

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Guardianship and) Supreme Court No.: 20060021
Conservatorship of David B. Johnson,)
an Incapacitated Person,)
Appellant.)

Appeal from the Order for Appointment of Co-Guardians of the Person and
Co-Conservators of the Estate, Entered November 17, 2005
Cass County No.: 09-05-P-00114
Cass County District Court, East Central Judicial District, Honorable John C. Irby

BRIEF OF APPELLEE

Beverley L. Adams (ND Id. 05329)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo ND 58108-6017
(701) 232-8957

ATTORNEY FOR APPELLEES

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[¶1]

STATEMENT OF ISSUES

[¶2]

1. Burden of Proof.

In re Braaten, 502 N.W. 2d at 512, 517 (N.D. 1993)
In Interest of Kupperion, 331 N.W. 2d 22, 27 (N.D. 1983)
Boehm v. Backes, 493 N.W. 2d 671, 674 (N.D. 1992)

[¶3]

2. Did the Johnson Children Prove by Clear and Convincing Evidence, a Memory Care Unit in Eden Prairie was the Least Restrictive Alternative Available, When Both Experts Testified a Memory Care Unit was Necessary; David is Extremely Confused about Where He is Currently Living and Does Not Have the Capacity to Make a Decision Relating to Where He Wants to Live?

In re Medworth, 562 N.W. 2d 522, 523 (Minn. Ct. App. 1997)
In re Conservatorship of Lord, 2001 WL 977941 (Minn. App. 2001)
In re Conservatorship of Brady, 607 N.W. 2d 781, 785 (Minn. 2000)

[¶4]

3. Should the Appeal be Dismissed as the Issue of David's Competence is Moot

In re E.T., 2000 N.D. 174, ¶ 5, 617 N.W. 2d 420
In re W.O., 2004 N.D. 8 ¶ 10, 673 N.W. 2d 264

[¶5]

JURISDICTIONAL STATEMENT

[¶6] The jurisdictional statement is correct as stated in Appellant's brief, except for a sentence in the middle of paragraph 2 which states ". . . given that his newly-appointed guardians had argued that David was incapable of requesting an appeal. (App. 2)." Appellees and Co-Guardians and Co-Conservators, David S. Johnson and Carrie E. Johnson (hereinafter referred to as "Johnson children" and individually as "Bucky" and "Carrie"), exercised their authority, after being appointed as Co-Guardians and Co-Conservators and terminated the Vogel Law Firm from doing any further legal work on behalf of David B. Johnson (hereinafter referred to as "David") in November of 2005. The motion that was filed on behalf of the Vogel Law Firm (App. 2), was for the purposes of clarifying whether they could continue to represent David to appeal the guardianship, when the Johnson children had exercised their authority under the guardianship/conservatorship to terminate the relationship of the law firm with David. The main focus of the motion referred to in (App. 2), was to discuss the ongoing representation of Vogel Law Firm of David. The primary focus was not whether David was capable of requesting an appeal.

[¶7]

STATEMENT OF CASE

[¶8] A temporary full guardianship was granted to the Johnson Children on May 19, 2005. (App. 1). This case involves an appeal of a court order granting full guardianship and conservatorship authority of David to his two children. (App. 116). The main focus at the hearing was not whether David needed a guardian and conservator, but whether David had the capacity to determine where he should live and if he did have capacity to make this decision, whether the guardianship and conservatorship should be

limited to allow David to make all decisions regarding his residence. The guardianship trial started on September 26, 2005 and could not be completed within one day, so therefore, the hearing was concluded on November 14, 2005. The court, after hearing the expert testimony, the testimony of the Johnson children and the testimony of David, ordered a full guardianship with no limitations. (App. 116). The court made this determination as it was clear from the testimony of the experts and David's own testimony, that the Johnson children were acting in David's best interests and a full guardianship was the least restrictive alternative based on David's progressive Alzheimer's disease and his inability to process information to make decisions.

[¶9] The Johnson children were opposed to the Vogel Firm appealing the guardianship/conservatorship order, as it was not clear that this really was David's wishes and that he was capable of making this determination. The reason the Johnson children questioned whether David really wanted to appeal this case was, David's counsel took the position, during the guardianship/conservatorship proceedings, that David wanted to move to Fargo to an assisted living facility in order to have more contact with his friends. However, when David ultimately testified, he was not interested in moving to an assisted living facility in Fargo and wanted to move back home, as he felt that he could care for himself. (Tr. 208, 232) The Johnson children were concerned that the primary reason for the appeal was to incur additional attorney's fees, as David is not capable of making a complex decision such as whether to appeal. The trial court questioned the Vogel Firm as to how much they believed it would cost to complete an appeal in this matter and Steve Johnson stated on the record that he believed he could do an appeal for \$3,000. This amount was not suggested through counsel for the Johnson children. David, through

counsel has ultimately filed his appeal. The Johnson children are now filing their responsive brief.

[¶10]

STATEMENT OF FACTS

[¶11] David was 82 years old at the time of the guardianship/conservatorship proceedings. (Tr. 199–247). David was married to Delores Johnson and they had two children, Bucky and Carrie (Tr. 202). Delores died of cancer in 1990. (Tr. 86). David was a very successful businessman and ultimately owned his own insurance company in Fargo, North Dakota. (Tr. 263). At the time of the guardianship proceedings, the value of David's assets exceeded \$3 Million. (Tr. 263).

[¶12] Carrie E. Johnson works in the media relations department at MeritCare in Fargo, North Dakota. (Tr. 84). Bucky is a family practice physician in Eden Prairie, Minnesota. (Tr. 173). Bucky is married to Barbara Johnson who is a psychiatrist. (Tr. 176). Bucky and Barbara have three children. (Tr. 185).

[¶13] Carrie Johnson first noticed that David was having memory problems approximately three years prior to the trial. (Tr. 85). Carrie Johnson showed up at her father's residence in South Fargo for Father's Day and he was not there. (Tr. 85). Carrie stated this was very odd for her to make arrangements to visit with her dad and for him not to be home. (Tr. 85). Carrie has been organizing her dad's medications, doing his laundry, arranging his healthcare appointments and taking him to all of his appointments for the past two years. (Tr. 85–86).

[¶14] In March of 2005, Carrie at the request of Dr. Mary Jo Lewis, at MeritCare brought her dad to see Dr. Swenson for an neuropsychological evaluation. (Tr. 30–31). (App. 82). (App. 92). Based on a number of meetings and numerous

psychological tests, Dr. Swenson concluded David had significant neuropsychological problems (Tr. 89), and informed Carrie that her father was unsafe in his current situation and that she needed to do something. Dr. Swenson told Carrie that they either need to move David to a facility or have someone with him in his home 24-hours a day 7 days a week. (Tr. 92). (App. 85, 97, 104). During one of the meetings between Carrie and Dr. Swenson and David, Dr. Swenson was discussing the results of the tests and it was clear that David was not understanding the significance of the testing results. (Tr. 93). Carrie informed Dr. Swenson that, as soon as her and her dad walked out of Dr. Swenson's office he would state that he is fine and that Carrie should leave him alone and that nothing needed to be done. (Tr. 93). Without hesitation, David said "she is right". (Tr. 93).

[¶15] David's driver's license was revoked on April 30, 2005, at the recommendation of Dr. Swenson and Dr. Lewis (Tr. 96), (App. 85), however, David drove on May 22, 2005, and was pulled over by law enforcement and given a ticket for crossing over the center line on University Drive. (Tr. 97-98).

[¶16] In March of 2005, Dr. Swenson informed Carrie that David was not safe to live on his own. (App. 85). Carrie and Bucky did not immediately move David, they implemented a system, where Carrie would go to his home daily and take care of all his doctor's appointments, laundry, groceries and her brother, Bucky would call David daily, to make sure that he took his medications and that he was doing okay, and that he was not driving. (Tr.85, 97, 101). Between March/April of 2005 and July 18, 2005, Carrie and her brother began extensive efforts to find an appropriate living environment for David. (Tr. 99-101, 110-117). Carrie investigated the possibility of having 24-hour care in the

home. She also talked with her brother about the options that they had. (Tr. 109–110). Carrie did ask David if he would be willing to have someone live in his home and he indicated that he that he was fine and he did not need this type of arrangement. (Tr. 100–101). When Carrie initially looked into getting home healthcare, David seemed somewhat receptive to that, but than changed his mind and was not willing to accept any assistance in his home. (Tr. 109-110). Once Carrie realized that David was not going to accept any services in the home, Carrie, Bucky and Bucky’s wife, Barb, discussed other alternatives including moving David to a care facility, called Summit Place in Eden Prairie, Minnesota. (Tr. 109–111). After a number of conversations, Bucky, Barb and Carrie decided that it would be best for Carrie to deal with managing the real property and personal property in Fargo, North Dakota, to manage the financial aspects of David’s issues and for Bucky and Barb to manage the personal issues for David, with David ultimately living near them in Eden Prairie Minnesota. (Tr. 111–112). Bucky, is a physician, who would be better suited to handle the medical concerns for David. Carrie and Bucky also decided, since Bucky has three children and Carrie has none, that it would be also in David’s best interest to live closer to the grandchildren to be more involved with them. (Tr. 112–113).

[¶17] Once Carrie and Bucky were named temporary guardians, they tried to involve David more in the decision making process, but it became more and more clear that he was incapable of being part of the decision making and that is when Carrie stopped having those conversations with her dad. (Tr. 113).

[¶18] Carrie did not ask her dad whether he wanted to move to Eden Prairie, as he was having a negative reaction when she asked him these questions and after doing

research and receiving information from Alzheimer's professionals, the recommendation was not to proactively ask for input. (Tr. 114).

[¶19] Once Carrie and Bucky decided that it would be in their dad's best interest to be living closer to Bucky, his wife, and their three kids in Eden Prairie, Carrie and Bucky started to look at care facilities. (Tr. 116). Initially, Carrie and Bucky looked at three care facilities on their own and the felt it was very overwhelming. (Tr. 115). Bucky then purchased the consumer report's magazine which recommended hiring a geriatric counselor, when selecting a care facility. (Tr. 116). Carrie and her brother ultimately hired a geriatric counselor who, after talking to Carrie and Bucky about their dad and reviewing medical records, recommended Summit Place in Eden Prairie. Bucky and Carrie then checked out Summit Place and one of the things that they really liked about Summit Place was unlike facilities in Fargo, Summit Place had two levels of memory care units. (Tr. 116). Having two memory care units assures that individuals with more similar situations are placed together. (Tr. 116). Carrie did not believe that anything less restrictive than a memory care unit would meet her father's needs. (Tr. 117). Carrie testified that he would not be able to live in an assisted living arrangement because he would not be prompted on a daily basis to take care of his daily needs and there would not be any programming or structure. (Tr. 117).

[¶20] When Carrie and her brother were evaluating where their father should live and in what type of facility, they had to look beyond what he was asking for, as leaving David in Fargo would not be in his best interests. (Tr. 118).

[¶21] Although the primary factor for moving David to Summit Place was having Bucky nearby to take care of David's medical and personal issues, Carrie began

receiving more information about Jean Xu, and her inappropriate contact with David. (Tr. 119–120). Jean Xu has been a friend of David's for approximately 10 years. (Tr. 311). As Carrie was managing the finances in 2005, with her authority under the Power of Attorney she noticed that the amount of money that her dad was giving to Jean Xu increased substantially over time. (Tr. 121). Initially, in 2000 her dad had given Jean Xu approximately \$7,000 cash. Two years later the amount of money was over three times that amount. (Tr. 121). In the fall of 2004, David had purchased Jean Xu a condo for approximately \$175,000 and had purchased an \$18,000 car for her in approximately 2000. (Tr. 121).

[¶22] Carrie did find a number of promissory notes from Jean Xu to David, however, to her knowledge none of that money had been paid back. (Tr. 121). Carrie did locate a document releasing the lien of approximately \$18,000.00, her dad held against Jean Xu's vehicle. (App. 135). This release was signed on July 3, 2005, which is after the date the temporary guardianship was put in place. (Tr.123–124). Jean Xu was aware of the temporary guardianship and did not speak to Carrie or Bucky about the release of the lien. In 2004, David had paid \$2,000 for furniture for Jean Xu, paid off a \$2,000 charge account of Jean Xu's, paid Jean Xu's dental bills, and made payments from David's Northwest Sales Company account, to pay off Jean Xu's promissory notes. (Tr. 124–126). In addition to these amounts, David B. Johnson purchased a condominium for Jean Xu in the amount of \$171,000 in September of 2004. He also paid the temporary advance to purchase the condo which was a \$1,000. (Tr. 124–126). David did obtain a mortgage on the condo that he had purchased for Jean Xu in September of 2004, and there is an issue whether David requested the mortgage or Steve Johnson suggested the

mortgage (Tr. 213), however, at the time of the hearing in September of 2005, no efforts had been made to make payments towards the mortgage. (Tr.127).

[¶23] The temporary guardianship for David was put in place on May 19, 2005. (App. 1). The move to Summit Place occurred on July 18, 2005. (Tr. 253). Bucky asked David whether he would be willing to move out of the home and into Summit Place. (Tr. 175, 248). However, David did not acknowledge that he needed any assistance and rejected Bucky's suggestion. (Tr. 175). Therefore, Bucky and Carrie felt that they had no alternative but to trick David into going down to Summit Place. (Tr. 253-257). Carrie believed that if they told their dad what they were doing on July 18, 2005, that he would refuse and that they would ultimately resort to involving law enforcement and that would be much more humiliating and more condescending towards their dad than creating a therapeutic fib. (Tr. 253-257). Bucky and Carrie tricked David into going to breakfast with a family friend, who ultimately drove David from Fargo to Summit Place on July 18, 2006. (Tr. 253-257).

[¶24] Bucky was present during Carrie's testimony and agreed with Carrie's testimony regarding the steps that they took and the decisions they made relating to their dad's placement. (Tr. 174). Bucky testified that he had asked his dad three or four times whether he would like to move to Eden Prairie and David's response was always "no", that he did not want any changes. (Tr. 174). The reason that Bucky and Carrie did not move David into a memory care unit in Fargo was that any move out of the home that he had lived in for the last 20 years was going to be traumatic. So there really was little reason to move him into a memory care unit in Fargo compared to Eden Prairie. (Tr. 174-176). The Johnson children considered the medical care that David would receive if

he was in Eden Prairie compared to living in Fargo and this was a factor in moving David to Eden Prairie. (Tr. 174–176). Bucky is a family practice physician in Eden Prairie and his wife is a psychiatrist. Summit Place, where David is currently living, is only two minutes from where Bucky works and 15 minutes from where Bucky and Barb live. (Tr. 174–176). David’s primary care provider is right next door to Summit Place so Bucky and Barb can just walk David over for medical appointments. (Tr. 174–176). This has been very efficient in managing David’s medical concerns. There was an occasion when Bucky’s wife, Barb, went to visit David and he had a rash on his face. She was able to take him immediately over to get medical treatment and a prescription for a cream to put on the rash. (Tr. 174–176). This would not have been taken care of so quickly if David was in Fargo.

[¶25] Since David has been at Summit Place in Eden Prairie, Bucky has telephone contact with him daily and they bring the kids over once or twice a week to see David. There is a swimming pool at Summit Place so the kids have gone swimming and they have taken David out to eat with them on a number of occasions. (Tr.177). David appears to appreciate having contact with the grandkids, Bucky and Barb. (Tr. 177). Bucky has not seen any signs of depression as a result of the move. (Tr. 178).

[¶26] Carrie and Bucky hired a one-on-one personal attendant to monitor David when he arrived at Summit Place. (Tr. 180). Bucky and Carrie were assuming that the first day at Summit Place would be the worst, however, when they placed him there, and consulted with the coordinator of the memory care unit to see how things were going, the memory care unit stated that he was “happy” later in the day and was getting along well with the other residents. (Tr. 178). Initially, Bucky said that David would talk about

moving back to Fargo fairly frequently and that at the time of the trial, these statements had become less frequent. (Tr. 178). David was eating and sleeping very well despite the move to Summit Place. (Tr. 180). Bucky described his dad as extremely introverted and that left to his own choices he tends to want to be by himself. This is a risk factor for developing a faster progression of Alzheimer's Disease. (Tr. 181). Bucky and Barb have taken their kids out of a lot sports activities so that they have more time to spend with David. (Tr. 185).

[¶27] Bucky went into detail about how they tried to keep their dad involved in the decision making process, relating to his living arrangements, however, he was not agreeable to any of the suggestions which included 24-hour care and therefore, he and Carrie had no choice but to move David to Summit Place. (Tr. 187-188). Bucky and Carrie talked to David on a number of occasions about moving down to Eden Prairie in some type of an assisted living arrangement, however, David's answer would always be that he was fine and to leave him alone in his house. (Tr. 187-189). Bucky and Carrie had been told by several professional that was not an option. (Tr. 189-190). Bucky and Carrie have always had their dad's personal freedom at the heart of all of their decisions. (Tr. 187). Bucky made it clear that he would like to do what his father wants to, to the extent that he can and keep him safe and still follow the recommendations of the professionals. (Tr. 190). Bucky agreed that as the guardian he should use the least restrictive living arrangement practicable to insure his dad's safety and that is a memory care facility. (Tr. 191).

[¶28] Although David's counsel argued that David should be allowed to live in Fargo, because his friends live in Fargo, Bucky informed the court that David does have

friends in Minneapolis, such as John Mutschler, aunt Helen and Elaine Berger, who is the woman who introduced David to his wife Delores. (Tr. 192). Bucky informed the court that David has more friends in Minneapolis than he does in Fargo. (Tr. 192). Bucky believed that current placement at Summit Place is the least restrictive and most appropriate placement for David. (Tr. 196-197). There are two levels of memory care units at Summit Place and David is on the higher functioning level.(Tr. 193). Bucky consulted with the professionals here in Fargo, the geriatric consultant and the staff at Summit Place about David's placement at the memory care unit and all of the information he has received indicates the current placement is still the most appropriate placement for David. (Tr. 197). Bucky's primary concern when they were locating a place for David, was to not be more restrictive than was needed. (Tr. 287-288). The director of the unit at Summit Place, Karen Metzler, informed Bucky that the current placement is the most appropriate placement for David. (Tr. 287-288). Although David has made comments to Bucky about wanting to live in Fargo, he also states that he loves Summit Place too. In Bucky's mind, David has some conflict. (Tr. 289). Whenever Bucky and his wife Barb leave, David is anxious to get back to socializing with the group that he lives with on the memory care unit and the staff. (Tr. 194).

[¶29] Dr. Swenson testified as David's treating psychologist, unlike Dr. Konewko who was hired by David as an expert witness. (Tr. 30-31). Dr. Swenson is board certified, has published several articles on Alzheimer's and dementia and has testified as a forensic psychologist on a number occasions. (Tr. 27-29). Dr. Swenson's Curriculum Vitae shows that he is a highly qualified expert in his field. (App. 123). When Dr. Swenson met with David in March and April of 2005, David told Dr. Swenson

that he was not on any medication. (Tr. 33-34). When Dr. Swenson asked David what medications he was on, he did not know. (Tr. 34). Dr. Swenson testified that not only does David have a form of Alzheimer's that affects his memory, he also has impairment to the frontal lobes of his brain, which impacts his ability to process information, attention, multitasking, regulate emotion, as well as the cognitive operations of things like judgment, insight, planning ahead and foresight. (Tr. 34-35). David's type of Alzheimer's Disease involves a frontotemporal variant. (Tr. 36). The significance of a frontotemporal variant, is they have more problems with insight and awareness of their condition and are more subject to the demands of their environment, such as they may wonder, and they do not have insight to understand that driving would be a dangerous behavior. (Tr. 36-37).

[¶30] David's disease is also progressing, as Dr. Swenson's testing in March of 2005, was not as poor as Dr. Konewko's testing which occurred in June of 2005. (Tr. 37-38) (App. 101). Dr. Swenson testified that David is not capable of making any decisions on his behalf. (Tr. 38). In both set of tests completed by Dr. Konewko and Dr. Swenson, whether it was verbal or spacial, David showed a 0% retention on all of the measures given when you tested his memory after a 20-minute delay. (Tr. 40). Dr. Swenson testified David is not capable of making a decision about where he wants to live because he cannot process what the consequences of his decision is. (Tr. 43-44). The reason David cannot have limited decision making power, is you cannot state that David should have full guardianship and conservatorship except for the limited area of residential. It is illogical to conclude David is incompetent in all areas except in one limited area, residential decision making. (Tr. 45). David is also a vulnerable adult and Dr. Swenson

believed this was another factor that supported that David cannot make a decision about where he wants to live. (Tr. 45). The reason that David has stated he wants to live in Fargo, is this is what he is familiar with on a long-term memory basis and he does not have the ability to process any other new information. (Tr. 45-46). It is not proper to give David a few select choices and let him make a decision out of those appropriate choices as he does not have any current memory and therefore, he is relying on his memory from the past to make a decision that has no relevance as to where he is currently at today. (Tr. 47-48). Making a decision about where you are going to live requires both executive functioning and memory. (Tr. 48).

[¶31] Prior to moving David to Summit Place, Bucky and Carrie both communicated with Dr. Swenson, the treating psychologist to obtain his opinion as to whether the placement was appropriate. (Tr. 49). Dr. Swenson testified that Summit Place was a very appropriate placement for David as it has the ability to deal with David medically as his disease progresses. (Tr. 52). Dr. Swenson testified that a memory care unit at Summit Place is the least restrictive placement for David as he cannot live in an assisted living arrangement that did not have a memory care unit component. (Tr. 53). Dr. Swenson testified that no matter where David lives he will need a memory care unit. (Tr. 56). Dr. Swenson testified a memory care unit is a better environment to support the process of Alzheimer's disease than David's own home would be, as there is better lighting, safer bathrooms and there is better scheduling. (Tr. 80-81).

[¶32] From a neuropsychological stand point, you cannot give David three choices or two choices and let him pick what is most appropriate, as this is not supported by the raw data of the testing that was completed. (Tr. 53). When Dr. Swenson gave

David the mini mental status exam his score was 24 and three months later when Dr. Konewko gave him the exam it was 21. (Tr. 54). David showed significant decline in 2½ months.

[¶33] Dr. Swenson concluded that if David testified that he could manage his own affairs and live independently without any assistance, this is really another indication of the level of impairment that he has. (Tr. 280). These statements by David, shows that he lacks the capacity to use good judgment and he cannot take all of the information and process it, to make a decision. (Tr. 280). His lack of judgment, lack of insight, and his unawareness of how significant his problem really is, is really part and parcel of why he can't even select from two or three choices relating to what is in his best interests. (Tr. 280).

[¶34] It is important to note that David actually presents better than he functions. (Tr. 55). The reason for this is despite the fact that he has Alzheimer's, it does not mean that he losses all of his other capacities. (Tr. 55). David presents better than he functions as he can speak well and he worked hard and was intelligent, his vocabulary is relatively good and is still intact. (Tr. 55). Also, the fact that he was a salesman, he can banter socially and he is very enjoyable to be around. (Tr. 55).

[¶35] It is clear that David has very limited insight into his problems, as he choose to drive in May 2005, after his license was revoked and after Dr. Swenson told him not to. (Tr. 57). Also, David testified that he feels that his memory has gotten better. (Tr. 219).

[¶36] Dr. Konewko was the expert witness hired by David's counsel. (Tr. 134). (App. 101). Dr. Konewko does not have any experience as an expert witness in these

type of situations and also testified that Dr. Swenson is a good doctor and that he did a good evaluation. (Tr. 134-137). Dr. Konewko is not board certified and is not published anything in the past 10 years and has never published anything in the area of dementia/Alzheimer's in adults. (Tr. 150). Dr. Konewko saw the same concerns with David that Dr. Swenson did, based on his testing, and Dr. Konewko had the same conclusions that Dr. Swenson had regarding an Alzheimer's presentation with the additional impact on his judgment when being asked to make a decision. (Tr. 138,151). Dr. Konewko was in agreement with Dr. Swenson that the best situation for David would be to live in some type of assisted living memory care type unit with 24-hour care. (Tr. 144). (App. 104). Dr. Konewko testified that if David stated that he wanted a financial institution like US Bank to manage his finances, he would be basing this opinion on the knowledge that he has based on his past years of doing business with US Bank. However, if US Bank was not as reputable as it once had been, David would not be able to process all that information because of his impairment. (Tr. 149-150).

[¶37] Dr. Konewko acknowledged that David drove on May 22, 2005. This was 5 days after David had met with Dr. Konewko and David had told Dr. Konewko that Dr. Swenson had told him not to drive and that he was not going to drive. (Tr. 157). Dr. Konewko could not tell whether it was his memory, judgment or impulse control that caused him to drive despite the fact that he communicated that he should not be driving. (Tr. 157). Dr. Konewko did not take the position that David should have independent decision making. (Tr. 158). His opinion was that David's wishes should count towards the ultimate decision. (Tr. 158).

[¶38] The most significant statement during Dr. Konewko's testimony was:

“A. I’m not saying that he should have the independent decision making, I’m saying that what he says counts.

Q. Okay. So if he’s given a choice or two of where to live and Fargo is not one of those choices than he should not independently be able to select Fargo, is that what you’re saying?

A. Correct. I mean, and this is a clinical situation we face all the time. So last week I have a woman who has Alzheimer’s disease. All of her kids live in California. She says, “You know, I want to stay in Fargo.” Kids who have drew up Power of Attorney for finances and health care, they just don’t have any roots here at all. That’s her choice but, you know, it just isn’t going to happen.

And so, you know, all things being equal if Fargo is a possibility and another place is a possibility and everything else is equal I think that he should have a say in that.”

(Tr. 158 – 159).

[¶39] Dr. Konewko opined that David needs 24-hour supervised living and Dr. Konewko acknowledges that is a component of his current living situation. (Tr. 166-167). Ultimately, Dr. Konewko testified that if the guardian is to narrow down the

choices for David as to what's appropriate or inappropriate, David can make a choice out of those selected choices but he is not able to independently make a decision about what he wants to do. (Tr. 167).

[¶40] It was clear when David testified, that he is extremely confused. David testified that he was currently taking karate and practicing with an expert in Minneapolis, Bob Farsaro. (Tr. 204). David did not have any recall that Dr. Swenson had informed him about his living conditions. (Tr. 206). When Steve Johnson initially asked David how he arrived at Eden Prairie, David started talking about record keeping and working on his books. (Tr. 207). Initially, David stated that he was okay with living in a facility in Fargo, similar to the one that he is living in, in Eden Prairie, however, he did testify that he would rather go back to his own house. (Tr. 208).

[¶41] When David was asked whether he had purchased a home for Jean Xu, recently, he stated:

“A. That is correct. I put down -- money down on a small apartment for Jean because she needed to get out of the place she was in because it was stifling and she was workin' herself to death.”

(Tr. 213).

[¶42] It was not clear that David recalled that he had actually purchased a condominium for Jean Xu. He testified that he had thought he had put money down on a small apartment. It was clear that David did not have independent recollection about buying the condo for Jean Xu and having a mortgage put in place, as David's counsel, lead him through all areas of questioning. (Tr. 213). Although David's counsel stipulated

that he should have a guardian and a conservator, (Tr. 10), it was clear that David did not agree with that. David stated he did not want anyone managing his money except for himself and First Bank. (Tr. 217).

[¶43] Counsel stipulated that David could not make any decisions regarding his finances as David cannot use good judgment to make this decision, however, counsel argued we should let him make decisions about whether he wants to live in an assisted living facility in Fargo or in Minneapolis. It is illogical to argue that David could make a decision about where he wants to live but he is incompetent to make a decision about managing his money. David cannot be competent to make decisions in one area but not another. (Tr. 45).

[¶44] David displayed even more confusion on cross-examination. When asked about why he lost his driver's license, David testified that one of the doctors suggested that he not drive, however, he went on talk about the food that he and his wife were on because she had lung cancer and then MeritCare dropped her on her head and killer her in the hospital. (Tr. 218). David did not know what kind of medication he was on except that his son was kind enough to supply medications. (Tr. 219). David testified that he had cancer and bipolar disease. (Tr. 226). He does not have either of these. The best evidence that David cannot make a decision about where he wants to live is, when the question was presented to him, to see if he understood, that if he lived in Fargo, he would not see Bucky and the kids as often. David stated:

Q. Now, does it make a difference for you if - - if you were to live in Fargo, you wouldn't be able to see Bucky and the kids as often? Does that - -

A. Well, no. They come up - - they come up all often. And so Carrie's up here so I don't deny the children. I think I've been fairly kind to Buck and Carrie. And so I'm flabbergasted when she uses an old friend of mine and hers that she used to go with to come up and pick me up on some pretext that we're going to go to breakfast.

Q. Do you understand if you move to Fargo you wouldn't be able to see Bucky and the kids as often because they couldn't drive?

A. Well, they'll come up here or I'd go down there or whatever the deal is. They come up they would - - they'd come up the same amount of times.

Q. How would you get down there?

A. Well, I don't know. If I'd ever - - if I'd ever - - I haven't been in the Cities now for several months - - for several years because it's a long trip and I had a lot of - - a lot of things going on down there but I stopped going down there because it's too crowded and too congested. It's a mad house down in Minneapolis now.

(Tr. 227).

[¶45] David was unable to explain why he met with Dr. Konewko. His response was "that they normally send out sheets and they feel you should have some attention done so that's why I met him". (Tr. 229). David had no idea that while he was

testifying, that he actually was living in Eden Prairie. David seemed to think he was still in Fargo at the time of the trial. David stated that Bucky has asked him several times to go over to house but he doesn't travel down to the cities much because he hasn't been there for years. (Tr. 230).

[¶46] David's own testimony showed that he clearly is a vulnerable adult. David stated that he has not given Jean Xu money and she has paid money back, she has paid a lot of it back. (Tr. 231). The evidence showed David gave or loaned Jean Xu a considerable amount of money and none of it had been paid back by Jean Xu. (App. 135, 142). Specifically, Jean Xu had David forgive the \$18,000 loan against her car without her paying any thing and after the temporary guardianship was in place. (App. 135).

[¶47] David did not recall having any conversations with Bucky about accepting assistance in his home and he stated that he did not need anyone in his home to help him exist. (Tr. 232). Although David's counsel was arguing that David would like to live in Fargo. David had no intention of living in assisted living in Fargo, as he wanted to live at his home.

[¶48]

LAW AND ARGUMENT

[¶49] After the hearing on September 26, 2005, which was ultimately concluded on November 14, 2005, the court granted the guardianship and conservatorship petition without any limitations on the authority of the guardian and the conservator. (App. 116). In addition, the court found "the powers and duties conferred upon the permanent co-guardians and co-conservators are appropriate as the least restrictive form of intervention, as both Dr. Konewko and Dr. Swenson testified that David B. Johnson's decision making ability is severely impaired and he is not capable of making a decision on his own of

where he would like to live as he is unable to process all the information and analyze the consequences of his decisions. (App. 118). The Petitioners have consulted with the ward regarding his living arrangements and have made decisions in his best interests.” (App. 118).

[¶50] **I. Burden of Proof.**

[¶51] The current guardianship law mandates that the trial court find incapacity, lack of an alternative resource plan, and the necessity of guardianship supervision, all by clear and convincing evidence, then select the least restrictive form of intervention. See N.D.C.C. § 30.1-28-04(2)(b). “A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made.” In re Braaten, 502 N.W. 2d 512, 517 (N.D. 1993). (*citing* Boehm v. Backes, 493 N.W. 2d 671, 674 (N.D. 1992)).

[¶52] “Whether a determination is a finding of fact or conclusion of law is decided by the reviewing court, and labels applied by the trial court are not conclusive.” In re Braaten, 502 N.W. 2d at 517 (*citing* In Interest of Kupperion, 331 N.W. 2d 22, 27 (N.D. 1983)), “accordingly, we will not disturb a trial court’s findings on guardianship unless the findings are clearly erroneous”. In re Braaten, 502 N.W. 2d 517. The parties stipulated that a guardianship and conservatorship was the least restrictive alternative. (Tr. 10). It is illogical to argue that “. . .the district court interpreted the facts through an erroneous interpretation of the law and failed to properly consider the necessity of analyzing the least restrictive placement alternatives and the policy considerations

outlined in Braaten, which favor a limited guardianship”, (Appellant’s brief ¶ 23), when both experts testified that David needs a memory care unit. (Tr. 53, 144, 166-167).

[¶53] II. **Did the Johnson Children Prove by Clear and Convincing Evidence, a Memory Care Unit in Eden Prairie was the Least Restrictive Alternative Available, When Both Experts Testified a Memory Care Unit was Necessary; David is Extremely Confused about Where He is Currently Living and Does Not Have the Capacity to Make a Decision Relating to Where He Wants to Live?**

[¶54] The parties stipulated that the least restrictive alternative was a guardianship and conservatorship, with the Johnson Children being appointing as co-guardians and Co-Conservators. (Tr. 10). David’s counsel argued that the co-guardians should have limited residential authority so that David could live in a care facility in Fargo North Dakota. It was not clear from David’s testimony that he wanted to live in a care facility in Fargo, as he stated he wanted to live in his home in Fargo. (Tr. 208). David’s position, that he should have the authority to make the decisions to live in Fargo and not Eden Prairie, as this is the “least restrictive alternative” is inconsistent with the actual facts of this case.

[¶55] David did not want a conservator either, as he felt that he himself or he and the bank could manage his finances. (Tr. 217). Counsel is taking the position that despite the fact that David expressed an interest relating to managing his own finances, there was no dispute that David needed a full conservatorship with no limitations. However, counsel is arguing because David could verbalize the fact that he wanted to live in Fargo in a care facility instead of Eden Prairie, that he is competent to make this decision, even though he is not competent to make any decisions relating to managing his finances. If David is incapable of deciding who should manage his finances and he needs a full conservatorship, it follows logically that he is not capable of making decisions

regarding his living arrangements and the least restrictive alternative relating to his living arrangements is a full guardianship.

[¶56] David's counsel relied heavily on the Braaten case for the proposition that the trial court, in this case, failed to follow the applicable law relating to the least restrictive alternatives set forth in In re Braaten.

[¶57] In the Braaten case, Diane Braaten had mental difficulties since birth. In re Braaten, 502 N.W. 2d at 514. In Braaten, the court ordered a full guardianship and conservatorship and then went on to state when it denied Diane's motion to stay the guardianship during the appeal, "it is my opinion that Diane Braaten is in need of full time guardian, not for all of her functions and activities but for certain ones that I deem to be life threatening." Id. at 515. In the Braaten case, there was testimony from a licensed psychologist that Diane did not need a full guardian, however, she would benefit from some assistance in making decisions affecting her access to medical services. Id. at 519 – 520. In the Braaten case, the issue was whether a full guardianship and conservatorship was "[the only] available alternative resource plan suitable to safeguard some or all of the ward's vital interests N.D.C.C. § 30.1-28-04(2)(b)(2)." Id. at 520. In the Braaten case, Diane wanted to continue to receive services from the work shop and the North Central Human Service Center as an alternative resource plan to a guardianship and this court agreed. Id. at 520.

[¶58] The Braaten case addresses the issue of whether there is an alternative in these types of cases, other than a full guardianship and conservatorship. In David's case everyone agrees that a full guardianship and conservatorship is necessary, however, the issue is whether the powers and duties conferred upon Bucky and Carrie are least

restrictive form of intervention consistent with David's ability for self-care under N.D.C.C. § 30.1-28-04, Subd. 2(b)(4). "Least restrictive form of intervention" means that "the guardianship imposed on the ward must compensate for only those limitations necessary to provide the needed care and services, and that the ward must enjoy the greatest amount of personal freedom and civil liberties consistent with the ward's mental and physical limitations." N.D.C.C. § 30.1-26-01(3). *Id.* at 521.

[¶59] In David's case, there was no evidence presented at trial to support that there is some less restrictive alternative than a full guardianship and conservatorship, other than arguments by David's counsel. Dr. Swenson David's treating neuropsychologist, stated Summit Place was the less restrictive alternative. (Tr. 52-53). Dr. Konewko opined that if Fargo was not one of the choices selected by the guardians, that David does not have the capacity to make this choice on his own. (Tr. 158-159). David's own testimony was that he felt he could live on his own. (Tr. 208). Also, Jean Xu was financial exploiting David and taking advantage of his incapacity, specifically by having him sign off on his lien against her vehicle in July of 2005, after a temporary guardianship was awarded. (Tr. 123-124). (App. 135). Bucky and Barb are trained medical professionals who can best deal with David and his medical issues. (Tr. 174-176). If David was to live in Fargo, he would have less contact with Bucky and Barb and his grandchildren. (Tr. 111-112, 175-176, 179). David has more friends in Minneapolis than he does in Fargo. (Tr. 192). Summit Place is a facility that David can transition throughout all of the stages of his Alzheimer's disease. (Tr. 52). Carrie and Bucky divided up the work so that Carrie would manage the property and the finances in Fargo and Bucky would manage the personal and medical issues relating to David which would

be best accomplished at Summit Place. (Tr. 111-112, 175-176, 179). David has absolutely no insight into his limitations and was so confused when he testified, that at trial, he thought he was still living in Fargo. (Tr. 230). All of these factors support that a full guardianship and conservatorship without limitations, as the least restrictive alternative in this case. There was no evidence on the record that there was any other alternative than a full guardianship and conservatorship.

[¶60] If David has testified that he wanted to live in Fargo because he was not very close to Bucky and his grandchildren, and that he preferred to spend more time with his friends, there may be some argument to make that David should have a limited guardianship. However, David's primary reason for stating that he wants to live Fargo is he believes that he could still live in his own residence. (Tr. 208). The reason that David states he wants to live in Fargo is this is what is familiar to him, not because he is able to evaluate all of the factors and make a reasoned decision. (Tr. 45-46). David states he wants to live in Fargo because that is what he is most familiar with. (Tr. 45-46). David's own expert stated that if "all things were equal" and there was no difference for him to live in Minneapolis versus Fargo, that Fargo would be an appropriate place. (Tr. 227). However, it is clear that there are significant factors which weigh heavily in support of David living in Summit Place at Eden Prairie, therefore, David's own expert was not supporting David's request to live in Fargo.

[¶61] If this court was to decide that the least restrictive alternative for David, in this case, would be to live in Fargo, the precedent established by that type of decision, would mandate that any time a ward is able to communicate a request, that this is sufficient to establish a limited guardianship.

[¶62] The Johnson Children have the right under North Dakota law to establish a residence for David at Summit Place in Eden Prairie Minnesota. Under N.D.C.C. § 30.1-28-12, Subd. 2, as long as the decision of the guardian is consistent with the terms of the guardianship order, the guardian is entitled to custody of the person of the ward and may establish the ward's place of residence "within or without the state". There is no restriction that the Johnson Children are limited to placing David in North Dakota.

[¶63] David's counsel relies on Minnesota law to support their position that since David stated he wanted to live in Fargo, David's right to establish his home is "inherent and inalienable".¹ In re Medworth, 562 N.W. 2d 522, 523 (Minn. Ct. App.

¹ Under Minn. Stat. § 524.5-102 and N.D.C.C. § 30.1-01-06, a guardian is defined as a person who is "a guardian of a minor or incapacitated person," whereas a conservator is defined as "a person who is appointed by a court to manage the estate of a protected person." However, at the time that In re Medworth, was decided by the Court of Appeals of Minnesota, no such distinction was made under Minnesota law. Both a conservator and a guardian were defined as one who carries out "the powers and duties designated in section 525.56 for the care of an incapacitated person or that person's estate, or both." Rather, the two were distinguished by a higher level of mental capacity for a conservatee than for a ward. The distinction is evidenced in the language of Minn. Stat. § 525.539 which limited the powers of a conservatee to "some, but not all, of the powers" given to a guardian. Therefore, the Court's holding in In re Medworth, is restricted to a situation where the powers of a conservatee are limited do to the conservatee's higher level of mental capacity. "A public guardian exercise all of the designated powers, while a public

1997). In Medworth, Elvira Medworth was moved from Minneapolis to Wisconsin, by her conservator, because she had allegedly complained about African-American nursing home staff. When the conservator could not select a provider based on race, he opted not to call any other potential in-home providers and moved Medworth to Wisconsin where an all Caucasian staff was employed. Id. at 523. The trial court found that Medworth should be allowed to reside in her home, as she testified that remaining in her house was her primary concern and that she was willing to spend some of her own money to obtain in-home care. Id. Also, a social worker testified that Medworth could be safe in her home with 24-hour supervision and assistance. Medworth's family physician also testified that she could safely remain in her home with proper support and mobilization of community services. Id. at 523. David's case is distinguishable from Medworth. In David's case, he states he wants to live at home, however, his attorneys have argued that he should live in a care facility in Fargo. Also, the following factors favor Minneapolis over Fargo: Jean Xu is financially exploiting David despite the fact that there is a guardianship and conservatorship in place; David's grandchildren all live in Eden Prairie; Barb and Bucky are physicians and better able to deal with David's medical conditions; Summit Place can take care of all of David's progressing dementia needs without the requirement to move him; there is no comparable facility in Fargo, the friends from Fargo have visited David in Eden Prairie; there is no recommendation from any of the professionals that David is capable of living in his home with 24-hour in home supervision; Carrie and Bucky have split up the responsibilities and Bucky is better conservator exercises only some of the powers." In re Conservatorship of Foster, 535 N.W. 2d 677 (1995) (quoting Minn. Stat. § 252A.02, Subd. 7, 8 (1994)).

suited to deal with the guardianship responsibilities, therefore it is in David's best interests to reside at Summit Place in Eden Prairie.

[¶64] In the Medworth case, the court found that "a conservator may change a conservatee's place of abode only if consistent with the best interests of the conservatee." Id. at 524. The Medworth court went on to state that "when analyzing whether a change in abode is a proper exercise of a conservator's power, the welfare of the conservatee is of paramount importance". (*citations omitted*), (holding welfare of ward is of utmost concern when guardian proposes to move ward from present abode;) Id. *citing Webster's New Universal Unabridged Dictionary 2077 (Gene L McKechnie ed., 2d ed. 1983)(defining "welfare" as "the condition of health, prosperity, and happiness"). The Medworth court went on to state "this rule holds especially true when a conservator proposes to move the conservatee outside of the jurisdiction appointing the conservator." In re Medworth, 562 N.W. 2d at 524. Clearly, the facts in Medworth are significantly different than the facts in David's case. In Medworth, the alleged racial preferences which played a significant role in limiting the conservator's investigation into care alternatives was a primary consideration. Id. at 525. The court went on to state:*

"while the conservator most likely had good intentions in moving his aunt to Wisconsin, the discriminatory rational underlying his decision cannot be allowed. In the face of an inherit right such as the establishment of one's own home, the conservator's admittedly discriminatory actions, and the entire record before us, the court in Medworth concluded that the trial court

abused its discretion in granting the conservator's petition to move Medworth from her home to a congregate living apartment in Amery, Wisconsin."

Id. at 525.

[¶65] Medworth, does not stand for the proposition that if a ward can communicate a request to live in a certain area, no other living arrangements can be made, by the guardian. Also, at the time of the decision in Medworth, a finding that an individual should have a conservator is not a finding an individual is incapacitated. Minn. Stat. § 252A.12. In Minnesota, only a guardianship is a finding of incapacity and a conservatorship was not. This is unlike North Dakota.

[¶66] It is important to note that in Minnesota, "a choice that is least restrictive of a conservatee's civil rights and personal freedoms is not always in the conservatee's best interests." In re Conservatorship of Lord, 2001 WL 977941 (Minn. App. 2001). (*Citations Omitted*). (App. 138). (Rejecting notion that living in private home is always less restrictive of a conservatee's civil rights and personal freedom than living in assisted-living or other healthcare facility and stating that "because the ultimate question to be answered is what is in the conservatee's best interests, such a blanket conclusion is unwarranted"). In re Conservatorship of Lord, (App. 138).

[¶67] It is clear based on the facts and evidence in this case, David's best interests is for him to reside at Summit Place in Eden Prairie. This court should adopt similar language as Minnesota has incorporated in its guardianship/conservatorship cases, that what is least restrictive is not necessarily dependent on only the wishes of the

conservatee, but the totality of the circumstances which includes the recommendations of medical personnel, the ward's preferences, and weigh all relevant factors.

[¶68] In North Dakota, it is clear that when an individual has lost abilities such as memory, judgment, planning, abstract thinking, intellectual skills, and changes have occurred in personality and behavior and he is suffering from dementia, this is a basis to order full guardianship and conservatorship without limitations. *See Guardianship and Conservatorship of Larson*, 530 N.W. 2d 348, 351 (Minn. 1995). In the Larson case, Mr. Larson was sometimes confused about what State he was in, the City he was in, how old he was, how much money he had and what his occupation was. *Id.* A guardianship was necessary to ensure his health and safety as the evidence demonstrated there was no other feasible alternative because the proposed ward would refuse services and be uncooperative. *Id.* at 351. It is important to note that in the Larson case, Mr. Larson was also arrested for driving without a license. *Id.* at 352. In the Larson case, a clinical psychologist and a social worker testified that Mr. Larson was unable to manage issues pertaining to finances, health and safety and this court, found that these facts left a definite and firm conviction that the trial court did not make a mistake in finding Mr. Larson was incapacitated and in need of a guardian. *Id.* at 352. In the Larson case this Court also believed it was significant that Mr. Larson had written out a check for \$4,000 and gave it to an individual named Lillian Ruff without getting an accounting of the money. This was another factor that supported the guardianship. *Id.* at 350.

[¶69] There are no facts to support that David living in Fargo, in a memory care unit is a less restrictive alternative of his civil rights and personal freedoms than the current placement at the memory care unit at Summit Place in Eden Prairie. David's

counsel points to no specific facts in the record to support their argument that David's civil rights and personal freedoms will be less restricted, living in a memory care unit in Fargo, North Dakota, than in a memory care unit in Eden Prairie, Minnesota. It is clear that due to David's illness, his civil rights and personal freedoms will be restricted wherever his place of abode is determined to be, with the result that he will not be able to come and go as he pleases or engage in activities of his choosing. The facts relied on by the trial court in David's case to support the conclusion of a guardianship with no limitations is: David will be closer to his son and only grandchildren; at Summit Place, David's current and future medical needs are covered without having to move him to another location; David is doing extremely well and better than expected at Summit Place and appears happy living there; his friends who live in Fargo, have been able to visit him at Summit Place and Bucky can assist with all medical decisions. These facts all support the trial court's conclusion and indicates the court understood the law, when it applied the law to the facts.

[¶70] The fact that David has expressed a preference to live in Fargo, cannot be the only criteria to determine David's place of abode. In re Conservatorship of Brady, 607 N.W. 2d 781, 785 (Minn. 2000), the preference of the ward should be considered when the conservatee has capacity to express a preference. Id. at 785-786. The expert opinion of Dr. Konewko and Dr. Swenson indicates David does not have the capacity to express an opinion. (Tr. 158-159, 43, 44-48).

[¶71] **III. Should the Appeal be Dismissed as the Issue of David's Competence is Moot?**

[¶72] An appeal will be dismissed as moot if no actual controversy is left to be determined. In re E.T., 2000 N.D. 174, ¶ 5, 617 N.W. 2d 420. No actual controversy

exists if certain events have occurred which make it impossible for this Court to issue relief or when the lapse of time has made the issue moot. In re W.O., 2004 N.D. 8 ¶ 10, 673 N.W. 2d 264.

[¶73] David has been diagnosed with Alzheimer's disease which is progressing. (Tr. 131). From the time that Dr. Swenson evaluated David in March/April of 2005 and the time that Dr. Konewko evaluated David in May and June of 2005, David's Alzheimer's Disease had progressed. (Tr. 37-38, 54, 131) (App. 101). We are now a full year after Dr. Konewko's evaluation. There is no question that if this court was to determine that the least restrictive alternative would be for David to live in Fargo, North Dakota, the circumstances of David's progressive Alzheimer's disease will make it impossible for this court to issue relief, as the lapse of time has made the issue of whether David should make decisions relating to his place of abode, moot. By the time, this court issues an opinion in this matter, David will have resided at Summit Place for a year. David's progressive Alzheimer's Disease has advanced and if there was a basis at the time of trial, to support that David could make a decision where he wanted to live, David's current mental status would not support that same conclusion. Therefore, this appeal should be dismissed.

[¶74] The Johnson Children made a decision to move David from his home Fargo to a memory care unit at Summit Place, in Eden Prairie, as this would give him more contact with Bucky and his only grandchildren, all of David's needs could be dealt with at one facility as his disease progressed. Carrie could then focus on the financial and property management issues while her brother who is a trained professional, can deal with David's personal issues including his medical issues. It is not as easy for Jean Xu to

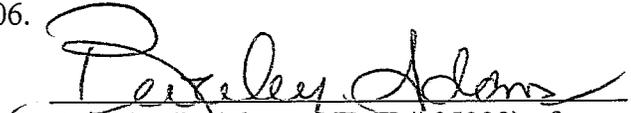
take advantage of David, if David is 200 miles from Fargo; David has friends in Minneapolis who visit him in addition to his friends from Fargo who visit him. Although David says he wants to live in Fargo, he wants to live at his own residence and not in another memory care unit in Fargo. David's civil liberties and personal freedoms are no less restricted at Summit Place than they would be in a memory care unit in Fargo, North Dakota. The Johnson Children made all efforts to include David in the decision making process, however, he denies that he has a problem and he refuses to accept any alternatives that were proposed to him. The Johnson Children had no other choice but to make a decision in David's best interests, which they did. Clearly, the decision to move David to Summit Place in Eden Prairie was in his best interests, and the least restrictive alternative taking into consideration his preference.

[¶75] Therefore, the court's November 17, 2005, Order must be upheld and this appeal dismissed.

[¶76] **CONCLUSION**

[¶77] For the above reasons, the Johnson Children respectfully request that the decision of the district Court be upheld and that the appeal be dismissed as there is clear and convincing evidence to uphold the trial court's decision and there is no evidence that the trial court was clearly erroneous in its finding of fact, its view of the law and there is no definite and firm conviction that a mistake has been made. In re the Guardianship/Conservatorship of Bruce M. Van Sickle, 2005 N.D. 69, ¶ 24, 694 N.W. 2d 212. In the alternative, the Johnson Children request that this appeal be dismissed as moot, as the Alzheimer's disease progresses, no actual controversy exists, which makes it impossible for this court to issue relief as the lapse of time has made the issue moot.

Dated this 19th day of May, 2006.



Beverley L. Adams (ND ID# 05329) of

SERKLAND LAW FIRM

10 Roberts Street

P.O. Box 6017

Fargo ND 58108-6017

(701) 232-8957

ATTORNEYS FOR PETITIONERS/

APPELLEES

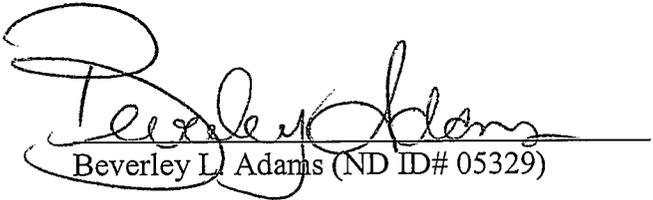
CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was on the
19th day of May, 2006, sent by electronic means to the follow:

Rob Manly
Vogel Law Firm
215 30th St. N.
P.O. Box 1077
Moorhead, MN 56561-1077
rmanly@vogellaw.com

Steven Johnson
Vogel Law Firm
218 NP Avenue
P.O. Box 1389
Fargo, North Dakota 58107-1389
sjohnson@vogellaw.com

Mr. Robert Schultz
Conmy Feste, Ltd.
406 Main Avenue
P.O. Box 2686
Fargo, ND 58108-2686
rschultz@conmylaw.com

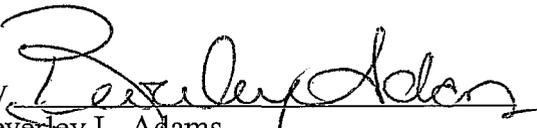

Beverley L. Adams (ND ID# 05329)

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee in the above matter, and as the author of the above brief, hereby, certify, in compliance with Rule 28(g) of the North Dakota Rules of Civil Procedure, that the above brief was prepared with proportional typeface and total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 10,200.

Beverley L. Adams (ND Id. 05329)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo ND 58108-6017
(701) 232-8957

ATTORNEYS FOR APPELLEES

By 
Beverley L. Adams