IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
APPEAL #27086

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ESTATE OF WAYNE KENNETH DUCHENEAUX,
APPELLANT,

vs.

DOUGLAS DUCHENEAUX,
APPELLEE.

****

APPEAL FROM CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT
TRIPP COUNTY, SOUTH DAKOTA, THE HONORABLE
JOHN L. BROWN, CIRCUIT COURT JUDGE, PRESIDING

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APPELLEE'S BRIEF

****

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STATEMENT OF LEGAL ISSUES

1. Whether the Circuit Court in a probate case involving deeded and trust property in Tripp County, South Dakota, had personal jurisdiction over a son of decedent requiring son to transfer back to the estate trust properties deeded to son prior and after son had been appointed guardian if it is found that decedent lacked mental capacity or was unduly influenced by son to sign such deeds. (Underlined Portion of Plaintiff/Appellant's Legal Issue Addressed as Appellee's Issue 1.)

   The Circuit Court judge correctly ruled that the Court lacked subject matter jurisdiction over the Indian Trust Quarters of Land.

   Most relevant statutes: SDCL 15-26A-7
   Most relevant cases: *Ducheneaux v. Secretary of the Interior of the United States*, 837 F.2d 340

2. Whether the Circuit Court in a probate case involving deeded and trust property in Tripp County, South Dakota, had personal jurisdiction over a son of decedent requiring son to transfer back to the estate trust properties deeded to son prior and after son had been appointed guardian if it is found that decedent lacked mental capacity or was unduly influenced by son to sign such deeds. (Underlined Portion of Plaintiff/Appellant's Legal Issue Addressed as Appellee's Issue 2.)

   The remainder of Appellants statement of legal issue exceeds the scope of the Circuit Court's findings, thus exceeds the scope of appeal; however, Appellees nonetheless make its arguments to Plaintiff/Appellant's claims.

   Most relevant statutes: SDCL 29A-3-407
   Most relevant cases: *In re Estate of Podgursky*, 271 N.W.2d 52, 57 (S.D. 1978)

STATEMENT OF THE CASE & FACTS

Wayne K. Ducheneaux is the father of Douglas D. Ducheneaux. Wayne Ducheneaux passed away on November 18, 2011. Prior to death, Wayne Ducheneaux legally transferred ownership of his property to certain son, Douglas D. Ducheneaux.

Therefore, Douglas D. Ducheneaux became the record owner of, and claims ownership of, the following described real property:

> The Northwest Quarter (NW1/4) of Section Thirty-four (34), Township Ninety-seven (97) North, Range Seventy-seven (77), West of the 5th P.M., Tripp County, SD is owned by Douglas D. Ducheneaux. [A copy of the deed dated August 4, 2011, recorded June 13, 2012 at 12:45 p.m. in Book 85 of Deeds and page 984 is attached as Appendix I.]
>
> The Northwest Quarter (NW1/4) of Section Fourteen (14), Township Ninety-seven (97) North, Range Seventy-eight (78), West of the 5th P.M., Tripp County, South Dakota is owned by the United States of America In Trust for Douglas Ducheneaux by virtue of a Deed to Restricted Indian Land signed August 19, 2011. [A copy of the Trust Deed to the United States of America, Bureau of Indian Affairs, dated August 19, 2011 is attached as Appendix II.]
>
> The Northeast Quarter (NE1/4) of Section Nineteen (19), Township Ninety-seven (97) North, Range Seventy-seven (77), West of the 5th P.M., Tripp County, SD is owned by the United States of America, in trust for the Rosebud Sioux Tribe, grantee, of Rosebud, South Dakota, Tribal Land Exchange (TLE) for the benefit of Douglas D. Ducheneaux. [A copy of the Relinquishment/Transfer of Assignment No. 2049 Ref. 600 dated July 1, 2011, approved July 14, 2011 by the Rosebud Indian Agency is attached as Appendix III.]

Wayne Ducheneaux submitted paperwork through the tribe to transfer one (1) of his quarters of land to his son, Douglas Ducheneaux. The one quarter was the NE1/4 §19-97N-R77, West of the 5th P.M., Tripp County, South Dakota (Relinquishment/Transfer of Assignment No. 2049). On July 12, 2011, the Board for TLE met and approved that transfer. A copy of the Minutes of the Board are attached to the Affidavit of Joe Ford which has been filed herein. (Appendix IV)

Further, on July of 2011, Wayne Ducheneaux made a request, or an Application for Gift Conveyance of Indian Land. The request was in regard to the NW1/4 of Section Fourteen (14), Township Ninety-seven (97) North, Range Seventy-eight (78), West of the

5th Principal Meridian, in Tripp County, South Dakota. Marlene Traversie, the Realty Specialist with the Bureau of Indian Affairs, Rosebud Agency, Division of Trust Services, a department operating under the United States Department of the Interior, received this Application. Marlene Traversie conducted a phone interview with Wayne K. Ducheneaux on July 12, 2011 at 2:30 p.m. to verify that it was his wish to transfer such quarter. (Appendix V) The interview of Mr. Ducheneaux on July 12, 2011 was conducted in a private session, so that no other parties (such as relatives) were allowed in this private session. One other employee of the Bureau of Indian Affairs, Vernette Long Warrior, was present at such interview to be a witness.

During the interview, Wayne Ducheneaux was asked who he wanted to give his land to, Mr. Ducheneaux answered, "My son, Douglas." When asked why he wanted to give his son, Douglas, his land, and he answered, "Because he's taking care of me." Ms. Traversie also asked if Wayne owed Douglas any money at this time, and Wayne answered, "No." Ms. Traversie asked Wayne if he had been promised money by Douglas if he gave his land to Douglas, and Mr. Wayne Ducheneaux answered, "No." Wayne Ducheneaux also told Ms. Traversie, "I am voluntarily giving it to him." At such interview, Mr. Ducheneaux also indicated that he wanted to retain a life estate in the land.

Furthermore, during the interview, Ms. Traversie explained to Mr. Wayne Ducheneaux that once he deeded this land to Douglas, he could not get the land back from Douglas, or change his mind and ask to get it back. Mr. Ducheneaux was asked if he understood that once he deeded the land to Douglas he could not get the land back at a later date, and Mr. Ducheneaux answered, "Yes," meaning that he understood.

Ms. Traversie's final question was, after knowing all of this, whether Mr. Ducheneaux still wished to gift deed the land to his son, Douglas, and Mr. Ducheneaux answered, "Yes." Thereafter, Wayne Ducheneaux signed the interview sheet, along with Ms. Traversie, and Ms. Vernette Long Warrier signed as a witness. After completing this interview, Mr. Ducheneaux was required to sign paperwork estimating the value of the property, waiving notice of the right to consult with class action lawsuit counsel in the *Cobell V. Norton* lawsuit, and signing the Deed to Restricted Indian Land. The documents were approved and recorded. A copy of the phone interview is attached as Appendix V.

The deed was approved by the Superintendent of the Bureau of Indian Affairs. The Superintendent, Bureau of Indian Affairs, Rosebud Agency, notified Wayne K. Ducheneaux by letter that he had 30 days from the date of the letter to tell the Bureau of Indian Affairs if he wanted to change his mind, or not complete the gift deed. Mr. Wayne K. Ducheneaux did not respond to the letter, and the gift deed was approved and recorded.

An Affidavit of Dawn Daughters which is on file herein, states Wayne K. Ducheneaux was living with Dawn Daughters at the time of the land transfer above, and Ms. Daughters testified in such affidavit that Wayne Ducheneaux was competent at such time to make out a will. (Appendix VI) Furthermore, in the deposition of Reuben Maulis, Mr. Maulis testified that Wayne Ducheneaux was competent throughout this time and Mr. Maulis was having Wayne Ducheneaux sign legal documents throughout this time period (during the land transfer process). Attorney Maulis has many years of experience in legal practice and knows what constitutes legal competence. (Appendix

VII) Dr. Marts testified in her deposition that she thought Wayne K. Ducheneaux may not be medically competent, but admitted that she had no knowledge of legal competence. (Appendix VIII)

Appellees filed a motion to set trial date in contested case concerning last will and testament of decedent dated May 7, 2014, in which outlines the fact that an Omnibus Motion was made (Motion No. 5) to determine which will was the appropriate testamentary disposition of the decedent, Wayne K. Ducheneaux. However, the Order of the Court dated June 7, 2012 does not resolve Motion No. 5.

A hearing was held on April 28, 2014 regarding the disputed parties filed motion for summary judgment. An Order Granting Defendant's Motion to Dismiss is dated May 2nd, 2014. An Order Denying Plaintiff's Motion for Summary Judgment is dated May 2nd, 2014. An Order Directing Entry of Final Judgment Pursuant to SDCL 1967 15-6-54 (b) is dated May 5th, 2014, therein the Court states "Any decision on the wills, deeded property, or personal property will have no effect on the trust property over which the Court has ruled that is lacks jurisdiction to effect in any way," as well as "No decision by the Court or jury as to the wills, deeded property, or personal property will moot the claims to the real estate held in trust because the Court has held that it lacks the power to effect title to the property." (Appendix IX)

Finally, the Order, in favor of Douglas Ducheneaux, states, "There is no likelihood that the Supreme Court will be obliged to consider jurisdiction over the real estate a second time because the claims to the described real estate have been dismissed and there is no jurisdiction issues pertaining to the remaining property in the case."

The Trial Court entered its judgment on April 28, 2014 in favor of Defendant. It is from this Judgment that the Plaintiff/Appellant has filed its appeal number 27086, dated July 14, 2014, to which Defendant/Appellee now addresses.

ARGUMENT

STANDARD OF REVIEW. The Appellant fails to state the applicable standard of review; however, "if application of the rule of law to the facts requires an inquiry that is essentially factual-one that is founded on the application of the fact-finding tribunal's experience with the mainsprings of human conduct-the concerns of judicial administration will favor the Trial Court, and the Trial Court's determination should be classified as one of fact reviewable under the clearly erroneous standard, but if, on the other hand, the question requires the Supreme Court to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo." *Isack v. Acquity*, 2014, 2014 WL 2993637. Therefore, the applicable standard of Supreme Court review is de novo.

ISSUE 1. Whether the Circuit Court in a probate case involving deeded and trust property in Tripp County, South Dakota, had personal jurisdiction over a son of decedent requiring son to transfer back to the estate trust properties deeded to son prior and after son had been appointed guardian if it is found that decedent lacked mental capacity or was unduly influenced by son to sign such deeds.

The arguments presented to the Trial Court on April 28, 2014, regarding the Motions for Summary Judgment dealt primarily with subject matter jurisdiction, and only

briefly discussed personal jurisdiction of Douglas Ducheneaux. Plaintiff/Appellant now raises the argument that the Circuit Court possesses personal jurisdiction over Douglas Ducheneaux, and as such, that it automatically possesses subject matter jurisdiction over the Indian Trust lands. Appellants state, "And a defendant cannot change the nature of the case to deprive the court of jurisdiction in a particular matter" citing *Benson v. State*, 710 NW2d 131 (SD 2006). However, that is exactly what is being attempted by the Plaintiff/Appellant - they have argued that the 2009 will of Wayne K. Ducheneaux stands; however, there are four (4) subsequent testamentary documents and a filed Motion to Set Trial Date in Contested Case Concerning Last Will and Testament of Decedent dated May 7th, 2014 by the Appellee requesting the Circuit Court to rule on the Plaintiff/Appellant's assertion.

Then, the Plaintiff/Appellant sought relief from the United States Department of the Interior, Office of Hearings and Appeals, Probate Hearing Division, but the Honorable Larry M. Donovan, Administrative Law Judge, held:

> "South Dakota Codified Law only governs 'real or personal property <u>other than trust or restricted land or trust personally</u> owned by the decedent at the time of death'." 43 C.F.R. §30, 102(b)(1), Order Denying Rehearing dated March 28, 2013. (underlining added) (copy attached)
>
> The court went on to hold that:
>
> The Secretary of Interior has exclusive jurisdiction over <u>trust or restricted land or trust personally</u> pursuant to 25 U.S.C. §372. Therefore, federal law, not state law, applies to the decedent's trust and restricted land or trust personally.

The Court went on to find that the real estate subject to this controversy is not part of Wayne Ducheneaux's estate, because Wayne Ducheneaux did not own such property at the time of his death. Therefore, the Court of competent jurisdiction has already found

the property not owned by Wayne K. Ducheneaux at the time of his death. Thus, this issue has been decided by the Court having exclusive jurisdiction over this exact issue, and Full Faith and Credit must be given to Hon. Larry M. Donovan's holding. A copy of the United States Department of the Interior, Office of Hearings and Appeals Probate Division is attached to this brief, as well as the court's decision on the petition for rehearing. (Appendix X and XI)

Now, as yet another attempt to "change the nature of the case," the Plaintiff/Appellant is asking this court to reverse the circuit court's jurisdictional holding regarding subject matter jurisdiction by using a personal jurisdiction argument. These constant attempts to "change the nature of the case" are directly averse to judicial economy. However, in the Plaintiff/Appellant's newest attempt, it cites *Conroy v. Conroy*, 575 F2d 175, 180 (8th Cir. 1978).

In *Conroy*, the parties were both members of the Oglala Sioux Tribe. Here, both Wayne and Douglas are members of the Rosebud Sioux Tribe; however, unlike in the present case under review by this Court, the commencement of the *Conroy* case began in Tribal Court and involved a divorce decree and subsequent land distribution pursuant to its order.

> "The Court concluded, subsequent to hearing, that the plaintiff had an enforceable property interest in her former husband's land, ordered that Defendant Gerry Conroy forthwith make and file an application with the Secretary of the Interior, pursuant to 25 C.F.R. §121.23, for the transfer of the beneficial title in and to the above-described real property to the name of Evelyn Conroy, Plaintiff herein, and, further, that the Secretary of the Interior or his duly authorized representative, give full and fair consideration to the above-ordered application under the provisions of 25 C.F.R. §§121.23 and 1.21.25(d), with due regard for the Findings of Fact and Conclusions of Law and the Decree of Divorce entered by Special Judge Harold Hanley of the Oglala Sioux Tribal Court, and the Memorandum Opinion of this Court on file herein.

> It is to be noted that the above decree does not purport, in and of itself, to order any conveyance of land, but rather to order an application to the Secretary to be made. Nor does it by its terms, or reasonable construction thereof, purport to affect title which the United States, as trustee, holds in the real property" *Id*. 180. Further, "We do not here paint with a broad brush. The question of property settlement, if any, upon divorce granted in Tribal Court, is one of first impression and no authority thereon is cited to us, pro or con. We rule narrowly upon the property division made, having in mind the various interests to be considered. It was well said by a recent commentator that corollary to the issue of fostering the development of tribal governments, development of tribal economic infrastructures, protection of tribal resources, and protection of civil rights, is the problem of describing with accuracy the boundaries of jurisdictional authority of the federal, state, and tribal governments in matters involving Indian affairs.
>
> This is an exceedingly complex area of law. Three rules of general import govern the resolution of any jurisdiction clash: (1) Congress has plenary authority in matters involving Indian affairs; (2) tribal jurisdiction is an inherent incident of tribal sovereignty and is limited only to the extent that Congress has taken it away" (*Id.* 184).

The United States Court of Appeals, Eighth Circuit, made the following abundantly clear in the *Conroy* case: (1) The court would narrowly honor the Tribal Court's ruling regarding the disposition of lands; however, in the case at bar, the Tribal Courts have never been involved; and, (2) Congress has the power and authority to delegate who has authority over Indian affairs. Thus, the State Court lacks subject matter jurisdiction regarding these two quarters.

> "Tribes possess authority over their members and territory by virtue of their retained inherent sovereignty unless limited by federal law." [*United States v. Wheeler*, 435 U.S. 313 (1978)]
>
> "Tribal sovereignty is a significant shield against the application of state law in Indian country. States may not exercise jurisdiction within Indian country if such action would infringe on rights of Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217 (1959)

In the case at bar, the United States of America owns the NW1/4 §14-97N-R78, West of the 5th P.M., Tripp County, South Dakota in trust for Douglas Ducheneaux. The deed has been filed and accepted and approved by the United States of America, Department of the Interior, Bureau of Indian Affairs, Rosebud Agency. Therefore, in this situation, the state lacks the subject matter jurisdiction and authority to interfere with title to this land.

Additionally, the United States of America owns the NE1/4 Section 19, Township 97N, Range 77, West of the 5th P.M., in trust for the Rosebud Sioux Tribe. The transfer was acknowledged by the decedent, Wayne Ducheneaux, prior to his death on July 1, 2011, and was approved and accepted by the Tribal Land Enterprise on July 14, 2011, and was approved by the Rosebud Indian Agency on July 14, 2011. Therefore again, in this situation, the state lacks subject matter jurisdiction and authority to interfere with title to this land as well.

In other cases, with differing facts than those presented in the case at bar, the State may regulate laws within Indian Country if certain elements are met. "State law might be permitted if two conditions are met: (i) there is no interference with tribal self-government; and (ii) non-Indians were involved." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) (underlined added) Much like the Defendant-favorable result, of the facts within the case at bar under the Wheeler and Williams's case analysis *supra*, the State's involvement with the two Indian Territory quarters of land fails the *McClanahan* test as well. "Tribal self-government" most assuredly includes the tribe's ability to establish, and be ruled by, its own laws regarding title in lands within its federally recognized boundaries. Thus, the first prong of the *McClanahan* test fails.

Furthermore, the second prong of the *McClanahan* test also fails because both Wayne Ducheneaux and Doug Ducheneaux are enrolled members of the Rosebud Sioux Tribe. Therefore, even under the *McClanahan* test the State cannot assert its authority over the two Indian Territory quarters held in trust on behalf of Doug D. Ducheneaux.

Finally, the state is preempted from asserting its authority over the two quarters held in trust on behalf of Doug Ducheneaux.

> "States may not exercise jurisdiction within Indian country if preempted by federal law". *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) "The laws of the United States placed in the Secretary of the Interior the authority to decide all matters relating to the control and disposal of Indian lands. These matters are federal questions over which state courts have no jurisdiction so long as title to the lands remains in the United States." *Jordan v. O'Brien*, 18 N.W.2d 30, 33 (S.D. 1945) Preemption in Indian law is broader than the preemption concept in constitutional law. State authority will be preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983); and see, e.g., *California* v. *Cabazon Band of Mission Indians*, supra—no state jurisdiction over gaming because of strong tribal and federal interests in gaming as economic development.

The United States Supreme Court and the South Dakota Supreme Court have clearly established case law, dating back to 1945, that unequivocally governs the subject matter jurisdiction issue within the case at bar. The sole authority over the two Indian Territory quarters of land, held in trust for Doug Ducheneaux, is a federal question. Thus, the State's interest in regulating title in the two above Indian Territory quarters would interfere, and would be incompatible, with federal and tribal interests reflected in federal law. This is absolutely true because, if the State Court chooses to interfere, the State would be affecting beneficial title to land set-aside for Indian use and under federal superintendence for the benefit of

Indians. Furthermore, by attempting to influence beneficial title in these two Indian Territory quarters, the State would be intruding upon the federally delegated duties of the Department of Interior, Bureau of Indian Affairs, Rosebud Sioux Tribe, as well as the personal rights of two enrolled members of the Rosebud Sioux Tribe Wayne Ducheneaux and Doug Ducheneaux. Therefore, the State's interests at stake are not sufficient to justify the assertion of state authority in this case.

Finally, the 1978 *Conroy* case, *Supra*, has received negative treatment, namely the *Ducheneaux v. Secretary of the Interior of U.S.*, 837 F2d 340, a 1988 United States Court of Appeals, Eighth Circuit, case which even examines a much more similar fact scenario, than *Conroy*, to the case at bar. In *Ducheneaux*, the Court held:

> "Assuming *arguendo* that the jurisdictional issue were not dispositive in this case, the district court was without authority to override Douglas' valid will.[4] The Supreme Court has spoken clearly on this issue in two cases.
>
> In *Blanset v. Cardin,* 256 U.S. 319, 41 S.Ct. 519, 65 L.Ed. 950 (1921), an Indian woman left a will disposing of allotted land which did not include her husband as a beneficiary. Her husband, a non-Indian, sought a one-third interest in the land under state law. The Supreme Court held that the husband had no interest in the land, stating conclusively:
> In a word, the act of Congress [25 U.S.C. § 373, governing the validity of Indian wills] is complete in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma Code. *Blanset,* 256 U.S. at 326, 41 S.Ct. at 522.
>
> The Court continued:
>
> [I]t was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress, free from restrictions on the part of the State as to the portions to be conveyed or as

to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior. *Id.* at 326-27, 41 S.Ct. at 522.

More recently, in *345 *Tooahnippah v. Hickel,* 397 U.S. 598, 90 S.Ct. 1316, 25 L.Ed.2d 600 (1970), the Supreme Court overturned the Secretary of the Interior's invalidation of an Indian's will. In his will the Indian testator had left nothing to his daughter, and the Secretary concluded that it would be inappropriate to "perpetuate this utter disregard for the daughter's welfare . . .." *Tooahnippah,* 397 U.S. at 602, 90 S.Ct. at 1319. The Supreme Court stated:

To sustain the administrative action performed on behalf of the Secretary would, on this record, be tantamount to holding that a public officer can substitute his preference for that of an Indian testator. * * * [W]e cannot assume that Congress, in giving testamentary power to Indians respecting their allotted property with the one hand, was taking that power away from the other by vesting in the Secretary the same degree of authority to disapprove such a disposition.

Whatever may be the scope of the Secretary's power to grant or withhold approval of a will under 25 U.S.C. § 373, we perceive nothing in the statute or its history or purpose that vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme with a provision for a relative who befriended the testator and omission of one who did not, simply because of a subjective feeling that the disposition of the estate was not "just and equitable." (Footnote omitted.) *Id.* at 608-10, 90 S.Ct. at 1322-23.

In *Akers v. Morton,* 499 F.2d 44 (9th Cir.1974), *cert. denied,* 423 U.S. 831, 96 S.Ct. 51, 46 L.Ed.2d 48 (1975), the Ninth Circuit confronted a situation similar to that presented here. Mr. Akers, an Indian, expressly disinherited his wife, also an Indian, from his will. Mrs. Akers asserted a dower right in the land conveyed by the will, land that had been acquired with her funds, but which had been titled as trust land in Mr. Akers' name. The Ninth Circuit held that even though the results were often inequitable, "[a]lienation of restricted Indian allotment land is controlled by federal law. Montana's dower law cannot of its own force entitle Mrs. Akers to claim a wife's interest in her deceased husband's restricted lands." *Akers,* 499 F.2d at 46. The court later stated: "The Secretary may disapprove a will only if it is technically deficient or if it is irrational. Where, as in this case, it is rational * * *, the Supreme Court has indicated that the Secretary is not free to disapprove the will merely on notions of fairness or equity." *Id.* at 47, citing *Tooahnippah,* 397 U.S. at 610, 90 S.Ct. at 1323.

> We believe this clear line of cases compels the conclusion that the district court erred in overriding the explicit provisions of Douglas' validly-executed will. Accordingly, we reverse the decision of the district court and reinstate the decision of the Secretary of the Interior." *Ducheneaux v. Secretary of the Interior of United States*, 837 F.2d 340, 1988

Here, prior to even executing his final holographic wills, Wayne K. Ducheneaux knowingly gifted or sold his property to his son, Douglas D. Ducheneaux. Wayne verified that his intentions were final multiple times during the transactions, to multiple parties. These intentions were shown in these deeds Wayne K. Ducheneaux signed, and in the holographic wills he signed. The law is clear: 1) The land was transferred prior to the making of such final testamentary instruments; and, 2) as stated above, this issue has already been decided by the Court having exclusive jurisdiction, namely: the United States Department of the Interior, Office of Hearings and Appeals, Probate Hearing Division, Honorable Larry M. Donovan, Administrative Law Judge. Therefore, Full Faith and Credit must be given to Honorable Larry M. Donovan's holding that "South Dakota Codified Law only governs 'real or personal property <u>other than trust or restricted land or trust personally</u> owned by the decedent at the time of death'." 43 C.F.R. §30, 102(b)(1), Order Denying Rehearing dated March 28, 2013. (underlining added) (copy attached as Appendix X and XI), as well as "The Secretary of Interior has exclusive jurisdiction over <u>trust or restricted land or trust personally</u> pursuant to 25 U.S.C. §372." As such, federal law, not state law, applies to the decedent's trust and restricted land or trust personally, so the real estate subject to this controversy is not part of Wayne Ducheneaux's estate, because Wayne Ducheneaux did not own such property at the time of his death.

For these reasons, the trial Court did not err in dismissing the action to recover the two (2) quarters of Indian trust land for lack of jurisdiction, and the Appellee prays that this Court would not allow the Plaintiff/Appellant to, yet again, attempt to change the nature of this case by granting its latest appeal request.

ISSUE 2. Whether the Circuit Court in a probate case involving deeded and trust property in Tripp County, South Dakota, had personal jurisdiction over a son of decedent requiring son to transfer back to the estate trust properties deeded to son prior and after son had been appointed guardian <u>if it is found that decedent lacked mental capacity or was unduly influenced by son to sign such deeds.</u>

Appellee now more specifically addresses the second underlined portion of the Plaintiff/Appellant's conjoining issue even though this exceeds the scope of the Circuit Court's findings, thus exceeding the scope of appeal. After almost two (2) years of discovery, Plaintiffs failed to offer, or produce, any actual facts or evidentiary proof of the alleged legal incompetency of Wayne Ducheneaux. SDCL 29A-3-407 provides in part, "… contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof." This law is paramount, because the Plaintiff's proffered facts fail to support the burden that they must meet to prove that Wayne Ducheneaux lacked the mental capacity to: 1) re-write his typed and holographic wills, while being able to comprehend the nature and extent of his property, to comprehend the persons who are the natural objects of his bounty, and to know the disposition that he desired to make of such property, (all of which Wayne K. Ducheneaux did); and, 2) make phone calls to several

different tribal and federal entities to ensure the successful transfer of his own assets, thereby carrying out the desires written within his will, (all of which Wayne K. Ducheneaux did).

In fact, the only possible contention, presented by the Plaintiffs, is the testimony of Dr. Teresa Marts, and she even admitted that she is not competent to testify as to legal competence. "And it would be fair to say, Doctor, that your training and education and experience, when you express an opinion about somebody's competency, relates to their medical condition?" Dr. Marts answered, "Correct." (Appendix VIII). "You are not—I apologize, I don't want to sound condescending, but you are not a lawyer?" Dr. Marts said, "No, I'm not." (p. 12) "And you are not familiar with what perhaps is described as legal competency or a person's ability under the law to make specific kinds of decisions for themselves," to which Dr. Marts requested, "Say that question again." "You are not familiar with the standard that is used?" Dr. Marts said, "No, I'm not."

Conversely, the deposition of Attorney Ruben G. Maulis (Appendix VII) was taken on July 17, 2013, and therein Ruben states that he began practicing law within the State of South Dakota at "a law firm here in Winner, the firm of Maule and Day. That was in 1965" (Deposition of Ruben G. Maulis, Page 6). Further, when asked, "Your representation of Wayne goes back quite a few years," Mr. Maulis replied, "To about 1972, I think, somewhere in there, early '70's" (Line 17, Page 7). (Appendix VII)

Interestingly, Attorney Maulis also addressed a pattern reflecting the on-again, off-again relationship between Wayne K. Ducheneaux and his son Douglas Ducheneuax. For example, Attorney Maulis, replied to Mr. Casey Bridgman's question: "In your dealings with Wayne, do you recall a time when there became a falling-out or a time

when I guess Wayne and Doug weren't getting along?" "Yes," Maulis replied. "Do you know about when that was?" "Well, I'm not sure when it exactly started, but Wayne contacted me in 2006. I could look at the file and give you a more exact date, but that was my first indication of when there was—it became serious." Attorney Bridgman then asked Attorney Maulis, "And Wayne specifically indicated to you that he was going to leave Doug out of the Will?" "Right. Yes." Bridgman further questioned, "And is the 2009 will, Exhibit 5, was that the result of that?" Maulis replied, "No—of the falling-out?" "Right," replied Bridgman. Attorney Maulis responded with "No. Okay. Doug was actually—there was a will on April 21 of 2006 in which Doug was included. September 12 of 2006, Doug was excluded."…"So the client is still the boss" asked Bridgman. "Right," Maulis replied. Mr. Bridgman continued asking questions relating to the Durable Health Care Power of Attorney and Durable Power of Attorney, and then asked, "And when were those dated, Ruben?" "They were dated June 1 2011," Maulis replied. "So you met with Wayne, I think you said in May of 2011, and then you go prepare these documents and take them back up to him to sign them?" questioned Bridgman "Right," Maulis answered. Bridgman followed with "Did you notarize those?" "Yes, I did," Maulis replied. "And did you feel that Wayne was competent, knew what he was doing and knew what he wanted in those documents," asked Bridgman. Attorney Maulis stated, "he was mentally competent. He was rather physically incompetent, but mentally competent. No Problem" (Line 4, Page 18). (Appendix VII)

Appellee continually admits that Wayne K. Ducheneaux and his son Douglas D. Ducheneaux experienced an on-again, off-again relationship, and this is proven by Ruben's drafting of two wills within the same year of 2006. Regardless, as Wayne's

health deteriorated, Douglas Ducheneaux, personally, took care of his dad. Ruben stated that, in his decades of legal experienced opinion, Wayne was competent—"No Problem." Yet, Plaintiff/Appellant continually argues that even though Wayne can make a will in 2006 and dramatically change it by taking Douglas Ducheneaux out of his will, within the very same year, the same could not, or should not, be justifiable in the reverse by putting Douglas Ducheneaux back into his will. This is absurd, without proof, and against logic.

Further, the following case law, *infra*, shows that legal competence depends upon many things, and Courts have found persons are competent one day, but may not be competent the next day. Mere allegations are not enough to survive summary judgment. Dr. Marts' allegation that Wayne was not medically competent, while admitting that she had no knowledge of legal competence, is not enough to substantiate a claim for legal incompetency.

Therefore, Plaintiff's Complaint, proffered facts and evidence, and alleged witness fail to mention one example, one scenario, or even one person that can properly address Wayne Ducheneaux's testamentary capacity. Further, "It does not necessarily follow that because one is physically weak and frail, one is of unsound mind and memory." *In re Hackett's Estate*, 145 N.W. 437 (S.D. 1914) The South Dakota Supreme Court, in *In re Estate of Podgursky*, 271 N.W.2d 52, 57 (S.D. 1978), quoted a California case: "It is well settled that mere proof of mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but *the contestant is required to go further and prove... such a complete mental degeneration as denotes utter incapacity to*

know and understand those things which the law prescribes as essential to the making of a will....(Emphasis added.)

How then, if Plaintiff completely lacks, after almost two (2) years of discovery, one incidence of proffered fact, testimony, evidence, or witness can the Plaintiff/Appellant's argument stand? It must not, as is stated so precisely in the following case law and Appellees' Brief regarding *Estate of Lila Kramlich*, 2002 WL 34222464 (S.D.):

> "I cannot set out the law on this subject any better than the Supreme Court did in *In re Estate of Dokken,* 604 N.W.2d 487, 491, where the court stated:
>
> SDCL 29A-2-501 provides: "[a]n individual eighteen or more years of age who is of sound mind may make a will." Sound mind, for purposes of testamentary capacity, has been defined as: One has a sound mind, for the purposes of making a will, if, without prompting, he is able 'to comprehend the nature and extent of his property, the persons who are the natural objects of his bounty and the disposition that he desires to make of such property.' *In re Estate of Podgursky,* 271 NW2d 52, 55 (SD 1978). Soundness of mind, for the purposes of executing a will, does not mean 'that degree of intellectual vigor which one has in youth or that is usually enjoyed by one in perfect health.' *Petterson v. Imbsen,* 46 SD 540, 546, 194 NW 842, 844 (1923). Mere physical weakness is not determinative of the soundness of mind, *In re Estate of Anders,* 88 SD 631, 636, 226 NW2d 170, 173 (1975); and it is not necessary that a person desiring to make a will should have sufficient capacity to make contracts and do business generally nor to engage in complex and intricate business matters.' *Petterson,* 46 SD at 546, 194 NW at 844. *Long,* 1998 SD 15, 575 NW2d at 257-58 (emphasis in original) (other citations omitted).
> The fact a guardian has been appointed to take care of a testator's estate does not, by itself, invalidate a will because of lack of testamentary capacity. 575 NW2d at 258 (*citing In re Estate of Hastings,* 347 NW2d 347, 350 (SD 1984)). In addition, "the fact that a testator is ill or suffering from a disease does not necessarily prevent that testator from possessing testamentary capacity." Id. (*citing In re Estate of Linnell,* 388 NW2d 881, 884 (SD 1986)). The testator may lack mental capacity to such an extent that according to medical science he is not of sound mind and memory, and nevertheless retain the mental capacity to execute a will. *Podgursky,* 271 NW2d at 57 (citing *Keely v. Moore,* 196 US 38, 25 SCt 169, 49 LEd 376 (1904)). "Testamentary capacity is not determined by any single

> moment in time, but must be considered as to the condition of the testator's mind a reasonable length of time before and after the will is executed." *Long,* 1998 SD 15, 575 NW2d at 258 (citing *Lanning,* 1997 SD 81, 565 NW2d at 796 *18 (citing *In re Estate of Nelson,* 330 NW2d 151, 155 (SD 1983))).

This Appellee's Brief is consistent with case law from around the nation. And, this case's facts are extremely similar to the Texas case, *In re Estate of Trawick*, 170 S.W.3d 871. In an action by Trawick's grandchildren challenging her will, the Court found evidence was sufficient to establish that testator had testamentary capacity when she executed her will; though there was testimony that some of testator's conduct was senile, eccentric and even bizarre, there was no evidence that any of that conduct persisted, some of grandchildren's witnesses acknowledged that on some days testator would be in good condition, attorney who prepared will testified that testator specified how she wanted her will to be written and that he prepared the will in accordance with her specifications, and attorney, two witnesses to the signing and the person who notarized the signatures testified that, at the time testator signed will, she appeared mentally competent, appeared to know what was going on, and understood what she was doing. Thus, the Court of Appeals of Texas affirmed the Trial Court's judgment.

Here, all the facts presented to the Court support the reality that Wayne K. Ducheneaux was competent to create his own will, to comprehend the nature and extent of his property, to comprehend the persons who are the natural objects of his bounty, and to know the disposition that he desired to make of such property. Additionally, the affidavits and depositions of Sherry Lansing, the notary public, Joe Ford, Marlene Traversie, Douglas Ducheneaux, and Dawn Daughters all support the fact that Wayne K. Ducheneaux voluntarily wanted to gift the land and pickup to his son, Douglas

Ducheneaux. Therefore, summary judgment would be proper, as a matter of law, in favor of the Defendant Douglas Ducheneaux regarding the incompetency issue.

Regarding the Undue Influence claim, Plaintiffs commenced this action by filing a complaint dated August 7, 2012. And, again after almost two (2) years of discovery, Plaintiffs have failed to offer or produce any actual facts, or proof whatsoever, of the alleged undue influence of Wayne Ducheneaux by Douglas Ducheneaux.

> "Undue influence, acts constituting. Undue influence consists:
> (1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; or
> (2) In taking an unfair advantage of another's weakness of mind; or
> (3) In taking a grossly oppressive and unfair advantage of another's necessities or distress" SDCL 53-4-7.

The Plaintiff's proffered facts fail to satisfy any one of the above acts constituting undue influence. The Plaintiff's presented facts fail under the first act constituting undue influence, because Wayne Ducheneaux personally chose Douglas Ducheneaux to be the benefactor of the gifts, which consisted of the three (3) quarters of land and his 2011 Ford F150 Supercrew black pickup. Wayne Ducheneaux chose to live with Douglas Ducheneaux during the remaining days of his life, and Wayne's holographic will made it very clear that he wanted to live with members of his family, instead of living in a nursing home. Wayne's will expressly states and reflects this wish. Thus, since Wayne was the one who personally chose to live and bless Douglas Ducheneaux with some of his possessions, Douglas could not have held a real or apparent authority…for the purpose of obtaining an unfair advantage over Wayne, and so the first act constituting undue influence fails.

The Plaintiff/Appellant presented facts fail under the second act constituting undue influence, because as is discussed *supra*, the Plaintiff/Appellant failed to offer one fact or one iota of proof that Wayne Ducheneaux lacked legal competency. Nor, has the Plaintiff/Appellant offered one fact or one iota of proof that Wayne had a weakness of mind, and that Douglas Ducheneaux took advantage of a weakness. Thus, the second act constituting undue influence fails.

The Plaintiff/Appellant presented facts fail under the third act constituting undue influence, because there are no facts that indicate how, when, or what Douglas Ducheneaux did to take a grossly oppressive or an unfair advantage of Wayne's necessities or distress. In fact, Wayne's holographic will 0exemplifies how much it meant to Wayne that Douglas would offer his home as a part-time residence to Wayne. Wayne's physical health was failing, and he needed a place to live, so Douglas took it upon himself to fill that imminent necessity for Wayne, not take advantage of Wayne's necessity. Regardless, Plaintiffs offer no insight into this allegation either, and the third act constituting undue influence fails as well.

Without a factual basis to support the Plaintiff's legal incompetency and undue influence allegation, summary judgment would be proper in favor of the Defendant, as a matter of law, regarding these issues, had the Trial Court been able to address them. It has not, and thus Plaintiff/Appellant's argument exceeds the scope of this Court's review.

CONCLUSION

The Plaintiff/Appellee has continually brought new claims addressing the same issue; however, the Court of competent exclusive jurisdiction has made its ruling regarding the Indian Trust Quarters; therefore, the holding of the United States

Department of the Interior, Office of Hearings and Appeals, Probate Hearing Division, Honorable Larry M. Donovan, Administrative Law Judge, must stand. Further, Full Faith and Credit must be given to Honorable Larry M. Donovan's ruling that "South Dakota Codified Law only governs 'real or personal property other than trust or restricted land or trust personally owned by the decedent at the time of death,' as well acknowledge that "The Secretary of Interior has exclusive jurisdiction over trust or restricted land or trust personally pursuant to 25 U.S.C. §372." As such, federal law, not state law, applies to the decedent's trust and restricted land or trust personally, so the real estate subject to this controversy is not part of Wayne Ducheneaux's estate, because Wayne Ducheneaux did not own such property at the time of his death. Thus, Douglas D. Ducheneaux unequivocally retains the beneficial title to the Indian Trust Quarters of Land.

Further, that the Trial Court's conclusion Number 4. within the Order Directing Entry of Final Judgment Pursuant to SDCL 1967 15-6-54(b) should be honored by this Court, in that any decision on the wills, deeded property, or personal property will have no effect on the trust property over which the Court has ruled that it lacks jurisdiction to effect in any way.

Finally, that this Court deny the Plaintiff/Appellant's attempt to, yet again, change the nature of this case by asserting that personal jurisdiction can take the place of subject matter jurisdiction regarding Indian Trust Lands.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully request Oral Argument.

Respectfully submitted this 29th day of August, 2014.

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IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
APPEAL #27086

****

ESTATE OF WAYNE KENNETH DUCHENEAUX,
APPELLANT,

vs.

DOUGLAS DUCHENEAUX,
APPELLEE.

****

****

AFFIDAVIT OF MAILING
AND
PROOF OF SERVICE

****

STATE OF SOUTH DAKOTA)
:
COUNTY OF JERAULD)

Casey N. Bridgman, being first duly sworn on oath, deposes and says: That he is the attorney for the Appellee in the above-entitled action; that he has served two (2) copies of the Appellee's Brief on Appellant's counsel, namely:

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and he further states that he mailed one (1) original and two (2) copies of the Appellee's Brief to the Clerk of the Supreme Court of South Dakota, 500 East Capitol Ave., Pierre,

SD 57501-5070, all by depositing the same in the United States Post Office at Wessington Springs, South Dakota, postage prepaid, addressed as stated above, on the 3rd day of January, 2014.

Dated this 29th day of August, 2014.

___//ss//Casey N. Bridgman//_____
Casey N. Bridgman

Subscribed and sworn to before me this 29th day of August, 2014.

___//ss// Kendra Brandenburg//_____
Notary Public
(SEAL) My commission expires: ___6-27-19_____

IN THE SUPREME COURT OF THE
IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
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AND
PROOF OF SERVICE

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****

CERTIFICATE OF COMPLIANCE

****

STATE OF SOUTH DAKOTA)
:
COUNTY OF JERAULD)

Casey N. Bridgman, being first duly sworn on oath, deposes and says: That he is the attorney for the Appellee in the above-entitled action, and that he certifies that Appellee's Brief complies with the type volume limitation contained in SDCL 15-26A-69, in that Appellee's Brief contains a word count of 7,908.

___//ss//Casey N. Bridgman//_____
Casey N. Bridgman

Subscribed and sworn to before me this 29th day of August, 2014.

___//ss// Kendra Brandenburg//_____
Notary Public
(SEAL) My commission expires: ___6-27-19_____

IN IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
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AND
PROOF OF SERVICE

****

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APPENDIX

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INDEX TO
APPELLEE'S APPENDIX

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September 16, 2014

Shirley Jameson-Fergel
Supreme Court Clerk
500 E Capitol Ave
Pierre, SD 57501

RE: Estate of Wayne Kenneth Ducheneaux v. Douglas Ducheneaux #27086

Dear Shirley:

Enclosed for filing are original and two copies of Appellant's Reply Brief regarding the above referenced matter. Should you have questions, contact me at your convenience.

Sincerely,

THE SCHREIBER LAW FIRM, Prof. L.L.C.

Brad A. Schreiber

Enclosed:
Appellant's Reply Brief

cc/ Casey N. Bridgman
Carrie Gonsor
Terry Pechota
Jack Gunvordahl
Debra Callaway
Denise Ducheneaux

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 27086

ESTATE OF WAYNE KENNETH DUCHENEAUX,

APPELLANT,

v.

DOUGLAS DUCHENEAUX,

APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF

SIXTH JUDICIAL CIRCUIT, TRIPP

COUNTY, SOUTH DAKOTA

HONORABLE JOHN L. BROWN

CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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ON THE BRIEF

NOTICE OF APPEAL FILED MAY 29, 2014

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INTRODUCTION

This is the reply brief of the Estate of Wayne Kenneth Ducheneaux (estate), appellant in this action. Appellee, Douglas Ducheneaux has filed his responsive brief. The E\estate submits this reply brief. It will address, where necessary, the arguments made by appellee in the order presented in appellee's brief.

STATEMENT OF CASE AND FACTS

Wayne Ducheneaux lacked the mental capacity and was subjected to the undue influence of his son, appellee, when he transferred the deeds to the two quarters of Indian trust land located in Tripp County, South Dakota. There was no legal transfer. Appellee became record owner because he caused his mentally incompetent father to transfer the deeds to him and then kept it secret until what he had done was discovered after the guardianship hearing.

The bulk of appellee's statement of case and the facts argues the merits of the case. In other words, it addresses the mental competence and lack of undue influence. Those are issues that remain to be decided. Appellee moved for summary judgment on both issues and the motion for summary judgment was denied. No appeal was filed. Ever fact mentioned in the statement of case and facts can be disputed and were disputed in the summary judgment proceeding.

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES: PAGES: ..

ARGUMENT

Appellant agrees with appellee that questions concerning jurisdiction are reviewed de novo by appellate courts.

ISSUE 1

There is absolutely no basis to appellee's argument that appellant did not argue to the lower court that it possessed personal jurisdiction over appellee to require him to make application to the Bureau of Indian Affairs to transfer the two trust quarters back to the estate if it were determined that decedent Wayne Ducheneaux lacked the mental incapacity to execute the deeds or signed the deeds under the undue influence of appellee. That the lower court possessed personal jurisdiction over the person of appellee was the bedrock of appellant's argument as to the land held in trust.

The hearing before the Department of Interior was to determine whether decedent Wayne Ducheneaux left a valid will as to the land held in trust. None of the alleged four wills proferred by appellee were determined to be valid. The administrative law judge held that the 2009 will was valid and distributed decedent's property pursuant to that 2009 will, to which appellant has no issue. Because the two quarters of trust land prior to the hearing had been transferred by Wayne Ducheneaux, who was incompetent and acting under the undue influence of his son, Douglas Ducheneaux, those two quarters were not part of the inventory over which the Department of Interior had any jurisdiction and it made no determination as to either tract.

Appellee's argument that appellant changed the nature of the case from the lower court to here is nonsense. Appellant's position in the lower court and now here is that the lower court had personal jurisdiction over appellee and if it is determined that Wayne Ducheneaux lacked the mental competency or was acting under the undue influence at the time of transfer to appellee, appellee can be ordered to transfer the two 160 acre tracts to the estate.

Appellee attempts to distinguish Conroy v. Conroy, 575 F2d 175, 180 (8TH Cir. 1978), which is directly on point and which supports the proposition that a court with personal jurisdiction over a defendant can require that person to make application to the Bureau of Indian Affairs to transfer trust land to which the person is not entitled. Certainly if Wayne Ducheneaux lacked the mental competence or signed the deeds to trust land due to the undue influence of appellee, appellee has property to which the person is not entitled and can be required to make such application as set out in Conroy.

Appellee stresses that, in Conroy, the action in which the judgment sought to be enforced was rendered in a tribal court while here it is state court. However, that is not a relevant distinction. The important point is that the court in which the judgment is rendered have personal jurisdiction over the person against whom the judgment is being rendered. The General Allotment Act which forbids involuntary alienation of allotments "does not negate a valid decree of a competent tribunal. It does not by any express provision, nor by any reasonable construction, support the denial to an Indian, here the plaintiff, of her rightful claim to valuable property." Emphasis added. Conroy, supra at 182. There can be no question here that the lower court had personal jurisdiction over appellee because he was a party to the proceedings before the court and had been before

the lower court in the preceding guardianship proceeding.

The reference to tribal sovereignty also is a red herring. There is no impact on tribal sovereignty. Appellee resides in Tripp County, owns deeded property there, and is a party in the present action. Appellee does not explain how tribal sovereignty can be effected by a judgment in this case requiring appellee to make application to transfer the property to which he is not entitled. Indeed, tribal courts have no jurisdiction over Indian trust land. Fredericks v. Mandel, 650 F2d 144 (8th Cir. 1981), cited in Red Fox v. Hettich, 494 NW2d 638, 646 (SD 1992). None of the parties here reside within the exterior boundaries of the Rosebud Sioux Tribe as determined by Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). All of the heirs interested in the estate are before the court. Defendant made no contest to personal jurisdiction in his answer. The lower court is a competent tribunal.

Moreover, as stated in Conroy, supra at 179, "(it) is to be noted that the above decree does not purport, in and of itself, to order any conveyance of land, but rather to order an application to the Secretary be made. Nor does it by its terms, or reasonable construction thereof, purport to affect the title which the United States, as trustee, holds in real property." Subject matter jurisdiction is not involved because there has never been any proposal to assume subject matter jurisdiction over the trust land.

Finally, the court is not prevented by preemption from requiring appellee as a person over whom it has personal jurisdiction to make application to transfer the property to the estate. The application would be made to the Bureau of Indian Affairs, the agency with subject matter jurisdiction over Indian trust land. Federal law is being followed, not stymied or avoided. Appellee can point to no federal law preventing the lower court from

assuming personal jurisdiction over appellee or which would be violated by such assumption of jurisdiction.

Appellee argues that Ducheneaux v. Secretary of the Interior, 837 F2d 340 (8th Cir. 1988), supports its position that the lower court has no personal jurisdiction over appellee so as to require him to make application to the Bureau of Indian Affairs in the event that it is found that decedent was either incompetent or acting under the undue influence of Doug Ducheneaux at the time that he made transfer of the trust lands at issue. Ducheneaux held that the United States District Court had no jurisdiction without the consent of the United States to award a surviving wife a share in trust land that had been devised pursuant to a competent will. Contrary to the position of appellee, the Ducheneaux court did not bestow negative treatment on the result in Conroy. It found that the tribal court involved in Conroy was a competent tribunal the same as the lower court here is a competent tribunal. 837 F2d 344. It repeated the holding in Conroy that the General Allotment Act would not negate a valid decree of a competent tribunal. Id. And it distinguished Conroy from the Ducheneaux case: "Thus the key difference between Conroy and this case is that in Conroy, the Tribal Court's partition of trust property between two Indians did not divest the United States of its legal title to property as trustee, but merely substituted different Indian beneficiaries." Appellee's remaining points on Ducheneaux consist of argument that the Office of Hearings and Appeals, in determining that of the several purportedly left by Wayne Ducheneaux the 2009 will was the only valid will, somehow determined that South Dakota Courts could not assume personal jurisdiction over appellee to require him to make application to transfer the property to the estate upon a determination that decedent lack the mental incompetence to

execute the deeds or was acting under the undue influence of appellee. Such is not the case. The Office of Hearings and Appeals made no ruling affecting the two quarters of trust land in this case because they were not part of the trust inventory, having been transferred under circumstances giving rise to the present claims that decedent lacked mental competence and was acting under the undue influence of appellee when he transferred the property prior to this death.

ISSUE 2

Appellee's second argument is that decedent cannot be found to have lacked mental competence or have been acting under the undue influence of appellee at the time that he transferred the two quarters of trust land to appellee. This argument, however, goes to the merits of the lawsuit. Appellee's motion for summary judgment on these grounds was denied and the issue is not before this Court. The appellant has set out in its statement of facts a contrary set of facts upon which a reasonable jury could conclude that decedent lacked mental competence and was acting under the undue influence of appellee at the time that decedent transferred the two quarters of trust land to appellee. The question before this Court is whether the lower court, if it is found that decedent lacked mental competence or was acting under the undue influence of appellee when he signed the deeds, can exercise its personal jurisdiction over appellee to require him to make application to the Bureau of Indian Affairs to transfer the two quarters to the estate.

CONCLUSION

For all the above reasons, the determination of the lower court that it lacked personal jurisdiction over appellee, Douglas Ducheneaux, should be reversed and this case remanded with instructions. The lower court had personal jurisdiction over appellee

and if the trier of fact determines that decedent, Wayne Ducheneaux, either lacked the mental competence to transfer the two quarters of trust land or that he was under the undue influence of appellee at the time of the transfers, appellee Douglas Ducheneaux can be ordered to transfer the two quarters back to the estate.

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument before this Court unless the Court on review finds oral argument to be unnecessary.

Dated this September 15, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Appellant does not exceed the number of words permitted under SDCL 1967 15-26A-66, said Brief containing 2102 words.

CERTIFICATE OF SERVICE

I certify that on September 16, 2014, I served a true and correct copy of the foregoing Appellant's Reply Brief on the following persons:

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