

ORIGINAL

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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

P.M.,

Petitioner

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

v.

JUN 11 2015

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

STATE OF NORTH DAKOTA

T.M. and K.J.,

Appellants

V.A.M. and D.N.,

Appellee

APPELLANTS' REPLY BRIEF

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

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TABLE OF CONTENTS

	Page(s)
Table of Authorities	ii
	Paragraph(s)
Argument	¶1
A. The Relevant Facts.....	¶2
B. V.A.M.'s Position Has Been Disregarded	¶3
C. A Rescission Action Cannot be Assigned	¶9
Conclusion	¶13

TABLE OF AUTHORITIES

Paragraph(s)

Cases

Fedorenko v. Rudman, 71 N.W.2d 332 (N.D. 1955).....¶11

Glenney v. Crane, 352 S.W.2d 773 (Tex. Civ. App. 1961).....¶12

Schmidt v. Grand Forks Country Club, 460 N.W.2d 125 (N.D. 1990)¶11, ¶12

Other Authorities

6 Am. Jur. 2d *Assignments* § 48.....¶11

Argument

[¶1] T.M. and K.J. file this reply to the response brief of D.N. This reply addresses T.M. and K.J.'s position on the relevant facts, the disregard of V.A.M.'s wishes relating to the assignment, and the legal impediments to assigning a claim for rescission.

A. The Relevant Facts

[¶2] The relevant facts for purposes of this appeal pertain to whether the district court erred in allowing the limited conservator to separate its duties as stipulated by the parties involved and the Order. These facts were set forth in the Appellants' Brief. The salient facts do not pertain to what V.A.M. and T.M. agreed to prior to the district court ordering a guardianship and conservatorship over V.A.M. While Appellants do not address the non-salient facts prior to the Order Appointing Limited Guarding of the Person and Limited Conservator of the Estate (App. 77), T.M. and K.J. dispute many of the facts contained in the fact section of D.N.'s brief and state this for the record.

B. V.A.M.'s Position Has Been Disregarded

[¶3] V.A.M. has made his position in this appeal clearly known: he is opposed to the limited conservator assigning any of its duties and rights as V.A.M.'s conservator to any of his children. The effect of any assignment would be a portion of the authority of the limited conservator would be carved out and removed from FIBT and placed in the laps of V.A.M.'s children who will then take on duties and responsibilities as sub-conservators. App. 113-14. V.A.M. would be faced with funding a legal dispute he does not seek or desire. That this dispute *could* be brought in some form after V.A.M.'s death is of little relevance in the present, especially while V.A.M. is very much alive and well and able to make decisions on legal matters that concern his affairs and his assets. App. 77-82. The

limited conservator and district court have ignored the position of V.A.M. without offering any evidence or explanation of why V.A.M.'s opinion does not matter.

[¶4] While D.N. claims sub-conservators would not be created, the district court has indicated that is exactly what would be created. App. 113-14. It is the opinion of the district court that any assignee of a claim would have to comply with the order conferring the duties of the limited conservator. *Id.* It is not just a chose in action that would have to be blindly followed if conferred through FIBT's assignment. The form of this assignment would be an amalgamation of a chose in action coupled with express duties conferred on a limited conservator appointed through a stipulation by the parties by order of the district court containing explicit limitations and instructions for such a limited conservator vis-à-vis V.A.M.

[¶5] So long as V.A.M. is alive and well and does not wish to pursue an action against his son, who has worked with him on the family farm for decades, the decision of V.A.M. should be respected. While it is true that the general condition of V.A.M. has deteriorated through life, many decisions in life are not strictly made by comparing a financial balance sheet. Decisions are emotional, especially when a family farm is involved. V.A.M. gave his position on the assignment to the district court. V.A.M. has given his position on other matters that were given weight by the district court. For example, V.A.M. did not want his financial information provided to his children and the district court decided that V.A.M. could make that decision. App. 57-58. V.A.M. agreed to the sale of personal property and additional real property to T.M. and the district court decided that V.A.M. could make that decision. Docket No. 68. What remains unclear is why the district court rejected V.A.M.'s position opposing FIBT's request to assign away

duties and rights otherwise held by a third-party limited conservator to family members against V.A.M.'s explicit wishes.

[¶6] Certainly FIBT has the authority to act as limited conservator for V.A.M. But it has already determined it “does not believe incurring the cost to investigate any such claims is in [V.A.M.]’s best interests, particularly in light of [V.A.M.]’s Will and stated intent regarding his estate plan.” App. 85. And at the hearing on the assignment issue, FIBT’s position was stated not in terms of V.A.M.’s understanding of the dispute but as one of economics: “[i]t’s more of an economic issue for the Conservator. As the Court is well aware, these are contentious, difficult, and most importantly, very expensive claims to pursue.” App. 35. FIBT continued:

The Conservator doesn’t believe it’s in Virgil’s best interest at this time, for him on his dime, to pursue these claims given his limited resources. Now, the family may have these claims, once [V.A.M.] has passed away, through the Estate. The family members have asked the Conservator to pursue these claims currently. . . . They don’t . . . believe it is in [V.A.M.’s] best interest for the Conservator to pursue these claims now, given the likelihood of success versus the cost.

App. 36.

[¶7] Instead, FIBT believes assigning the claim to V.A.M.’s children now would be in his best interests to potentially avoid a dispute after V.A.M.’s passes away and so the children could pursue it with their own money. App. 37. But this ignores the plain reality: V.A.M. is very much alive and has a strong opinion on the matter that has been disregarded. And, there will be cost to V.A.M. if he decides to intervene in any action or decides to participate in any dispute.

[¶8] V.A.M. “shall retain the right to make decisions regarding these [legal] matters *unless* it is determined by [FIBT] 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 [FIBT] regarding decisions about what is in his best interests.” App. at 78 (emphasis added). FIBT has not outlined to the district court or to V.A.M. why this assignment is in V.A.M.'s best interests and why he does not have sufficient understanding to make an informed decision concerning any assignment. The portion of the district court's order allowing an assignment of claims should be reversed.

C. A Rescission Action Cannot be Assigned

[¶9] D.N. argues in her appellate brief at paragraph 21 that the right of V.A.M. to rescind a contract can be assigned. T.M. and K.J. dispute this and argue North Dakota should hold as a matter of law such an assignment of a rescission action is not permitted.

[¶10] At present, V.A.M. solely holds the right to bring a claim against T.M. involving the conveyance of real property made prior to the guardianship and conservatorship proceedings beginning. D.N. (or other children of V.A.M.) would not have complete ownership over any chose that would be assigned through any assignment. The limited conservatorship Order specifically states that V.A.M. retains control over many aspects of his still continuing life, including his legal affairs. App. 78. And any sub-conservator taking an assignment must abide by the conservatorship Order because the district court has opined any assignment requires the assignee to abide by the original Order establishing the limited conservatorship. App. 113-14. Any assignment of a right to pursue legal claims against and between children of V.A.M. *cannot* as a matter of law proceed because a necessary element of any chose in action is complete ownership over the chose. V.A.M. will *always* have an element of ownership and control over his legal rights under

the district court's limited conservatorship Order—he will need to be consulted and his values must be considered and respected. App. 78. D.N.'s argument fails as a matter of law because a chose in action must be owned entirely by the assignee.

[¶11] D.N. cites to *Schmidt v. Grand Forks Country Club*, 460 N.W.2d 125 (N.D. 1990) and *Fedorenko v. Rudman*, 71 N.W.2d 332 (N.D. 1955), claiming North Dakota law allows for the assignment of the right to rescind or sue for rescission. The majority rule, which has not yet been decided in North Dakota, is the right to rescind an alleged voidable transaction or sue for rescission is not assignable. 6 Am. Jur. 2d *Assignments* § 48. *Schmidt* did not answer the question of whether the right to rescind an allegedly voidable real property transaction could be assigned as a chose in action in North Dakota. *Schmidt*, 460 N.W.2d at 128. The facts of *Schmidt* were such that no assignment was even attempted and this Court did not reach the determinative issue. *Id.* And *Fedorenko* does not have salient facts involving an assignment or a chose in action.

[¶12] The legal question for the Court is whether in an alleged voidable contract scenario, as alleged by D.N. at paragraph 23 of her brief (e.g., undue influence, lack of capacity, or breach of fiduciary duty), the limited conservator can assign a chose in action to attempt to claim rescission on a real property transfer under North Dakota law. A right to rescind a voidable transaction or to sue for rescission is not assignable. 6 Am. Jur. 2d *Assignments* § 48. “The right to set aside a deed on the ground of fraud or duress is not a right to recover real estate. It has been characterized as a personal action.” *Glenney v. Crane*, 352 S.W.2d 773, 777 (Tex. Civ. App. 1961). While the *Schmidt* case left unanswered the ultimate question of whether an action for rescission is assignable under North Dakota law, several authorities were included in the decision supporting Appellants’

position that rescission actions are not assignable as a matter of law. *Schmidt*, 460 N.W.2d at 128. North Dakota should adopt the rationale of these authorities and hold an action to rescind is non-assignable as a matter of law.

CONCLUSION

[¶13] For the reasons outlined in Appellants' initial and reply briefs, the North Dakota Supreme Court should reverse the portion of the district court's Order authorizing an assignment of claim for undue influence, lack of capacity, or breach of fiduciary duty.

Dated this 11th day of June, 2015.

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

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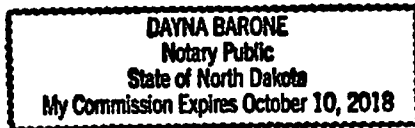
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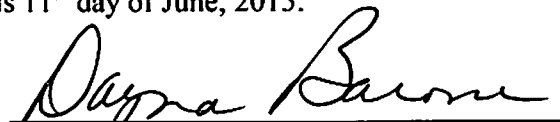
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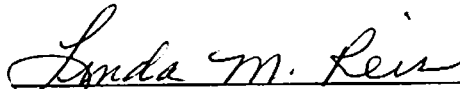
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