

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Supreme Court Case No. DA-21-0011

IN THE MATTER OF THE CONSERVATORSHIP OF

H.D.K., a Protected Person.

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**ANSWER BRIEF OF APPELLEE H.D.K., a Protected Person**

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On Appeal from the Montana Fourth Judicial District Court  
Missoula County, Cause No. DG-19-52  
The Honorable Shane A. Vannatta, Presiding

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## **INTRODUCTION**

H.D.K. is an 85-year-old woman who, along with her late husband, J.K. (“Jim”), acquired a substantial number of properties in and around Missoula collectively valued in excess of \$3 Million, including a number of rental properties which provide H.D.K.’s primary source of income. H.D.K. has been diagnosed with dementia and has issues with short term memory but has long desired to complete an estate plan devising those properties to her two adult children, T.K. (“Tony”) and S.K.H. (“Sofeea”). The Appellant, Tony, seeks to overturn the district court’s order regarding the division of properties in H.D.K.’s estate plan. The district court issued its order after an interview with H.D.K., live testimony from the parties and others, reports from the court appointed visitor and physician, and post-hearing submissions from the parties. The district court’s order incorporated H.D.K.’s testimony and stated wishes with respect to the division of her property in her estate plan. H.D.K. files this Answer Brief in support of the district court’s order and requests this Court affirm the order.

## **STATEMENT OF ISSUES**

1. Did the district court deprive Tony of procedural due process or abuse its discretion in issuing pre-hearing orders denying Tony’s motion for a pretrial scheduling order and quashing Tony’s subpoena for the entire file of H.D.K.’s prior

attorney, or in its conduct of the hearing regarding H.D.K.'s testamentary capacity and intent?

2. Did the district court err in finding H.D.K. had testamentary capacity?

3. Did the district court err in finding that H.D.K. intended to divide the properties in her estate 60% to Tony and 40% to Sofeea?

4. Did the district court err by not determining the present values of H.D.K.'s properties?

### **STATEMENT OF CASE**

On July 17, 2019, H.D.K.'s daughter Sofeea filed a Verified Petition for Appointment a Temporary Conservator for H.D.K. indicating that H.D.K. was having difficulty completing her estate planning and was subject to influence by others. (CR 1, CR 72, ¶¶ 10-12). On July 19, 2019, the court appointed the Western Montana Chapter as H.D.K.'s temporary conservator and appointed Dirk Williams as H.D.K.'s attorney. (CR 2). On September 16, 2019, Tony appeared as an interested party. (CR 9). On September 17, 2019, Mr. Williams filed a report recommending that the court: appoint substitute counsel for H.D.K.; appoint the Western Montana Chapter or a similar entity to assist H.D.K. in completion of her estate plan; appoint the Western Montana Chapter or a similar entity as guardian for H.D.K.; order Tony, Sofeea and the conservator to

participate in a mediation; and approve an estate plan including the distribution of properties as necessary to meet H.D.K.'s testamentary intent. (CR 10, pp. 2-4).

Mr. Williams' report detailed the history of his representation and estate planning efforts on behalf of Jim and H.D.K., and included exhibits indicating the current status of their properties and their values, and his recommendation for the distribution of those properties. (*Id.*, pp. 4-33).

On September 19, 2019, the court held a hearing attended by Mr. Williams, Tony and Sofeea and their respective attorneys, at which time the parties agreed to extend the temporary guardianship and substitute Trent Baker as H.D.K.'s attorney. (CR 10.1). A stipulation and order to that effect were then filed. (CR 11, 12). On February 19, 2019, H.D.K. filed a motion to further extend the temporary conservatorship and schedule a mediation within two months to resolve H.D.K. estate plan and avoid causing H.D.K. further stress. (CR 13). Tony and Sofeea agreed to the extension of the conservatorship, selection of the Western Montana Chapter as conservator and agreed to have attorney Bill Wagner serve as mediator, but Tony opposed early mediation. (*Id.*, p. 2). The Court granted H.D.K.'s motion on February 21, 2020. (CR 14).

On February 24, 2020, Tony filed a request for a Rule 16 scheduling order. (CR 15). On February 27, 2020, the district court denied Tony's request after detailing the procedural history of the matter and noting that Tony had consented to

the continuation of the temporary conservatorship and neither Tony nor any other interested party had filed a petition, response, objection or any other pleading highlighting a dispute in need of adjudication. (CR 16, pp. 1-3). No such pleading was ever filed.

On March 4, 2020, the parties attended a full day mediation at which there was substantial progress and agreement among the parties on a number of issues. (CR 18, pp. 2-3). Tony subsequently hired a new attorney and, on June 19, 2020, filed an unopposed motion for a status conference because the scope of the conservator's duties had not been defined, an inventory had not been prepared and there were still unresolved issues between the parties, as noted in the settlement conference report. (CR 23). The status conference was held on July 23, 2020, attended by Tony and Sofeea and their respective attorneys, representatives of the Western Montana Chapter and H.D.K.'s attorney. (CR 24.1). Tony asserted that H.D.K.'s testamentary capacity needed to be determined and a physician and visitor appointed. (CR 24.1). The Court ordered the parties to submit suggestions for appointment of a visitor, a physician and a hearing date. (CR 24.1).

H.D.K. suggested appointment of Bonnie Malcom as visitor and H.D.K.'s personal doctor as physician, to which Tony and Sofeea concurred. (CR 25, 26, 27). On July 30, 2020, Sofeea filed a request for a hearing in September on the capacity issue, noting that discussion by the parties during the prior status conference

indicated a three-hour hearing would be appropriate. (CR 28). Tony filed a notice stating that there was no objection to the hearing but that his attorney's availability in September was limited. (CR 29). On August 3, 2020, the district court issued an order appointing the stipulated visitor and physician, setting a deadline for their reports, defining the scope of the temporary conservator's authority and duties, setting a three-hour hearing regarding H.D.K.'s capacity and need for appointment of a permanent conservator. (CR 30). H.D.K.'s physician declined the appointment so Dr. Bolyard was substituted as physician and her August 2019 report was accepted by the district court with the agreement of the parties. (CR 31, 36).

On August 31, 2020, Tony filed a notice of service of a subpoena on Mr. Williams, H.D.K.'s former attorney. (CR 33). The subpoena requested production of "all documents in your possession or control related to or in support of your *Initial Report of Counsel for [H.D.K.]* filed with the Court in the above captioned matter on Sept. 17, 2019 and all documents in your possession or control related to or in support of the estate planning documents drafted on behalf of [Jim] and [H.D.K.]" (CR 33, pp. 1-2, italics in original). On September 3, 2020, H.D.K. filed a motion to quash the subpoena noting that the broad request clearly implicated documents subject to the attorney-client privilege between Mr. Williams and his clients, Jim and H.D.K., whom had never waived that privilege. (CR 35). The district court ordered the subpoena quashed on September 10, 2020. (CR 39).

On September 18, 2020, the district court held a hearing regarding the need for a permanent conservatorship at which the parties also discussed Tony's subpoena to Mr. Williams and the scope and length of the hearing regarding H.D.K.'s testamentary capacity and intent. (CR 41). At the hearing, Tony's attorney raised concerns regarding Mr. Williams' report and attendance at the hearing, and he suggested that Tony may want an opportunity to brief the issue or change the scope of his subpoena. (September 18, 2020 Hearing Trans., 6:20-7:15). The district court recognized the need for a second hearing regarding H.D.K.'s testamentary intent and plan, that Mr. Williams would need to testify at that hearing and that he would be subject to cross examination. (September 18, 2020 Hearing Trans., 8:17-9:3).

The district court then addressed the issue of attorney client privilege, stating:

I think we need to approach carefully the issue of attorney/client privilege. Just because [H.D.K.] has some mild cognitive disability, it doesn't -- and a conservator has been appointed, it doesn't mean that the attorney/client privilege goes out the window.

(September 18, 2020 Hearing Trans., 9:5-10). Tony did not raise any other objections or concerns regarding the production or nonproduction of documents from Mr. Williams' file during the remainder of this hearing or prior to the second hearing.

The district court addressed the scope and length of the second hearing, including special provisions to obtain testimony from H.D.K. free of influence by her children:

I would like an unencumbered, uninfluenced testimony by [H.D.K.] as to her understanding of the plan, her intentions for the plan, all of those things. And then, of course, we can have some further testimony from Mr. Williams, or any other witnesses that the parties wish to have.

(September 18, 2020 Hearing Trans., 9:24-10:4). When the district court asked the parties how long they would need for the hearing, Sofeea's attorney said three hours would be sufficient and Tony's attorney said less time would probably be needed.

(September 18, 2020 Hearing Trans., 23:24-24:6). The district court further detailed the scope of the hearing and scheduled the hearing for the afternoon of September 23, 2020, beginning at 1:30 and set an in-chambers meeting with H.D.K. and her attorney for the day before. (September 18, 2020 Hearing Trans., 29:2-33:7).

At the hearing on September 23, 2020, H.D.K., Dirk Williams and Sofeea testified regarding H.D.K.'s testamentary capacity and intent. (September 23, 2020 Hearing Trans. and Exam. of H.D.K.). The hearing consumed the entire afternoon of September 23 and resumed on October 5, 2020 for two hours of testimony from Sofeea, Sofeea's daughter, and Tony. (October 5, 2020 Hearing Trans.). The hearing resumed the following day for another hour of testimony from Tony. (October 6, 2020 Hearing Trans.). At the conclusion of the testimony on October 6, 2020, Sofeea's attorney offered to conclude her cross-examination and the hearing. (October 6, 2020 Hearing Trans. 56:16-23). Tony's attorney said that he planned to call Tony's wife and daughter as witnesses. (October 6, 2020 Hearing Trans. 57:2-25). Sofeea's attorney suggested that the district court instead allow the submission

of additional testimony or evidence by affidavit. (October 6, 2020 Hearing Trans. 58:8-12). The district court, without further objection, closed the hearing and allowed the parties to supplement the record with additional information by sworn affidavits and ordered the parties to submit proposed findings of fact and conclusions of law. (October 6, 2020 Hearing Trans. 58:13-61:9).

Tony filed a Motion to Admit Evidence of Testamentary Intent, which included various property lists allegedly authenticated by H.D.K. without the knowledge or participation of her attorney. (CR 58). The district court granted the motion despite objection. (CR 71). Tony submitted affidavits from his wife, daughter and son as well as two of his own. (CR 60, 61, 62, 63, 69). Sofeea submitted an affidavit from a representative of the conservator and her own. (CR 57, 67). The district court issued its Findings of Fact and Conclusions of Law, and Order on December 3, 2020. (CR 72).

## **STATEMENT OF FACTS**

H.D.K. has two adult children, Tony and Sofeea. (CR 72, ¶ 2). H.D.K.'s husband Jim died in 2016. (CR 72, ¶ 3). H.D.K. lives at 307 S. 6<sup>th</sup> Street West in Missoula. (CR 72, ¶ 4). Tony, his wife Cyndy and their two adult children live in Missoula and Tony and Cyndy's daughter has lived with H.D.K. (CR 72, ¶¶ 4, 5).

Sofeea and her family live outside of Montana, and Sofeea visits regularly and H.D.K. visits Sofeea and her children at their homes. (CR 72, ¶ 6).

H.D.K. and Jim retained Mr. Williams to assist them with their estate planning in 2009. (CR 72, ¶ 17). On August 20, 2014, H.D.K. and Jim executed a trust and pour-over wills. (*Id.*). The trust was to hold the interests of three limited liability companies (“LLCs”) among which ownership of the various rental properties would be divided. (*Id.*). Upon the death of both H.D.K. and Jim, two of the LLCs would go to Tony and one would go to Sofeea. (*Id.*). Any other assets of the trust would be distributed equally to Tony and Sofeea. (*Id.*). Mr. Williams testified that H.D.K. and Jim’s plan was that Tony would inherit 60% of their estate and Sofeea would inherit 40%. (*Id.*).

In July of 2015 H.D.K., individually and as attorney-in-fact for Jim, executed deeds transferring certain rental properties into two of the LLCs. (*Id.*, ¶¶ 19-20). However, the name of the LLC intended for Sofeea was taken so Mr. Williams transferred the properties back to H.D.K. and Jim and created a new LLC and in October of 2015, H.D.K. executed a deed to transfer the properties to the new LLC. (*Id.*, ¶ 20). That deed was never recorded. (*Id.*, ¶ 21).

During her testimony on September 23, 2020, H.D.K. authenticated a copy of a letter she wrote to Tony and Sofeea dated December 6, 2018, (Hearing Exhibit 1) stating that the properties she had intended to for each child had changed but that

she still intended to distribute her estate 60% to Tony and 40% to Sofeea. (*Id.*, ¶ 25). The letter also indicated that she wanted Tony to inherit her home and she wanted Sofeea to receive the Cramer Creek property (aka Borboula). (*Id.*, ¶ 25). In 2019, The letter referenced two lists of properties, one from 2014 that H.D.K. made with Jim (aka Pop) and one she asked Sofeea to help her with in 2018, and H.D.K. testified the letter reflects her current wishes. (*Id.*, ¶¶ 25, 26). Sofeea submitted with her affidavit a copy of the 2018 list she helped H.D.K. prepare, clarifying that she only helped H.D.K. with the format. (*Id.*, ¶ 26). That list is consistent with the distribution ordered by the district court. (*Id.*, ¶¶ I, II).

On August 8, 2019, H.D.K. was examined by the neuropsychologist later appointed by the court as physician upon agreement of the parties, who determined that H.D.K. had “Major Neurocognitive Disorder, presumably related to Alzheimer’s disease, vascular dementia, or a mixed dementia involving both pathologies.” (*Id.*, ¶ 12). During the exam, H.D.K. identified for the physician which properties she intended each of her children to inherit, with some uncertainty as to a couple of the properties. (*Id.*, ¶¶ 12, 13). H.D.K. acknowledged that her “kids can talk her into anything.” (*Id.*, ¶ 15). The physician recommended that the Western Montana Chapter continue as conservator and possibly guardian and that a new attorney be appointed in place of Mr. Williams. (*Id.*).

On August 28, 2020, the court-appointed visitor met with H.D.K. and reported that she has “mild cognitive impairment” and is unable at this point “to take a strong stance one way or the other in her estate planning.” (*Id.*, ¶ 11). The visitor recommended H.D.K.’s long held estate planning wishes from when her mental status was intact be maintained, including H.D.K.’s and Jim’s desire that Tony should inherit 60% of H.D.K.’s estate and Sofeea should inherit 40%. (*Id.*). The visitor also recommended the continued involvement of the Western Montana Chapter. (*Id.*).

Tony, Sofeea, Sofeea’s daughter and Mr. Williams each testified that H.D.K. had exhibited some decline in mental status, mainly in the form of short-term memory lapses. (*Id.*, ¶ 32).

The district court found that during the September 23, 2020 hearing, H.D.K. “presented as a relatively clear-minded individual for someone in her mid-80s,” and “was spunky, mischievous, nervous and exasperated by the disputes that brought her into court.” (*Id.*, ¶ 16). She reiterated her intent to devise 60% of her estate to Tony and 40% to Sofeea, explaining that Tony should receive more because he moved back to Missoula to help her and Jim. (*Id.*). H.D.K. testified correctly regarding the identities of her children, grandchildren and deceased husband. (*Id.*, ¶ 33). She testified that she owned 12-13 rental properties and listed the addresses of 7, recognizing she was not remembering all of them. (*Id.*, ¶ 34). H.D.K. correctly

identified all of her non-rental properties. (*Id.*, ¶ 38). She estimated her monthly rental income before expenses was about \$13,000, she received a little over \$1000 per month in Social Security, and she stated that Tony manages her money. (*Id.*, ¶¶ 35-36).

Tony testified that the rental properties bring in approximately \$10,000 per month before expenses. (*Id.*, ¶ 37). A representative of the conservator provided an affidavit that based on information provided by Tony's wife, monthly rental income before expenses was about \$14,000, H.D.K.'s Social Security was \$1,173.90 per month, and H.D.K. owns 10 rental properties with 20 units. (*Id.*, ¶ 39).

Based on the foregoing findings, the district court concluded that H.D.K. satisfied the elements to establish that she retains testamentary capacity but is susceptible to the influence of others. (*Id.*, ¶¶ D-G). The district court also concluded that the evidence established H.D.K. had testamentary intent and wrote or signed various documents indicating her preferences for particular properties to pass to Tony or Sofeea, many with a high degree of consistency, and that substantial evidence established H.D.K.'s long held intent to devise 60% of her estate to Tony and 40% to Sofeea. (*Id.*, ¶¶ H-J).

Based on the forgoing, the district court ordered certain properties be transferred to the two LLCs owned by the trust and to be transferred to Tony and Sofeea respectively upon H.D.K.'s death. (*Id.*, ¶¶ I, II). The distribution ordered by

the district court list is consistent with the most recent list referred to in H.D.K.'s December 2018 letter, which H.D.K. testified represents her current intent. (*Id.*, ¶¶ 25, 26).

The district court ordered that the Western Montana Chapter as conservator must use if best efforts to maximize rental income before selling any of H.D.K.'s properties, but if it must sell properties to provide for H.D.K. during H.D.K.'s lifetime, those properties should be selected so that distributions upon H.D.K.'s death would continue to of reflect H.D.K.'s intent to distribute 60% of her estate to Tony and 40% to Sofeea. (*Id.*, ¶¶ IV, V). The district court further ordered that upon H.D.K.'s death, the Western Montana Chapter shall act the Personal Representative of her estate, shall value all of her property, and shall make such distributions as needed to of fulfill H.D.K.'s intent to distribute 60% of her estate to Tony and 40% to Sofeea. (*Id.*, ¶ III). Any deviation from the foregoing would require court approval, with notice to the parties as required by law. (*Id.*).

### **STANDARD OF REVIEW**

Testamentary intent is a question of fact. *In re Estate of Johnson*, 2002 MT 341, ¶ 18, 313 Mont. 316, 60 P.3d 1014. Existence of testamentary capacity is a question of fact. *In re Estate of Quirin*, 2015 MT 132, ¶ 17, 379 Mont. 173, 348 P.3d 658. This Court reviews a district court's findings of fact to determine if they

are clearly erroneous. *Id.*, ¶ 10. A court’s findings are clearly erroneous if they are not supported by substantial evidence, they misapprehended the effect of the evidence, or if this Court is convinced by its review of the record that the district court made a mistake. *Id.* This Court reviews a district court’s conclusions of law for correctness. *Id.*

Pre-trial and discovery rulings are reviewed for abuse of discretion. *Brookins v. Mote*, 2021 MT 283, ¶ 21, 367 Mont. 193, 199, 292 P.3d 347, 353 (citing *Anderson v. Werner Enterprises, Inc.*, 1998 MT 333, ¶ 13, 292 Mont. 284, 972 P.2d 806). This is based on a district court’s “inherent discretionary power to control discovery” and its “authority to control trial administration.” *Id.* The decisions of a trial judge will be reversed “only when his or her judgment may materially affect the substantial rights of the complaining party and allow the possibility of a miscarriage of justice.” *Id.*

## **SUMMARY OF ARGUMENT**

The district court did not deprive Tony of procedural due process or abuse its discretion in issuing pre-hearing orders denying Tony’s motion for a pretrial scheduling order and quashing Tony’s subpoena for the entire file of H.D.K.’s prior attorney, or in its conduct of the hearing regarding H.D.K.’s testamentary capacity and intent. The district court correctly found, based on substantial evidence, that

H.D.K. had testamentary capacity and that she intended to divide the properties in her estate 60% to Tony and 40% to Sofeea. The district court properly found that valuation of H.D.K.'s properties in order to satisfy her desired distribution should be done at the time of her death and determining the current values is unnecessary.

## **ARGUMENT**

### **A. The district court did not deprive Tony of procedural due process or abuse its discretion in pre-hearing rulings or conduct of the hearing.**

#### **1. Tony has no standing to assert due process rights with respect to H.D.K.'s property or conservatorship action.**

An adult child does not have standing to assert a protected person's due constitutional process rights or to assert a violation of their own constitutional process rights in a conservatorship matter. *In re Guardianship & Conservatorship of A.M.M.*, 2016 MT 213, ¶¶ 12,13, 384 Mont. 413, 380 P.3d 736. Conservatorship proceedings are not intended to be adversarial proceedings but are intended to promote the best interests of the protected person. *Id.* Here, Tony asserts that the district court violated his due process rights in pre-hearing rulings or conduct of the hearing. The district court recognized that under Mont. Code Ann. § 72-5-401 the purpose of a conservatorship is to promote the effective management of the property and affairs of the person to be protected. (CR 16, p. 2). There is no dispute that the property at issue in this case is H.D.K.'s property. The district court properly

focused its rulings on protecting H.D.K.'s property and assisting her in completing her estate plan without interference from her children. Tony has no standing to assert an alleged violation of his constitutional due process rights in this matter.

**2. The district court did not abuse its discretion when it denied Tony's request for a scheduling order.**

A court abuses its discretion if it acts "arbitrarily without conscientious judgment or exceed[s] the bounds of reason." *City of Missoula v. Mountain Water Co.*, 2016 MT 183, ¶ 18, 384 Mont. 193, 378 P.3d 1113. Here, Tony asserts that the district court abused its discretion by denying Tony's request to issue a scheduling order. However, the district court denied Tony's request after detailing the procedural history of the matter and noting that Tony had consented to the temporary conservatorship and neither Tony nor any other interested party had filed a petition, response, objection or any other pleading highlighting a dispute in need of adjudication. (CR 16, pp. 1-3).

Tony was clearly on notice that if he believed there was a dispute in need of adjudication he would simply have to file a pleading describing the dispute. No such pleading was filed. Tony consented to the scheduling of the hearing and participated in the hearing without objection, and without ever seeking to delay it for purposes of discovery, further motion practice or any other reason. The district court did not abuse its discretion in denying the request for a scheduling order.

**3. The district court did not abuse its discretion when it quashed Tony's subpoena for the file of H.D.K.'s former attorney.**

Tony asserts that the district court abused its discretion when it granted H.D.K.'s motion to quash Tony's subpoena for the file of H.D.K.'s former attorney. Tony's subpoena included a broad request which would have required production Mr. Williams' entire file, including attorney-client privileged documents. (CR 33, pp. 1-2). H.D.K.'s motion noted the broad nature of the subpoena and that neither Jim nor H.D.K. had ever waived that privilege and cited Rule 45(d)(3)(A)(iii), M.R.Civ.P., which requires a subpoena to be quashed if it "requires the disclosure of privileged or other protected matter, if no exception or waiver applies." (CR 35). The district court ordered the subpoena quashed on that basis. (CR 39).

The district court further explained its ruling at the September 18, 2020, hearing. (September 18, 2020 Hearing Trans., 9:5-10). Tony raised concerns regarding Mr. Williams' report and attendance at the hearing, which the district court addressed, but Tony did not raise any other objections or concerns regarding the production or nonproduction of documents from Mr. Williams' file during that hearing or prior to the second hearing. Tony has never argued that Jim or H.D.K. waived their attorney-client privilege or that any exception to the privilege applies. The district court did not abuse its discretion by quashing Tony's subpoena.

**4. The district court did not abuse its discretion when it concluded the hearing.**

Tony argues that the district court abused its discretion by closing the hearing after nearly 6 hours of testimony over 3 days. The hearing was initially schedule for 3.5 hours in one afternoon and Tony not only consented to that schedule but suggested that might be more time than necessary. (September 18, 2020 Hearing Trans., 23:24-24:6). The district court clearly and repeatedly explained the scope of the hearing when Tony consented to the schedule. (September 18, 2020 Hearing Trans., 9:24-10:4, 29:2-33:7).

At the conclusion of the hearing, Tony's attorney said that he planned to call Tony's wife and daughter as witnesses. (October 6, 2020 Hearing Trans. 57:2-25). Sofeea's attorney suggested that the district court instead allow the submission of additional testimony or evidence by affidavit. (October 6, 2020 Hearing Trans. 58:8-12). Tony did not object and the district court closed the hearing and allowed the parties to supplement the record with additional information by sworn affidavits. (October 6, 2020 Hearing Trans. 58:13-61:9).

Tony then took full advantage of the opportunity to supplement the record. He filed a Motion to Admit Evidence of Testamentary Intent, which included various property lists allegedly authenticated by H.D.K. without the knowledge or participation of her attorney. (CR 58). The district court granted the motion despite objection. (CR 71). Tony submitted affidavits from his wife, daughter and son as

well as two of his own. (CR 60, 61, 62, 63, 69). The district court did not abuse its discretion in concluding the hearing and allowing supplementation of the record without objection from any party.

**B. The district court correctly concluded that H.D.K. retained testamentary capacity.**

Testamentary capacity requires a testator be aware of three elements: (1) the nature of the act to be performed; (2) the nature and extent of the property to be disposed of; and (3) the objects of his or her bounty. *In re Estate of Quirin*, 2015 MT 132, ¶ 14, 379 Mont. 173, 348 P.3d 658. A court is not required to independently consider the testator's mental capacity to understand the elements, or the testator's strength, clearness of mind or memory. *Id.* at ¶ 16.

The district court correctly found substantial evidence demonstration that H.D.K. retained testamentary capacity. Mr. Williams' testimony, the Trust, the 2018 letter and other evidence cited by the district court showed that H.D.K. understood the nature of the act to be performed. (CR 72, ¶ E). The district court properly found H.D.K. satisfied the second element because, she was able to identify by address the majority of her substantial real estate holding and the sources and amount of her income, in some cases more accurately than Tony, who manages her money and property. (*Id.*, ¶¶ 34-39). H.D.K. clearly satisfied the third element from *Quirin* by correctly and repeatedly identifying her two children. (*Id.*, ¶ 33). The district court correctly determined H.D.K. retained testamentary capacity.

**C. The district court correctly found that H.D.K. intended to devise her estate 60% to Tony and 40% to Sofeea.**

Tony asserts that the district court erred in finding that H.D.K. intended to devise her estate 60% to Tony and 40% to Sofeea. “There is no definite fixed rule for determining testamentary intent, but each case must stand on its own peculiar facts and circumstances,” and a testator’s intent is a question of fact to be decided by a district court or jury pursuant to § 72-1-208, MCA. *In re Estate of Johnson*, 2002 MT 341, ¶ 18, 313 Mont. 316, 60 P.3d 1014 (citing *In re Augestad’s Estate*, 111 Mont. 138, 106 P.2d 1087, 1088 (1940)).

Here, the district court properly decided, based on substantial evidence, that H.D.K.’s long held intent was to devise 60% of her estate to Tony and 40% to Sofeea. (CR 72, ¶¶ H-J). Mr. Williams testified that H.D.K. and Jim’s plan was that Tony would inherit 60% of their estate and Sofeea would inherit 40%. (*Id.*, ¶ 17). H.D.K. authenticated a copy of a letter she wrote to Tony and Sofeea dated December 6, 2018, (Hearing Exhibit 1) stating that the properties she had intended to for each child had changed but that she still intended to distribute her estate 60% to Tony and 40% to Sofeea. (*Id.*, ¶ 25). The visitor recommended H.D.K.’s long held estate planning wishes from when her mental status was intact be maintained, including H.D.K.’s and Jim’s desire that Tony should inherit 60% of H.D.K.’s estate and Sofeea should inherit 40%. (*Id.*, ¶ 11). H.D.K., during the hearing, reiterated her intent to distribute her estate 60% to Tony and 40% to Sofeea and explained that

Tony's share was larger because he moved back to Missoula to help her and Jim. (*Id.*, ¶ 11).

This substantial evidence is sufficient to overcome the minimal evidence to the contrary and supports the district court's determination regarding H.D.K.'s testamentary intent.

**D. The district court properly found that valuation of H.D.K.'s properties in order to satisfy her desired distribution should be done at the time of her death and determining the present values is unnecessary.**

Tony asserts that the district court erred by not determining current values of the properties prior to deciding which properties would be transferred to which LLC. However, no such valuation was ever requested by Tony. Tony had the opportunity to provide testimony or other evidence regarding the values of the properties but did not. The record does contain various documents that include values of the various properties at different points in time. While these do not show current values, they do show relative values of the properties, which would be equally useful in determining an appropriate division. However, the district court based its decision on a property lists prepared by H.D.K. or at her direction and referenced in her December 2018 letter. (CR 72, ¶¶ 25, 26).

Current values would be largely irrelevant to H.D.K.'s intended distribution because that division would occur at the time of her death which may be many years from now and during which time many of the properties may be sold to provide for

her care. The district court's order properly recognized and addressed these facts. The district court ordered that the Western Montana Chapter as conservator must use if best efforts to maximize rental income before selling any of H.D.K.'s properties, but if it must sell properties to provide for H.D.K. during H.D.K.'s lifetime, those properties should be selected so that distributions upon H.D.K.'s death would continue to reflect H.D.K.'s intent to distribute 60% of her estate to Tony and 40% to Sofeea. (*Id.*, ¶¶ IV, V). The district court further ordered that upon H.D.K.'s death, the Western Montana Chapter shall act the Personal Representative of her estate, shall value all of her property, and shall make such distributions as needed to fulfill H.D.K.'s intent to distribute 60% of her estate to Tony and 40% to Sofeea. (*Id.*, ¶ III). Any deviation from the foregoing would require court approval, with notice to the parties as required by law, which would allow the parties an opportunity to contest the proposed distribution. (*Id.*).

## **CONCLUSION**

H.D.K respectfully requests this Court affirm the decisions of the district court. The district court's decisions accurately reflect H.D.K.'s past and current testamentary wishes to which she testified, protect her best interests and put an end to this stressful affair.

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing ANSWER BRIEF OF APPELLEE H.D.K. is proportionately spaced, printed with the typeface Times New Roman, 14-point font, is double spaced, and contains approximately 5,303 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

DATED this 28<sup>th</sup> day of June, 2021.

Datsopoulos, MacDonald & Lind, P.C.

By: /s/ Trent N. Baker  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have filed a true and accurate copy of the foregoing ANSWER BREIF OF APPELLEE H.D.K. with the Clerk of the Montana Supreme Court; and that I have served a true and accurate copies of the same upon each attorney of record in the above-referenced District Court action, as follows:

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