

NO. A07-0165

STATE OF MINNESOTA
IN SUPREME COURT

Catherine F. Peterka,

Respondent,

vs.

Stephen G. Dennis, Certified Public Accountant, and Baune, Dosen & Co.,

Appellant,

Todd R. Haugen, Attorney At Law,

Defendant.

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STATEMENT OF ISSUES

The Family Law Section of the Minnesota State Bar Association and the Minnesota Chapter of the American Academy of Matrimonial Lawyers (hereafter Family Law *Amicus*) relies upon the statement of issues presented by Appellants Stephen G. Dennis and Baune Dosen.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Ms. Peterka sued Mr. Dennis¹ and his accounting firm, claiming that Mr. Dennis had negligently valued her former husband's businesses in a Hennepin County District Court marital dissolution proceeding. The district court granted Mr. Dennis' motion for summary judgment, finding he was protected by quasi-judicial immunity as an independent neutral evaluator. (Order On Motion To Dismiss By Virtue Of Quasi-Judicial Immunity of April 8, 2005, Honorable Tony N. Leung, Judge, A. 88 – 98.²) In *Peterka v. Dennis*, 744 N.W.2d 28 (Minn. App. 2008), the Court of Appeals reversed the district court, holding that neutrals appointed by stipulation and order to conduct a neutral business appraisal lack quasi-judicial immunity.

¹ To avoid confusion, this Family Law *Amicus* shall refer to the parties in this case as Mr. Dennis and Ms. Peterka.

² "A." refers to Appendix of Mr. Dennis. "F.Am.A." refers to the Appendix of the Family Law *Amicus*.

By Order of April 15, 2008, the Supreme Court granted Mr. Dennis' petition for review and allowed the Family Law *Amicus* to participate in combination as *amicus curiae* in this case. This Court also allowed the Minnesota Society of Certified Public Accountants to submit an *amicus* brief in this matter.

ARGUMENT

ARGUMENT ONE

PUBLIC POLICY SUPPORTS GRANTING IMMUNITY TO A PROFESSIONAL APPOINTED TO PROVIDE A NEUTRAL OPINION.

The Court of Appeals in *Peterka* held that public policy does not compel a grant of quasi-judicial immunity to a court-appointed³ neutral business appraiser in a divorce proceeding because the appraiser was performing a service for the parties, and not the court. See *Peterka v. Dennis*, *supra* at 32-33. This reasoning betrays a serious misapprehension of the vital role that neutral experts play in family court proceedings.

³ The Family Law *Amicus* strongly disagrees with any distinction attempted to be drawn between stipulated and non-stipulated orders relative to the extension of quasi-judicial immunity to a selected neutral. To hold otherwise would discourage negotiated settlement of cases and seriously hamstring the selection of a mutually acceptable expert trusted by the parties and counsel or as might be assigned from an existing panel maintained by a judicial district for appointment of guardians ad litem, parenting expeditors, parenting consultants, financial neutral evaluators, custody evaluators or Rule 114 certified neutrals. Where attorneys and parties have input into the selection of a neutral to handle and resolve parental disputes, valuation or other financial issues, the likelihood of cooperation and resolution is substantially higher than through the imposition of an unacceptable authority figure or decision-maker.

Neutral experts are an important case management tool in family court proceedings. As far back as 1985, the Minnesota Court of Appeals remanded a valuation issue in a divorce case with instructions to the trial court to appoint a neutral valuation expert. See *Pekarek v. Pekarek*, 362 N.W.2d 394, 397 (Minn. App. 1985) Minn. R. Gen. Prac. 114.13 implicitly recognizes the benefit in family court proceedings of having meaningful information presented from an independent perspective on a variety of issues. These issues could include asset valuations, cash flow analyses, vocational assessments and custody evaluations. See Minn. R. Gen. Prac. 114.13 (e) (referencing training, standards and qualifications of family law evaluative neutrals.)

Over the past fifteen years, Family Court has dealt with the burgeoning caseloads and lengthening calendars, with the increasingly difficult balancing of caseloads with budget cutbacks. As a result, courts have initiated various programs to alleviate court congestion and delay. In 1992, the Honorable Mary Davidson started the “Divorce with Dignity” program in Hennepin County. In 2001, the Honorable Charles A. Porter initiated initial case management conferences (ICMCs) as a means for the court to take control of all cases as of commencement of the proceeding. The ICMC program has substantially reduced the temporary hearing calendar, along with the acrimonious motions and destructive affidavits inimical to the long-term interests of families. The ICMC

program expanded to the early neutral evaluation programs (social [custody] in 2002 and financial in 2004) initiated under the leadership of the Honorable James T. Swenson. These programs have spread across Minnesota and the country precisely because of the high level of case management provided through the use of neutral experts. (See: “Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation In Hennepin County, Minnesota,” 44 Family Court Review 672 - 682, [October 2006], Pearson, Bankovics, *et al.* – F.Am.A. 1).

The ability of the court and counsel to assess the complexity and specific needs of a case at the outset has led to the exponentially increased use of facilitative, evaluative and hybrid experts in family court.⁴ The use of case management strategies, an approach expressly endorsed and actively promoted by this Supreme Court in the implementation of its long-term strategic goals for the judicial system in general and family court in particular, is proving cost-effective to the system and litigants.

The use of neutral experts is a method identified for accomplishing the strategic goals of this Court to promote early resolution of cases through strategies

⁴ The Family Law *Amicus* notes that Minn. R. Gen. Prac. 114 was first adopted as of July 1, 1993, as an outgrowth of the ADR Supreme Court Task Force chaired by the Honorable Charles A. Flinn. The rule specified a menu of ADR services and two evaluative processes, one of which was “early neutral evaluation.”

such as early case management and early neutral evaluation. See Focus on the Future: Priorities & Strategies for Minnesota's Judicial Branch (FY 2007 – FY 2009) (A. 137). On April 23, 2004, this Court issued an order relating to best case management practices in family court in which it, among other things, urged the judiciary to actively encourage the use of neutral experts to value disputed assets. See In Re Family Court Early Case Mgmt. & ADR Best Prac. Guidelines, ADM-04-8002 (Minn. April 23, 2004) (A.119). With the assistance of a grant from the State Justice Institute, a Statewide Early Case Management/Early Neutral Evaluation Committee was created in late 2007 to bring the family court programs recommended by the Supreme Court into all the judicial districts through pilot projects. (See State Justice Institute Quarterly Progress Report, Early Case Management/Early Neutral Evaluation Pilot Project, April 30, 2008, F.Am.A. 11) The substantial reduction in costs, time delay for litigants and actual bench time coupled with the high rate of resolution of cases and consumer satisfaction is the best measure of the success of the program. The underpinning of the early neutral evaluation programs is the use of neutrals appointed by the court.

The family law bar supports the use of neutral experts because they help to resolve difficult and contentious cases in an expeditious manner, thereby reducing court congestion and legal expense. Using a neutral to conduct a valuation is far less costly and is more productive than hiring dueling experts to perform the same

work. The use of a neutral also helps to ensure that information is exchanged in a timely and productive manner. Cases are more apt to be settled through the involvement of a neutral expert because parties and attorneys value the independent perspective of a professional viewed as an “honest broker.”

Studies have shown that neutral professionals are often caught in the crossfire between parties and thereafter can become the subject of civil lawsuits and complaints to licensing boards. See “Quasi-Judicial Immunity for Forensic Mental Health Professionals in Court-Appointed Roles,” Kirkland, Kirkland, King and Renfro, *Journal of Child Custody* Vol 3 (1) 2006. (F.Am.A. 17, 18, 20) The Family Law *Amicus* contends that neutrals serve as an arm of the court and should be protected from civil liability when they function within the boundaries of a court-appointed role.

If the Court of Appeals’ decision in the present case is not reversed, the Family Law *Amicus* fears that many professionals will refuse to become involved as neutral experts in family court proceedings.⁵ For those experts who choose to become involved anyway, the risk is that their professional opinion will become compromised by an understandable desire to assuage the sentiments of an unreasonable or extremely aggressive party, thereby destroying the neutrality and independence of the expert. In *Parker v. Dodgion*, 971 P.2d 496, 498-499 (Utah,

⁵ Amicus believes that since the *Peterka* decision, many financial experts are reluctant to serve as neutrals in family court.

1998), the Utah Supreme Court offered the following observations in support of providing quasi-judicial immunity to court-appointed psychologists conducting evaluations in contested custody proceedings:

“First, if these individuals are subject to suit, they will be much less willing to serve in such a capacity. Second, a psychologist who agrees to fill the role of court-appointed evaluator will be less likely to offer the disinterested, objective opinion the court seeks in making such an appointment if he or she is subject to suit.”

In *Duff v. Lewis*, 114 Nev. 564, 568-569, 958 P.2d 82, 85 - 86 (1998), the Supreme Court of Nevada upheld a grant of quasi-judicial immunity to a court-appointed psychologist making custody recommendations, notwithstanding the fact that the psychologist’s performance was found to be deficient by a professional licensing board. The Court held as follows:

The common law doctrine of absolute immunity extends to all persons who are an integral part of the judicial process. The purpose behind a grant of absolute immunity is to preserve the independent decision-making and truthfulness of critical judicial participants without subjecting them to the fear and apprehension that may result from a threat of personal liability. “Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.” Additional reasons for allowing absolute judicial immunity include: “(1) the need to save judicial time in defending suits; (2) the need for finality in the resolution of disputes; (3) to prevent deterring competent persons from taking office; (4) to prevent the threat of lawsuit from discouraging independent action; and (5) the existence of adequate procedural safeguards such as change of venue and appellate review.”

These policy reasons apply equally to court-appointed officials such as psychologists and psychiatrists who assist the court in making decisions. Without immunity, these professionals risk exposure to lawsuits whenever they perform quasi-judicial duties. Exposure to liability could deter their acceptance of court appointments or color their recommendations. *Id.* at 568 – 569, 958 P.2d at 85 – 86. (Citations omitted)

Neutral professionals are at greatest risk of potential liability or undue influence in precisely those types of cases where they are most needed – high-conflict divorces, which comprise 10% of all family court litigation but which consume 90% of the time and services provided by the family courts and family law professionals. See “Parental Conflict Resolution Six –, Twelve -, and Fifteen - Month Follow-Ups of a High-Conflict Program,” 42 Family Court Review, 99, 99 (January 2004), Neff & Cooper. Such cases frequently involve parties with personality disorders who deny any contribution to their own problems and who view as an adversary anyone who fails to agree with them. See *id.* at 100. Disallowing immunity to neutral experts would enable such litigious parties to foment litigation and would skew decisions in their favor.

Immunity from civil liability is based on the idea that although a defendant might be negligent, important social values require that the defendant remains free of liability. *Dziubak v. Mott*, 503 N.W.2d 771, 774 (Minn. 1993) (citing W. Page Keaton *et al.*, Prosser & Keaton on The Law of Torts, § 131 at 1032 [5th ed. 1984]). More than 80 years ago, a Federal Court of Appeals gave the following

eloquent justification for judicial immunity:

“A defeated party to a litigation may not only think himself wronged but may attribute wrong motives to the judge whom he holds responsible for his defeat. He may think the judge has allowed passion or prejudice to control his decision.” *Yaselli v. Goff*, 12 F. 2d 396, 399 (2d Cir.1926, aff’d, 275 U.S. 503, 48 S.Ct. 155 (1927) quoted in *Linder v. Foster*, 209 Minn. 43, 47, 295 N.W.2d 299, 301 (1940).

In *Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988), this Court noted that immunity for guardians ad litem in family court proceedings prevents harassment from disgruntled parents who could take issue with any or all of the guardian’s actions or recommendations to the Court.

In recognizing absolute witness immunity, the North Dakota Supreme Court noted:

Because losers in one forum often seek another forum to assail participants in the first forum, absolute immunity is essential “to assure that judges, advocates **and witnesses** can perform their respective functions without harassment or intimidation. At the same time, the safeguards built into the judicial process tend to reduce the need for private damages actions....”

Loran v. Iszler, 373 N.W.2d 870, 875 (N.D.1985), *quoting* *Butz v. Economou*, 438 U.S. 478, 512, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (emphasis added).

In the present case, the Court of Appeals oddly justified its withholding of quasi-judicial immunity for the neutral business appraiser by noting that neither party was precluded from disagreeing with the appraiser’s opinion or presenting

additional evidence on the issue of the valuation of the Peterka businesses. See *Peterka v. Dennis*, *supra* at 32. A litigant's ability to challenge a neutral expert's opinion through additional trial court and appellate review, however, is precisely one of a number of safeguards built into the judicial process, and is a trenchant argument in favor of, not against, immunity. See *Duff v. Lewis*, *supra*. In *Dziubak v. Mott*, 503 N.W.2d 771, 774, 776 (Minn. 1993), this Court noted that the potential for abuse of immunity for public defenders was limited, given the existence of appellate review.

In *Riemers v. O'Halloran*, 678 N.W.2d 547 (ND 2004), the North Dakota court quoted the United States Supreme Court in identifying the safeguards against inaccurate testimony by witnesses immune from suits for damages:

The insulation of the judge from political influence, the importance of precedence in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges.... Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of the information and the impartiality of the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error.

Riemers, *supra* at 551, quoting *Butz v. Economou*, *supra* at 512.

To the extent that a party rejects a neutral's conclusions, sufficient alternatives are available. A dissatisfied litigant may obtain a second opinion, whether by employing a "shadow expert" or by hiring an expert of his/her own

selection to challenge the conclusions of the neutral. Litigants always have the right to cross-examine the neutral on valuation assumptions and the foundation of the expert's opinion. Dissatisfied litigants can appeal a trial court's decision. Having failed to exercise available remedies to challenge the divorce court's adoption of the Dennis' business valuations, Ms. Peterka's lawsuit against Mr. Dennis is little more than an improper collateral attack upon a judgment and decree. See *Nussbaumer v. Fetrow*, 556 N.W.2d 595, 599 (Minn. App. 1996), *review denied* (Minn. Feb. 26, 1997).

ARGUMENT TWO

COURT-APPOINTED NEUTRALS IN FAMILY COURT PROCEEDINGS ARE ENTITLED TO QUASI-JUDICIAL IMMUNITY.

Judicial immunity shields judges from civil liability for acts performed in the exercise of judicial authority. *Linder v. Foster*, *supra* at 300. Quasi-judicial immunity has been extended to persons *who are integral parts of the judicial process*.[§] *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d. 96 (1983)*cert. denied* 460 U.S. 1037, 103 S.Ct. 1426, 75 L.Ed.2d 787 (1983).

Historically, Minnesota's appellate courts have extended quasi-judicial immunity to various court-appointed professionals within the judicial system. See *e.g.*, *Dziubak v. Mott*, *supra* at 777 (public defender appointed by court to

[§] The Family Law Amicus notes that the trial court enunciated this rationale in its reliance upon *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955). (A.93)

represent indigent defendant in criminal proceeding); *Tindell v. Rogosheske*, *supra* at 387 (guardian ad litem appointed by court to represent interests of child in family court proceeding); *Linder v. Foster*, *supra* at 301 (psychiatrist appointed in civil commitment proceeding to prepare and submit mental health evaluation); *Stewart v. Case*, 53 Minn. 62, 66, 54 N.W. 938, 939 (1893) (assessor appointed by court to value property for purpose of levying taxes); *Myers v. Price*, 463 N.W.2d 773, 776 (Minn. App. 1990) (therapist appointed by court in juvenile protection proceeding to evaluate whether children were abused and to assess their counseling needs).

In past decisions, the Minnesota Court of Appeals has decided the issue of whether a participant in a court proceeding is integral to the judicial process on the basis of whether there has been a court appointment. In *Zagaros v. Erickson*, 558 N.W.2d 516, 523 (Minn. App. 1997), the Court of Appeals stated that although a non-court-appointed custody evaluator in a marital dissolution proceeding was not entitled to quasi-judicial immunity, a court-appointed custody evaluator had such protection. In two other Court of Appeals' decisions where summary judgment was reversed on the issue of quasi-judicial immunity, the Court of Appeals based its decision on the unresolved fact question of whether there had been a court appointment. See *Koelln v. Nexus Residential Treatment Facility*, 494 N.W.2d

914, 920 (Minn. App. 1993); *Sloper v. Dodge*, 426 N.W.2d 478, 479 (Minn. App. 1988).

Other jurisdictions have extended quasi-judicial immunity to neutral psychological experts appointed in family court proceedings to evaluate and render an opinion in contested custody litigation. See e.g. *Hathcock v. Barnes*, 25 P.2d 295, 297 (Okla. App. 2001); *Diehl v. Danuloff*, 242 Mich. App. 120, 133, 618 N.W.2d 83, 90 (1999); *Foster v. Washoe Co.*, 114 Nev. 936, 937 – 938, 964 P. 2d 788 (1998); *Duff v. Lewis*, *supra* at 570-571, 958 P. 2d 82, 82 (1998); *Parker v. Dodgion*, *supra* at 498; *Delcourt v. Silverman*, 919 S.W. 2d 777 (Tex. App. 1996); *Lythgoe v. Guinn*, 884 P.2d 1085, 1086 (1994); *Lavit v. Superior Court*, 173 Ariz. 96, 99, 839 P. 2d 1141 (Ariz. App. 1992).

In *Parker v. Dodgion*, *supra* at 498, the Utah Supreme Court justified its extension of quasi-judicial immunity to a neutral psychologist appointed by the trial court in an underlying custody proceeding to conduct a custody evaluation because the psychologist was exercising discretionary judgment while acting as a neutral factfinder for the court - a judicial function which was an integral part of the judicial process. In *Diehl v. Danuloff*, *supra*, n.3 at 133, the Michigan Court of Appeals held that a neutral psychologist court-appointed to conduct a custody evaluation performs a function intimately related and essential to the judicial

process because the psychologist's focus is not necessarily on the best interests of the parties involved in the litigation but is rather to assist the court.

Court-appointed neutral business appraisers perform functions similar to that of court-appointed neutral custody evaluators in that they assess highly complex and subjective issues and provide courts with objective information, which may lead to settlement. "Note: Breaking Down Business Valuation: The Use of Court Appointed Business Appraisers in Divorce Actions," 44 Family Court Review 623, 630 (October 2006). In *Nardini v. Nardini*, 414 N.W.2d 184, (Minn. 1987), this Court noted that a business appraisal involves the application of common sense, informed judgment, and the weighing of facts, with no "simplistic formulaic approach" or "universal formula," equating a valuation to an art, influenced by various subtle and subjective factors.

Appellate courts of other states have granted immunity to court-appointed expert accounting witnesses. In *Riemers v. O'Halloran*, *supra*, the North Dakota Supreme Court was faced with the issue of whether a court-appointed accountant in a divorce proceeding should have immunity from the husband's subsequent fraud action for statements and findings the accountant made during the divorce proceeding. In *Riemers*, a judicial referee had appointed O'Halloran and his accounting firm as the court's forensic accounting expert pursuant to Rule 706 of the North Dakota Rules of Evidence. *Id.* at 548 – 549. The firm was assigned the

task of determining, as precisely as possible, husband's earnings for a period of six years and to specifically identify any "accounting and financial irregularities and deceptions" perceived in husband's financial affairs. *Id.* at 549. Upon concluding its work, the firm was directed to provide a written report of its findings and conclusions to the court and the parties. *Id.* After O'Halloran issued his report and testified in the divorce trial, husband sued O'Halloran and his firm in a fraud action. The trial court dismissed the action, based on the accountant's absolute immunity from suit as a witness in the divorce action. *Id.* The North Dakota Supreme Court affirmed, holding that the accountant was entitled to absolute witness immunity. *Id.* at 552.

In *Shatzman v. Cunningham*, 2002 WL 31955214 (Mich. App. Dec. 17, 2002)⁷, the Michigan Court of Appeals held that an accountant appointed to value business assets in a divorce proceeding was entitled to quasi-judicial immunity in a subsequent action for negligence and breach of fiduciary duties brought by the husband. The *Shatzman* court concluded that the accountant was performing a function integral to the judicial process because the valuation of assets in a divorce case is a judicial fact-finding function involving the exercise of judgment independent of the parties. The Michigan Court of Appeals went to the heart of the issue, holding:

⁷ Unpublished opinion attached to Amicus Appendix at F.Am.A. 39, consistent with Minn. Stat. § 480A.08, Subd. 3 (2006).

“Hence, regardless of whether Cunningham’s valuations in plaintiff’s divorce case are deemed findings of a ‘master,’ ‘arbitrator,’ or even an ‘expert,’ we hold that plaintiff’s action against Cunningham is barred based on quasi-judicial immunity because Cunningham’s actions arose from his court-ordered appointment to resolve valuation disputes between the parties to the divorce action, a fact-finding function that involves judgment independent of the parties.”

Shatzman, 2002 WL 31955214

In the present case, the Court of Appeals failed to appreciate the integral judicial nature of the function performed by Mr. Dennis in the underlying divorce proceeding. The Court of Appeals in *Peterka*, relying upon *Gammel v. Ernst & Ernst*, *supra*, held that Mr. Dennis lacked quasi-judicial immunity because he was not performing a judicial function. See *Peterka v. Dennis*, *supra* at 31. In *Gammel*, *supra*, this Court held that accountants who had been hired by a corporation to audit its books and records were not immune from liability in a subsequent lawsuit for negligence and fraud brought by one of the corporation’s shareholders. See *id.* at 255 – 56, 72 N.W.2d at 368 – 69. The *Gammel* accountants argued that they were entitled to immunity as they were acting as quasi-arbitrators in the performance of their work.[§] *Id.* at 254, 72 N.W.2d at 368.

[§] The accountants in *Gammel* appear to have been relying upon *Melady v. S. St. Paul Live Stock Exch.*, 142 Minn. 194, 197, 171 N.W. 806, 807 (1919), in which this Court granted quasi-judicial immunity to the members of the board of a livestock exchange who, while acting in an arbitative role, had disciplined one of the exchange’s members. Arbitral immunity is not dependent upon appointment by court order. See, *Boraks v. American*

This Court rejected the accountants' argument, reasoning that the accountants' duties did not call for the exercise of independent judgment or discretion, but instead were akin to services performed by a professional who had been hired pursuant to an employment contract. *Id.* at 256, 72 N.W.2d at 369.

Gammel is distinguishable from the present case because the accountants in *Gammel* were not court-appointed and were not being sued for actions taken in an underlying judicial proceeding. No Minnesota case subsequent to *Gammel* suggests that a neutral professional appointed by court order in a judicial proceeding must be acting in an adjudicative or arbitral role in order to be entitled to quasi-judicial immunity. For example, the guardian ad litem appointed in *Tindell v. Rogosheske*, *supra*, was not appointed to adjudicate or arbitrate, but instead was appointed to represent the interests of a child in a parentage/child support proceeding. *See Tindell* at 340 – 341. Moreover, the public defender in *Dziubak*, *supra*, had no adjudicative responsibilities whatsoever, having been appointed to vigorously represent the legal interests of a criminal defendant. *See Dziubak* at 773. The fair reading of the above precedents is that all court-appointed neutrals are integral to the judicial process and therefore entitled to quasi-judicial immunity.

Arbitration Association, 205 Mich. App. 149, 151, 517 N.W.2d 771, 772 (1994).

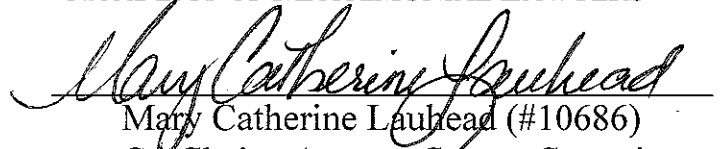
CONCLUSION

The Family Law *Amicus* urges the Supreme Court to enunciate as judicial policy that any court appointment, whether by court order or by a certified panel assignment or stipulation of the parties, provides that appointee with quasi-judicial immunity. This will encourage and continue the use of neutral valuations as a judicial management tool in family court.

Dated: May 21, 2008

Respectfully Submitted,

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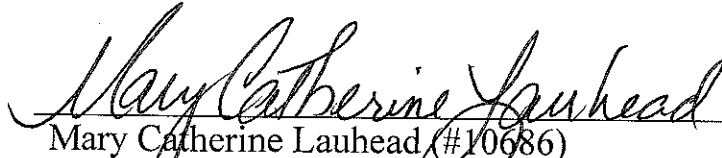
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The undersigned attorney for the Family Law *Amicus* certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 14 point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 4179 words, including headings, footnotes and quotations (and excluding the Table of Contents and Table of Authorities).

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