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IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 23-0682

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF:

J.F.R.,

A Protected Person and Appellant.

Appeal from the Third Judicial District Court, Silver Bow County
Cause No. DG-2023-02 GC
The Honorable Ray J. Dayton, Presiding

APPELLANT'S REPLY BRIEF

Lawrence E. Henke
David L. Vicevich
Vicevich Law
3738 Harrison Avenue
Butte, MT 59701
Telephone: (406) 782-1111
larry@vicevichlaw.com
dave@vicevichlaw.com
Attorneys for J.F.R.

Julie R. Sirrs
Shelby K. Towe
Boone Karlberg, P.C.
201 West Main, Ste. 300
P.O. Box 9199
Missoula, MT 59807-9199
jsirrs@boonekarlberg.com
stowe@boonekarlberg.com
Attorneys for Jana Cooke, Petitioner and interested party

Augustine Menke
Knight & Dahood
113 East Third Street
Anaconda, MT 59711
amenke@kdesdlaw.com
Attorney for Stephanie Ross, an interested party

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Much like the District Court in this matter, Jana Cooke spends most of her brief addressing issues that are collateral at best to the concerns raised by the virtue of her "Emergency Petition" for the protection of J.F.R. While drawing distinctions from statutes which have no practicable application to the facts from the arguments of J.F.R., Jana ignored the core issues that (i) no emergency was established, (ii) the Petitioner had not complied with the statute for establishing a need for guardianship, and (iii) the District Court did not craft a narrow guardianship and/or conservatorship as required by law.

A. <u>Immediate action is substantively the same as emergency action.</u>

J.F.R. is an independent woman who relies on her daughter Stephanie Ross and her husband and son for day-to-day living assistance. Her other daughter, Jana Cooke, lives in Washington and she does not believe she gets sufficient updates on her mother's health and financial status. *Tr., pg 294, lns 16-22 and pg. 311, lns 18-23.* That is neither an emergency nor justification for the severe remedy of full guardianship and/or conservatorship.

While it is possible J.F.R. does need "some" assistance from a guardian and conservator, the issue she takes with the District Court proceedings is that they were a rushed decision based on reports from a visitor and non-physician who did not speak to Ms. Ross but instead focused her entire report on the

assertions of the visitor and Ms. Cooke. *Tr., generally testimony of Dr. Bolyard, pgs. 49-77.*

J.F.R. argued in her opening brief that there were no present events which constituted an "emergency", therefore a temporary guardianship and conservatorship appointment was improper. *Appellant's brief, pgs. 9-16.* Ms. Cooke claims that M.C.A. § 72-5-317 allows for temporary guardianship, and M.C.A. § 72-5-421 allows for temporary conservatorship if "immediate action" is required. This is a futile attempt at creating a distinction where there is no difference.

M.C.A. § 72-5-611(1)(a) defines emergency as "a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf." No definition for "immediate action" is found in the applicable statutes, and Ms. Cooke provides no description of the distinction between an "emergency" situation and a situation which requires "immediate attention."

The Merriam-Webster Dictionary's first definition of "emergency" is "an unforeseen combination of circumstances or the resulting state that calls for immediate action." In other words, Ms. Cooke's assertion that J.F.R.

applied the wrong standard in addressing the lack of an emergency situation which would make a temporary appointment of a guardian and conservator is a nothing more than a post hoc effort to support the District Court's decision playing word games that have no effect on the outcome: the appointment of a temporary guardian and conservator was not justified. Whether Ms. Cooke claims there was an emergency or a need for immediate action, the result is the same: neither existed.

The District Court overreached in finding that J.F.R. was in need of immediate action to appoint a temporary full guardian and conservator. "Appointing a guardian in an emergency should be an unusual event." Official Comments to M.C.A. § 72-5-611. In this matter, the appointment of Western Montana Chapter as conservator and Ms. Cooke, Ms. Ross, and Western Montana Chapter as co-guardians was an unnecessary rush to judgment, especially in light of Ms. Ross's appointment by J.F.R.'s existing Power of Attorney for Stephanie to act as guardian and conservator coupled with the very safe and desired living arrangements that have been in place for years. *Tr., pg 120, lns. 15-19.*

B. <u>Omitted words matter.</u>

While there is a place in the law for paraphrasing statutes and case law to make the meaning clearer in the context of the facts of the case or in order to adjust the grammatical tense being used in a brief with the tense used in Supreme Court opinion, Ms. Cooke goes too far in her paraphrasing by changing the meaning of some of her key citations.

On Page 8 of her brief, Ms. Cooke cites to her version of the standard of review, saying:

> The Montana Supreme Court reviews conservatorship and guardianship appointments to "determine whether the district court's findings of fact are clearly erroneous and its conclusions of law are correct." *In re D.L.B.*, 2017 MT 106, ¶ 7, 387 Mont. 323, 394 P.3d 169 (citation omitted). "[T]he evidence [is reviewed] in the light most favorable to the prevailing party." *Id.*

What *In re D.L.B.* actually says, and is omitted from Ms. Cooke's standard of review, are the words "involuntary commitment orders" and "involuntary commitment proceedings." In other words, the standard of review Ms. Cooke relies upon is not discussing conservatorship and guardianship appointments at all.

The more accurate standard of review for this matter is as follows:

> Subject to statutory restrictions, the selection of the person to be appointed guardian is committed largely to the discretion of the trial court, and [the Montana Supreme Court] will only interfere

> with such an appointment in the case of a clear abuse of discretion. *In re Guardianship of Nelson*, 204 Mont. 90, 94, 663 P.2d 316, 318 (1983). The choice of a conservator is also subject to statutory restrictions, and reviewed by this Court for an abuse of discretion. *See In re J.A.L.,* 2014 MT 196, ¶ 11, 376 Mont. 18, 329 P.3d 1273 (reviewing the district court's choice of a guardian/conservator for an abuse of discretion).

In re Guardianship of A.M.M., 2015 MT 250, ¶ 16, 380 Mont. 451, 456, 356 P.3d 474, 478–79.

Interestingly, Ms. Cooke also includes the above citation as part of her standard of review, but twice omits the words "subject to statutory restrictions" from her version of the language from the case. That omission is no small thing; the statutory restrictions would make Stephanie Ross the guardian and conservator for J.F.R. because J.F.R. pre-selected Ms. Ross to fill those roles. *Tr., pg 120, lns. 15-19.* Likewise, "subject to statutory restrictions" makes her evidence in the Petition and aftermath non-compliant with the statutes. *See Section D, infra.*

The statutes control, if necessary, the appointment hierarchy for a guardian and the interplay between guardians and conservators. Mont. Code Ann. § 72-5-312(2)(a) makes the first priority in selection of a guardian "a person . . . 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." That person is Stephanie Ross. Only

by omitting from the standard of review described in *In re Guardianship of A.M.M.* that the selection of a guardian or conservator is "subject to statutory restrictions" is Ms. Cooke able to justify her appointment as co-guardian and the appointment of Western Montana Chapter as conservator based on the more-difficult-to-overcome standard of abuse of discretion.

C. <u>At risk for exploitation is not the same as exploited.</u>

Just like Ms. Cooke's brief ignores the lack of distinction between "emergency" and "immediate action", and changes words in statutes and case law to fit her narrative, she repeatedly cites the findings of the District Court which fails to recognize the difference between J.F.R. being potentially vulnerable to being financially exploited versus actually being financially exploited, which the statute requires. While Ms. Cooke arguably may have established in the temporary guardianship and conservatorship proceedings that J.F.R. <u>could</u> be financially exploited due to her declining memory, she did not establish that J.F.R. was actually being financially exploited as the present emergency before the District Court improvidently appointed a temporary conservator, who was also a co-guardian appointee in contravention to yet another statute. M.C.A. § 72–5–312(4)(a).

Ms. Cooke cites the District Court's opinion that:

> [T]here appears to be an active effort to prevent the information needed for an accounting from coming to light. Without such oversight, [J.F.R.] is at genuine risk of running out of funds for her care before the end of her life. Under these circumstances, [J.F.R.] is also at high risk for financial exploitation.

Appellee's brief, pg 12 (citing CR 98, p. 22).

Ms. Cooke further points out that Dr. Bolyard's recommendation of Western Montana Chapter as conservator was made 'based on [J.F.R.'s] *lack of understanding of her finances*.'" Appellee's brief, pg. 13(quoting Tr. of Temp. Co-Guardians Hr'g, 46:24-47:3 (emphasis added).)

Lack of understanding of her finances, however, is not the appropriate threshold sufficient to determine if a conservatorship is necessary; Ms. Cooke failed to prove J.F.R. "has property that **will be** wasted or dissipated **unless** proper management is provided or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds." M.C.A. § 72-5-409(2)(b) (emphasis added).

Ms. Cooke's complaints about her mother's well-being were not grounded in concern of financial exploitation or lack of proper health care; she simply has not been allowed to micromanage her mother's life from 550

miles away. The District Court's holding, which Ms. Cooke cites to, reflects that reality:

> [J.F.R.] is at a stage of her life that she needs considerable assistance, both in meeting her needs of living and in the management of her finances. The way [J.F.R.]'s matters are being handled is causing **a rift within the family that is not necessary** and is contrary to [J.F.R.]'s wellbeing. More particularly, preventing contact and communication between [J.F.R.] and Jana is wrong.
> …
> Substantial evidence also establishes that there is an immediate need for the appointment of co-guardians to act in [J.F.R.]'s best interest. **While [J.F.R.] appears to be appropriately cared for in her current living arrangement**, the current decision makers around [J.F.R.] are making certain decisions that are not in her best interests. In addition to moving [J.F.R.] to a home that is functionally ill-equipped to meet [J.F.R.]'s basic needs, the Court's prior direction to not interfere in [J.F.R.]'s communications with Jana have not been followed. The reports of the Court-appointed visitor and physician establish that **[J.F.R.] would welcome and benefit from such contact**…

Appellees' brief, pgs 17-18 (citing CR 98, p. 23.)(emphasis added).

Perhaps J.F.R. could benefit from contact with Ms. Cooke, but that is up to her, nor the District Court. A rift in the family is unfortunate, but not a basis for appointment of a conservator on an emergency basis.

D. Western Montana Chapter is ineligible to fill both roles.

Western Montana Chapter was improperly appointed to be both sole conservator for J.F.R. and co-guardian of J.F.R. In response to J.F.R. pointing

out that violation of M.C.A. § 72–5–312(4)(a), Ms. Cooke argues that *Matter of Est. of M.D.* stands for the proposition that the statute does not apply. *Appellee's brief, pg. 19.* Ms. Cooke provides no pin cite to the quotation she attributes to *Matter of Est. of M.D.* and once the case is read, it is clear Ms. Cooke misstates the holding.

In *Matter of Est. of M.D.*, one son, Lloyd, was appointed as guardian for his mother, over the objection of Robert, M.D.'s other son. *Matter of Est. of M.D.*, 2017 MT 22, ¶ 1, 386 Mont. 234, 235, 388 P.3d 954, 955. Robert's position was that Lloyd could not be guardian because "he provides or is likely to provide substantial services to M.D. due to his business interest in, and management of, the family farm" which violates M.C.A. § 72–5–312(4)(a). *Id.* at ¶ 13. Noting that the case was one of first impression of the interpretation of the "substantial services" provision of M.C.A. § 72–5–312(4)(a), the Court determined that it is common for family and business interests to be intertwined and there must be a link between the business interests being provided and some harm to the incapacitated person for appointment of a family member as a guardian to be improper. *Id.* at ¶ 16.

The holding in *Matter of Est. of M.D.* has no applicability to J.F.R.'s case. Rather, she argues that Western Montana Chapter, which has no

involvement with her other than profiting from being her court-appointed conservator, is prohibited from also being a guardian of J.F.R. because of those material services. Unlike *Matter of Est. of M.D.*, Western Montana Chapter has no familial interest J.F.R.'s wealth like the sons did in the family farm. *Id.* Further, the Court holding addresses the appointment of a "family member" as conservator and guardian, not a corporate entity whose very existence is derived from charging for its services. *Id.* Taking the interpretation of Ms. Cooke, the Court is being invited to legislate from the bench and rescind M.C.A. § 72–5–312(4)(a), which of course it cannot do.

E. <u>Bolyard is ineligible to serve in the statutorily required physician role.</u>

It should not have to be stated, but apparently it is necessary in this case for Ms. Cooke: compliance with statutory requirements is mandatory. *In re Birkeland's Est.*, 164 Mont. 94, 97, 519 P.2d 154, 156 (1974) ("Montana law provides that the right to dispose of property by will is entirely statutory and at least a substantial, if not an exact, compliance with the statutory requirements is mandatory." *Id., citing Estate of Connelly*, 138 Mont. 153, 355 P.2d 145; *In re Noyes' Estate*, 40 Mont. 178, 405 P. 1013405 P. 1013).

Ms. Cooke asks this Court to ignore that Loretta Bolyard is not a physician; and, she further asks this Court to ignore that M.C.A. § 72-5-315 requires a "physician" conduct the medical review. This Court should decline this invited deviation from the statute.

Ms. Cooke argues two points in support of affirming the appointment of Dr. Bolyard – a non-physician – as physician in this matter because: 1) that J.F.R. should have appealed Dr. Bolyard's appointment sooner under M.C.A. § 72-5-313, and 2) that another district court has appointed Dr. Bolyard in the past. Neither changes the fact that Dr. Bolyard's ineligibility for the position she was appointed to is a statutory requirement that cannot be waived or ignored.

On May 15, 2023, Ms. Cooke sought appointment of Dr. Bolyard as the "physician" required under M.C.A. § 72-5-315 in order to install a temporary guardian. CR 1. The Court granted the petition regarding Dr. Bolyard on May 22, without a response from J.F.R. CR 2.

No response was necessary because Bolyard was facially non-compliant with the statute. The statute is clear, and other than Ms. Cooke repeatedly calling Dr. Bolyard a physician in Appellee's brief, it is undisputed that Dr. Bolyard is <u>not</u> a physician. Though Ms. Cooke argues at length about

why a neuropsychologist is a good person to provide an opinion on J.F.R.'s mental health, that does not change that the appointment of Dr. Bolyard did not comply with the unambiguous requirements of M.C.A. § 72-5-315.

1. "Must" is mandatory statutory language.

M.C.A. § 72-5-315 controls the Emergency Petition and guardianship and conservatorship matter under appeal. M.C.A. § 72-5-315 states:

> (3) The person alleged to be incapacitated **must** be examined by a physician appointed by the court who shall submit a report in writing to the court and **must** be interviewed by a visitor sent by the court.

Mont. Code Ann. § 72-5-315 (3)

This Court holds that "Our purpose in construing a statute is to ascertain the legislative intent and give effect to the legislative will." *State v. Gibbons*, 2024 MT 63, ¶ 47, 416 Mont. 1, 22, 545 P.3d 686, 700. "Statutory construction is a 'holistic endeavor' and must account for the statute's text, language, structure, and object." *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280, 288, 90 P.3d 426, 432. "Must" is the word that the legislature chose to indicate a mandatory requirement; "must" is the word that shall be applied by law. *See, generally*, *In re City of Columbus Police Dept.* (1994), 265 Mont. 379, 381–82, 877 P.2d 470, 471 (the plain language of a statute using "*shall"*

indicates a mandatory requirement.). "The legislative intent is to be ascertained, in the first instance, from the plain meaning, of the words used." *Western Energy Co. v. Dept. of Revenue*, 1999 MT 289, ¶ 11, 297 Mont. 55, 990 P.2d 767.

The application of that statutory interpretation is brought home by this Court in a conservatorship matter and on an issue from this case – the conservator's failure to file an inventory within 90 days. *Redies v. Cosner*, 2002 MT 86, ¶ 19, 309 Mont. 315, 322, 48 P.3d 697, 701. Below, Ms. Cooke and the Western Montana Chapter argue in another motion that the Western Chapter's failure to conduct and file an inventory within the statutory time frame of 90 days was not mandatory – again, they sought to ignore mandatory statutory language. This Court has rejected that argument time and again, such as in *Redies*, where it stated the 90-day inventory requirement is a specific mandatory requirement that must be enforced over attempts at dilution from non-compliant parties. *Id.*

2. M.C.A. § 72-5-315 controls, not 72-5-313.

Here, in this case, Ms. Cooke requests this Court ignore the plain language of M.C.A. § 72-5-315 and instead apply the language of another, different statute M.C.A. § 72-5-313, which applies to visitors and not

physicians. *Appellee's brief, pg. 20.* This is simply comparing apples to watermelons.

Ms. Cooke argues that instead of applying the mandatory statutory requirement of a "physician" that, in effect, anyone can be appointed as the physician and unless an objection is made it is waived. *Id.*

In support of this argument, however, Ms. Cooke refers to *In re Guardianship & Conservatorship of A.M.M.,* and cites that case's analysis of M.C.A. § 72-5-313 – not M.C.A. 72-5-315 – in support of her argument. *Id.* It is instructive to see precisely what the pin cite of ¶ 38 actually says:

> ¶ 38 Timothy fails to cite any facts to prove that Emerson is unqualified **to be a visitor**. Furthermore, the time to make any challenge to Emerson's appointment as visitor under § 72–5–313, MCA, has passed. This temporary and limited appointment was made on February 6, 2014, meaning Timothy had 30 days to appeal this order under M.R.App. P. 4(5)(a)(i). *See In re Klos,* 284 Mont. at 201, 943 P.2d at 1279 (holding that temporary appointments in guardianship proceedings are immediately appealable).

In re Guardianship of A.M.M., 2015 MT 250, ¶ 38, 380 Mont. 451, 461, 356 P.3d 474, 481–82 (emphasis added).

Ms. Cooke mysteriously claims *In re Guardianship & Conservatorship of A.M.M.*, ¶ 38 supports her argument that the challenge to Dr. Bolyard's appointment is untimely. But again, words matter; Ms. Cooke has provided

no basis for use of a deadline to challenge appointment of a physician under M.C.A. § 72-5-315 other than by an inapposite reference to a statute that does not apply to physicians, but visitors. Furthermore, the *A.M.M.* decision was pointing to the appealability of the conservator appointment appeal deadline, by which this appeal is unquestionably timely. It was made patently clear that the discussion of the 30-day time frame was referencing the "appointment" of the temporary conservator and not the assignment of the visitor or physician:

> The orders making the temporary appointments were entered on January 15, 2014, and February 6, 2014. M.R.App. P. 4(5)(a)(i) requires that Timothy file a notice of appeal of these orders within 30 days for consideration by this Court.

In re Guardianship of A.M.M., 2015 MT 250, ¶ 38, 380 Mont. 451, 458, 356 P.3d 474, 479.

Ms. Cooke's attempted distinction made here would lead to an absurd result, which is to hold that the assignment of, for example, an auto mechanic as physician would be allowed to stand so long as no one objected to that appointment within 30 days. On its face, the appointment of an auto mechanic, just like the appointment of a neuropsychologist, is facially invalid under M.C.A. § 72-5-315 because "must" means "must" and "physician" means "physician".

3. Past mistakes should not be repeated.

Additionally, Ms. Cooke claims that *In re Conservatorship of H.D.K.* stands for the proposition that Dr. Bolyard has been affirmed to be appropriately appointed as a physician. *Appellee's brief, pg. 21.* As Ms. Cooke's counsel is aware, as counsel of record in *In re Conservatorship of H.D.K.*, that case had nothing to do with a guardianship and was not decided under the auspices of M.C.A. § 72-5-315. Rather, "[t]he only contested issue was H.D.K.'s testamentary capacity and estate plan." *Id.* at ¶ 12. Thus, it is yet just another red-herring argument that seeks to invite the improper disregard of mandatory statutory language.

CONCLUSION

Based on the foregoing facts and arguments, J.F.R. respectfully request this Court vacate the District Court's November 20, 2023, Order appointing temporary co-guardians and co-conservators and remand for further consideration of the emergency petition.

RESPECTFULLY SUBMITTED this 20th day of May, 2024.

/s/ Lawrence E. Henke
Lawrence E. Henke
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate procedure, I certify that this brief is printed with a proportionately spaced Times New Roman non-script text typeface of 14 points; is double spaced except for quoted and indented material; and the word count calculated by Microsoft Word totals 3,483 words, excluding table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 20th day of May, 2024.

/s/ Lawrence E. Henke
Lawrence E. Henke
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this this 20th day of May, 2024, the foregoing APPELLANT'S REPLY BRIEF was e-served on all interested parties by the Montana Supreme Court's ePass MT to the following:

Julie R. Sirrs
Shelby K. Towe
Boone Karlberg, P.C.
jsirrs@boonekarlberg.com
stowe@boonekarlberg.com

Augustine Menke
Knight & Dahood
amenke@kdesdlaw.com

/s/ Lawrence E. Henke
Lawrence E. Henke
Attorney for Appellant

CERTIFICATE OF SERVICE

I, David L. Vicevich, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-21-2024:

Julie Rachel Sirrs (Attorney)
Boone Karlberg P.C.
P.O. Box 9199
Missoula MT 59807
Representing: Jana Cooke
Service Method: eService

Lawrence E. Henke (Attorney)
3738 Harrison Avenue
BUTTE MT 59701
Representing: J. F. R.
Service Method: eService

Augustine M. Menke (Attorney)
113 East Third Street
Anaconda MT 59711
Representing: Stephanie Ross
Service Method: eService

Electronically Signed By: David L. Vicevich
Dated: 05-21-2024