

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE GUARDIANSHIP)
AND CONSERVATORSHIP OF EVA M. FRYE) Appeal No. 30722
a personal alleged to need protection)

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE MATTHEW M. BROWN
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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NOTICE OF APPEAL FILED MAY 29, 2024

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Jodie Frye-Byington (“Jodie”) appeals to this Court the Honorable Matthew M. Brown’s, Circuit Court Judge of the Seventh Judicial Circuit - hereinafter referred to as the “Trial Court,” Judgment and Order appointing Appellee Amy Frye-Trupe (“Amy”) as Eva M. Frye’s, d/o/b June 17, 1942 (“Eva,”) a person allegedly in need of protection, conservator on April 30, 2024. Rec.¹ pp. 2974-2976.

On August 11, 2022, Amy filed a Petition for Guardianship and Conservatorship regarding Eva. Rec. pp. 1-21. Numerous hearings were held by the Trial Court between February 3, 2023, and December 11, 2023, concerning this guardianship/conservatorship proceeding.

The Trial Court issued its Findings of Fact and Conclusions of Law on April 5, 2024. Rec. pp.2948-2966. Amy filed proposed Findings of Fact and Conclusions of Law, on January 10, 2024. Rec. pp.2768-2784. Jodie filed her proposed Findings of Fact and Conclusions of Law on January 19, 2024. Rec. pp.2787-2806. On April 5, 2024, the Trial Court entered its Findings of Fact and Conclusions of Law. Rec. pp.2948-2966. On April 30, 2024, the Trial Court entered an order appointing Amy as Eva’s sole conservator. Rec. pp.2974-2976. On April 30, 2024, the Trial Court entered an order appointing Amy, Julie Frye-Mueller (“Julie”) and Jodie as Eva’s co-guardians. Rec. pp.269-2973. A Notice of Entry of Judgment and Order Appointing Co-Guardians was filed on May 1, 2024. Rec. pp.2979-2980. A Notice of Entry of Judgment and Order Appointing Amy Frye Trupe as Sole Conservator was filed on May 1, 2024. Rec.

¹ Rec. means the Trial Court’s record of this guardianship/conservatorship proceeding.

pp.2986-2987. A Notice of Appeal was filed on May 29, 2024. The Notice of Appeal was filed timely.

STATEMENT OF LEGAL ISSUES

Frye-Byington raises the following issues in this Appeal:

- I. Did the Trial Court Abuse its Discretion in Appointing Amy as Sole Conservator When She Breached the Fiduciary Duty that She Owed to Eva?

The Trial Court appointed Amy as Eva's sole conservator.

List of the most relevant cases and statutory provisions:

Conservatorship of Irwin, 2007 S.D. 41, ¶16, 732 N.W.2d 411; and SDCL § 29A-5-411.

- II. Did the Trial Court Abuse its Discretion and Err in Failing to Give Effect to Either Eva's August 29, 2019 or her November, 2021 Powers of Attorney?

List of the most relevant cases and statutory provisions:

Johnson v. Markve, 2022 S.D. 57 ¶31;
Baun v. Estate of Kramlich, 2003 S.D. 89, ¶24, 667 N.W.2d 672;
SDCL § 29A-5-304; and
SDCL § 20-11A-1.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

This appeal concerns the Trial Court's appointment of Amy as Eva's sole conservator. Rec. pp.2974-2976. Eva is the sole owner of a paint store, which is incorporated as Roger Frye Paint and Supply, Inc. ("RFP&S" or the "Paint Store"). The Trial Court carved the Paint Store out of this guardianship/conservatorship proceeding. Memorandum Opinion on Motion for Declaration Voiding Corporate Resolution. Rec. pp.1150-1152.

On February 9, 2023, the Trial Court entered an order on Amy's Petition for Appointment of Emergency Temporary Guardianship and Temporary Conservatorship appointing Jodie as Eva's temporary guardian. Rec. pp. 349-350. The Trial Court issued Letters of Temporary Guardianship and Conservatorship to Jodie on February 9, 2023. Rec. p. 348. The Trial Court instructed counsel for Amy and Jodie to stipulate to a third-party institution to act as temporary conservator. Rec. pp. 349-350. The parties could not agree upon a temporary conservator. On March 15, 2023, the Trial Court appointed Jeannine Lecy ("Lecy") as the temporary Conservator. Rec. pp.435-437. On June 26, 2023, Lecy filed a Petition and Resignation of Temporary Conservator. Rec. pp. 777-795. In her Petition and Resignation of Temporary Conservator, Lacey stated that, "[t]he elevated level of anonymity existing between and among Eva Frye's three daughters is so aggravated that the undersigned has been hindered in her duties as temporary conservator." Rec. p. 779.

This appeal also concerns the appointment of all three daughters as co-guardians. Rec. pp. 2969-2973. The Trial Court appointed Jodie as temporary guardian. Rec. pp. 349-350. Eva signed a healthcare power of attorney, on August 29, 2019, which appointed her husband Roger D. Frye ("Roger") as agent and Jodie as her alternate agent and nominated Jodie as alternate guardian. Rec. pp. Rec. 13-16. The Trial Court did not find that Eva lacked the capacity or competency to execute this August 2019 healthcare power of attorney. Rec. pp. 2948-2966. The Trial Court found that Eva lacked the capacity to execute a November 2021 financial power of attorney that appointed Jodie as Eva's agent and invalidated it. FF&CL p.7 ¶32; Rec. p. 2954.

Statement of the Facts

Eva was born on June 17, 1942; she is currently 82 years old. Rec. p.2949.

Eva has three daughters, namely Jodie, Julie and Amy. Rec. p.2949. Eva was married to Roger who died on February 3, 2021. Rec. p.2950. Eva is the beneficiary of Roger Frye's will, which has been probated in File No. 51PRO21-000307.

On August 11, 2022, Amy filed a Petition for Guardianship and Conservatorship regarding Eva. Rec. pp. 1-22. On August 23, 2022, Amy filed an Amended Petition for Guardianship and Conservatorship. Rec. pp. 27-48. On January 25, 2023, Amy filed a Petition for Appointment of Emergency Temporary Guardianship and Temporary Conservatorship. Rec. pp. 79-90. On August 29, 2019, Eva signed a Healthcare Power of Attorney appointing Roger as her agent and Jodie as her successor agent and nominating Jodie as her successor guardian. Rec. pp. 13-16. Attorney Tomac testified that during one of their meetings concerning Roger's probate case, Eva mentioned that she wanted to update her financial power of attorney. Tr. p. 71 l.7-15.² On November 16, 2021, Eva signed a Durable Financial Power of Attorney appointing Jodie as agent. Rec. pp. 1799-1825.

Amy testified that she transferred monies, consisting of \$350,000, from Roger and Eva's personal account with US Bank into a different bank account with Black Hills Federal Credit Union ("BHFCU,") which account is in Amy's and Julie's names only. Tr. pp. 230-232; Ex. JFB27 – Rec. pp.1857-1861; Tr.12/11/23 p.43 l.7-14. The source of the monies that were transferred was rent from the Paint Store and other real estate

² Tr. refers to the transcript of hearings before the Trial Court transcribed by various court reporters.

assets owned by Roger and Eva personally. Tr. 9/28/23 pp.6-7 l.23-1; Ex. Lecy1A; Rec. pp. 2401-2402; and Tr. 12/11/23 p. 43 l.9-14. Amy testified that when she initially incorporated R&E Enterprises, as a South Dakota limited liability company ("R&E Enterprises,") it was just in her name. Tr. 9/28/23 pp. 7-8 l.15-16. Amy later changed the members of R&E Enterprises to Eva and her three daughters. Tr. 9/28/23 p.8 l.17-19. This \$250,000.00 check was written by Amy out of R&E Enterprises' US Bank account and deposited into her personal account at BHFCU on May 28, 2020. Ex. JFB27, pp. 1-2.

R&E Enterprises was not formed at the time that this \$250,000.00 check was written and deposited into Amy's existing personal account at BHFCU. Tr. pp. 230-232; Ex. JFB27 - Rec. pp. 1857-1861. Amy deposited this \$250,000.00 check into her bank account on May 28, 2020. Ex. JFB27, pp.1-2. Amy added Julie to this bank account; the bank statements were being mailed to Amy's home address for over 2.5 years. Tr. 9/28/23 pp.5 l.19-21. On February 16, 2022, Amy wrote another check out for \$100,000.00 on Roger and Eva's US Bank account that held rental monies and deposited that check as well in Amy's and Julie's personal BHFCU account. Exhibit JFB27; Rec. pp. 1859-1861. R&E Enterprises was incorporated by Amy in April 2022. In April, 2022, Amy opened a new account at BHFCU and transferred the rental monies out of Amy's and Julie's personal account into a new account now called R&E Enterprises, which Amy owned solely. Tr. 12/11/23 p.19 l.4-12. BHFCU required a corporate resolution authorizing the creation of this new bank account. Amy completed this corporate resolution naming herself as one hundred percent (100%) owner of R&E

Enterprises. Amy testified that Eva owns R&E Enterprises. Tr. 9/7/23 p. 237-238. The monies from this account were transferred, in the amount of \$348,554.37, by the prior temporary Conservator and went into Eva's RBC Wealth Management ("RBC,") on May 1, 2023. Lecy Ex.1; Rec. p. 2173.

Amy is charging a fee to act as Conservator through RFP&S. Eva's attorney Elliot Bloom reported to this Court in his Report of Attorney for Protected Person, dated February 1, 2024, that Amy, using her temporary conservator powers, voted to pay herself a conservator fee through the Paint Store even though she had previously resigned as an employee of the Paint Store. Rec. pp. 2820. Amy testified that she would waive all conservator fees and not charge anything if she was appointed permanent conservator. Tr.9/7/23 pp.245-246 l.18-1.

ARGUMENT

I. Standard of Review.

The abuse of discretion is the standard of review for guardianship/conservatorship matters. *In re Adam*, 2021 S.D. 54, ¶18. The Standard of Review for determining if a Trial Court abused its discretion is:

An abuse of discretion occurs when there is "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.

Plains Commerce Bank, Inc. v. Beck, 2023 S.D. 8, ¶23 (citations omitted).

The standard to determine if someone has the capacity to appoint an agent is:

A person entirely without understanding has no power to make a contract of any kind. *Johnson v. Markve*, 2022 S.D. 57 ¶31; citing SDCL 20-11A-1. Any person with capacity to contract may create an agency and confer authority on any other person to do any act which he might do The phrase "entirely without understanding" means that "the person contracting did

not possess the mental dexterity required to comprehend the nature and ultimate effect of the transaction in which [she] was involved.

Johnson, 2022 S.D. at 57, ¶31.

The standard of review for a Trial Court's findings of fact generally is:

We examine findings of fact for clear error. The credibility of the witnesses, the import to be accorded their testimony, and the weight of the evidence must be determined by the Trial Court, and we give due regard to the Trial Court's opportunity to observe the witnesses and examine the evidence."

J. Clancy, Inc. v. Khan Comfort, LLC, 2022 S.D. 68, ¶8. (citations omitted); SDCL § 15-6-52(a). When these standards of review are applied here, it is abundantly clear that the Trial Court abused its discretion and clearly erred in appointing Amy as Eva's sole conservator.

II. **The Trial Court Abused its Discretion in Appointing Amy as Sole Conservator When she Breached the Fiduciary Duty that She Owed to Eva.**

The Trial Court abused its discretion in appointing Amy as Eva's sole conservator when Amy repeatedly converted Eva's monies. A conservator, in managing the estate, shall act as a fiduciary and in the best interests of the minor or protected person. SDCL § 29A-5-411; *Conservatorship of Irwin*, 2007 S.D. 41, ¶16, 732 N.W.2d 411. Moreover, a conservator must exercise reasonable care, diligence, and prudence. SDCL § 29A-5-405; *Conservatorship of Irwin*, *Id.* A conservator's breach's her fiduciary duty when estate money is used for personal reasons and not used for the care of the protected person. *Conservatorship of Irwin*, 2007 S.D. at 41, ¶20. A breach of fiduciary duty also exists when fiduciaries commingle trust funds with their own. *Conservatorship of Irwin*, 2007 S.D. at 41, ¶20; citing *Ward v. Lange*, 1996 S.D. 113, ¶15, 553 N.W.2d 246, 251. Amy has repeatedly breached her fiduciary duty to Eva in both respects.

Amy has repeatedly breached her fiduciary duty to Eva by converting Eva's rent monies. Amy acknowledged that she transferred monies, consisting of \$350,000.00, from Roger and Eva's personal bank account into a different bank account with Black Hills Federal Credit Union in her and Julie's names. Tr.9/7/23 pp.231-232 l.24-24; Ex. JFB27- Rec. pp 1857-1861. The source of the monies that were transferred were rent from the Paint Store and other real estate assets owned by Roger and Eva Frye. Tr. 9/28/23 pp.6-7 l.23-1; Ex. Lecy 1A; Rec. pp.2401-2402; and Tr. 12/11/23 p.43 l.9-14. Historically, rent from the RFP&S building was paid to Roger. Shortly after Roger Frye's death Amy directed that all rent be made payable to R&E Enterprises. Tr.12/11/23 p. 40 l.11-21. Amy deposited the monies into a US Bank account, which was Roger's and Eva's personal account earmarked for rental income. Ex. JFB27- Rec. pp. 1857-1861. R&E Enterprises does not own any real property. Lecy Ex. 1; Rec. p. 2130. Before and after Roger's death, Amy transferred these rent monies and other monies into an account at BHFCU that Amy and Julie solely owned. Amy testified at a hearing before this Court, on September 7, 2023, that she wrote a check, dated May 28, 2020, for \$250,000.00 to BHFCU for deposit into an account solely in Amy and Julie Mueller's ("Julie") names. Tr.9/7/23 pp. 230-232; Ex. JFB27 - Rec. pp1857-1861. Amy acknowledged in her testimony that her mom and dad's names are not on this account. Tr.9/28/23 pp.7 l.1-4. Amy also testified that she "took another \$100,000 over there" for total of \$350,000.00. Tr.9/7/23 pp.232 l.9-24. Exhibit JFB27 demonstrates that a \$100,000.00 check signed by Amy that was deposited into the same account owned by Amy and Julie on February 16, 2022. Copies of these checks are part of the settled

record. Ex. JFB27 - Rec. pp 1857-1861. Amy acknowledged that R&E Enterprises/Amy's bank statements go to Amy's address. Tr. 9/28/23 pp. 5 l.19-21. Temporary conservator Lecy testified that after she completed her final report, she learned that there was another BHFCU checking account that was in Julie and Amy's names. Tr. 9/28/23 p. 113 l.15-20. Lecy testified further that she cannot get these records, because she only had the power to get Eva's records. Tr. 9/28/23 p. 113 l.19-20.

Amy also admitted that she had cashier checks generated from monies from her parents' account and redeposited those monies at a later date. Tr. 9/28/23 p. 41 l.22-24. Amy obtained a cashier's check for \$200,000.00 on April 4, 2018. Ex. JFB13; Rec. 1837; Tr.9/7/23 p.208 l.15-20. Amy obtained another cashier's check for \$100,000.00. Rec. p.1860. Lecy's final report indicates that \$650,000.00 was moved in and out of the same account. Rec. p.2130.

Amy continued to breach her fiduciary duty to Eva by depositing Eva's rent monies into an R&E bank account that she and Julie own. R&E Enterprises was incorporated by Amy on April 7, 2022. Tr. 9/28/23 pp. 7-8 l.15-16. Amy testified that when she initially incorporated R&E Enterprises, "it was just her." Tr. 9/28/23 pp. 7-8 l.15-16. Amy testified further that she modified the incorporation paperwork so all four of them were members of R&E Enterprises. Tr. 9/28/23 p. 8 l.20-22. Amy did so, even though she acknowledged that the properties generating the rent monies are owned solely by the estate of Roger Frye and Eva. Tr. 9/28/23 p. 9 l.1-4. Amy testified she did this because her father died and her mother has Alzheimer's. Tr. 9/28/23 p.9 l.5-10.

Amy listed herself as one hundred percent (100%) owner of this account, not just once but twice, in corporate resolutions required by Black Hills Federal Credit Union to open the R&E Enterprises' bank account. When asked if R&E Enterprises owned any real estate, Amy testified that, "in my heart they do, but on paper they don't." Tr.9/7/23 p. 228 l. 1-2. Amy presumably testified to this because in her heart she wanted to own the properties in addition to the rent generated from them, because she owns R&E Enterprises. By transferring the monies into a limited liability company that either Amy owned alone, or with three other people, she clearly breached her fiduciary duty by diminishing Eva's ownership in this limited liability company. Individuals who breach their fiduciary duty owed to a person in need of protection should never be appointed as conservator.

Amy also breached her fiduciary duty to Eva by co-mingling her monies with Eva's monies. Amy transferred the \$350,000.00 from the BHFCU account owned by Amy and Julie to a new BHFCU bank account that Amy owns. Tr. 12/11/23 p.19 l.4-12. The Three Hundred Fifty Thousand Dollars (\$350,000.00) remained in Amy's and Julie's bank accounts for almost three years (May 28, 2020 to May 1, 2023). Ex. JFB27, pp. 1-2. On May 1, 2023, \$348,554.37 was transferred by the prior temporary Conservator into Eva's RBC Wealth Management ("RBC,") account. Notwithstanding the transfer of monies into her own bank account and the co-mingling of Eva's and her monies the Trial Court appointed Amy as Eva's sole conservator.

Amy will likely argue that her transfers of monies into her and Julie's bank accounts does not matter, because the monies were ultimately transferred back into Eva's

investment account. Return of monies acquired through theft is not a defense to criminal activity. SDCL § 22-30A-10.1. Furthermore, no case law is known to exist that allows a breach of fiduciary duty to be unwound in this manner. Moreover, converting assets, even if done temporarily, demonstrates unfitness to act as a conservator. Furthermore, if both Amy or Julie had died prior to the re-transfer of these assets they would have been part of either Amy's and/or Julie's estate.

Julie took cash, in the amount of \$30,000.00 from Eva's home and gave it to Amy, so Amy could put it in a safe at RFP&S. Tr.9/7/23 pp. 20-21 l.20-3. Julie indicated that she left \$9,000 in Eva's safe. Tr.9/7/23 pp. 20-21 l.20-3. A portion of this cash, in the amount of \$22,200.00, was acquired by the prior temporary conservator Lecy. Lecy Ex. 1; Rec. p. 2129. The \$9,000.00 cash in Eva's safe has not been not turned over to Lecy. Lecy Ex. 1; Rec. p. 2129.

Amy has also diminished RFP&S inventories by crediting back her son's transactions with the Paint Store. Tr.12/11/23 p.44 l.3-11. One such transaction occurred on October 21, 2021, for \$9,297.18. JFB Ex. 28.

The Trial Court appointed Amy as Eva's conservator against the recommendations of the temporary conservator Lecy. Ex. Lecy 1A; Rec. pp. 2401-2415. The Trial Court also did so against the recommendations of Eva's attorney. Rec. pp. 2808-2827. The reasonable result is to uphold Eva's November 2021 power of attorney and to appoint Jodie as conservator and guardian.

The Trial Court's appointing Eva's three daughters as co-guardians is untenable. The Trial Court set up a rotating ten (10) day schedule whereby each daughter would

have Eva in their home for 10 days. When Amy was asked about her proposal for a rotating caregiving schedule, specifically if Amy has had Eva in her care for ten (10) consecutive days within the past two years; Amy responded that she has not since she was fifteen (15) years old. Tr.12/11/23 pp.237-238 l.22-4. Moreover, Amy has never followed this rotating schedule, as she has had Eva in her care for only one day. Amy testified that Amy and Julie want Eva when it is convenient for them to have Eva. Tr. 12/11/23 p.217 l.7-18. Eva was placed in a nursing home, by Julie and Amy without consulting Jodie, less than three months after the Trial Court appointed the Co-Guardians, which clearly demonstrates that neither Julie or Amy wanted to take care of their mother. Not surprisingly, this schedule is unworkable and definitely not in Eva's interest as she has deteriorated physically and has also led to much consternation and disagreements between the three co-guardians.

III. **The Trial Court Abuse its Discretion and Erred in Failing to Give Effect to Either Eva's August 29, 2019 or her November, 2021 Powers of Attorney.**

Eva had the capacity to execute the August 2019 healthcare power of attorney appointing Jodie as alternate agent and nominating Jodie as alternate guardian. Eva had the capacity to execute her November 2021 financial power of attorney appointing Jodie as agent. South Dakota law clearly defines the parameters for appointment of a guardian and conservator, to wit:

Any individual who has sufficient capacity to form a preference may at any time nominate any individual or entity to act as his guardian or conservator. . . . The court shall appoint the individual or entity so nominated if the nominee is otherwise eligible to act and would serve in the best interests of the protected person. If a person alleged to be in need of protection has designated an individual to serve as guardian or conservator under a validly executed legal instrument, including a power of attorney, and the court does not appoint the designated

individual, the court shall issue written findings of fact and conclusions of law as to why the designated individual was not appointed.

SDCL § 29A-5-304.

Any person with capacity to contract may create an agency and confer authority on any other person to do any act which he might do. *Johnson v. Markve*, 2022 S.D. 57 ¶31; SDCL § 20-11A-1. The phrase "entirely without understanding" means that a person contracting does not possess the mental dexterity required to comprehend the nature and ultimate effect of the transaction. *Johnson*, 2022 S.D. 57 ¶31; SDCL § 20-11A-1. This Court has stated in a different context that:

The test for capacity to contract for the sale of real property is somewhat different than the test for testamentary capacity quoted above. As we held in *Shearn v. Anderson*, 74 S.D. 41, 48 N.W.2d 821, impairment of the faculties by disease or old age will not invalidate a deed if the party executing it had sufficient mental capacity to understand his act. It must be shown that the grantor did not have sufficient mind and memory to comprehend the nature and character of the transaction. Mental weakness that does not amount to inability to comprehend and understand the nature and effect of the transaction is not sufficient to invalidate a deed.

Estate of Jones v. SD Children's Home Society, 90 S.D 126, 238 N.W.2d 677 (1976); citing *Meyer v. Kiecksee*, 68 S.D. 43, 298 N.W. 261. When the standard is applied here, it is clear that Eva had the requisite mental capacity to grant her husband, and Jodie as successor agent, the authority to make healthcare decisions for her and to nominate them as her guardians and to appoint Jodie as her agent for financial matters.

Eva's mental state was evaluated by the Mayo Clinic between April 6, 2021, and April 9, 2021. Ex. AFT 3; Rec. pp. 1897-1921. The clinical notes from an April 8, 2021, comprehensive visit indicated Eva's cognitive profile is suggestive of moderate

Alzheimer's dementia. Rec. pp. 1905-1907. Harry Park, M.D., M.S., stated that, "[h]er current presentation seems to need further evaluation for cognitive dysfunction by detailed neuropsychological tests." Ex. AFT 3, p.22; Rec. pp. 1916. The Mayo clinical notes further state that, "[a]pproximately two months ago, Ms. Frye's husband of 60 years died unexpectedly, which caused a major shock to the patient...". Ex. AFT 3, p.6; Rec. p. 1900.

Licensed psychologist Greg Swenson, PhD, evaluated Eva on June 23, 2022, approximately seven months after Eva granted Jodie authority to make financial decisions for her and nominated her as conservator. Ex. AFT4; Rec. pp. 1922-1924. A summary of Greg Swenson, PhD's evaluation results indicate that, "clinical evaluation, history, current functioning, and performance on psychological tests, are consistent with a pretty aggressive decline in cognitive ability, characteristic of Alzheimer's type dementia." Rec. pp. 1923-1924. Greg Swenson, PhD, recommended the establishment of a power of attorney regarding financial and medical matters, which Eva had done seven months prior. Rec. p. 1924.

Attorney Jennifer Tomac testified concerning Eva's competency to sign a healthcare power of attorney in November 2021. Tr.9/6/23 pp. 74-76 1-5. Attorney Tomac testified concerning the steps she made to ensure that Eva understood the effect of her granting a power of attorney. Tr.9/6/23 p.75 1.3-17. Specifically, Attorney Tomac testified that,

Q: Now, let me ask you a little bit about capacity. As an attorney that practices in estate planning, what is the capacity in South Dakota in order to draft a will?

A: Yeah. So they have to know the natural objects of their bounty and then the nature and extent of your assets.

Q: Do you believe that Eva was able to meet that capacity requirement on the day that she executed the will that you have a copy of it in front of you?

A: Yes. And that's because I asked her those questions. So I asked her to identify who, and I don't use the words natural objects of your bounty when I'm talking to the client, but I asked her to identify who her children were, who would receive things if she passed away, and then to give me an idea of the type of things that she owned. . . . So she was able to tell me that she knew she had a house and a cabin and she had some bank accounts and her pride and joy, Roger Frye Paint & Supply.

Q: and there's a set of questions that you have just mentioned. Do you ask that of everyone before a sign will?

A: I do.

Q: Let me ask you about the power of attorney. This was executed approximately one year prior to the will; is that correct?

A: it was, yeah.

Q: And did you ask Eva any questions about the power of attorney before she executed it?

A: Yeah. So little different with the power of attorney. It's more along the lines of do they have the capacity to enter into contract, do they understand the extent and effect of what it is they are signing. So when it comes to executing a power of attorney, my questions are more directed towards that type of thing. So I asked her if she understood that by signing this that she was naming Jodie as her agent to do all the things that were enumerated and listed out in that document, and she said that she did. . . .

Q: And do you have any doubt as an attorney that she had the capacity in order to draft that contractual document?

A: No.

Q: Now, if in your practice have you ever come across any clients that you were concerned with capacity to the extent that you may refer them to have an evaluation done?

A: Interesting question. It has been discussed, but I've never actually referred someone for that prior to signing documents, and my rationale is based on case law. Particularly in South Dakota, that is very clear that even if there is a diagnosis of dementia, even if there is a variety of other things in place, that at the moment that they are signing the document, whether they have the requisite capacity up to that moment, whether they could have a lucid interval, it's more about the moment when they're making those decisions.... But in the meantime, both times when I met with Eva both to get her instructions on what she wanted and then again later on to execute the documents, she was able to pass the tests that are articulated in South Dakota law for capacity to sign those documents.

Tr. 9/6/23 pp. 73-76 l.25-18.

The capacity to sign a power of attorney is similar to the capacity to sign a will.

On that point, this Court has stated:

Dr. Brown diagnosed Lila with severe dementia people may lack mental capacity to such an extent that according to medical opinion they are of unsound mind, but nevertheless they may still retain sufficient mental capacity to execute a will.

Baun v. Estate of Kramlich, 2003 S.D. 89, ¶24, 667 N.W.2d 672; citing *Matter of Podgursky's Estate*, 271 N.W.2d 52, 57 (S.D. 1978) (citing *Keely v. Moore*, 196 U.S. 38, 25 S. Ct. 169, 49 L. Ed. 376 (1904)). Eva may now have moderate Alzheimer's dementia, but she does not have severe dementia as the protected person had in *Baun*, 2003 S.D. at 89, ¶24. Attorney Tomac testified she had no doubt that Eva had the capacity to sign either a will or the November 16, 2021, power of attorney. Tr. 9/6/23 p.75 l.5-17. Furthermore, minimal self-serving evidence was presented that she lacked capacity to sign the August 2019 healthcare power of attorney appointing Jodie as her successor agent.

CONCLUSION

The Trial Court abused its discretion in appointing Amy who breached the fiduciary duty that she owed to Eva by transferring substantial monies into her own personal bank accounts and who has funneled rent monies into R&E Enterprises that she either had, or still has, exclusive ownership of. Amy testified that she originally owned R&E Enterprises. She testified that she later modified the members of R&E Enterprises to herself, her two sisters and Eva. If Eva owns anything less than one hundred percent (100%) of R&E Enterprises, her assets have been converted. Amy has also breached her fiduciary duty by co-mingling Eva's assets with her assets since 2020. The Trial Court abused its discretion and erred in appointing Amy as sole conservator notwithstanding these clear breaches of Amy's fiduciary duty owed to Eva.

The Trial Court compounded its error by appointing Amy, Julie and Jodie as co-guardians when Jodie was nominated as Eva's guardian in a November 2019 healthcare power of attorney. Weak and self-serving testimony was presented that Eva lacked capacity to sign her August 2019 healthcare power of attorney appointing Jodie as her successor agent. The Trial Court also abused its discretion in failing to give effect to either Eva's August 2019 or her November 2021 financial powers of attorney appointing Jodie as her agent. The Trial Court also abused its discretion in invalidating Eva's November 2021 financial power of attorney. Attorney Tomac testified that she had no doubt that Eva had the capacity to sign her financial power of attorney in November 2021. The proper result is to uphold Eva's November 2021 power of attorney and to appoint Jodie as conservator and guardian.

REQUEST FOR ORAL ARGUMENT

Jodie respectfully requests that oral argument be held in this appeal.

CERTIFICATION OF VOLUME LIMITATIONS

The undersigned counsel certifies that Appellant's Brief was prepared using a Microsoft Word - Version 2024 - word processing software. This brief complies with the type-volume limitations imposed by SDCL § 15-26A-66(b)(2). Appellant's Brief contains 4,582 words and 22,842 characters. The above-mentioned word processing system was used to count the number of words and characters in Appellant's Brief.

Dated this 26th day of August 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of **Appellant's Brief** upon the person(s) designated herein, on the date shown below, by either email or First-Class mail, to-wit:

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Dated this 26th day of August 2024.



Brian L. Utzman

APPENDIX

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STATE OF SOUTH DAKOTA)
)SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

) 51GDN22-000082
)

IN THE MATTER OF THE)
GUARDIANSHIP AND)
CONSERVATORSHIP OF)
EVA M. FRYE)

)
) FINDINGS OF FACT AND
) CONCLUSIONS
) OF LAW
)

A Person Alleged to Need Protection.)
)

The above captioned matter, having come before the Court, the Honorable Matthew M. Brown Presiding and appearing Elliott Bloom, Attorney for Eva Frye; Michael J. Whalen, Attorney for Jeannine Lecy; Quentin L. Riggins and Aidan Goetzinger, Attorneys for Temporary Guardian, Jodie Frye Byington; and Rodney W. Schlauger and Laura E. Hauser, Attorneys for Amy Frye-Trupe; Julie Mueller, appeared pro se; the Court, after a review of the file, the evidence, testimony and arguments of counsel hereby makes the following:

FINDINGS OF FACT

Background

1. Eva M. Frye ("Eva") was born on June 17, 1942.
2. Eva and her husband, Roger Frye ("Roger") had three children, Jodie Frye Byington ("Jodie"), and Julie Mueller ("Julie") who are twins, and the youngest is Amy Frye-Trupe ("Amy").
3. All three of the girls, Eva, and Roger have worked at Roger Frye's Paint and Supplies, Inc. (the "Paint Store") for decades.

4. Roger, passed away on February 3, 2021.
5. Although difficult, Julie, Mike and Amy have had access to Eva, subsequent to the interim Court orders, and have been able to accommodate and take care of Eva. (Sept 7th HT 182: 3-24, Testimony of Julie).
6. Based upon their shared experience, Eva has enjoyed her time with Julie, Mike, and Amy. They go to dinner, spend time on their deck, and Julie and Eva peacefully sleep together. (Sept. 7th HT 185: 1-15, Testimony of Julie; and Sept. 7th HT 142: 19- 5, Testimony of Mike Mueller). Eva enjoys spending time with Jodie also. (Dec. 11 HT at 165: 2-7, Testimony of Lori Moore; Dec. 11 HT at 178: 23-25, 179: 1-3, 181: 11-17, Testimony of Shannon Casey Reitzel; Dec. 11 HT at 206: 20-24, Testimony of Marguerite Mc. Phillips).

Eva's Dementia

7. The family noticed Eva was hiding food around the house as early as 2012. (Sept. 7th HT 219: 15-23, Testimony of Amy).
8. During Christmas of 2016, Eva thought she purchased the grandchildren ornaments, and that someone had stolen them – in reality, she never purchased them. (Sept. 7th HT220: 20-25, 221: 1-10, Testimony of Amy).
9. Jim Clement, a financial advisor with RBC Wealth Management, has been the financial advisor to all three of the girls, and Eva and Roger,

individually, since 2009 and knows the family. (Sept. 7th HT9:19-21, Testimony of Jim Clement).

10. Mr. Clement, who has known the Frye family for years, and noticed that Eva's cognitive abilities were in decline at a Christmas Party in 2019. (Sept. 7th HT 12: 8-23, Testimony of Jim Clement).
11. Eva kept inquiring about a passport, and later kept asking about Jim Clement's father who had died years prior - not understanding he was no longer alive. (Sept. 7th HT 12:20-25, Testimony of Jim Clement).
12. There were incidences that Eva had flooded her own house by leaving the sink or water hoses on. (Sept. 7th HT 139: 8-19, Testimony of Mike Mueller).
13. Eva was unable to drive herself. (Sept. 7th HT 139: 20-24, Testimony of Mike Mueller).
14. In 2019, Eva had become unfamiliar with her surroundings at or near Applebee's. She did not know where she was, and her children had to come find her and bring her home. (Sept. 7th HT 171: 9-25, 172: 1-22 Testimony Julie).
15. Eva's mental decline became readily apparent after the death of her husband, Roger on February 3, 2021. At his funeral, she could not understand why Roger was lying in the coffin and not getting up. After Roger died, Eva shared stories that she was talking with him and then he would disappear. She was very confused and disorientated. (Sept. 7th HT

141: 1-12, Testimony of Mike Mueller; Sept. 7th HT 174: 7-25, Testimony of Julie; Sept. 7th HT 221: 17-21, Testimony of Amy; *see also* Trupe Exhibit 3, Page 21).

16. In April of 2021, Jodie became concerned for Eva's mental health, and along with Amy's husband, Marty Trupe, brought Eva to Mayo Clinic for Eva's "seemingly increasing memory loss and confusion." (Trupe Exhibit 3, Page 18).

17. The comprehensive visit at Mayo Clinic noted, among other things, the following:

- a. Eva had Alzheimer's Disease
- b. "She had progressive worsening of overall cognition and memory for at least the past few years."
- c. She was unable to remember the building she was in, the city, state, day of the week, month or year.
- d. She was unable to do simple calculations.
- e. Eva was unable to define an island or remember the number of weeks in a year.
- f. Eva could not draw a face of a clock.

(Trupe Exhibit 3, Page 1).

18. Dr. Greg Swenson ("Dr. Swenson") received his undergraduate degree from Washington University, in St Louis, Missouri and his PhD from Biola University in California. He is a licensed psychologist and has been practicing psychology since 1976. (Sept. 7th HT 101: 10-11, 15-17, 22-25, 102: 1-3, Testimony of Dr. Swenson).

19. Dr. Swenson spent nine years studying in higher education. His graduate work consisted of studies in personality theory, assessments of intelligence and personality psychopathology diagnosis, biological basis of behaviors. (Sept. 7th HT 102: 1-22, Testimony of Dr. Swenson).
20. His graduate work further consisted of accessing conditions, performing therapy, diagnostic evaluation, cognitive abilities, and cognitive declines. (Sept. 7th HT 103: 1-4, Testimony of Dr. Swenson).
21. Dr. Swenson also worked at a hospital psychiatric facility and has been retained by the State to do psychological evaluations by the Department of Social Security. (Sept. 7th HT 103: 13-23, 104: 12-19, Testimony of Dr. Swenson).
22. Dr. Swenson reviewed the Mayo Clinic records including the results of the Kokeman test, which is a standard test to determine functional capacity. In April of 2021, Eva was not able to answer orientation, even after hints. (Sept. 7th HT 106: 2-8, 24-25, 107: 1-25, 108: 1-25, 109: 1-25, 110: 1-14, 113: 15-25, 114: 1-16, Testimony of Dr. Swenson; *see also* Trupe Exhibit 3, Page 21).
23. Dr Swensen conducted his own psychological evaluation of Eva, applying the Wechsler Adult Intelligence Scale ("WAIS"), which like the Kokeman test, is a standard test to measure general intelligence. (Sept. 7th HT 113: 15-23, Testimony of Dr. Swenson; *see also* Trupe Exhibit 4).

24. Based on his review of the Mayo Clinic records and Eva's full scale IQ, it is Dr. Swenson's professional opinion that – based upon a reasonable degree of psychiatric probability – dementia is a progressive disease and Eva did not possess the mental dexterity required to comprehend the nature and ultimate effect of the POA naming Jodie as the sole POA. (Sept. 7th HT 114: 1-16, 115: 7-20, Testimony of Dr. Swenson).
25. Dr. Swenson testified he relied on the medical records and the results of other tests listed in Findings of Fact 22-24 in forming his conclusion. Dr. Swenson did not meet Eva prior to the execution of the 2021 Power of Attorney, and was not present when Eva executed the 2021 Power of Attorney.

Power of Attorney Issues

26. Prior to Roger's death, Jodie, Amy and Julie, were all joint Powers of Attorney ("POA") in a Financial Durable POA dated June 27, 2019. (Sept. 7th HT 225: 16-25; *see also* Trupe Exhibit 6).
27. Before Jodie's attempt to change the POA, in 2019 and 2020, Eva started to demonstrate signs of dementia. She would forget her keys, hide food around the house, put bananas under the bed in the spare rooms. (Sept. 7th HT 172: 10-22, Testimony of Julie; Sept. 7th HT 219: 15-24, Testimony of Amy).
28. After it was determined that Eva was incompetent at Mayo Clinic, Jodie scheduled a meeting at Tomac & Tomac Law Office for Eva to sign a POA

on November 16, 2021. (Sept. 6th HT 84: 9-14, Testimony of Attorney Jennifer Tomac).

29. Jodie scheduled the appointment to discuss the power of attorney. (Sept. 6th HT 84: 9-14, Testimony of Attorney Jennifer Tomac).

30. Jodie did not inform her sisters of the meeting. Jodie drove Eva to attorney Tomac's office where the November 2021 POA was executed, naming Jodie as the sole agent. (Sept. 6th HT 84: 6-14, Testimony of Jennifer Tomac; June 27, 2023 HT 60: 1-12, Testimony of Jodie; *see also* Trupe Exhibit 8).

31. Attorney Jennifer Tomac testified that Eva possessed the requisite capacity to create and execute the 2021 Power of Attorney. (Sept 6th HT at 74: 24-25; 75: 1-25, 76: 1-18; 88: 21-25; 89: 1-6, 95: 8-13, Testimony of Jennifer Tomac).

32. The Court finds the testimony of Dr. Swenson to be more compelling than the testimony of Attorney Tomac on the issue of whether Eva possessed the requisite capacity to create and execute the 2021 Power of Attorney. The Court firmly concludes, given the entirety of the record, that in 2021, *Eva did not have the mental acuity and understanding to execute the November 2021 POA*. Therefore, the November 2021 POA is void.

33. After the POA was executed the family dynamics changed as Jodie assumed control of Eva and the Paint Store. (Sept. 7th HT 11: 10-12, Testimony of Jim Clement; Sept. 7th HT 144: 21-25, 145: 1-4, Testimony of

Mike Mueller; Sept. 7th HT 167: 1-25, 168: 1-25, 169: 1-23, Testimony of Julie).

34. Attorney Tomac also motioned the Court, to withdraw from her representation on July 11, 2022, citing that Eva had diminished capacity. (Sept. 6th HT 80: 18-22, Testimony of Attorney Jennifer Tomac; *see also* Lecy Exhibit 5(f)).

Amy's Managing Roger, Eva, and the Store's Finance

35. Amy has been managing the finances of the Paint Store since 1983; administered the Paint Store's Simple 401K since before 2009; managed Eva and Roger's rental properties since 1987; and, paid all of Roger and Eva's personal obligations since approximately 2012. Since 2012 Amy has been overseeing Roger and Eva's investments. (Sept. 7th HT 10: 6-10, Testimony of Jim Clement; Sept. 7th HT 179: 7-21, Testimony of Julie; Sept. 7th HT September 7th HT 219: 4-8, 226: 17-22, Testimony of Amy).
36. Amy was the administrator of the Roger and Eva's personal finances since 2009, and after Roger's death, and has done a competent job. (Sept. 7th HT 10: 8-24, Testimony of Jim Clement; Sept. 7th HT 138: 15-25, 139: 1-5, Testimony of Mike Mueller; Sept. 7th HT 179: 19-25, 180: 1-15, Testimony of Julie; Sept. 7th HT 218: 6-25, 219: 1-9, Testimony of Amy).
37. Consistent with Roger's blessing, and while he was alive, Amy would prepare cashiers' checks, payable to Eva, and remove money from the account when they were out of town to protect the money from Jodie. Amy

would later redeposit the cashier's checks. (Sept. 7th HT 207: 1-12, Testimony of Julie; Sept. 7th HT 239: 1-19, Testimony of Amy; *see* JFB Exhibit 13; *see* Lecy Exhibit 1, Pages 166-185).

38. Roger trusted Amy with all financial operations. (Sept. 7th HT 138: 15-25, Testimony of Mike Mueller; Sept. 7th HT 179: 19-24 180: 7-15, Testimony of Julie).

Jeannine Lecy, First Temporary Conservator

39. On March 15, 2023, Jeannine Lecy ("Lecy"), a forensic accountant was appointed Temporary Conservator. (Order Appointing Temporary Conservator dated March 15, 2023).
40. Lecy was ordered to conduct a forensic accounting of all accounts associated with Eva, and any businesses Eva has an ownership interest, for the dates of January 1, 2019, to the end of her tenure in May of 2023. (Order Appointing Temporary Conservator dated March 15, 2023; Sept. 6th HT 38: 3-9, Testimony of Lecy; *see* Lecy Exhibit 3).
41. Lecy has worked as a consultant, bookkeeper, and accountant, for 35 to 40 years. (Sept. 6th HT 32: 7-25, Testimony of Lecy).
42. Lecy participated in more than a dozen fraud investigation, for City, State, and various counties for 20 years. (Sept. 6th HT 33: 21-24, Testimony of Lecy).

43. Lecy has also attended continuing education classes for fraud investigation. (Sept. 6th HT 33: 12-15, Testimony of Lecy; see Lecy Exhibit 2).
44. Lecy, is a pro-advisor on quick books, and taught quick books for 30 years. (Sept. 6th HT 33: 12-13, 18-22, Testimony of Lecy).
45. In the Order appointing Lecy, she was directed to "conduct a forensic accounting of all business accounts and personal accounts owned by Eva, including obtaining information prior to January 1, 2019, if needed." (Order Appointing Temporary Conservator dated March 15, 2023; Sept 6th HT 40: 3-19, Testimony of Lecy),
46. Lecy asked all three of the girls to gather information, she visited all the banks holding accounts for Eva, met with Mr. Bloom, Eva's attorney, gathered documents, including bank records, tax returns, and interviewed people to locate all of Eva's assets (Sept. 6th HT 40: 18-23, 51: 6-24, Testimony of Lecy).
47. Generally, Jodie did not cooperate with Lecy, and created obstructions to Lecy doing her work, but Amy and Julie were cooperative and did not create issues for Lecy. (Sept 6th HT 65: 5-19, 121: 3-11, Testimony of Lecy).
48. During her appointment, Lecy was informed that Eva had \$30,000 in cash, of which Lecy located \$22,200 that was held in Amy's safe. Lecy deposited the \$22,200 into Eva's account. (Sept. 6th HT 59: 7-16, 60: 2-4, Testimony of Lecy).

49. Jodie took an envelope containing \$8,400 in cash from Eva's safe deposit box, in front of Lecy, claiming it belonged to her. Lecy could not account for the cash or deposit it. (Sept. 6th HT 60: 5-14, Testimony of Lecy).
50. Jodie also changed the passwords to the QuickBooks and refused to give them to Lecy. (Sept 6th HT 63: 13-24, Testimony of Lecy).
51. Jodie wrote a check for \$5,000 to herself, Check #0149. Lecy contacted Attorney Elliot Bloom, regarding the check, he was unaware of the purpose of this check. (Sept. 6th HT 64: 13-24, Testimony of Lecy; see Lecy Exhibit 1, Page 166-167).
52. When Lecy inquired of Jodie the reason for the \$5,000 check, she responded: "It's not important. It's taken care of." (Sept. 6th HT 64: 13-25, 65: 1-4, Testimony of Lecy; see Lecy Exhibit 1, Page 3, Section 16; see also Lecy Exhibit 1, 166-167).
53. Lecy discovered that Jodie had been paying individuals to watch and take care of Eva. On many occasions Jodie did not allow Amy nor Julie access to Eva. (Sept. 6th HT 106: 5-20, Testimony of Lecy; see also Lecy Exhibit 5(D); Sept 7th HT 183: 3-23, Testimony of Julie).
54. Jodie also did not provide necessary information to Lecy, and threatened Lecy regarding being a conservator. (Sept. 6th HT 65: 5-19, Testimony of Lecy).

55. Lecy ultimately resigned as conservator; one of her reasons for doing so was lack of cooperation from Jodie. (Sept. 6th HT 121: 3-11, Testimony of Lecy).

56. Of the three girls, Lecy testified that Amy had the most experience as managing the family's finances and out of the three children would be the best conservator between them. (Sept. 6th HT 112: 6-9, Testimony of Lecy).

Gambling Issues

57. The Order appointing Temporary Guardian suspended Jodie's POA, yet using the suspended POA she wrote checks to casinos so she could continue to gamble. (Sept. 6th HT 49: 1-11, Testimony of Lecy).

58. Jodie's writing of checks to casino was an ongoing problem during Lecy's tenure as guardian and violated the Court's March 15, 2023, Order which suspended the POA. (Sept. 6th HT 49: 1-11, Testimony of Lecy; *see* Order Appointing Temporary Conservator dated March 15, 2023).

59. There were instances when Eva wanted to go dancing, but Jodie would make her go to Deadwood and gamble. (Sept. 6th HT 117: 6-12, Testimony of Lecy).

60. On August 19, 2023, Julie and Mike Mueller went to Deadwood to observe Eva's gambling, there, Jodie was primarily playing while Eva just watched Jodie. (Sept. 7th HT 145: 19-25, Testimony of Mike Mueller; Sept. 7th HT 181: 1-25, 182: 1-3, Testimony of Julie; *see* Trupe Exhibit 24).

Jodie's Accusations

61. Jodie has accused Amy of stealing approximately \$350,000.00 in life insurance proceeds upon the death of Roger, despite the fact that she was shown these funds were deposited into Eva's RBC account and provided statements by RBC regarding the deposit and a copy of the check. (Sept. 7th HT: 13: 5-21, Testimony of Jim Clement; Sept. 6th HT 112: 14-25, Testimony of Lecy; *see also* Lecy Exhibit 1, Page 45-61).
62. The money was properly deposited into the RBC account and Amy never stole any money. (Sept. 7th HT 13-14: 25-14, Testimony of Jim Clement; Sept. 6th HT 43: 3-23, Testimony of Lecy).
63. Jodie accused Amy of stealing approximately \$350,000 worth of cash from Roger and Eva, despite being shown that such cash was accounted for as an account owned by R&E Enterprises in QuickBooks and later moved into an account owned by R&E Enterprises, LLC. All money was accounted for by Lecy. (Sept. 6th HT 113: 2-20, 114: 9-25, 115: 25, 116: 1-13; *see also* Lecy Exhibit 1A, Page 9-10; Sept. 7th HT 228: 3-21, 231: 23-25, 232: 8-24, Testimony of Amy; Sept. 28th HT 72: 8-15; *see also* Trupe Exhibits 9, 10, 11, and 13).
64. Jodie was aware of the creation of R&E Enterprises, LLC and the account at Black Hills Federal Credit Union owned by R&E Enterprises, LLC. (Sept. 7th HT 236: 14-24, Testimony of Amy; *see also* Trupe Exhibit 14; *see also* Lecy Exhibit 1, Page 172-174).

65. Lecy conducted a forensic examination of all accounts and stated that there were no funds missing and all funds were accounted for, and contrary to Jodie's assertions, Amy did not take any money. (Sept. 6th HT: 112: 14-25, 114: 12-20, 115: 11-13, 116: 1-14, Testimony of Lecy; *see also* Lecy Exhibit 1(A)).

Jodie's Conduct During the Trial

66. During the course of the Trial, the Court observed Jodie walking around the courtroom, on multiple occasions speaking from the well where she called witnesses "liars", and at one point stated to Eva that the witness is a liar and upset Eva to the point where Eva stood up and interjected herself into the proceedings. (Sept. 7th HT: 18: 4-25, 19: 1-8, Testimony of Lecy; Sept. 7th HT 239-240: 23-6, Testimony of Amy; Dec. 11th HT 218: 5-7, Testimony of Amy).

67. Jodie's conduct during the trial forced the Court to issue an order that there was to be no intimidating the witnesses, and that Jodie's conduct was unfair, inappropriate, and disruptive. (Sept. 7th HT: 21: 10-17, 22: 11-20).

68. Jodie allowed Tomi Collins to stay in Eva's home. During the course of the trial, Tomi harassed Attorney Elliot Bloom and Attorney Quentin Riggins resulting in the Sheriff to be called twice during the proceedings. (Dec. 11th HT 90: 12-25, Testimony of Jodie).

Petitions

69. Amy has petitioned for the appointment of herself and Julie Mueller as Co-Guardians of Eva and for the appointment of herself as Conservator.
70. Jodie has petitioned for the appointment of herself as guardian and conservator.
71. Jodie has also petitioned in the alternative for the appointment of Black Hills Advocates as the guardian and conservator of Eva.
72. No evidence has been offered regarding the ability of Black Hills Advocates to serve as guardian and conservator.
73. Black Hills Advocates did not attend the hearing(s) and no cause has been shown for Black Hills Advocates absence.

Based upon the foregoing finding of Fact, the Court makes the following conclusions of law:

1. Pursuant to SDCL 29A-5-312, "[t]he proposed guardian or conservator shall attend the hearing except for good cause shown."
2. "The Court must comply with SDCL §29A-5-312 and administer to guardianship to ensure future compliance with SDCL § 29A-5-312 and administer the guardianship to ensure future compliance with SDCL chapter 29A-5." *Guardianship of Nelson*, 2013 S.D. 12 ¶ 28, 827 N.W.2d 72, 81 (noting that failure to comply with SDCL § 29A-5-312 is reversible error).

3. Black Hills Advocates did not attend the hearing and no cause was shown for its absence. Accordingly, Black Hills Advocates cannot be appointed guardian or conservator of Eva.
4. "As a matter of law, a fiduciary relationship exists whenever a power of attorney is created." *Estate of Lynch v. Lynch*, 2023 S.D. 23, ¶ 46, 991 N.W.2d 95, 111 (quoting *In re Estate of Duebendorfer*, 2006 S.D. 79 ¶ 26, 721 N.W.2d 438, 445.)
5. In the present case, Jodie has breached this duty by her continued self-dealing at the expense and against the wishes of Eva. "Self-dealing occurs when an agent pits their personal interest against their obligations to the principal." *Estate of Stoebner v. Huether*, 2019 S.D. 58, ¶ 19, 935 N.W. 2d 262, 268 (quoting *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 23, 908 N.W. 2d 170, 177).
6. "In order for self-dealing to be authorized, the instrument creating the fiduciary duty must provide in clear and unmistakable language authorizing self-dealing acts." *Lynch*, 2023 S.D. 23, ¶ 37, 991 N.W.2d at 108 (citing *Beinash v. Moller*, 2006 S.D. 78, ¶ 14, 721 N.W.2d 431, 435). Here the power of attorney does not have such 'clear and unmistakable language' authorizing Jodie to further her own agenda at the sacrifice of Eva. *See Id.*

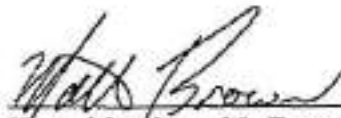
7. The November POA is void and not an effective nomination as guardian and conservator as a matter of law and the prior POA dated June 27, 2019, is binding where all three girls are POA. (See Trupe Exhibit 6).
8. Pursuant to SDCL § 29A-5-304, in making an appointment for guardian or conservator of a protected person, the court shall consider the "proposed guardian or conservator's geographic location, familial or other relationship with the protected person, ability to carry out the powers and duties of the office, commitment to promoting the protected person's welfare, any potential conflicts of interest, and the recommendations of the spouse, the parents or other interested relatives, whether made by will or otherwise." SDCL §29A-5-304.
9. Amy, Julie, and Jodie all reside in Rapid City, South Dakota, are daughters of Eva, have the ability to carry out the offices of guardian as specified below, are committed to promoting Eva's best interests and carrying for Eva, and were appointed agents under the POA signed by Eva dated June 27, 2019.
10. The issues raised by the Court and counsel about Jodie's prior conduct in excluding Amy and Julie from Eva, concerns about self-dealing and other concerns raised by the Court and counsel are ameliorated by appointing all three daughters as co-guardians and by appointing Amy Trupe as sole Conservator.

11. Amy Trupe is appointed as Conservator of Eva, and a separate Order will be entered accordingly.

12. Amy Trupe, Julie Meuller, and Jodie Frye-Byington are appointed as co-guardians.

Dated this 4th day of April, 2024


BY THE COURT:



Hon. Matthew M. Brown
Circuit Court Judge, 7th Circuit


Amber Watkins, Clerk of Courts
By  Deputy



FILED
Pennington County, SD
IN CIRCUIT COURT
APR 05 2024
Amber Watkins, Clerk of Courts
By  Deputy

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

) 51GDN22-000082
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IN THE MATTER OF THE)
GUARDIANSHIP AND)
CONSERVATORSHIP OF)
EVA M. FRYE)

) JUDGMENT AND ORDER
) APPOINTING AMY FRYE TRUPE AS
) SOLE CONSERVATOR
)

A Person Alleged to Need Protection.)
)

The above captioned matter, having come before the Court, the Honorable Matthew M. Brown Presiding and appearing Elliott Bloom, Attorney for Eva Frye; Michael J. Whalen, Attorney for Jeannine Lecy; Quentin L. Riggins and Aidan Goetzinger, Attorneys for Temporary Guardian, Jodie Frye Byington; and Rodney W. Schlauger and Laura E. Hauser, Attorneys for Temporary Conservator Amy Frye-Trupe; Julie Mueller, appeared pro se; the Court, after a review of the file, the evidence, testimony and arguments of counsel, now, therefore it is hereby:

ORDERED, ADJUDGED, AND DECREED,

- A. The Power of Attorney dated November 16, 2021, is void and not an effective nomination of conservator as a matter of law, and any and all prior general durable powers of attorney shall be void;
- B. That Amy Frye-Trupe is appointed as sole permanent Conservator of Eva M. Frye. Amy Frye-Trupe is suitable and qualified to serve as the sole Conservator. A bond shall not be required;
- C. The appointment shall continue until resignation by the Conservator or further order of the Court;
- D. Letters of Conservatorship shall be issued to Amy Frye-Trupe;

- E. Pursuant to SDCL § 29A-5-405, the Conservator shall have authority regarding the protected person's property and financial affairs and shall apply the income and principal as needed for the support, care, health, and if applicable, habilitation or therapeutic needs.
- F. The Conservator shall maintain sufficient contact with the protected person to know of the protected person's capabilities, limitations, needs, and opportunities. The Conservator shall, to the extent known, consider the express desires and personal values of the protected person when making decisions, shall act as fiduciary in managing the estate, and shall otherwise act in the protected person's best interests and exercise reasonable care, diligence, and prudence. The Conservator shall have the power and authority to request and obtain any and all information regarding Eva or any business owned by Eva, including but not limited to, bank statements, financial records, investment account statements, tax returns, business tax returns, leases, property tax assessments, or any other documentation needed at the sole discretion of the Conservator.
- G. The Conservator shall have all powers provided in SDCL § 29A-5-411. The powers of the Conservator provided in SDCL § 29A-5-411 shall include and not be limited to all accounts, real property, and personal property owned by Roger Frye Paint & Supply, Inc. and R&E Enterprises, LLC.
- H. The Conservator shall have the power and authority to access any and all bank accounts, investment accounts, or business accounts owned by Eva, Roger Frye Paint & Supply, Inc., and R&E Enterprises, LLC and shall have the power and authority as a co-signor on all such accounts to pay bills, make deposits, etc.
- I. Within sixty (60) days of the date of this Order, the Conservator shall file an accounting with the Court for the period July 5, 2023, through April 4, 2024, (the period in which the Conservator was Temporary Conservator).
- J. Pursuant to SDCL § 29A-5-408, the Conservator shall file an accounting with the Court within sixty (60) days following the first anniversary of the

Conservator's permanent appointment. The Conservator shall file annual accountings each year thereafter, unless otherwise ordered by the Court.

- K. All parties and third parties shall promptly provide any and all documentation requested by the Conservator;
- L. The background check requirement of SDCL § 29A-5-110 is hereby waived. The Conservator has previously completed the required training curricula pursuant to SDCL § 29A-5-119, and such certificate of completion was filed with the Court on June 28, 2023.

BY THE COURT:

4/30/2024 3:02:03 PM

Attest:

Slaughter, Patrick
Clerk/Deputy





The Honorable Matt Brown

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

) 51GDN22-000082
)
)

IN THE MATTER OF THE)
GUARDIANSHIP AND)
CONSERVATORSHIP OF)
EVA M. FRYE)

) JUDGMENT AND ORDER FOR
) APPOINTMENT OF CO-GUARDIANS
)

A Person Alleged to Need Protection.)
)

The above captioned matter, having come before the Court, the Honorable Matthew M. Brown Presiding and appearing Elliott Bloom, Attorney for Eva Frye; Michael J. Whalen, Attorney for Jeannine Lecy; Quentin L. Riggins and Aidan Goetzinger, Attorneys for Temporary Guardian, Jodie Frye Byington; and Rodney W. Schlauger and Laura E. Hauser, Attorneys for Amy Frye-Trupe; Julie Mueller, appeared pro se; the Court, after a review of the file, the evidence, testimony and arguments of counsel, now, therefore it is hereby:

ORDERED, ADJUDGED, AND DECREED,

A. The Power of Attorney dated November 16, 2021, is void and not an effective nomination as guardian as a matter of law and any and all prior powers of attorney for healthcare are void;

B. That Amy Frye Trupe, Julie Mueller, and Jodie Frye Byington are appointed as permanent Co-Guardians of Eva M. Frye with a 2/3 majority vote deciding any and all conflicted decisions ("Majority Vote");

C. The Court finds Amy Frye-Trupe, Julie Mueller, and Jodie Frye-Byington are suitable and qualified to serve as the Guardians. A bond shall not be required.

D. The appointment of the Co-Guardians shall continue until resignation by a Co-Guardian or further order of the Court;

E. Letters of Co-Guardianship shall be issued to Amy Frye-Trupe, Julie Mueller, and Jodie Frye-Byington;

F. Pursuant to SDCL § 29A-5-401 and 416, the Co-Guardians shall make decisions, by a Majority Vote, regarding the protected person's support, care, health, habilitation, therapeutic treatment, and, if not inconsistent with an order of commitment or custody, shall determine the protected person's residence. The Co-Guardians shall maintain sufficient contact with the protected person to know of the protected person's capabilities, limitations, needs, and opportunities.

G. A single Guardian may not bind the protected person in any document or contract, hire any caregivers, obligate the protected person to any debt, or liability, nor make any significant decision regarding her care, or control, and the three Co-Guardians shall have the authority to make decisions as or execute binding documents or contracts as provided in this Order only upon Majority Vote.

H. The Proposed Guardianship Plan prepared by Amy Frye-Trupe and admitted as Exhibit 26, is hereby adopted by the Court and as further provided herein;

I. Each Guardian shall be primarily responsible for the protected person on a rotating Ten (10) day period ("10 Day Period"). The first 10 Day Period shall begin on May 1, 2024 and Jodie Frye-Byington shall be primarily responsible for the protected person. The second 10 Day period shall begin on May 10, 2024, and Julie Mueller shall be primarily responsible for the protected person. The third 10 Day Period shall begin on May 20, 2024 and Amy Frye-Trupe shall be primarily responsible for the protected person. Each 10 Day Period shall continue on a rotating basis consistent with this paragraph. Except for Holidays provided below, drop-off and pick-up shall occur at 12:00 PM at Eva's house, if not infringing on the paint store business, otherwise at the paint store, unless otherwise agreed upon by the Co-Guardians. For the avoidance of confusion, the first day of each 10 Day Period is the day following pick-up and the last day of each 10 Day Period is the drop-off date.

J. Holidays shall be rotated between the three Co-Guardians. The term "Holiday" includes the following: New Years Day, Easter Day, Mother's Day, Memorial Day, Eva's Birthday (June 17th), Fourth of July, Labor Day, Thanksgiving Day, Christmas Eve, Christmas Day, and New Years Eve. An interruption in a 10 Day Period due to a Holiday does not restart or alter the 10 Day Period. It provides a break in the 10 Day Period. For a Holiday, drop-off will occur at 12:00 PM at Eva's house, if not infringing on the paint store business, otherwise at the paint store, the day before a Holiday and pickup will occur at 12:00 PM the day after the Holiday, unless otherwise agreed upon by the Co-Guardians. Julie Mueller shall

have the protected person on Mother's Day, May 12, 2024; Amy Frye-Trupe shall have the protected person on Memorial Day, May 27, 2024; Jodie Frye-Byington shall have the protected person on Eva's Birthday, June 17, 2024; and each holiday shall continue to rotate on that schedule thereafter.

K. During each Guardian's 10 Day Period, the Conservator shall pay to the Guardian \$50 per day, a total of \$500 ("Allowance"). The Allowance is intended to be used on or for the protected person. No receipts are required to be provided to the Conservator regarding the daily \$50 Allowance. For all other expenses, the Co-Guardians shall work with the Conservator for payment or reimbursement.

L. The Co-Guardians shall file an annual report to the Court within sixty (60) days following the anniversary of the appointment, annually thereafter, or on a calendar-basis not later than April 15th of each year. Within fourteen (14) days after filing the annual report with the Clerk of Courts, the annual report shall be mailed to all individuals and entities listed in the petition or as required by law.

The report shall state:

1. The current mental, physical, and social condition of the protected person;
2. The living arrangements during the reporting period;
3. The medical, educational, vocational, and other professional services provided to the protected person and the guardian evaluation as to the adequacy of the care;
4. A summary of the Co-Guardians' visits with and activities on the protected person's behalf;
5. Co-Guardians' opinion of the current treatment or habilitation plan;

6. Co-Guardian's recommendation as to the need for a continued guardian and recommended changes in the scope of guardianship;

7. The compensation requested by a Co-Guardian, if any.

M. The background check requirement of SDCL § 29A-5-110 is hereby waived. Pursuant to SDCL § 29A-5-119, the Co-Guardians shall complete the required training curricula. The Court acknowledges that Jodie Frye-Byington completed her guardianship training, and such certificate of completion was filed with the Court on March 9, 2023. The Court acknowledges that Amy Frye-Trupe completed her guardianship training, and such certificate of completion was filed with the Court on April 15, 2024. The Court acknowledges that Julie Mueller completed her guardianship training, and such certificate of completion was filed with the Court on April 15, 2024.

N. The requirement of Jodie Frye-Byington to file a guardian's report during her appointment as the temporary guardian is hereby waived.

BY THE COURT:

4/30/2024 2:56:41 PM

Attest:
Slaughter, Patrick
Clerk/Deputy




The Honorable Matt Brown

STATE OF SOUTH DAKOTA

)

IN CIRCUIT COURT

) SS.

COUNTY OF PENNINGTON

)

SEVENTH JUDICIAL CIRCUIT

FILE NO. GDN22-82

In the Matter of the
Guardianship and
Conservatorship of

EVA M. FRYE,

A Person Alleged to
Need Protection.

EVIDENTIARY HEARING

BEFORE: THE HONORABLE MATT M. BROWN
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
September 7, 2023

A P P E A R A N C E S:

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FOR MS. JODIE FRYE-BYINGTON:

MR. QUENTIN L. RIGGINS
-- AND --
MR. AIDAN GOETZINGER
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P.O. Box 8045
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1 FOR MS. AMY FRYE-TRUPE: MS. LAURA E. HAUSER
2 -- AND --
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4 Attorneys at Law
5 P.O. Box 2670
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7
8 FOR MS. JEANNINE LECY: MR. MICHAEL J. WHALEN
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13 FOR MS. JULIE MUELLER: MS. JULIE MUELLER
14 Appearing Pro Se
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| 9 Exhibit | Description | Offered | Ruled On |
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| 10 Trupe Exhibit 1 | Photos | 100 | 100 |
| 11 Trupe Exhibit 2 | Photos | 100 | 100 |
| 12 Trupe Exhibit 3 | Medical Records | 100 | 100 |
| 13 Trupe Exhibit 4 | Dr. Swenson's Report | 100 | 100 |
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| 19 Trupe Exhibit 10 | QuickBooks Report | 100 | 100 |
| 20 Trupe Exhibit 11 | QuickBooks Report | 100 | 100 |
| 21 Trupe Exhibit 12 | Bank Statement | 100 | 100 |
| 22 Trupe Exhibit 13 | Bank Statement | 100 | 100 |
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| 25 Trupe Exhibit 16 | Meeting Minutes | 100 | 100 |

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| 1 | Trupe Exhibit 17 | Audit Trail | 100 | 100 |
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- 1 R&E Enterprises listed.
- 2 A Yes, this is a QuickBooks printout.
- 3 Q This would be QuickBooks printout for U.S. Bank [REDACTED].
- 4 A Yes.
- 5 Q So, essentially, even though the owners were listed as the
6 three of you by U.S. Bank, you always accounted for this
7 as an R&E Enterprises bank account?
- 8 A Always.
- 9 Q So when you would do tax returns and you were asked for
10 financials for R&E Enterprises --
- 11 A It was right there at my fingerprints.
- 12 Q And you would give them this summary or this check
13 register or whatever else they needed.
- 14 A Correct.
- 15 Q Now I want to have you go ahead and take a look at
16 Exhibit 11 for me. Can you explain what Exhibit 11 is?
- 17 A This is R&E Enterprises account at Black Hills Federal
18 Credit Union, high yield.
- 19 Q Okay. And what occurred on that the first transaction on
20 May 27, 2020? Can you explain that?
- 21 A Yes. R&E Enterprises, going back to whatever that one we
22 were just at, account number [REDACTED] at U.S. Bank, had way
23 too much money in it. It was not getting any interest.
24 It was a checking account. I talked to Dad about it. I
25 said, Where do you want me to put this money? I go, It's

1 not getting any interest.

2 He said, Why don't you call around, find out who is
3 giving the best interest.

4 Black Hills Federal Credit Union was giving the
5 interest. So I wrote a check to Black Hills Federal
6 Credit Union, took it over to Black Hills Federal Credit
7 Union and thought I could do just like I did with account
8 number [REDACTED] at U.S. Bank and just call it R&E Enterprises,
9 and you couldn't do that anymore.

10 Q And let me clarify. So by do what you did at U.S. Bank,
11 you mean have it an owner listed as one thing but then the
12 checks show a different thing.

13 A Correct.

14 Q And you would account for it all the same. You didn't --
15 it didn't matter to you who was listed as the owners --

16 A No.

17 Q -- on the statement.

18 A It's all R&E Enterprises.

19 Q So, Amy, is there a Lecy binder up there still?

20 A No.

21 THE COURT: I think I've got the originals. I think this
22 was up there.

23 MS. HAUSER: Do you have one, Your Honor, for the Lecy?

24 THE COURT: Yeah. I've got a copy and this is the
25 originals. But I have a copy also so I'm good.

1 MS. HAUSER: Thank you, Your Honor.

2 Q Amy, I'm going to have you turn to what was previously
3 marked as Lecy Exhibit 1A.

4 Well, I guess it's this one.

5 A There's no tabs or anything.

6 MS. HAUSER: Do you mind if I use this copy?

7 MR. RIGGINS: That's fine.

8 That's the supplement, Exhibit 1?

9 MS. HAUSER: Yes. This is the supplement.

10 Q I'm going to show you this document.

11 A Okay.

12 Q So, Amy, I'm going to be having you flip between a couple
13 of exhibits here so just bear with me a little bit. But
14 right in front of you is what's been marked as Lecy
15 Exhibit 1A and it's Exhibit 1 to Exhibit 1A. And, now, is
16 this Black Hills Federal Credit Union [REDACTED]?

17 A Yes.

18 Q That's the account number on this account?

19 A Yes.

20 Q So who is listed as the owners on this bank statement?

21 A Amy and Julie.

22 Q And can you tell me what occurred down at the bottom on
23 this bank statement on May 28th?

24 A That is when I took the \$250,000 out of [REDACTED] and took it
25 to Black Hills Federal Credit Union to deposit it.

1 Q So you created this account believing that it would be an
2 R&E Enterprises account?

3 A Yes.

4 Q And you always accounted for this as R&E Enterprises?

5 A Yes. It never left QuickBooks.

6 Q Flipping back to Trupe Exhibit 11, that shows that it was
7 always accounted for as R&E Enterprises?

8 A Yes. That's why it says R&E at the top.

9 Q Thank you, Amy.

10 Were any checks ever written out of this Black Hills
11 Federal ██████?

12 A I do not believe so. I don't know why there would be.

13 Q So you never made any transfers, you never used this money
14 for your benefit?

15 A No.

16 Q Because it was R&E Enterprises' money?

17 A Correct.

18 Q Now, I'm sorry to be flipping back and forth on you again.
19 But can you tell me what occurred on February 16, 2022,
20 looking at Trupe Exhibit 11?

21 A February 16, 2022. I took another 100,000 over there.

22 Q And so a total now of 350,000 was deposited in Black Hills
23 Federal ██████?

24 A Correct.

25 Q And that is shown, if you flip to Page 8 of that document

1 in your hand.

2 And so same thing here now on Lecy Exhibit 1A, Page 8.

3 It shows the 100,000 was transferred into 8997?

4 A Correct.

5 Q Now, if you'll take a look at Exhibit 13 for me, Trupe
6 Exhibit 13. I know you have a million binders in front of
7 you.

8 A Thank you.

9 Q And so what's the statement date on Trupe Exhibit 13?

10 A 9/30 of '22.

11 Q And is this a Black Hills Federal Credit Union account now

12 [REDACTED]?

13 A Is it what?

14 Q Is this Black Hills Federal Credit Union account [REDACTED]?

15 A Yes.

16 Q And who is the owner of this account?

17 A R&E Enterprises, LLC.

18 Q And now looking at now at Page 9.

19 A This one?

20 Q In Lecy Exhibit 1 --

21 A Uh-huh.

22 Q -- A. What occurred on April 8th?

23 A Looking at this?

24 Q Yes. Are you looking at Page 9?

25 A No, I'm sorry. I'm on 8.

STATE OF SOUTH DAKOTA)
)
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SS.
SEVENTH JUDICIAL CIRCUIT

FILE NO. GDN22-82

In the Matter of the)
Guardianship and)
Conservatorship of)
)
EVA M. FRYE,)
)
A Person Alleged to)
Need Protection.)

EVIDENTIARY HEARING

BEFORE: THE HONORABLE MATT M. BROWN
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
September 28, 2023

A P P E A R A N C E S:

FOR MS. EVA FRYE: MR. ELLIOT BLOOM
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FOR MS. AMY FRYE-TRUPE: MR. RODNEY SCHLAUGER
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FOR MS. JULIE MUELLER: MS. JULIE MUELLER
Appearing Pro Se

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1 And there's been a lot of discussion about this
2 account. Specifically, do you recall when Ms. Lecy
3 testified that she believed you were an owner of this
4 account?

5 A Say that again.

6 Q Do you recall when Ms. Lecy, the former --

7 A Jeannine, yeah.

8 Q -- conservator testified that she believed you were an
9 owner of this account? Do you remember that testimony?

10 A I don't recall her saying that.

11 Q Do you recall when you were asked by your attorney
12 questions about this account, that you indicated that it
13 was an R&E account; is that correct?

14 A In my eyes this is an R&E Enterprises account.

15 Q So I just want to be very clear, you're not claiming that
16 you own any of the money that was ever in this account; is
17 that correct?

18 A No.

19 Q Let me have you take a look at the address of this
20 particular invoice on this Page 1. Is that your address?

21 A Yes, that is my address.

22 Q And the account, at least on Page 1 says,
23 Amy L. Frye-Trupe and Julie Mueller; is that correct?

24 A That's correct.

25 Q And it does not say R&E; correct?

1 A No, it does not say R&E.

2 I had not -- can I explain why it doesn't say R&E?

3 Q Sure.

4 A Okay. So I went to the bank, credit union, to put the
5 money in R&E Enterprises. Back when Dad and I made
6 R&E Enterprises, and you too, Mom, when we made
7 R&E Enterprises, it wasn't an LLC, it was we're going to
8 call the rentals R&E Enterprises.

9 So back in that day, we went to U.S. Bank. The bank
10 put it as Roger, Eva, Amy as owners of the account. But
11 we could still have checks made that said R&E Enterprises.
12 So when I went to Black Hills Federal Credit Union with
13 the \$250,000, I thought that I could just open an account
14 that said R&E Enterprises. I didn't know you had to have
15 a TIN or an EIN or whatever you have to have, the number
16 for the IRS.

17 So consequently, I get there, I say I want to put this
18 \$250,000 in R&E Enterprises and they said, well, what's
19 the TIN or EIN? I said, well, what do you mean? I just
20 want to put it in R&E Enterprises. I was told I had to
21 get the LLC set up, so I just threw it in this account
22 temporarily until I got the LLC created.

23 Q And is it not true that the property that generated the
24 rents that went into this account is property owned by
25 your mom and dad; correct?

1 A Correct.

2 Q And isn't it true that on Page 1, you don't have your mom
3 or your dad listed on this particular account, do you?

4 A No, I do not.

5 Q So why would you not list your mom and dad but you listed
6 Julie?

7 A Julie could leave the store with me to take care of these
8 items. My father knew all of this. My father knew
9 exactly what I had done without a question.

10 Q Other than, you know, your word and your conversations
11 with your dad, do you have anything in writing that
12 suggested that he was aware that you did this?

13 A No. We didn't put things in writing. My dad never did
14 business in writing. It was always a handshake or a word.

15 Q Well, let me ask you about R&E Enterprises. At some point
16 you filed an LLC in that name; correct?

17 A Yes. And I understand I did not do it correctly.

18 Q And that's because when you initially filed it, you only
19 had yourself and Julie as directors; is that correct?

20 A No.

21 I did it -- you could pull up the papers. I did it
22 at, like, 1:30 in the morning at my computer at home,
23 created this LLC. I'm not a lawyer. I'm not an
24 accountant. All I did was what I thought was right.

25 So I'm going through there, and I've done the -- what

1 do you call the annual thing that you do every year for
2 companies? My words are blank.

3 Anyway, I've done that every year, so when I go
4 through and put -- I thought there was going to be another
5 page where I could list all of us. So when I originally
6 set it up at 1:30 in the morning, I just put my name on
7 it. And thinking that I was, like, the registered agent
8 that the postcard would come to every year to remind you
9 to update. Anyway, so I did it just me. And then I hit
10 print because the next page didn't give me a place to put
11 everybody. I hit print, I realized that there wasn't the
12 last page that I thought there was. So then I went right
13 back into the web site to do a correction and it said I
14 had to do it by mail rather than on the web site. So I
15 printed the papers to do the correction. I filled that
16 out and then I mailed it the next day.

17 Q And so when you filed the correction, it listed as
18 directors yourself, Julie, Eva, and Jodie; correct?

19 A Correct.

20 Q Who are the members of R&E?

21 A Well, that's what I -- that's what I made. You said
22 directors. I made all four of us members, not directors.

23 Q Do you have an operating agreement for R&E?

24 A No, I do not. Like I told you, I did not do things
25 correctly.

STATE OF SOUTH DAKOTA)
COUNTY OF PENNINGTON)

IN CIRCUIT COURT)
SS.)
SEVENTH JUDICIAL CIRCUIT)

FILE NO. GDN22-82

In the Matter of the)
Guardianship and)
Conservatorship of)
EVA M. FRYE,)
A Person Alleged to)
Need Protection.)

EVIDENTIARY HEARING

BEFORE: THE HONORABLE MATT M. BROWN
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
September 6, 2023

A P P E A R A N C E S :

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-- AND --
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Rapid City, SD 57709

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1 Q When did you discuss preparation of a will with Eva?

2 A So this came, if I remember correctly, about a year later.

3 Actually her attorney at that time, Elliot, reached out to

4 me and said that she had expressed interests to him in

5 changing her will and that he had recommended that she

6 come back to me for that because I was the one who did her

7 power of attorney.

8 Q So you prepared this particular document after discussion

9 with Eva's attorney, Elliot Bloom.

10 A Well, he asked me to reach out -- he asked my office to

11 reach out to her to schedule a time to have her come down,

12 yes.

13 Q Was there anyone else present when you discussed

14 preparation of an updated will for Eva?

15 A No.

16 Q What did Eva tell you about why she wanted to make changes

17 to her will?

18 A She told me she still wanted everything to go to all her

19 daughters but all they did was fight, so she wanted

20 somebody else to be in charge.

21 Q Who did she select to be in charge?

22 A Shannon Reitzel.

23 Q Did she indicate why she selected Shannon Reitzel?

24 A She said she trusted her.

25 Q Now, let me ask you a little bit about capacity. As an

1 attorney that practices in estate planning, what is the
2 capacity in South Dakota in order to draft a will?

3 A Yeah. So they have to know the natural objects of your
4 bounty and then the nature and extent of your assets.

5 Q Do you believe that Eva was able to meet that capacity
6 requirement on the day that she executed the will that you
7 have a copy of in front of you?

8 A Yes. And that's because I asked her those questions. So
9 I asked her to identify who, and I don't use the words
10 natural objects of your bounty when I'm talking to the
11 client, but I asked her to identify who her children were,
12 who would receive things if she passed away, and then to
13 give me an idea of the type of things that she owned.

14 And this was a kind of a unique case because I don't
15 always know if what they're telling me is true or not when
16 they say that. But in this case because I had worked on
17 looking at probate earlier and stuff, I had an idea of
18 what she owned. So she was able to tell me that she knew
19 she had a house and a cabin and she had some bank accounts
20 and her pride and joy, Roger Frye Paint & Supply.

21 Q And there's a set of questions that you just mentioned.
22 Do you ask that of everyone before they sign a will?

23 A I do.

24 Q Let me ask you about the power of attorney. This was
25 executed approximately one year prior to the will; is that

1 correct?

2 A It was, yeah.

3 Q And did you ask Eva any questions about the power of
4 attorney before she executed it?

5 A Yeah. So a little different with the power of attorney.
6 It's more along the lines of do they have capacity to
7 enter into a contract, do they understand the extent and
8 effect of what it is that they are signing.

9 So when it comes to executing a power of attorney, my
10 questions are more directed towards that type of thing.
11 So I asked her if she understood that by signing this that
12 she was naming Jodie as her agent to do all of the things
13 that were enumerated and listed out in that document, and
14 she said that she did.

15 Q And do you have any doubt as an attorney that she had the
16 capacity in order to draft that contractual document?

17 A No.

18 Q Now, if -- in your practice have you ever come across any
19 clients that you were concerned with capacity to the
20 extent that you may refer them to have an evaluation done?

21 A Interesting question. It's been discussed, but I've never
22 actually referred someone for that prior to signing
23 documents, and my rationale is based on case law.
24 Particularly in South Dakota, that is very clear that even
25 if there is a diagnosis of dementia, even if there is a

1 variety of other things in place, that at the moment that
2 they are signing the document, whether they have the
3 requisite capacities up to that moment, whether they could
4 have a lucid interval, it's more about in the moment when
5 they're making those decisions.

6 And so this was an interesting case and, you know, you
7 all know this in here, but I was in talks with the family
8 about, you know, different daughters had spoken to me
9 about the need for a guardianship, and I had said, you
10 know, you're going to need a medical evaluation for that
11 and, you know, if that's something you guys are concerned
12 about, you're going to need to pursue that and get that
13 done.

14 But in the meantime, both the times when I met with
15 Eva both to get her instruction on what she wanted and
16 then again later on to execute the documents, she was able
17 to pass the tests that are articulated in South Dakota law
18 for capacity to sign those documents.

19 MR. RIGGINS: That's all the questions I have.

20 THE COURT: Thank you.

21 MR. RIGGINS: I apologize, I neglected to offer the
22 exhibits. We were discussing whether we could stipulate
23 to foundation, but I never got mine on the record. So I
24 would offer Exhibits 6 and 8.

25 THE COURT: Any objection?

**IN THE SUPREME COURT
STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE
GUARDIANSHIP AND
CONSERVATORSHIP OF EVA M. FRYE**
A PERSON ALLEGED TO NEED PROTECTION

Appeal No. 30722

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Matthew M. Brown
Circuit Court Judge

Notice of Appeal filed on May 29, 2024

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Preliminary Statement

In this Brief, Appellee Amy Frye-Trupe will be referenced as “Amy.” Appellant Jodie Frye-Byington will be referenced as “Jodie” or “Appellant.” Interested person Julie Mueller will be referenced as “Julie.” Protected Person Eva M. Frye will be referenced as “Eva.” Appellant’s Brief will be identified as “Appellant’s Brief,” and Appellant’s Appendix will be identified by “App.” followed by the appropriate page number. References to the Settled Record will be cited as “SR” followed by the appropriate page number.

Oral Argument

Amy does not believe oral argument would significantly aid the Court in resolving the issues presented in this appeal. However, the undersigned would be pleased to appear should the Court determine otherwise.

Jurisdictional Statement

On April 5, 2024, the Circuit Court, the Honorable Matthew Brown, issued Findings of Fact and Conclusions of Law. App. 1-18. On April 30, 2024, the Circuit Court entered a Judgment and Order appointing Amy as sole Conservator and a Judgment and Order for Appointment of Amy, Julie, and Jodie as Co-Guardians. App. 19-26. Notice of Entry was served on both Orders on May 1, 2024. SR 2979 and 2986. Jodie filed a Notice of Appeal on May 29, 2024. SR 3009. This Court has jurisdiction pursuant to SDCL § 15-26A-3.

Statement of the Issues

1. Whether the Circuit Court abused its discretion in appointing Amy as sole conservator?

The Circuit Court appointed Amy as the permanent conservator of Eva.

Most Relevant Authority:

In the Matter of the Guardianship of Rich, 520 N.W. 2d 63 (S.D. 1994)

In re Conservatorship of Gaaskjolen, 2014 S.D. 10, 844 N.W. 2d 99

In re Guardianship of Jacobsen, 482 N.W.2d 634 (S.D. 1992)

SDCL § 29A-5-304

2. Whether the Circuit Court abused its discretion and erred in failing to give effect to either Eva's August 29, 2019 or her November 16, 2021 powers of attorney?

The Circuit Court found the November 2021 power of attorney was void due to Eva's lack of mental dexterity. The Circuit Court was not presented with, and did not consider, the issue of whether the August 2019 power of attorney was applicable. The Circuit Court appointed Amy, Julie, and Jodie as co-guardians of Eva.

Most Relevant Authority:

In re Estate of Howe, 2004 S.D. 118, 689 N.W.2d 689

Johnson v. Markev, 2022 S.D. 57, 980 N.W.2d 662.

SDCL § 20-11A-1

SDCL § 59-12-1(5)(a)

Statement of the Case

This is an appeal from the Seventh Judicial Circuit, Pennington County, South Dakota, the Honorable Matthew Brown.

On August 11, 2022, Amy first petitioned the Circuit Court for an order appointing her as the permanent guardian and conservator of her mother, Eva Frye. SR 1-5.

On February 9, 2023, the Circuit Court appointed Jodie as the temporary guardian. SR 349. On March 15, 2023, the Circuit Court appointed Jeannine Lecy as the temporary conservator, and tasked Lecy with conducting a forensic accounting of all the businesses and personal accounts of Eva, dating back to January 1, 2019. SR 435-437. On June 23, 2023, Lecy filed her Final Accounting and Report of Facts (volumes 1-3) revealing her forensic examination for January 1, 2019 through June 23, 2023. SR 501-776. Shortly thereafter, the Circuit Court granted Lecy's Petition and Resignation. SR 838-839. Following Lecy's resignation, on July 5, 2023, the Court appointed Amy as temporary conservator. SR 865-867.

A four-day evidentiary hearing was held regarding the appointment of a permanent guardian and conservator of Eva. SR 1174-1653 and SR 2503-2767. On April 5, 2024, the Circuit Court entered Findings of Fact and Conclusions of Law appointing Amy as the permanent conservator and Amy, Julie, and Jodie as permanent co-guardians of Eva. SR 2948-2966. On April 30, 2024, the Circuit Court entered an Order for Appointment of Co-Guardians and an Order Appointing Amy Frye-Trupe as Sole Conservator. SR 2969-2973.

Statement of the Facts

A. Family Background

Eva was born on June 17, 1942. App. 1. Eva and her husband, Roger Frye (“Roger”) had three children – Jodie, Julie, and Amy.¹ *Id.* For decades, all of the family members worked at the family business – Roger Frye’s Paint and Supplies, Inc. (the “Paint Store”). *Id.* Roger died on February 3, 2021. App. 2.

B. Management of Paint Store and Frye Family Finances

Roger trusted Amy with all financial operations. App. 9. Amy has managed the finances of the Paint Store since 1983, administered the Paint Store’s Simple 401K since before 2009, managed Eva and Roger’s rental properties since 1987, and paid all of Roger and Eva’s personal obligations and managed their investments since approximately 2012. App. 8.

Mr. James Clement (“Mr. Clement”) is a financial advisor for RBC Wealth Management. SR 1305. He has served as Roger and Eva’s financial advisor since January of 2009. *Id.* Mr. Clement and Amy have worked together since 2009 on the Paint Store’s 401(k) retirement plan. Mr. Clement testified that Amy was competent and “excellent” to work with on the Paint Store’s accounts. SR 1306. After Roger’s death in 2021, Amy became more involved in Roger and Eva’s

¹Jodie and Julie are twins.

finances with RBC Wealth Management. SR 1307. According to Mr. Clement, Amy did a nice job assisting with Eva's personal investments as well. *Id.*

C. Jodie's Spending and Gambling

Roger and Eva knew that Jodie is a spender and a gambler. SR 1592. Roger repeatedly instructed Jodie to stop ordering stock for the Paint Store, but she would continue to purchase unneeded items. *Id.* In fact, the basement of the Paint Store is full of unnecessary or unsellable inventory that Jodie ordered. *Id.* Jodie's gambling was established before the Circuit Court. For example, on August 18, 2023, while Eva was in Julie's care, Jodie wrote Check #01073 for \$500 and Check #01074 for \$500 from the Guardianship account to First Gold Casino. SR 2107-2108; *see also* SR 2118. Additionally, on March 15, 2023, the Court entered an Order Appointing a Temporary Conservator and suspended any and all general durable powers of attorney. SR 447-449. Despite the Court's Order, Jodie continued to use her power of attorney to write checks to casinos. App.12; *see also* SR 1222. When Jodie was confronted by Lecy, she blamed Eva, stating, "Mom's been gambling for years and she's going to continue gambling . . ." SR 1222. As another example, on August 19, 2023, Julie and her husband went to Deadwood to observe Eva's gambling, but they observed that it was Jodie who was gambling, while Eva just watched Jodie. App. 12.

Thus, with Roger's blessing, Amy occasionally removed money from the Paint Store account to protect it from Jodie when Roger, Eva, or Amy intended to be out of town. SR 2730-2731. Amy would later transfer the money back into a Paint Store account upon their return. *Id.*

D. Eva's Dementia

In 2012, the family began to notice a decline in Eva's cognitive abilities, as she started hiding food around the house. App. 2. Over the years, the deterioration progressed. During Christmas of 2016, Eva thought ornaments she had purchased for her grandchildren were stolen, but, in reality, she had never purchased the ornaments. *Id.* In 2019, Eva had gone to Applebee's in Rapid City, South Dakota, and became disoriented. App. 3. Her children had to find her and bring her home. *Id.* During a Christmas party in 2019, Eva kept asking Mr. Clement about his father, unable to remember that his father had died several years prior. *Id.* Also, around this time, there were several instances where Eva flooded her house by leaving the sink or water hose on. *Id.*; *see also* SR 1435.

Eva's mental decline became readily apparent after the death of her husband, Roger, on February 3, 2021. App. 3. At Roger's funeral, Eva became very confused and disoriented; she did not understand why Roger was lying in the coffin and not getting up. *Id.* Thereafter, Eva shared stories that she was talking with him — and then Roger would disappear. *Id.*

In April of 2021, Eva was brought to the Mayo Clinic for a comprehensive visit, which noted, among other things, the following:

- Eva had Alzheimer's Disease
- "She had progressive worsening of overall cognition and memory for at least the past few years."
- She was unable to remember the building she was in, the city, state, day of the week, month, or year.
- She was unable to do simple calculations.
- Eva was unable to define an island or remember the number of weeks in a year.
- Eva could not draw a face of a clock.

App. 4; *see also* SR 1897.

E. The November 2021 Power of Attorney

Shortly after the Mayo Clinic appointment, Jodie scheduled a meeting for Eva at Tomac & Tomac Law Office to discuss a new power of attorney, naming Jodie as the sole agent. SR App. 6-7. On November 16, 2021, Eva executed a new power of attorney at Tomac & Tomac. App. 7.

In connection with the initial petition for appointment of guardian and conservator, Dr. Gregory Swenson ("Dr. Swenson") performed a psychological evaluation of Eva. SR 17-19. Dr. Swenson received his undergraduate degree from Washington University, in St Louis, Missouri and his PhD from Biola University in California. App. 4. He is a licensed psychologist and has been

practicing psychology since 1976. *Id.* Dr. Swenson's graduate work consisted of studies in personality theory, assessments of intelligence and personality psychopathology diagnosis, biological basis of behavior, accessing conditions, performing therapy, diagnostic evaluation, cognitive abilities, and cognitive declines. App. 5. Dr. Swenson also worked at a hospital psychiatric facility and has been retained by the State of South Dakota to conduct psychological evaluations by the Department of Social Security. *Id.*

Dr. Swenson reviewed the Mayo Clinic records, including the results of the Kokeman test, a standard test to determine functional capacity. *Id.* He also conducted his own psychological evaluation of Eva, applying the Wechsler Adult Intelligence Scale, another standard test to measure general intelligence. *Id.* Based on his review of the records and analysis of Eva, it was Dr. Swenson's professional opinion that Eva did not possess the mental dexterity required to comprehend the nature and ultimate effect of the power of attorney naming Jodie as sole agent on November 16, 2021. App. 6.

F. Jeannine Lecy, First Temporary Conservator and Forensic Accountant

On March 15, 2023, Jeannine Lecy ("Lecy"), a forensic accountant, was appointed Temporary Conservator. SR 435-437. Lecy has extensive experience working as a consultant, bookkeeper, and accountant. SR 1205. As a forensic accountant, Lecy has participated in more than a dozen fraud investigations. SR

1205-1206. Lecy is also a ProAdvisor on QuickBooks, and taught QuickBooks for 30 years. SR 1206.

Lecy was ordered to conduct a forensic accounting of all business and personal accounts in which Eva has an ownership interest. SR 435-437. Lecy conducted her examination for the time period covering January 1, 2019 through June 23, 2023 – the date of her resignation. *Id.* During her investigation, Lecy asked all three of the girls to gather and provide financial information for Eva. SR 1213-1214. Lecy visited all the banks holding accounts for Eva. *Id.* She met with Mr. Elliot Bloom, Eva’s attorney. *Id.* She collected documents, including bank records and tax returns, and interviewed various people to locate all of Eva’s assets. *Id.*

Within the first 30 days of Lecy’s appointment, she started having problems with Jodie’s cooperation – problems that only became worse as time progressed. SR 1238. Jodie changed passwords to the computer and QuickBooks at the Paint Store. SR 1236. Jodie refused to answer Lecy’s questions regarding a \$5,000 check from Eva to Jodie, stating, “It’s not important. It’s taken care of.” SR 1237-1238. Ultimately, Jodie’s lack of cooperation led to Lecy’s resignation. SR 1294.

Lecy prepared and filed a 275-page Final Accounting and Report of Facts detailing her entire forensic examination. SR 501-776. Lecy investigated Jodie’s

concerns that funds were missing from Eva,² and she submitted a Final Accounting Supplement. SR 1285 and SR 1052-53. Lecy determined that all cash and assets were accounted for, and no funds were missing. SR 1289.

Lecy testified that of the three girls, Amy should be appointed permanent conservator of Eva, based upon Amy's past experiences in managing the family's finances. SR 1285.

G. Jodie's Conduct During the Trial

During the Trial, the Circuit Court found Jodie's conduct to be "absolutely unconditionally unfair, inappropriate, and disruptive . . ." SR 1317. On multiple occasions the Court observed Jodie speaking from the well where she called witnesses "liars." App. 14. On one occasion, Jodie's comments upset Eva to the extent Eva interjected herself into the proceedings. App. 14. *See also* SR 1239-1240. Accordingly, the Circuit Court was forced to issue an order that no individual may comment as to the testimony of a witness or otherwise interfere with or intimidate the witness. SR 1317-1318.

Standard of Review

"Subject to statutory restrictions, the selection of a [guardian and] conservator is a matter which is left primarily to the discretion of the appointing court." *In the*

² These are the same concerns as those raised in Jodie's *Appellant's Brief* at pages 8-10.

Matter of the Guardianship of Rich, 520 N.W. 2d 63, 65-66 (S.D. 1994) (citing *In re Guardianship of Jacobsen*, 482 N.W. 2d 634, 636 (S.D. 1992). “The term ‘abuse of discretion’ refers to an end or purpose not justified by and clearly against reason and evidence.” *In re Guardianship of Jacobsen*, 482 N.W. 2d at 636. It is “a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.” *In re Conservatorship of Gaaskjolen*, 2014 S.D. 10, ¶ 9, 844 N.W. 2d 99, 101. Only a “‘clear’ abuse of discretion warrants reversal.” *In re Guardianship of Jacobsen*, 482 N.W. 2d at 636.

Argument

The Circuit Court’s appointment of the permanent conservator and co-guardians was reasonable, fair, and well within the bounds of its discretion. *See In re Conservatorship of Gaaskjolen*, 2014 S.D. 10, ¶ 9, 844 N.W. 2d at 101. In this appeal, Jodie raises new claims regarding breach of fiduciary duty, conversion, and application of an August 2019 power of attorney. Appellant’s Brief Pg. 12-16. These issues were never presented before the Circuit Court. Jodie asks this Court to act as a fact finder on newly raised issues and determine that the Circuit Court’s decision was unjustified, arbitrary, and unreasonable. Appellant’s Brief Pg. 6-7. This Court should decline Jodie’s invitation and should instead affirm the Circuit Court in all respects.

1. Appellant's Brief asserts impermissible supplemental facts that should not be considered by this Court.

“This Court’s appellate procedure regarding the appellant’s brief requires ‘[e]ach statement of material fact shall be accomplished by a reference to the record where such fact appear.’” *Dakota Industries, Inc. v. Cabela’s.com*, 2009 S.D. 39, ¶ 19, 766 N.W.2d 510, 516 FN 4 (citing SDCL § 15-26-60(5)).

Jodie disregards this rule by improperly adding facts that are not in the record, nor supported by the evidence. First, she claims Amy is charging a fee to act as Conservator.³ Appellant Brief Pg. 6. Second, she asserts Eva was placed in a nursing home following the court’s appointment of Co-Guardians.⁴ Appellant Brief Pg. 12. Lastly, she asserts that Amy has failed to follow the care schedule of Eva.⁵ *Id.* These facts are mere allegations and not supported by the settled record.

2. The issues of breach of fiduciary duty or conversion were never raised before the Circuit Court.

Jodie argues Amy breached her fiduciary duty by converting Eva’s monies. Appellant’s Brief Pg. 7. However, the issues of breach of fiduciary duty or conversion were not brought before the Circuit Court. Rather, the issue before the

³ Jodie cites SR 2820 for this proposition, which cites to the September 28 hearing transcript and the December 11 hearing transcript. Neither transcript supports the assertion that Amy charged a fee.

⁴ Jodie cites to nothing in support of this proposition.

⁵ Jodie cites to the December 11 hearing transcript for this assertion, but it does not support her claim.

Circuit Court was simply who is eligible for appointment as conservator under SDCL § 29A-5-304.

“The burden of demanding a ruling rests upon the party desiring it. ‘If a party permits the court to proceed to judgment without action upon his motion or objection, he will be held to have waived the right to have the motion or objection acted upon.’” *In re Estate of Howe*, 2004 S.D. 118, ¶ 37, 689 N.W.2d at 22, 33 (citing *Jameson v. Jameson*, 1999 S.D. 129, ¶ 25, 600 N.W.2d 577, 583). It is well-established law in South Dakota that “an issue not raised at the trial court level cannot be raised for the first time on appeal.” *Clough v. Nez*, 2008 S.D. 125, ¶ 28, 759 N.W.2d 297, 308-309 (quoting *Action Mech., Inc. v. Deadwood Historic Pres. Comm’n*, 2002 S.D. 121, ¶ 50, 652 N.W.2d 742, 755).

Jodie never pled nor argued to the Circuit Court that Amy breached her fiduciary duty or converted funds. In addition, Jodie never moved to amend the pleadings to conform to the evidence. SDCL § 15-6-15(b). This Court has established that “a motion to amend the pleadings must be made to the Circuit Court before this Court will consider whether the issue was tried by implied consent under SDCL § 15-16-15(b).” *In re Ricard Family Trust*, 2016 S.D. 64, ¶ 24, 886 N.W.2d 326, 332 (citing *Dussart v. Dussart*, 1996 S.D. 41, ¶ 6, 546 N.W.2d 109, 111)). “This is because the ‘complaining party must give the trial court an opportunity to consider claimed irregularities and rule on them.’” *Id.*

Jodie's failure to raise the issues of breach of fiduciary duty and conversion precludes her from presenting the issues on appeal.

3. The Circuit Court did not abuse its discretion in appointing Amy as the Conservator and Amy, Julie, and Jodie as the Co-Guardians.

As noted above, the appointment of a guardian and conservator is largely left to the discretion of the appointing court. *In the Matter of the Guardianship of Rich*, 520 N.W. 2d at 65-66 (citing *In re Guardianship of Jacobsen*, 482 N.W. 2d at 636); see also 39 Am. Jur. 2d Guardian and Ward § 38 (2024). "We afford great deference to the Circuit Court's ability to judge the credibility of the witnesses and the weight to be given to their testimony." *In re Ricard Family Trust*, 2016 S.D. 64, ¶ 15, 886 N.W.2d at 330. This Court has held that the factual findings of the Circuit Court are overturned only when a "review of the evidence leaves this Court with a 'definite and firm conviction that a mistake has been made.'" *In re Conservatorship of Gaaskjolen*, 2014 S.D. 10, ¶ 9, 844 N.W. 2d at 101. Here, the Circuit Court made no mistake.

SDCL § 29A-5-304, provides in pertinent part:

If a person alleged to be in need of protection has designated an individual to serve as guardian or conservator under a validly executed legal instrument, including a power of attorney, and the court does not appoint the designated individual, the court shall issue written findings of fact and conclusions of law as to why the designated individual was not appointed.

In the absence of an effective nomination by the protected person, the court shall appoint as guardian or conservator the individual or entity that will act in the protected person's best interests. In making that appointment, *the court shall consider the proposed guardian's or conservator's geographic location, familial or other relationship with the protected person, ability to carry out the powers and duties of the office, commitment to promoting the protected person's welfare, any potential conflicts of interest, and the recommendations of the spouse, the parents or other interested relatives*, whether made by will or otherwise. The court may appoint more than one guardian or conservator and need not appoint the same individual or entity to serve as both guardian and conservator.

SDCL § 29A-5-304 (emphasis added).

Here, Amy meets all the requirements imposed by SDCL § 29A-5-304. Amy and Eva both reside in Rapid City. App. 17. Amy is able to successfully carry out the duties as conservator based on her history of managing the Paint Store's and her parents' finances – and this was supported and corroborated by the testimony of Jeannine Lecy and James Clement. App. 9, SR 1285, and SR 1306-1307. In considering the familial relationships, as provided in SDCL § 29A-5-304, Amy has the support of her sister Julie and will continue to promote Eva's best interest and welfare. SR 1477. Further, all three of the co-guardians satisfy this statutory requirement.

A. The Circuit Court did not abuse its discretion in appointing Amy as the permanent Conservator.

Consistent with SDCL § 29A-5-304, the Circuit Court entered findings of fact and conclusions of law as to why Jodie, the designated individual under the

November 16, 2021 power of attorney, was not appointed conservator of Eva.

App. 1-18. The Circuit Court’s decision was based on several factors.

First, the court found that on November 16, 2021, Eva did not have the mental acuity and understanding to execute the power of attorney, rendering it void. App. 7. In making this determination, the court considered the testimony of both Dr. Swenson and Attorney Jennifer Tomac. *Id.* Dr. Swenson, based on his review of Eva’s Mayo Clinic medical records from April of 2021 and his own evaluation of Eva from June of 2022, opined that Eva did not possess the mental dexterity to understand the November 16, 2021 power of attorney. App. 5-6, SR 17-19.

The court further considered Eva’s best interests, who had the ability to carry out the duties of conservatorship, and who was committed to promoting Eva’s welfare. *See* SDCL § 29A-5-304. Ultimately, the court found:

- (1) “Jodie did not cooperate with Lecy, and created obstructions to Lecy doing her work[.]” App. 10.
- (2) Jodie took an envelope of cash containing \$8,400 from Eva’s safe deposit box and did not allow Lecy to account for it. App. 11.
- (3) Jodie wrote a check for \$5,000 to herself, and upon questioning by Lecy simply responded: “It’s not important. It’s taken care of.” App. 11.
- (4) Despite the fact that the Court had suspended Jodie’s power of attorney, she continued to write checks as Eva’s agent. App. 12.

- (5) The family dynamics and tensions changed as Jodie assumed control over the Paint Store. App. 7.
- (6) Jodie's conduct was such that the Court had to issue an order that there be no intimidating witnesses. App. 14.

Consistent with SDCL § 29A-5-304, the court issued written findings of fact and conclusions of law as to why Jodie was not appointed Eva's conservator. App. 7-14.

At the same time, the court determined that Amy, who had been managing the Paint Store finances since 1983 and her parents' personal finances since 2012, was an appropriate conservator. App. 8. Roger trusted Amy with all financial operations. App. 9.

Jodie spends much of her brief accusing Amy of misappropriating funds and placing money into a bank account held by R&E Enterprises, to the tune of \$350,000 in cash. App. 13. Since approximately 1987, Roger, Eva, and Amy have used the fictitious name "R&E Enterprises" to account for the expenses of the rental properties owned by Roger and Eva. SR 1523. Roger and Eva never transferred real estate to R&E Enterprises, but simply accounted for all expenses and deposits using the fictitious name. SR 1524. Following a conversation with Roger, on May 27, 2020, Amy moved funds from R&E Enterprises' U.S. Bank account into an account with Black Hills Federal Credit Union ("BHFCU"), which continued to be accounted for under R&E Enterprises. SR 1524, SR 1978-

1983. Amy later created R&E Enterprises, LLC, a South Dakota limited liability company, and moved the money from R&E Enterprises' BHFCU account into a BHFCU account owned by R&E Enterprises, LLC. SR 1529-30, SR 1986. Jodie was aware of the creation of R&E Enterprises, LLC and the account at BHFCU. App. 13; *see also* SR 1988. Lecy specifically investigated this accusation and submitted her Final Accounting Supplement regarding this issue, concluding that all the money was accounted for. SR 1052-1053; *see also* SR 1285-1286.

Jodie also accuses Amy of stealing approximately \$350,000 in life insurance proceeds following Roger's death. App. 13; *see also* SR 1285-1286. That allegation continued during the course of the trial. But the court found it to lack merit, as Jodie was previously provided with statements and a copy of the deposited check, showing the money was in Eva's investment account with RBC Wealth Management. SR 1309. This was confirmed by Mr. Clement's testimony. App. 13.

Lecy further testified that of the three girls, Amy had the most experience managing the family's finances and would be best suited for the role of conservator. App. 12. Finally, the court considered Julie's testimony that the Frye family, including Roger and Eva, had discussed that Amy would care for Roger and Eva's finances, as that is what she has always done. SR 1475. Amy

“dotted all I’s, crossed [all] T’s.” SR 1476. Undoubtedly, Julie supports the appointment of Amy as conservator. SR 1477.

Jodie strangely argues that a criminal statute, SDCL § 22-30A-10.1⁶ supports her appeal. It does not. The statute does not address factors regarding the appointment of a conservator, nor does it apply to civil actions. It is inapplicable to the current appeal.

Upon examination of the entire record, the Circuit Court properly determined that Amy was qualified to serve as Eva’s permanent conservator. App. 18. It was not an abuse of discretion to name Amy as the sole conservator. The court reasonably considered all evidence and testimony, and its appointment of Amy was reasonable, justified, and within the range of permissible choices. *See In re Conservatorship of Gaaskjolen*, 2014 S.D. 10, ¶ 9, 844 N.W. 2d at 101.

B. The Circuit Court did not abuse its discretion in appointing Amy, Julie, and Jodie as Co-Guardians of Eva.

In considering Eva’s best interests and the factors outlined in SDCL § 29A-5-304, the Circuit Court did not abuse its discretion in appointing Eva’s three daughters as her co-guardians. Amy, Julie, and Jodie all reside in Rapid City,

⁶ “If any person, who has been accused of theft, restores or returns the property allegedly stolen before an indictment or information is laid before a magistrate, such fact may be considered in mitigation of punishment. The restoration or return of the property is not a defense nor may it be considered by the finder of fact.”

South Dakota, have the ability to carry out the office of guardianship, and are committed to promoting Eva's best interests. App. 17. In addition, all three daughters want to help care for Eva. Jodie presented no evidence that Amy and Julie were not qualified or able to serve as guardians. In fact, if any of the daughters would not be qualified to serve, it would be Jodie, particularly upon consideration of the Circuit Court's finding that "[o]n many occasions Jodie did not allow Amy nor Julie access to Eva." App. 11. However, the court found that "Jodie's prior conduct in excluding Amy and Julie from Eva, concerns about self-dealing and other concerns . . . are ameliorated by appointing all three daughters as co-guardians . . ." App. 17.

For these reasons, the court's appointment of co-guardians was reasonable, consistent with Eva's wishes, and within the range of permissible options.

4. The Circuit Court did not abuse its discretion in failing to give effect to the August 2019 or November 2021 Powers of Attorney.

A. August 29, 2019 Power of Attorney

In the proceedings below, Jodie made no argument regarding the August 29, 2019 power of attorney. She did not plead that the August 29, 2019 power of attorney is applicable to the case or binding upon the parties, nor did she move to amend to conform to the evidence. *See* SDCL § 15-6-15(b). She did not argue the August 29, 2019 power of attorney has authority to appoint her as Eva's guardian.

On the contrary, in Jodie's petition, she only cited to the November 16, 2021 power of attorney. SR 1023. Now, in this appeal, she is arguing for the first time that the Circuit Court should have given effect to the August 2019 power of attorney.

Failure to present any evidence at the trial court results in a failure to preserve an issue on appeal. *In re Estate of Howe*, 2004 S.D. 118, ¶ 37, 689 N.W.2d at 33. Jodie bore the burden to argue and prove that the August 29, 2019 power of attorney should be given effect. She made no such argument, at any time, in any pleading, or in any proceeding. By failing to do so, she waived her argument. *See Id.* (citing *Jameson v. Jameson*, 1999 SD 129, ¶ 25, 600 N.W.2d at 583). Accordingly, "[t]he failure to present an issue to the Circuit Court constitutes a bar to review on appeal." *Halbersma v. Halbersma*, 2009 S.D. 98, ¶ 22, 775 N.W.2d 210, 218 (citations omitted).

Even if this Court considers Jodie's argument that she should have been appointed sole guardian under the August 2019 power of attorney, the Circuit Court's ruling must still be affirmed because it properly concluded that Jodie was ill-suited to serve as Eva's sole guardian. Consistent with SDCL § 29A-5-304, the Circuit Court entered findings of fact as to why Jodie was not appointed as the sole guardian of Eva, specifically finding that Jodie breached a fiduciary duty owed to Eva, did not cooperate with and hindered Lecy's forensic investigation, excluded

Amy and Julie from seeing Eva, and intimidated witnesses during the trial. App. 10-11 and 16. Given these concerns, the court determined that appointing all three daughters was appropriate. App 17-18.

B. November 16, 2021 Power of Attorney

Contrary to Jodie’s assertion, the mental capacity required to sign a power of attorney is not the same as the capacity required to sign a will. *See* Appellant’s Brief Pg. 16. Pursuant to SDCL § 59-12-1(5) a principal has an “incapacity” if that individual is unable to “manage property, business, or financial affairs because the individual . . . has an impairment or other deficit in the ability to receive and evaluate information . . .” SDCL § 59-12-1(5)(a). Accordingly, “[a] person entirely without understanding has no power to make a contract of any kind. . .” SDCL § 20-11A-1. This Court has previously “interpreted the phrase ‘entirely without understanding’ to mean that ‘the person contracting did not possess the mental dexterity required to comprehend the nature and ultimate effect of the transaction in which [she] was involved.’” *Johnson v. Markve*, 2022 S.D. 57, ¶ 31, 980 N.W.2d 662, 672 (quoting *First State Bank of Sinai v. Hyland*, 299 N.W.2d 894, 897-97 (S.D. 1987)). In determining whether an individual possessed sufficient capacity to execute a power of attorney, the critical inquiry is whether the person had sufficient mental acuity and understanding when the power of attorney occurred. *Id.*

Here, Eva certainly did not have the mental acuity and understanding to execute the November 16, 2021 power of attorney. As noted above, a person is deemed incapacitated if they are unable to receive and evaluate information. SDCL § 59-12-1(5)(a). The family began noticing signs of Eva's dementia as early as 2012, when she began hiding food around the house, losing her keys, and placing bananas under the bed in spare rooms. App. 2 and 6. Concurrently, the same year, Amy began handling Roger and Eva's financial affairs, which included paying bills and overseeing their investments. App. 8.

Ironically, in April of 2021, it was Jodie who became concerned for Eva's mental condition, and along with Amy's husband, took Eva to the Mayo Clinic for Eva's "seemingly increasing memory loss and confusion." App. 4; *see also* SR 1902. In April of 2021, the Mayo Clinic records state that Eva "has had progressive worsening of overall cognition and memory for at least the past few years." SR 1897. While at Mayo Clinic, Eva did not have the mental dexterity to define an island, perform simple calculations, or draw the face of a clock. App. 4; *see also* SR 1897. As testified to by Dr. Swenson, dementia is a progressive disease. App. 6. Clearly, due to the advancement of Eva's dementia, her mental deficiency would have only worsened between April to November of 2021. *See* SR 1402 and 1411.

The Circuit Court determined that the November 16, 2021 power of attorney was void, because Eva did not possess the necessary mental acuity and dexterity to understand the document. App. 7. This Court should affirm the Circuit Court's decision to invalidate the November 16, 2021 power of attorney and affirm its appointment of the conservator and co-guardians.

Conclusion

Based upon the foregoing, the Circuit Court's Judgment and Order Appointing Amy Frye-Trupe as Sole Conservator and Judgment and Order for Appointment of Co-Guardians dated April 30, 2024 should be affirmed.

Dated this 10th day of October, 2024.

**BANGS, McCULLEN, BUTLER,
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Certificate of Compliance

Pursuant to SDCL §15-26A-66(b)(4), Appellee's counsel states that the foregoing brief is typed in proportionally spaced typeface in Equity A Tab 13 point. The software used to prepare this brief indicated that there are a total of 5,393 words in the body of the brief.

By: /s/ Rodney W. Schlauger
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Certificate of Service

The undersigned hereby certifies that October 10, 2024, the foregoing Appellee's Brief was filed electronically with the South Dakota Supreme Court and that the original was filed by mailing the same to:

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OCT 15 2024

Shelley A. Johnson
Clerk

**IN THE SUPREME COURT
STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF EVA M. FRYE
A PERSON ALLEGED TO NEED PROTECTION**

Appeal No. 30722

**APPEAL FROM THE CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA**

The Honorable Matthew M. Brown
Circuit Court Judge

Notice of Appeal filed on May 29, 2024

INTERESTED PERSON'S BRIEF

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30722

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Opening Statement:

Our family has always shared both work and play throughout our lives. Mom (Eva) and Dad (Roger) always desired, as shown in all of their wills, to equally share their good fortune with us three daughters. Likewise, each of us daughters had an equivalent, but separate, workload at the paint store. For decades we volunteered as a family in the community and collectively ran a successful family business that was well respected in Western South Dakota and beyond.

My husband, Mike, and I have been very supportive of our whole family. We have specifically helped Jodie for almost forty (40) years in numerous ways. As her twin I am able to say that I know her better than anyone else in the world. Jodie has changed drastically for the worse over the last two years. Her untrue allegations against Amy and I have been extremely hurtful to our entire family. Her need for control is frightening and causes great concern in many different areas. In my opinion she and her son have been "self enriching" at the expense of our Mother, Eva.

Until a temporary conservator was ordered by this court Jodie had unfettered access to all of Mom's monthly \$1000 checks to cash (which Mom usually did with them). Once these checks became a direct deposit instead of being cashable, I believe this was a factor in why Jodie pushed back on the temporary conservators. I considered getting a subpoena for Jodie to provide accounting of all of Mom's money with regard to monthly checks, personal safe contents, and gambling deposits, and Jodie's own credit card receipts but chose not to.

Statement of the issues:

1. Did the Trial Court abuse its discretion in appointing Amy as sole conservator?
2. Did the Trial Court abuse its discretion in appointing three co-guardians of Eva M. Frye with a rotating caretaking schedule?
3. Did the Trial Court error in invalidating the power of attorney granted to Jodie?

Argument:

Issue 1: Did the Trial Court abuse its discretion in appointing Amy as sole conservator?

SR 1475-1476: As I testified, Dad's high level of trust of Amy was always present. I have always had both confidence and trust in Amy as well.

SR 1289: Jeannine Lecy was unanimously chosen by the attorneys and the circuit court to perform temporary conservator duties and a forensic audit of all of Mom's properties. Jeannine has a proven record as a fraud investigator and if something would have been missing, she would have found it. She found all of the money to be in place. Furthermore, all transactional history disclosed it was always there. Jeannine's findings strongly reinforce the court's appointment of Amy as permanent conservator (SR 1285).

Neither Amy nor Julie ever initiated changes in wills or powers of attorney documents that Mom and Dad had intentions of and had in place while they had sound minds. Jodie has the track record for recent change initiation:

Examples:

SR 942: In 2019 Jodie initiates new wills for both Mom and Dad with Lance Russell. Removes Amy as co-trustee with Mom.

SR 1636: Jodie admits to cancelling post Mayo Clinic medical appointments in Rapid City for Mom, even though follow up care was prescribed by Mayo Clinic.

SR 1309: Spring 2021 - Jodie complains about her and Mom not getting to see the life insurance check that Amy properly deposited into Mom's RBC account.

SR 1271: Summer 2021 - Jodie testifies that she explained (to Jennifer Tomac at Fork Real) for "5 to 10 minutes" the joint power of attorney problems regarding the life insurance check handling.

SR 1257: Jennifer Tomac testified Jodie scheduled the POA appointment.

Some of the above items will repeat in Issue 3, but I wanted to show that neither Amy nor I initiated changes, only Jodie did.

Issue 2: Did the Trial Court abuse its discretion in appointing three co-guardians of Eva M. Frye with a rotating caretaking schedule?

SR 1259 – All three daughters had concerns of Mom’s health and therefore the Mayo Clinic visit was scheduled. Both Jodie and Amy’s late husband (Marty) attended Mom’s appointments with her at Mayo Clinic in early April 2021.

SR 946 – Jodie testifies she has taken care of Mom and Dad at their home since 1999. That is when she bought the house that had a backyard that shared a property line with Mom and Dad’s backyard. She often mentioned she wanted to be close to Mom and Dad to care for them as they aged. Since she was divorced in 2013 and lived that close, she was often the “first responder” and closest caretaker as was her plan. Amy and I, and also our husbands, loved Mom and Dad equally and helped them as often as we could as well. We also helped Jodie when she needed it.

Equal guardianship to each daughter offers us more opportunity to spend time with Mom without the previous barriers or demands from Jodie. Since our parents always wanted us three to be treated equally, we want to reciprocate with equal guardianship.

Issue 3: Did the Trial Court error in invalidating the power of attorney granted to Jodie?

Bottom line, this was a good decision. Below are several anecdotal reasons that show Jodie’s desire for control and power of both Mom’s money and properties:

SR 1309: Spring 2021 · Jodie complains about her and Mom not getting to see the life insurance check that was properly deposited into Mom’s RBC account.

SR 1271: Summer 2021 – Jodie testifies that she explained (to Jennifer Tomac at Fork Real) for “5 to 10 minutes” the joint power of attorney problems regarding the life insurance check handling.

SR 1257: Jennifer Tomac testified Jodie scheduled the POA appointment. On November 16, 2021 Mom signed it and it came into effect.

Issue 3 - continued:

SR 952: Jodie testified that she "missed the tiny little part at the top where it said Jodie Frye-Byington. I didn't know they were going to do that..." This is in regard to the "new" durable power of attorney that she claimed she had nothing to do with. Please refer back to the previous three SR's that relate to her involvement.

August 2021: Jacob (Jodie's son) is allowed to move into the family cabin, owned by Mom, for a couple of months until he found another place. The understanding was that for this short term, he would pay the difference (increase) in monthly utilities to cover those extra costs. A few months into his stay it was obvious that Jacob was not finding an alternative location to live, but it is obvious that his mother now had a "secret" durable power of attorney that enabled her to decide he could stay there. Jacob only paid a few months of excess utilities, self enriched off of his Grandma, and trashed the property during his almost three years at the cabin.

Exhibit 1: From Jeannine Lecy's report: December 29, 2021 - Eva Frye is appointed Personal Representative of the ESTATE OF ROGER D. FRYE by Heather Shaw, Deputy Clerk of Courts for Pennington County. If Eva was not competent to neither initiate nor sign a new Durable Power of Attorney the month before, how was this PR appointment prompted let alone legitimate? Again, Jodie's hands are obviously on this one.

SR 929: "New" durable power of attorney naming Jodie is finally revealed in August 2022, a full nine months after Mom signed it. This "news" was the tipping point that caused Amy to petition for both guardianship and conservatorship of our mother.

Exhibit 2: From Jeannine Lecy's report: December 7, 2022 (SR 1424: well after Dr. Swenson's evaluation)- Mom signed yet another new will, created by Tomac and Tomac, naming Shannon Reitzel as her personal representative. Once again, Mom signs a document that was clearly arranged by Jodie. Shannon testified on Jodie's behalf later regarding the allegations that Jodie brought against Amy and me.

SR 1320-1321: Jodie gives herself a raise of \$5.00 per hour when she and her sisters had always been at an exact same wage.

SR's 908, 909, 910, 912, 923, 926, 927, 937, and 963: Several examples of Jodie's self dealing. I am sure that Mom was "convinced" of these as she trusted all of us.

3/17/23 – Jeannine Lecy assigned temporary conservator for 90 days and Jodie's 11/16/21 Durable Power of Attorney is suspended.

SR 1217: Jeannine is confused how Eva could sign a new will (Exhibit 2)

SR 1220-1221: Jeannine sees checks signed by Eva at First Gold in Deadwood during Jeannine's tenure as temporary conservator.

SR 1223: Jodie's attempt at bank records with testimony of threatening and strong arming bank personnel during her suspended Durable POA.

SR 1236-1237: Jeannine first sees files for BH Energy bills in filing cabinet at the store and when she returns to get copies, the 2022 file has been removed and no one can find it. Was this done to conceal Jacob's utility bills at the cabin? And his lack of payment?

SR 1238: Jeannine testified that Jodie was not cooperative, yet both Amy and Julie were always cooperative.

SR 1239: Mom rose up in the court room when sitting next to Jodie while Jeannine was testifying. She was upset only later (SR 1313 to 1315) to find out that Jodie was calling Jeannine a liar during most of Jeannine's testimony. Jeannine was intimidated by this attempt to disrupt her because Jeannine could hear Jodie.

Note: Although the court tried to take responsibility for this unnoticed behavior by Jodie, three attorneys (Bloom, Riggins, and Goetzinger) were obviously within earshot as they were seated between Jodie and the witness. I am appalled that none of these attorneys tried to stop Jodie from continually saying "liar". I believe they are all three complicit in letting this behavior persist. (SR1314)

I was very pleased that the Circuit Court voided this 11/16/21 Durable Power of Attorney as Jodie went beyond taking advantage of both Mom and this document. There are plenty more anecdotes of Jodie's power and control actions, but we have enough items here and I will plead that this durable POA stays voided.

Closing Statement:

No one knows a twin sister as well as the other twin sister. I lived away from Jodie maybe three years total in our entire life and we were very close for almost sixty years. She used to have a kind and giving heart when it came to others. All that has changed since our Dad died on February 3, 2021. Mom and Dad built a nice life, business, and estate. All three daughters have always been deemed equal beneficiaries of that.

Jodie has brought both chaos and disrepute to our family and business and should not be rewarded for that behavior. All of the attempts that Jodie made to change legal documents knowing that Mom was incapable of even understanding what was going on shows Jodie's desperation for power and control over Mom's finances and properties. Neither Amy nor I would ever do what Jodie has done. I pray that God changes her heart and she returns to the kind and giving person she once was.

Please uphold the rulings from the Honorable Matthew Brown as his understanding of the truth is remarkable and I believe this case should be put to rest as it is.

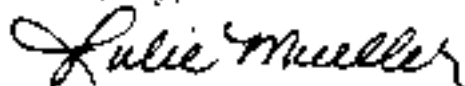
Conclusion:

Please affirm the Circuit Court's orders from April 30, 2024.

Thank you.

Dated this 15th day of October, 2024.

Sincerely,



Julie Mueller, Pro Se

Interested Person

Exhibit 1-IM

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

)
188
)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

ESTATE OF ROGER D. FRYE,
Deceased.

File No. 51 PRO21-000307

LETTERS OF PERSONAL REPRESENTATIVE

On December 29th, 2021, EVA FRYE was appointed by this court and qualified as personal representative of the ESTATE OF ROGER D. FRYE

These Letters are issued as evidence of the appointment, qualifications, and authority of EVA FRYE to do and perform all acts authorized by law

ISSUED 29th day of December, 2021

BY THE COURT.

/s/ Rainie Truman
Clerk

Appointed and issued 12/29/2021 by /s/ Heather Shaw, Deputy



State of South Dakota, Seventh Judicial
County of Pennington, Circuit Court
I hereby certify that the foregoing appointment
is a true and correct copy of the original as
the same appears on record in my office.

DEC 29 2021

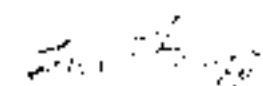
Rainie J. Truman
Clerk of County, Pennington County

By [Signature] Clerk


Filed 12/29/2021 9:48 AM CST Pennington County South Dakota 51 PRO21-000307


Exhibit 2 - JM

I, Eva Frye, the testator, sign my name to this instrument this 7th day of December, 2022, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and testament and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.


Eva Frye, Testator

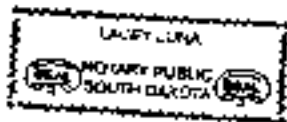
We, Jennifer Lomac and Brad Gardner, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as her last will and testament, and that she signs it willingly (or willingly directs another to sign for her), that she executes it as her free and voluntary act for the purposes therein expressed, and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

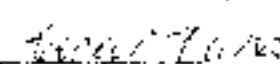

Jennifer Lomac, Witness
807 Columbus St
Rapid City, South Dakota 57701


Brad Gardner, Witness
807 Columbus St
Rapid City, South Dakota 57701

The State of South Dakota
County of Pennington.

Subscribed, sworn to, and acknowledged before me by Eva Frye, the testator, and subscribed and sworn to before me by Jennifer Lomac and Brad Gardner, witnesses, this 7th day of December, 2022.




Notary Public
Lacey Luna

My commission expires January 5, 2028

Last Will and Testament of Eva Frye
Page 18 of 18

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The undersigned hereby certifies that October 14, 2024, the foregoing Interested Party's Brief was filed by U.S. Mail and email the same to:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE GUARDIANSHIP)
AND CONSERVATORSHIP OF EVA M. FRYE) Appeal No. 30722
a personal alleged to need protection)

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE MATTHEW M. BROWN
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Jodie Frye-Byington ("Jodie") does not take issue with Appellee Amy Frye-Trupe's ("Amy" or "AFT") Jurisdictional Statement. Interested person Julie Frye Mueller ("Julie") does not make a Jurisdictional Statement.

STATEMENT OF LEGAL ISSUES

Jodie does not take issue with either Amy's or Julie's restatement of the issues in this appeal.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

Jodie does not take issue with Amy's Statement of the Case. Julie does not make a Statement of the Case.

Statement of the Facts

Jodie does take issue with Amy's Statement of the Facts and Julie's incorporation of facts into her argument. Amy's Statement of the Facts and Julie's incorporation of facts into her argument are replete with either misstatement of the record or inclusion of impertinent facts. Amy in her Appellee Brief ("Amy's Brief") stated that, "Roger and Eva knew that Jodie was a spender and a gambler." Amy testified that Jodie was a spender and gambler. Amy recites facts concerning Jodie's mismanagement of Roger Frye's Paint & Supply, Inc., (the "Paint Store" or "RFP&S") business even though the Honorable Matthew M. Brown, Circuit Court Judge of the Seventh Judicial Circuit - hereinafter referred to as the "Trial Court," in a memorandum opinion dated August 31,

2023, determined that business decisions are beyond the purview of the judiciary.¹

Whether Jodie had the authority to and did order too many supplies for the Paint Store is impertinent even if true.

Julie references a change to Eva's will. Changes to Eva's will is not pertinent to this guardianship/conservatorship proceeding. Julie also references Jacob Byington's (Jodie's son – "Jacob") use of Eva's cabin, which is also not pertinent to this guardianship/conservatorship proceeding. The Trial Court precluded testimony concerning Jacob living in the cabin. Tr. 12/11/23, p.139, 1.2-10; Rec. p.2641.² Amy texted Jacob, on December 28, 2021, stating that, "Jacob, I never agreed to you paying rent. You're the security guard and you don't pay rent, period." JFB Ex. 1; Rec. p.1677. Julie also references Eva being appointed as the Personal Representative of Roger Frye's estate and that Jodie had something to do with this. Once again, this issue is not pertinent to this guardianship/conservatorship proceeding. Eva was named as the Personal Representative in Roger Frye's will; the application for informal probate, dated December 23, 2021, named Eva as Personal Representative. File No. 51PRO21-000307. Jodie had nothing to do with this nomination.

Julie's Appellee Brief references her feelings and her beliefs, which is inappropriate. However, Julie does not reference her feelings towards Jodie. Shannon

1. Amy did not address the Paint Store's finances in her Temporary Conservator's Accounting, dated July 3, 2024, for this reason.

2 "Tr." refers to the transcript of an evidentiary hearing held in this case. "Rec." refers to the settled record of this case.

Casey testified that Julie told Eva that, “. . . Mom, you don’t like Jodie. You hate Jodie . . . don’t you remember mom you hate Jodie. Tr.12/11/23, p.183, l.5-7; Rec. p.2685.

Julie makes an opening statement, which is not allowed under SDCL § 15-26A-61.

Julie does not make any citations to the record in her Opening Statement. As Amy has stated in her Appellee Brief, this is not allowed. *Dakota Industries, Inc. v. Cabela’s.com, Inc.*, 2009 S.D. 39, ¶18, 766 N.W.2d 510.

In Julie’s Appellee Brief, page 2, she states that Roger Frye had a high level of trust with Amy and that she also has trust in Amy. Jodie testified that Julie had hated Amy for years, but her position may have changed because of the \$350,000. Tr. 12/11/23, p.80, l. 22-23; Rec. p. 2,582.

Eva loved to gamble and had a long history of gambling. Tr.9/7/23, p.37, l.7-11; Rec. p.1334; JFB Ex. 10, Rec. p.1827-1833; Tr.9/28/23, p.12, l. 20-22, Rec.7-11; Rec. p. 1563. Eva had been gambling in Deadwood for 33 years. Tr.9/7/23, p.37, l.7-11; Rec. p. 1333. Amy testified that she had no proof that Jodie used any of Eva’s money to gamble. Tr.9/28/23, p.25, l.18-20; Rec. p.1575. Amy testified further that it was her understanding that Lecy and Elliott Bloom, Eva’s attorneys, had an agreement that Eva could spend up to one thousand dollars per month gambling. Tr.9/28/23, p.20, l.9-12; Rec. p.1570. In his report of the Trial Court, Eva’s attorney, Elliott Bloom, stated that, “[t]here have been allegations made that Jodie spent Eva’s money for her own gambling

endeavors; however, these allegations were never supported by evidence and did not weigh into this report or recommendation.” Rec. p.2817.

Julie’s Appellee Brief also contains a closing statement that is not allowed under SDCL § 15-26A-61. This closing statement references the Paint Store; the Trial Court held that the Paint Store was not part of this guardianship/conservatorship proceeding.

Amy recites numerous incidents to document Eva’s mental decline in her Appellee Brief. A family friend, Lori Moore testified that Eva’s cognitive abilities declined slowly to some degree over the past three years. Tr.12/11/23, p.167, l.14-20; Rec. p.2,669. Facts recited by Amy concerning Eve’s dementia, the August 2019 Power of Attorney³, the November, 2021 POA and Jeannine’s Lecy’s accounting will be addressed in the argument portion of this brief.

ARGUMENT

I. Standard of Review.

Jodie does not take issue with Amy’s statement of the Standard of Review. Julie does not state what the Standard of Review is.

II. The Trial Court was Required to Consider Evidence Concerning Amy’s Breach of her Fiduciary Duty.

Contrary to Amy’s contention, Jodie did not raise a new claim regarding Amy’s breach of fiduciary duty. First, no claims are raised in a guardianship conservatorship proceeding. The issue is the need for appointment of either a guardian or conservator and who should be appointed to fill that role. SDCL § 29A-5-304; and SDCL § 29A-5-312. Jodie submitted detailed testimony and exhibits, which will be discussed *infra*,

³ Powers of attorney will be abbreviated as “POA.”

concerning Amy's conversion of her parents' monies. Even if Jodie had not tendered any evidence concerning this matter, South Dakota law clearly requires that a trial court consider the suitability of the proposed guardian or conservator. SDCL § 29A-5-312. The evidence that Amy converted Eva's funds would certainly go to her unsuitability as a conservator, even if the testimony was not expressed in terms of a breach of fiduciary duty. Moreover, Lecy testified that she had a fiduciary duty while acting as conservator. TR9/7/23 p.93, l.23-25; Rec. p.1389. Furthermore, Jodie clearly objected to Amy being appointed as the permanent conservator, stated the reasons for doing so, and she petitioned the Trial Court to be appointed as conservator. Tr.12/11/23 pp.201-203, l.16-1; Rec. pp.2703-2705. The Trial Court denied Amy's objection to testimony concerning Amy acting as temporary conservator on this basis. Tr.12/11/23 pp.201-203, l.16-1; Rec. pp.2703-2705.

Contrary to Amy's contention, application of the August 2019 POA does not constitute a new claim. The August 2019 POA was part of the settled record. Amy attached the August 2019 healthcare POA, naming Jodie as an alternate agent, as an exhibit to her Petition for Appointment of Guardian and Conservator. Rec. pp.13-16. Jodie also attached the August 2019 POA as Exhibit A of her Answer. Rec. pp.173-176. Jodie testified that Amy and Julie both knew that she was the agent in this healthcare POA. Tr. 9/28/23, pp.86-87, l.24-3; Rec. pp.1636-1637.

Contrary to Amy's contention, application of the June 27, 2019 financial POA does not constitute a new claim. Amy testified that she knew of the financial POA named all three children as alternate agents. Tr. 9/7/23, pp.225-230, l.6-18; Rec. pp.1521-

1526. Amy tendered this POA into evidence as Trupe Ex. 6. Amy did not attach this POA to her petition. Rec. pp.1-21. Amy only attached a revoked December 28, 2007 POA in her petition. Rec. pp.6-12. In doing so, Amy was attempting to mislead the Trial Court concerning her authority to act as attorney-in-fact.

III. The Trial Court Abused its Discretion in Appointing Amy as Sole Conservator When She Breached the Fiduciary Duty that She Owed to Eva.

Contrary to Amy's contention, it was an abuse of the Trial Court's discretion to appoint Amy as permanent conservator when she breached her fiduciary duty by converting Roger's and Eva's monies to her own use. The majority of Amy's Appellee Brief discusses why Jodie should not be appointed as conservator rather than why Amy should be appointed. Amy does not dispute that she transferred monies, consisting of \$350,000.00, from Roger and Eva's personal account with US Bank into her personal account at Black Hills Federal Credit Union ("BHFCU,") which account is in Amy's and Julie's names only. Tr.9/7/23, pp. 230-232; Ex. JFB27; Rec. pp.1857-1861; Tr.12/11/23 p.43 l.7-14. Amy does not dispute that, in April, 2022, she opened a new account at BHFCU and transferred the converted rental monies out of Amy's and Julie's personal account into a new account now called R&E Enterprises. Trupe Ex. 13; Tr.9/7/23, p.233, l.5-7; Rec. p.1529; Tr.12/11/23, p.19 l.4-12. Amy skips past the fact that this BHFCU account is her and Julie's account, not Eva's. Exhibit JFB27; Rec. pp. 1859-1861. Amy also skips past the fact that she solely owned R&E Enterprises when it became an incorporated entity and that she transferred this \$350,000.00 into said entity.

Tr.12/11/23 p.19, 1.4-12; Rec. p.2,521. Amy does not challenge any of the following facts in her Appellee Brief, to wit:

Amy deposited a \$250,000.00 check into her bank account on May 28, 2020 (Ex. JFB27, pp.1-2);

Amy added Julie to this bank account; the bank statements were being mailed to Amy's home address for over 2.5 years (Tr. 9/28/23 pp.5 1.19-21);

On February 16, 2022, Amy wrote another check for \$100,000.00 on Roger and Eva's US Bank account that held rental monies and deposited that check as well in Amy's and Julie's personal BHFCU account (Ex. JFB27 -Rec. pp. 1859-1861);

R&E Enterprises was incorporated by Amy in April 2022; Amy opened a new account at BHFCU and transferred the rental monies out of Amy's and Julie's personal account into a new account now called R&E Enterprises, which Amy owned solely (Tr. 12/11/23 p.19 1.4-12);

BHFCU required a corporate resolution authorizing the creation of this new bank account; Amy completed this corporate resolution naming herself as one hundred percent (100%) owner of R&E Enterprises;

Amy testified that she changed the ownership structure of R&E Enterprises so that all three sisters and Eva were the owners of R&E Enterprises. Tr.9/28/23 p.8 1.20-22; Rec. p.2510.

Amy tendered the BHFCU corporate resolution reflecting the revised ownership structure of R&E Enterprises as Trupe Exhibit 14; Rec. p.1988. By transferring the monies into a limited liability company that either Amy owned alone, or with three other people, she clearly breached her fiduciary duty by diminishing Eva's ownership of Eva's rent monies that were held in his limited liability company. Individuals who breach their fiduciary duty owed to a person in need of protection should never be appointed as their conservator.

Amy relies heavily upon Temporary Conservator Jeannine Lecy's ("Lecy") determination that all funds have been accounted for. Lecy submitted a supplementary accounting to address the R&E Enterprises account with BHFC that she falsely reported that she did not know about. Tr.12/11/23, p.85, l.7-18; Rec. p. 2587; Lecy Ex. 1A; Rec. p.2401. Lecy does not reference the correct account number for this account, even though Jodie had advised her of the correct account number on May 23, 2023. Tr.12/11/23, p.85, l.7-18; Rec. p. 2587; Rec. p. 2183. Lecy did not investigate this account; Lecy testified that she lacked the authority to investigate Amy and Julie's BHFCU account because it was not owned by Eva. Tr.9/7/23, p.47,l.9-19; Rec. p.1344. Lecy acted in this manner even though the Court's Order appointing her gave her this authority. Tr.9/7/23, pp.47-48,l.20-8; Rec. pp.1344-1345. Lecy does, however, acknowledge that \$350,000.00 came out of an account owned by Eva, Roger and Amy and went into an account solely owned by Amy and Julie. Tr.9/7/23, p.49, l.4-8; Rec. p.1346. Jodie confirmed this in her testimony. Tr.12/11/23, p.19, l.4-12; Rec. p.2521. Lecy submitted a supplemental accounting addressing this bank account on August 23, 2023. Lecy Ex.1A, Rec. pp.2401-2403. The funds may have been accounted for, as a result of Jodie's demands, but they were converted by Amy and Julie.

Amy thinks it is strange that Jodie references SDCL § 22-30A-10.1. This statute provides that returning stolen monies is not a defense to a criminal theft charge. Certainly, this same rationale applies to whether Amy has breached her fiduciary duty as a temporary conservator when she converts monies to her own use but later returns those monies. These rent monies may have ultimately been deposited into Eva's RBC

investment account by Lecy, but this does not obviate Amy's breach of her fiduciary duty in transferring the monies to her own personal bank account. These monies were in Amy's ownership for almost three years (May 28, 2020 to May 1, 2023). Ex. JFB27, pp.1-2; Rec. pp.1857-1862. Amy did not return these monies; Lecy confiscated them from her at Jodie's insistence. Rec. pp.2401-2402. Amy cites no legal authority for the proposition that a breach of a fiduciary duty may be unwound by returning the monies years later. Moreover, if Amy had died during this time period, these monies would be part of her estate, not Eva's.

Amy references certain findings of fact of the Trial Court that are without support in the record. Amy intimates in her Appellee Brief that Lecy resigned based upon problems that she had with Jodie. Lecy stated in her Petition and Resignation of Temporary Conservator that:

The elevated level of enmity existing between and among Eva Frye's three daughters is so aggravated that the undersigned has been hindered in her duties as Temporary Conservator. Specifically, while attempting to fulfill her tasks as conservator, the undersigned has been inundated with cell phone calls and text messages from Jodie, Julie, and Amy with various complaints, allegations, accusations, suspicions, claims, and demands that only sometimes fell within the scope of the conservatorship. (For example, there were cross-allegations of physical assault; claims of denial of access to Eva; and suspicions that Jodie had substituted collectible currency with ordinary bills.), It is the undersigned's observation that the relations between Jodie, Julie, and Amy are so strained, hostile, confrontational, and antagonistic as to be utterly unmanageable.

Rec. p.779. Lecy recommended that a trust department of a financial institution be the successor conservator. Rec. p.779. Trial Court found that Jodie took an envelope of cash with \$8,400.00 in it. Lecy testified that the envelope had Jodie's name on it. Tr.9/6/23, p.58, 1.18-21. Lecy's accounting does not take issue with Jodie taking this

cash, presumably because Lecy acknowledged that this cash was Jodie's cash. The Trial Court found that Jodie claimed that Amy stole an insurance check for \$350,000.00. This finding is without support in the record. Jodie testified that, "I did not claim that she stole \$350,000.00. I said Julie and Amy took the check . . . to Jim Clement to deposit it even though it says it must be endorsed by endorsee or it is not valid." Tr.12/11/23, pp.78-79, l.23-4; Rec. pp.2581-2582. When Julie asked Jodie about this insurance check, Jodie acknowledged that the check was deposited into Eva's RBC account, but that Eva was not shown, or told about, this check. Tr.12/11/23, pp.114-115, l.7-6; Rec. pp.2616-2617.

IV. The Trial Court Abused its Discretion and Erred in Failing to Give Effect to Either Eva's August 29, 2019 or her November 2021 Powers of Attorney.

Contrary to Amy's contention, the Trial Court abused its discretion in failing to give effect to Eva's August 2019 POA nominating Jodie as Eva's alternative guardian. In defending the Trial Court's failure to consider and give effect to the August 2019 healthcare POA, Amy alleges incorrectly that Jodie did not argue regarding the August 2019 POA. As referenced *supra*, Amy knew about this POA, but ignored it. Tr.9/28/23, pp.86-87, l.24-3; Rec. pp. 1636-1637. Amy attached this POA as an exhibit to her petition for appointment as guardian and conservator. Rec. pp.13-16. Moreover, the Trial Court was obligated to consider this POA, under SDCL § 29A-5-304, because it nominated guardians. Rec. pp 13-16. SDCL § 29A-5-304 provides that, "[a]ny individual who has sufficient capacity to form a preference may at any time nominate any individual or entity to act as his guardian or conservator. . . . The court

shall appoint the individual or entity so nominated if the nominee is otherwise eligible to act and would serve in the best interests of the protected person.” Whether this POA was argued about is of no import.

Amy recites the correct standard for review of an individual’s ability to sign a POA, but applies the standard incorrectly. Amy merely recites incidents of Eva’s past confusion and the medical records. Neither of which addresses the specific issue of capacity to contract at the time the POA was signed. Whether Eva knew about the “hands on a clock” is a different test for a different purpose. Attorney Tomac’s testimony was the only evidence concerning whether Eva had the capacity to contract and the mental dexterity required to comprehend the nature and ultimate effect of the transaction at the time that she signed this POA. See, *Johnson v. Markve*, 2022 S.D. 57 ¶31; SDCL § 20-11A-1. Attorney Tomac testified concerning the steps she made to ensure that Eva understood the effect of her granting a POA in November 2021. Tr.9/6/23, p.75, 1.3-17; Rec. p.1248. Attorney Tomac testified she had no doubt that Eva had the capacity to sign the November 16, 2021 POA. Tr. 9/6/23 p.75 1.5-17; Rec. p.1248. The Trial Court’s finding that Eva lacked the capacity to sign her POA is therefore clearly erroneous.

Amy does not criticize Jodie’s performance as Eva’s guardian in her Appellee Brief or otherwise. Shannon Casey testifies that Jodie has been a good guardian to Eva, “sainthood practically.” Tr.12/11/23, p.181, 1.2-5; Rec. p.2683. Shannon Casey also testified that she sees Jodie and Eva a couple times a week and that Eva is good, happy, funny and does really well when she is with Jodie. TR12/11/23, pp.178-170, 1.21-3.

CONCLUSION

Contrary to Amy's contention, Amy's breach of her fiduciary duty has not been raised for the first time on appeal. Considerable testimony and documentary evidence was admitted concerning Amy's conversion of monies from Roger Frye and Eva Frye's personal account at US Bank to her personal account at BHFCU. Lecy may have accounted for these monies, but did not remedy their conversion by Amy until years later. Lecy also did not consider or account for the ownership structure of R&E Enterprises, which Amy acknowledged that she owned exclusively for a period of time and then it was owned by herself, Julie, Jodie and Eva. The only assets of R&E Enterprises were generated entirely from rent received from Roger's and Eva's real properties, which should have stayed in her personal bank account. Amy testified and signed a BHFCU's corporate banking resolution stating that she was the one hundred percent (100%) owner of R&E Enterprises. Amy testified that she changed the ownership structure of R&E Enterprises so that her, Julie, Jodie and Eva all owned R&E Enterprises. Amy diluted Eva's rent monies by transferring unilaterally her rent monies into R&E Enterprises whether the dilution is complete or a partial dilution. The Trial Court abused its discretion and erred in appointing Amy as sole conservator given these clear breaches of the fiduciary duty that she owed to Eva.

The Trial Court compounded its error by appointing Amy, Julie and Jodie as co-guardians when Jodie was nominated as Eva's guardian in a November 2019 healthcare POA. Contrary to Amy's contention the November 2019 healthcare POA was not raised for the first time on appeal. Amy attached this POA as an exhibit to her petition

for appointment as guardian and conservator. Weak and self-serving testimony was presented that Eva lacked capacity to sign her November 2019 healthcare POA. No evidence was presented demonstrating that Eva lacked the capacity to contract or the mental dexterity required to comprehend the nature and ultimate effect of the transaction at the time that she signed either the August 2019 or November 2021 Powers of Attorney appointing Jodie as her successor agent. Attorney Tomac testified she had no doubt that Eva had the capacity to sign the November 16, 2021 POA. The Trial Court also abused its discretion in failing to give effect to and in invalidating Eva's November 2021 financial POA appointing Jodie as her agent. The proper result is to uphold Eva's November 2021 POA and to appoint Jodie as conservator and guardian.

REQUEST FOR ORAL ARGUMENT

Jodie reiterates her request for oral argument.

CERTIFICATION OF VOLUME LIMITATIONS

The undersigned counsel certifies that Appellant's Brief was prepared using a Microsoft Word - Version 2024 - word processing software. This brief complies with the type-volume limitations imposed by SDCL § 15-26A-66(b)(2). Appellant's Brief contains 3,394 words and 17,597 characters. The above-mentioned word processing

system was used to count the number of words and characters in Appellant's Brief.

Dated this 5th day of February 2025.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of **Appellant's Reply Brief** upon the person(s) designated herein, on the date shown below, by either email or First-Class mail, to-wit:

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Dated this 5th day of February 2025.



Brian L. Utzman