

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
No. 29308**

JAMES BRUGGEMAN, by Substitute Petitioner BLACK HILLS ADVOCATE, LLC on
behalf of the Vulnerable Adult Petitioner,

Petitioner and Appellee,

vs.

JENNIFER RAMOS,

Respondent and Appellant.

Appeal from Circuit Court, Fourth Judicial Circuit
Butte County, South Dakota

HONORABLE MICHELLE K. COMER
Circuit Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Following the guidelines prescribed in SDCL §15-26A-63, Petitioner/Appellee, James Bruggeman, is referred to as “Mr. Bruggeman.” Substitute Petitioner/Appellee, Black Hills Advocate, LLC, is referred to as “BH Advocate.” Respondent/Appellant, Jennifer Ramos, is referred to as “Ms. Ramos.” Citations to the Certified Record are “R. ___” (followed by the applicable page numbers) in the Clerk’s Index. References to Ms. Ramos’s Appendix are “App. ___” (followed by the applicable page numbers).

JURISDICTIONAL STATEMENT

Jennifer Ramos, Respondent, appeals from the following orders, which are all variations or amendments of the same relief:

- (i) Permanent Order for Protection dated March 17, 2020, R.102-104, App.1-3;
- (ii) Findings of Fact and Conclusions of Law (which include a Judgment and Order) signed by the circuit court on April 6, 2020, having a Notice of Entry of Order dated April 16, 2020, R. 5169-5186, R. 5559-5560, App.4-23;
- (iii) Judgment and Order Amending Order for Protection *nunc pro tunc* to March 17, 2020, signed by the circuit court on May 28, 2020, having a Notice of Entry of Order dated June 3, 2020, R. 5820-5823, R. 5879-5880, App. 24-29; and
- (iv) Permanent Order for Protection Modification dated June 1, 2020, signed by the Court on June 8, 2020, R. 5906-5909, App.30-33

Each of the orders listed above is appealable per SDCL §15-26A-3.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests the privilege of appearing before this Court for oral argument in this appeal.

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT QUASHED THE JAMES BRUGGEMAN SUBPOENA.

The circuit court quashed Mr. Bruggeman’s subpoena concluding that it had previously found Mr. James Bruggeman to be incompetent in a guardianship file. R. 5278-5279.

State of South Dakota v. Lufkins, 381 N.W.2d 263 (S.D. 1986)

State of South Dakota v. Warren, 462 N.W.2d 195 (S.D. 1990)

II. WHETHER THE CIRCUIT COURT ERRED WHEN IT DETERMINED JAMES BRUGGEMAN TO BE A VULNERABLE ADULT AND VICTIM OF FINANCIAL EXPLOITATION AND NEGLECT.

The circuit court found that Mr. Bruggeman was a vulnerable adult. R. 5181, R. 5515.

SDCL §21-65-1(15)

a. The circuit court erred as a matter of law in holding that Mr. Bruggeman was unable to protect himself from abuse.

The circuit court found that Mr. Bruggeman was a vulnerable adult. R. 5181, R. 5515.

Peterson v. Burns and Johnson and Eieslan, 2001 S.D. 126, 635 N.W.2d 556

b. The circuit court erred when it found Mr. Bruggeman was an abused vulnerable adult.

The circuit court found that BH Advocate showed by a preponderance of the evidence that vulnerable adult abuse had occurred at the hands of Ms. Ramos through financial exploitation of Mr. Bruggeman. R. 5518. While in her capacity of caregiver and power of attorney of Mr. Bruggeman, Ms. Ramos willfully and wrongfully took over \$328,000 to purchase for herself and her children, with the intent to cause financial loss to Mr. Bruggeman and/or to bring about financial gain for herself. R.5183.

c. The circuit court erred when it found Mr. Bruggeman to have been financially exploited by Ms. Ramos.

The circuit court found that BH Advocate showed by a preponderance of the evidence that vulnerable adult abuse had occurred at the hands of Ms. Ramos through financial exploitation of Mr. Bruggeman. R. 5518. While in her capacity of caregiver and power of attorney of Mr. Bruggeman, Ms. Ramos willfully and wrongfully took over \$328,000 to purchase for herself and her children, with the intent to cause financial loss to Mr. Bruggeman and/or to bring about financial gain for herself. R.5183.

State of South Dakota v. Hauge, 2019 S.D. 45, 932 N.W.2d 165 (2019)
SDCL §21-65-1(4)(d)
SDCL §21-65-1(7)

d. The circuit court erred when it found Mr. Bruggeman to have been neglected by Ms. Ramos.

The circuit court found that BH Advocate showed by a preponderance of the evidence that vulnerable adult abuse had occurred at the hands of Ms. Ramos through neglect of Mr. Bruggeman. As his caregiver and health care power of attorney, Ms. Ramos neglected Mr. Bruggeman as, without reasonable medical justification, failed to provide adequate medical care for Mr. Bruggeman when Mr. Bruggeman had the means available to obtain the recommended care. R. 5182.

SDCL §21-65-1(4)(c)

III. WHETHER THE CIRCUIT COURT ERRED WHEN IT AWARDED MR. BRUGGEMAN AND BH ADVOCATES ATTORNEY FEES.

The circuit court found Ms. Ramos to be responsible for Petitioner’s reasonable and necessary legal fees in the amount of \$19,821.85. R. 5185.

AGFirst Farmers Cooperative. v. Diamond C. Dairy, LLC, 2013 S.D. 19, 827 N.W.2d 843

Crisman v. Determan Chiropractic, Inc, 2004 S.D. 103, 687 N.W.2d 507.

STATEMENT OF THE CASE

This is an appeal from the determination by the circuit court that James Bruggeman was an abused vulnerable adult at the hands of Ms. Ramos under S.D.C.L. Chapter 21-65. BH Advocate, on behalf of Mr. Bruggeman, commenced this action by

filing a Petition and Affidavit for a Protection Order (Vulnerable Adult) on February 11, 2020. R1-20. BH Advocate had standing to file because it was previously appointed as guardian and conservator for Mr. Bruggeman in file number 09GDN19-05. The petition alleged, first, that Ms. Ramos was Mr. Bruggeman's caretaker or was entrusted with Mr. Bruggeman's property at the time, and that she neglected Mr. Bruggeman's health or welfare without medical justification and within Mr. Bruggeman's means. R. 2. Second, the petition alleged that Ms. Ramos was Mr. Bruggeman's family member, caretaker or a person in whom Mr. Bruggeman had placed trust and confidence at the time that Ms. Ramos defrauded and/or stole Mr. Bruggeman's property. R. 2. On that same day, an Ex Parte Temporary Order for Protection was granted. R. 21. The permanent order for protection was heard by the Honorable Judge Michelle K. Comer on March 17, 2020. R. 5270.

Immediately prior to the permanent protection order hearing, the circuit court addressed BH Advocate's Motion and Brief to Quash, R. 70-75, which had been filed on March 13, 2020, in response to the witness subpoena, issued by Ms. Ramos's counsel at the time, directing Mr. Bruggeman to appear and testify. The circuit court granted the motion concluding "that the Court has previously found him incompetent. Not only now has the Court found him incompetent, but there is an additional physician from the VA, in addition to the original one that did the competency evaluation, who has found ... that he lacks the capacity." R. 5278-5279. As a result, Mr. Bruggeman, who is still living, was not present and did not testify.

The relief granted at that time included:

- Ms. Ramos shall not come within a distance of 100 feet of Mr. Bruggeman.
 - Ms. Ramos shall not come within a distance of 100 feet of 1821 Valley Drive, Belle Fourche, SD 57717.
 - Ms. Ramos shall not come within a distance of 100 feet of 1210 Union Street, Belle Fourche, SD 57717.
 - Ms. Ramos is restrained from exercising any powers on behalf of Mr. Bruggeman through a court-appointed guardian, conservator, or guardian ad litem, an attorney in fact, or another third party.
 - Mr. Ramos is restrained from exercising control over funds, benefits, property, resources, belongings, or assets of Mr. Bruggeman, except as otherwise provided for in this Order.
 - Ms. Ramos shall return custody or control of the funds, benefits, property, resources, belongings, or assets to BH Advocate.
 - Ms. Ramos is prohibited from transferring any funds, benefits, property, resources, belongings, or assets of Mr. Bruggeman to any person other than Mr. Bruggeman, except as otherwise provided in this Order.
 - Phone calls, emails, third party contact, including correspondence direct or indirect, are not permitted to Mr. Bruggeman.
 - Ms. Ramos is to turn over all rents, keys, proceeds from 2014 to BH Advocate. Provide accounting of all rents listed from 2014 and *immediately convey Willow Creek Property to Mr. Bruggeman.*
- R. 102-104.

BH Advocate filed its Renewed Motion to Show Cause on April 9, 2020. R. 5194-5196. At a hearing conducted on that motion, the circuit court “took notice *sua sponte* that it lacked jurisdiction to enter an order compelling Respondent to immediately convey title to the real property located at 2231 Willow Creek Road, Belle Fourche, South Dakota (the “Willow Creek Property”) by warranty deed.” R. 5820. Thereafter, the circuit court ordered that “the Order for Protection and the Judgment and Order are hereby amended *nunc pro tunc* to remove the requirement that Respondent immediately convey to Petitioner title to the Willow Creek Property by warranty deed” and, instead, “to require Respondent to immediately deliver to Petitioner funds, benefits, property, resources, belongings, or assets to the Petitioner’s Guardian and Conservator, namely Black Hills Advocate, LLC, which includes, but is not limited to the \$296,500.00 Respondent admits she removed from Petitioner’s accounts to purchase the real Willow Creek property.” R. 5821.

The first Notice of Appeal was timely filed and served on April 16, 2020. R. 5561. The Amended Notice of Appeal was filed on June 4, 2020. R. 5885. The Second Amended Notice of Appeal was filed on June 11, 2020. R. 5912.

STATEMENT OF THE FACTS

Mr. Bruggeman is a 75-year old veteran. R. 5170. Mr. Bruggeman was born December 16, 1944. R. 21. Mr. Bruggeman and Ms. Ramos have known each since Ms. Ramos was a child. R. 5283, R. 5284. Throughout her life, Mr. Bruggeman has bought Ramos things, including several cars. R. 5170. The circuit court found that in 2011 Mr. Bruggeman was diagnosed with vascular dementia. R. 5170. Mr. Bruggeman’s close friends, including Ms. Ramos, provided support for Mr. Bruggeman by administering

medication, paying bills, cleaning, doing laundry, shopping, and preparing meals. R. 5170. Mr. Bruggeman also received home health care assistance through the Veterans Administration (“V.A.”) R. 5170. In January 2012, it was noted that Ms. Ramos began taking over as Mr. Bruggeman’s caregiver. R. 5171. Mr. Bruggeman visited his attorney, now the Honorable Michael W. Day, on June 14, 2012 and appointed Ms. Ramos as his agent under a Power of Attorney, naming the Trust Department of Pioneer Bank & Trust as an alternative. R. 5016, 5020. Mr. Bruggeman designated that the Power of Attorney would become effective upon his disability or incapacity. R. 5021. Ms. Ramos did not know about the Durable Power of Attorney naming her as agent “until about a year later.” R. 5289. Within this same document Mr. Bruggeman executed his healthcare directives. R. 5022. Again, Mr. Bruggeman designated Ms. Ramos as his as his health care agent to make medical decisions if Mr. Bruggeman himself ever became unable to speak for himself. R. 5022.

Mr. Bruggeman also executed his Last Will and Testament at the same time. Mr. Bruggeman was not married and had no children. R. 5027. Mr. Bruggeman bequeathed his entire estate, real, personal and mixed to Ms. Ramos. R. 5028. In the event Ms. Ramos predeceased Mr. Bruggeman, his estate was to go to Ms. Ramos’s daughter, Izzabella D. Ramos. R. 5028. Ms. Ramos did not know about Mr. Bruggeman execution of the will “until about 2013, or maybe later, when he said, ‘You’re going to need these things as proof and evidence if you know’...” R. 5289.

In October 2012 Mr. Bruggeman purchased 1210 Union Street (“Union Street property”) in part with proceeds from stocks and holdings, while the remainder of the purchase price was financed by a mortgage. R. 5031, R. 5407. Ms. Ramos paid the

mortgage payments. R. 5393, R. 5407. The Union Street property was intended by Mr. Bruggeman to be used as a residence for Ms. Ramos and her children. R. 5290, R. 5292, R. 5407. In May of 2014, Mr. Bruggeman was adamant about living independently. Although he had fallen down the stairs, his only consideration to prevent this from happening again was that he was “going to talk with a realtor tomorrow and may sell his home and move into a smaller one story home.” R. 3832. Although the V.A. recommended at this same time for Mr. Bruggeman to enter assisted living, Mr. Bruggeman “was hesitant to commit to this option presently.” R. 3833. The purchase of the Union Street property was never for Mr. Bruggeman to live in, it did not have that purpose until there was a need to satisfy the V.A.’s recommendations. R. 5293. In January of 2015, after Ms. Ramos “converted the garage into an apartment” for Mr. Bruggeman, he moved in. R. 5293, R. 9294.

Ms. Ramos declined assistance for Mr. Bruggeman from Meals on Wheels, a home bath aide, and home making care because they didn’t need it. R. 5295-5296. Ms. Ramos voiced concern about depleting their assets if he would enter a long-term care facility. R. 5297-5298.

Mr. Bruggeman and Ms. Ramos’s relationship was unique before Mr. Bruggeman is noted to have memory issues 2011.¹ Mr. Bruggeman and Ms. Ramos commingled their accounts back in 2007. R. 5033. When the funds were commingled, Mr. Bruggeman was still able to care for himself. Mr. Bruggeman was living alone until 2015. R. 5293, R.

¹ Findings of Fact Number 8. Ms. Ramos contests to the prognosis as being incorrectly stated. This fact has not been stipulated to. Appellant does contest this information and does not accept the FOF in this instance.

5294. Mr. Bruggeman does not have any medical notes indicating a diagnosis of vascular dementia until September 26, 2011. R. 115. Mr. Bruggeman did not become completely reliant on Ms. Ramos until 2018. Even at this point, Mr. Bruggeman was able to toilet, bathe and dress himself. R 3127-3128. At this point their finances had been tied up together for 11 years. Ms. Ramos was faced with the challenge of Mr. Bruggeman telling her he “wants to remain independent, and that he would not last more than 3 months if he were away from his adoptive family,” R. 3126, and, conversely, suggesting to the V.A. and Mr. Bruggeman that due to her own increasing time constraints and duties he needed a higher level of care. R. 3128. In May of 2018 Ms. Ramos sought to have an evaluation completed of Mr. Bruggeman as she grew concerned that his transition from independence to constant assistance from her was becoming greater than what could be provided in the Union Street property. R. 3133. They needed to be under one roof in a bigger house. Between April 30, 2018 and May 3, 2018, Ms. Ramos was doing what she could to purchase a property to satisfy the V.A. R. 4921-4935.

Mr. Bruggeman contacted his financial adviser, Troy Niehaus (“Mr. Niehaus”) to begin working out a financial plan to accomplish this objective. In April of 2018, Mr. Niehaus met with Mr. Bruggeman at the Wells Fargo Bank in Belle Fourche. R. 5412. Mr. Niehaus set up the meeting because he wanted to talk to Mr. Bruggeman before granting Ms. Ramos third-party authorization to sell investments and move money. R. 5408. Mr. Niehaus understood the following:

There was discussion about buying a new house. Jennifer had told me— about his current living situation on the Union Street address, the VA home healthcare had told her that, you know, his current living arrangement/living conditions weren’t up to their standards or parameters and that they weren’t going to continue to service – or to help him. And so the rationale for buying the new home was that – so that he could be inside

the home with them, have more supervision, you know, improved living arrangement.” R. 5410-5411.

Further, Mr. Niehaus did not just speak with Mr. Bruggeman one time about the purchase of the house in 2018, but Mr. Niehaus spoke to Mr. Bruggeman after Ms. Ramos notified Mr. Niehaus that a property had been identified. R. 5412. Mr. Niehaus talked to Mr. Bruggeman about the verification of the funds, “and Jim had told me, you know, ‘Whatever she needs, make it available to her.’” R. 5412. Mr. Niehaus had further communication with Mr. Bruggeman when they reviewed the sale after the closing. R. 5412.

Liquidating assets was not the only option they looked into. Mr. Niehaus additionally testified that after meeting with Mr. Bruggeman on that day, Mr. Bruggeman and Ms. Ramos went over and talked to a mortgage person in the next cubicle. R. 5412.

At the hearing, and in hindsight, Mr. Niehaus contradicted himself when he testified that during a few days in June and July, he and Mr. Bruggeman had multiple phone calls in one day. R. 5412-13. Although Mr. Niehaus testified that this was concerning to him, there is nothing in the record to document that he made any notes of these conversations or that he undertook any special action. Further, although Mr. Niehaus testified to these alleged concerns, Wells Fargo never did anything by way of restricting Ms. Ramos’s use of or access to his account. R. 5413.

STANDARD OF REVIEW

The standards of review in protection order cases are established to involve, first, a determination of whether the trial court’s findings of fact were clearly erroneous and, second, if the trial court’s findings of fact are not clearly erroneous then whether it abused its discretion. *Schaefer v. Liechti*, 2006 SD 19, ¶ 8, 711 N.W.2d 257, 260

(citations omitted). It is within the circuit court’s discretionary power to determine whether a witness is competent to testify, and its decision will be reviewed as an abuse of discretion. *State v. Warren*, 462 N.W.2d 195, 198 (1985) (citations omitted). Similarly, an award of attorney fees is reviewed under the abuse of discretion standard. *In re South Dakota Microsoft Antitrust Litigation*, 2005 SD 113, ¶ 27, 707 N.W.2d 85, 97. Cases requiring statutory interpretation are reviewed under a de novo standard of review. *Peterson v. Burns and Johnson and Eieslan*, 2001 S.D. 126, ¶ 7, 635 N.W.2d 556, 561.

ARGUMENTS AND AUTHORITIES

1. WHETHER THE CIRCUIT COURT ERRED WHEN IT QUASHED THE JAMES BRUGGEMAN SUBPOENA

The circuit court should have permitted Mr. Bruggeman to appear at the hearing for the purpose of examining him and determining his competence to testify. “Generally, every person is competent to be a witness if they have personal knowledge of the matter at hand, have sufficient understanding to receive, remember, narrate impressions and are sensible to the obligation of an oath.” *State v. Warren*, 462 N.W.2d 195, 198 (citing *State v. Lufkins*, 381 N.W.2d 263, 266 (S.D. 1986) (additional citations omitted)).

“As long ago as 1895, this Court upheld the general rule that determination of a witness’ competence ‘is left in the first instance to the discretionary judgment of the trial court, after informing itself by proper examination.’” *State v. Weisenstein*, 367 N.W.2d 201, 203-04 (S.D. 1985) (quoting *State v. Reddington*, 7 S.D. 368, 377, 64 N.W. 170, 172-73(1895)). And although *Weisenstein* and *Reddington* addressed competency of a child to testify, the determining factors are the same, “sufficient mental capacity to observe, recollect, and communicate, and some sense of moral responsibility...” *Weisenstein*, 367 N.W.2d 201, 204 (S.D. 1985) (quoting *State v. Leonard*, 60 S.D. 144,

145, 244 N.W. 88-89 (1932). “The determination of the witness’ competency is within the discretionary power of the trial judge and may be reversed only upon a showing of abuse of discretion.” *State v. Warren*, 462 N.W.2d 195, 198 (1985) (citing *State v. Lufkins*, 381 N.W.2d at 266 (S.D. 1986) (additional citations omitted)). “When reviewing the exercise of judicial discretion, the members of this court may not consider whether they would have made a similar rule; rather, they must consider whether, in view of the law and the circumstances of the particular case, a judicial mind could reasonably have reached such conclusion.” *Weisenstein*, 367 N.W.2d at 205 (internal citations omitted).

This Court in *Lufkins* upheld the circuit court’s finding that the witness was incompetent to testify. See 381 N.W.2d at 266. The circuit court in *Lufkins* held a motions hearing where it heard from a social worker who examined the witness. *Id.* at 266. During the hearing the social worker testified that the witness did not remember the day in question, the death of the victim, that the witness had difficulty maintaining attention, the witness did not have vivid memories, the witness’s memories were not in chronological order, the witness was unable to recall dates and places, and that the witness experienced some memory blocking and inability to recall in detail. *Id.* The South Dakota Supreme Court agreed that “[t]he testimony and evidence presented at the motion hearing sufficiently established that Blue Dog had lost his personal knowledge of the events in question and lacked the understanding to receive, remember, and narrate any remaining impressions.” *Id.*

Additionally, the witness experienced visual hallucinations, bizarre behavior in the past, slowing of thought, sparsity of speech and loss of intellectual function. *Id.* It is

also important to note that the witness in *Lufkins* had testified in the previous trial and that his transcript was available for the retrial. *Id.* at 265. Unlike in *Lufkins*, however, the circuit court in the instant case did not examine Mr. Bruggeman and did not hear testimony from any medical expert but only relied on a written neuropsychological evaluation from Dr. Jon Dennig (“Dr. Dennig”), who did not testify, and who did not address any of the factors addressed above. Although it appears that Dr. Dennig spent nine hours evaluating, reviewing and preparing his report, the circuit court did not seek Dr. Dennig’s opinion as to whether Mr. Bruggeman was capable of testifying. See generally R. 3127. In fact, Dr. Dennig noted that, “Veteran currently states that he wants to remain independent, and that he would not last more than 3 months if he were away from his adoptive family.” R. 84. Further, “Veteran reports good relationships at home with his CG and her children.” R. 84.

No evidence has been offered or received that Mr. Bruggeman did not remember or did not voluntarily gift the money to Ms. Ramos to purchase a home in which they were to reside. To the contrary, Mr. Bruggeman met with his Well Fargo Advisor, Mr. Niehaus, to discuss liquidating funds. Mr. Niehaus did his due diligence before providing the documentation requested by Mr. Bruggeman by setting up a meeting with him to discuss the “seriousness of giving someone third-party authorization to sell funds, to move money.” R. 5408. “[I] wanted to be sure that, you know, Jim was on board.” R. 5409.

The facts presented in *Lufkins* are distinguishable from the facts that were presented to the circuit court in the instant case, where it is believed that Mr. Bruggeman would be reasonably found to have capacity to testify. This Court has been faced with

similar circumstances in *Warren*, and the circuit court should have relied on this Court's guidance in *Warren* and at least held a separate hearing to determine whether Mr. Bruggeman was competent to testify.

In *Warren*, this Court compared the facts with which it was presented to those in *Lufkins* and determined "that the witness [in *Lufkins*] had lost his personal knowledge of the events in question and lacked the understanding to receive, remember, or narrate any remaining impressions." *Warren*, 462 N.W.2d 195, 198. The Court stated, "[t]hat is not the situation before us." *Id.* In *Warren*, a psychiatrist testified that the witness could report facts, had a good remote memory, understood what telling the truth entails and that it is important. See *Id.* A psychologist testified that the witness was mildly mentally handicapped. *Id.* Another psychiatrist testified that the witness did suffer from dementia; however, the witness did understand the concept of telling the truth. *Id.* The psychiatrist further testified that the witness communicated better when questions were written to him and that the witness would not be able to follow matters that were too complex. *Id.*

The circuit court in *Warren* found the witness did have a diminished mental condition due to his age and low IQ. "However, the court also indicated that it believed Hess' testimony would have some value to the proceedings and would be received under the special care of the court and under guarded circumstances." *Warren*, 462 N.W.2d 195, 198. Most notably, the circuit court in the instant case failed to address the most important question, which the *Warren* and *Lufkins* addressed, which "the trial court specifically referred to in *Lufkins*, finding that Hess could understand the obligation of an oath or the need to tell the truth." *Id.*

Whereas the circuit court in *Lufkins* held a motions hearing to determine whether the witness was competent to testify, the circuit court in *Warren* held a competency hearing. *Warren*, 462 N.W.2d at 198; see also *State v. Weisenstein*, 367 N.W.2d 201, 204 (“In an interview conducted apart from the jury, the victim communicated to the trial judge that (1) he remembered the night Kurtis entered his bedroom, (2) that he knew Kurtis, (3) that he knew the difference between telling the truth and telling a lie, and (4) that he would tell the truth.”). Unlike in *Lufkins* and *Warren*, the circuit court in the instant case did not hold any hearing to determine whether it was proper for Mr. Bruggeman to testify. Instead, the circuit court relied on the fact that Mr. Bruggeman has been found “incompetent” pursuant to a guardianship proceeding, which in that proceeding the circuit court found that it would be detrimental to his health, care or safety for Mr. Bruggeman to attend the hearing. R .94. “I’m going to grant the motion to quash based upon the fact that the court has previously found him incompetent.” R. 5278. The issue before the physician in determining whether Mr. Bruggeman needed to attend the guardianship proceeding is significantly different than a determination by a physician of whether he can attend a hearing to testify, with sufficient knowledge, understanding, or ability to tell the truth. Per SDCL §29A-5-306 (6), [i]f the [guardianship] petition states that the incapacity of the person alleged to need protection will prevent attendance at the hearing, an opinion as to whether such attendance would be detrimental to the person’s health, care or safety.”

In its Motion and Brief to Quash, Petitioner cites to Dr. Mary Clark’s (“Dr. Clark”) responses in written form that Mr. Bruggeman “lacks capacity to understand.” R. 71. She did not testify. Dr. Clark completed the evaluation in conjunction with the

guardianship and conservatorship; she was not determining whether Mr. Bruggeman had sufficient understanding to receive, remember, narrate impression and be sensible to the obligation of an oath. See *Warren* 462 N.W.2d at 198. Dr. Dennig in writing ultimately concluded that Mr. Bruggeman, “no longer has the capacity to care for himself or make decision that are in his best interest.” R. 71. Neither Dr. Clark nor Dr. Dennig commented on Mr. Bruggeman’s ability to understand the import and consequence of telling the truth.

Further, the circuit court did not make either oral or written findings of fact on why and how Mr. Bruggeman’s attendance to testify would have been a traumatic confrontation with Ms. Ramos. The circuit court did not provide any such analysis on that point. Based on the foregoing, the medical records provided are insufficient basis for the circuit court to determine that Mr. Bruggeman was incompetent to testify at the protection order hearing. And without allowing him to testify, the circuit court failed to exercise its responsibility to independently inform itself by proper examination of Mr. Bruggeman’s competence to testify. Therefore, it abused its discretion. This Court is unable to determine by the law and facts whether a judicial mind could reasonably have reached such a conclusion.

2. WHETHER THE CIRCUIT COURT ERRED WHEN IT DETERMINED JAMES BRUGGEMAN TO BE A VULNERABLE ADULT AND VICTIM OF FINANCIAL EXPLOITATION AND NEGLECT

a. The circuit court erred as a matter of law in holding that Mr. Bruggeman was unable to protect himself from abuse.

This case appears to be one of first impression in South Dakota, involving statutory interpretation of SDCL 21-65-1(15). That statute defines a “vulnerable adult” as

a person sixty-five years of age or older who is unable to protect himself or herself from abuse as a result of age or a mental or physical condition, or an adult with a disability as defined in SDCL §22-46-1.

This Court interprets “statutes under a de novo standard of review without deference to the decision of the trial court.” *Peterson*, 2001 S.D. 126, ¶ 7, 635 N.W.2d at 561 (quoting *In re Estate of Karnen*, 2000 S.D. 32, ¶ 7, 607 N.W. 2d 32, 35). “Statutes are to be construed to give effect to each statute and so as to have them exist in harmony.” *In re Estate of Karnen*, 2000 S.D. 32 ¶ 8, 607 N.W.2d at 35 (quoting *State v. Woods*, 361 N.W.2d 620, 622 (S.D. 1985)). “When construing a statute, the court determines the intent of the Legislature from the words of the statute, giving them their plain meaning. *Peterson*, 2001 S.D. 126, ¶ 20, 635 N.W.2d at 564 (quoting *Hagemann v. NJS Eng’g, Inc.*, 2001 S.D. 102, ¶ 5, 632 N.W.2d 840, 843; *M.B. v. Konenkamp*, 523 N.W.2d 94, 97 (S.D. 1994).

As it relates to this case, the phrase “who is unable to protect himself or herself from abuse as a result of age or a mental or physical condition” is especially problematic. Specifically, the statute does not provide sufficient guidance about what conduct by others constitutes abuse and, further, how one measures or determines whether an individual is unable to protect himself or herself *as a result* [i.e., as a consequence of] the particular condition. Ms. Ramos contends that the statute is unconstitutionally vague because it fails provide her with fair notice that her actions, involvement with, and relationship to Mr. Bruggeman is proscribed by the statute. Mr. Bruggeman treated Ms. Ramos and her children as family. Likewise, she was merely involved in life-long familial relationship with Mr. Bruggeman, and that involved mutual and attendant

obligations and even economic benefits.² The statute is unconstitutionally vague and encourages arbitrary enforcement that puts countless families and caregivers at grave risk.

“The standard for determining whether a statute is unconstitutionally vague is whether ‘it give[s] a person of reasonable intelligence fair notice that his contemplated conduct is forbidden.’” *State v. Holway*, 2002 S.D. 50, ¶13, 644 N.W.2d 624 (S.D. 2002) (quoting *State v. McGill*, 536 N.W. 2d 89, 95 (S.D. 1995)). The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute. “The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect.” *Rowley v. South Dakota Board of Pardons and Paroles*, 2013 S.D. 6, ¶7, 826 N.W.2d 360, 363; *City of Rapid City v. Estes*, 2011 S.D. 75, ¶ 12, 805 N.W. 2d 714, 718 (quoting *State ex rel. Dep’t of Transp. v. Clark*, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162).

“When the language in a statute is clear, certain and unambiguous, there is not reason for construction, and the Court’s only function is to declare the meaning of the statute as clearly expressed.” *In re Estate of Hamilton*, 2012 S.D. 34, ¶ 7, 814 N.W.2d

² It is now widely accepted that the diversity of family living arrangements has increased since the early 1960s, and so has the fluidity of the family and the economic dynamics. Caring for aging parents and parental figures has become more common, demanding and complex. In this case, Mr. Bruggeman served as a one-time legal guardian for Ms. Ramos who, in turn, took over the caregiver role for Mr. Bruggeman in his later years. From any reasonable perspective, they were family.

141, 143 (quoting *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611). An “[a]mbiguity is a condition of construction, and may exist where the literal meaning of a statute leads to an absurd or unreasonable conclusion.” *People ex rel. J.L.*, 2011 S.D. 36, ¶ 4, 800 N.W.2d 720; *In re Sales Tax Refund Applications of Black Hills Power & Light Co.*, 298 N.W.2d 799, 803 (S.D. 1980).

“A statute or portion thereof is ambiguous when it is capable of being understood only by reasonably well-informed persons in either of two or more senses.” Whenever a case such as this one is before the court, however, it is obvious that people disagree as to the meaning to be given to a statute. This alone cannot be controlling. The court should look at the language of the statute itself to determine if “well-informed persons” should have become confused.

Petition of Famous Brands, Inc., 347 N.W. 2d 882, 886 (S.D. 1984) citing *National Amusement Co. v. Wisconsin Dep’t of Taxation*, 41 Wis.2d 261, 267, 163 N.W.2d 625, 628 (1969) (internal citation omitted).

As a matter of law, the circuit court erred in construing the statute in a manner that permitted the arbitrary enforcement of standards – not to be understood by reasonably well-informed people who are in mutually beneficial and supportive relationship – about what conduct constitutes abuse (specifically, financial exploitation) and how a limiting condition actually results in an inability to protect oneself, especially after a lengthy duration and pattern of mutual economic support is demonstrated.

b. The circuit court erred in finding that Mr. Bruggeman was an abused vulnerable adult

The circuit court found that in 2011 Mr. Bruggeman was diagnosed with vascular dementia. R. 5170. According to the entire progress notes made by the physician from his interaction with Mr. Bruggeman during his visit September 22, 2011, the diagnoses was

“most likely a vascular dementia.” R. 4355. This is a subtle but significant distinction that the circuit court failed to recognize. Reading the progress notes in their entirety, the reason for the visit in September 22, 2011, was a follow up to Mr. Bruggeman having visited the emergency room in September 4, 2011. Since September 4th of that year, Mr. Bruggeman was having confusion and disorientation but had since followed up with his doctor on his medication management and was “back to his normal self” at the time of the September 22nd visit. R. 4350. Mr. Bruggeman lived alone, and the physician had noted no concerns about this arrangement. R. 4350. Mr. Bruggeman was able to rattle off his complete medication list and what each was for, he was responsible for his own finances and knew how to use a computer R. 4351. Further, Mr. Bruggeman was able to articulate the date, his person, where he was and the purpose of the reason for the visit. R. 4354.

This appeared to be a similar issue in 2013 when Mr. Bruggeman went to the emergency room on January 29, 2013, complaining of severe rib pain. R. 314. The discharge diagnoses number 4 states, “[h]istory of vascular dementia with some mild confusion related to narcotic therapy, resolved after discontinuance of this medication.” R. 314.

The extent of the health care assistance was minimal. Mr. Bruggeman was taking his “medication correctly 90% of the time.” R. 4356. Additionally, the purpose of the health care assistance was only temporary, until Mr. Bruggeman and his care givers could complete the goal of demonstrating and verbalizing a home safety plan to prevent falls. R. 4357. Further the progress notes state that there was no level of care decisions made at this time, there were no caregiver issues, and that Mr. Bruggeman was “interested in

doing an advance directive with the SW and she will see veteran.” R. 4358. The discharge plan was just to “assess the needs of veteran at each visit for any changes in physical and mental health.” R. 4358.

In January of 2015, Mr. Bruggeman met with Dr. Michael Huxford (“Dr. Huxford”). R. 3655. Dr. Huxford learned during the evaluation that Mr. Bruggeman “reported some difficulty remembering names and where he placed things but overall did not believe he had problems with his cognitive functioning.” R. 3656. Further, Mr. Bruggeman “reported doing most activities of daily living independently or with minimal assistance.” R. 3656. Dr Huxford found Mr. Bruggeman to “function with activities of daily living independently in his home though does require some assistance.” R. 3658. Additionally, Dr. Huxford found even with Mr. Bruggeman living in his own apartment in the backyard, that “he lives with a caregiver, who is involved daily with his care.” R. 3658.

The purpose of Dr. Huxford’s evaluation was to compare Mr. Bruggeman’s abilities at this time with testing from summer of 2013. R. 3656. Mr. Bruggeman had some cognitive deficits in 2013 but primary care providers with HBPC (“home based primary care”) team wanted to clarify current cognitive abilities and assist with treatment planning. R. 3656. Dr. Huxford found that Mr. Bruggeman’s cognitive functioning, attention and working when compared to previous evaluation, did not appear to have taken a significant turn for the worse. R. 3657. “That is, his abilities at this time do not appear to be significantly worse than his abilities one year ago.” R. 3657. Dr. Huxford’s ultimate finding was “significant impairment in cognitive and pronounced difficulties in delayed memory/recall and visuospatial and executive functions.” R. 3657.

As Mr. Bruggeman's mental and physical health deteriorated, Ms. Ramos was faced with difficulties. For example, in December 2016, Mr. Bruggeman's progress notes state that Mr. Bruggeman was orientated to place and time and person and situation, but "unable to name the year within the 2000s." R. 3236. Dr. Huxford went on to explain, "[t]his is a change for him as he has been largely able to name the year, sometimes with recognition format." R. 3236. Additionally, during Mr. Bruggeman's visit with Dr. Huxford, Mr. Bruggeman stated that he had been going to AA meetings about one a week with friends. Dr. Huxford notes that the "details of these narratives are sophisticated and detailed and have the appearance of authenticity." R. 3236. However, according Ms. Ramos, Dr. Huxford learns, "that he has not been out of his house for many months now despite her efforts to help him to do so." R. 3236. This is the first time Dr. Huxford recognized Mr. Bruggeman's steep decline, "[t]hough he has shown cognitive impairment on these tests in the past, his symptoms have become worse and it seems likely the case that they have maintained a higher severity for many weeks now." R. 3237.

Dr. Huxford and Ms. Ramos talked at length about Mr. Bruggeman, and Dr. Huxford notes no concerns of Ms. Ramos and her caregiving ability. "Jennifer describes a good plan for caring for this veteran so to ensure his basic needs, safety, and medication compliance as well as an appreciation for efforts towards the highest quality of life possible for him." R. 3237. "She is also open to feedback and education and expressed thanks and appreciation for the information/counsel offered." R. 3237. Dr. Huxford concluded Mr. Bruggeman's results to be "consistent with a Major neurocognitive

disorder because of deficits in memory, attention, processing speed, and executive functions.” R. 3241.

Medical diagnoses are complicated, but when the doctors do not testify it makes things more complicated. For example, in September 26, 2011, Mr. Bruggeman was diagnosed with vascular dementia, uncomplicated. But more than four years later, on March 4, 2016, the narrative was changed from vascular dementia, uncomplicated to vascular dementia. R. 115. What is the explanation? There is none in the records.

Mr. Bruggeman was a strong-willed man. For example, in 2013 after a fall that caused him four rib fractures, the general medical ward at Fort Meade recommended a short stay at a nursing home. R. 314. Mr. Bruggeman turned this offer down and went home alone. R. 314. Mr. Bruggeman was diagnosed with “Vascular dementia/severe cognitive impairment by neuropsychiatric testing 5/2018” R. 308.

Additionally, it is mentioned multiple times that Mr. Bruggeman’s mental status would appear to improve with adjustments to medication. R. 314. “History of vascular dementia with some mild confusion related to narcotic therapy, resolved after discontinuance of this medication.” R. 314. Or with proper care and treatment. R. 310. “Patient’s mental status does appear to improve somewhere throughout his stay, but some obvious mental dementia remains.” R 310.

On November 8, 2019, the progress notes state that Mr. Bruggeman was oriented to person and place. That Mr. Bruggeman was able to make needs known and was able to understand others. R. 319. Similarly, on November 7, 2019, Mr. Bruggeman was oriented to person, place, time and situation. Mr. Bruggeman was able to make needs known and was able to understand others. R. 320. Mr. Bruggeman spent an hour painting a coin

bank, he was noted as being readily able to take direction, oriented to person and situation and able to make needs now to others and to understand others. R. 326.

This Court should take note of the need to go further in its examination of the record than what the circuit court did. For example, the circuit court simply stated on the record, “[t]he court finds that Mr. Bruggeman is a vulnerable adult as defined by statute.” R. 5515. Further, the circuit court’s Findings of Fact and Conclusions of Law merely find Mr. Bruggeman “is a 75 year old veteran with several neurocognitive impairment, eligible for protection pursuant to SDCL ch. 21-65.” R. 5170. “Bruggeman is a 75-year old veteran with severe neurocognitive impairment and is therefore a vulnerable adult.” R. 5181. The statute requires a finding that the person be unable to protect himself *as a result* of the mental condition. Which is why it is so important to see that the relationship between Mr. Bruggeman and Ms. Ramos never changed. The use of the comingled funds, purchasing a home for Ms. Ramos and her family, Ms. Ramos and Mr. Bruggeman taking care of the properties together were common occurrences. This was not some new relationship or type of behavior that began when Mr. Bruggeman became unable to care for himself. Their relationship was always a voluntary choice, and there is no question that when the comingling began in 2007 that Mr. Bruggeman had no mental defect.

c. The circuit court erred when it found Mr. Bruggeman to have been financially exploited by Ms. Ramos

Mr. Bruggeman had been helping and treating Ms. Ramos as family since she was a child. R. 5283, R. 5234, R. 5325. Mr. Bruggeman became temporary guardian of Ms. Ramos for a time after Ms. Ramos’s mother was sentenced to prison. R. 5327-5238. The court failed to recognize the familial relationship between Mr. Bruggeman and Ms. Ramos. Not only did Mr. Bruggeman take care of Ms. Ramos in her youth but Ms.

Ramos also helped Mr. Bruggeman manage the properties he owned, paid for costs associated with the properties and personally repaired and remodeling the properties with no compensation in return. R. 5841, R. 5843-5844.

There is no dispute from the court's oral findings and testimony that the relationship between Ms. Ramos and Mr. Bruggeman was the same prior to his allegedly becoming incapacitated in 2011. For example, Mr. Bruggeman and Ms. Ramos comingled their accounts back in 2007. R. 5033. When the funds were commingled Mr. Bruggeman was still able to care for himself. Mr. Bruggeman does not have any medical indication of vascular dementia until September 26, 2011. R. 115.

Mr. Bruggeman did not become completely reliant on Ms. Ramos until 2018; and even at this point, Mr. Bruggeman was able to toilet, bathe and dress himself. R 3127-3128. Throughout her life, Mr. Bruggeman has bought Ms. Ramos things, including several cars. R. 5170. Mr. Bruggeman purchased a house that Ms. Ramos and her family lived in and that Ms. Ramos paid the monthly mortgage on. Mr. Bruggeman in 2012 freed "up proceeds to help Jennifer Ramos with the Union Street purchase" R. 5405-5406. This is significant because in February of 2013, Mr. Bruggeman was still able to live at home; the V.A. "had considered perhaps a short nursing home stay for convalescence, although at this point he feels he is quite a bit better and able to go home." R. 314. Transaction in 2012 shows a similar pattern to the transaction in 2018.

Additionally, there has been ample testimony that Mr. Bruggeman and Ms. Ramos jointly contributed to the comingled funds and accounts. For example, although it was Mr. Bruggeman who financed the down payment to the Union Street property it was Ms. Ramos who paid the mortgage. R. 5393. Mr. Bruggeman's financial adviser, Troy

Niehaus, also acknowledged that Mr. Bruggeman was only selling enough of his stocks and holdings to get to a mortgage “payment down to a level that she could make.” R. 5407.

If this Court determines that circuit court did not error in finding Mr. Bruggeman to be a vulnerable adult, BH Advocate has still failed to establish evidence by a preponderance of the evidence that Ms. Ramos financially exploited Mr. Bruggeman.

Although it appears that a review of SDCL 21-65-1(4)(c) and (d) is a matter of first impression, this Court has addressed criminal cases relating to exploitation of a disabled adult. The statute, SDCL 22-46-3, provides “any person who, having assumed the duty voluntarily, by written contract, by receipt of payment for care, or by order of a court to provide for the support of an elder or an adult with a disability, and having been entrusted with the property of that elder or adult with a disability, with intent to defraud, appropriates such property to a use or purpose not in the due and lawful execution of that person’s trust, is guilty of theft by exploitation.”

This Court stated its rationale of theft by exploitation perfectly in *State v. Hauge*, when it recognized that:

“[a]lthough Hauge’s offense is not a crime of violence, theft by exploitation is particularly insidious in that it involves the manipulation of disabled or elderly adults, a particularly vulnerable population. This is especially so because the victim is often dependent on the thief for help and support. Victims who are elderly and in poor mental or physical health are largely defenseless against such crimes. Exploiting the elderly for financial gain wreaks havoc not only on the victim but in many cases the entire family, often irreparably destroying familial bonds. Financial exploitation of a vulnerable adult is therefore a serious offense when weighed against other types of crimes.
State v. Hauge, 2019 S.D. 45, ¶ 35, 932 N.W.2d 165, 175 (2019).

Although *Hauge* reviewed criminal theft by exploitation, it is reasonable for the rationale to cross over to SDCL §21-65-1(4)(d).

SDCL §21-65-1(7) described financial exploitation as , “exploitation as defined in subdivision 22-46-1(5) when committed by a person who stands in a position of trust or confidence”. SDCL §22-46-1(5) defines exploitation as “the wrongful taking or exercising of control over property of an elder or adult with a disability with intent to defraud the elder or adult with a disability”. There is no dispute that Ms. Ramos was Mr. Bruggeman’s caregiver. The dispute is whether Ms. Ramos has wrongfully taken or exercised control over property of Mr. Bruggeman with intent to defraud Mr. Bruggeman. The lifelong familial bond and the attendant, mutual personal and economic support established by the record clearly places this care outside the parameters of actionable conduct under the statute. The circuit court clearly erred in finding that financial exploitation occurred.

d. The circuit court erred when it found Mr. Bruggeman to have been neglected by Ms. Ramos

Similarly, in SDCL 21-65-1(4)(c), reference is made to “[n]eglect as defined in subdivision 22-46-1(6) and 22-46-1.1. SDCL 22-46-1(6) defines neglect as “harm to the health or welfare of an elder or an adult with disability, without reasonable medical justification, caused by a caretaker, within the means available for the elder or adult with disability, including the failure to provide adequate food, clothing, shelter, or medical care” and excludes, “a decision that is made to not seek medical care for an elder or disabled adult upon the **expressed desire of the elder or disabled adult; a decision to not seek medical care for an elder or disabled adult based upon a previously executed declaration, do-not-resuscitate order, or a power of attorney for health**

care; a decision to not seek medical care for an elder or disabled adult if otherwise authorized by law; or the failure to provide goods and services outside the means available for the elder or disabled adult.” (Emphasis added).

Ms. Ramos cannot be found to have neglected Mr. Bruggeman because her decision to not put Mr. Bruggeman in a nursing home was aligned with Mr. Bruggeman’s expressed desire to stay out of a nursing home. See R. 5297; In May of 2018, Mr. Bruggeman underwent a neuropsychological evaluation. During the evaluation the writer noted, “Veteran currently states that he wants to remain independent, and that he would not last more than 3 months if we were away from his adoptive family.” R. 3126. Further, “Veteran reports good relationships at home with his CG [caregiver] and her children.” R. 3126.

Also, Ms. Ramos falls under the exception because “the term, neglect, does not include a decision to not seek medical care for an elder or disabled adult based upon a power of attorney for health care. Ms. Ramos was specifically following her duties as agent under Mr. Bruggeman’s Healthcare Directives. “Without intending to limit this authority, my agent shall have the following powers:” R. 5022. “To employ and discharge physicians, psychiatrists, dentists, nurses, therapists, and any other professional as my agent may deem necessary for my physical, mental and emotional well-being, and to pay reasonable compensation to them.” R. 5022-23. “To give or withhold consent to my medical care...to revoke, withdraw, modify or change consent to my medical care, surgery, or any other medical procedures or tests, hospitalization, convalescent care, or home care...” R. 5023. “I ask that my agent be guided in making these decisions by what I have indicated to him/her about my personal preferences regarding that care, and as

otherwise set forth herein.” R. 5023. “Based upon those same preferences, my agent may also summon paramedics or other emergency medical personnel and seek emergency treatment for me, or choose not to do so, as my agent deems appropriate given my wishes and my medical status at the time of the decision.” R. 5023. “My agent is authorized, when dealing with hospitals and physicians, to sign documents titled or purporting to be a ‘refusal to permit treatment’ or ‘leaving hospital against medical advice’ as well as any necessary waivers of or release from liability required by the hospitals or physicians to implement my wishes regarding medical treatment or non-treatment.” R. 5023.

Given that statutory authority is supposed to exist in harmony, and SDCL 21-65-1(4)(c) uses SDCL 22-46-1(6) to define neglect, it would be inconsistent to find for purposes to this statute that the exception should not be applied. Further, it would not be in harmony with state law if agents under health care directs would be allowed to be charged with neglect for following the directions the principal provided to them.

The circuit court found that Ms. Ramos, as his caregiver and health care power of attorney, neglected Mr. Bruggeman as without reasonable medical justification, failed to provide adequate medical care for Mr. Bruggeman when he had to means available to obtain the recommended care. R. 5182.

And once again, this Court should recognize that the circuit court failed to provide any specific example or references to the record that showed Ms. Ramos’s decision to keep Mr. Bruggeman in her home and outside of the long-term care facility harmed his health or welfare or that it was not based on his stated desires.

3. WHETHER THE CIRCUIT COURT ERRED WHEN IT AWARDED MR. BRUGGEMAN AND BH ADVOCATE ATTORNEY FEES

“An award of attorney fees is reviewed under the abuse of discretion standard.”

Crisman v. Determan Chiropractic, Inc., 2004 S.D. 103, ¶ 24, 687 N.W.2d 507, 513 (citing *City of Sioux Falls v. Johnson*, 2003 S.D. 115, ¶ 6, 670 N.W.2d 360, 362. “The allowance of attorney fees rests in the discretion of the trial court and will be interfered with only if there appears to be error in exercise of the discretion.” *Olson v. Olson*, 438 N.W.2d 544, 548 (S.D. 1989) (internal citation omitted). ““This Court has consistently required trial courts to enter findings of fact and conclusions of law when ruling on a request for attorney fees’ because ‘without findings of facts and conclusions of law, there is nothing to review.’” *AGFirst Farmers Cooperative. v. Diamond C. Dairy, LLC*, 2013 S.D. 19, ¶ 21, 827 N.W.2d 843, 849 (quoting *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 30, 687 N.W.2d 507, 514. “The American rule is that each party bears the party’s own attorney fees.” *Crisman*, 2004 S.D. 103, ¶ 26, 687 N.W.2d at 513 (citing *Public Entity Pool for Liability v. Score*, 2003 S.D. 17, ¶ 7, 658 N.W.2d 64, 67-68).

“This Court has set forth factors for the trial court to consider in setting attorney fees in numerous decisions.” *Crisman*, 2004 S.D. 103, ¶ 27, 687 N.W.2d at 513. For example:

[t]he facts to be considered in awarding attorney fees in a civil case are set forth in *City of Sioux Falls v. Kelley*, 513 N.W.2d 97, 111 (S.D. 1994): (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation,

and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

Crisman, 2004 S.D. 103, ¶ 28, 687 N.W.2d at 514.

The circuit court after the permanent protection order hearing left attorney fees under advisement. R. 5519. The circuit court in its order attached to its findings of fact, conclusions of law merely states: “That Ramos shall pay Petitioner’s reasonable and necessary legal fees incurred in bringing this action as determined by the Court and set forth in the Affidavit of Cassidy M. Stalley in the amount of \$19,821.85. That a judgment is rendered for Petitioner and against Ramos in the amount of \$19,821.85.” R. 5185. This does not provide for sufficient findings of facts for this Court to review, therefore, because this Court cannot infer whether there was an error in discretion, this issue should be remanded back to the circuit court for more appropriate findings of fact.

CONCLUSION

This case presents a variety of complexities and conundrums. While on the one hand, the protection of vulnerable adults from abuse, neglect, abandonment, or exploitation is a laudable and necessary state endeavor, the changing definition of family creates equally evolving notions of household, parent, child, support and economics. It is undisputed that but for Jennifer Ramos, James Bruggeman would have been alone in this world. She was cared for by him and, later, cared for him. She was the only family he knew in his later years, having been unmarried, without children, and no close relationship with siblings or other collateral family members. Mr. Bruggeman fully intended to benefit Ms. Ramos and her children through his testamentary intentions, and he appointed her as his agent and decision maker whenever his capacity was determined

to be in decline. That trust was communicated to attorney Michael Day at a time when Mr. Bruggeman's capacity was not questioned.

When Ms. Ramos sought help from the V.A. to evaluate Mr. Bruggeman and assist with his declining condition, the bureaucratic gears ground to a halt, leaving them to fend for themselves. When Mr. Bruggeman was adamant in his protestations about transitioning to assisted or skilled nursing facilities, Ms. Ramos stood by him, offering her continued support and caregiving services to the best of her ability. Nobody else did that. When she voiced their concern over the enormous cost to Mr. Bruggeman of an institutional placement, she was accused of greed and exploitation. She has been attacked, vilified and accused of all manner of neglect and exploitation without credible evidence and under a statutory scheme that is destined to set families and caregivers up to fail due to the uncertainty arising from the arbitrary enforcement of the rather recently enacted statute. And at the core of this conundrum was the court's refusal to hear from the man at the center of it all, Mr. Bruggeman, at a time when there had been no formal determination by applicable standards that he was unable to come forward and tell his side of the story. Viewed through this prism, it is easy to see how the circuit court erred in so many ways in the adjudication of these issues.

Dated this 4th day of August, 2020.

Stephen J. Wesolick
Mariah C. Bloom
Wesolick Law Firm /
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Rapid City, South Dakota 57701
(605) 721-7665 tel
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Counsel for Jennifer Ramos

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type volume limitation provided for in SDCL § 15-26A-66(b)(4). This brief contains 9,365 words. I have relied on the word count of the word processing system used to prepare this brief.

Dated this 4th day of August, 2020.

Stephen J. Wesolick
Mariah C. Bloom

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellant's Brief were served by depositing the same in the United States Post Office in Rapid City, South Dakota, with first class postage thereon fully prepaid this 4th day of August, 2020.

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Pierre, SD 57501

Stephen J. Wesolick
Mariah C. Bloom

APPENDIX

Permanent Order for Protection dated March 17, 2020..... App.1

Findings of Fact and Conclusions of Law (which include a Judgment and Order)
signed by the circuit court on April 6, 2020, having a Notice of Entry of Order dated
April 16, 2020..... App.4

Judgment and Order Amending Order for Protection *nunc pro tunc* to
March 17, 2020, signed by the circuit court on May 28, 2020, having a
Notice of Entry of Order dated June 3, 2020.....App. 24

Permanent Order for Protection Modification dated June 1, 2020,
signed by the Court on June 8, 2020..... App.30

APPENDIX

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STATE OF SOUTH DAKOTA)
)
COUNTY OF BUTTE)

IN CIRCUIT COURT
4TH JUDICIAL CIRCUIT

VULNERABLE ADULT ABUSE

EX PARTE TEMPORARY PERMANENT
 MODIFICATION

ORDER FOR PROTECTION

TPO NO. 09TPO20-06

PETITIONER

JAMES BRUGGEMAN

First Middle Last

By Substitute Petitioner (name and DOB):
BLACK HILLS ADVOCATE LLC

On behalf of the Vulnerable Adult Petitioner.

V.

RESPONDENT

JENNIFER RAMOS

First Middle Last

Relationship to Petitioner:

Respondent's Address:

2231 WILLOW CREEK ROAD

BELLE FOURCHE SD 57717

CAUTION: Weapon Involved

PETITIONER IDENTIFIER

12/16/1944

Date of Birth of Petitioner

FILED

MAR 17 2020

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

Substitute Petitioner's Relationship to Petitioner:

RESPONDENT IDENTIFIERS:

| SEX | RACE | HEIGHT | WEIGHT |
|-------------------|------|---------------|---------|
| F | | 5'2" | 105 |
| EYES | HAIR | DATE OF BIRTH | |
| BRO | | 05/13/1983 | |
| DRIVERS LICENSE # | | STATE | EXPDATE |
| 00854130 | | SD | |

Distinguishing Features:

THE COURT FINDS:

That it has jurisdiction over the parties and subject matter, and the Respondent has been provided with reasonable notice and opportunity to be heard, and that in the case of an ex parte order, the Respondent will be provided with reasonable notice and opportunity to be heard sufficient to protect the Respondent's due process rights.

THE COURT ORDERS:

That the Respondent is restrained from acts of physical abuse, emotional and psychological abuse, neglect, and financial exploitation of a vulnerable adult.

That the Respondent is restrained from contact with the Petitioner by any direct or indirect means except as authorized in this Order.

Additional findings and orders are on the following pages.

This Order shall be effective 03/17 2020 through 03/17 2023
Month/Day Year Month/Day Year

Only this Court can change this Order.

WARNING TO RESPONDENT: This Order shall be enforced, even without registration, by courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands (18 U.S.C. §2265). Crossing state, territorial, or tribal boundaries to violate this Order may result in federal imprisonment (18 U.S.C. §2262).

APP. 1

ADDITIONAL FINDINGS:

This matter came before this Court on this day and the following parties appeared personally:

- Petitioner Petitioner's Attorney CASSIDY STALLEY Other _____
- Substitute Petitioner S. Petitioner's Attorney CASSIDY STALLEY Other _____
- Respondent Respondent's Attorney SHILOH MACNALLY Other _____

- 1) This Court **FINDS** that, without admitting to the allegations in the Petition, the Respondent waives further hearing, findings of fact, and conclusions of law, and stipulates to the entry of an Order of Protection on the terms specified below.
- 2) Having considered the evidence presented and any affidavits and pleadings on file, this Court **FINDS**:
 - A. That jurisdiction and venue are properly before this Court;
 - B. That the above-named Petitioner is eligible for a protection order pursuant to SDCL ch. 21-65;
 - C. By a preponderance of the evidence that "vulnerable adult abuse" as defined by SDCL 21-65-1(4), has occurred; and
 - D. That the Respondent had actual notice of the hearing and an opportunity to participate.

ADDITIONAL ORDERS:

- 1) The Respondent is excluded from the Petitioner's residence listed in 2B.
- 2) The Respondent shall not come within a distance of 100 FEET from the following persons and places:
 - A. The Petitioner personally
 - B. The Petitioner's residence (street/apt) _____
(city) _____, (state) _____ (zip) _____ - _____
 - C. The Petitioner's place of employment (street) _____
(city) _____, (state) _____ (zip) _____ - _____
 - D. Other places (street/apt) 1821 VALLEY DR
(city) BELLE FOURCHE, (state) SD (zip) 57717 - _____
(street/apt) 1210 UNION ST
(city) BELLE FOURCHE, (state) SD (zip) 57717 - _____
(street/apt) _____
(city) _____, (state) _____ (zip) _____ - _____

This distance restriction applies unless otherwise specified in this Order.

- 3) The Respondent is restrained from exercising any powers on behalf of the Petitioner through a court-appointed guardian, conservator, or guardian ad litem, an attorney in fact, or another third party.
- 4) This Court **FINDS** that Respondent has financially exploited the Petitioner pursuant to SDCL 21-65-1(7) and 21-65-12 and **ORDERS**:
 - A. The Respondent is restrained from exercising control over the funds, benefits, property, resources, belongings, or assets of the Petitioner, except as otherwise provided for in this Order.
 - B. The Respondent shall return custody or control of the funds, benefits, property, resources, belongings, or assets:
 - To the Petitioner.
 - To the Petitioner's guardian / conservator / attorney in fact, namely BLACK HILLS ADVOCATE.
 - C. The Respondent shall follow the instructions of the guardian, conservator, or attorney in fact of the Petitioner, namely BLACK HILLS ADVOCATE.
 - D. The Respondent is prohibited from transferring any funds, benefits, property, resources, belongings, or assets of the Petitioner to any person other than the Petitioner, except as otherwise provided in this Order.

APP. 2

5) Phone calls, emails, third party contact, including correspondence direct or indirect, are not permitted, to Petitioner, except as follows:

NONE

6) Other relief as follows: TURN OVER ALL RENTS, KEYS, PROCEEDS FROM 2014 TO BLACK HILLS ADVOCATE. PROVIDE ACCOUNTING OF ALL RENTS LISTED IN 2D FROM 2014 AND IMMEDIATELY CONVEY WILLOW CREEK PROPERTY TO JAME BRUGGEMAN.

WARNING TO RESPONDENT: You may be held in contempt for violating this Protection Order even if any person protected by the Order initiates the contact or invites you to violate the Order's prohibitions. Only the court can change the Order; the protected person cannot waive any of its provisions.

AND IT IS FURTHER ORDERED THAT: the Petitioner shall, immediately upon the granting of this Order, deliver two copies of this Order to the sheriff of this county. One copy shall be personally served by the sheriff upon the Respondent, unless personal service has been acknowledged below.

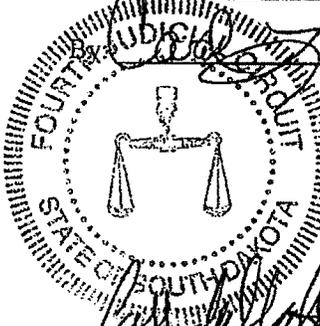
DATED 3 / 17 / 2020

Service of this Order is authorized on any day including Sunday

Michelle K. Brown
Judge

Attest: Laura Schriber, Clerk of Courts

Michelle K. Brown, Deputy



**NOTICE OF ENTRY OF ORDER AND
ACKNOWLEDGMENT OF PERSONAL SERVICE**

I acknowledge receipt of a copy of this Order of Protection.

[Signature]
Petitioner/
Substitute Petitioner
(circle one)

3-17-2020
Date

[Signature]

3/17/20
Respondent Date

FILED

MAR 17 2020

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

App. 3

2. James C. Bruggeman (“Bruggeman”) is a 75-year old veteran with severe neurocognitive impairment, eligible for protection pursuant to SDCL ch. 21-65.

3. Respondent, Jennifer Ramos (“Ramos”), is a long-time, close family friend of Bruggeman. Since 2012, Ramos has been Bruggeman’s caretaker and power of attorney for finances, as well as power of attorney for health care.

4. Petitioner, Black Hills Advocate, LLC (“Black Hills Advocate), is Bruggeman’s permanent guardian and conservator, and is therefore a “substitute petitioner” pursuant to SDCL 21-65-1(14).

5. This Court has jurisdiction over the parties and subject matter of this case; venue is proper.

6. Ramos was provided with reasonable notice and opportunity to be heard sufficient to protect her due process rights.

7. Throughout her life, Bruggeman has bought Ramos things, including several cars.

8. In 2011, Bruggeman was diagnosed with vascular dementia. Exhibit 1 at 4237-4242.

9. His close friends, including Ramos, provided support for Bruggeman by administering medication, paying bills, cleaning, doing laundry, shopping, and preparing meals.

10. Bruggeman also received home health care assistance through the VA. Ex. 1 at 4242-4245.

11. In January 2012, it was noted that Ramos was taking over as Bruggeman's caregiver. Ex. 1 at 4165.

12. In June 2012, shortly after his dementia diagnosis, Bruggeman updated his Durable Power Attorney with Health Care Directives, appointing Ramos as his attorney-in-fact. Exhibit 2.

13. At the same time, Bruggeman also signed a new Last Will and Testament, naming Ramos as his personal representative and leaving his entire estate to Ramos. Exhibit 3.

14. In late 2012, Bruggeman liquidated assets and purchased a residential property, at 1210 Union Street, Belle Fourche, South Dakota 57717 ("Union Street house"), for \$150,000.00, for Ramos and her children. Testimony of Ramos and Niehaus.

15. Bruggeman was the only individual listed on the mortgage and deed for the Union Street house. Exhibit 5; Testimony of Ramos.

16. At that time, his financial advisor noted Bruggeman's forgetfulness. Testimony of Niehaus.

17. Ramos and her children moved into the Union Street house in late 2012. Testimony of Ramos.

18. In May 2014, the VA recommended that Bruggeman seek a higher level of care. Ex. 1 at 3722.

19. Yet, Ramos, as Bruggeman's designated caregiver, left Bruggeman to manage and live alone at his Valley Drive home until on or about December 31, 2014,

when Ramos finally moved Bruggeman into a small garage in the backyard of the Union Street house. Testimony of Ramos.

20. At that time, Ramos placed a baby monitor in the garage to monitor Bruggeman and his needs. Testimony of Ramos; Ex. 1 at 3530.

21. From 2014 to 2017, Bruggeman continued to decline while his medical providers continued to recommend higher levels of care. And Ramos, as his primary caregiver, did the minimum. Bruggeman continued living alone in the garage, and Ramos continued to isolate Bruggeman, admitting that she refused outside assistance for Bruggeman, including Meals on Wheels, home bath aides, and homemaking, even though those things would have helped him. Testimony of Ramos; Ex. 1 at various.

22. In January 2015, Bruggeman had a neurocognitive evaluation and was diagnosed by Dr. Michael J. Huxford with major neurocognitive disorder. Impairment in cognitive functioning, specifically in areas of attention and working memory, were noted. Ex. 1 at 3544-3547.

23. In December 2016, Bruggeman underwent another round of neurocognitive testing, given concerns of worsening cognition and increased behavioral difficulties; he was again diagnosed with major neurocognitive disorder. Ex. 1 at 3124-3133.

24. In April 2017, the VA strongly recommended that Bruggeman needed increased supervision and assistance due to his cognitive decline. The VA recommended that Bruggeman receive 24/7 care and supervision, due to his behaviors of increased disorientation and sun-downing. Ex. 1 at 3058-3061; 3040.

25. In May 2017, the VA again strongly recommended that Bruggeman needed increased supervision and assistance due to his worsening cognitive decline. The VA recommended it would be in Bruggeman's best interest to have a higher level of care, such as from a nursing home, which could provide 24/7 care and supervision. Ex. 1 at 3037-41.

26. The VA gave Ramos three months to pursue a long-term placement that could provide 24/7 care and supervision to Bruggeman. Ex. 1 at 3039; Testimony of Ramos.

27. However, instead of following the VA's recommendation, Ramos informed the VA in late May 2017 that she would not be placing Bruggeman in long-term care because of the financial impact it would have on herself and her children. Ex. 1 at 3032; Ex. 6.

28. Ramos admitted that she had commingled her assets with Bruggeman's and that his name was on her home loan and title. Ramos stressed that she did not want to lose her home and cars. Ramos conveyed that she and her family would be homeless if Bruggeman was placed in a long-term care facility. Ex. 6.

29. Upon receipt of this information, the VA immediately voiced its concerns about possible financial exploitation and isolation of Bruggeman by Ramos to the South Dakota Department of Human Services. Ex. 16.

30. Due to Ramos' refusal to put Bruggeman's needs above her own and move him into a long-term care facility, Bruggeman was discharged from home health services.

Bruggeman continued to live alone in the garage with a baby monitor; Ramos admitted he was like a toddler. Ex. 1 at 3026-3029; Testimony of Ramos.

31. Ramos testified she went to every appointment with Bruggeman. Therefore, Ramos was well-aware of the VA's recommendations that it would be in Bruggeman's best interest to have a higher level of care, such as from a nursing home, to provide 24/7 care and supervision. Further, Ramos knew she was Bruggeman's health care power of attorney and that Bruggeman lacked the capacity to make health care decisions for himself.

32. As his caretaker and health care power of attorney, Ramos neglected Bruggeman as, without reasonable medical justification, Ramos failed to provide adequate medical care for Bruggeman, when Bruggeman had the means available to obtain the recommended care.

33. On March 26, 2018, Ramos and her husband, Clay Runyan, made an offer to purchase a home at 2231 Willow Creek Road, Belle Fourche, South Dakota ("Willow Creek house"), for a purchase price of \$300,000.00, with financial contingency of obtaining a mortgage. Ex. 2 at 663-668; Ex. 7.

34. At some point between March 26, 2018, and April 3, 2018, Ramos contacted Wells Fargo, seeking to be added as a supplemental account owner/third party authorized individual on Bruggeman's Wells Fargo Advisors brokerage accounts. Testimony of Niehaus.

35. Troy Niehaus, financial advisor for Wells Fargo Advisors, testified that given the significance of adding someone as a supplemental account owner/third party

authorized individual, thereby granting them authority over potentially large sums of money, Niehaus requested that Bruggeman meet him in person to discuss the gravity of giving Ramos such access. Testimony of Niehaus.

36. On April 3, 2018, Niehaus met with Bruggeman and Ramos. Testimony of Niehaus.

37. Niehaus testified that during that meeting, Bruggeman conveyed he wanted to add Ramos as a supplemental account owner/third party authorized individual, in case he would become incapacitated for any reason and money and/or securities needed to be sold and moved for his benefit. Testimony of Niehaus.

38. Niehaus prepared the necessary paperwork and obtained Bruggeman's and Ramos' signatures, granting Ramos third party authorization to Bruggeman's Wells Fargo brokerage accounts, "in case of health issues." Ex. 8.

39. Niehaus stressed that the supplemental account owner/third party authorization did not authorize Ramos to use funds for herself, only for the use and benefit of Bruggeman and his health care needs. Testimony of Niehaus.

40. Niehaus also testified that, during this meeting on April 3, 2018, it was discussed that Ramos and Bruggeman were together looking to purchase a new home, in which Bruggeman would live with Ramos and her children. Niehaus understood from this discussion that Bruggeman would be purchasing a home with more space so that he could live within the main home – as opposed to living in a garage in the backyard – and Ramos could help Bruggeman more conveniently and consistently. Testimony of Niehaus.

41. Ramos admitted she did not tell Niehaus that Bruggeman had been diagnosed with major neurocognitive disorder. Testimony of Niehaus; Testimony of Ramos.

42. Ramos also admitted that she failed to inform Niehaus that the VA was recommending 24/7 care and supervision from a nursing home due to Bruggeman's worsening cognitive decline, increased disorientation, and sun-downing. Testimony of Niehaus; Testimony of Ramos.

43. Several days later, on April 27, 2018, Ramos submitted an Amendment to Purchase Agreement on the Willow Creek house, removing Runyan as a purchaser, but – more notably – removing her financial contingency and advising that she would be proceeding with a cash sale. Ex. 2 at 654; Ex. 9; Testimony of Ramos.

44. On April 30, 2018, the sellers countered, requesting that Ramos provide proof from Wells Fargo Bank and Pioneer Bank, verifying the availability of funds, as well as Ramos' ability to use all said funds for the sole purpose of purchasing the Willow Creek house. Ex. 2 at 653; Ex. 10; Testimony of Ramos.

45. Ramos admitted that, less than 24 hours later, she contacted the VA and requested that Bruggeman be declared incompetent. Ex. 11; Testimony of Ramos.

46. Consequently, another neuropsychological evaluation was completed on May 9, 2018, by Dr. Denning. Dr. Denning noted that Bruggeman has "deficits in the following areas: recent poor judgment (financial), disorientation and confusion, and increased impulsivity and inhabitation." Dr. Denning found that Bruggeman "no longer has the capacity to care for himself or make decisions that are in his best interests." It

was again recommended that Bruggeman be placed in a higher level of care, such as a nursing home or assisted-living facility. Ex. 1 at 3014-3022; Ex. H; Testimony of Ramos.

47. Ramos admitted that, five days later, on May 14, 2018, she withdrew \$228,756.46 from Bruggeman's Wells Fargo brokerage accounts. Testimony of Ramos; Testimony of Niehaus.

48. Ramos admitted that, a week after that, on May 21, 2018, she withdrew \$100,000.00 from Bruggeman's Pioneer Bank and Trust account. Ex. 12; Testimony of Ramos; Testimony of Niehaus.

49. Ramos admitted that, on May 21, 2018 – only two weeks after having Bruggeman declared incompetent – she purchased the Willow Creek house by using the approximately \$328,000.00 cash she withdrew from Bruggeman's accounts. Testimony of Ramos.

50. Ramos admitted she is the only individual on the deed and purchase agreement for the Willow Creek house. Testimony of Ramos; Exhibit 2 at 686.

51. At that time, Ramos was Bruggeman's caretaker and power of attorney.

52. Ramos willfully financially exploited Bruggeman by taking and exercising control over his funds with the intent to defraud Bruggeman of his funds for her own financial gain and benefit.

53. Niehaus testified that in June 2018, following the withdrawal of over \$200,000.00 from Bruggeman's Wells Fargo brokerage accounts, Bruggeman contacted Niehaus several times via telephone, often with back-to-back phone calls. Niehaus

related that at that time Bruggeman expressed concern about his available balances and requested notification if Ramos attempted to make additional transactions. Bruggeman also contacted Niehaus several times, asking to remove Ramos as supplemental account owner/third party authorized individual, but then calling back directing to leave Ramos as a supplemental account owner/third party authorized individual on his brokerage accounts. Testimony of Niehaus.

54. The purchase of the Willow Creek house by Ramos was not a transaction for the use and benefit of Bruggeman and his needs, but instead a financial loss to Bruggeman, and a financial gain to Ramos and for her use and benefit.

55. While Ramos testified she moved Bruggeman into the Willow Creek house when she and her children moved in, the evidence suggests otherwise. Testimony of Ramos.

56. Indeed, Niehaus testified that, during a telephone conversation with Bruggeman in July 2018, Bruggeman related to Niehaus that he had not moved to the Willow Creek house and “may not ever move” to the Willow Creek house. Testimony of Niehaus.

57. In August 2018, after securing a new house for herself and her children entirely in her name only, Ramos finally moved Bruggeman into an assisted living center, Serenity Corner Assisted Living, in Spearfish, South Dakota. Testimony of Ramos.

58. Given Niehaus’ telephone calls with Bruggeman in June and July, and Bruggeman’s statement that he may not ever move into the Willow Creek house, Niehaus

testified he contacted Wells Fargo's Elder Client Initiatives to perform an investigation.

Testimony of Niehaus.

59. Wells Fargo subsequently restricted Bruggeman's Wells Fargo investment accounts on or about August 2018. Testimony of Niehaus.

60. In September 2018, Bruggeman signed a document revoking Ramos as supplemental account owner/third party authorized individual on his brokerage accounts.

Testimony of Niehaus; Ex. 14.

61. Throughout 2018, and while acting as his power of attorney, Ramos admitted she took Bruggeman's money at Pioneer Bank and Trust for her and her children's own use and benefit. Ramos admitted to taking Bruggeman's funds to purchase such things as, but not limited to, an Xbox Live subscription, Rod Stewart tickets, clothing, and a massage. Ramos also admitted she took approximately \$8,000.00 from Bruggeman's account to construct a pole barn and make other home improvements at the Willow Creek house. All of this was for her and her children's own personal benefit, not Bruggeman's. Ex. 13; Testimony of Ramos.

62. Ramos' actions, as Bruggeman's power of attorney, constitute financial exploitation of a vulnerable adult, with the intent to defraud Bruggeman by financial loss to him and financial gain to herself.

63. In January 2019, Bruggeman told Ramos he wanted to move to Arizona with a friend. Law enforcement was involved. Butte County Chief of Police Marlyn Pomrenke testified that Bruggeman was adamant that he was going to go to Arizona. However, Pomrenke testified that it was apparent Bruggeman was in no condition to

make such a move and that staying at an assisted living facility was in his best interests; Pomrenke testified if Bruggeman were his dad, he would not have allowed his dad to leave South Dakota. Pomrenke advised Ramos to contact an attorney. Testimony of Pomrenke and Ramos.

64. Ramos claimed that she did everything in her power to prevent Bruggeman from leaving his assisted living facility and going to Arizona with his friend, but in the end there was nothing she could do. However, Ramos testified approximately five times that, given her status as power of attorney and power of attorney health care, she “had the power” and that she “always had the power.” Ramos could have stopped Bruggeman from leaving his assisted living facility as his power of attorney health care and failed to do so. Ramos was also well-aware that Bruggeman needed 24/7 supervision and that he was not in a position to make his own decisions. Testimony of Ramos.

65. Bruggeman returned to South Dakota in April 2019 and was promptly admitted to the VA, where he was diagnosed with failure to thrive. Multiple witnesses testified that Bruggeman was in very rough shape. Ramos claimed that he had been in a rehab facility for months after breaking his back and was covered in bruises.

66. Despite the VA again recommending 24/7 supervision and a nursing home level of care to ensure Bruggeman’s safety and assistance with ADLs, Ramos again had Bruggeman discharged to her care in early May 2019. Ramos again claimed that Bruggeman did not have enough money to afford higher levels of care. Ex. 17; Testimony of Fleming and Ramos.

67. Days after he was discharged to Ramos' care, Ramos brought Bruggeman back to the VA emergency room. At that time, the VA noted that Bruggeman was covered in bruises and that it was evident Ramos could not care for Bruggeman properly. The VA promptly contacted the Department of Human Services, noting that it was apparent that Ramos was depending on Bruggeman's finances, prohibiting his money from going towards payment of an appropriate and necessary placement. Ex. 18; Testimony of Fleming and Ramos.

68. The Department of Human Services then became heavily involved in Bruggeman's case, and Bruggeman was not released to Ramos' care. Since May 2019, Bruggeman has been placed at the VA. Testimony of Fleming.

CONCLUSIONS OF LAW

To the extent that any Conclusion of Law is improperly designated as such, it shall be considered as a Finding of Fact.

1. A vulnerable adult or substitute petitioner may seek relief from vulnerable adult abuse by filing a petition and affidavit in the circuit court. SDCL 21-65-2.
2. A vulnerable adult is a person sixty-five years of age or older who is unable to protect himself or herself from abuse as a result of age or mental or physical condition, or an adult with a disability. SDCL 21-65-1(15).
3. Bruggeman is a 75-year old veteran with severe neurocognitive impairment and is therefore a vulnerable adult.

4. A substitute petitioner is a family or household member, guardian, conservator, attorney-in-fact, or guardian ad litem for a vulnerable adult, or other interested person. SDCL 21-65-1(14).

5. Black Hills Advocate is Bruggeman's permanent guardian and conservator and is therefore a substitute petitioner.

6. Vulnerable adult abuse is any of the following:

- (a) Physical abuse;
- (b) Emotional and psychological abuse;
- (c) Neglect; or
- (d) Financial exploitation.

SDCL 21-65-1(4).

7. Vulnerable adult abuse must be proven by a preponderance of the evidence. SDCL 21-65-11.

8. Neglect means harms to the health or welfare of a vulnerable adult, without reasonable medical justification, caused by a caretaker, within the means available for the vulnerable adult, including the failure to provide adequate food, clothing, shelter, or medical care. SDCL 21-65-1(14); SDCL 22-46-1(6).

9. A caretaker is a related or nonrelated person who has the responsibility for the health or welfare of a vulnerable adult as a result of assuming the responsibility voluntarily, by contract, by receipt of payment for care, or by order of the court. SDCL 21-65-1(2); SDCL 22-46-1(2).

10. Ramos was Bruggeman's caretaker and durable power of attorney health care.

11. Petitioner has shown by a preponderance of the evidence that vulnerable adult abuse has occurred by Ramos by neglect of Bruggeman. As his caretaker and health care power of attorney, Ramos neglected Bruggeman as, without reasonable medical justification, Ramos failed to provide adequate medical care for Bruggeman, when Bruggeman had the means available to obtain the recommended care.

12. Financial exploitation is the wrongful taking or exercising of control over property of a vulnerable adult with intent to defraud a vulnerable adult, by a person who stands in a position of trust or confidence. SDCL 21-65-1(7); SDCL 22-46-1(5).

13. Conduct is intentional when a person acts or fails to act for the purpose of causing injury or knowing that injury is substantially certain to occur. Knowledge or intent may be inferred from the person's conduct and the surrounding circumstances. South Dakota Civil Pattern Jury Instructions 20-50-20.

14. "Defraud" means to deprive another of a right or property by fraud, that is, to gain or seek to gain some unfair or dishonest advantage by any deception, deceit, artifice or unlawful act or breach of duty or confidence. To act with "intent to defraud" means to act willfully and with the specific intent to deceive or cheat, ordinarily for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. South Dakota Criminal Pattern Jury Instructions, 1-11-5.

15. A person who stands in a position of trust or confidence is a person who is a caretaker for, or who is in a confidential relationship with, the vulnerable adult. SDCL 21-65-1(13)(b) and (c).

16. Ramos was a person who stood in a position of trust or confidence, as she was Bruggeman's caretaker and power of attorney.

17. Petitioner has shown by a preponderance of the evidence that vulnerable adult abuse has occurred at the hands of Ramos through financial exploitation of Bruggeman. While in her capacity of caretaker and power of attorney of Bruggeman, Ramos willfully and wrongfully took over \$328,000.00 to purchase a house for herself, as well as making numerous other purchases for herself and her children, with the intent to cause financial loss to Bruggeman and/or to bring about financial gain for herself.

18. A prevailing party may recover expenditures necessarily incurred in gathering and procuring evidence or bringing the matter to trial. Such expenditures include costs of telephonic hearings, costs of telephoto or fax charges, fees of witnesses, interpreters, translators, officers, printers, service of process, filing, expenses from telephone calls, copying, costs of original and copies of transcripts and reporter's attendance fees, court appointed experts, and other similar expenses and charges. SDCL 15-17-37.

19. Attorney's fees may be taxed as disbursements if allowed by specific statute. SDCL 15-17-38.

20. SDCL 21-65-15 specifically states that Ramos may be ordered to pay attorney's fees and court costs of the vulnerable adult and substitute petitioner.

JUDGMENT AND ORDER

WHEREFORE, based upon the Court's Findings of Fact and Conclusions of Law, the Court hereby ORDERS as follows:

1. That Ramos is restrained from acts of physical abuse, emotional and psychological abuse, neglect, and financial exploitation of a vulnerable adult.
2. That Ramos is restrained from contact with Bruggeman by any direct or indirect means.
3. That Ramos shall not come within 100 feet of Bruggeman.
4. That Ramos shall not come within 100 feet of 1714 8th Ave, Belle Fourche, South Dakota.
5. That Ramos shall not come within 100 feet of 1210 Union Street, Belle Fourche, South Dakota.
6. That Ramos is restrained from exercising any powers on behalf of Bruggeman through a court-appointed guardian, conservator, or guardian ad litem, an attorney-in-fact, or another third party.
7. That Ramos is restrained from exercising control over the funds, benefits, property, resources, belongings, and assets of Bruggeman.
8. That Ramos shall immediately return custody or control of all funds, benefits, property, resources, belongings, and assets of Bruggeman to Bruggeman's guardian and conservator, Black Hills Advocate.
9. That Ramos shall follow the instructions of Bruggeman's guardian and conservator, Black Hills Advocate.
10. That Ramos is prohibited from transferring any funds, benefits, property, resources, belongings, and assets of Bruggeman to any person other than Bruggeman and Bruggeman's guardian and conservator, Black Hills Advocate.

11. That Ramos is restrained from all phone calls, emails, third party contact, including direct or indirect, to Bruggeman.

12. That Ramos shall immediately turn over all keys, rental agreements, rents, and proceeds she has collected from 2014 to the present for the rental of the residences located at 1714 8th Ave, Belle Fourche, South Dakota, and the home and/or garage apartment at 1210 Union Street, Belle Fourche, South Dakota to Black Hills Advocate.

13. That Ramos shall immediately provide an accounting of all rents and proceeds collected from 2014 to the present for the rental of the residences located at 1714 8th Ave, Belle Fourche, South Dakota, and the home and/or garage apartment at 1210 Union Street, Belle Fourche, South Dakota to Black Hills Advocate.

14. That Ramos shall immediately convey the property located at 2231 Willow Creek Road, Belle Fourche, South Dakota, by warranty deed.

15. That Ramos shall pay Petitioner's reasonable and necessary legal fees incurred in bringing this action as determined by the Court and set forth in the Affidavit of Cassidy M. Stalley in the amount of \$19,821.85. That a judgment is rendered for Petitioner and against Ramos in the amount of \$19,821.85.

Let Judgment be entered accordingly.

BY THE COURT: Signed: 4/16/2020 4:03:13 PM

Michelle Comer

Michelle K. Comer
Circuit Court Judge

Attest:
Jensen, Alana
Clerk/Deputy



App. 21

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2020, I sent to:

Mr. Stephen J. Wesolick
Aspen Legacy Planning/Wesolick Law Firm
909 St. Joseph Street, Ste. 202
Rapid City, SD 57701
stephen@aspenlegacyplanning.com

Ms. Mariah C. Bloom
Aspen Legacy Planning/Wesolick Law Firm
909 St. Joseph Street, Ste. 202
Rapid City, SD 57701
mariah@aspenlegacyplanning.com

by Notice of Electronic Filing generated by the Odyssey File & Serve system, a true and correct copy of **Notice of Entry of Findings of Fact and Conclusions of Law** relative to the above-entitled matter.

/s/ Cassidy M. Stalley
Cassidy M. Stalley

property, resources, belongings, or assets other than title to real property. The Court is of the opinion that the Order for Protection entered on March 17, 2020, ("Order for Protection") followed by the Findings of Fact and Conclusions of Law, with Judgment and Order, entered on April 6, 2020, ("Judgment and Order") shall be amended to remove the requirement of Respondent's conveyance of title to the real property, relying upon SDCL 21-65-16. After hearing argument of counsel and testimony of Respondent, the Court is also of the opinion that Respondent shall be ordered to return to Petitioner the funds in the amount of \$296,500.00, representing the amount that Respondent admits she withdrew from Petitioner's bank account(s) to purchase the Willow Creek Property. It is, therefore,

ORDERED that the Order for Protection and the Judgment and Order are hereby amended *nunc pro tunc* to remove the requirement that Respondent immediately convey to Petitioner title to the Willow Creek Property by warranty deed. It is further,

ORDERED that the Order for Protection and the Judgment and Order are hereby amended *nunc pro tunc* to require Respondent to immediately deliver to Petitioner funds, benefits, property, resources, belongings, or assets to the Petitioner's Guardian and Conservator, namely Black Hills Advocate, LLC, which includes, but is not limited to the \$296,500.00 Respondent admits she removed from Petitioner's accounts to purchase the real Willow Creek property. It is further,

ORDERED that the Order for Protection and the Judgment and Order are hereby amended *nunc pro tunc* to require that Respondent not sell, convey or transfer the Willow Creek Property, or permit any encumbrance against it and, in general, to maintain the property and pay taxes on it pending appeal or further order of the Court. It is further,

ORDERED that Petitioner shall have a judgment against Respondent in the amount of \$296,500.00, which sum represents the funds used to purchase the real property located at 2231 Willow Creek Road, Belle Fourche, South Dakota. Execution on said judgment of \$296,500.00 shall be stayed upon payment of a \$1,000.00 supersedeas bond by Respondent pending appeal. It is further,

ORDERED that the Order for Protection and the Judgment and Order are hereby amended *nunc pro tunc* to reflect the proper addresses of Petitioner's rental properties, incorrectly listed in 2B of the Order for Protection, to: 1210 Union Street, Belle Fourche South Dakota; and 830 Lawrence Street, Belle Fourche, South Dakota. Respondent shall not come within 100 feet of these properties; shall be restrained from exercising control over such properties; and shall immediately turn over all rents, keys, and proceeds from 2014 to the present to Black Hills Advocate. Petitioner will also immediately provide an accounting of all rents on the Belle Fourche properties listed above from 2014 to the present to Black Hills Advocate. It is further,

ORDERED that all Findings of Fact and Conclusions of Law are hereby incorporated by this reference as though fully set forth herein. It is further,

ORDERED that this Order, and the portions of the Protection Order not revised herein, shall continue to be in full force and effect and all terms therein and in this Order shall continue to apply until March 17, 2023 or until otherwise ordered by the Court. It is further,

ORDERED that Respondent's Application for Stay is GRANTED and Respondent shall be required to deposit a cash supersedeas bond in the amount of \$1,000.00 to suspend enforcement of the Order for Protection and Judgment and Order. Upon Respondent's deposit of

the cash supersedeas bond with the Clerk of Courts all further proceedings in this action shall be suspended and stayed pending appeal or further order of the Court.

IT IS FURTHER ORDERED that the Petitioner shall, immediately upon the granting of this Amended Protection Order, deliver two (2) copies of the same to the Butte County Sheriff. One copy shall be personally served by the Sheriff upon Respondent.

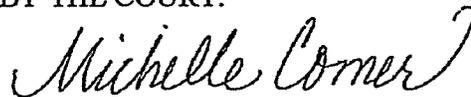
All other relief not specifically granted by this order is DENIED.

WARNING TO RESPONDENT: You may be held in contempt for violating this Amended Protection Order, even if any person protected by the Order initiates the contact or invites you to violate the Amended Order's prohibitions. Only the court can change this Amended Order and original Protection Order; the protected person cannot waive any of its provisions.

Dated this _____ day of May, 2020, effective, however, the 17th day of March, that being the date of the hearing affording judicial basis for this order.

Signed: 5/28/2020 4:04:26 PM

BY THE COURT:



Michelle K. Comer
Circuit Court Judge

Attest
Schmoker, Laura
Clerk/Deputy



I hereby certify that on June 3, 2020, I sent to:

Mr. Stephen J. Wesolick
Aspen Legacy Planning/Wesolick Law Firm
909 St. Joseph Street, Ste. 202
Rapid City, SD 57701
stephen@aspenlegacyplanning.com

Ms. Mariah C. Bloom
Aspen Legacy Planning/Wesolick Law Firm
909 St. Joseph Street, Ste. 202
Rapid City, SD 57701
mariah@aspenlegacyplanning.com

by Notice of Electronic Filing generated by the Odyssey File & Serve system, a true and correct copy of **Notice Of Entry Of Order** relative to the above-entitled matter.

/s/ Cassidy M. Stalley

Cassidy M. Stalley

STATE OF SOUTH DAKOTA)
)
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|
| VULNERABLE ADULT ABUSE <input type="checkbox"/> EX PARTE TEMPORARY <input checked="" type="checkbox"/> PERMANENT <input checked="" type="checkbox"/> MODIFICATION | ORDER FOR PROTECTION TPO NO. <u>09TPO20-000006</u> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|

PETITIONER
JAMES C BRUGGEMAN
First Middle Last

PETITIONER IDENTIFIERS:
12/16/1944
Date of Birth of Petitioner

By Substitute Petitioner (name and DOB):
BLACK HILLS ADVOCATE LLC
On behalf of the Vulnerable Adult Petitioner.

Substitute Petitioner's Relationship to
Petitioner:

**V.
RESPONDENT**

JENNIFER RAMOS
First Middle Last

RESPONDENT IDENTIFIERS:

Relationship to Petitioner:

| | | | |
|-------------------|------|---------------|---------|
| SEX | RACE | HEIGHT | WEIGHT |
| F | | 5'2" | 105 |
| EYES | HAIR | DATE OF BIRTH | |
| BRO | | 05/13/1983 | |
| DRIVERS LICENSE # | | STATE | EXPDATE |
| 00854130 | | SD | |

Respondent's Address:
2231 WILLOW CREEK ROAD
BELLE FOURCHE, SD 57717

Distinguishing Features:

CAUTION: Weapon Involved

THE COURT FINDS:

That it has jurisdiction over the parties and subject matter, and the Respondent has been provided with reasonable notice and opportunity to be heard.

THE COURT ORDERS:

That the Respondent is restrained from acts of physical abuse, emotional and psychological abuse, neglect, and financial exploitation of a vulnerable adult.

That the Respondent is restrained from contact with the Petitioner by any direct or indirect means except as authorized in this Order.

Additional findings and orders are on the following pages.

This order shall be effective 06/01 2020 through 03/17 2023
Month/Day Year Month/Day Year

Only this Court can change this Order.

WARNING TO RESPONDENT: This Order shall be enforced, even without registration, by courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands (18 U.S.C. §2265). Crossing state, territorial, or tribal boundaries to violate this Order may result in federal imprisonment (18 U.S.C. §2262).

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ADDITIONAL FINDINGS:

This matter came before this Court on this day and the following parties appeared personally:

- Petitioner Petitioner's Attorney STALLEY, CASSIDY M Other
 Substitute Petitioner S. Petitioner's Atty Other
 Respondent Respondent's Attorney MACNALLY, SHILOH M Other

- 1) This Court FINDS that, without admitting to the allegations in the Petition, the Respondent waives further hearing, findings of fact, and conclusions of law, and stipulates to the entry of an Order of Protection on the terms specified below.
- 2) Having considered the evidence presented and any affidavits and pleadings on file, this Court FINDS:
- A. That jurisdiction and venue are properly before this Court;
 - B. That the above-named Petitioner is eligible for a protection order pursuant to SDCL ch.21-65;
 - C. By a preponderance of the evidence that "vulnerable adult abuse" as defined by SDCL 21-65-1(4) has occurred; and
 - D. That the Respondent had actual notice of the hearing and an opportunity to participate.

ADDITIONAL ORDERS:

- 1) The Respondent is excluded from the Petitioner's residence listed in 2B.
- 2) The Respondent shall not come within a distance of 100 Feet from the following persons and places:
- A. The Petitioner personally
 - B. The Petitioner's residence (street/apt) _____ (city) _____, (state) _____ (zip) _____
 - C. The Petitioner's place of employment (street) _____ (city) _____, (state) _____ (zip) _____
 - D. Other places (street/apt) 1210 UNION ST (city) BELLE FOURCHE, (state) SD (zip) 57717
830 LAWRENCE ST (city) BELLE FOURCHE, (state) SD (zip) 57717
- This distance restriction applies unless otherwise specified in this Order.
- 3) The Respondent is restrained from exercising any powers on behalf of the Petitioner through a court-appointed guardian, conservator, or guardian ad litem, an attorney in fact, or another third party.
- 4) This Court FINDS that Respondent has financially exploited the Petitioner pursuant to SDCL 21-65-1(7) and 21-65-12 and ORDERS:
- A. The Respondent is restrained from exercising control over the funds, benefits, property, resources, belongings, or assets of the Petitioner, except as otherwise provided for in this Order.
 - B. The Respondent shall return custody or control of the funds, benefits, property, resources, belongings, or assets:
 - To the Petitioner.
 - To the Petitioner's guardian / conservator / attorney in fact, namely _____ (circle)
 - C. The Respondent shall follow the instructions of the guardian, conservator, or attorney in fact of the Petitioner, namely _____
 - D. The Respondent is prohibited from transferring any funds, benefits, property, resources,

APP. 31

belongings, or assets of the Petitioner to any person other than the Petitioner, except as otherwise provided in this Order.

- 5) Phone calls, emails, third party contact, including correspondence, direct or indirect, are not permitted, to Petitioner, except as follows:

NONE

- 6) Other relief as follows: RESPONDENT TO IMMEDIATELY DELIVER TO PETITIONER FUNDS, BENEFITS, PROPERTY, RESOURCES, BELONGINGS, OR ASSETS TO PETITIONER'S GUARDIAN AND CONSERVATOR (BLACK HILLS ADVOCATE LLC), INCLUDING BUT NOT LIMITED TO \$296,500. RESPONDENT SHALL NOT SELL, CONVEY, OR TRANSFER THE WILLOW CREEK PROPERTY OR PERMIT ANY ENCUMBERANCE AGAINST IT AND SHALL MAINTAIN THE PROPERTY AND PAY TAXES ON IT. TURN OVER ALL RENTS, KEYS AND PROCEEDS FROM 2014 TO BLACK HILLS ADVOCATE. PROVIDE ACCOUNTING OF ALL RENTS LISTED IN 2D FROM 2014 TO JAMES BRUGGEMAN.

WARNING TO RESPONDENT: You may be held in contempt for violating this Protection Order even if any person protected by the Order initiates the contact or invites you to violate the Order's prohibitions. Only the court can change the Order; the protected person cannot waive any of its provisions.

AND IT IS FURTHER ORDERED THAT: the Petitioner shall, immediately upon the granting of this Order, deliver two copies of this Order and two copies of the Motion to Modify to the sheriff of this county. One copy of each shall be personally served by the sheriff upon the Respondent, unless personal service has been acknowledged below.

APP. 32

Dated: 06 / 01 / 2020

Signed: 6/8/2020 10:58:47 AM
Service of this Order is authorized on any day including Sunday.

Michelle Comer

JUDGE MICHELLE COMER

Attest: /S/ LAURA SCHMOKER, Clerk of Courts

By: JSBF10201, Deputy



**NOTICE OF ENTRY OF ORDER AND
ACKNOWLEDGMENT OF PERSONAL SERVICE**

I acknowledge receipt of a copy of this Order of Protection.

*Steph... Attorney Representative
for Jennifer Ramos 6/9/2020*

JAMES C BRUGGEMAN, Petitioner;
BLACK HILLS ADVOCATE LLC, Substitute
Petitioner

Date

JENNIFER RAMOS, Respondent

Date

STATE OF SOUTH DAKOTA
Fourth Judicial Circuit Court

I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:

JUN 08 2020

Laura Schroker
Butte County Clerk of Courts

By: *Laura Schroker*

APP. 33

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
No. 29308**

JAMES BRUGGEMAN, by Substitute Petitioner BLACK HILLS ADVOCATE, LLC on
behalf of the Vulnerable Adult Petitioner,

Petitioner and Appellee,

vs.

JENNIFER RAMOS,

Respondent and Appellant.

Appeal from Circuit Court, Fourth Judicial Circuit
Butte County, South Dakota

HONORABLE MICHELLE K. COMER
Circuit Judge

APPELLANT'S CORRECTED BRIEF

ATTORNEYS FOR APPELLANT:

Stephen J. Wesolick
Mariah C. Bloom
WESOLICK LAW FIRM
909 St. Joseph Street, Suite 202
Rapid City, SD 57701

ATTORNEYS FOR APPELLEE:

Cassidy M. Stalley
N. Drew Skjoldal
LYNN, JACKSON, SHULTZ & LEBRUN
909 St. Joseph Street, Suite 800
Rapid City, SD 57701

Shiloh M. MacNally
MACNALLY LAW OFFICE
625 ½ Main Street, Ste. 2
Rapid City, SD 57701
(Circuit court proceedings only)

ORIGINAL NOTICE OF APPEAL FILED APRIL 16, 2020

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PRELIMINARY STATEMENT

Following the guidelines prescribed in SDCL §15-26A-63, Petitioner/Appellee, James Bruggeman, is referred to as “Mr. Bruggeman.” Substitute Petitioner/Appellee, Black Hills Advocate, LLC, is referred to as “BH Advocate.” Respondent/Appellant, Jennifer Ramos, is referred to as “Ms. Ramos.” Citations to the Certified Record are “R. ___” (followed by the applicable page numbers) in the Clerk’s Index. References to Ms. Ramos’s Appendix are “App. ___” (followed by the applicable page numbers). **Citations to the correct Certified Record are “Correct R. ___” (followed by the applicable page numbers). In the Certified Record some page numbers are duplicated, the duplicated page numbers cited in this brief will be included in the attached Appendix “Second App. _____” (followed by the applicable page numbers).**

JURISDICTIONAL STATEMENT

Jennifer Ramos, Respondent, appeals from the following orders, which are all variations or amendments of the same relief:

- (i) Permanent Order for Protection dated March 17, 2020, R.102-104, App.1-3;
- (ii) Findings of Fact and Conclusions of Law (which include a Judgment and Order) signed by the circuit court on April 6, 2020, having a Notice of Entry of Order dated April 16, 2020, R. 5169-5186, R. 5559-5560, App.4-23; **see also Second App. 1-2; Not Second App. 3-4.**

- (iii) Judgment and Order Amending Order for Protection *nunc pro tunc* to March 17, 2020, signed by the circuit court on May 28, 2020, having a Notice of Entry of Order dated June 3, 2020, R. 5820-5823, R. 5879-5880, App. 24-29; **see also Second App. 5-6; Not Second App. 7-8.**
- (iv) Permanent Order for Protection Modification dated June 1, 2020, signed by the Court on June 8, 2020, R. 5906-5909, App.30-33

Each of the orders listed above is appealable per SDCL §15-26A-3.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests the privilege of appearing before this Court for oral argument in this appeal.

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT QUASHED THE JAMES BRUGGEMAN SUBPOENA.

The circuit court quashed Mr. Bruggeman's subpoena concluding that it had previously found Mr. James Bruggeman to be incompetent in a guardianship file. Correct R. 5286-5287.

State of South Dakota v. Lufkins, 381 N.W.2d 263 (S.D. 1986)
State of South Dakota v. Warren, 462 N.W.2d 195 (S.D. 1990)

II. WHETHER THE CIRCUIT COURT ERRED WHEN IT DETERMINED JAMES BRUGGEMAN TO BE A VULNERABLE ADULT AND VICTIM OF FINANCIAL EXPLOITATION AND NEGLECT.

The circuit court found that Mr. Bruggeman was a vulnerable adult. R. 5181, Correct R. 5523.

SDCL §21-65-1(15)

a. The circuit court erred as a matter of law in holding that Mr. Bruggeman was unable to protect himself from abuse.

The circuit court found that Mr. Bruggeman was a vulnerable adult. R. 5181, Correct R. 5523.

Peterson v. Burns and Johnson and Eieslan, 2001 S.D. 126, 635 N.W.2d 556

b. The circuit court erred when it found Mr. Bruggeman was an abused vulnerable adult.

The circuit court found that BH Advocate showed by a preponderance of the evidence that vulnerable adult abuse had occurred at the hands of Ms. Ramos through financial exploitation of Mr. Bruggeman. Correct R. 5526. While in her capacity of caregiver and power of attorney of Mr. Bruggeman, Ms. Ramos willfully and wrongfully took over \$328,000 to purchase for herself and her children, with the intent to cause financial loss to Mr. Bruggeman and/or to bring about financial gain for herself. Correct R.5184.

c. The circuit court erred when it found Mr. Bruggeman to have been financially exploited by Ms. Ramos.

The circuit court found that BH Advocate showed by a preponderance of the evidence that vulnerable adult abuse had occurred at the hands of Ms. Ramos through financial exploitation of Mr. Bruggeman. Correct R. 5526. While in her capacity of caregiver and power of attorney of Mr. Bruggeman, Ms. Ramos willfully and wrongfully took over \$328,000 to purchase for herself and her children, with the intent to cause financial loss to Mr. Bruggeman and/or to bring about financial gain for herself. Correct R. 5184.

State of South Dakota v. Hauge, 2019 S.D. 45, 932 N.W.2d 165 (2019)
SDCL §21-65-1(4)(d)
SDCL §21-65-1(7)

d. The circuit court erred when it found Mr. Bruggeman to have been neglected by Ms. Ramos.

The circuit court found that BH Advocate showed by a preponderance of the evidence that vulnerable adult abuse had occurred at the hands of Ms. Ramos through neglect of Mr. Bruggeman. As his caregiver and health care power of attorney, Ms. Ramos neglected Mr. Bruggeman as, without reasonable medical justification, failed to provide adequate medical care for Mr. Bruggeman when Mr. Bruggeman had the means available to obtain the recommended care. R. 5182.

SDCL §21-65-1(4)(c)

III. WHETHER THE CIRCUIT COURT ERRED WHEN IT AWARDED MR. BRUGGEMAN AND BH ADVOCATES ATTORNEY FEES.

The circuit court found Ms. Ramos to be responsible for Petitioner's reasonable and necessary legal fees in the amount of \$19,821.85. Correct R. 5186.

AGFirst Farmers Cooperative. v. Diamond C. Dairy, LLC, 2013 S.D. 19, 827 N.W.2d 843

Crisman v. Determan Chiropractic, Inc, 2004 S.D. 103, 687 N.W.2d 507.

STATEMENT OF THE CASE

This is an appeal from the determination by the circuit court that James Bruggeman was an abused vulnerable adult at the hands of Ms. Ramos under S.D.C.L. Chapter 21-65. BH Advocate, on behalf of Mr. Bruggeman, commenced this action by filing a Petition and Affidavit for a Protection Order (Vulnerable Adult) on February 11, 2020. R1-20. BH Advocate had standing to file because it was previously appointed as guardian and conservator for Mr. Bruggeman in file number 09GDN19-05. The petition alleged, first, that Ms. Ramos was Mr. Bruggeman's caretaker or was entrusted with Mr. Bruggeman's property at the time, and that she neglected Mr. Bruggeman's health or welfare without medical justification and within Mr. Bruggeman's means. R. 2. Second, the petition alleged that Ms. Ramos was Mr. Bruggeman's family member, caretaker or a person in whom Mr. Bruggeman had placed trust and confidence at the time that Ms. Ramos defrauded and/or stole Mr. Bruggeman's property. R. 2. On that same day, an Ex Parte Temporary Order for Protection was granted. R. 21. The permanent order for protection was heard by the Honorable Judge Michelle K. Comer on March 17, 2020. Correct R. 5278.

Immediately prior to the permanent protection order hearing, the circuit court addressed BH Advocate's Motion and Brief to Quash, R. 70-75, which had been filed on

March 13, 2020, in response to the witness subpoena, issued by Ms. Ramos’s counsel at the time, directing Mr. Bruggeman to appear and testify. The circuit court granted the motion concluding “that the Court has previously found him incompetent. Not only now has the Court found him incompetent, but there is an additional physician from the VA, in addition to the original one that did the competency evaluation, who has found ... that he lacks the capacity.” Correct R. 5286-5287. As a result, Mr. Bruggeman, who is still living, was not present and did not testify.

The relief granted at that time included:

- Ms. Ramos shall not come within a distance of 100 feet of Mr. Bruggeman.
- Ms. Ramos shall not come within a distance of 100 feet of 1821 Valley Drive, Belle Fourche, SD 57717.
- Ms. Ramos shall not come within a distance of 100 feet of 1210 Union Street, Belle Fourche, SD 57717.
- Ms. Ramos is restrained from exercising any powers on behalf of Mr. Bruggeman through a court-appointed guardian, conservator, or guardian ad litem, an attorney in fact, or another third party.
- Mr. Ramos is restrained from exercising control over funds, benefits, property, resources, belongings, or assets of Mr. Bruggeman, except as otherwise provided for in this Order.
- Ms. Ramos shall return custody or control of the funds, benefits, property, resources, belongings, or assets to BH Advocate.

- Ms. Ramos is prohibited from transferring any funds, benefits, property, resources, belongings, or assets of Mr. Bruggeman to any person other than Mr. Bruggeman, except as otherwise provided in this Order.
- Phone calls, emails, third party contact, including correspondence direct or indirect, are not permitted to Mr. Bruggeman.
- Ms. Ramos is to turn over all rents, keys, proceeds from 2014 to BH Advocate. Provide accounting of all rents listed from 2014 and *immediately convey Willow Creek Property to Mr. Bruggeman.*

R. 102-104.

BH Advocate filed its Renewed Motion to Show Cause on April 9, 2020. R. 5194-5196. At a hearing conducted on that motion, the circuit court “took notice *sua sponte* that it lacked jurisdiction to enter an order compelling Respondent to immediately convey title to the real property located at 2231 Willow Creek Road, Belle Fourche, South Dakota (the “Willow Creek Property”) by warranty deed.” R. 5820. Thereafter, the circuit court ordered that “the Order for Protection and the Judgment and Order are hereby amended *nunc pro tunc* to remove the requirement that Respondent immediately convey to Petitioner title to the Willow Creek Property by warranty deed” and, instead, “to require Respondent to immediately deliver to Petitioner funds, benefits, property, resources, belongings, or assets to the Petitioner’s Guardian and Conservator, namely Black Hills Advocate, LLC, which includes, but is not limited to the \$296,500.00 Respondent admits she removed from Petitioner’s accounts to purchase the real Willow Creek property.” R. 5821.

The first Notice of Appeal was timely filed and served on April 16, 2020. R. 5561. The Amended Notice of Appeal was filed on June 4, 2020. R. 5885. **Second App. 9. Not Second App. 10.** The Second Amended Notice of Appeal was filed on June 11, 2020. R. 5912.

STATEMENT OF THE FACTS

Mr. Bruggeman is a 75-year old veteran. R. 5170. Mr. Bruggeman was born December 16, 1944. R. 21. Mr. Bruggeman and Ms. Ramos have known each since Ms. Ramos was a child. Correct R. 5291, Correct R. 5292. Throughout her life, Mr. Bruggeman has bought Ramos things, including several cars. R. 5170. The circuit court found that in 2011 Mr. Bruggeman was diagnosed with vascular dementia. R. 5170. Mr. Bruggeman's close friends, including Ms. Ramos, provided support for Mr. Bruggeman by administering medication, paying bills, cleaning, doing laundry, shopping, and preparing meals. R. 5170. Mr. Bruggeman also received home health care assistance through the Veterans Administration ("V.A.") R. 5170. In January 2012, it was noted that Ms. Ramos began taking over as Mr. Bruggeman's caregiver. R. 5171. Mr. Bruggeman visited his attorney, now the Honorable Michael W. Day, on June 14, 2012 and appointed Ms. Ramos as his agent under a Power of Attorney, naming the Trust Department of Pioneer Bank & Trust as an alternative. R. 5016, 5020. Mr. Bruggeman designated that the Power of Attorney would become effective upon his disability or incapacity. R. 5021. Ms. Ramos did not know about the Durable Power of Attorney naming her as agent "until about a year later." Correct R. 5297. Within this same document Mr. Bruggeman executed his healthcare directives. R. 5022. Again, Mr. Bruggeman designated Ms.

Ramos as his as his health care agent to make medical decisions if Mr. Bruggeman himself ever became unable to speak for himself. R. 5022.

Mr. Bruggeman also executed his Last Will and Testament at the same time. Mr. Bruggeman was not married and had no children. R. 5027. Mr. Bruggeman bequeathed his entire estate, real, personal and mixed to Ms. Ramos. R. 5028. In the event Ms. Ramos predeceased Mr. Bruggeman, his estate was to go to Ms. Ramos's daughter, Izzabella D. Ramos. R. 5028. Ms. Ramos did not know about Mr. Bruggeman execution of the will "until about 2013, or maybe later, when he said, 'You're going to need these things as proof and evidence if you know'..." Correct R. 5297.

In October 2012 Mr. Bruggeman purchased 1210 Union Street ("Union Street property") in part with proceeds from stocks and holdings, while the remainder of the purchase price was financed by a mortgage. R. 5031, Correct R. 5415. Ms. Ramos paid the mortgage payments. Correct R. 5401, Correct R. 5415. The Union Street property was intended by Mr. Bruggeman to be used as a residence for Ms. Ramos and her children. Correct R. 5298, Correct R. 5300, Correct R. 5415. In May of 2014, Mr. Bruggeman was adamant about living independently. Although he had fallen down the stairs, his only consideration to prevent this from happening again was that he was "going to talk with a realtor tomorrow and may sell his home and move into a smaller one story home." R. 3832. Although the V.A. recommended at this same time for Mr. Bruggeman to enter assisted living, Mr. Bruggeman "was hesitant to commit to this option presently." R. 3833. The purchase of the Union Street property was never for Mr. Bruggeman to live in, it did not have that purpose until there was a need to satisfy the V.A.'s recommendations.

Correct R. 5301. In January of 2015, after Ms. Ramos “converted the garage into an apartment” for Mr. Bruggeman, he moved in. Correct R. 5301, Correct R. 5302.

Ms. Ramos declined assistance for Mr. Bruggeman from Meals on Wheels, a home bath aide, and home making care because they didn’t need it. Correct R. 5303-5304. Ms. Ramos voiced concern about depleting their assets if he would enter a long-term care facility. Correct R. 5305-5306.

Mr. Bruggeman and Ms. Ramos’s relationship was unique before Mr. Bruggeman is noted to have memory issues 2011.¹ Mr. Bruggeman and Ms. Ramos comingled their accounts back in 2007. R. 5033. When the funds were commingled, Mr. Bruggeman was still able to care for himself. Mr. Bruggeman was living alone until 2015. Correct R. 5301, Correct R. 5302. Mr. Bruggeman does not have any medical notes indicating a diagnosis of vascular dementia until September 26, 2011. R. 115. Mr. Bruggeman did not become completely reliant on Ms. Ramos until 2018. Even at this point, Mr. Bruggeman was able to toilet, bathe and dress himself. R 3127-3128. At this point their finances had been tied up together for 11 years. Ms. Ramos was faced with the challenge of Mr. Bruggeman telling her he “wants to remain independent, and that he would not last more than 3 months if he were away from his adoptive family,” R. 3126, and, conversely, suggesting to the V.A. and Mr. Bruggeman that due to her own increasing time constraints and duties he needed a higher level of care. R. 3128. In May of 2018 Ms. Ramos sought to have an evaluation completed of Mr. Bruggeman as she grew concerned

¹ Findings of Fact Number 8. Ms. Ramos contests to the prognosis as being incorrectly stated. This fact has not been stipulated to. Appellant does contest this information and does not accept the FOF in this instance.

that his transition from independence to constant assistance from her was becoming greater than what could be provided in the Union Street property. R. 3133. They needed to be under one roof in a bigger house. Between April 30, 2018 and May 3, 2018, Ms. Ramos was doing what she could to purchase a property to satisfy the V.A. R. 4921-4935.

Mr. Bruggeman contacted his financial adviser, Troy Niehaus (“Mr. Niehaus”) to begin working out a financial plan to accomplish this objective. In April of 2018, Mr. Niehaus met with Mr. Bruggeman at the Wells Fargo Bank in Belle Fourche. Correct R. 5420. Mr. Niehaus set up the meeting because he wanted to talk to Mr. Bruggeman before granting Ms. Ramos third-party authorization to sell investments and move money. Correct R. 5416. Mr. Niehaus understood the following:

There was discussion about buying a new house. Jennifer had told me—about his current living situation on the Union Street address, the VA home healthcare had told her that, you know, his current living arrangement/living conditions weren’t up to their standards or parameters and that they weren’t going to continue to service – or to help him. And so the rationale for buying the new home was that – so that he could be inside the home with them, have more supervision, you know, improved living arrangement.” Correct R. 5418-5419.

Further, Mr. Niehaus did not just speak with Mr. Bruggeman one time about the purchase of the house in 2018, but Mr. Niehaus spoke to Mr. Bruggeman after Ms. Ramos notified Mr. Niehaus that a property had been identified. Correct R. 5420. Mr. Niehaus talked to Mr. Bruggeman about the verification of the funds, “and Jim had told me, you know, ‘Whatever she needs, make it available to her.’” Correct R. 5420. Mr. Niehaus had further communication with Mr. Bruggeman when they reviewed the sale after the closing. Correct R. 5420.

Liquidating assets was not the only option they looked into. Mr. Niehaus additionally testified that after meeting with Mr. Bruggeman on that day, Mr. Bruggeman and Ms. Ramos went over and talked to a mortgage person in the next cubicle. Correct R. 5420.

At the hearing, and in hindsight, Mr. Niehaus contradicted himself when he testified that during a few days in June and July, he and Mr. Bruggeman had multiple phone calls in one day. Correct R. 5420-5421. Although Mr. Niehaus testified that this was concerning to him, there is nothing in the record to document that he made any notes of these conversations or that he undertook any special action. Further, although Mr. Niehaus testified to these alleged concerns, Wells Fargo never did anything by way of restricting Ms. Ramos's use of or access to his account. Correct R. 5421.

STANDARD OF REVIEW

The standards of review in protection order cases are established to involve, first, a determination of whether the trial court's findings of fact were clearly erroneous and, second, if the trial court's findings of fact are not clearly erroneous then whether it abused its discretion. *Schaefer v. Liechti*, 2006 SD 19, ¶ 8, 711 N.W.2d 257, 260 (citations omitted). It is within the circuit court's discretionary power to determine whether a witness is competent to testify, and its decision will be reviewed as an abuse of discretion. *State v. Warren*, 462 N.W.2d 195, 198 (1985) (citations omitted). Similarly, an award of attorney fees is reviewed under the abuse of discretion standard. *In re South Dakota Microsoft Antitrust Litigation*, 2005 SD 113, ¶ 27, 707 N.W.2d 85, 97. Cases requiring statutory interpretation are reviewed under a de novo standard of review. *Peterson v. Burns and Johnson and Eieslan*, 2001 S.D. 126, ¶ 7, 635 N.W.2d 556, 561.

ARGUMENTS AND AUTHORITIES

1. WHETHER THE CIRCUIT COURT ERRED WHEN IT QUASHED THE JAMES BRUGGEMAN SUBPOENA

The circuit court should have permitted Mr. Bruggeman to appear at the hearing for the purpose of examining him and determining his competence to testify. “Generally, every person is competent to be a witness if they have personal knowledge of the matter at hand, have sufficient understanding to receive, remember, narrate impressions and are sensible to the obligation of an oath.” *State v. Warren*, 462 N.W.2d 195, 198 (citing *State v. Lufkins*, 381 N.W.2d 263, 266 (S.D. 1986) (additional citations omitted)).

“As long ago as 1895, this Court upheld the general rule that determination of a witness’ competence ‘is left in the first instance to the discretionary judgment of the trial court, after informing itself by proper examination.’” *State v. Weisenstein*, 367 N.W.2d 201, 203-04 (S.D. 1985) (quoting *State v. Reddington*, 7 S.D. 368, 377, 64 N.W. 170, 172-73(1895)). And although *Weisenstein* and *Reddington* addressed competency of a child to testify, the determining factors are the same, “sufficient mental capacity to observe, recollect, and communicate, and some sense of moral responsibility...” *Weisenstein*, 367 N.W.2d 201, 204 (S.D. 1985) (quoting *State v. Leonard*, 60 S.D. 144, 145, 244 N.W. 88-89 (1932). “The determination of the witness’ competency is within the discretionary power of the trial judge and may be reversed only upon a showing of abuse of discretion.” *State v. Warren*, 462 N.W.2d 195, 198 (1985) (citing *State v. Lufkins*, 381 N.W.2d at 266 (S.D. 1986) (additional citations omitted)). “When reviewing the exercise of judicial discretion, the members of this court may not consider whether they would have made a similar rule; rather, they must consider whether, in view of the law and the circumstances of the particular case, a judicial mind could reasonably

have reached such conclusion.” *Weisenstein*, 367 N.W.2d at 205 (internal citations omitted).

This Court in *Lufkins* upheld the circuit court’s finding that the witness was incompetent to testify. See 381 N.W.2d at 266. The circuit court in *Lufkins* held a motions hearing where it heard from a social worker who examined the witness. *Id.* at 266. During the hearing the social worker testified that the witness did not remember the day in question, the death of the victim, that the witness had difficulty maintaining attention, the witness did not have vivid memories, the witness’s memories were not in chronological order, the witness was unable to recall dates and places, and that the witness experienced some memory blocking and inability to recall in detail. *Id.* The South Dakota Supreme Court agreed that “[t]he testimony and evidence presented at the motion hearing sufficiently established that Blue Dog had lost his personal knowledge of the events in question and lacked the understanding to receive, remember, and narrate any remaining impressions.” *Id.*

Additionally, the witness experienced visual hallucinations, bizarre behavior in the past, slowing of thought, sparsity of speech and loss of intellectual function. *Id.* It is also important to note that the witness in *Lufkins* had testified in the previous trial and that his transcript was available for the retrial. *Id.* at 265. Unlike in *Lufkins*, however, the circuit court in the instant case did not examine Mr. Bruggeman and did not hear testimony from any medical expert but only relied on a written neuropsychological evaluation from Dr. Jon Dennig (“Dr. Dennig”), who did not testify, and who did not address any of the factors addressed above. Although it appears that Dr. Dennig spent nine hours evaluating, reviewing and preparing his report, the circuit court did not seek

Dr. Dennig's opinion as to whether Mr. Bruggeman was capable of testifying. See generally R. 3127. In fact, Dr. Dennig noted that, "Veteran currently states that he wants to remain independent, and that he would not last more than 3 months if he were away from his adoptive family." Correct R. 81. Further, "Veteran reports good relationships at home with his CG and her children." Correct R. 81.

No evidence has been offered or received that Mr. Bruggeman did not remember or did not voluntarily gift the money to Ms. Ramos to purchase a home in which they were to reside. To the contrary, Mr. Bruggeman met with his Well Fargo Advisor, Mr. Niehaus, to discuss liquidating funds. Mr. Niehaus did his due diligence before providing the documentation requested by Mr. Bruggeman by setting up a meeting with him to discuss the "seriousness of giving someone third-party authorization to sell funds, to move money." Correct R. 5416. "[I] wanted to be sure that, you know, Jim was on board." Correct R 5417.

The facts presented in *Lufkins* are distinguishable from the facts that were presented to the circuit court in the instant case, where it is believed that Mr. Bruggeman would be reasonably found to have capacity to testify. This Court has been faced with similar circumstances in *Warren*, and the circuit court should have relied on this Court's guidance in *Warren* and at least held a separate hearing to determine whether Mr. Bruggeman was competent to testify.

In *Warren*, this Court compared the facts with which it was presented to those in *Lufkins* and determined "that the witness [in *Lufkins*] had lost his personal knowledge of the events in question and lacked the understanding to receive, remember, or narrate any remaining impressions." *Warren*, 462 N.W.2d 195, 198. The Court stated, "[t]hat is not

the situation before us.” *Id.* In *Warren*, a psychiatrist testified that the witness could report facts, had a good remote memory, understood what telling the truth entails and that it is important. See *Id.* A psychologist testified that the witness was mildly mentally handicapped. *Id.* Another psychiatrist testified that the witness did suffer from dementia; however, the witness did understand the concept of telling the truth. *Id.* The psychiatrist further testified that the witness communicated better when questions were written to him and that the witness would not be able to follow matters that were too complex. *Id.*

The circuit court in *Warren* found the witness did have a diminished mental condition due to his age and low IQ. “However, the court also indicated that it believed Hess’ testimony would have some value to the proceedings and would be received under the special care of the court and under guarded circumstances.” *Warren*, 462 N.W.2d 195, 198. Most notably, the circuit court in the instant case failed to address the most important question, which the *Warren* and *Lufkins* addressed, which “the trial court specifically referred to in *Lufkins*, finding that Hess could understand the obligation of an oath or the need to tell the truth.” *Id.*

Whereas the circuit court in *Lufkins* held a motions hearing to determine whether the witness was competent to testify, the circuit court in *Warren* held a competency hearing. *Warren*, 462 N.W.2d at 198; see also *State v. Weisenstein*, 367 N.W.2d 201, 204 (“In an interview conducted apart from the jury, the victim communicated to the trial judge that (1) he remembered the night Kurtis entered his bedroom, (2) that he knew Kurtis, (3) that he knew the difference between telling the truth and telling a lie, and (4) that he would tell the truth.”). Unlike in *Lufkins* and *Warren*, the circuit court in the instant case did not hold any hearing to determine whether it was proper for Mr.

Bruggeman to testify. Instead, the circuit court relied on the fact that Mr. Bruggeman has been found “incompetent” pursuant to a guardianship proceeding, which in that proceeding the circuit court found that it would be detrimental to his health, care or safety for Mr. Bruggeman to attend the hearing. Correct R. 91. “I’m going to grant the motion to quash based upon the fact that the court has previously found him incompetent.” Correct R. 5286. The issue before the physician in determining whether Mr. Bruggeman needed to attend the guardianship proceeding is significantly different than a determination by a physician of whether he can attend a hearing to testify, with sufficient knowledge, understanding, or ability to tell the truth. Per SDCL §29A-5-306 (6), [i]f the [guardianship] petition states that the incapacity of the person alleged to need protection will prevent attendance at the hearing, an opinion as to whether such attendance would be detrimental to the person’s health, care or safety.”

In its Motion and Brief to Quash, Petitioner cites to Dr. Mary Clark’s (“Dr. Clark”) responses in written form that Mr. Bruggeman “lacks capacity to understand.” R. 71. She did not testify. Dr. Clark completed the evaluation in conjunction with the guardianship and conservatorship; she was not determining whether Mr. Bruggeman had sufficient understanding to receive, remember, narrate impression and be sensible to the obligation of an oath. See *Warren* 462 N.W.2d at 198. Dr. Dennig in writing ultimately concluded that Mr. Bruggeman, “no longer has the capacity to care for himself or make decision that are in his best interest.” R. 71. Neither Dr. Clark nor Dr. Dennig commented on Mr. Bruggeman’s ability to understand the import and consequence of telling the truth.

Further, the circuit court did not make either oral or written findings of fact on why and how Mr. Bruggeman’s attendance to testify would have been a traumatic confrontation with Ms. Ramos. The circuit court did not provide any such analysis on that point. Based on the foregoing, the medical records provided are insufficient basis for the circuit court to determine that Mr. Bruggeman was incompetent to testify at the protection order hearing. And without allowing him to testify, the circuit court failed to exercise its responsibility to independently inform itself by proper examination of Mr. Bruggeman’s competence to testify. Therefore, it abused its discretion. This Court is unable to determine by the law and facts whether a judicial mind could reasonably have reached such a conclusion.

2. WHETHER THE CIRCUIT COURT ERRED WHEN IT DETERMINED JAMES BRUGGEMAN TO BE A VULNERABLE ADULT AND VICTIM OF FINANCIAL EXPLOITATION AND NEGLECT

a. The circuit court erred as a matter of law in holding that Mr. Bruggeman was unable to protect himself from abuse.

This case appears to be one of first impression in South Dakota, involving statutory interpretation of SDCL 21-65-1(15). That statute defines a “vulnerable adult” as a person sixty-five years of age or older who is unable to protect himself or herself from abuse as a result of age or a mental or physical condition, or an adult with a disability as defined in SDCL §22-46-1.

This Court interprets ““statutes under a de novo standard of review without deference to the decision of the trial court.”” *Peterson*, 2001 S.D. 126, ¶ 7, 635 N.W.2d at 561 (quoting *In re Estate of Karnen*, 2000 S.D. 32, ¶ 7, 607 N.W. 2d 32, 35). ““Statutes are to be construed to give effect to each statute and so as to have them exist in

harmony.” *In re Estate of Karnen*, 2000 S.D. 32 ¶ 8, 607 N.W.2d at 35 (quoting *State v. Woods*, 361 N.W.2d 620, 622 (S.D. 1985)). “When construing a statute, the court determines the intent of the Legislature from the words of the statute, giving them their plain meaning. *Peterson*, 2001 S.D. 126, ¶ 20, 635 N.W.2d at 564 (quoting *Hagemann v. NJS Eng’g, Inc.*, 2001 S.D. 102, ¶ 5, 632 N.W.2d 840, 843; *M.B. v. Konenkamp*, 523 N.W.2d 94, 97 (S.D. 1994).

As it relates to this case, the phrase “who is unable to protect himself or herself from abuse as a result of age or a mental or physical condition” is especially problematic. Specifically, the statute does not provide sufficient guidance about what conduct by others constitutes abuse and, further, how one measures or determines whether an individual is unable to protect himself or herself *as a result* [i.e., as a consequence of] the particular condition. Ms. Ramos contends that the statute is unconstitutionally vague because it fails provide her with fair notice that her actions, involvement with, and relationship to Mr. Bruggeman is proscribed by the statute. Mr. Bruggeman treated Ms. Ramos and her children as family. Likewise, she was merely involved in life-long familial relationship with Mr. Bruggeman, and that involved mutual and attendant obligations and even economic benefits.² The statute is unconstitutionally vague and

² It is now widely accepted that the diversity of family living arrangements has increased since the early 1960s, and so has the fluidity of the family and the economic dynamics. Caring for aging parents and parental figures has become more common, demanding and complex. In this case, Mr. Bruggeman served as a one-time legal guardian for Ms. Ramos who, in turn, took over the caregiver role for Mr. Bruggeman in his later years. From any reasonable perspective, they were family.

encourages arbitrary enforcement that puts countless families and caregivers at grave risk.

“The standard for determining whether a statute is unconstitutionally vague is whether ‘it give[s] a person of reasonable intelligence fair notice that his contemplated conduct is forbidden.’” *State v. Holway*, 2002 S.D. 50, ¶13, 644 N.W.2d 624 (S.D. 2002) (quoting *State v. McGill*, 536 N.W. 2d 89, 95 (S.D. 1995)). The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute. “The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect.” *Rowley v. South Dakota Board of Pardons and Paroles*, 2013 S.D. 6, ¶7, 826 N.W.2d 360, 363; *City of Rapid City v. Estes*, 2011 S.D. 75, ¶ 12, 805 N.W. 2d 714, 718 (quoting *State ex rel. Dep’t of Transp. v. Clark*, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162).

“When the language in a statute is clear, certain and unambiguous, there is not reason for construction, and the Court’s only function is to declare the meaning of the statute as clearly expressed.” *In re Estate of Hamilton*, 2012 S.D. 34, ¶ 7, 814 N.W.2d 141, 143 (quoting *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611). An “[a]mbiguity is a condition of construction, and may exist where the literal meaning of a statute leads to an absurd or unreasonable conclusion.” *People ex rel. J.L.*, 2011 S.D. 36, ¶ 4, 800 N.W.2d 720; *In re Sales Tax Refund Applications of Black Hills Power & Light Co.*, 298 N.W.2d 799, 803 (S.D. 1980).

“A statute or portion thereof is ambiguous when it is capable of being understood only by reasonably well-informed persons in either of two or

more senses.” Whenever a case such as this one is before the court, however, it is obvious that people disagree as to the meaning to be given to a statute. This alone cannot be controlling. The court should look at the language of the statute itself to determine if “well-informed persons” should have become confused.

Petition of Famous Brands, Inc., 347 N.W. 2d 882, 886 (S.D. 1984) citing *National Amusement Co. v. Wisconsin Dep’t of Taxation*, 41 Wis.2d 261, 267, 163 N.W.2d 625, 628 (1969) (internal citation omitted).

As a matter of law, the circuit court erred in construing the statute in a manner that permitted the arbitrary enforcement of standards – not to be understood by reasonably well-informed people who are in mutually beneficial and supportive relationship – about what conduct constitutes abuse (specifically, financial exploitation) and how a limiting condition actually results in an inability to protect oneself, especially after a lengthy duration and pattern of mutual economic support is demonstrated.

b. The circuit court erred in finding that Mr. Bruggeman was an abused vulnerable adult

The circuit court found that in 2011 Mr. Bruggeman was diagnosed with vascular dementia. R. 5170. According to the entire progress notes made by the physician from his interaction with Mr. Bruggeman during his visit September 22, 2011, the diagnoses was “most likely a vascular dementia.” R. 4355. This is a subtle but significant distinction that the circuit court failed to recognize. Reading the progress notes in their entirety, the reason for the visit in September 22, 2011, was a follow up to Mr. Bruggeman having visited the emergency room in September 4, 2011. Since September 4th of that year, Mr. Bruggeman was having confusion and disorientation but had since followed up with his doctor on his medication management and was “back to his normal self” at the time of

the September 22nd visit. R. 4350. Mr. Bruggeman lived alone, and the physician had noted no concerns about this arrangement. R. 4350. Mr. Bruggeman was able to rattle off his complete medication list and what each was for, he was responsible for his own finances and knew how to use a computer R. 4351. Further, Mr. Bruggeman was able to articulate the date, his person, where he was and the purpose of the reason for the visit. R. 4354.

This appeared to be a similar issue in 2013 when Mr. Bruggeman went to the emergency room on January 29, 2013, complaining of severe rib pain. R. 314. The discharge diagnoses number 4 states, “[h]istory of vascular dementia with some mild confusion related to narcotic therapy, resolved after discontinuance of this medication.” R. 314.

The extent of the health care assistance was minimal. Mr. Bruggeman was taking his “medication correctly 90% of the time.” R. 4356. Additionally, the purpose of the health care assistance was only temporary, until Mr. Bruggeman and his care givers could complete the goal of demonstrating and verbalizing a home safety plan to prevent falls. R. 4357. Further the progress notes state that there was no level of care decisions made at this time, there were no caregiver issues, and that Mr. Bruggeman was “interested in doing an advance directive with the SW and she will see veteran.” R. 4358. The discharge plan was just to “assess the needs of veteran at each visit for any changes in physical and mental health.” R. 4358.

In January of 2015, Mr. Bruggeman met with Dr. Michael Huxford (“Dr. Huxford”). Correct R. 3555. Dr. Huxford learned during the evaluation that Mr. Bruggeman “reported some difficulty remembering names and where he placed things

but overall did not believe he had problems with his cognitive functioning.” Correct R. 3556. Further, Mr. Bruggeman “reported doing most activities of daily living independently or with minimal assistance.” Correct R. 3556. Dr Huxford found Mr. Bruggeman to “function with activities of daily living independently in his home though does require some assistance.” Correct R. 3558. Additionally, Dr. Huxford found even with Mr. Bruggeman living in his own apartment in the backyard, that “he lives with a caregiver, who is involved daily with his care.” Correct R. 3558.

The purpose of Dr. Huxford’s evaluation was to compare Mr. Bruggeman’s abilities at this time with testing from summer of 2013. Correct R. 3556. Mr. Bruggeman had some cognitive deficits in 2013 but primary care providers with HBPC (“home based primary care”) team wanted to clarify current cognitive abilities and assist with treatment planning. Correct R. 3556. Dr. Huxford found that Mr. Bruggeman’s cognitive functioning, attention and working when compared to previous evaluation, did not appear to have taken a significant turn for the worse. Correct R. 3557. “That is, his abilities at this time do not appear to be significantly worse than his abilities one year ago.” Correct R. 3557. Dr. Huxford’s ultimate finding was “significant impairment in cognitive and pronounced difficulties in delayed memory/recall and visuospatial and executive functions.” Correct R. 3557.

As Mr. Bruggeman’s mental and physical health deteriorated, Ms. Ramos was faced with difficulties. For example, in December 2016, Mr. Bruggeman’s progress notes state that Mr. Bruggeman was orientated to place and time and person and situation, but “unable to name the year within the 2000s.” R. 3236. Dr. Huxford went on to explain, “[t]his is a change for him as he has been largely able to name the year, sometimes with

recognition format.” R. 3236. Additionally, during Mr. Bruggeman’s visit with Dr. Huxford, Mr. Bruggeman stated that he had been going to AA meetings about one a week with friends. Dr. Huxford notes that the “details of these narratives are sophisticated and detailed and have the appearance of authenticity.” R. 3236. However, according Ms. Ramos, Dr. Huxford learns, “that he has not been out of his house for many months now despite her efforts to help him to do so.” R. 3236. This is the first time Dr. Huxford recognized Mr. Bruggeman’s steep decline, “[t]hough he has shown cognitive impairment on these tests in the past, his symptoms have become worse and it seems likely the case that they have maintained a higher severity for many weeks now.” R. 3237.

Dr. Huxford and Ms. Ramos talked at length about Mr. Bruggeman, and Dr. Huxford notes no concerns of Ms. Ramos and her caregiving ability. “Jennifer describes a good plan for caring for this veteran so to ensure his basic needs, safety, and medication compliance as well as an appreciation for efforts towards the highest quality of life possible for him.” R. 3237. “She is also open to feedback and education and expressed thanks and appreciation for the information/counsel offered.” R. 3237. Dr. Huxford concluded Mr. Bruggeman’s results to be “consistent with a Major neurocognitive disorder because of deficits in memory, attention, processing speed, and executive functions.” R. 3241.

Medical diagnoses are complicated, but when the doctors do not testify it makes things more complicated. For example, in September 26, 2011, Mr. Bruggeman was diagnosed with vascular dementia, uncomplicated. But more than four years later, on

March 4, 2016, the narrative was changed from vascular dementia, uncomplicated to vascular dementia. R. 115. What is the explanation? There is none in the records.

Mr. Bruggeman was a strong-willed man. For example, in 2013 after a fall that caused him four rib fractures, the general medical ward at Fort Meade recommended a short stay at a nursing home. R. 314. Mr. Bruggeman turned this offer down and went home alone. R. 314. Mr. Bruggeman was diagnosed with “Vascular dementia/severe cognitive impairment by neuropsychiatric testing 5/2018” R. 308.

Additionally, it is mentioned multiple times that Mr. Bruggeman’s mental status would appear to improve with adjustments to medication. R. 314. “History of vascular dementia with some mild confusion related to narcotic therapy, resolved after discontinuance of this medication.” R. 314. Or with proper care and treatment. R. 310. “Patient’s mental status does appear to improve somewhere throughout his stay, but some obvious mental dementia remains.” R 310.

On November 8, 2019, the progress notes state that Mr. Bruggeman was oriented to person and place. That Mr. Bruggeman was able to make needs known and was able to understand others. R. 319. Similarly, on November 7, 2019, Mr. Bruggeman was oriented to person, place, time and situation. Mr. Bruggeman was able to make needs known and was able to understand others. R. 320. Mr. Bruggeman spent an hour painting a coin bank, he was noted as being readily able to take direction, oriented to person and situation and able to make needs now to others and to understand others. R. 326.

This Court should take note of the need to go further in its examination of the record than what the circuit court did. For example, the circuit court simply stated on the record, “[t]he court finds that Mr. Bruggeman is a vulnerable adult as defined by statute.”

Correct R. 5523. Further, the circuit court’s Findings of Fact and Conclusions of Law merely find Mr. Bruggeman “is a 75 year old veteran with several neurocognitive impairment, eligible for protection pursuant to SDCL ch. 21-65.” R. 5170. “Bruggeman is a 75-year old veteran with severe neurocognitive impairment and is therefore a vulnerable adult.” R. 5181. The statute requires a finding that the person be unable to protect himself *as a result* of the mental condition. Which is why it is so important to see that the relationship between Mr. Bruggeman and Ms. Ramos never changed. The use of the comingled funds, purchasing a home for Ms. Ramos and her family, Ms. Ramos and Mr. Bruggeman taking care of the properties together were common occurrences. This was not some new relationship or type of behavior that began when Mr. Bruggeman became unable to care for himself. Their relationship was always a voluntary choice, and there is no question that when the comingling began in 2007 that Mr. Bruggeman had no mental defect.

c. The circuit court erred when it found Mr. Bruggeman to have been financially exploited by Ms. Ramos

Mr. Bruggeman had been helping and treating Ms. Ramos as family since she was a child. Correct R. 5291, Correct R. 5333, Correct R. 5334. Mr. Bruggeman became temporary guardian of Ms. Ramos for a time after Ms. Ramos’s mother was sentenced to prison. Correct R. 5335-5336. The court failed to recognize the familial relationship between Mr. Bruggeman and Ms. Ramos. Not only did Mr. Bruggeman take care of Ms. Ramos in her youth but Ms. Ramos also helped Mr. Bruggeman manage the properties he owned, paid for costs associated with the properties and personally repaired and remodeling the properties with no compensation in return. Correct R. 5849, Correct R. 5851-5852.

There is no dispute from the court's oral findings and testimony that the relationship between Ms. Ramos and Mr. Bruggeman was the same prior to his allegedly becoming incapacitated in 2011. For example, Mr. Bruggeman and Ms. Ramos comingled their accounts back in 2007. R. 5033. When the funds were commingled Mr. Bruggeman was still able to care for himself. Mr. Bruggeman does not have any medical indication of vascular dementia until September 26, 2011. R. 115.

Mr. Bruggeman did not become completely reliant on Ms. Ramos until 2018; and even at this point, Mr. Bruggeman was able to toilet, bathe and dress himself. R 3127-3128. Throughout her life, Mr. Bruggeman has bought Ms. Ramos things, including several cars. R. 5170. Mr. Bruggeman purchased a house that Ms. Ramos and her family lived in and that Ms. Ramos paid the monthly mortgage on. Mr. Bruggeman in 2012 freed "up proceeds to help Jennifer Ramos with the Union Street purchase" Correct R. 5413-5414. This is significant because in February of 2013, Mr. Bruggeman was still able to live at home; the V.A. "had considered perhaps a short nursing home stay for convalescence, although at this point he feels he is quite a bit better and able to go home." R. 314. Transaction in 2012 shows a similar pattern to the transaction in 2018.

Additionally, there has been ample testimony that Mr. Bruggeman and Ms. Ramos jointly contributed to the comingled funds and accounts. For example, although it was Mr. Bruggeman who financed the down payment to the Union Street property it was Ms. Ramos who paid the mortgage. Correct R. 5401. Mr. Bruggeman's financial adviser, Troy Niehaus, also acknowledged that Mr. Bruggeman was only selling enough of his stocks and holdings to get to a mortgage "payment down to a level that she could make." Correct R. 5415.

If this Court determines that circuit court did not error in finding Mr. Bruggeman to be a vulnerable adult, BH Advocate has still failed to establish evidence by a preponderance of the evidence that Ms. Ramos financially exploited Mr. Bruggeman.

Although it appears that a review of SDCL 21-65-1(4)(c) and (d) is a matter of first impression, this Court has addressed criminal cases relating to exploitation of a disabled adult. The statute, SDCL 22-46-3, provides “any person who, having assumed the duty voluntarily, by written contract, by receipt of payment for care, or by order of a court to provide for the support of an elder or an adult with a disability, and having been entrusted with the property of that elder or adult with a disability, with intent to defraud, appropriates such property to a use or purpose not in the due and lawful execution of that person’s trust, is guilty of theft by exploitation.”

This Court stated its rationale of theft by exploitation perfectly in *State v. Hauge*, when it recognized that:

“[a]lthough Hauge’s offense is not a crime of violence, theft by exploitation is particularly insidious in that it involves the manipulation of disabled or elderly adults, a particularly vulnerable population. This is especially so because the victim is often dependent on the thief for help and support. Victims who are elderly and in poor mental or physical health are largely defenseless against such crimes. Exploiting the elderly for financial gain wreaks havoc not only on the victim but in many cases the entire family, often irreparably destroying familial bonds. Financial exploitation of a vulnerable adult is therefore a serious offense when weighed against other types of crimes.
State v. Hauge, 2019 S.D. 45, ¶ 35, 932 N.W.2d 165, 175 (2019).

Although *Hauge* reviewed criminal theft by exploitation, it is reasonable for the rationale to cross over to SDCL §21-65-1(4)(d).

SDCL §21-65-1(7) described financial exploitation as , “exploitation as defined in subdivision 22-46-1(5) when committed by a person who stands in a position of trust

or confidence”. SDCL §22-46-1(5) defines exploitation as “the wrongful taking or exercising of control over property of an elder or adult with a disability with intent to defraud the elder or adult with a disability”. There is no dispute that Ms. Ramos was Mr. Bruggeman’s caregiver. The dispute is whether Ms. Ramos has wrongfully taken or exercised control over property of Mr. Bruggeman with intent to defraud Mr. Bruggeman. The lifelong familial bond and the attendant, mutual personal and economic support established by the record clearly places this care outside the parameters of actionable conduct under the statute. The circuit court clearly erred in finding that financial exploitation occurred.

d. The circuit court erred when it found Mr. Bruggeman to have been neglected by Ms. Ramos

Similarly, in SDCL 21-65-1(4)(c), reference is made to “[n]eglect as defined in subdivision 22-46-1(6) and 22-46-1.1. SDCL 22-46-1(6) defines neglect as “harm to the health or welfare of an elder or an adult with disability, without reasonable medical justification, caused by a caretaker, within the means available for the elder or adult with disability, including the failure to provide adequate food, clothing, shelter, or medical care” and excludes, “a decision that is made to not seek medical care for an elder or disabled adult upon the **expressed desire of the elder or disabled adult; a decision to not seek medical care for an elder or disabled adult based upon a previously executed declaration, do-not-resuscitate order, or a power of attorney for health care**; a decision to not seek medical care for an elder or disabled adult if otherwise authorized by law; or the failure to provide goods and services outside the means available for the elder or disabled adult.” (Emphasis added).

Ms. Ramos cannot be found to have neglected Mr. Bruggeman because her decision to not put Mr. Bruggeman in a nursing home was aligned with Mr. Bruggeman's expressed desire to stay out of a nursing home. See Correct R. 5305; In May of 2018, Mr. Bruggeman underwent a neuropsychological evaluation. During the evaluation the writer noted, "Veteran currently states that he wants to remain independent, and that he would not last more than 3 months if we were away from his adoptive family." R. 3126. Further, "Veteran reports good relationships at home with his CG [caregiver] and her children." R. 3126.

Also, Ms. Ramos falls under the exception because "the term, neglect, does not include a decision to not seek medical care for an elder or disabled adult based upon a power of attorney for health care. Ms. Ramos was specifically following her duties as agent under Mr. Bruggeman's Healthcare Directives. "Without intending to limit this authority, my agent shall have the following powers:" R. 5022. "To employ and discharge physicians, psychiatrists, dentists, nurses, therapists, and any other professional as my agent may deem necessary for my physical, mental and emotional well-being, and to pay reasonable compensation to them." R. 5022-23. "To give or withhold consent to my medical care...to revoke, withdraw, modify or change consent to my medical care, surgery, or any other medical procedures or tests, hospitalization, convalescent care, or home care..." R. 5023. "I ask that my agent be guided in making these decisions by what I have indicated to him/her about my personal preferences regarding that care, and as otherwise set forth herein." R. 5023. "Based upon those same preferences, my agent may also summon paramedics or other emergency medical personnel and seek emergency treatment for me, or choose not to do so, as my agent deems appropriate given my wishes

and my medical status at the time of the decision.” R. 5023. “My agent is authorized, when dealing with hospitals and physicians, to sign documents titled or purporting to be a ‘refusal to permit treatment’ or ‘leaving hospital against medical advice’ as well as any necessary waivers of or release from liability required by the hospitals or physicians to implement my wishes regarding medical treatment or non-treatment.” R. 5023.

Given that statutory authority is supposed to exist in harmony, and SDCL 21-65-1(4)(c) uses SDCL 22-46-1(6) to define neglect, it would be inconsistent to find for purposes to this statute that the exception should not be applied. Further, it would not be in harmony with state law if agents under health care directs would be allowed to be charged with neglect for following the directions the principal provided to them.

The circuit court found that Ms. Ramos, as his caregiver and health care power of attorney, neglected Mr. Bruggeman as without reasonable medical justification, failed to provide adequate medical care for Mr. Bruggeman when he had to means available to obtain the recommended care. R. 5182.

And once again, this Court should recognize that the circuit court failed to provide any specific example or references to the record that showed Ms. Ramos’s decision to keep Mr. Bruggeman in her home and outside of the long-term care facility harmed his health or welfare or that it was not based on his stated desires.

3. WHETHER THE CIRCUIT COURT ERRED WHEN IT AWARDED MR. BRUGGEMAN AND BH ADVOCATE ATTORNEY FEES

“An award of attorney fees is reviewed under the abuse of discretion standard.” *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 24, 687 N.W.2d 507, 513 (citing *City of Sioux Falls v. Johnson*, 2003 S.D. 115, ¶ 6, 670 N.W.2d 360, 362. “The allowance of attorney fees rests in the discretion of the trial court and will be interfered

with only if there appears to be error in exercise of the discretion.” *Olson v. Olson*, 438 N.W.2d 544, 548 (S.D. 1989) (internal citation omitted). ““This Court has consistently required trial courts to enter findings of fact and conclusions of law when ruling on a request for attorney fees’ because ‘without findings of facts and conclusions of law, there is nothing to review.’” *AGFirst Farmers Cooperative. v. Diamond C. Dairy, LLC*, 2013 S.D. 19, ¶ 21, 827 N.W.2d 843, 849 (quoting *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 30, 687 N.W.2d 507, 514. “The American rule is that each party bears the party’s own attorney fees.” *Crisman*, 2004 S.D. 103, ¶ 26, 687 N.W.2d at 513 (citing *Public Entity Pool for Liability v. Score*, 2003 S.D. 17, ¶ 7, 658 N.W.2d 64, 67-68).

“This Court has set forth factors for the trial court to consider in setting attorney fees in numerous decisions.” *Crisman*, 2004 S.D. 103, ¶ 27, 687 N.W.2d at 513. For example:

[t]he facts to be considered in awarding attorney fees in a civil case are set forth in *City of Sioux Falls v. Kelley*, 513 N.W.2d 97, 111 (S.D. 1994): (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

Crisman, 2004 S.D. 103, ¶ 28, 687 N.W.2d at 514.

The circuit court after the permanent protection order hearing left attorney fees under advisement. Correct R. 5527. The circuit court in its order attached to its findings of fact, conclusions of law merely states: “That Ramos shall pay Petitioner’s reasonable and necessary legal fees incurred in bringing this action as determined by the Court and

set forth in the Affidavit of Cassidy M. Stalley in the amount of \$19,821.85. That a judgment is rendered for Petitioner and against Ramos in the amount of \$19,821.85.” Correct R. 5186. This does not provide for sufficient findings of facts for this Court to review, therefore, because this Court cannot infer whether there was an error in discretion, this issue should be remanded back to the circuit court for more appropriate findings of fact.

CONCLUSION

This case presents a variety of complexities and conundrums. While on the one hand, the protection of vulnerable adults from abuse, neglect, abandonment, or exploitation is a laudable and necessary state endeavor, the changing definition of family creates equally evolving notions of household, parent, child, support and economics. It is undisputed that but for Jennifer Ramos, James Bruggeman would have been alone in this world. She was cared for by him and, later, cared for him. She was the only family he knew in his later years, having been unmarried, without children, and no close relationship with siblings or other collateral family members. Mr. Bruggeman fully intended to benefit Ms. Ramos and her children through his testamentary intentions, and he appointed her as his agent and decision maker whenever his capacity was determined to be in decline. That trust was communicated to attorney Michael Day at a time when Mr. Bruggeman’s capacity was not questioned.

When Ms. Ramos sought help from the V.A. to evaluate Mr. Bruggeman and assist with his declining condition, the bureaucratic gears ground to a halt, leaving them to fend for themselves. When Mr. Bruggeman was adamant in his protestations about transitioning to assisted or skilled nursing facilities, Ms. Ramos stood by him, offering

her continued support and caregiving services to the best of her ability. Nobody else did that. When she voiced their concern over the enormous cost to Mr. Bruggeman of an institutional placement, she was accused of greed and exploitation. She has been attacked, vilified and accused of all manner of neglect and exploitation without credible evidence and under a statutory scheme that is destined to set families and caregivers up to fail due to the uncertainty arising from the arbitrary enforcement of the rather recently enacted statute. And at the core of this conundrum was the court's refusal to hear from the man at the center of it all, Mr. Bruggeman, at a time when there had been no formal determination by applicable standards that he was unable to come forward and tell his side of the story. Viewed through this prism, it is easy to see how the circuit court erred in so many ways in the adjudication of these issues.

Dated this 31st day of December, 2020.

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Counsel for Jennifer Ramos

CERTIFICATE OF COMPLIANCE

I certify that this **corrected brief** complies with the type volume limitation provided for in SDCL § 15-26A-66(b)(4). This **corrected brief** contains **9,446** words. I have relied on the word count of the word processing system used to prepare this brief.

Dated this 31st day of December, 2020.

Stephen J. Wesolick
Mariah C. Bloom

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellant's Corrected Brief were served by depositing the same in the United States Post Office in Rapid City, South Dakota, with first class postage thereon fully prepaid this 31st day of December, 2020.

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APPENDIX

Permanent Order for Protection dated March 17, 2020..... App.1

Findings of Fact and Conclusions of Law (which include a Judgment and Order)
signed by the circuit court on April 6, 2020, having a Notice of Entry of Order dated
April 16, 2020..... App.4

Judgment and Order Amending Order for Protection *nunc pro tunc* to
March 17, 2020, signed by the circuit court on May 28, 2020, having a
Notice of Entry of Order dated June 3, 2020.....App. 24

Permanent Order for Protection Modification dated June 1, 2020,
signed by the Court on June 8, 2020..... App.30

SECOND APPENDIX

Notice of Entry of Findings of Fact and Conclusions of Law.....Second App.1

Portion of Permanent Protection Order Hearing Transcript.....Second App.3

Notice of Entry of Order dated June 3, 2020.....Second App.5

Portion of Show Cause Hearing Transcript.....Second App.7

Amended Notice of Appeal.....Second App.9

Portion of Show Cause Hearing Transcript.....Second App.10

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STATE OF SOUTH DAKOTA)
)
COUNTY OF BUTTE)

IN CIRCUIT COURT
4TH JUDICIAL CIRCUIT

VULNERABLE ADULT ABUSE
 EX PARTE TEMPORARY PERMANENT
 MODIFICATION

ORDER FOR PROTECTION
TPO NO. 09TPO20-06

PETITIONER

JAMES BRUGGEMAN
First Middle Last

By Substitute Petitioner (name and DOB):
BLACK HILLS ADVOCATE LLC
On behalf of the Vulnerable Adult Petitioner.

V.

RESPONDENT

JENNIFER RAMOS
First Middle Last

Relationship to Petitioner:

Respondent's Address:
2231 WILLOW CREEK ROAD
BELLE FOURCHE SD 57717

CAUTION: Weapon Involved

PETITIONER IDENTIFIERS:

12/16/1944
Date of Birth of Petitioner

Substitute Petitioner's Relationship to Petitioner:

FILED

MAR 17 2020

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

RESPONDENT IDENTIFIERS:

| SEX | RACE | HEIGHT | WEIGHT |
|-------------------|------|---------------|---------|
| F | | 5'2" | 105 |
| EYES | HAIR | DATE OF BIRTH | |
| BRO | | 05/13/1983 | |
| DRIVERS LICENSE # | | STATE | EXPDATE |
| 00854130 | | SD | |

Distinguishing Features:

THE COURT FINDS:

That it has jurisdiction over the parties and subject matter, and the Respondent has been provided with reasonable notice and opportunity to be heard, and that in the case of an ex parte order, the Respondent will be provided with reasonable notice and opportunity to be heard sufficient to protect the Respondent's due process rights.

THE COURT ORDERS:

That the Respondent is restrained from acts of physical abuse, emotional and psychological abuse, neglect, and financial exploitation of a vulnerable adult.

That the Respondent is restrained from contact with the Petitioner by any direct or indirect means except as authorized in this Order.

Additional findings and orders are on the following pages.

This Order shall be effective 03/17 2020 through 03/17 2023
Month/Day Year Month/Day Year

Only this Court can change this Order.

WARNING TO RESPONDENT: This Order shall be enforced, even without registration, by courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands (18 U.S.C. §2265). Crossing state, territorial, or tribal boundaries to violate this Order may result in federal imprisonment (18 U.S.C. §2262).

APP. 1

ADDITIONAL FINDINGS:

This matter came before this Court on this day and the following parties appeared personally:

- Petitioner Petitioner's Attorney CASSIDY STALLEY Other _____
- Substitute Petitioner S. Petitioner's Attorney CASSIDY STALLEY Other _____
- Respondent Respondent's Attorney SHILOH MACNALLY Other _____

- 1) This Court FINDS that, without admitting to the allegations in the Petition, the Respondent waives further hearing, findings of fact, and conclusions of law, and stipulates to the entry of an Order of Protection on the terms specified below.
- 2) Having considered the evidence presented and any affidavits and pleadings on file, this Court FINDS:
 - A. That jurisdiction and venue are properly before this Court;
 - B. That the above-named Petitioner is eligible for a protection order pursuant to SDCL ch. 21-65;
 - C. By a preponderance of the evidence that "vulnerable adult abuse" as defined by SDCL 21-65-1(4), has occurred; and
 - D. That the Respondent had actual notice of the hearing and an opportunity to participate.

ADDITIONAL ORDERS:

- 1) The Respondent is excluded from the Petitioner's residence listed in 2B.
- 2) The Respondent shall not come within a distance of 100 FEET from the following persons and places:
 - A. The Petitioner personally
 - B. The Petitioner's residence (street/apt) _____
(city) _____, (state) _____ (zip) _____ - _____
 - C. The Petitioner's place of employment (street) _____
(city) _____, (state) _____ (zip) _____ - _____
 - D. Other places (street/apt) 1821 VALLEY DR
(city) BELLE FOURCHE, (state) SD (zip) 57717 - _____
(street/apt) 1210 UNION ST
(city) BELLE FOURCHE, (state) SD (zip) 57717 - _____
(street/apt) _____
(city) _____, (state) _____ (zip) _____ - _____

This distance restriction applies unless otherwise specified in this Order.

- 3) The Respondent is restrained from exercising any powers on behalf of the Petitioner through a court-appointed guardian, conservator, or guardian ad litem, an attorney in fact, or another third party.
- 4) This Court FINDS that Respondent has financially exploited the Petitioner pursuant to SDCL 21-65-1(7) and 21-65-12 and ORDERS:
 - A. The Respondent is restrained from exercising control over the funds, benefits, property, resources, belongings, or assets of the Petitioner, except as otherwise provided for in this Order.
 - B. The Respondent shall return custody or control of the funds, benefits, property, resources, belongings, or assets:
 - To the Petitioner.
 - To the Petitioner's guardian / conservator / attorney in fact, namely BLACK HILLS ADVOCATE.
 - C. The Respondent shall follow the instructions of the guardian, conservator, or attorney in fact of the Petitioner, namely BLACK HILLS ADVOCATE.
 - D. The Respondent is prohibited from transferring any funds, benefits, property, resources, belongings, or assets of the Petitioner to any person other than the Petitioner, except as otherwise provided in this Order.

APP. 2

5) Phone calls, emails, third party contact, including correspondence direct or indirect, are not permitted, to Petitioner, except as follows:
NONE

6) Other relief as follows: TURN OVER ALL RENTS, KEYS, PROCEEDS FROM 2014 TO BLACK HILLS ADVOCATE. PROVIDE ACCOUNTING OF ALL RENTS LISTED IN 2D FROM 2014 AND IMMEDIATELY CONVEY WILLOW CREEK PROPERTY TO JAME BRUGGEMAN.

WARNING TO RESPONDENT: You may be held in contempt for violating this Protection Order even if any person protected by the Order initiates the contact or invites you to violate the Order's prohibitions. Only the court can change the Order; the protected person cannot waive any of its provisions.

AND IT IS FURTHER ORDERED THAT: the Petitioner shall, immediately upon the granting of this Order, deliver two copies of this Order to the sheriff of this county. One copy shall be personally served by the sheriff upon the Respondent, unless personal service has been acknowledged below.

DATED 3 / 17 / 2020

Service of this Order is authorized on any day including Sunday

Michelle Kloman
Judge

Attest: Laura Schriber, Clerk of Courts

Wendy Katerbach, Deputy



**NOTICE OF ENTRY OF ORDER AND
ACKNOWLEDGMENT OF PERSONAL SERVICE**

Acknowledge receipt of a copy of this Order of Protection.

[Signature]
Petitioner /
Substitute Petitioner
(circle one)

3-17-2020
Date

[Signature]
Respondent

3/17/20
Date

FILED

MAR 17 2020

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

App. 3

2. James C. Bruggeman (“Bruggeman”) is a 75-year old veteran with severe neurocognitive impairment, eligible for protection pursuant to SDCL ch. 21-65.

3. Respondent, Jennifer Ramos (“Ramos”), is a long-time, close family friend of Bruggeman. Since 2012, Ramos has been Bruggeman’s caretaker and power of attorney for finances, as well as power of attorney for health care.

4. Petitioner, Black Hills Advocate, LLC (“Black Hills Advocate), is Bruggeman’s permanent guardian and conservator, and is therefore a “substitute petitioner” pursuant to SDCL 21-65-1(14).

5. This Court has jurisdiction over the parties and subject matter of this case; venue is proper.

6. Ramos was provided with reasonable notice and opportunity to be heard sufficient to protect her due process rights.

7. Throughout her life, Bruggeman has bought Ramos things, including several cars.

8. In 2011, Bruggeman was diagnosed with vascular dementia. Exhibit 1 at 4237-4242.

9. His close friends, including Ramos, provided support for Bruggeman by administering medication, paying bills, cleaning, doing laundry, shopping, and preparing meals.

10. Bruggeman also received home health care assistance through the VA. Ex. 1 at 4242-4245.

11. In January 2012, it was noted that Ramos was taking over as Bruggeman's caregiver. Ex. 1 at 4165.

12. In June 2012, shortly after his dementia diagnosis, Bruggeman updated his Durable Power Attorney with Health Care Directives, appointing Ramos as his attorney-in-fact. Exhibit 2.

13. At the same time, Bruggeman also signed a new Last Will and Testament, naming Ramos as his personal representative and leaving his entire estate to Ramos. Exhibit 3.

14. In late 2012, Bruggeman liquidated assets and purchased a residential property, at 1210 Union Street, Belle Fourche, South Dakota 57717 ("Union Street house"), for \$150,000.00, for Ramos and her children. Testimony of Ramos and Niehaus.

15. Bruggeman was the only individual listed on the mortgage and deed for the Union Street house. Exhibit 5; Testimony of Ramos.

16. At that time, his financial advisor noted Bruggeman's forgetfulness. Testimony of Niehaus.

17. Ramos and her children moved into the Union Street house in late 2012. Testimony of Ramos.

18. In May 2014, the VA recommended that Bruggeman seek a higher level of care. Ex. 1 at 3722.

19. Yet, Ramos, as Bruggeman's designated caregiver, left Bruggeman to manage and live alone at his Valley Drive home until on or about December 31, 2014,

when Ramos finally moved Bruggeman into a small garage in the backyard of the Union Street house. Testimony of Ramos.

20. At that time, Ramos placed a baby monitor in the garage to monitor Bruggeman and his needs. Testimony of Ramos; Ex. 1 at 3530.

21. From 2014 to 2017, Bruggeman continued to decline while his medical providers continued to recommend higher levels of care. And Ramos, as his primary caregiver, did the minimum. Bruggeman continued living alone in the garage, and Ramos continued to isolate Bruggeman, admitting that she refused outside assistance for Bruggeman, including Meals on Wheels, home bath aides, and homemaking, even though those things would have helped him. Testimony of Ramos; Ex. 1 at various.

22. In January 2015, Bruggeman had a neurocognitive evaluation and was diagnosed by Dr. Michael J. Huxford with major neurocognitive disorder. Impairment in cognitive functioning, specifically in areas of attention and working memory, were noted. Ex. 1 at 3544-3547.

23. In December 2016, Bruggeman underwent another round of neurocognitive testing, given concerns of worsening cognition and increased behavioral difficulties; he was again diagnosed with major neurocognitive disorder. Ex. 1 at 3124-3133.

24. In April 2017, the VA strongly recommended that Bruggeman needed increased supervision and assistance due to his cognitive decline. The VA recommended that Bruggeman receive 24/7 care and supervision, due to his behaviors of increased disorientation and sun-downing. Ex. 1 at 3058-3061; 3040.

25. In May 2017, the VA again strongly recommended that Bruggeman needed increased supervision and assistance due to his worsening cognitive decline. The VA recommended it would be in Bruggeman's best interest to have a higher level of care, such as from a nursing home, which could provide 24/7 care and supervision. Ex. 1 at 3037-41.

26. The VA gave Ramos three months to pursue a long-term placement that could provide 24/7 care and supervision to Bruggeman. Ex. 1 at 3039; Testimony of Ramos.

27. However, instead of following the VA's recommendation, Ramos informed the VA in late May 2017 that she would not be placing Bruggeman in long-term care because of the financial impact it would have on herself and her children. Ex. 1 at 3032; Ex. 6.

28. Ramos admitted that she had commingled her assets with Bruggeman's and that his name was on her home loan and title. Ramos stressed that she did not want to lose her home and cars. Ramos conveyed that she and her family would be homeless if Bruggeman was placed in a long-term care facility. Ex. 6.

29. Upon receipt of this information, the VA immediately voiced its concerns about possible financial exploitation and isolation of Bruggeman by Ramos to the South Dakota Department of Human Services. Ex. 16.

30. Due to Ramos' refusal to put Bruggeman's needs above her own and move him into a long-term care facility, Bruggeman was discharged from home health services.

Bruggeman continued to live alone in the garage with a baby monitor; Ramos admitted he was like a toddler. Ex. 1 at 3026-3029; Testimony of Ramos.

31. Ramos testified she went to every appointment with Bruggeman. Therefore, Ramos was well-aware of the VA's recommendations that it would be in Bruggeman's best interest to have a higher level of care, such as from a nursing home, to provide 24/7 care and supervision. Further, Ramos knew she was Bruggeman's health care power of attorney and that Bruggeman lacked the capacity to make health care decisions for himself.

32. As his caretaker and health care power of attorney, Ramos neglected Bruggeman as, without reasonable medical justification, Ramos failed to provide adequate medical care for Bruggeman, when Bruggeman had the means available to obtain the recommended care.

33. On March 26, 2018, Ramos and her husband, Clay Runyan, made an offer to purchase a home at 2231 Willow Creek Road, Belle Fourche, South Dakota ("Willow Creek house"), for a purchase price of \$300,000.00, with financial contingency of obtaining a mortgage. Ex. 2 at 663-668; Ex. 7.

34. At some point between March 26, 2018, and April 3, 2018, Ramos contacted Wells Fargo, seeking to be added as a supplemental account owner/third party authorized individual on Bruggeman's Wells Fargo Advisors brokerage accounts. Testimony of Niehaus.

35. Troy Niehaus, financial advisor for Wells Fargo Advisors, testified that given the significance of adding someone as a supplemental account owner/third party

authorized individual, thereby granting them authority over potentially large sums of money, Niehaus requested that Bruggeman meet him in person to discuss the gravity of giving Ramos such access. Testimony of Niehaus.

36. On April 3, 2018, Niehaus met with Bruggeman and Ramos. Testimony of Niehaus.

37. Niehaus testified that during that meeting, Bruggeman conveyed he wanted to add Ramos as a supplemental account owner/third party authorized individual, in case he would become incapacitated for any reason and money and/or securities needed to be sold and moved for his benefit. Testimony of Niehaus.

38. Niehaus prepared the necessary paperwork and obtained Bruggeman's and Ramos' signatures, granting Ramos third party authorization to Bruggeman's Wells Fargo brokerage accounts, "in case of health issues." Ex. 8.

39. Niehaus stressed that the supplemental account owner/third party authorization did not authorize Ramos to use funds for herself, only for the use and benefit of Bruggeman and his health care needs. Testimony of Niehaus.

40. Niehaus also testified that, during this meeting on April 3, 2018, it was discussed that Ramos and Bruggeman were together looking to purchase a new home, in which Bruggeman would live with Ramos and her children. Niehaus understood from this discussion that Bruggeman would be purchasing a home with more space so that he could live within the main home – as opposed to living in a garage in the backyard – and Ramos could help Bruggeman more conveniently and consistently. Testimony of Niehaus.

41. Ramos admitted she did not tell Niehaus that Bruggeman had been diagnosed with major neurocognitive disorder. Testimony of Niehaus; Testimony of Ramos.

42. Ramos also admitted that she failed to inform Niehaus that the VA was recommending 24/7 care and supervision from a nursing home due to Bruggeman's worsening cognitive decline, increased disorientation, and sun-downing. Testimony of Niehaus; Testimony of Ramos.

43. Several days later, on April 27, 2018, Ramos submitted an Amendment to Purchase Agreement on the Willow Creek house, removing Runyan as a purchaser, but – more notably – removing her financial contingency and advising that she would be proceeding with a cash sale. Ex. 2 at 654; Ex. 9; Testimony of Ramos.

44. On April 30, 2018, the sellers countered, requesting that Ramos provide proof from Wells Fargo Bank and Pioneer Bank, verifying the availability of funds, as well as Ramos' ability to use all said funds for the sole purpose of purchasing the Willow Creek house. Ex. 2 at 653; Ex. 10; Testimony of Ramos.

45. Ramos admitted that, less than 24 hours later, she contacted the VA and requested that Bruggeman be declared incompetent. Ex. 11; Testimony of Ramos.

46. Consequently, another neuropsychological evaluation was completed on May 9, 2018, by Dr. Denning. Dr. Denning noted that Bruggeman has "deficits in the following areas: recent poor judgment (financial), disorientation and confusion, and increased impulsivity and inhabitation." Dr. Denning found that Bruggeman "no longer has the capacity to care for himself or make decisions that are in his best interests." It

was again recommended that Bruggeman be placed in a higher level of care, such as a nursing home or assisted-living facility. Ex. I at 3014-3022; Ex. H; Testimony of Ramos.

47. Ramos admitted that, five days later, on May 14, 2018, she withdrew \$228,756.46 from Bruggeman's Wells Fargo brokerage accounts. Testimony of Ramos; Testimony of Niehaus.

48. Ramos admitted that, a week after that, on May 21, 2018, she withdrew \$100,000.00 from Bruggeman's Pioneer Bank and Trust account. Ex. 12; Testimony of Ramos; Testimony of Niehaus.

49. Ramos admitted that, on May 21, 2018 – only two weeks after having Bruggeman declared incompetent – she purchased the Willow Creek house by using the approximately \$328,000.00 cash she withdrew from Bruggeman's accounts. Testimony of Ramos.

50. Ramos admitted she is the only individual on the deed and purchase agreement for the Willow Creek house. Testimony of Ramos; Exhibit 2 at 686.

51. At that time, Ramos was Bruggeman's caretaker and power of attorney.

52. Ramos willfully financially exploited Bruggeman by taking and exercising control over his funds with the intent to defraud Bruggeman of his funds for her own financial gain and benefit.

53. Niehaus testified that in June 2018, following the withdrawal of over \$200,000.00 from Bruggeman's Wells Fargo brokerage accounts, Bruggeman contacted Niehaus several times via telephone, often with back-to-back phone calls. Niehaus

related that at that time Bruggeman expressed concern about his available balances and requested notification if Ramos attempted to make additional transactions. Bruggeman also contacted Niehaus several times, asking to remove Ramos as supplemental account owner/third party authorized individual, but then calling back directing to leave Ramos as a supplemental account owner/third party authorized individual on his brokerage accounts. Testimony of Niehaus.

54. The purchase of the Willow Creek house by Ramos was not a transaction for the use and benefit of Bruggeman and his needs, but instead a financial loss to Bruggeman, and a financial gain to Ramos and for her use and benefit.

55. While Ramos testified she moved Bruggeman into the Willow Creek house when she and her children moved in, the evidence suggests otherwise. Testimony of Ramos.

56. Indeed, Niehaus testified that, during a telephone conversation with Bruggeman in July 2018, Bruggeman related to Niehaus that he had not moved to the Willow Creek house and “may not ever move” to the Willow Creek house. Testimony of Niehaus.

57. In August 2018, after securing a new house for herself and her children entirely in her name only, Ramos finally moved Bruggeman into an assisted living center, Serenity Corner Assisted Living, in Spearfish, South Dakota. Testimony of Ramos.

58. Given Niehaus’ telephone calls with Bruggeman in June and July, and Bruggeman’s statement that he may not ever move into the Willow Creek house, Niehaus

testified he contacted Wells Fargo's Elder Client Initiatives to perform an investigation.

Testimony of Niehaus.

59. Wells Fargo subsequently restricted Bruggeman's Wells Fargo investment accounts on or about August 2018. Testimony of Niehaus.

60. In September 2018, Bruggeman signed a document revoking Ramos as supplemental account owner/third party authorized individual on his brokerage accounts. Testimony of Niehaus; Ex. 14.

61. Throughout 2018, and while acting as his power of attorney, Ramos admitted she took Bruggeman's money at Pioneer Bank and Trust for her and her children's own use and benefit. Ramos admitted to taking Bruggeman's funds to purchase such things as, but not limited to, an Xbox Live subscription, Rod Stewart tickets, clothing, and a massage. Ramos also admitted she took approximately \$8,000.00 from Bruggeman's account to construct a pole barn and make other home improvements at the Willow Creek house. All of this was for her and her children's own personal benefit, not Bruggeman's. Ex. 13; Testimony of Ramos.

62. Ramos' actions, as Bruggeman's power of attorney, constitute financial exploitation of a vulnerable adult, with the intent to defraud Bruggeman by financial loss to him and financial gain to herself.

63. In January 2019, Bruggeman told Ramos he wanted to move to Arizona with a friend. Law enforcement was involved. Butte County Chief of Police Marlyn Pomrenke testified that Bruggeman was adamant that he was going to go to Arizona. However, Pomrenke testified that it was apparent Bruggeman was in no condition to

make such a move and that staying at an assisted living facility was in his best interests; Pomrenke testified if Bruggeman were his dad, he would not have allowed his dad to leave South Dakota. Pomrenke advised Ramos to contact an attorney. Testimony of Pomrenke and Ramos.

64. Ramos claimed that she did everything in her power to prevent Bruggeman from leaving his assisted living facility and going to Arizona with his friend, but in the end there was nothing she could do. However, Ramos testified approximately five times that, given her status as power of attorney and power of attorney health care, she “had the power” and that she “always had the power.” Ramos could have stopped Bruggeman from leaving his assisted living facility as his power of attorney health care and failed to do so. Ramos was also well-aware that Bruggeman needed 24/7 supervision and that he was not in a position to make his own decisions. Testimony of Ramos.

65. Bruggeman returned to South Dakota in April 2019 and was promptly admitted to the VA, where he was diagnosed with failure to thrive. Multiple witnesses testified that Bruggeman was in very rough shape. Ramos claimed that he had been in a rehab facility for months after breaking his back and was covered in bruises.

66. Despite the VA again recommending 24/7 supervision and a nursing home level of care to ensure Bruggeman’s safety and assistance with ADLs, Ramos again had Bruggeman discharged to her care in early May 2019. Ramos again claimed that Bruggeman did not have enough money to afford higher levels of care. Ex. 17; Testimony of Fleming and Ramos.

67. Days after he was discharged to Ramos' care, Ramos brought Bruggeman back to the VA emergency room. At that time, the VA noted that Bruggeman was covered in bruises and that it was evident Ramos could not care for Bruggeman properly. The VA promptly contacted the Department of Human Services, noting that it was apparent that Ramos was depending on Bruggeman's finances, prohibiting his money from going towards payment of an appropriate and necessary placement. Ex. 18; Testimony of Fleming and Ramos.

68. The Department of Human Services then became heavily involved in Bruggeman's case, and Bruggeman was not released to Ramos' care. Since May 2019, Bruggeman has been placed at the VA. Testimony of Fleming.

CONCLUSIONS OF LAW

To the extent that any Conclusion of Law is improperly designated as such, it shall be considered as a Finding of Fact.

1. A vulnerable adult or substitute petitioner may seek relief from vulnerable adult abuse by filing a petition and affidavit in the circuit court. SDCL 21-65-2.
2. A vulnerable adult is a person sixty-five years of age or older who is unable to protect himself or herself from abuse as a result of age or mental or physical condition, or an adult with a disability. SDCL 21-65-1(15).
3. Bruggeman is a 75-year old veteran with severe neurocognitive impairment and is therefore a vulnerable adult.

4. A substitute petitioner is a family or household member, guardian, conservator, attorney-in-fact, or guardian ad litem for a vulnerable adult, or other interested person. SDCL 21-65-1(14).

5. Black Hills Advocate is Bruggeman's permanent guardian and conservator and is therefore a substitute petitioner.

6. Vulnerable adult abuse is any of the following:

- (a) Physical abuse;
- (b) Emotional and psychological abuse;
- (c) Neglect; or
- (d) Financial exploitation.

SDCL 21-65-1(4).

7. Vulnerable adult abuse must be proven by a preponderance of the evidence. SDCL 21-65-11.

8. Neglect means harms to the health or welfare of a vulnerable adult, without reasonable medical justification, caused by a caretaker, within the means available for the vulnerable adult, including the failure to provide adequate food, clothing, shelter, or medical care. SDCL 21-65-1(14); SDCL 22-46-1(6).

9. A caretaker is a related or nonrelated person who has the responsibility for the health or welfare of a vulnerable adult as a result of assuming the responsibility voluntarily, by contract, by receipt of payment for care, or by order of the court. SDCL 21-65-1(2); SDCL 22-46-1(2).

10. Ramos was Bruggeman's caretaker and durable power of attorney health care.

11. Petitioner has shown by a preponderance of the evidence that vulnerable adult abuse has occurred by Ramos by neglect of Bruggeman. As his caretaker and health care power of attorney, Ramos neglected Bruggeman as, without reasonable medical justification, Ramos failed to provide adequate medical care for Bruggeman, when Bruggeman had the means available to obtain the recommended care.

12. Financial exploitation is the wrongful taking or exercising of control over property of a vulnerable adult with intent to defraud a vulnerable adult, by a person who stands in a position of trust or confidence. SDCL 21-65-1(7); SDCL 22-46-1(5).

13. Conduct is intentional when a person acts or fails to act for the purpose of causing injury or knowing that injury is substantially certain to occur. Knowledge or intent may be inferred from the person's conduct and the surrounding circumstances. South Dakota Civil Pattern Jury Instructions 20-50-20.

14. "Defraud" means to deprive another of a right or property by fraud, that is, to gain or seek to gain some unfair or dishonest advantage by any deception, deceit, artifice or unlawful act or breach of duty or confidence. To act with "intent to defraud" means to act willfully and with the specific intent to deceive or cheat, ordinarily for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. South Dakota Criminal Pattern Jury Instructions, 1-11-5.

15. A person who stands in a position of trust or confidence is a person who is a caretaker for, or who is in a confidential relationship with, the vulnerable adult. SDCL 21-65-1(13)(b) and (c).

16. Ramos was a person who stood in a position of trust or confidence, as she was Bruggeman's caretaker and power of attorney.

17. Petitioner has shown by a preponderance of the evidence that vulnerable adult abuse has occurred at the hands of Ramos through financial exploitation of Bruggeman. While in her capacity of caretaker and power of attorney of Bruggeman, Ramos willfully and wrongfully took over \$328,000.00 to purchase a house for herself, as well as making numerous other purchases for herself and her children, with the intent to cause financial loss to Bruggeman and/or to bring about financial gain for herself.

18. A prevailing party may recover expenditures necessarily incurred in gathering and procuring evidence or bringing the matter to trial. Such expenditures include costs of telephonic hearings, costs of telephoto or fax charges, fees of witnesses, interpreters, translators, officers, printers, service of process, filing, expenses from telephone calls, copying, costs of original and copies of transcripts and reporter's attendance fees, court appointed experts, and other similar expenses and charges. SDCL 15-17-37.

19. Attorney's fees may be taxed as disbursements if allowed by specific statute. SDCL 15-17-38.

20. SDCL 21-65-15 specifically states that Ramos may be ordered to pay attorney's fees and court costs of the vulnerable adult and substitute petitioner.

JUDGMENT AND ORDER

WHEREFORE, based upon the Court's Findings of Fact and Conclusions of Law, the Court hereby ORDERS as follows:

1. That Ramos is restrained from acts of physical abuse, emotional and psychological abuse, neglect, and financial exploitation of a vulnerable adult.
2. That Ramos is restrained from contact with Bruggeman by any direct or indirect means.
3. That Ramos shall not come within 100 feet of Bruggeman.
4. That Ramos shall not come within 100 feet of 1714 8th Ave, Belle Fourche, South Dakota.
5. That Ramos shall not come within 100 feet of 1210 Union Street, Belle Fourche, South Dakota.
6. That Ramos is restrained from exercising any powers on behalf of Bruggeman through a court-appointed guardian, conservator, or guardian ad litem, an attorney-in-fact, or another third party.
7. That Ramos is restrained from exercising control over the funds, benefits, property, resources, belongings, and assets of Bruggeman.
8. That Ramos shall immediately return custody or control of all funds, benefits, property, resources, belongings, and assets of Bruggeman to Bruggeman's guardian and conservator, Black Hills Advocate.
9. That Ramos shall follow the instructions of Bruggeman's guardian and conservator, Black Hills Advocate.
10. That Ramos is prohibited from transferring any funds, benefits, property, resources, belongings, and assets of Bruggeman to any person other than Bruggeman and Bruggeman's guardian and conservator, Black Hills Advocate.

11. That Ramos is restrained from all phone calls, emails, third party contact, including direct or indirect, to Bruggeman.

12. That Ramos shall immediately turn over all keys, rental agreements, rents, and proceeds she has collected from 2014 to the present for the rental of the residences located at 1714 8th Ave, Belle Fourche, South Dakota, and the home and/or garage apartment at 1210 Union Street, Belle Fourche, South Dakota to Black Hills Advocate.

13. That Ramos shall immediately provide an accounting of all rents and proceeds collected from 2014 to the present for the rental of the residences located at 1714 8th Ave, Belle Fourche, South Dakota, and the home and/or garage apartment at 1210 Union Street, Belle Fourche, South Dakota to Black Hills Advocate.

14. That Ramos shall immediately convey the property located at 2231 Willow Creek Road, Belle Fourche, South Dakota, by warranty deed.

15. That Ramos shall pay Petitioner's reasonable and necessary legal fees incurred in bringing this action as determined by the Court and set forth in the Affidavit of Cassidy M. Stalley in the amount of \$19,821.85. That a judgment is rendered for Petitioner and against Ramos in the amount of \$19,821.85.

Let Judgment be entered accordingly.

BY THE COURT: Signed: 4/6/2020 4:03:13 PM

Michelle Comer

Michelle K. Comer
Circuit Court Judge

Attest:
Jensen, Alana
Clerk/Deputy



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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2020, I sent to:

Mr. Stephen J. Wesolick
Aspen Legacy Planning/Wesolick Law Firm
909 St. Joseph Street, Ste. 202
Rapid City, SD 57701
stephen@aspenlegacyplanning.com

Ms. Mariah C. Bloom
Aspen Legacy Planning/Wesolick Law Firm
909 St. Joseph Street, Ste. 202
Rapid City, SD 57701
mariah@aspenlegacyplanning.com

by Notice of Electronic Filing generated by the Odyssey File & Serve system, a true and correct copy of **Notice of Entry of Findings of Fact and Conclusions of Law** relative to the above-entitled matter.

/s/ Cassidy M. Stalley
Cassidy M. Stalley

property, resources, belongings, or assets other than title to real property. The Court is of the opinion that the Order for Protection entered on March 17, 2020, ("Order for Protection") followed by the Findings of Fact and Conclusions of Law, with Judgment and Order, entered on April 6, 2020, ("Judgment and Order") shall be amended to remove the requirement of Respondent's conveyance of title to the real property, relying upon SDCL 21-65-16. After hearing argument of counsel and testimony of Respondent, the Court is also of the opinion that Respondent shall be ordered to return to Petitioner the funds in the amount of \$296,500.00, representing the amount that Respondent admits she withdrew from Petitioner's bank account(s) to purchase the Willow Creek Property. It is, therefore,

ORDERED that the Order for Protection and the Judgment and Order are hereby amended *nunc pro tunc* to remove the requirement that Respondent immediately convey to Petitioner title to the Willow Creek Property by warranty deed. It is further,

ORDERED that the Order for Protection and the Judgment and Order are hereby amended *nunc pro tunc* to require Respondent to immediately deliver to Petitioner funds, benefits, property, resources, belongings, or assets to the Petitioner's Guardian and Conservator, namely Black Hills Advocate, LLC, which includes, but is not limited to the \$296,500.00 Respondent admits she removed from Petitioner's accounts to purchase the real Willow Creek property. It is further,

ORDERED that the Order for Protection and the Judgment and Order are hereby amended *nunc pro tunc* to require that Respondent not sell, convey or transfer the Willow Creek Property, or permit any encumbrance against it and, in general, to maintain the property and pay taxes on it pending appeal or further order of the Court. It is further,

ORDERED that Petitioner shall have a judgment against Respondent in the amount of \$296,500.00, which sum represents the funds used to purchase the real property located at 2231 Willow Creek Road, Belle Fourche, South Dakota. Execution on said judgment of \$296,500.00 shall be stayed upon payment of a \$1,000.00 supersedes bond by Respondent pending appeal. It is further,

ORDERED that the Order for Protection and the Judgment and Order are hereby amended *nunc pro tunc* to reflect the proper addresses of Petitioner's rental properties, incorrectly listed in 2B of the Order for Protection, to: 1210 Union Street, Belle Fourche South Dakota; and 830 Lawrence Street, Belle Fourche, South Dakota. Respondent shall not come within 100 feet of these properties; shall be restrained from exercising control over such properties; and shall immediately turn over all rents, keys, and proceeds from 2014 to the present to Black Hills Advocate. Petitioner will also immediately provide an accounting of all rents on the Belle Fourche properties listed above from 2014 to the present to Black Hills Advocate. It is further,

ORDERED that all Findings of Fact and Conclusions of Law are hereby incorporated by this reference as though fully set forth herein. It is further,

ORDERED that this Order, and the portions of the Protection Order not revised herein, shall continue to be in full force and effect and all terms therein and in this Order shall continue to apply until March 17, 2023 or until otherwise ordered by the Court. It is further,

ORDERED that Respondent's Application for Stay is GRANTED and Respondent shall be required to deposit a cash supersedeas bond in the amount of \$1,000.00 to suspend enforcement of the Order for Protection and Judgment and Order. Upon Respondent's deposit of

the cash supersedeas bond with the Clerk of Courts all further proceedings in this action shall be suspended and stayed pending appeal or further order of the Court.

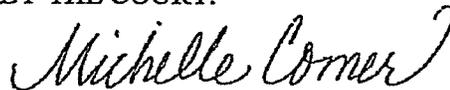
IT IS FURTHER ORDERED that the Petitioner shall, immediately upon the granting of this Amended Protection Order, deliver two (2) copies of the same to the Butte County Sheriff. One copy shall be personally served by the Sheriff upon Respondent.

All other relief not specifically granted by this order is DENIED.

WARNING TO RESPONDENT: You may be held in contempt for violating this Amended Protection Order, even if any person protected by the Order initiates the contact or invites you to violate the Amended Order's prohibitions. Only the court can change this Amended Order and original Protection Order; the protected person cannot waive any of its provisions.

Dated this _____ day of May, 2020, effective, however, the 17th day of March, that being the date of the hearing affording judicial basis for this order.
Signed: 5/28/2020 4:04:26 PM

BY THE COURT:



Michelle K. Comer
Circuit Court Judge

Attest
Schmoker, Laura
Clerk/Deputy



I hereby certify that on June 3, 2020, I sent to:

Mr. Stephen J. Wesolick
Aspen Legacy Planning/Wesolick Law Firm
909 St. Joseph Street, Ste. 202
Rapid City, SD 57701
stephen@aspenlegacyplanning.com

Ms. Mariah C. Bloom
Aspen Legacy Planning/Wesolick Law Firm
909 St. Joseph Street, Ste. 202
Rapid City, SD 57701
mariah@aspenlegacyplanning.com

by Notice of Electronic Filing generated by the Odyssey File & Serve system, a true and correct copy of **Notice Of Entry Of Order** relative to the above-entitled matter.

/s/ Cassidy M. Stalley
Cassidy M. Stalley

STATE OF SOUTH DAKOTA)
)
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|
| VULNERABLE ADULT ABUSE <input type="checkbox"/> EX PARTE TEMPORARY <input checked="" type="checkbox"/> PERMANENT <input checked="" type="checkbox"/> MODIFICATION | ORDER FOR PROTECTION TPO NO. <u>09TPO20-000006</u> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|

PETITIONER
JAMES C BRUGGEMAN
First Middle Last

PETITIONER IDENTIFIERS:
12/16/1944
Date of Birth of Petitioner

By Substitute Petitioner (name and DOB):
BLACK HILLS ADVOCATE LLC
On behalf of the Vulnerable Adult Petitioner.

Substitute Petitioner's Relationship to
Petitioner:

V.
RESPONDENT

JENNIFER RAMOS
First Middle Last

RESPONDENT IDENTIFIERS:

Relationship to Petitioner:

| SEX | RACE | HEIGHT | WEIGHT |
|-------------------|------|---------------|---------|
| F | | 5'2" | 105 |
| EYES | HAIR | DATE OF BIRTH | |
| BRO | | 05/13/1983 | |
| DRIVERS LICENSE # | | STATE | EXPDATE |
| 00854130 | | SD | |

Respondent's Address:
2231 WILLOW CREEK ROAD
BELLE FOURCHE, SD 57717

Distinguishing Features:

CAUTION: Weapon Involved

THE COURT FINDS:

That it has jurisdiction over the parties and subject matter, and the Respondent has been provided with reasonable notice and opportunity to be heard.

THE COURT ORDERS:

That the Respondent is restrained from acts of physical abuse, emotional and psychological abuse, neglect, and financial exploitation of a vulnerable adult.

That the Respondent is restrained from contact with the Petitioner by any direct or indirect means except as authorized in this Order.

Additional findings and orders are on the following pages.

This order shall be effective 06/01 2020 through 03/17 2023
Month/Day Year Month/Day Year

Only this Court can change this Order.

WARNING TO RESPONDENT: This Order shall be enforced, even without registration, by courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands (18 U.S.C. §2265). Crossing state, territorial, or tribal boundaries to violate this Order may result in federal imprisonment (18 U.S.C. §2262).

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ADDITIONAL FINDINGS:

This matter came before this Court on this day and the following parties appeared personally:

- Petitioner Petitioner's Attorney STALLEY, CASSIDY M ... Other ...
 Substitute Petitioner S. Petitioner's Atty ... Other ...
 Respondent Respondent's Attorney MACNALLY, SHILOH M. ... Other ...

- 1) This Court FINDS that, without admitting to the allegations in the Petition, the Respondent waives further hearing, findings of fact, and conclusions of law, and stipulates to the entry of an Order of Protection on the terms specified below.
- 2) Having considered the evidence presented and any affidavits and pleadings on file, this Court FINDS:
- A. That jurisdiction and venue are properly before this Court;
 - B. That the above-named Petitioner is eligible for a protection order pursuant to SDCL ch.21-65;
 - C. By a preponderance of the evidence that "vulnerable adult abuse" as defined by SDCL 21-65-1(4) has occurred; and
 - D. That the Respondent had actual notice of the hearing and an opportunity to participate.

ADDITIONAL ORDERS:

- 1) The Respondent is excluded from the Petitioner's residence listed in 2B.
- 2) The Respondent shall not come within a distance of 100 Feet from the following persons and places:
- A. The Petitioner personally
 - B. The Petitioner's residence (street/apt) _____, (state) _____ (zip) _____
 - C. The Petitioner's place of employment (street) _____, (state) _____ (zip) _____
 - D. Other places (street/apt) 1210 UNION ST
(city) BELLE FOURCHE, (state) SD (zip) 57717
(street/apt) 830 LAWRENCE ST
(city) BELLE FOURCHE, (state) SD (zip) 57717

This distance restriction applies unless otherwise specified in this Order.

- 3) The Respondent is restrained from exercising any powers on behalf of the Petitioner through a court-appointed guardian, conservator, or guardian ad litem, an attorney in fact, or another third party.
- 4) This Court FINDS that Respondent has financially exploited the Petitioner pursuant to SDCL 21-65-1(7) and 21-65-12 and ORDERS:
- A. The Respondent is restrained from exercising control over the funds, benefits, property, resources, belongings, or assets of the Petitioner, except as otherwise provided for in this Order.
 - B. The Respondent shall return custody or control of the funds, benefits, property, resources, belongings, or assets:
 - To the Petitioner.
 - To the Petitioner's guardian / conservator / attorney in fact, namely _____
(circle)
 - C. The Respondent shall follow the instructions of the guardian, conservator, or attorney in fact of the Petitioner, namely _____
 - D. The Respondent is prohibited from transferring any funds, benefits, property, resources,

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belongings, or assets of the Petitioner to any person other than the Petitioner, except as otherwise provided in this Order.

5) Phone calls, emails, third party contact, including correspondence, direct or indirect, are not permitted, to Petitioner, except as follows:

NONE

6) Other relief as follows: RESPONDENT TO IMMEDIATELY DELIVER TO PETITIONER FUNDS, BENEFITS, PROPERTY, RESOURCES, BELONGINGS, OR ASSETS TO PETITIONER'S GUARDIAN AND CONSERVATOR (BLACK HILLS ADVOCATE LLC), INCLUDING BUT NOT LIMITED TO \$296,500. RESPONDENT SHALL NOT SELL, CONVEY, OR TRANSFER THE WILLOW CREEK PROPERTY OR PERMIT ANY ENCUMBERANCE AGAINST IT AND SHALL MAINTAIN THE PROPERTY AND PAY TAXES ON IT. TURN OVER ALL RENTS, KEYS AND PROCEEDS FROM 2014 TO BLACK HILLS ADVOCATE. PROVIDE ACCOUNTING OF ALL RENTS LISTED IN 2D FROM 2014 TO JAMES BRUGGEMAN.

WARNING TO RESPONDENT: You may be held in contempt for violating this Protection Order even if any person protected by the Order initiates the contact or invites you to violate the Order's prohibitions. Only the court can change the Order; the protected person cannot waive any of its provisions.

AND IT IS FURTHER ORDERED THAT: the Petitioner shall, immediately upon the granting of this Order, deliver two copies of this Order and two copies of the Motion to Modify to the sheriff of this county. One copy of each shall be personally served by the sheriff upon the Respondent, unless personal service has been acknowledged below.

APP. 32

Dated: 06 / 01 / 2020

Signed: 6/8/2020 10:58:47 AM
Service of this Order is authorized on any day including Sunday.

Michelle Comer

JUDGE MICHELLE COMER

Attest: /S/ LAURA SCHMOKER, Clerk of Courts

By: JSBF10201, Deputy



NOTICE OF ENTRY OF ORDER AND
ACKNOWLEDGMENT OF PERSONAL SERVICE

I acknowledge receipt of a copy of this Order of Protection.

JAMES C BRUGGEMAN, Petitioner;
BLACK HILLS ADVOCATE LLC, Substitute
Petitioner

Date

Steph... representative
for Jennifer Ramos 6/9/2020
JENNIFER RAMOS, Respondent Date

STATE OF SOUTH DAKOTA
Fourth Judicial Circuit Court
I hereby certify that the foregoing instrument
is a true and correct copy of the original as the
same appears on file in my office on this date:

JAN 08 2020

Laura Schmoker
Butte County Clerk of Courts

By: *Laura Schmoker*

APP. 33

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2020, I sent to:

Mr. Stephen J. Wesolick
Aspen Legacy Planning/Wesolick Law Firm
909 St. Joseph Street, Ste. 202
Rapid City, SD 57701
stephen@aspenlegacyplanning.com

Ms. Mariah C. Bloom
Aspen Legacy Planning/Wesolick Law Firm
909 St. Joseph Street, Ste. 202
Rapid City, SD 57701
mariah@aspenlegacyplanning.com

by Notice of Electronic Filing generated by the Odyssey File & Serve system, a true and correct copy of **Notice of Entry of Findings of Fact and Conclusions of Law** relative to the above-entitled matter.

/s/ Cassidy M. Stalley

Cassidy M. Stalley

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Second
APP 4

I hereby certify that on June 3, 2020, I sent to:

Mr. Stephen J. Wesolick
Aspen Legacy Planning/Wesolick Law Firm
909 St. Joseph Street, Ste. 202
Rapid City, SD 57701
stephen@aspenlegacyplanning.com

Ms. Mariah C. Bloom
Aspen Legacy Planning/Wesolick Law Firm
909 St. Joseph Street, Ste. 202
Rapid City, SD 57701
mariah@aspenlegacyplanning.com

by Notice of Electronic Filing generated by the Odyssey File & Serve system, a true and correct copy of **Notice Of Entry Of Order** relative to the above-entitled matter.

/s/ Cassidy M. Stalley

Cassidy M. Stalley

Second
APP. 6

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STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF LAWRENCE)

I, SANDRA C. SEMERAD, RMR, CRR, an Official Court Reporter and Notary Public in the State of South Dakota, Fourth Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings in the above-entitled matter and that Pages 1 through 44, inclusive, are a true and correct copy, to the best of my ability, of my stenotype notes of said proceedings had before the HONORABLE MICHELLE K. COMER, Circuit Court Judge.

Dated at Deadwood, South Dakota, this 3rd day of June, 2020.

/s/ Sandra C. Semerad
SANDRA C. SEMERAD, RMR, CRR
Registered Merit Reporter
My Commission Expires: 3/7/24

*Second
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Second
APP. 8

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

JAMES BRUGGEMAN,)
Petitioner,)

File No. 09TPO20-000006

By BLACK HILLS ADVOCATE LLC)
Substitute Petitioner,)

AMENDED NOTICE OF APPEAL

vs.)

JENNIFER RAMOS,)
Respondent.)

To: Cassidy M. Stalley and Drew Skjoldal of Lynn Jackson, Shultz & Lebrun, PC, attorneys for Petitioner James Bruggeman and Substitute Petitioner Black Hills Advocate, LLC and to Jason R. Ravnsborg, SD Attorney General:

PLEASE TAKE NOTICE and be advised that the above-named Respondent, Jennifer Ramos, hereby appeals to the Supreme Court of South Dakota from (i) the Permanent Order for Protection dated March 17, 2020, (ii) the Findings of Fact and Conclusions of Law (which include a Judgment and Order) signed by the Court on April 6, 2020, having a Notice of Entry of Order dated April 16, 2020, and (iii) Judgment and Order Amending Order for Protection nunc pro tunc to March 17, 2020 signed by the Court on May 28, 2020, having a Notice of Entry of Order dated June 3, 2020.

Dated this 4th day of June, 2020.

[Signature on following page]

*Second
APP. 9*

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*Second
 App 10*

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

Appeal No. 29308

JAMES BRUGGEMAN, by Substitute Petitioner, BLACK HILLS ADVOCATE,
LLC on behalf of the Vulnerable Adult Petitioner,

Petitioner and Appellee,

vs.

JENNIFER RAMOS,

Respondent and Appellant.

Appeal from the Circuit Court
Fourth Judicial Circuit
Butte County, South Dakota

Honorable Michelle K. Comer
Circuit Court Judge

APPELLEE'S BRIEF

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PRELIMINARY STATEMENT

This brief is in response to Respondent Jennifer Ramos' Appellant Brief. Respondent-Appellant will be referred to as "Ramos." Petitioner-Appellee will be referred to as "Bruggeman." Reference to the record shall be designated as "CR," followed by the appropriate page number. Reference to Ramos' Appellant Brief will be referred to as "Ramos Br." followed by the appropriate page number.

JURISDICTIONAL STATEMENT

On May 28, 2020, the Honorable Michelle K. Comer entered a Judgment and Order Amending Order for Protection *nunc pro tunc* to March 17, 2020. CR 5881. Ramos timely filed her notice of appeal. CR 5885; 5561. The Order is appealable pursuant to SDCL 15-26A-3.

STATEMENT OF THE ISSUES

Bruggeman elects to restate the issues presented by Appellant as follows:

- I. Whether the circuit court abused its discretion in quashing the subpoena of Bruggeman without independently determining his competence to testify.

Ramos did not raise this issue below. The circuit court quashed the subpoena based on evidence that Bruggeman lacked the capacity to testify, suffered from severe neurocognitive impairment, and that it would be detrimental to his health, care, and safety to testify.

Action Mech., Inc. v. Deadwood Historic Pres. Comm'n, 2002 S.D. 121, 652 N.W.2d 742

Kern v. Progressive Northern. Ins. Co., 2016 S.D. 52, 883 N.W.2d 511

Wald, Inc. v. Stanley, 2005 S.D. 112, 706 N.W.2d 626

SDCL 21-65-7

SDCL 15-6-45

II. Whether SDCL 22-65-1(15) is unconstitutionally vague.

The record does not show that Ramos raised this issue below or properly notified the South Dakota Attorney General. The circuit court did not rule on this issue because it was not raised below.

Action Mech., Inc. v. Deadwood Historic Pres. Comm'n, 2002 S.D. 121, 652 N.W.2d 742

Sharp v. Sharp, 422 N.W.2d 443 (S.D. 1988)

In re Estate of Holan, 2001 S.D. 6, 621 N.W.2d 588

III. Whether the circuit court erred in determining that Ramos neglected and financially exploited Bruggeman, a vulnerable adult, and entering a protection order.

The circuit court determined that Bruggeman, a vulnerable adult, was a victim of vulnerable adult abuse by Ramos through neglect and financial exploitation and entered an order of protection.

Goeden v. Daum, 2003 S.D. 91, 668 N.W.2d 108

SDCL 21-65-1(2), (4), (7), and (15)

SDCL 22-46-1(2), (5), and (6)

IV. Whether the circuit court's decision to award attorney fees was supported by sound reason and evidence.

The circuit court awarded \$19,831.85 in reasonable and necessary attorney fees to Bruggeman based on the affidavit of the substitute petitioner's attorney.

BAC Home Loans Servicing, LP v. Trancynger, 2014 S.D. 22, 847 N.W.2d 137

Sjomeling v. Sjomeling, 472 N.W.2d 487 (S.D. 1991)

SDCL 21-65-15

STATEMENT OF THE CASE

On February 7, 2020, Black Hills Advocate, LLC, as Bruggeman's permanent guardian and conservator, filed a Petition and Affidavit for a Protection Order (Vulnerable Adult) against Ramos, as a substitute petitioner. CR 1.

On February 11, 2020, the circuit court entered an Ex Parte Temporary Order for Protection in favor of Bruggeman and issued a Notice of Hearing, Summons to Appear and Order (Vulnerable Adult Abuse). CR 21-24. That same day, Ramos was personally served with a copy of the Ex Parte Temporary Order for Protection, Petition and Affidavit for Protection Order, and Notice of Hearing and Summons to Appear (Vulnerable Adult Abuse). CR 27. The permanent protection order hearing was set for a February 24, 2020. CR 24.

On February 24, 2020, the parties appeared before the circuit court. CR 5644. At the start of the hearing, Ramos made an oral motion to continue. CR 5646-5647. Bruggeman opposed the motion and the circuit court originally denied the same. CR 5646-5647. However, upon further argument from Ramos, the circuit court continued the permanent protection order hearing to March 17, 2020. CR 5647-5651. The circuit court ordered that the temporary protection order remain in place. CR 5649; CR 41.

On March 17, 2020, the continued permanent protection order hearing was held before the Honorable Michelle K. Comer. CR 5644. After reviewing the evidence, hearing the testimony of witnesses, and argument of counsel, the circuit court found that Bruggeman had established by the preponderance of the evidence

that he was a vulnerable adult that had been subjected to years of vulnerable adult abuse by Ramos through neglect and financial exploitation. CR 5183-84. The circuit court ordered, among other things, that Ramos be restrained from engaging in further vulnerable adult abuse, contacting or coming within 100 feet of Bruggeman, and from exercising control over any of Bruggeman's funds, property, or assets. CR 5185. The circuit court further ordered Ramos immediately return all funds, property, and assets of Bruggeman, including conveying title to the property at 2231 Willow Creek Road, Belle Fourche, South Dakota ("Willow Creek property"), which Ramos admitted purchasing with funds embezzled from Bruggeman. CR 5186.

On May 13, 2020, the parties again appeared before the circuit court on various motions of the parties. CR 5820; 5827. The circuit court took *sua sponte* notice that it lacked jurisdiction to compel Ramos to convey title to the Willow Creek property to Bruggeman. *Id.*; *see also* CR 5835-36; 5865. However, noting that the Legislature did not intend for vulnerable adults, like Bruggeman, to have to pursue separate legal actions to obtain the return of property and assets wrongfully taken from them, the circuit court ordered the permanent protection order be amended. CR 5865-5866; 5821. More specifically, the circuit court ordered that the Order for Protection be amended *nunc pro tunc* to require Ramos to immediately deliver all funds and assets, including the \$296,500.00 Ramos

admittedly embezzled from Bruggeman to purchase the Willow Creek property. CR 5866; 5868-69; 5821. Ramos now appeals the circuit court's judgment.

STATEMENT OF THE FACTS

Bruggeman is a 75 year-old veteran with severe neurocognitive impairment. CR 5170; 5188. Ramos is a long-time acquaintance of Bruggeman. CR 5170. To say their relationship "was unique" is an understatement. Ramos Br. at 8. Indeed, in 2002, Ramos filed for and was granted a permanent protection order against Bruggeman. CR 5283. In her petition, Ramos alleged that Bruggeman raped her when she was 14 years old. CR 5283; 5331. Yet Ramos "never really stopped talking to him" and Bruggeman continued to be an "extremely" significant part of her life. CR 5332; 5288; 5326.

In 2011 Bruggeman was diagnosed with vascular dementia. CR 5170; 4355; 4383. About that same time, close friends, including Ramos, began providing daily support for Bruggeman by administering medication, paying bills, cleaning, doing laundry, shopping, and preparing meals. Ramos Br. at 6-7; *see also* CR 5170. The Veteran's Administration ("VA") also began providing Bruggeman home health care assistance. Ramos Br. at 7; *see also* CR 5170.

By January 2012 Ramos had taken over as Bruggeman's primary caregiver. Ramos Br. at 7; *see also* CR 5171. And by June 2012 Bruggeman had updated his Durable Power Attorney with Health Care Directives, appointing Ramos as his attorney-in-fact. CR 5171; 5016-26. Bruggeman had also signed a new Last Will

and Testament, naming Ramos as personal representative and leaving Ramos his entire estate. CR 5171; 5027-30.

Shortly thereafter, in late 2012, Bruggeman liquidated \$75,000.00 in assets, secured a \$75,000.00 mortgage, and purchased residential property located at 1210 Union Street, Belle Fourche, South Dakota 57717, for Ramos and her children. CR 5031; 5171; 5290; 5407. Ramos and her children moved into the home in November 2012. CR 5171. Bruggeman was the only individual listed on the mortgage and deed. CR 5031; 5171. While Ramos claimed to have paid the mortgage payments on this house, Ramos produced no evidence of the same. CR 5391-94. Instead the evidence showed that the mortgage payments were made from Bruggeman's bank account with funds he received from his rental property. CR 5317-19; 5392; 5844; 5857-59. Notably, during this transaction Bruggeman's long-time financial advisor, Troy Niehaus ("Niehaus"), noted that Bruggeman appeared "a little forgetful." CR 5171; 5404-06.

In May 2014 the VA recommended that Bruggeman seek a higher level of care and advised he would benefit from daily assisted living. CR 5171; 5293; 3823; 3833. Yet Ramos, as Bruggeman's designated caregiver, left Bruggeman to live and manage alone for seven months. CR 5171-72; 5293-94. In December 2014, Ramos moved Bruggeman into a small shack in the backyard of his Union Street house and provided "care" and supervision through use of a baby monitor. CR 5172; 5295; 5349; 3541.

From 2014 to 2017, Bruggeman steadily declined while his medical providers repeatedly recommend higher levels of care. CR 5172; 5293; 5296; 3555-3558; 3236-37. But Ramos continued to provide only the bare minimum. CR 5172. Indeed, Bruggeman remained living alone in the backyard shack, being further isolated by Ramos through her refusal of outside assistance, such as Meals on Wheels, home bath aides, and homemaking – despite Bruggeman’s desire for the same. CR 5172; 3169; 5295-5296.

In January 2015, Dr. Michael J. Huxford (“Dr. Huxford”) diagnosed Bruggeman with major neurocognitive disorder due to vascular disease with behavioral disturbance. CR 5172; 3555-3558. Dr. Huxford noted impairment in cognitive functioning, specifically in areas of attention and working memory. CR 3555-3558.

In December 2016, given concerns of worsening cognition and increased behavioral difficulties, Bruggeman underwent another round of neurocognitive testing. CR 5172; 3235-3243. Bruggeman was again diagnosed with major neurocognitive disorder due to vascular etiology. *Id.* Expressing his sympathy to “see and hear of this level of deterioration in” Bruggeman, Dr. Huxford noted, “Bruggeman’s test results are consistent with a Major [sic] neurocognitive disorder because of deficits in memory, attention, processing speed, and executive function.” CR 3237; 3241. Dr. Huxford further advised, “[g]iven these impaired abilities, recent poor judgement (financial), disorientation and confusion, and increased impulsivity and inhibition, it is clear that his capacities to function on

some independent level are not possible.” CR 3242. Dr. Huxford made it clear that:

[Bruggeman] lack [sic] skills needed for independence, responsibility, and self-control including keeping his own schedule, following time limits and schedule, following multi-step directions, and making appropriate choices toward his best self-interests. Further he lacks skills needed for protection of his health as well as to respond appropriately to illness and injury[.]

CR 3237. Dr. Huxford discussed his findings with Ramos. CR 3236.

In April 2017, relying on Dr. Huxford’s evaluation, the VA strongly recommended to Ramos that Bruggeman needed increased supervision and assistance due to his cognitive decline. CR 5172-73; 3169-72. The VA recommended that Bruggeman receive 24-hour care and supervision. *Id.* Ramos did not follow those recommendations.

A month later, the VA again strongly advised Ramos that Bruggeman needed increased supervision and assistance due to his worsening cognitive decline. CR 5173; 5035-39; 5296-97. Given that Ramos was unable to provide 24-hour care and supervision, the VA voiced that it would be in Bruggeman’s best interest to have a higher level of care, such as a nursing home, because of his increased disorientation and sundowning behaviors. *Id.* The VA explained to Ramos that Bruggeman no longer had the capacity to make health care decisions for himself. CR 5296; 5038. The VA gave Ramos three months to pursue a long-term placement that could provide the recommended 24-hour care and supervision. CR 5173; 5035-39; 5296-97.

Ramos testified that she attended every appointment with Bruggeman. CR 5315. Ramos further admitted that by 2017 she was well-aware of Bruggeman's diagnosis, the VA's recommendations, and knew that it would be in Bruggeman's best interest to have a higher level of care, such as a nursing home for 24-hour care and supervision. CR 5313-14; 5388-89. Moreover, Ramos admittedly knew she was Bruggeman's health care power of attorney and that Bruggeman lacked the capacity to make health care decisions for himself. CR 5296; 5390; 3169.

Despite knowing Bruggeman's needs, Ramos informed the VA in late May 2017 that she would not be placing Bruggeman in long-term care – because of the financial impact it would have on herself and her children. CR 5173; 5033; 5300. Ramos admitted to the VA that she had commingled her assets with Bruggeman's and that his name was on her home loan and title. CR 5173; 5300-01. As a result, Ramos expressed that placement in long-term care, while in the best interests of Bruggeman, would mean losing her home and cars. *Id.* Ramos stressed that she and her family would be homeless if she followed the VA's recommendation and used Bruggeman's funds for his best interest to place Bruggeman in a long-term care facility. *Id.*; *see also* CR 5298.

Upon Ramos' shocking admissions, the VA immediately raised its concerns about possible financial exploitation and isolation of Bruggeman by Ramos to the South Dakota Department of Human Services. CR 5173; 5093. And given Ramos' admitted refusal to use Bruggeman's assets and to put his needs above her

own and move him into a long-term care facility, Bruggeman was discharged from home health services. CR 5173-74; 3137-39; 5301.

While describing Bruggeman as being similar to a “toddler” at this time, Ramos left Bruggeman to live alone in the shack with a baby monitor until August 2018 when she moved him into an assisted living center so she could work the Sturgis Rally. CR 5174; 5313-14; 5388-89.

On March 26, 2018, Ramos and her husband, Clay Runyan, made an offer to purchase a new home, the Willow Creek property, for a purchase price of \$300,000.00, with financial contingency of obtaining a mortgage. CR 5174.

At some point between March 26, 2018, and April 3, 2018, Ramos contacted Wells Fargo seeking to be added as a supplemental account owner/third-party authorized individual on Bruggeman’s Wells Fargo Advisors brokerage accounts. CR 5174; 5408. Niehaus, Bruggeman’s long-time financial advisor, testified that given the “seriousness of giving someone third-party authorization,” thereby granting that individual authority over potentially large sums of money, Niehaus requested that Bruggeman come in to personally to discuss the gravity of the situation. CR 5174-75; 5408-09.

That in-person meeting occurred in April 2018. CR 5175; 5408. Bruggeman and Ramos attended. CR 5409-11. Niehaus testified that Bruggeman wanted to add Ramos as a supplemental account owner in case Bruggeman would become incapacitated for any reason and money and securities needed to be sold and moved for his benefit. CR 5175; 5409-5410. Ramos testified that was her

understanding of the same. CR 5305-07. Consequently, Niehaus prepared the necessary paperwork and obtained Bruggeman's and Ramos' signatures, granting Ramos third-party authorization to Bruggeman's Wells Fargo brokerage accounts – solely for the use and benefit of Bruggeman and his health care needs. *Id.*; *see also* CR 5175; 5410; 5421; 5040-48.

During this meeting, there was also a discussion about Bruggeman buying a new house. CR 5175; 5410-11. Ramos told Niehaus that Bruggeman was planning on purchasing a larger home for himself, Ramos, and her children, so that Bruggeman could live within the main home – as opposed to living in a shack in the backyard – allowing Ramos to provide 24-hour care and supervision. *Id.*

Notably, at no time did Ramos inform Niehaus that Bruggeman was suffering from a medically diagnosed major neurocognitive disorder. CR 5176; 5411-12. Ramos likewise failed to inform Niehaus that Bruggeman had been evaluated by the VA, or that the VA was recommending 24-hour care and supervision from a nursing home given Bruggeman's worsening cognitive decline, increased disorientation, and sundowning. CR 5176.

Several days later, on April 27, 2018, Ramos submitted an Amendment to Purchase Agreement on the Willow Creek property, removing Runyan as a purchaser, and – more notably – removing her financial contingency and advising that she would be proceeding with a cash sale. *Id.*; *see also* CR 5308. On April 30, 2018, the sellers countered, requesting Ramos provide proof from Wells Fargo Bank and Pioneer Bank, verifying the availability of funds, as well as Ramos'

ability to use said funds, for the purchase the Willow Creek property. CR 5176; 5308-9.

Ramos admitted that less than 24 hours later she contacted the VA and requested “a letter from the VA that [Bruggeman] doesn’t have decision making capacity.” CR 5176; 5310; 5051. Consequently, another neuropsychological evaluation was completed on May 9, 2018, by Dr. Jon E. Denning. CR 5176-77.

Dr. Denning noted that Bruggeman had previously been found to have “deficits in the following areas: recent poor judgment (financial), disorientation and confusion, and increased impulsivity and inhabitation.” CR 5176; 5134 (referring to Dr. Huxford’s December 2017 evaluation). And like Dr. Huxford, Dr. Denning found that Bruggeman “no longer has the capacity to care for himself or make decisions that are in his best interests.” CR 5176; 5136. Dr. Denning advised Bruggeman’s “judgment and decision making continues to be a major concern because of what it suggests about his ability to manage his health care, finances, and ADLS.” CR 5135. Dr. Denning diagnosed Bruggeman with “Vascular Dementia with Behavior Disturbance (impulsivity/inhibition)” and recommended that Bruggeman be placed in a higher level of care, such as a nursing home or assisted-living facility. CR 5176; 5136.

Ramos admitted that only five days later, on May 14, 2018, she withdrew \$228,756.46 from Bruggeman’s Wells Fargo brokerage accounts. CR 5177; 5311. A week after that, Ramos admitted withdrawing an additional \$100,000.00 from Bruggeman’s Pioneer Bank and Trust account. CR 5177; 5052-57; 5311-12. And

only two weeks after having Bruggeman declared incompetent – Ramos purchased the Willow Creek property audaciously using approximately \$296,500.00 she had withdrawn from Bruggeman’s accounts. CR 5177; 5311-12; 5321; 5396.

While the purchase of the Willow Creek property was financed wholly by Bruggeman, purportedly for him to live in and be cared for by Ramos, Ramos is the only individual on the deed and purchase agreement. CR 5177; 4953. And despite Ramos’ testimony to the contrary, there is no evidence that Bruggeman resided at the Willow Creek property until – if at all – a few days in the spring of 2019. CR 5178. In fact, the evidence actually shows that in July 2018, Bruggeman related to Niehaus that he had not moved yet into the Willow Creek property and that he did not think he would move to the Willow Creek property. CR 5178; 5413. This proved true, as in August 2018, after securing a new house for herself and her children entirely in her name only and with Bruggeman’s money, Ramos moved Bruggeman into an assisted living center. CR 5178; 5313.

Following the withdrawal of over \$200,000.00 from his Wells Fargo brokerage accounts, Bruggeman contacted Niehaus several times, often with back-to-back phone calls, during the summer of 2018. CR 5177-78; 5412-14. Niehaus testified that at that time Bruggeman expressed concern about his available balances and requested notification if Ramos attempted to make additional transactions. *Id.* Bruggeman also asked several times to remove Ramos as a third-party authorized individual, but then would change his mind. CR 5178; 5414-15. After learning that Bruggeman had not moved into the Willow Creek property,

Niehaus became “very concerned” and contacted Wells Fargo’s Elder Client Initiatives to perform an investigation. CR 5178-79. As a result, Wells Fargo subsequently restricted Bruggeman’s Wells Fargo investment accounts. CR 5179.

Throughout 2018, Ramos admitted she used Bruggeman’s money at Pioneer Bank and Trust for her and her children’s own use and benefit. CR 5179; 5058-50900. Indeed, Ramos admitted to taking Bruggeman’s funds to purchase such things as an Xbox Live subscription, Rod Stewart tickets, clothing, and a massage. CR 5179; 5320-23. Ramos also admitted to taking approximately \$8,000.00 from Bruggeman’s account to construct a pole barn and make other home improvements at the Willow Creek property. CR 5179; 5323-24; 5058-50900.

In January 2019, Bruggeman informed Ramos that he planned to move to Arizona with a friend. CR 5179-5180. Law enforcement was involved. *Id.* Butte County Chief of Police Marlyn Pomrenke testified that Bruggeman was adamant that he was going to go to Arizona. *Id.* However, Chief Pomrenke testified that it was apparent Bruggeman was in no condition to make such a move and that staying at an assisted living facility was in Bruggeman’s best interests; Pomrenke testified if Bruggeman were his dad, he would not have allowed his dad to leave South Dakota. *Id.* Pomrenke advised Ramos to contact an attorney. *Id.*

While Ramos was well-aware that Bruggeman needed 24-hour care and supervision, that he was not in a position to make his own decisions, and that “it was dangerous for him to leave,” Ramos ultimately allowed Bruggeman to move

to Arizona against medical advice. CR 5180; 5370. Ramos testified that she did everything in her power to prevent Bruggeman from leaving, but in the end there was nothing she could do. *Id.* However, the circuit court found that Ramos was aware that she had the power to stop Bruggeman given her status as power of attorney and power of attorney health care and simply failed to do so. CR 5180; 5517.

Bruggeman returned to South Dakota in April 2019 and was promptly admitted to the VA where he was diagnosed with failure to thrive. CR 5180. Multiple witnesses testified that Bruggeman was in very rough shape. *Id.* Ramos claimed that Bruggeman had been in a rehab facility in Las Vegas for months after breaking his back and was covered in bruises. CR 5180; 5317; 5377.

Despite the VA insistence that 24-hour care and supervision and nursing home level of care was necessary to ensure Bruggeman's safety and assistance with ADLs, Ramos again had Bruggeman discharged to her care. CR 5180. While Ramos claimed that Bruggeman did not have enough money to afford higher levels of care, VA records indicate otherwise. CR 5180; 2770-71; 5096. In fact, the VA noted Bruggeman was "over resources and income," meaning that Bruggeman did not qualify for long-term services and support to help financially with any placement because he had over \$43,000.00 in accounts or properties. CR 5096; 5431. Niehaus confirmed the same. CR 5405.

Days after being discharged to Ramos' care, Ramos brought Bruggeman back to the VA emergency room. CR 5181. At that time, the VA noted that

Bruggeman was covered in bruises and that it was evident Ramos could not care for Bruggeman properly. CR 5181; 5096. The VA promptly contacted the Department of Human Services, noting that it was apparent that Ramos was using Bruggeman's money for her own benefit or otherwise prohibiting his money from going towards payment of an appropriate and necessary placement for his benefit. CR 5181; 5097-98.

Thereafter, the Department of Human Services became involved in Bruggeman's case. CR 5181. Based on the Department's involvement, Bruggeman was placed in the VA's long-term care wing. CR 5181; 5432-34.

Black Hills Advocate, LLC was appointed permanent guardian and conservator on January 31, 2020. CR 9.

STANDARD OF REVIEW

The trial court's decision to grant or deny a protection order is reviewed under the same standard that is “used to review the grant or denial of an injunction.” *Goeden v. Daum*, 2003 S.D. 91, ¶ 5, 668 N.W.2d 108, 110 (citation omitted). In applying that standard, this Court “must first determine if the trial court's findings of fact were clearly erroneous.” *Id.*

A trial court's finding is clearly erroneous if, after reviewing the entire evidence, we are left with the definite and firm conviction that a mistake has been made. All conflicts in the evidence must be resolved in favor of the trial court's determinations. The credibility of the witnesses, the weight to be accorded their testimony, and the weight of the evidence must be determined by the circuit court and we give due regard to the circuit court's opportunity to observe the witnesses and the evidence.

Matter of Estate of Gaaskjolen, 2020 S.D. 17, ¶ 18, 941 N.W.2d 808, 813–14.

To be clear, “this court is not free to disturb the lower court's findings unless it is satisfied that they are contrary to a clear preponderance of the evidence.” *Goeden*, 2003 S.D. 91, ¶ 5, 668 N.W.2d at 110 (citation omitted). “Doubts about whether the evidence supports the court's findings of fact are to be resolved in favor of the successful party's ‘version of the evidence and of all inferences fairly deducible therefrom which are favorable to the court's action.’” *Id.* (citation omitted).

“If the findings of fact are not clearly erroneous, this Court must then determine whether the trial court abused its discretion in granting or denying the protection order.” *Id.* “Abuse of discretion is the most deferential standard of review available with the exception of no review at all.” *Wald, Inc. v. Stanley*, 2005 S.D. 112, ¶ 8, 706 N.W.2d 626, 629. “An abuse of discretion is ‘a fundamental error of judgment, a choice outside the reasonable range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.’” *Id.*

This Court reviews evidentiary rulings and an award of attorney fees under an abuse of discretion standard. *Meadowland Apartments v. Schumacher*, 2012 S.D. 30, ¶ 24, 813 N.W.2d 618, 624 (citation omitted); *Johnson v. Miller*, 2012 S.D. 61, ¶ 7, 818 N.W.2d 804, 806.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY QUASHED THE SUBPOENA OF BRUGGEMAN.

Raising the issue for the first time on appeal, Ramos contends the circuit court abused its discretion in quashing the subpoena of Bruggeman because it did not “independently inform itself by proper examination of Mr. Bruggeman’s competence to testify.” Ramos Br. at 16. Ramos argues that it was error for the circuit court to rely “on a written neuropsychological evaluation” in determining Bruggeman’s competency and asserts the circuit court should have held a separate competency hearing. Ramos Br. at 13. However, nowhere in Ramos’ Appellant Brief does she direct this Court to a location in the record where this argument was raised below. This Court is not, and should not be, required to scour the record for Ramos’ alleged arguments. Indeed, “[j]udges are not like pigs, hunting for truffles buried in” the record. *United States v. Gurley*, 434 F.3d 1064, 1069 (8th Cir. 2006) (citation omitted); *Hinds v. Cendant, Inc.*, No. CIV 06-1001, 2007 WL 900423, at *1 (D.S.D. Mar. 22, 2007). But more importantly, under this Court’s cardinal rule, “[a]n issue not raised at the trial court level cannot be raised for the first time on appeal.” *Action Mech., Inc. v. Deadwood Historic Pres. Comm’n*, 2002 S.D. 121, ¶ 50, 652 N.W.2d 742, 755 (citation omitted).

Ramos attempted to serve Bruggeman with a subpoena only six days before the continued permanent protection order hearing. CR 74. Bruggeman promptly moved to quash the subpoena. CR 70-75. In doing so, Bruggeman asserted,

among other things, that he had been previously declared incompetent at the insistence of Ramos. CR 71. Relying on the evaluations of his physicians, Bruggeman further argued that he lacked the capacity to testify and that it would be detrimental to his health, care, and safety to testify. CR 72. Ramos did not file a response.

The parties argued the issue before the circuit court at the onset of the continued permanent protection order hearing. CR 5274-79. And while Ramos asserted a variety of arguments, none even remotely addressed the issue she now raises. CR 5276-78. Ramos' counsel only argued briefly on the issue of competence:

As to – with regard to him not being competent and that's why there's a guardian involved, obviously we haven't seen this report that he's not competent. I understand that the Court has appointed a guardian and conservator for him; however, he is the crux of this case and we do believe some testimony – however limited – of Mr. Bruggeman would show that his intentions have always been to have Ms. Ramos take care of things and that he had given her certain things.

CR 5277.

“This court has said on countless occasions that an issue may not be raised for the first time on appeal. Thus, an issue not presented at the trial court level will not be reviewed at the appellate level.” *Mortweet v. Eliason*, 335 N.W.2d 812, 813 (S.D. 1983). An “appellant must affirmatively establish a record on appeal that shows the existence of error. He or she must show that the trial court was given an opportunity to correct the grievance he or she complains about on

appeal.” *Husky Spray Serv., Inc. v. Patzer*, 471 N.W.2d 146, 153-54 (S.D. 1991) (citation omitted). And “an objection must be sufficiently specific to put the circuit court on notice of the alleged error so it has the opportunity to correct it.” *Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, ¶ 23, 913 N.W.2d 496, 503 (citation omitted).

Ramos’ issue with the circuit court quashing the subpoena was not properly preserved for review. Accordingly, it is waived.

Even if not waived, Ramos has failed to show that the circuit court made a “fundamental error of judgment, a choice outside the reasonable range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable” in quashing the subpoena. *Wald, Inc. v. Stanley*, 2005 S.D. 112, ¶ 8, 706 N.W.2d 626, 629.

The record shows (without objection from Ramos) that in quashing the subpoena the circuit court considered two separate evaluations from two physicians at the VA, both who found Bruggeman lacked capacity and suffered from severe neurocognitive impairment. CR 5278-79; 79-92. The circuit court further took note of the physicians’ positions that it would be detrimental to Bruggeman’s health, care, and safety to attend a hearing. CR 5279. The circuit court even expressed some level of concern about COVID-19 and the potential exposé if Bruggeman was required to appear. *Id.* Under SDCL 21-65-7 the circuit court was required to “exercise its discretion in a manner that protects the vulnerable adult from traumatic confrontation with the respondent.” The circuit

court obviously did so here and Ramos has failed to show how such decision was arbitrary or reasonable under the circumstances.

Moreover, “it is ‘a well entrenched rule of this Court’ that we affirm correct decisions even when based on ‘wrong reasons.’” *In re Setliff*, 2002 S.D. 58, ¶ 25, 645 N.W.2d 601, 608 (citations omitted). Thus, while Bruggeman vehemently contends the circuit court did not err, Bruggeman also presented the circuit court with arguments and authority that the subpoena failed to comply with statutory requirements. CR 5275-76; 73-74. As a circuit court is “allowed considerable discretion on its evidentiary rulings,” such arguments and authority, in the totality of the circumstances, certainly gave the circuit court grounds to quash the subpoena. *Kern v. Progressive Northern. Ins. Co.*, 2016 S.D. 52, ¶ 29, 883 N.W.2d 511, 518 (citation omitted). In sum, the circuit court did not abuse its discretion in quashing the subpoena of Bruggeman.

II. RAMOS WAIVED HER CONSTITUTIONAL ARGUMENT.

Ramos challenges the constitutionality of SDCL 21-65-1(15), which defines a “vulnerable adult” under the Protection of Vulnerable Adult statutes. Ramos asserts that “the statute is unconstitutionally vague because it fails [sic] provide her with fair notice that her actions, involvement with, and relationship to Mr. Bruggeman is proscribed by statute.” Ramos Br. at 17.

However, this issue was not brought before the circuit court. Ramos is raising it for the first time on appeal. And as this Court is well aware, “the

constitutionality of a statute cannot be raised for the first time on appeal.” *Sharp v. Sharp*, 422 N.W.2d 443, 445 (S.D. 1988) (citation omitted).

Bruggeman recognizes this Court “has discretion to disregard this general rule of administration and rule on such constitutional issues when faced with a compelling case.” *Id.* But this is not such a case. Indeed, this question is not one of substantive law, but one riddled by factual disputes. *Id.*

Moreover, Ramos failed to notify the South Dakota Attorney General of her constitutional challenge as mandated by SDCL 15-6-24(c). While Ramos did send the attorney general a copy of her Notice of Appeal, Amended Notice of Appeal, and a copy of her brief, this Court has made clear that these items “do not constitute notice of a constitutional challenge contemplated under SDCL 15-6-24(c).” *In re Estate of Holan*, 2001 S.D. 6, ¶ 12, 621 N.W.2d 588, 591.

Under this Court’s guiding precedent, this issue is waived. *Id.*; *Sharp*, 422 N.W.2d at 446.

III. THE CIRCUIT COURT DID NOT ERR IN DETERMINING THAT RAMOS NEGLECTED AND FINANCIALLY EXPLOITED BRUGGEMAN, A VULNERABLE ADULT.

Ramos contends that circuit court erred in determining that Bruggeman was a vulnerable adult and that her conduct amounted to vulnerable adult abuse by financial exploitation and neglect. But her arguments are largely an attempt to retry the case on appeal.

This Court has consistently stated its role on appeal is not “to retry this case or substitute [its] judgment as to the credibility and weight of the evidence.

Hubbard v. City of Pierre, 2010 S.D. 55, ¶ 27, 784 N.W.2d 499, 511. Instead, “this Court defers to the circuit court, as fact finder, to determine the credibility of witnesses and the weight to be given to their testimony. *Id.* at ¶ 26. This is because “[t]he trier of fact is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony.” *Century 21 Associated Realty v. Hoffman*, 503 N.W.2d 861, 864 (S.D. 1993). “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 [this Court] give[s] due regard to the trial court’s opportunity to observe the witnesses and examine the evidence.” *Baun v. Estate of Kramlich*, 2003 S.D. 89, ¶ 21, 667 N.W.2d 672, 677. On appeal, “doubts about whether the evidence supports the court’s findings of fact are to be resolved in favor of the successful party’s ‘version of the evidence and of all inferences fairly deducible therefrom which are favorable to the court’s action.’” *Goeden*, 2003 S.D. 91 at ¶ 5, 668 N.W.2d at 110 (citation omitted). “If the record contains evidence to support the trial court’s decision, [this Court] will not disturb a trial court’s finding of fact on appeal.” *Cordell v. Codington Cty.*, 526 N.W.2d 115, 116 (S.D. 1994).

With that in mind, each of Ramos’ alleged errors will be addressed individually:

A. Vulnerable Adult.

SDCL 21-65-1(15) defines “vulnerable adult” as “a person sixty-five years of age or older who is unable to protect himself or herself from abuse as a result of

age or a mental or physical condition, or an adult with a disability as defined in § 22-46-1.”

Highlighting select portions of Bruggeman’s medical records, Ramos asserts “this Court should take note of the need to go further in its examination of the record than what the circuit court did” before reaching a finding that Bruggeman is a vulnerable adult. Ramos Br. at 24. But this Court does not “decide factual issues de novo.” And [t]his [C]ourt is not free to disturb the lower court’s findings unless it is satisfied that they are contrary to a clear preponderance of the evidence. *Goeden*, 2003 S.D. 91 ¶ 5, 668 N.W.2d at 110 (citation omitted). Such is not the case here.

Indeed, the greater weight of the evidence shows that Bruggeman was a vulnerable adult “unable to protect himself from abuse as a result of his age, mental, or physical condition.” In fact, Ramos herself admitted Bruggeman was like a “toddler” who “can’t be left alone” because it would be detrimental to his health and well-being. CR 5314. The circuit court also heard Ramos acknowledge that by 2017 Bruggeman no longer had the capacity to make health care decisions for himself, that he was exhibiting severe neurocognitive disorders, and that he needed 24-hour care and supervision for his own safety and care because of his increased disorientation and sundowning behaviors. CR 5296-97; 5388; 5035. Describing Bruggeman, Ramos testified: “He’s still in there still today. He’s still in there. But he had had multiple strokes. He’d had a brain aneurysm. He’d fallen and broken his ribs. He had dementia, Parkinson’s,

Alzheimer's. He had sundowners. He was full-blown to a catheter bag 24/7." CR 5370. Ramos even confessed to demanding that the VA declare Bruggeman incompetent. CR 5310; 5051.

Evidence was also presented that since 2014 the VA has recommended Bruggeman have a higher level of care and assisted daily living. CR 5171; 5293. The evidence shows that in 2016 Dr. Huxford advised that Bruggeman's "capacities to function on some independent level are not possible" and that "he lacks skills needed for protection of his health as well as to respond appropriately to illness and injury." CR 3242. By May 2018, Bruggeman had declined in such a way that he "no longer has the capacity to care for himself or make decisions that are in his best interests." CR 5176; 5136.

There was plainly competent and substantial evidence to support the circuit court's findings. This Court does not retry cases. *Hubbard*, 2010 S.D. 55, ¶ 27, 784 N.W.2d at 511. Ramos' "contrary view of the evidence is not sufficient to leave [this Court] with 'a definite and firm conviction that a mistake has been made.'" *Underhill v. Mattson*, 2016 S.D. 69, ¶ 14, 886 N.W.2d 348, 353-54 (citation omitted). Viewing the evidence in a light most favorable to uphold circuit court's decision, the decision must be upheld. *Century 21 Associated Realty*, 503 N.W.2d at 864. The circuit court's decision that Bruggeman is a vulnerable adult was certainly not a fundamental error in judgment.

B. Financial Exploitation.

Financial exploitation is a form of vulnerable adult abuse. SDCL 21-65-1(4)(d). Financial exploitation is defined as “the wrongful taking or exercising of control over property of an elder or adult with a disability with intent to defraud the elder or adult with a disability” “by a person who stands in a position of trust or confidence.” SDCL 21-65-1(7) and SDCL 22-46-1(5). Ramos asserts that her conduct did not amount to financial exploitation under SDCL 21-65-1(7) and SDCL 22-46-1(5) because her “familiar relationship” with Bruggeman and the fact that they had commingled their funds prior to Bruggeman’s decline, insulates her from “actionable conduct under the statute.” Ramos Br. at 24-27. However, the evidence does not support Ramos’ contention.

In fact, Ramos’ argument that her close, “familiar relationship” with Bruggeman somehow absolves her of taking nearly \$300,000.00 from Bruggeman actually supports the circuit court’s finding and conclusion of financial exploitation. Indeed, Ramos’ argument conclusively shows that she stood “in a position of trust or confidence” with Bruggeman. SDCL 21-65-1(7); *see also* Ramos Br. at 24-27. As Ramos details in her brief, she “helped Mr. Bruggeman manage properties he owned,” she was his “caregiver,” and Ramos and Bruggeman had a “lifelong familiar bond” with “attendant,” though wholly not mutual “personal and economic support.” Ramos Br. at 25, 27.

Moreover – and what Ramos fails to acknowledge here – is that at the time she appropriated nearly \$300,000.00 from Bruggeman to purchase a home for

herself, Ramos undisputedly was Bruggeman's durable power of attorney. CR 5016; 5177; 5305-06. As a matter of law, Ramos stood in a fiduciary relationship with Bruggeman. *Hein v. Zoss*, 2016 S.D. 73, ¶ 8, 887 N.W.2d 62, 65-66 (citation omitted). "A fiduciary relationship is founded on a peculiar confidence and trust placed by one individual in the integrity and faithfulness of another. When such relationship exists, the fiduciary has a duty to act primarily for the benefit of the other." *In re Estate of Duebendorfer*, 2006 S.D. 79, ¶ 26, 721 N.W.2d 438, 445 (citation and internal quotation marks omitted). "A fiduciary must act with utmost good faith and avoid any act of self-dealing that places [her] personal interest in conflict with [her] obligations to the beneficiaries." *Hein*, 2016 S.D. 73, ¶ 8, 887 N.W.2d at 66 (citation omitted).

But the greater weight of the evidence reflects that self-dealing is exactly what Ramos engaged in here. Using her position of trust and confidence, with a man she had outright asked the VA to declare incompetent, Ramos obtained for herself third-party authorization on Bruggeman's investment accounts. She then purloined those investment accounts (as well as Bruggeman's checking account) to purchase a house for herself and her children; Ramos is the only person listed on the deed. It is clear that Ramos did this to ensure that she would not be left homeless when and if Bruggeman started selling assets to secure higher levels of care. While Ramos claims the plan was for Bruggeman to live in the home and be cared for by her, save for a few days in May 2019, Bruggeman never resided at the property. CR 5178-79. Instead, Ramos left Bruggeman in the backyard shack –

alone for months – until she moved him into an assisted living center in August 2018 so she could work the Sturgis Rally. CR 5174; 5313-14; 5294. Bruggeman, who obviously trusted Ramos but suffered from severe neurocognitive disorders and needed 24-hour care and supervision because of his increased disorientation and sundowning behaviors, was wholly defenseless.

The circuit court was in the best position to judge the credibility of the witnesses and to weigh the evidence. The circuit court observed Ramos repeatedly admit to comingling and using Bruggeman’s funds with her own. Ramos’ admissions to using Bruggeman’s funds as her own were so frequent and boldly stated that it is easy to see how the circuit court found that financial exploitation occurred.

As Ramos aptly quoted in her brief, this Court considers this type of conduct as “particularly insidious in that it involves the manipulation of disabled or elderly adults, a particularly vulnerable population.” *State v. Hauge*, 2019 S.D. 45, ¶ 35, 932 N.W.2d 165, 175. This Court has further recognized that “[t]his is especially so because the victim is often dependent on the thief for help and support. Victims who are elderly and in poor mental or physical health are largely defenseless against such crimes.” *Id.*

The evidence as presented supports the circuit court’s finding that financial exploitation occurred. And considering the evidence in the light most favorable to Bruggeman’s version, the circuit court did not err in determining that Ramos’ conduct amounted to vulnerable adult abuse by financial exploitation. *Goeden*,

2003 S.D. 91, ¶ 5, 668 N.W.2d at 110. While Ramos argues a different view of the evidence, this is not enough “‘to leave [this Court] with ‘a definite and firm conviction that a mistake has been made.’” *Underhill*, 2016 S.D. 69, ¶ 14, 886 N.W.2d at 353-54. Moreover, the circuit court did not abuse its discretion in granting the protection order on this basis.

C. Neglect.

Neglect is another form of vulnerable adult abuse. SDCL 21-65-1(4)(c). Neglect is defined as “harm to the health or welfare of an elder or an adult with a disability, without reasonable medical justification, caused by a caretaker, within the means available for the elder or adult with a disability, including the failure to provide adequate food, clothing, shelter, or medical care.” SDCL 21-65-1(4)(c) and SDCL 22-46-1(6).

Ramos claims that her conduct did not constitute neglect under SDCL 21-65-1(4)(c) and SDCL 22-46-1(6) but instead falls under the exception in SDCL 22-46-1.1 in that she was merely complying with Bruggeman’s wishes and acting as his power of attorney. Ramos Br. at 28. However, this contention is being raised for the first time on appeal and without any authority.

At no point during this case did Ramos specifically raise this issue, let alone cite the circuit court to this exception in SDCL 22-46-1.1. The issue was not raised through Ramos’ testimony or argued in closing arguments. Ramos even had a final opportunity to preserve the issue for appeal by making objections to

Bruggeman’s proposed findings of fact and conclusions of law (or even proposing her own) and failed to do so.

Under this Court’s long standing principle, “[t]his Court will not decide issues the trial court has not had the opportunity to rule upon.” *Knudson v. Hess*, 1996 S.D. 137, ¶ 8, 556 N.W.2d 73, 75 (citation omitted); *Action Mech., Inc.*, 2002 S.D. 121, ¶ 50, 652 N.W.2d at 755 (“an issue not raised at the trial court level cannot be raised for the first time on appeal.”). Had Ramos specifically raised the issue below, the parties would have had an opportunity to brief the issue for the circuit court. *Hall v. State ex rel. S. Dakota Dep’t of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 27. But more importantly, the circuit court “would have been made aware of the issue and given an opportunity to rule on it.” *Id.* Having never raised the issue of the SDCL 22-45-1.1 exception at the circuit court level, Ramos “cannot now assert the circuit court erred on matters it was never asked to determine.” *Knudson*, 1996 S.D. 137, ¶ 12, 556 N.W.2d at 77 (citation omitted). Moreover, the failure to cite to supporting authority is a violation of SDCL 15-26A-60(6) and the issue is deemed waived on appeal. *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 842 (S.D. 1990). For all these reasons, this issue is waived.

Even if not waived, a review of the record reveals this exception does not apply. Indeed, Ramos’ decision to keep Bruggeman out of a nursing home was not based on her desire to honor Bruggeman’s wishes. Instead, viewing the evidence in Bruggeman’s favor, Ramos refused to place Bruggeman in an assisted living center because of the financial impact it would have on herself and her

children. CR 5033; 5298; 5173. Ramos admitted that if she placed Bruggeman in an assisted living center as recommended, it would deplete all of Bruggeman's assets – assets that Ramos was promised at Bruggeman's death and assets that Ramos used freely as her own to the detriment of Bruggeman. CR 5298-99; 5027.

Moreover, while Bruggeman may very well have wanted to “remain independent” and at home, Ramos apparently forgot about his wishes after using Bruggeman's assets to secure a \$300,000.00 home solely in her name for herself and her children. Truly, Ramos placed Bruggeman in an assisted living center within weeks of purchasing the Willow Creek home.

And while one can certainly appreciate wanting to honor an elderly loved one's wishes to stay at home, one would also expect that the elderly loved one would receive adequate care and supervision at home. This was obviously not done. While Ramos was well-aware that Bruggeman needed a higher level of care and 24-hour supervision because of his increased disorientation and sundowning behaviors, Ramos – as his caregiver, friend, and power of attorney health care – kept Bruggeman living alone, in a backyard shack, with a baby monitor. Ramos admitted that she was unable to provide the recommended 24-hour care and supervision Bruggeman needed, but refused outside assistance such as Meals on Wheels, home bath aides, and assistance with homemaking. CR 5172-73; 5035-39; 3169. And as a result of Ramos' decisions, Bruggeman was discharged from home health and home health was never restarted. CR 5172; 3169. There is no

evidence in the record that this was what Bruggeman envisioned when he made his health care wishes known.

There is overwhelming evidence to support the circuit court's decision on neglect. For example, Ramos admitted that by 2017 Bruggeman no longer had the capacity to make health care decisions for himself. CR 5296; 5390; 3169. His physician and the VA made it abundantly clear to Ramos in 2017:

[Bruggeman] *lack [sic] skills needed for independence, responsibility, and self-control including keeping his own schedule, following time limits and schedule, following multi-step directions, and making appropriate choices toward his best self-interests. Further he lacks skills needed for protection of his health as well as to respond appropriately to illness and injury[.]*

CR 3237 (emphasis added). Yet because of decision made by Ramos, Bruggeman lived alone in a shack until August 2018 when he was placed into assisted living. Then in January 2019, Ramos allowed Bruggeman to leave his assisted living center – against all professional advice – and move to Arizona. CR 5180; 5370. When Bruggeman returned to South Dakota in April 2019, the VA diagnosed him with failure to thrive. CR 5180. When the VA again insisted that Bruggeman receive 24-hour care and supervision, Ramos had him discharged to her care, only to return him days later to the VA emergency room covered in bruises. CR 5180-81; 5096.

Put another way, Ramos' argument is truly absurd when followed to its logical conclusion. Essentially, Ramos argues that she cannot be found to have neglected Bruggeman since she honored his desire to be kept out of a nursing

home. If this were a true, the exception would render all of the vulnerable adult abuse statutes irrelevant, since regardless of the severity of the neglect, a caregiver who honored a vulnerable adult's wish to remain out of a facility could have his or her neglect, cruelty, and exploitation cured by keeping the vulnerable adult out of a facility. This position also ignores years of case law addressing the obligation of a fiduciary to act in the best interests of the principal. It is unimaginable that our legislature or our courts would have envisioned the exception cited by Ramos to produce this result.

In sum, Ramos waived the exception argument. Even if not waived, the circuit court properly judged the credibility of the witnesses and weighed the evidence. There was clearly competent and substantial evidence to support the circuit court's finding of neglect. Under the weight of the evidence, the circuit court's decision was not arbitrary or unreasonable.

IV. THE CIRCUIT COURT'S DECISION TO AWARD ATTORNEY FEES WAS SUPPORTED BY SOUND REASON AND EVIDENCE.

Pursuant to SDCL 21-65-15, the circuit court "may order the respondent to pay the attorney's fees and court costs of the vulnerable adult and substitute petitioner." Notably not claiming error in the award or amount of attorney fees, Ramos instead argues that circuit court erred in not properly analyzing the factors in determining attorney fees and therefore, the "issue should be remanded back to the circuit court for more appropriate findings of fact." Ramos Br. at 31. Ramos' argument is unsupported by the record and South Dakota law.

This Court has stated that “[a]lthough [it] has expressed a preference for written findings and conclusions, it has accepted oral findings and conclusions where the basis of the trial court's ruling is clear.” *BAC Home Loans Servicing, LP v. Trancynger*, 2014 S.D. 22, ¶ 23, 847 N.W.2d 137, 143 (citing *State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 23, 785 N.W.2d 272, 281). *See also In re Guardianship & Conservatorship of Fischer*, 2008 S.D. 51, ¶ 8, 752 N.W.2d 215, 217 (noting that this Court may decide the appeal without further findings if it feels it is in a position to do so) and *State v. Stevenson*, 2002 S.D. 120, ¶ 10, 652 N.W.2d 735, 739 (observing that this Court has accepted verbal findings and conclusions where the record leaves no room for speculation and conjecture concerning what the trial court found or concluded). Such is the case here.

This Court’s decision in *Trancynger* is instructive. In *Trancynger*, the circuit court did not issue written findings of fact and conclusions of law on the issue of attorney fees. *Trancynger*, 2014 S.D. 22, ¶ 20, 847 N.W.2d at 142-43. The circuit court did, however, note on the record that attorney fees “appear[ed] to be reasonable” given the size of the file and work done in the litigation. *Id.* But, like here, the circuit court held the issue in abeyance and requested the prevailing party to provide an affidavit that articulated the actual time spent on the file. *Id.* As such, the prevailing party’s attorney filed an affidavit itemizing the amount of time worked on the file, but also, notably, “analyzing the factors considered in determining whether the attorney fees were reasonable.” *Id.* After receiving the affidavit, the circuit court awarded attorney fees. *Id.*

On appeal, this Court held the circuit court did not abuse its discretion in awarding attorney fees or in failing to articulate written findings and conclusions.

In doing so, this Court articulated

In making the determination, Judge Macy made a ruling based on the type of litigation, the length of the litigation, the amount of time spent on the case, and the fee customarily charged for similar services. In doing so, and after receiving an affidavit outlining the same, he concluded that the fee was reasonable by awarding the fees as part of the judgment. “Although this Court has expressed a preference for written findings and conclusions, it has accepted oral findings and conclusions where the basis of the trial court's ruling is clear.” Here, it is clear Judge Macy based his decision on the length and type of litigation, the amount of time spent on the case, and the affidavit of BAC's attorney. Judge Macy's decision was supported by sound reason and evidence and therefore, was not an abuse of discretion.

Id. at ¶ 23.

Similarly, in this case it is clear the circuit court “made a ruling based on the type of litigation, the length of the litigation, the amount of time spent on the case, and the fee customarily charged for similar services.” Indeed, the circuit court took the attorney fee issue under advisement following the continued protection order hearing. CR 5519. One of Black Hills Advocate’s (the substitute petitioner) attorneys then submitted a four-page affidavit, with a billing statement attached as an exhibit. CR 5141-5150. The attorney’s affidavit and exhibit thoroughly detailed and “analyz[ed] the factors considered in determining whether the attorney fees were reasonable.” *Trancynger*, 2014 S.D. 22, ¶ 21, 847 N.W.2d at 143; *see also* CR 5141-5150. The circuit court then issued its findings of fact and conclusions of law, concluding the requested attorney fees to be “reasonable and

necessary legal fees incurred in bringing this action as determined by the Court and set forth in the Affidavit of Cassidy M. Stalley.” CR 5186.

There is sufficient reasoning and evidence for this Court to determine that the circuit court did not abuse its discretion in awarding attorney fees. This issue does not need to be remanded but simply affirmed on appeal.

CONCLUSION

For all the reasons stated above, Bruggeman respectfully submits that the circuit court’s judgment must be affirmed.

Dated this 1st day of October, 2020.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, Cassidy M. Stalley, counsel for the Appellee does hereby submit the following:

The foregoing brief is 34 pages in length. It is typed in proportionally spaced typeface in Times New Roman 13 point. The word processor used to prepare this brief indicates that there are a total of 8,517 words and 44,188 characters (no spaces) in the body of the brief.

/s/ Cassidy M. Stalley
Cassidy M. Stalley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Brief of Appellee in the above-entitled action were duly served upon the following persons on the 1st day of October, 2020, by electronic mail at the addresses listed below:

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The undersigned further certifies that the original and two (2) copies of the Brief of Appellee in the above-entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, the date above written.

/s/ Cassidy M. Stalley
Cassidy M. Stalley

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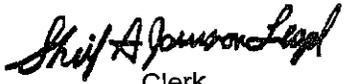
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January 7, 2021

SUPREME COURT
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Ms. Shirley A. Jameson-Fergel
South Dakota Supreme Court Clerk
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Re: James Bruggeman / Black Hills Advocate v. Jennifer Ramos
Appeal No.: 29308
Our File No.: 160034-00029

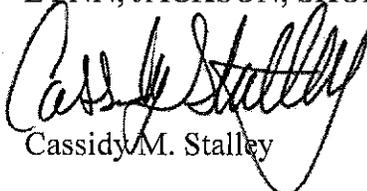
Dear Ms. Jameson-Fergel:

Please be advised that Appellee is in receipt of Appellant's Corrected Brief, filed December 31, 2020. Appellee has reviewed Appellant's Corrected Brief. It appears that all corrections are to the record citations, which does not impact the substantive arguments made in Appellee's Brief, filed October 1, 2020.

As such, Appellee wishes to inform the Supreme Court of South Dakota that a corrected response brief is not necessary. Appellee will rely on the brief filed October 1, 2020 and will not be filing a corrected response brief.

Sincerely,

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.


Cassidy M. Stalley

CAS:smb

cc: Stephen J. Wesolick & Mariah C. Bloom (via email)