

IN THE SUPREME COURT OF
THE STATE OF MONTANA

DA 21-0569

IN THE MATTER OF G. M. P.
An Alleged Incapacitated Person

BRIEF OF APPELLEE

On Appeal from the Montana Sixteenth Judicial District Court
Custer County Cause No. DG 2020.05
The Honorable Nickolas C. Murnion, Presiding

Appearances:

Tracee Raymond
P.O. Box 2213
Colstrip, MT 59323
406/853-1371
traceeraymond@hotmail.com
PRO SE APPELLANT

Janette Krutzfeldt Jones, Esq.
KRUTZFELDT & JONES, LLP
Attorneys at Law
507 Pleasant
Miles City, MT 59301
406/234-1222
jkjones@midrivers.com
ATTORNEY FOR APPELLEE

Molly S. Considine, Esq.
PATTEN PETERMAN BEKKEDAHL & GREEN
PLLC
2817 2nd Avenue North Ste. 300
Billings, MT 59101-2041
mconsidine@ppbglaw.com
ATTORNEY FOR PROTECTED PERSON, G. M. P.

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INTRODUCTION

G. M. P. is an 88 year old widow with 3 living adult children: A. D. R. (“Appellee”); T. L. R. (“Appellant”); and, G. W. R. G. M. P. was diagnosed with dementia in April 2016. Appellant seeks to overturn the district court’s order appointing Appellee as full guardian and conservator for G. M. P. The district court issued its order after a review of power of attorney documents signed by G. M. P., medical documentation of G. M. P.’s mental and physical decline, live testimony of the parties and witnesses, reports from the appointed visitor and physician and recommendations from the attorney for G. M. P.

STATEMENT OF ISSUES FOR REVIEW

1. Did the district court abuse its discretion in appointing Appellee as full guardian and conservator for G. M. P.?
2. Did the district court deprive G. M. P. of procedural due process and does Appellant have standing to assert due process claims on behalf of G. M. P.?
3. Did the district court deprive Appellant of procedural due process or abuse its discretion by: a) denying Appellant’s submission of certain evidence; b) sustaining objections to testimony presented by Appellant; or, c) failing to give notice to Appellant prior to its Order appointing Appellee temporary guardian and conservator?

STATEMENT OF THE CASE

On November 25, 2020, Appellee filed a verified Petition for Appointment of Guardian and Conservator for his mother, G. M. P., indicating that G. M. P. had recently experienced major physical illness and injury and that G. M. P.'s declining mental capabilities and physical handicaps required immediate intervention to protect G. M. P. CR 1. On December 1, 2020, the district court appointed Appellee as temporary guardian and conservator for G. M. P. and appointed a visitor, physician and an attorney for G. M. P. CR 2. Notice of the Petition and the Order appointing Appellee was served on Appellant by mail on December 2, 2020. CR 3.

On January 12, 2021, Appellant filed an Objection to Petition alleging that G. M. P. was not "incapacitated" within the meaning of the statute, but if G. M. P. was determined to be incapacitated, then Appellant should be appointed guardian and conservator. CR 4, CR 5 ¶¶ 6, 12. On January 22, 2021, Appellee filed a Response to Objection providing 4 power of attorney documents signed by G. M. P., including a General Power of Attorney dated July 28, 2020, of which Appellee did not have until Appellant filed her Objection. CR 7; Tr. 193: 7-19. Appellee included medical documentation describing a long history of medical intervention necessitated by G. M. P.'s dementia and physical decline. CR 7. Appellant was

present with G. M. P. at most of the medical appointments and discussed G. M. P.'s advancing dementia with G. M. P.'s providers. *Id.*

On October 28, 2021, the district court held a hearing on Appellee's Petition. Appellee presented testimony from 4 witnesses: himself; the court appointed visitor; Appellant; and G. M. P.'s son, George. CR 58, ¶ 4. Appellant presented testimony from 4 witnesses: herself; her daughter; her friend; and, G. M. P.'s neighbor. *Id.* The district court reviewed exhibits, admitted without objection from Appellant, including medical records, the visitor's report, 4 powers of attorney and financial records. (October 28, 2021 Hearing Trans., 54:22-57:7, 168:23-169:11, 174:13-175:5, 176:20-177:16).

STATEMENT OF THE FACTS

G. M. P. was first diagnosed with dementia in 2016. Hearing Exhibit B. Her dementia steadily worsened and G. M. P. requires assistance with all of her basic physical and financial needs. Hearing Exhibits A, H-1. In addition, G. M. P. suffers from severe macular degeneration and glaucoma which impairs her eyesight to the point that she is dependant on others for most activities of daily living. Hearing Exhibit H-1, D.

Appellant argued that G. M. P. was not "legally blind;" however, Appellant acknowledged that G. M. P. had several physical conditions and mental challenges

that interfered with G. M. P.'s ability to care for herself or make decisions for her own needs. Tr. 90: 4-22, 95: 14-25. Appellant agreed that G. M. P. was in need of a guardian and conservator. Tr. 282: 5-18.

In November 2020, G. M. P. was hospitalized with COVID. Tr. 106: 3-24. G. M. P. was released from the hospital into Appellant's care. *Id.* Appellee sought temporary appointment as guardian and conservator and on December 4, 2020, Appellee moved G. M. P. from Appellant's house into Appellee's home. CR 1, Tr. 130: 2-132:5. Appellee was prevented by Appellant from seeing G. M. P. for the previous year. Tr. 123:8-125:25. Appellee was alarmed when he saw G. M. P.'s sickly condition. Tr. 132: 6-133: 24. Appellant lived in a mobile home with her husband and G. M. P. and 8 Boxer dogs, including occasional puppy litters. Tr. 77: 21-82:3.

Appellee testified that G. M. P. suffered neglect while in Appellant's care, including the following: a recent head injury and contusion; weight loss, anemia and malnourishment; incontinence; lack of treatment for her glaucoma; painful long and ingrown toenails; rotten teeth and gum decay; poor hygiene; earrings grown into her ears; instability and unable to support her own weight; and emotional fragility and night terrors. Tr. 132: 6-150: 24; 297: 13-299:18 Appellee and other medical professionals documented G. M. P.'s compromised

physical and medical condition and the neglect that G. M. P. endured while in Appellant's care. Tr. 64:21-65: 22, Hearing Exhibits A, H-1, P-1.

The appointed visitor, Tracy Newbold, testified that she met G. M. P. on December 7, 2020, when G. M. P. was initially removed Appellant's care. Tr. 64: 21- 65: 22. Ms. Newbold observed and documented G. M. P.'s poor condition. *Id.*, Hearing Exhibit A. Ms. Newbold testified that G. M. P. has thrived in Appellee's care. Tr. 67: 21-68:11.

The district court reviewed the report of G. M. P.'s current treating physician, Dr. Elise Sylar, discussing G. M. P.'s deplorable physical and emotional condition in December 2020. Hearing Exhibit P.1. Dr. Sylar commended Appellee for improving G. M. P.'s physical and mental health citing "attentiveness of her current caregivers" and that Appellee has "really gone above and beyond in caring for this patient." *Id.*

Appellee has obtained medical care for G. M. P., enrolled G. M. P. in memory care assistance programs, made handicap adaptations to his home and has taken classes to learn skills to better address G. M. P.'s needs. Tr. 139: 1-144: 11; 152: 7-156: 5; 300: 3-11. Appellee has attempted to gain control of G. M. P.'s assets and responsibly manage G. M. P.'s limited financial accounts which

Appellee believes Appellant has dissipated. Tr. 160: 11-164:1; 165: 20- 166:13; 170: 8-176:15; Exh. O.

George Raymond, G. M. P.'s son, testified that G. M. P. was in need of a guardian and conservator to protect her well-being and that Appellee is the appropriate person to be G. M. P.'s guardian and conservator. Tr. 220: 16-222: 5; Tr. 223: 22-224:16. George disagreed with Appellant's intervention and testified that Appellant neglected G. M. P. while she was in Appellant's home. Tr. 223: 3-21. George corroborated Appellee's testimony that Appellant has mismanaged G. M. P.'s limited assets. Tr. 224:7-225:6.

Appellant has not made any accommodations to her home to provide safe care for G. M. P., nor has Appellant investigated or planned any medical care or treatment options for G. M. P. should Appellant be granted guardian and conservator. Tr. 79:13-23; 105: 21-24; 279: 2-281: 19. Appellant is unaware of G. M. P.'s current medical needs. Tr. 278: 1-279: 1; 286: 6-25. Appellant acknowledged making numerous expenditures from G. M. P.'s bank account, including paying Appellant's attorney a retainer for a separate dispute Appellant had with Appellee about a family cabin. Tr. 110: 3-16; 111: 9-112: 20. Appellant admitted she purchased a new 2019 Jeep Compass which she titled in her and G. M. P.'s name, but the loan for the car was only in G. M. P.'s name. Tr. 112: 21-

113: 25. G. M. P. was no longer driving at the time Appellant purchased the new car. Tr. 114: 1-8.

The district court found “Appellee has established a consistent and comprehensive medical, physical and emotional care plan for [G. M. P.] that provides high quality and controlled care in [G. M. P.’s] best interests.” CR 58, ¶

15. The district court decided that Appellee was the best person to serve as guardian for G. M. P. because:

“[Appellee] has made her care and well-being his first priority..[and] Petitioner has (i) arranged for a primary care provider for [G. M. P.] with Sheridan Memorial Hospital; (ii) enrolled [G. M. P.] in an adult dementia daycare program with supervised staff that [G. M. P.] enjoys attending; (iii) arranged for a home health attendant to visit [G. M. P.] to assist with caregiving; (iv) modified his home to ensure [G. M. P.] is safe as she navigates his home; (v) coordinated with a physical therapist who established an exercise routine for [G. M. P.]; (vi) had an occupational therapist appointment to analyze her fine motor skills; and (vii) arranged for her to meet with a dentist. Collectively, these actions provide good cause to appoint Petitioner as the permanent full guardian for [G. M. P.] because he demonstrated that he is acting in her best interests.” CR 58, ¶ 23.

The district court concluded from the testimony that Appellant was not the best person to be appointed guardian and conservator for G. M. P. because:

“Appellant is unaware of her mother’s current medical needs and lacks any comprehensive care plan for her if G. M. P. was returned to her care. Through witness testimony, it became apparent that Appellant, when acting as [G. M. P.’s] financial power of attorney, made modifications to [G. M. P.’s] bank accounts and made questionable expenditures, including the purchase of a new 2019 Jeep Compass collateralized by [G. M. P.’s]

certificate of deposit. The 2019 Jeep Compass is currently in Appellant's possession." CR 58, ¶ 22.

STANDARD OF REVIEW

The standard of review to reverse the district court's findings of fact is a determination that the district court was clearly erroneous. *In re Estate of Quirin*, 2015 MT 132, ¶ 10, 379 Mont. 173, 348 P.3d 658. A district court's findings are clearly erroneous if the findings are: not supported by substantial evidence; misapprehend the effect of the evidence; or, the district court made a mistake. *Id.* This Court reviews a district court's conclusions of law for correctness. *Id.*

Whether a district court violated a party's right to due process is a question of law for which the standard of review is plenary. *In re T.S.B.*, 2008 MT 23, ¶ 20, 341 Mont. 204, 177 P.3d 429.

Pre-trial and trial administration rulings by the district court 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). The trial judge's decisions regarding trial administration 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 THE ARGUMENT

The district court did not abuse its discretion and properly appointed Appellee as permanent guardian and conservator because he is best qualified to serve and is the best person to promote and protect the well-being of G. M. P.

Appellant does not have standing to raise claims on behalf of G. M. P. regarding violation of statutory or procedural due process.

The district court did not deprive Appellant of due process nor did the district court abuse its discretion by excluding an exhibit offered by Appellant; limiting Appellant's testimony; or, not giving notice to Appellant prior to appointing Appellee temporary guardian and conservator.

ARGUMENT

A. The district court did not abuse its discretion in appointing Appellee as full guardian and conservator for G. M. P. because the district court considered the priority for appointment and made findings supporting the appointment as required by statute and Appellant has not shown any factual support that the district court's findings and conclusions are clearly erroneous.

The district court has broad discretion, subject to statutory restrictions, to make the decision to select a particular person over another person to be guardian or conservator. *In re Estate of M.D.*, 2017 MT 22, ¶ 23, 386 Mont. 234, 241, 388 P.3d 954. A person has priority to be appointed guardian over another person

when “nominated by the incapacitated person if the court specifically finds that at the time of the nomination the incapacitated person had the capacity to make a reasonably intelligent choice.” Mont. Code Ann. § 72-5-312(2)(a) (2021).

However, the district court is not bound to follow such priority for a guardian, rather “the court shall select the person ... that is best qualified and willing to serve.” Mont. Code Ann. § 72-5-312(3) (2021). For a conservator, pursuant to §72-5-410(1), MCA, the court may appoint “an individual nominated by the protected person if the person ... has, in the opinion of the court, sufficient mental capacity to make an intelligent choice....” Also, for a conservator, “[t]he court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority.” Mont. Code Ann. § 72-5-410(3) (2021).

The Montana Supreme Court has consistently held that it will not substitute its judgment for that of the trial court “regarding the credibility of witnesses and the weight of their testimony.” *In re Seizure of \$23,691.00 in US Currency*, 273 Mont. 474, 485, 905 P.2d 148, 155 (1995). In this case, the district court reviewed pre-trial briefs, voluminous exhibits and proposed findings and conclusions as well as listened to a full day of witnesses at the hearing. The district court reviewed medical records from 2016 to 2021 and the physician and visitor reports to find that G. M. P. did not have “the capacity to make a

reasonably intelligent choice,” at the time G. M. P. signed the July 28, 2020 General Power of Attorney removing Appellee and naming Appellant for appointment as guardian and conservator. CR 58, ¶ 11.

The district court concluded that based on “the testimony of witnesses, review of the medical records, financial transactions and recommendations of the visitor and [G. M. P.’s] legal counsel, Appellee is the ‘best qualified’ to be appointed as guardian and conservator of the person and estate of [G. M. P.]” CR 58 ¶ 12, pg. 8. Furthermore, the district court considered that “Appellant and Petitioner have significant animosity toward each other such that they are incapable of effectively communicating with one another. Thus, it is not in the best interests of [G. M. P.] to appoint Appellant as the conservator if Petitioner is serving as the permanent guardian.” CR 58, ¶ 24.

Appellant fails to present any authority or reference to the record to establish her bald assertions that Appellee lied or that Appellee is a bad character. Appellant has made raging statements but cites no basis of clear error by the district court. Appellant’s claims are unfounded and meritless. The district court’s analysis followed the statutory law and weighed the factual evidence and testimony to reach the well supported decision that Appellee was the “best qualified” to be guardian and conservator for G. M. P.

B. Appellant has no legal standing to assert due process rights on behalf of G. M. P. when G. M. P. has made no due process claim herself and G. M. P. is represented by counsel.

Appellant alleges that G. M. P. was denied due process because the district court did not follow “the personal wishes of G.H.P. [sic]” and did not recognize the July 28, 2020, General Power of Attorney and give Appellant priority for appointment as guardian and conservator. Appellee Brief, pgs. 5, 7. The district court considered testimony and medical records and found that G. M. P. did not have “..’the capacity to make a reasonably intelligent choice’ when she removed Appellee as her agent and designated only Appellant as her power of attorney on July 28, 2020.” CR 58, Conclusion ¶11. Further, the district court inquired of G. M. P.’s attorney, Molly Considine, about G. M. P.’s wishes and Ms. Considine’s opinion of G. M. P.’s best interests. Tr. 300: 2-13. Ms. Considine supported Appellee’s appointment as guardian and conservator and also presented evidence that G. M. P. was neglected while in Appellant’s care. Tr. 24: 3-5; 300: 13-17; 301: 3-6, Exhibits Q1-6.

This Court has ruled on the issue of standing to claim due process violations for a protected person in a disputed guardianship proceeding. *In re Guardianship and Conservatorship of A.M.M.*, 2015 MT 250, ¶28, 380 Mont. 451, 458, 356 P.3d 474. In the *A.M.M.* case, supra, this Court agreed with the district court finding

that the appellant did “not have standing to assert the rights of his mother, and [appellant] is not an attorney who can represent her in court” noting “A.M.M. was represented by counsel at all phases of the proceedings.” *Id.* The Court reasoned that the *A.M.M.* appellant did not possess standing to assert the rights of his mother merely because the appellant suffered perceived damage to his reputation. *Id.*

In this case, the due process rights of G. M. P. have been asserted and protected by G. M. P.’s own counsel. Molly Considine was appointed December 1, 2020, to represent G. M. P. and Ms. Considine has vigorously protected the legal and procedural rights of G. M. P. throughout all phases of this proceeding. For example, Ms. Considine filed motions with the district court to protect G. M. P.’s due process rights regarding a geriatric examination and to safeguard G. M. P.’s attorney client privilege. CR 30, 32. Ms. Considine also moved to exclude testimony of public health investigations protecting G. M. P.’s due process right to privacy in protected information. Tr. 24: 15-25: 13.

Similar to the *A.M.M.* appellant, Appellant lacks standing to assert that G. M. P.’s rights to due process were violated merely because Appellant felt her “irrefutable and highly pertinent” evidence was “stifled” by the district court. Appellant Brief, pgs. 6, 9. Appellant fails to present any legal argument to

support her claim that she has standing to claim G. M. P.'s due process rights were violated.

C. The district court did not deprive Appellant of procedural due process or abuse its discretion in pre-hearing rulings or conduct of the hearing.

Due process considerations arise from a person's constitutional right not to be "deprived of life, liberty, or property without due process of law." Mont. Const. art. II, §17. Due process includes both procedural and substantive rights which include procedural rights to notice and an opportunity for an appropriate hearing. *In re H.D.K.*, 2021 MT 254, ¶ 20 (citing *Montanas v. State*, 2006 MT 277, ¶¶ 29, 30, 334 Mont. 237, 146 P.3d 759).

In the *H.D.K.* case, supra, the appellant, Tony, alleged his due process rights were violated by the district court denying admission of his planned evidence. *Id.* at ¶ 21. The *H.D.K.* court found that the purpose of the proceedings were to protect the best interests of H.D.K., not Tony, and that Tony had been given ample opportunity to present evidence, testify and file pleadings. *Id.* The *H.D.K.* court recognized that attention to due process was given to H.D.K. as was required, and that Tony's claims on appeal did not necessitate the court's inquiry into his due process rights. *Id.*

The district court afforded Appellant a meaningful opportunity to present evidence, testify, call witnesses and otherwise present her case to satisfy due process. Appellant was initially represented by counsel who filed pleadings in support of Appellant's position and helped Appellant participated in an unsuccessful mediation. CR 4, 16. Appellant's counsel did not withdraw until 5 weeks before the hearing. The district court granted Appellant additional time to prepare for trial and submit briefs, afforded Appellant latitude presenting evidence and calling and questioning witnesses and allowed Appellant ample time to present her case. CR 24, 27. The district court gave Appellant additional time after the hearing to submit proposed findings and conclusions even though the scheduling order required that such findings be filed before the hearing. Tr. 288: 8-289: 7.

Appellant seems to argue that G. M. P.'s personal wishes were not considered which was a violation of Appellant's due process. This is simply not supported by the facts. The district court reviewed 3 powers of attorney all expressing G. M. P.'s "wishes" *prior* to the time that G. M. P. was found to have diminished capacity to make an informed decision. Exh. F, G, G-1. The district court reviewed testimony and a written report of the visitor regarding her interactions with G. M. P. Tr. 63-75, Exh. A. The district court inquired of Ms.

Considine's general impressions of G. M. P.'s wishes. Tr. 300: 2-17. The district court heard testimony of G. M. P.'s 3 children all describing their mother's wishes and directions. Even if Appellant had standing to make the claim, Appellant fails to make any credible argument that G. M. P.'s due process rights were violated.

D. The district court did not violate Appellant's procedural due process rights when it denied the admission of her exhibit or limited her hearing testimony to relevant testimony.

The district court has broad discretion in determining issues relating to trial administration. *Fink v. Williams*, 2012 MT 304, ¶ 20, 367 Mont. 431, 291 P.3d 1140. Appellant argues that she was denied due process when she could not admit a proposed exhibit and the judge limited her testimony. Appellant Brief pg. 6, 9.

Appellant offered Exhibit 3 at the hearing which she claimed was a Medical Misconduct Complaint she filed with the Montana Board of Medical Examiners against G. M. P.'s eye doctor because the doctor's report described G. M. P. as "legally blind." Appellant disputed that G. M. P. was "legally blind." Appellant objected to admission of the Eye Clinic medical record regarding G. M. P.'s eyesight and Appellee withdrew the exhibit. Tr. 51: 8-17; 52: 10-21; 54: 22. The Eye Clinic record was never considered by the district court.

During Appellant's case, she offered Exhibit 3 trying to argue that the Complaint against the doctor was relevant to determine the extent of G. M. P.'s physical limitations. Tr. 60: 18-19; Tr. 275: 3- 276: 5. The district court denied the admission of Exhibit 3 as irrelevant. Tr. 276:6-20. The district court was absolutely correct to deny admission of Exhibit 3. Whether G. M. P. was legally blind or the extent of G. M. P.'s macular degeneration was not an issue presented by Appellee or the sole basis of the claim that G. M. P. needed assistance. How could admitting a Complaint against a doctor who was not even present at the hearing or whose record was not in evidence possibly be relevant to deciding what was in G. M. P.'s best interests?

Appellant claims that the district court erred by not allowing Appellant to testify or question her witnesses. The record demonstrates just the opposite. Appellant was given the unrestricted right to testify with her own dialogue. Tr. 265-277. Objections were made and sustained when Appellant digressed into discussing Appellant's own problems, rather than the issue of G. M. P.'s needs. Tr. 271:10-273:6. The district court limiting the questions Appellant could ask her witnesses or curtailing Appellant's irrelevant dialogue did not deprive Appellant of the reasonable opportunity to present evidence. While the district court must give latitude to a *pro se* litigant, such latitude should not be boundless and a *pro se*

litigant can be held to standards of trial conduct imposed by the district court.

State v. Ferre, 2014 MT 96, ¶ 16, 347 Mont. 428, 322 P.3d 1047.

E. Appellant is barred from claiming that she was entitled to notice of the Petition for Appointment of Temporary Guardian and Conservator when she failed to appeal the Order of appointment and first raised objection to notice in her appeal brief.

Appellant claims that the district court erred by not providing notice to Appellant prior to the district court's Order appointing Appellee as temporary guardian and conservator. Appellant Brief, pg. 10. Appellee filed his Petition for Appointment of Guardian and Conservator and included a request for appointment as temporary guardian and conservator describing that G. M. P. was in need of immediate care. CR 1, ¶ 7. Pursuant to §72-5-317(2), MCA, "if there is no appointed guardian and the court further finds that the welfare of the incapacitated person requires immediate action, it may, *with or without notice*, appoint a temporary guardian for the incapacitated person..." Mont. Code Ann. §72-5-317(2) (2021) (emphasis added). Montana law specifically allows the district court to issue a temporary order "without notice." *Id.*


Appellant was served notice on December 3, 2020, that Appellee was temporary guardian and conservator. CR 3. An order granting a temporary guardianship is a final appealable order. *In re Klos*, 284 Mont. 197, 202, 943 P.2d

1277, 1279 (Mont. 1997). Appellant was represented by counsel and filed an Objection to the Petition on January 14, 2021. CR 4. Appellant made no objection to notice of the Petition or the Order. Appellant did not appeal the Order. Appellant did not object at the hearing about notice of the Order. Furthermore, on October 5, 2021, the district court issued an Order continuing the appointment of Appellee as temporary guardian and conservator. CR 24. Again, Appellant did not object and Appellant did not appeal. A party is prevented from claiming error for the first time on appeal when the party has not timely availed itself of the right to appeal or given the district court the ability to address error at the time the error occurred. *In re A.M.M.*, 380 Mont. at 458, 356 P.3d at 479.

CONCLUSION

Appellee respectfully requests this Court affirm the decisions of the district court. The district court's decisions are a thoughtful and complete review of the facts and law to determine that the "best qualified" person to protect the best interests of G. M. P. as guardian and conservator.

RESPECTFULLY SUBMITTED on March 28, 2022.



JANETTE KRUTZFELDT JONES
KRUTZFELDT & JONES, LLP
Attorneys at Law
507 Pleasant Street
Miles City, MT 59301
ATTORNEY FOR APPELLEE

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief is proportionally spaced typeface of 14 points and does not exceed 10,000 words.



JANETTE KRUTZFELDT JONES

KRUTZFELDT & JONES, LLP

Attorneys at Law

507 Pleasant Street

Miles City, MT 59301

ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have e-filed this Brief with the Clerk of the Montana Supreme Court and that a copy will also be mailed, on March 29, 2021, to each attorney of record and any party not represented by counsel as follows:

TRACEE RAYMOND
PO BOX 2213
COLSTRIP MT 59323
APPELLANT *PRO SE*

MOLLY S CONSIDINE ESQ
PATTEN PETERMAN BEKKEDAHL & GREEN PLLC
2817 2ND AVENUE NORTH STE 300
BILLINGS MT 59101-2041
COUNSEL FOR G. M. P.

DATED: March 28, 2022



JANETTE KRUTZFELDT JONES
KRUTZFELDT & JONES, LLP
Attorneys at Law
507 Pleasant Street
Miles City, MT 59301
ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

I, Erica Griffith Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-28-2022:

Molly S. Considine (Attorney)
2817 2nd Ave. North #300
Billings MT 59101
Representing: G. H. P.
Service Method: eService

Tracee Lee Raymond (Appellant)
PO Box 2213
Colstrip MT 59323
Service Method: Conventional

Janette Krutzfeldt Jones (Attorney)
507 Pleasant Street
Miles City MT 59301-0128
Representing: Alan David Raymond
Service Method: Conventional

Electronically Signed By: Erica Griffith Brown
Dated: 03-28-2022