

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

In the Matter of the Guardianship of  
the Person and Conservatorship of the  
Estate of V.A.M., an Incapacitated Person

Supreme Court No. 20150043  
District Court No. 49-2012-PR-00051

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P.M. Petitioner

v.

V.A.M., T.M., K.J., D.N., S.M., P.S.M., L.S.;  
First International Bank and Trust, Limited  
Conservator; Fiduciary and Advocacy  
Services, Limited Guardian, Respondents

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T.M. and K.J., Appellants.

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**APPELLEE D.N. 'S BRIEF**

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APPEAL FROM THE DISTRICT COURT  
EAST CENTRAL JUDICIAL DISTRICT  
TRAILL COUNTY, NORTH DAKOTA  
THE HONORABLE DOUGLAS HERMAN

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PEMBERTON, SORLIE, RUFER  
& KERSHNER, P.L.L.P.  
Stephen F. Rufer, No. 03834  
110 North Mill Street  
Fergus Falls, Minnesota 56537  
Telephone: 218-736-5493  
[s.rufer@pemplaw.com](mailto:s.rufer@pemplaw.com)

Attorneys for D.N.

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## STATEMENT OF THE ISSUE

[¶1] Whether the district court abused its discretion when it assigned V.A.M.'s claims for undue influence, lack of capacity, or breach of fiduciary duty to V.A.M.'s children regarding gifts and transactions made by V.A.M. prior to the appointment of a Limited Guardian and Limited Conservator.

## STATEMENT OF FACTS

[¶2] V.A.M. and V.A.M.'s now-deceased spouse "had a long standing and stable estate plan in place since March 1996. Minor modifications to the estate plan were made in December 2004." See Appellants' Appendix ("App. A"), 94.

[¶3] V.A.M. and V.A.M.'s now-deceased spouse "had a farm consisting of 1185.34 deeded acres including the 21.69 acres on which the farmstead is located." Id.

[¶4] As part of the estate plan, T.M. was granted an option to buy V.A.M.'s spouse's share of the above-cited farmland at "80% of the appraised market value." Id.

[¶5] V.A.M.'s estate plan also granted an option for T.M. to "buy the home half section on which the farmstead was located, the farmstead, buildings and machinery at 50% of the appraised market value." Id. There is another option for T.M. to "purchase the remainder of his interest in the farmland, another half section, at 80% of the appraised market value." Id.

[¶6] On September 8, 2012, V.A.M.'s spouse passed away, and V.A.M. subsequently executed a warranty deed in which V.A.M. gifted his portion of the farmland to T.M. and T.M.'s spouse on November 7, 2012 for no consideration instead of at the 50% discount, as provided in the estate plan. Id.

¶7] Of V.A.M.'s seven children, only T.M. and K.J. knew about the existence of the November 7, 2012 warranty deed until "sometime later in November 2012." App. A, 94-95. V.A.M. was upset following the November 7, 2015 transfer, and he confided to one of his daughters that following said gift; he "had nothing left." Id.

¶8] Prior to the death of V.A.M.'s spouse on September 8, 2012, V.A.M. and his spouse were estimated to own assets in excess of over \$6 million. Id. at 95. Following the death of V.A.M.'s spouse, but prior to V.A.M.'s November 7, 2012 gift of farmland to T.M., V.A.M.'s estimated net worth was over \$ 3 million. Id. The \$3 million estimate does not include the value of V.A.M.'s deceased spouse's ownership interest in the above-cited farmland. Id.

¶9] As of September 29, 2014, V.A.M.'s assets were less than \$500,000.00. *Id.* at 83-84, 96. If V.A.M.'s farm had been sold to T.M. in a manner consistent with the long-term estate plan, then V.A.M. would currently have assets in excess of \$2 million, and V.A.M. would also be receiving sufficient rental income from his land to pay for V.A.M.'s on-going needs. Id. at 96. V.A.M. also would have been able to help pay for his brother's nursing home care, which is something that V.A.M. had intended to do for his brother. Id.

¶10] V.A.M. gifted a significant amount of farmland to T.M. on November 7, 2012, and at this time V.A.M. "had several risk factors affecting his capacity and leaving him in a vulnerable state. Those risk factors include, recent loss of his spouse, documented cognitive decline (clinically evaluated in 2008 and 2010), diagnosed Parkinson's disease, living alone, multiple medications including Lorazepam (for management of anxiety), self-medicating with whiskey to manage a persistent cough due

to his Parkinson's, fear of change of his living situation, advanced age and a dependence on a person of trust and influence." Id. at 95.

[¶11] The Guardian Ad Litem (hereinafter "the GAL") reviewed V.A.M.'s November 7, 2012 gift of land to T.M. and T.M.'s spouse, and the GAL stated that V.A.M. "did not know the value of the gift [of farmland] that he made [to T.M. and T.M.'s spouse on November 7, 2012], [V.A.M.] believed that the original will was set up . . . [to gift the farm to T.M. and T.M.'s spouse] and that the gift [was] following the intent of the original will[.]" Id. at 95, 122.

[¶12] The GAL also stated in her May 2, 2013 report to the Court that a physician had opined that V.A.M.'s "cognitive difficulties could make [V.A.M.] vulnerable to influence and that [V.A.M.] would benefit from having support/assistance for making decisions about personal affairs including medical, residential and legal issues." Id. at 95, 127.

[¶13] The GAL further acknowledged a second physician's opinion that there were (and continue to be) "risk factors present for [V.A.M.] being unduly influenced such as depression, kids with different agendas and due to [V.A.M.'s] mild executive and cognitive impairments." Id.

[¶14] The GAL concluded that V.A.M. is "incapacitated[.]" and V.A.M.'s "current mental state and limitations, as explained by family members, Dr. Bergloff and Dr. Swenson, coupled with depression and family conflict currently prevents him from being able to communicate responsible decisions concerning matters of residence, medical treatment, legal affairs, vocation and finance without help and assistance." Id. at 95-96, 130. The GAL also mentioned that V.A.M.'s "mental state and limitations could

be dangerous to his health and safety if appropriate supports are not in place." Id. at 96, 130.

[¶15] At the time of V.A.M.'s November 7, 2012, gift of farmland to T.M. and T.M.'s spouse, V.A.M. placed "blind trust" in T.M. Id. at 95. Furthermore, "[f]ive of [V.A.M.'s] seven children believe that [V.A.M.] assigned his farmland to [T.M.] while [V.A.M.] was vulnerable to undue influence and lacked the capacity to make such a financial decision." Id. at 96.

[¶16] In addition, there was a second problematic land transaction between V.A.M. and T.M. Five days prior to the appointment of a Limited Guardian and Limited Conservator and one day before the GAL's report to the district court regarding the necessity of appointing a guardian and conservator for V.A.M. was finished, V.A.M. executed a contract for deed with T.M. for the purchase of farmland previously owned by V.A.M.'s spouse. Id. at 98-99. This transfer was performed secretly and without notice to D.N.'s attorney even though there were concurrent settlement discussions taking place before, during, and after the May 1, 2013 contract for deed. Id.

[¶17] Five of V.A.M.'s seven children believe that V.A.M. lacked the capacity to sign the May 1, 2013 contract for deed. Id. at 99.

#### **STANDARD OF REVIEW**

[¶18] The district court's assignment of certain claims to V.A.M.'s children is reviewable on an abuse of discretion standard. S.D.F. v. L.K. (In re V.J.V.N.), 2008 ND 106, ¶ 9, 750 N.W.2d 462 (citation omitted). However, a "party asserting [that a district] court abused its discretion . . . carries a *heavy* burden." Lynch v. New Pub. Sch. Dist. No. 8, 2012 ND 88, ¶ 23, 816 N.W.2d 53 (citations omitted) (emphasis added). Furthermore,

an "abuse of discretion by the district court is never assumed, and the burden is on the party seeking relief affirmatively to establish it." *Id.* at ¶ 23 (citations omitted). In addition, the "district court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination." *Id.* (citations omitted) (emphasis added). Furthermore, "[t]he party seeking relief must show more than the district court made a 'poor' decision, but that it positively abused the discretion it has under the rule." *Id.* (citations omitted). The Supreme Court "will not overturn the district court's decision merely because it is not the decision [the Supreme Court] may have made if [it was] deciding the motion." *Id.* (citations omitted).

#### **LAW AND ARGUMENT**

[¶19] The appellants have failed to carry their *heavy* burden of establishing that the district court abused its discretion by assigning "any and all possible claims currently held by [V.A.M.] against any child of [V.A.M.] . . . for undue influence, lack of capacity, or breach of fiduciary duty regarding prior gifts and transactions made by [V.A.M.]." App. A, 103. Appellants' primary argument in favor of establishing an abuse of discretion relies on a misguided theory that the district court's order "carved out portions of authority that were previously granted to a conservator[.]" which supposedly created "sub-conservators" in opposition to the established statutory procedure for the appointment of conservators. Appellant's Brief ("App. Brief") at ¶15. Appellants also assert that the district court abused its discretion by disregarding a Stipulation executed by most of V.A.M.'s children and because the district court did not follow V.A.M.'s request that the above-cited claims not be assigned to V.A.M.'s children. App. Brief at

¶¶21-27. For the reasons mentioned below, appellants' entire line-of-argumentation is unconvincing in its entirety, and the district court acted properly and within its discretion with the assignment of the above-cited claims to V.A.M.'s children.

**A. The District Court did not Abuse its Discretion when it Assigned V.A.M.'s Claims for Undue Influence, Lack of Capacity, and Breach of Fiduciary Duty to V.A.M.'s Children with Respect to the Gifts and Transactions that V.A.M. Enacted Prior to the Establishment of the Limited Conservatorship.**

[¶20] The appellants would like this Court to focus on the non-existent creation of "sub-conservators" in order to reverse the assignment of V.A.M.'s claims to his children pursuant to paragraph 5 of the district court's November 14, 2014 order. However, the issue on appeal has nothing to do with the supposed creation of "sub-conservators." On the contrary and as the appellants admit in their brief, the "issue on appeal is whether the district court erred when it granted FIBT's petition to assign certain legal claims of V.A.M. to his children." App. Brief at ¶5 (emphasis added).

[¶21] As a threshold matter, a conservator can assign certain claims and/or potential claims to others pursuant to a court order because a protected person would be able to assign such claims if the protected person were "present and not under disability[.]" N.D.C.C. § 30.1-29-08(2)(c). The particular assignment at issue is an assignment of particular choses in action that V.A.M. had as of November 14, 2014 to V.A.M.'s children. A "chose in action is a comprehensive term including an infinite variety of contracts, covenants, and promises which confer on one party a right to recover a personal chattel or a sum of money from another by action." First Am. Bank Valley v. George J. Hegstrom Co., 551 N.W.2d 288, 292 (N.D. 1996) (citation omitted) (emphasis added). This Court has also affirmed that a chose in action also includes when a party

sues another party for rescission of a real estate contract. Schmidt v. Grand Forks Country Club, 460 N.W.2d 125 (N.D. 1990).

[¶22] This Court further acknowledged that a party may sue out a chose in action by seeking rescission of a real estate conveyance, and the Court expressly stated that the rescinding party would be entitled to a reconveyance of the real property if the applicable contract was successfully rescinded and provided that the real property had "not passed into the hands of innocent persons." Fedorenko v. Rudman, 71 N.W.2d 332, 336 (N.D. 1955). Seeking a reconveyance of real estate pursuant to a rescission action makes sense because a "rescission is the unmaking of a contract. . .[and] [a]n attempted rescission of a contract assumes that it has ceased to exist." Id. (citations omitted). Furthermore, "[r]escission does not merely terminate a contract, it abrogates and undoes the contract from the beginning. . .[and thus] [g]enerally speaking, rescission abrogates the contract not partially but completely." Id. (citations omitted). Thus, pursuant to the district court's assignment of claims and the applicable case law, V.A.M.'s children may seek monetary damages and/or the reconveyance of the subject real estate from T.M.

[¶23] The case before the Court is similar to the fact patterns in the above-cited cases. If V.A.M.'s conveyance of farmland to T.M. was the product of undue influence, lack of capacity, or breach of fiduciary duty, then V.A.M. would be entitled to sue T.M. for the monetary value of the land and possibly for a reconveyance of the subject real property. This conclusion follows because the applicable statutory law provides that a "party to a contract may rescind the same in the following cases only: If the consent of the party rescinding or of any party jointly contracting with the party rescinding was

given by mistake or obtained through duress, menace, fraud, or undue influence[.]" N.D.C.C. § 9-09-02(1) (emphasis added).

[¶24] In addition, "[i]n this State, 'a chose in action may be transferred either by parol or by written assignment.'" Schmidt, 460 N.W.2d at 128 (citing Willow City v. Vogel, Vogel, Brantner & Kelly, 268 N.W.2d 762, 764 (N.D. 1978) [quoting Roberts v. First Nat. Bank, 8 N.D. 474, 79 N.W. 993 Syllabus 3 (1899)]). Furthermore, "[t]he law requires the observance of no particular formality in the assignment of a chose in action." Willow City, 268 N.W.2d at 765 (citing International Harvester Company v. Hanson, 36 N.D. 78, 161 N.W. 608, 610 (1917)).

[¶25] Consequently, the district court had the authority pursuant to N.D.C.C. § 30.1-29-08(2)(c) to assign V.A.M.'s above-cited claims to V.A.M.'s children. This assignment was valid because it involved the assignment of choses in action, and this State's case law has repeatedly upheld the validity of such assignments. As a result, there were multiple grounds upon which the district court could validly assign V.A.M.'s claims, and thus it cannot be asserted that the district court's assignment was nothing more than "an arbitrary, unreasonable, or unconscionable . . . [decision, which was] not the product of a rational mental process[.]" Lynch, 2012 ND 88, ¶ 23, 816 N.W.2d 53 (citations omitted). In sum, the appellants have failed to carry their "heavy burden" of establishing that the district court abused its discretion with the assignment certain claims that V.A.M. had to his children, and as a result the district court's assignment of claims pursuant to paragraph 5 of the November 14, 2014 order should be upheld.

**B. The District Court did not Abuse its Discretion when it Effectively Delegated a Limited Set of Duties and Powers of the Limited Conservatorship to V.A.M.'s Children.**

[¶26] In the alternative, the Court may determine that paragraph 5 of the November 14, 2014 order effectively delegated specific conservatorship "duties and powers," as opposed to a mere assignment of certain claims to V.A.M.'s children. The appellants argue in favor of this potential determination when they criticize the district court's "assignment of duties and powers[,]" as well as when the appellants acknowledge that the district court "delegated the authority that it [the district court] ha[d] already given" to the limited conservator.

App. Brief at ¶¶25, 26.

[¶27] However, even if the district court did delegate specific conservatorship "duties and powers" to V.A.M.'s children pursuant to paragraph 5 of the district court's November 14, 2014 order, this delegation is permitted pursuant to N.D.C.C. §§ 30.1-29-24(1), 59-16-07(1), and 59-16-16(24). Consequently, the district court's delegation of specific conservatorship "duties and powers" would be nothing more than a straightforward application of North Dakota statutory law, and thus the district court's decision would not be an abuse of discretion.

[¶28] This conclusion follows because the applicable statute provides that a "conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in this state." N.D.C.C. § 30.1-29-24(1) (emphasis added). One of the "additional powers" conferred on trustees (and by extension on conservators) is the power to "delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances." N.D.C.C. § 59-16-07(1) (emphasis added). Consequently, a trustee [and by extension a conservator] has the power to delegate the prosecution or defense of "an action, claim, or judicial proceeding in any jurisdiction to

protect trust [and by extension a protected person's] property[.]" N.D.C.C. § 59-16-16(24). The delegation of a conservator's "duty and power" to prosecute or defend certain actions or claims on behalf of a protected person's estate is permissible so long as the delegation is something that "a prudent trustee [and by extension conservator] of comparable skills could properly delegate under the circumstances." N.D.C.C. § 59-16-07(1).

[¶29] Nothing in the record suggests that the district court abused its discretion when it authorized the delegation of the limited conservatorship's "duty and power" to prosecute any and all of V.A.M.'s above-cited claims to V.A.M.'s children pursuant to paragraph 5 of the district court's November 14, 2014 order. The district court could have determined that the limited conservator made a prudential decision that it could not manage the rest of V.A.M.'s estate and simultaneously sue one or more of V.A.M.'s children for, among other things, the improper transfer of real property to one child prior to the appointment of the limited guardian and limited conservator. The district court may have determined that V.A.M., in his incapacitated state, would lose confidence in the limited conservator if it pursued undue influence, lack of capacity, and/or breach of fiduciary duty claims against any of V.A.M.'s children. In addition, the district court may have determined that the above-cited delegations would be more cost-effective than having the limited conservator pursue the above-cited claims. There are many potential explanations as to how the district court could have arrived at its decision to delegate certain limited conservatorship "powers and duties" pursuant to paragraph 5 of the district court's November 14, 2014 order. With the foregoing facts and law in mind, the appellants have not satisfied their "heavy burden" of seeking to establish that the district

court abused its discretion, and the Supreme Court cannot assume that the district court abused its discretion. Lynch, 2012 ND 88, ¶ 23, 816 N.W.2d 53 (citations omitted).

[¶30] In fact, appellants have not identified anything in the record that unquestionably supports a showing that the district court abused its discretion. Appellants merely allege that (1) the district court unjustifiably appointed "sub-conservators" pursuant to paragraph 5 of the district court's November 14, 2014 order, and that (2) the district court neither acknowledged the Stipulation nor followed V.A.M.'s expressed wishes with respect to the assignment of V.A.M.'s undue influence, lack of capacity, and/or breach of fiduciary duty claims to his children. Appellants' "sub-conservatorship" argument has been addressed above, and appellants' second above-cited argument is addressed below.

**C. The District Court Gave Due Consideration to the Stipulation of Record and the Wishes of V.A.M. in Assigning Certain Rights Pursuant to Paragraph 5 of the November 14, 2014 Order.**

[¶31] Appellants also argue that the district court abused its discretion when it "failed to account for the fact that the limited conservator was founded and based upon the stipulation of the family." App. Brief at ¶24. The Stipulation may have been entered into by most of V.A.M.'s children, but the district court found in its applicable order that V.A.M. was "an incapacitated person and is in need of the continuing care and supervision of a limited guardian and a limited conservator." App. A. at 78. The applicable order also provided that V.A.M. "shall retain the right to make decisions regarding these [legal] matters unless it is determined by the Limited Conservator that the decision is not in his best interests or that [V.A.M.] does not have an understanding sufficient enough to enable him to make an informed decision regarding a particular

matter. [V.A.M.'s] values must be considered and respected by the Limited Conservator regarding decisions about what is in his best interests." App. A at 78 (emphasis added).

[¶32] Neither the Stipulation nor the applicable order establishing the limited conservatorship state or imply that in the event that V.A.M. disagrees with the limited conservator's proposed legal course of action, V.A.M.'s proposed course of action must prevail. To be clear, no party is arguing that V.A.M.'s opinions with respect to legal matters should be wholly disregarded. However, the plain language of the applicable order expressly states that the limited conservator can override V.A.M.'s opinions regarding legal matters if the limited conservator believes that a particular decision is not in V.A.M.'s best interests. The limited conservator is not obligated pursuant to the applicable order to rubber-stamp all of V.A.M.'s opinions regarding legal matters, and district court's assignment of certain claims was not an abuse of discretion because said courts have "broad powers to handle the estate and affairs of a protected person." Oliver v. Braaten (In re Sickles), 518 N.W.2d 673, 678 (N.D. 1994). As can be seen in the appellants' appendix, the limited conservator and the district court were well-aware of V.A.M.'s opposition to the assignment of V.A.M.'s claims to his children. App. A at 90-93, 100-101, 104-106, 109-114.

[¶33] Appellants are effectively arguing that V.A.M. should be permitted to override the limited conservator's determination that the assignment of certain claims pursuant to paragraph 5 of the district court's November 14, 2014 order is in V.A.M.'s best interests. As appellants argue, "[i]f V.A.M. wishes to investigate T.M. and bring allegations against him, then V.A.M. should be the one asking for this to occur." App. Brief at ¶24. However, it is a matter of record that V.A.M. is an incapacitated person

who is not capable of making decisions in his best interests 100% of the time. App. A at 78. If appellants' interpretation of the Stipulation and order establishing the limited conservatorship were to prevail, then there would be no need for any guardianship or conservatorship to be in place because V.A.M. would not need any supervision or care in his legal affairs. This is not the case, and appellants are not challenging the existence of the limited guardianship or limited conservatorship in this appeal. App. Brief at ¶5.

[¶34] Given the above-cited considerations, the appellants have not satisfied their "heavy burden" of establishing that the district court abused its discretion when it assigned certain claims to V.A.M.'s children notwithstanding appellants' preferred interpretation of the Stipulation and V.A.M.'s opposition to the assignment.

**D. Appellee V.A.M. has not Rebutted the Strong Presumption in Favor of Affirming the Assignment of V.A.M.'s Claims to V.A.M.'s Children.**

[¶35] V.A.M.'s attorney has submitted a brief on appeal in opposition to the assignment of V.A.M.'s claims to V.A.M.'s children. In particular, this brief reiterates that the assignment of claims was (1) against V.A.M.'s best interests and that (2) V.A.M. was authorized to make the land transfers identified above pursuant to case law cited in V.A.M.'s appellate brief.

[¶36] As a threshold matter, the district court and the limited guardian and limited conservator were well-aware of the factual background of this case, as has been shown above. The limited conservator petitioned the district court for the assignment of certain claims, and both the limited conservator and the district court took V.A.M.'s best interests into account when the decision to assign certain claims was made. App. A at 111-14. A reversal of the district court's assignment of claims is not merited solely because V.A.M. now disagrees with the limited conservator and the district court as to

what V.A.M.'s best interests are. In sum, V.A.M. has not met the "heavy burden" of showing that the district court abused its discretion in assigning V.A.M.'s claims to V.A.M.'s children.

[¶37] Finally, the case law cited in V.A.M.'s appellate brief for the proposition that V.A.M. was authorized to gift the farm to T.M. on November 7, 2012 is not applicable to the case before the Court. See Appellee V.A.M. Brief at ¶ 14 (citing In re Estate of Gleeson, 2002 ND 211, ¶ 8, 655 N.W.2d 69). In re Estate of Gleeson stands for the proposition that the appointment of a conservator has no bearing on the capacity of a protected person, but the Court acknowledged that the appointment of a guardian does affect the capacity of a ward. In re Estate of Gleeson, 2002 ND 211, ¶ 8, 655 N.W.2d 69. The GAL's May 2, 2013 report extensively documented V.A.M.'s incapacity, and the district court found V.A.M. to be incapacitated and a limited guardian was accordingly appointed. App. A at 78-80. It is axiomatic that a person who is incapacitated cannot engage in certain contractual transactions, including the gifting of a significant amount of farmland contrary to a long-standing estate plan.

### **CONCLUSION**

[¶38] Paragraph 5 of the district court's November 14, 2014 order should be upheld, and appellants' prayer for reversal of this part of the order, along with appellants' other requested relief, should be denied in their entirety.

PEMBERTON, SORLIE, RUFER  
& KERSHNER, P.L.L.P.

Dated: May 21, 2015

/s/ Stephen F. Rufer  
Stephen F. Rufer, No. 03834  
110 North Mill Street  
Fergus Falls, Minnesota 56537  
Telephone: 218-736-5493  
[s.rufer@pemplaw.com](mailto:s.rufer@pemplaw.com)  
Attorneys for D.N.

**CERTIFICATE OF COMPLIANCE**

The undersigned attorney for Appellee Dianne Neciporenko in the above-entitled matter hereby certifies, in compliance with Rule 32(a)(1)(A), N.D.R.App.P., that the above brief contains 4,055 words (excluding words contained in (1) the table of contents, (2) the table of authorities, and (3) this certificate), which is within the limit of 8,000 words

PEMBERTON, SORLIE, RUFER  
& KERSHNER, P.L.L.P.

/s/ Stephen F. Rufer  
\_\_\_\_\_  
Stephen F. Rufer, No. 03834  
110 North Mill Street  
Fergus Falls, Minnesota 56537  
Telephone: 218-736-5493  
[s.rufer@pemplaw.com](mailto:s.rufer@pemplaw.com)  
Attorneys for D.N.

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P.M. Petitioner

v.

V.A.M., T.M., K.J., D.N., S.M., P.S.M., L.S.;  
First International Bank and Trust, Limited  
Conservator; Fiduciary and Advocacy  
Services, Limited Guardian, Respondents

**CERTIFICATE OF SERVICE**

\_\_\_\_\_  
T.M. and K.J., Appellants.

\_\_\_\_\_

STATE OF MINNESOTA    )  
  )ss.  
COUNTY OF OTTER TAIL)

I hereby certify that on May 21, 2015, I cause to be electronically filed **Appellee D.N.'s Brief** with the Clerk of the North Dakota Supreme Court (at **supclerkofcourt@ndcourts.gov**) and served the same electronically as follows:

- Zachary E. Pelham .....zepefile@pearce-durick.com
- Timothy G. Richard .....trichard@serklandlaw.com
- Berly D. Nelson .....bnelson@serklandlaw.com
- John A. Juelson .....jjuelson@ohnstadlaw.com

I further certify that a copy of the foregoing document will be mailed first-class

mail, postage paid, to the following:

Fiduciary & Advocacy Services  
Kelly Qualey, Executive Dir.  
112 N Univ. Dr., Ste. 260  
Fargo, ND 58102

P.S.M  
4517 Adams Drive  
Reiles Acres, ND 58102

P.M  
3030 W Owasso Blvd.  
Roseville, MN 55113

S.M  
17105-27<sup>th</sup> Street SE  
Argusville, ND 58005

L.S  
PO Box 786  
La Center, WA 98629

Dated: May 21, 2015

/s/ Stephen F. Rufer  
Stephen F. Rufer, ND ID #03734