination of Frey as her guardian was natural and unsurprising.

The District Court found that the animosity between the two sisters was not new but was "longstanding." Thus, this animosity already existed when Wells signed the Health Care

⁴ The Court based its decision on the prior statute, which when "taken as a whole, the statute's enumerated factors direct that a guardian be someone who is preferred by the ward if possible." Id. at 793. Since the current statute is even more explicit, the result should be no different here.

Directive naming Frey as primary agent and when Wells told Frey and Gerk she wanted Frey to take care of her. As a result, in selecting one of two daughters – and in not selecting an independent, third-party – Wells made known her preference for Frey, despite whatever animosity existed. The District Court ignored the finding that the animosity was longstanding when overruling Wells’ wishes and the statutory priorities. The District Court abused its discretion by substituting its values for those of Wells. Under the best interest standard, the District Court had a duty to take into account Wells’ preferences – from her point of view.

2. All testimony about the interaction between Frey and Wells was positive. It is undisputed that Wells chose to live with Frey when she could no longer live independently, demonstrating the strength of their interaction. There was zero testimony about conflict in the relationship between Wells and Frey, or that Frey’s care for her mother was in any way substandard. See Kowalski, 478 N.W.2d at 794 (stating that the ward’s nominee was with the ward at the nursing home three or more days a week, actively working with the ward in therapy and daily care, and that the ward’s nominee had detailed knowledge of the ward’s condition, changes, and needs). As noted, Vandermolen has repeatedly said Frey would be a suitable guardian.

3. The evidence was uniform that Frey is a dedicated, committed daughter who has her mother’s welfare at heart. She has an acute understanding of her mother’s needs and desires, and has long assisted her mother with food, clothing, shelter, and medical care. See Kowalski, 478 N.W.2d at 794 (finding that “[n]o witness responded that [the ward’s nominee] caused trouble, but rather each said she is highly cooperative and exceptionally attentive to what treatments and activities are in [the ward’s] best interests”). Further, Vandermolen conceded that the physical care of Wells was not at issue, and there are no findings of inadequate care by Frey.

The only factor upon which the District Court relied upon in determining that it was in Wells' best interest to appoint an unrelated stranger as guardian was the finding that there was animosity between Frey and Vandermolen. However, there was not any evidence or a finding that this alleged animosity adversely had affected Wells in any way. Similarly there was no evidence or a finding how this animosity adversely affected Frey's ability to act in her mother's best interest when making decisions regarding her mother's medical care or living conditions, or how any such adverse affect would be diminished by appointing an unrelated stranger as Wells' guardian. See Kowalski, 478 N.W.2d at 793 (stating that "[t]here is no language in the statute specifically directing that a guardian be a neutral, detached party"); Estate of Gustafson, 308 A.D.2d 305, 307 (N.Y. App. Div. 2003) (reciting that it has long been held that "strangers will not be appointed [guardian] of the person or property of the incompetent, **unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve**") (emphasis added). The speculation by the District Court that the animosity had "*the potential to cause the respondent aggravation should it escalate*" lacks any evidentiary support, let alone any testimony by a medical or mental health professional as to such speculation. See Kowalski, 478 N.W.2d at 794 (stating that "[t]he court is not in a position to make independent medical determinations without support in the record"). That statement by the District Court is so ubiquitous that it could apply to anyone with children, and likely would apply to any family in which two members disagree on who should be guardian.

Further, the evidence clearly demonstrates that the disputes between Frey and Vandermolen were *regarding Vandermolen's care of their mother, not Frey's*. The testimony showed that Vandermolen took her mother to New Jersey, where she left her alone on the beach and in the car while shopping. Frey and Vandermolen disputed whether Vandermolen had

permission to bring her mother out of state. Thus, the New Jersey trip which was the subject of testimony at the hearing has no bearing on Frey's qualifications as guardian, only on Vandermolen's. The other dispute occurred when Vandermolen's husband suggested that Frey's husband call the police because Vandermolen refused to leave the Frey property. (Tr. at 79). This incident, also, does not reflect adversely on Frey's suitability as a guardian. See Kowalski, 478 N.W.2d at 795 (stating that "[i]t is not the court's role to accommodate one side's threatened intransigence, where to do so would deprive the ward of an otherwise suitable and preferred guardian").

As noted above, the District Court relied upon three decisions for the proposition that it is within the Court's discretion to appoint a third party as guardian where a family dispute puts family member petitioners at odds with the best interests of the proposed ward/respondent. As noted above, these decisions pre-date the pertinent statutes. In re Guardianship of Strom, 205 Minn. 399, 405, 286 N.W. 245, 249 (Minn. 1939), In re Conservatorship of Edwards, 390 N.W.2d 300, 305 (Minn. Ct. App. 1986); Schmidt v. Hebeisen, 347 N.W.2d 62, 64 (Minn. Ct. App. 1984). These cases, however, are factually distinguishable, and thus do not support the District Court's opinion. None of the three involved the situation here -- in which the proposed ward/respondent nominated a family member to serve as guardian. In each of the three cases, the proposed ward/respondent's preferences were unknown. Thus, unlike in the present case, in the three cited cases, the court was left to decide who to appoint amongst competing family factions without guidance from the proposed ward/respondent.

Moreover, these cases did not simply involve animosity between siblings, as is the case here. In Schmidt, the Court had "a reasonable basis to believe" that the sole family member who was nominated to serve as guardian "had misappropriated funds belonging to the ward," and

therefore had adverse interests to the ward. Schmidt, 347 N.W.2d at 64-65; see also Edwards, 390 N.W.2d at 300 (family member appellant, who appears not to have been nominated to serve as guardian, had sold some of his father's assets "but would not or could not provide an accounting of the funds he received"). In Strom, the Supreme Court decided the issue of the ward's capacity, but declined to review the selection of a third party as guardian. Instead, the Supreme Court ruled that the issue of who should be guardian had not properly been before the Court, and therefore remanded for a decision. 205 Minn. at 404, 286 N.W. at 248-49.

The undisputed evidence in this case does not support the District Court's conclusion that Frey is unsuitable to serve as guardian. The undisputed evidence supports the appointment of Frey, a close family member whom Wells named in a health care directive. The District Court abused his discretion in the face of the uncontraverted evidence that Frey is a suitable guardian.

CONCLUSION

The Minnesota Uniform Guardianship and Protective Proceedings Act and the Minnesota Health Care Directives Act create presumptions that favor self-determination with respect to medical decisions. These Acts provide that a principal's designation of an individual to be his or her health care agent shall be followed, absent clear and convincing evidence otherwise. The District Court cited no clear and convincing evidence. Indeed, there was none.

The evidence at the hearing demonstrated that Frey is a diligent, caring, and loving daughter who has cared for her mother for years. No one questioned Frey's commitment or suggested her care has in any way been deficient. The evidence also showed that Wells nominated Frey to be responsible for her care through a formal Health Care Directive. The Court lacked a basis to disregard Wells' wishes or to appoint a third-party stranger.

If the Health Care Directives Act is to have continued meaning, the District Court's decision must be reversed. This Court should reverse the trial court's decision and direct the appointment of Frey.

Dated this 8th day of September, 2006.

A handwritten signature in black ink, appearing to read "Dan Oberdorfer", written over a horizontal line.

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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) (with amendments effective July 1, 2007).