

NO: A120660

**STATE OF MINNESOTA
IN COURT OF APPEALS**

In Re: Guardianship and Conservatorship of:

Jeraldine J. Pates,

Respondent.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Appellants Abraham Younkin and Linda Towler (Appellants) submit their Reply Brief in response to the Briefs of Respondents David Younkin and Jeraldine J. Pates.¹

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPOINTING A CONSERVATOR.

1. The Order Lacked Clear and Convincing Evidence that Mrs. Pates is Unable to Manage Property and Business Affairs Because of an Impairment in the Ability to Receive and Evaluate Information or Make Decisions.

The record lacked clear and convincing evidence that Mrs. Pates was unable to manage her property and business affairs and receive and evaluate information because of an impairment as required by Minn. Stat. Sec. 524.5-401(2)(i). *See* A-3. While the district court noted that "[h]er verbal and working calculation skills are abnormal due to her memory loss and Alzheimer's disease", there was no testimony connecting this evidence as an impairment causing her to be unable to manage property and business affairs or receive or evaluate information. There was no medical testimony to make such a connection and none of the witnesses were capable of providing a medical opinion on this issue. The district court abused its discretion to the

¹ References to the brief of Respondent David Younkin are designated as Br. Resp. D.Y. and the brief of Jeraldine J. Pates as Br. Resp. J.P.

extent it made such a connection on its own.

For example, the record lacked clear and convincing evidence connecting Mrs. Pates's verbal working and calculation skills and Alzheimer's disease to her missing payment of one bill. The record indicated that the telephone bill was overlooked one time and that it was Linda Towler, not Mrs. Pates, who overlooked the bill. There was no evidence that the bill was not paid on time because of an impairment with Mrs. Pates. One late payment on a bill is insufficient evidence to support the appointment of a conservator.

There was no clear and convincing evidence linking her changes to her estate planning and alleged lack of knowledge how such changes were made to an impairment. The court's statement "it appears she is easily influenced by individuals in decisions she has made regarding her assets, estate planning, and regarding the sale of her home" was not tied to an impairment by clear and convincing evidence. A-3. There was no misuse of assets, her estate plan was in place and her house had not been sold.

The record was devoid of clear and convincing evidence that Mrs. Pates's withdrawal of \$92,000 from her bank was because of an impairment. She had previously kept large sums of cash at home and her withdrawal was consistent with her *modus operandi*. Abraham Younkin's not disclosing the

whereabouts of the funds to David's lawyer in court does not prove Mrs. Pates's inability to manage the funds because of an impairment. It suggests a lack of trust by Mrs. Pates in David Younkin's ability to assist her best financial interests.

The Court Visitor's Report by Joyce Wallace is inadequate to support appointment of a conservator. She did not testify at the trial. A-67. The report is flawed for a number of reasons. The report followed a visit with Mrs. Pates on November 21, 2011 when Ms. Wallace was accompanied by Patricia Younkin, David Younkin's wife. *See* A-67 (Daughter-in-law Trish Younkin left the apartment and waited in another area of the building). There was no reason for "Trish" Younkin to be present for Mrs. Pates's meeting with the Court Visitor. The report indicates that Trish Younkin improperly influenced the visit by Ms. Wallace and gave her information that ended up in the report.

The Court Visitor's Report contained hearsay facts that Mrs. Pates would not have conveyed to Ms. Wallace in the interview. For example, language in the report states that "Mrs. Pates has significant problems with her memory and needs the assistance of others to manage her finances." A-67, 70. Br. Resp. D.Y. at 15. Ms. Wallace cites Mrs. Pates's [alleged] inability to provide the correct names of neighbors or grandchildren in

support of this conclusion. A-70. The names of neighbors and grandchildren, however, were not sought among the questions in the Court Visitor's Report form. A-67-69. In order for Ms. Wallace to reach this conclusion she would have had to have known the names of Mrs. Pates's neighbors and grandchildren. The record contained no foundation showing that she knew the names of Mrs. Pates's neighbors or grandchildren in order to corroborate this statement. The information could only have been supplied by Patricia Younkin. Notably, Mrs. Pates named all of her six children in her meeting with Ms. Wallace. A-68. Virtually none of the Court Visitor's Report dealt with assets or financial information and it is of little value on the conservatorship issue.

The changes to Mrs. Pates's estate planning documents do not evidence the need for a conservator because of an impairment. See Br. Resp. D.Y. at 15. This argument reflects David Younkin's primary concern that he has been omitted as a beneficiary from his mother's Will. He brought Mrs. Pates to attorney Scott Timm on March 11, 2011 to have her estate planning documents re-worked to include them in her plans. Afterward, he had no interest in pursuing conservatorship until he learned that his mother had again re-worked her estate planning documents omitting him as a beneficiary from her Will. Clearly, he was looking out for his own

interests rather than those of Mrs. Pates.

Mrs. Pates's answers about her Will at the trial were correct. During her cross-examination she was asked if she had omitted David Younkin from her Will. T-133: Mrs. Pates hesitated and said "I'd have to ---I don't know. No, No. I think everybody's included." T-133. She was uncomfortable answering the question in front of her litigating children. In actuality, David Younkin was included in her Will but was not named as a beneficiary. A-32. Her answer that "everybody's included" was correct. David L. Younkin is included as a "child" of Mrs. Pates in section 6.1.2. of her Will. A-35. He is also included in section 6.3 governing "intentional omission." A-36. This provision stated, in part, "I specifically omit DAVID L. YOUNKIN or his descendants from receiving any gifts under this agreement." A-36. This provision specifically notes her consideration of David Younkin and his omission as a beneficiary. His assertion that she testified she "provided for" all of her children in her Will is incorrect as she did not make this statement. Br. Resp. D.Y. at 15. The question whether David was omitted as a beneficiary or as an heir was not specifically asked at trial. T-133.

The ten-year-old loan with Linda Towler is not evidence of the need for a conservator in 2012. There was no allegation Mrs. Pates made the loan because of an impairment ten years ago and this is a red herring. *See* Br.

Resp. D.Y. at 16 (referring to lawsuit over loan).

Mrs. Pates also properly answered that her son Abe was her designee for her power of attorney and respondent does not dispute this testimony. T-133. There was no evidence that he had misused the power of attorney at any time or that execution of the power of attorney was due to an impairment.

The appointment of a conservator, and specifically the requirement that she was unable to manage property and business affairs because of an impairment in her ability to receive and evaluate information or make decisions per Minn. Stat. Sec. 524.5-401(2)(i), was not supported by clear and convincing evidence.

2. Insufficient Evidence of Property to Be Dissipated.

David Younkin's contention that "[t]he Trial Court adequately described that a significant amount of cash was given over to family members, rather than keeping it in a bank to earn interest" is not supported by the record Br. Resp. D.Y. at 16. There was no evidence that Mrs. Pates gave a significant amount of cash to other family members to keep. Instead, the evidence showed she had assistance in her banking transaction to obtain the funds. There was no evidence that she had been harmed by these events and it was undisputed that her funds had not been spent, lost, misused or

dissipated. The court abused its discretion by concluding her funds were being dissipated because they were not earning interest in the bank. See Finding of Fact No. 3, A-3. Respondent cites no authority supporting the proposition that failure to earn interest equates to dissipation.

Additionally, allowing family members to assist Mrs. Pates in managing her funds is not clear and convincing evidence of the need for a conservator. This indicates her ability to have people of trust and confidence assist her in her cash management. She trusts her son, Abraham Younkin, to help her and there was no evidence of misuse of her funds by him or others. She was not financially exploited by family or strangers. The court's speculation that she was vulnerable financially was unsupported by clear and convincing evidence.

The mere fact that Abraham Younkin did not disclose the whereabouts of Mrs. Pates's funds in court is not evidence that Mrs. Pates needs a conservator. This, instead, shows distrust among family members not wanting to share information. It also shows Mrs. Pates's desire not to include David Younkin in her confidence with respect to her financial information. David Younkin cites no evidence of her being taken advantage of financially but only speculates about events that have not occurred.

3. Less Restrictive Means Than Conservatorship Are

Available.

A power of attorney is a workable tool that would provide any necessary assistance instead of a conservatorship. Mrs. Pates had a power of attorney with Abraham Younkin as attorney in fact. The court's finding that she is "easily influenced and has taken actions that appear to be against her wishes or at least against her interests" (not best interests as Respondent states) is not supported by the evidence. Finding of Fact No. 3, A-3, 4. *See* Br. Resp. D.Y. at 17. While steps taken by her may not be in the best interests of David Younkin, this is not the standard to utilize. The record at trial does not support her being financially exploited, funds misused or dissipated, or assets or money missing. David's personal interests in being a beneficiary of her Will, having access to her money, and winning the family dispute is not relevant to appointment of a conservator.

II. THE APPOINTMENT OF DAVID YOUNKIN INSTEAD OF ABRAHAM YOUNKIN AS CONSERVATOR WAS AN ABUSE OF DISCRETION.

The district court abused its discretion by appointing David Younkin as conservator instead of Abraham Younkin who was the preference of Mrs. Pates. According to Minn. Stat. Sec. 524.5-413(a)(2), Abraham Younkin held priority of appointment by virtue of his nomination by Mrs. Pates. The exception in 524.5-413(c) can only be made when the court is "acting in the

best interest of the protected person". *See* Minn. Stat. Sec. 524.5-413(c).

The court's failure to make specific findings of fact articulating why appointment of David Younkin instead of Abraham Younkin was in the best interest of Mrs. Pates constitutes an abuse of discretion.

Findings of Fact Numbers 5 and 6 do not suffice to satisfy Minn. Stat. Sec. 524.5-413(c) because they fail to articulate why Abraham Younkin should not serve as conservator or why appointment of David Younkin instead of Abraham was in Mrs. Pates's best interests.

The record demonstrated that the withdrawal of funds from the bank by Mrs. Pates was not harmful to her or against her wishes. *See* Finding of Fact No. 5, A-4. Keeping the funds at a location undisclosed to David Younkin and not earning interest is not evidence that he is best suited to serve as conservator under the circumstances. The court's finding that "Objectors have been secretive" is incomplete and not accurate in context as it omits discussion of David Younkin's secretive conduct. *See* Finding of Fact No. 5, A-4. The Objectors were not secretive with Mrs. Pates. The fact that David Younkin may not have been aware of all of her financial transactions does not translate to the Objectors being secretive with Mrs. Pates. Nor does it equate to the appointment of David Younkin being in her best interest over Abraham Younkin. There is no question the family

members have trust issues. David Younkin, for example, secretly took Mrs. Pates to see attorney Scott Timm on March 11, 2011 to change her estate planning documents in their favor. He did not consult with her in advance of filing his petition to be appointed her guardian and conservator. The court failed to discuss why these actions of David Younkin made him better suited than Abraham Younkin as conservator.

The old loan by Linda Towler again resurfaced in Finding No. 5, but this has nothing to do with whether appointment of David Younkin over Abraham Younkin is in the best interest of Mrs. Pates. The later changes to Mrs. Pates's estate plan that omitted David Younkin as a beneficiary under her Will is about David's concerns about not being a beneficiary. He was not a beneficiary of her Will signed in 2010 and the changes omitting him from the Will in September, 2011, were consistent with this plan. A-32, 36. This evidence does not dictate that appointment of David Younkin as conservator over Abraham Younkin is in Mrs. Pates's best interest.

Finding of Fact Number 6 cites Minn. Stat. Sec. 514.413(d), governing bonds, and is misplaced. It further fails to articulate facts to support the finding that appointment of David Younkin over Abraham Younkin is in Mrs. Pates's best interests. *See In Re Conservatorship of*

Lundgaard, 453 N.W. 2d 58, 63 (Minn. App. 1990)(use of such "general" conclusory findings will force a remand for findings consistent with legislative mandate of specificity).

David Younkin contends the issue is not one of undue influence and that this case is not about testamentary capacity. Br. Resp. D.Y. at 20. The issue of undue influence, however, is germane to the type of influence of family members on Mrs. Pates to affect the court's decision about who should be appointed as her conservator. The district court's finding that Mrs. Pates was subject to "some form" of influence fails to articulate why the influence supports the need for a conservator. *See* Finding of Fact No. 5, A-4. This failure is especially significant because the people of "influence" are her children. Being influenced by one's children is not evidence of the need for a conservator. Neither the court nor David Younkin have cited authority stating that mere influence by adult children is sufficient evidence to support the need for a conservator and selection of one child over another to serve. In short, the type of influence necessary to affect the need for a conservator, and the selection of a conservator, should be undue influence that improperly directs decisions of the individual affected. There was no evidence of improper influence by Abraham Younkin.

Finally, while David Younkin asserts that this case is not about

testamentary capacity (Br. Resp. D.Y. at 20), he relies upon Mrs. Pates's alleged inability to recite details of her Will in court as evidence that she needs a conservator. His continued focus on her estate planning documents, and personal efforts to inject himself into her estate plan and eventually become her conservator, suggests his motivation to serve as conservator is rooted in her estate plan and Will and how it affects him.

III. THE COURT ABUSED ITS DISCRETION GRANTING PROTECTIVE POWERS OVER THE PERSON.

The district court abused its discretion by granting David Younkin protective powers over the person of Mrs. Pates under Minn. Stat. Sec. 524.5-310 concurrent with its finding she was not incapacitated.

David Younkin follows a tortured path to argue the court was within its power to craft such an order under Minn. Stat. Sec. 524.5-310. Br. Resp. D.Y. at 22-23. He contends the statute allows the court to make any other protective order in relation to the estate and affairs of any individual, if the court determines that the individual is unable to manage business affairs because of an impairment in the ability to receive and evaluate information or make decisions. Br. Resp. D.Y. at 22-23 (Emphasis in original). He subsequently incorporates Mrs. Pates's alleged transportation need, doctor's appointments, and residence changes to be included under this provision contending they "deal with the affairs of Mrs. Pates". Br. Resp. D.Y. at 23. This illustrates the mistaken nature of the approach as the statutory language governing "business affairs" has not been construed to cover

personal affairs under the guardianship statutes. Neither the court nor Respondent cited authority that "business affairs" included her personal affairs. This is true for a number of reasons.

Adopting David Younkin's and the court's construction of Minn. Stat. Sec. 524.5-310 and 524.5-401 to grant personal powers would circumvent, and largely eviscerate, the statutory mechanism of the guardianship statutes. Parties would no longer need to prove by clear and convincing evidence that a respondent is incapacitated or in need of specific assistance to be granted powers over the person. *See* Minn. Stat. Sec. 524.5-310(b)(requiring clear and convincing evidence of incapacity for guardianship or limited guardianship). Parties could simply argue some assistance was needed for the person's "affairs" as Respondent contends. By circumventing the guardianship laws and granting powers over the person of Mrs. Pates without a finding of incapacity, the district court abused its discretion.

In terms of the substantive arguments, the court's Finding of Fact Number 2 is insufficient to support the court's Order. Br. Resp. D.Y. at 21-22. The facts in this finding related to Mrs. Pates's move to Cambridge do not show a need for a protective power, much less one to be granted to David Younkin. There was no evidence Mrs. Pates's need in these areas was not being met. The issue of David Younkin being unaware of Mrs. Pates's move to Cambridge does not evidence a need for someone to manage this power. Instead, it reveals that he was not in touch with his mother's needs and evidences her prerogative not to include him in all of her personal

decisions. Mrs. Pates's move to a safe, clean and affordable location in Cambridge is inadequate supporting the Order granting David Younkin the power to handle her ability to move her residence.

David Younkin never attended a doctor's appointment with Mrs. Pates, provided transportation for such appointments, or made her appointments. The court failed to enunciate why he would now be the best person to handle these arrangements when he had never done so before nor shown any interest in doing so.

The court's granting limited protective powers over the person of Mrs. Pates to David Younkin without a finding of incapacity circumvented the guardianship statutes and was unsupported by evidence demonstrating how it was in Mrs. Pates's best interest to do so. Under the circumstances, the court abused its discretion.²

IV. A BOND IS REQUIRED UNDER RULES OF STATUTORY CONSTRUCTION.

The rules of statutory construction dictate that a bond is required for a conservator appointed after August 1, 2009 in conformance with Minn. Stat. Sec. 524.5-413(d). This statute provides as follows:

In any proceeding where the value of the personal property of the estate of the proposed protected person in the initial inventory of the estate filed by the conservator under section 524.5-419 is expected to be at least \$10,000, the court shall require the conservator to post a bond. The bond requirement under this paragraph does not apply to

² Respondent Jeraldine Pates suggests the district court should consider an independent fiduciary. Br. Resp. J.P. at 23. This court need not address that issue at this time as the issue was not before the district court.

conservators appointed before August 1, 2009, but shall apply as current conservatorships are reviewed by the court after August 1, 2009.

This law was amended in 2009. *See* Minn. Stat. Sec. 524.5-413. Minn. Stat. Sec. 524.5-415, relied upon by David Younkin for the proposition that the district court may decline to order a bond in its discretion, was enacted in 2003. *See* Minn. Stat. Sec. 524.5-415.

According to the law of statutory construction, "[w]hen the provisions of two or more laws passed at different sessions of the legislature are irreconcilable, the law latest in date of final enactment shall prevail." *See* Minn. Stat. Sec. 645.26, subd. 4; *Barton v. Moore*, 558 N.W. 2d 746, 751-52 (Minn. 1997)(most recently enacted statutory remedy prevails).

Additionally, a special provision shall prevail over a general provision. *See* Minn. Stat. Sec. 645.26, subd. 1; *Barton*, *supra*, at 752. Here, Minn. Stat. Sec. 524.5-413(d) was enacted in 2009 after Minn. Stat. Sec. 524.5-415. Because Sec. 524.5-413(d) was enacted after Sec. 524.415, it should be applied. The statute, moreover, specifically addresses conservatorship estates over \$10,000 after August 1, 2009. The rules of construction dictate that Minn. Stat. Sec. 524.5-413 should be applied and a bond should have been ordered.

Additionally, for argument's sake, the district court failed to make findings of fact explaining why a bond for David Younkin should not be imposed. His secretly arranging for Mrs. Pates to change her estate plan in his favor on March 11, 2011, his desire to access all of her funds to

invest, and his obsessive focus on becoming the center of her estate plan and Will demonstrate that he is not the most trustworthy or suitable person to act without a bond.

CONCLUSION

For these reasons, the Order of the district court appointing David Younkin as conservator with limited protective powers should be reversed. Alternatively, the Order should be reversed and remanded with Abraham Younkin appointed as conservator with limited protective powers consistent with Mrs. Pates's stated preference.

RESPECTFULLY SUBMITTED,

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Dated: July 3, 2012


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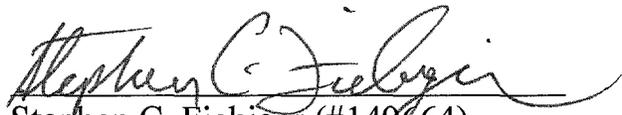
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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this Brief complies with the typeface requirements and word count limitation of Minnesota Rule of Civil Appellate Procedure 132.01, subd. 3 and contains 3,648 words. The following word processing software was used to prepare this Brief:
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