IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30081

In the Matter of the Estate of

JERRY L. SIMON,

Deceased.

Appeal from the Fourth Judicial Circuit
Meade County, South Dakota
The Honorable Kevin J. Krull
Circuit Court Judge

APPELLANT LYNDA SIMON'S BRIEF

Elliot J. Bloom
Conor P. Casey
BEARDSLEY, JENSEN & LEE,
Prof. LLC
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709-9579
ebloom@blackhillslaw.com
ccasey@blackhillslaw.com
Attorneys for Appellants

Michael W. Strain
STRAIN MORMAN LAW FIRM,
P.O. Box 729
Sturgis, SD 57785
(605)-347-3624
mike@mormonlaw.com
Attorneys for Appellee

NOTICE OF APPEAL FILED August 11, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES

SECONDARY SOURCES

I. PRELIMINARY STATEMENT

Appellant Lynda Simon will be referred to as "Petitioner" or "Appellant" or "Lynda." Appellee Estate of Jerry L. Simon will be referred to collectively as "Estate" or "Appellee." Jerry L. Simon will be referred to individually as "Testator" or "Jerry." The circuit court will be referred to as "circuit court." References to the Clerk's Index will be referred to as "CI" with the specific page number following. Reference to Appellant's Appendix will be referred to as "Lynda.Appx" with the specific page number following. The circuit court's Findings of Fact and Conclusions of Law will be referred to as FOF and COL.

II. JURISDICTIONAL STATEMENT

The Personal Representative of the Estate, Steve Elgen, filed his Application for Informal Probate and Appointment of Personal Representative on November 1, 2019. (CI at 1-2.) On November 13, 2019, Steve Elgen was appointed to be Personal Representative of Jerry's Estate. (CI at 7.) Petitioner filed her Petition for an Intestate Share on January 4, 2021. (CI at 51, 53-54.) On January 11, 2021, the Estate filed its Objection to Petition for Intestate Share. (CI at 57-58.) The Estate filed the Inventory for the Estate of Jerry Simon on February 19, 2021. (CI at 62-63.) On May 13, 2021, an evidentiary hearing was held on Petitioner's Petition for an Intestate Share, which was continued to June 25, 2021. (CI at 500, 667.) Over a year later, on July 8, 2022, the Court entered Findings of Fact, Conclusions of Law, and an Order

denying Petitioner's Petition for an Intestate Share. (CI at 848-856.) A Notice of Entry of Order was filed on July 14, 2022. (CI at 859-860.) Following the Order, Petitioner filed her Notice of Appeal on August 11, 2022. (CI at 870-871.) A hearing transcript was ordered and the Alphabetical Index was filed on August 18, 2022. Jurisdiction is proper pursuant to SDCL § 15-26A-3.

III. STATEMENT OF LEGAL ISSUES

Whether the circuit court erred in denying Lynda Simon's Petition for an Intestate Share under SDCL § 29A-2-301 finding the Estate proved Jerry intended certain transfers to Lynda were in lieu of a testamentary provision when the record lacked any evidence of such an intention.

IV. STATEMENT OF THE CASE

Lynda Simon and Jerry enjoyed a loving relationship that started in 2005 and spanned fourteen years. Jerry and Lynda were married for eight of those years. From 2009 on, Lynda was heavily involved in the 4,600-acre ranch by contributing personal finances and working the ranch with Jerry every single day.

Following his death on September 28, 2019, his Last Will and Testament was discovered. Since his Last Will and Testament was drafted in 2003, before Lynda and Testator's relationship began, Lynda was omitted.

Lynda received transfers outside of Jerry's Last Will and Testament that equaled a de minimis 7.99% of the worth of Jerry's entire estate.

She was not the beneficiary of any bank accounts, life insurance policies, or 401(k) accounts owned by Jerry. Of the minimal transfers Lynda received outside of Jerry's Last Will and Testament, there is no evidence on record that Jerry intended for those transfers to be in lieu of a testamentary provision.

As such, the circuit court committed reversible error in finding that that the evidentiary record before it "shows that [Jerry] provided for the spouse outside of his Last Will and Testament by his statements, transfers made, the amount of the transfers, and the other evidence presented." Given the mandates of SDCL § 29A-2-301, Appellant requests this Court reverse the circuit court's decision.

V. STATEMENT OF THE FACTS

A. Jerry and Lynda's Relationship

Jerry and Lynda met in the fall of 2005 at the First Gold Hotel in Deadwood, South Dakota, where Lynda was a blackjack dealer. (CI at 507, 509.) First Gold was not busy on that particular day so Lynda was reading a horse sale catalog at the blackjack table where she was dealing. (*Id.*) Jerry, an avid horseman, sat down at Lynda's table and started talking to her about horses. (*Id.*) From that day forward, Jerry always sought out Lynda's table at First Gold for blackjack and conversation about horses. (CI at 507-508.) After six weeks of blackjack and conversation, Lynda gave Jerry her phone number. (CI at 508.) They began dating in November 2005. (CI at 508-509.)

When the couple met, Lynda owned horses of her own and was in the process of selling all of them. (CI at 543-545.) After selling the majority of her horses, Lynda was left with four mares. (*Id.)* Jerry suggested Lynda move the mares to his ranch. (*Id.)* He also suggested she could choose what stallions she could breed her mares with. (*Id.*) Lynda agreed and moved her four mares to Jerry's ranch. (*Id.*) Every foal that was a result of this breeding, Jerry and Lynda split the profits. (CI at 558-559.)

Lynda moved to Jerry's ranch in the spring of 2009. (CI at 509.) Lynda and Jerry lived together on the ranch until his death. (*Id.*) The ranch was nearly 4,600 acres, with well over 100 horses and some cattle. (CI at 546, 576.) While living on the ranch, Lynda actively helped with its management. (CI at 509-510.) Every day she helped with chores, calving, and making sure the horses and cows were fed. (CI at 510.) Jerry and Lynda were together every day running the ranch and talking about its operation. (*Id.*) They had a long and true relationship that resulted in Lynda and Jerry eventually getting married in November 2011. (CI at 506, 548.)

Lynda also contributed financially to the operation of the ranch. (CI at 511.) When the ranch had down years, Lynda mortgaged her own land to support the ranch, provided cash to the ranch out of her own retirement account and inheritance from her father's estate, used her own credit cards for the ranch's expenses, and even provided hay when

the ranch was short for the winter. (CI at 511-521.) While Jerry was alive, Lynda continually contributed to the function and financial well-being of the ranch. (*Id.*)

At the time Jerry and Lynda met, Lynda had an individual lifetime membership in the American Quarter Horse Association ("AQHA"), and Jerry had an annual membership in the AQHA. The organization is dedicated to the preservation, improvement, and record-keeping of the American Quarter Horse. Jerry had a long-running breeding program with AQHA. (CI at 523.)

When Jerry and Lynda began dating, they began purchasing horses together. (CI at 523.) Every horse that Jerry and Lynda purchased together would go into Jerry's individual AQHA account to preserve the long-running breeding program Jerry had established with the AQHA. (*Id.*) Then, in 2014, Jerry put his name on Lynda's lifetime AQHA account and converted it into a joint account. (CI at 524.) Thereafter, every horse that was purchased by Jerry and Lynda went into the joint account.[1] (*Id.*)

B. Jerry's Death and Last Will and Testament

Jerry died on September 28, 2019. (CI at 1.) Approximately two years prior to meeting Lynda and eight years prior to marrying her, Jerry drafted his Last Will and Testament on December 3, 2003. (CI at 511-

[1] No horses were transferred from the separate account to the joint account. (CI at 524-525.)

512.) At no point in time between the drafting of his Last Will and Testament and his death did Jerry change his Last Will and Testament.[2] (*Id.*) At no time during Jerry and Lynda's relationship did he ever mention estate planning or a Last Will and Testament to Lynda. (CI at 507, 522.) At no point in time during Jerry and Lynda's relationship did he ever indicate that the horses jointly titled in their AQHA account, or any other jointly titled asset that Lynda's name was on, were intended to be in lieu of any testamentary gift or to be considered her inheritance. (CI at 530.)

C. Lynda's Petition for Intestate Share

Under Jerry's Last Will and Testament, his daughter DeLynn "Simon" Hanson was devised and bequeathed his entire estate. (CI at 10.) Lynda was not named in the Last Will and Testament. (*Id.*)

On January 4, 2021, a Petition for Intestate Share was filed on behalf of Lynda Simon. (CI at 53-54.) On January 11, 2021, the Estate filed an Objection to Petition for Intestate Share. (CI at 57-56.) On May 13, 2021, an evidentiary hearing was held on the Petition and the Estate's Objection before the Honorable Kevin J. Krull of the Fourth Judicial Circuit. (CI at 500.) Lynda presented evidence and testified at the hearing. (*Id.*) The Estate presented evidence and testimony from

[2] At any point over the course of their marriage, Jerry could have changed his will to exclude Lynda, but he did not. (CI at 682-83, 687, 729.) In fact, following one of his prior divorces, Testator changed his will to reflect his intention to disinherit the divorced wife. (CI at 725-26.)

Bryan Hanson, Jerry's son-in-law, and Steve Elgen, the personal representative. (*Id.*)

The hearing established how much Lynda had received outside of Jerry's Last Will and Testament. Lynda received $68,026.88 of value from the horses jointly titled in her and Jerry's joint AQHA account. (CI at 530.) In addition to the horses, Jerry and Lynda also jointly owned some vehicles, a flatbed trailer, and a camper. (CI at 531-536, 62-63.) From those jointly titled assets, the expected value Lynda should receive is $38,275.[3] (*Id.*) Outside of these jointly titled assets, Lynda was not a beneficiary of any bank accounts, life insurance policies, or 401(k) accounts. (CI at 536-537.) From the jointly titled assets, Lynda received assets that total $106,301.88 in value.[4] (CI at 537.) The Estate has a total value of $1,331,105.63.[5] (CI at 540.) In comparison, Lynda received only 7.99% of the value of the total assets of the Estate. (*Id.*)

Every witness at the hearing confirmed that Jerry had never spoken with any of them about his estate planning or Last Will and Testament. Lynda testified that Jerry never discussed estate planning

---

[3] This number does not take into account the value Lynda will actually receive from these jointly-titled items, but only what was stated as the value on the Estate's Inventory. (CI at 533-536.)

[4] The $106,301.88 is just a value attributed to the items Lynda received, which value was prepared by the Estate without challenge at this time. (CI at 541.)

[5] This valuation was based upon Steve Elgen's inventory, and there is no proof on record to show that the inventory is based upon a fair market appraisal. (CI at 62-63.) Further, this valuation includes the 4,600 acres the ranch sits on, the value of the business, the value of the horses, the value of the cattle, and all other assets attributed to Jerry's Estate.

with her.[6] (CI at 23.) Bryan testified that Jerry never discussed estate planning with him. (CI at 104.) Steve Elgen, the Personal Representative, testified that Jerry never discussed estate planning with him. (CI at 112, 138.) According to the record from the May 13, 2021, hearing, Jerry never talked with anyone about his intentions relative to his estate.

Further, Lynda confirmed Jerry never spoke with her about whether the jointly titled items in Lynda's and Jerry's name were intended to be in lieu of a testamentary provision once Jerry passed. She testified Jerry never said anything about the horses being in lieu of any testamentary provision. (CI at 31.) Lynda further testified Jerry never told her the other jointly titled items were to be in lieu of any testamentary provision. (CI at 37.)

The first evidentiary hearing was continued to June 25, 2021. (CI at 667.) On that date, the Estate presented evidence and testimony from Casey Humble, a friend of Jerry's, and DeLynn "Simon" Hanson, Jerry's daughter. (CI at 668.)

Humble confirmed Jerry never stated the jointly titled items Lynda received outside of the Last Will and Testament were in lieu of a testamentary devise. (CI at 681-82, 686.) Casey testified to a discussion

[6] Lynda testified that the ranch would stay in the family. (CI at 585-587.) After Jerry's passing Lynda had a conversation with his mother. (*Id.*) Jerry's mother was concerned about the ranch. (*Id.*) Lynda reassured her that "ultimately the ranch belonged to Chase and Timber Hanson." (*Id.*)

that he and Jerry had prior to marrying Lynda. (CI at 674.) The context of the conversation was in regards to marriage and divorce because Jerry had two prior marriages that ended in divorce:

> Q: (By Attorney Michael Strain) Okay Did there a come a point in time you learned that Jerry was going to marry [Lynda]?
>
> A: Yeah, he told me he was gonna.
>
> Q: Tell us more about that conversation about approximately when it took place and where, and just fill us in a little more what you guys were talking about.
>
> A: Well, Like I say, I couldn't tell you what years it was of course, but he said – he said to me he was going to marry her or was going to ask her to marry him, and I said, no offense to anyone involved, I just – he had been married twice, and I said, "Are you sure you want to do this a third time?"
>
> Q: Okay.
>
> A: "I mean, how many times do you want to go through this?" And he said, "No, I do want to be married to her and it will be fine."
>
> Q: Did you have any discussions about the ranch at all.
>
> A: I did. I ask him, I said, "Well, what are you going to do if something happens, what do you want done with this ranch?"
>
> Q: Okay. And what was the general response that he gave you?
>
> A: He said, "I have a will and it goes to DeLynn. It's intended for Timber and Chase."
>
> Q: Okay. Did you make any more inquiry about the will or if she knew about it, what he's going to do with it all, or what's your recollection?
>
> A: I kind of quizzed on him a little bit about that – the depth of the will a little, and he just said, "Nobody else knows about it, nobody needs to."

(CI at 674-675.) The conversation between Casey and Jerry took place prior to Jerry's marriage to Lynda, and Casey confirmed that the context of the conversation was regarding divorce:

> Q: (Attorney Elliot Bloom) When did that conversation take place?
>
> A: I can't give you an exact year, but it was about the time that he mentioned something about him and Lynda getting married.
>
> Q: So it was before they got married?
>
> A: I believe so, but – yeah, I believe so.
>
> Q: And your conversation with him, and again I'm paraphrasing, was more in lines of, hey, you've been married two other times, you don't want this to go wrong again, right?
>
> A: Correct.
>
> Q: So it was more in line of divorce, rather than if anything happened to him?
>
> A: Correct.

(CI at 680-681.)

DeLynn also confirmed Jerry never discussed estate planning with her. (CI at 747.) DeLynn testified Jerry never told her that the jointly titled items that Lynda would receive outside of the Last Will and Testament were in lieu of a testamentary provision (*Id.)*

Almost a year after the hearings, the circuit court denied Lynda's Petition for an Intestate Share. (CI at 856.) The circuit court concluded the evidence on record "shows that [Jerry] provided for [Lynda] outside of the Will by his statements, transfers made, the amount of the transfers,

and the other evidence presented," under SDCL § 29A-2-301(a)(3). (CI at 856.)

Given the unambiguous language of SDCL § 29A-2-301, the circuit court committed reversible error. The record upon which the circuit court rendered its decision is void of any evidence that supports the conclusion Jerry intended that the transfers to Lynda outside of the Testator's Last Will and Testament were to be in lieu of a testamentary provision. As such, the denial of Lynda's Petition for Intestate Share should be reversed.

VI. ARGUMENT

A. Standard of Review

Appellant is challenging the circuit court's application of law to the facts and its conclusions of law[7] that form the basis for the denial of her Petition. This Court has stated:

> 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 [circuit] court, and the [circuit] court's determination should be classified as one of fact reviewable under the clearly erroneous standard. *If, on the other hand, the question requires us 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.*

[7] Underpinning the circuit court's conclusions of law are a number of findings of fact that are wholly irrelevant and immaterial to Appellee's burden of proof under SDCL § 29A-2-301. (*See* CI at 800-810.)

Huether v. Mihm Transp. Co., 2014 S.D. 93, ¶ 14, 857 N.W.2d 854, 860-61 (citing *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 16, 790 N.W.2d 52, 59) (emphasis added). Given the nature of the inquiry here, the standard of review is de novo[8] because the error Appellant challenges confronts the "values that animate legal principles" as they apply to the facts of this case. *Id.*

Similarly, this Court reviews conclusions of law under a de novo standard. *Dowling Family P'ship v. Midland Farms*, 2015 S.D. 50, ¶ 10, 865 N.W.2d 854, 860 (citing *Gartner v. Temple*, 2014 S.D. 74, ¶ 8, 855 N.W.2d 846, 850). "The interpretation . . . and . . . application of statutes to given facts is a question law (or a mixed question of law and fact) that we review de novo." *Trask v. Meade Cty. Commission*, 2020 S.D. 25, ¶ 8, 943 N.W.2d 493, 496 (*Smith v. Tripp Cty.*, 2009 S.D. 26, ¶ 10, 765 N.W.2d 242, 246).

B. Lynda's Intestate Share

Whether a pretermitted surviving spouse is owed an intestate share is controlled by SDCL § 29A-2-301:

> (a) A testator's surviving spouse who married the testator after the execution of the testator's will *is entitled to receive*, as an intestate share, *no less than the value of the share of*

[8] Even if this Court was to find that the mixed questions of law and fact at issue in this case demand a clearly erroneous standard, Appellants assert that a "a complete review of the evidence," as discussed below, will show that a definite and firm mistake has been made. *Estate of Fox*, 2019 S.D. 16, ¶ 12, 925 N.W.2d 467, 471 (citing *In re Estate of Flaws*, 2016 S.D. 60, ¶ 19, 885 N.W.2d 336, 342-43) (discussing under a clearly erroneous standard if a definite and firm mistake has been made, a reviewing court may reverse the lower court's decision).

> *the estate the surviving spouse would have received if the testator had died intestate*, unless:
>
> > (1) It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;
> >
> > (2) The will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or
> >
> > (3) *The testator provided for the spouse by transfer outside the will and* ***the intent that the transfer be in lieu of a testamentary provision*** *is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.*
>
> (b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises abate as provided in § 29A-3-902.

SDCL § 29A-2-301 (emphasis added). This appeal confronts an issue regarding Lynda's Petition for an Intestate Share from the Estate and most specifically whether the exceptions listed in subsection (a)(3) of SDCL § 29A-2-301 apply. (CI at 870.) As such, the burden of proving that Lynda is not owed an intestate share under SDCL § 29A-2-301 is squarely on the proponent of the will. *See* Restatement (Third) of Property (Wills & Dona. Trans.) § 9.5 Cmt. B (Am. Law Inst. 2003) (stating "[t]he proponent of the will bears the burden of proof on these exceptions"). Here, the proponent of the Last Will and Testament at issue is the Estate.

Lynda is clearly an omitted spouse under SDCL § 29A-2-301. She is not named in the Last Will and Testament and she married Jerry after this Last Will and Testament was drafted. *See* SDCL § 29A-2-301.

Appellant has affirmatively carried her burden in that regard. (CI at 756-57.) Additionally, considering the subsections (a)(1)[9] and (a)(2)[10] of SDCL § 29A-3-301 were not considered by the circuit court or argued by the Estate, Appellant will only address subsection (a)(3). (CI 854-855 (COL 10, 12.)) Subsection (a)(3) requires the Estate to prove the Testator, in this case Jerry, provided for the Lynda outside of his Last Will and Testament and the "***intent that the transfer be in lieu of a testamentary provision***." SDCL § 29A-2-301(a)(3). The Estate must prove the Testator intended[11] that the transfers outside of the Last Will and Testament be in lieu of a testamentary provision for Appellant in at least one of three ways:

(i) Testator's statements;

(ii) Reasonable inference from the amount of the transfer; or

(iii) Other evidence.

See SDCL § 29A-3-301(a)(3). The language of 29A-3-301(a)(3) is clear and reflects "the true intention of the law" which is "expressed in the

---

[9] Obviously since Testator executed his will before meeting Lynda, there is no evidence he executed it in contemplation of his marriage to her. *See also Estate of Dennis*, 714 S.W.2d 661, 666 (Mo. Ct. App. 1986).

[10] There is no evidence within the will that shows it is to be "effective notwithstanding any subsequent marriage." *See* SDCL § 29A-2-301(a)(2).

[11] The intent contemplated by SDCL § 29A-2-301(a)(3) is not the same as testamentary intent, as contemplated under SDCL § 29A-2-501. *Compare* SDCL § 29A-2-301(a)(3) (considering testator's plain intent as to a transfer being in lieu of a testamentary provision); *with* SDCL § 29A-2-501 considering a testator's intent that a document is intended to be their will and has the capacity to make such a determination); *see also Matter of Nelson's Estate*, 274 N.W.2d 584, 587 (S.D. 1978).

statute." *State v. Jensen*, 2006 S.D. 106, ¶ 15, 662 N.W.2d 643, 648. "Only 'when the language is ambiguous, unclear, or if confining ourselves to the express language would produce an absurd result' do we look beyond the express language of statutes." *Abata v. Pennington Cty. Bd. of Comm'rs*,, 2019 S.D. 39, ¶ 18, 931 N.W.2d 714, 721 (citing *MGA Ins. Co., v. Goodsell*, 2005 S.D. 118, ¶ 17, 707 N.W.2d 483, 487).

As for subsection (a)(3), the slim caselaw available from other jurisdictions offer one principle as it relates to the transfers outside of a Testator's will: the number or amount of transfers outside of a will is indicative of a Testator 's intent that the transfers are intended to be in lieu of a testamentary provision. *See In re Estate of King*, 444 P.3d 863, 868-69 (Colo. Ct. App. 2019) (where the court concluded that a $4,000,000 life insurance policy for the surviving spouse and $52,000 jointly held assets were enough to show that the testator intended for those transfers to be in lieu of a testamentary provision); *In re Estate of Ferguson*, 130 S.W.3d 656, 654 (Mo. Ct. App. 2004) (where the court held there was substantial evidence to show the testator did not intend for the transfers to the spouse outside of his will to be in lieu of a testamentary provision, where the estate was valued at $1,437,000 and the spouse received between $144,000 to $148,000 in transfers); *Matter of Estate of Frandson*, 356 N.W.2d 125, 127-29 (N.D. 1984) (where the trier of fact's determination that the value of transfers outside of the will showed that the transfers were intended to be in lieu of a testamentary

provision was upheld; petitioner received $81,000 in transfers and the testator's remaining probate estate was valued at $94,000); *see also Becraft v. Becraft*, 628 So.2d 404, 406-07 (Ala.1993) (where the court stated that a transfer "that passes outside the estate in relation to the intestate share is relevant to the question of whether the gift was intended as being in lieu of a testamentary provision" and held that the proponent of the will failed to establish that $25,000 life-insurance policy payable to surviving spouse was intended to be in lieu of a testamentary provision).

Here, the circuit court erred in finding the Estate had carried its burden in proving, through SDCL § 29A-3-301(a)(3), that Jerry intended for Lynda's $106,301.88 in transfers outside of the Last Will and Testament to be in lieu of a testamentary provision for an Estate valued at $1,331,105.63. The circuit court's misapplication of the relevant law to the record of this case constitutes reversible error. The circuit court's conclusion that the "evidence presented shows that [Jerry] provided for the spouse outside of the Will by his statements, transfers made, the amount of the transfers, and other evidence presented" incorrectly applies the law at issue and, in view of the record, shows a reversible error was made. (CI at 856; COL 17.) As such, this Court should reverse the circuit court's ruling.

a. Jerry Never Stated that the Transfers Lynda Received were in Lieu of a Testamentary Provision.

There is no evidence showing Jerry ever stated the transfers Lynda received were in lieu of a testamentary provision. He never told Lynda the transfers were in lieu of a testamentary provision. (CI at 31.) Jerry never even discussed estate planning with his son-in-law, Bryan Hanson, his own personal representative, Steve Elgen, or his own daughter, DeLynn "Simon" Hanson. (CI at 104, 112, 138, and 747.) No one testified that Jerry ever discussed his estate planning or intent regarding these transfers with him or her. As such, it is not possible that Jerry made the type of statements contemplated by SDCL § 29A-3-301(a)(3). Therefore, there are no statements of Testator on record that support Appellee's burden under subsection (a)(3).

The circuit court's reliance on Jerry's intention for the ranch to stay within the family is irrelevant for purposes of SDCL § 29A-3-301(a)(3). (CI at 86; COL 14); *see supra* pg. 8 n. 6. Lynda's testimony that the ranch was to stay in the family evinces no intention that Jerry intended that the transfers Lynda received were in lieu of a testamentary provision. (CI at 86.) In fact, there is no evidence on record that shows that the ranch must be sold in order for Lynda to receive an intestate share. The ranch could be financed or mortgaged and would still stay in the family. Regardless, Lynda's testimony is irrelevant and immaterial to the Estate's burden in this matter. *See* SDCL § 29-2-301(a)(3) (stating that *only Testator's statements* as to an intent that transfers are in lieu of a testamentary provision should be considered.) Further, subsection

(a)(3) only contemplates the testator's statements, insofar as they may concern the testator's intent that a transfer is in lieu of a testamentary provision. As the record stands, there are no statements from the Testator contemplated by SDCL § 29A-2-301.

b. The Only Reasonable Inference from the Amount of the Transfers is that Jerry did not Intend for the Transfers to be in Lieu of a Testamentary Provision.

The amount of transfers Lynda received outside of the Last Will and Testament is de minimis in comparison to the value of the Estate as a whole. The amount of the transfers is the only relevant and material evidence in the record that the Estate offered for purposes of its burden under SDCL § 29A-3-301. However, the comparison this Court should employ underlines the fact that the amount of transfers Lynda received cannot carry the Estate's burden.

The $106,301.88 Lynda received in transfers represents 7.99% of the value of Jerry's entire estate. Even compared to the intestate share Lynda would receive from Jerry's entire estate, the transfers only represent 14.8% of the intestate share she would receive. *See Becraft v. Becraft*, 628 So.2d at 406-07. These de minimis amounts cannot carry the Estate's burden when the bulk of testimony establishes that Jerry and Lynda had a fulfilling relationship and marriage and that Lynda steadily contributed to the well-being of the estate that is the subject of this appeal. As such, the circuit court's comparison of the alleged percentage value of Jerry's horses to the percentage of the Elective

Share[12] that Lynda is entitled to is reversible error. (CI at 855; COL 12, 17.)

Given the case law across jurisdictions that confront this issue, the circuit court's failure to even consider this comparison is reversible error. Unlike in *In re Estate of King*, Lynda is not receiving over $4,000,000 from a life insurance policy. *See* 444 P.3d at 868-69. Lynda was not the beneficiary of any life insurance policy and is only receiving transfers that amount to 7.99% of the value of the entire Estate. Similarly, Lynda is not receiving over 85% of the value of the Estate through her transfers like the petitioner in *Matter of Estate of Frandson*. *See* 356 N.W.2d at 127-29. Even if this Court chooses to compare Lynda's transfers with the Intestate Share she would take, her transfers still only amount to a de minimis 14.8% of value of the Intestate Share. *See Becraft v. Becraft*, 628 So.2d at 406-07. The de minimis amount Lynda received shows one thing: Jerry did not intend the transfers to be in lieu of a testamentary provision.

Similarly, where the value of the transfers an omitted spouse receives is 10% of the value of the entire estate is worth, it has been held there is sufficient evidence the testator did not intend for those transfers to be in lieu of a testamentary provision. *In re Estate of Ferguson*, 130 S.W.3d at 654. In *In re Estate of Ferguson*, the spouse received between

[12] The circuit court's Conclusions of Law discussing Lynda's Elective Share are wholly irrelevant and immaterial to the inquiry under Section 29A-2-301. (CI at 854; COL 4-8.)

$144,000 and $148,000 outside of the will for an estate worth $1,437,000. *Id.* Missouri's "omitted-spouse" statute is the same as South Dakota's. *Id.* at 662; *see also* Vernon Annotated Missouri Statutes § 474.235. In that case, the testator unintentionally omitted his spouse from his will, but the omitted spouse was the recipient of a retirement benefit and a life estate. *Id.* at 664. Given the de minimis value of the retirement benefit and life estate in comparison to the estate's value, the court concluded that there was "substantial evidence supporting the trial court's conclusion that [testator] did not provide for [the omitted spouse] by transfer outside of the will." *Id.*

Here, like the omitted spouse in *In re Estate of Ferguson*, Lynda is receiving a de minimis amount of transfers in comparison to the value of Jerry's entire estate. In fact, she is not even the recipient of any retirement account or life estate like the omitted spouse in *In re Estate of Ferguson*. Instead, she is only receiving jointly-titled assets. The comparison in value of the transfers to Lynda to the value of Jerry's entire estate show Jerry did not intend the transfers to Lynda outside of the will to be in lieu of a testamentary provision.

c. No Other Evidence on Record is Material or Relevant to the Estate's Burden.

The bulk of the evidence provided by the Estate is immaterial and irrelevant given the plain language of SDCL § 29A-3-301 and the case law available on this issue. It is not the type of "other evidence"

contemplated by SDCL § 29A-3-301(a)(3), which requires a showing that Jerry intended "the transfer[s] be in lieu of a testamentary provision."

Appellee will likely argue that the majority of the evidence the circuit court considered qualifies as other evidence. However, no evidence, except for the amount of transfers outside of the will, qualifies as the type of evidence contemplated by SDCL § 29A-2-301. Jerry's alleged conversation with Casey Humble regarding his upcoming marriage to Lynda has no bearing on the inquiry before this Court. First, that conversation[13] took place prior to Jerry transferring all of the horses into a joint AQHA account and also before Lynda was added as a joint owner on the other assets (CI at 674-75, 680-81.) Jerry's comments do not evince his intention that the transfers he was to make years down the road were to be in lieu of a testamentary provision for Lynda. There is no evidence Jerry and Casey further discussed this at any other point in time. There is no evidence Jerry even contemplated these transfers at the time of this conversation.

Secondly, Jerry's comments were in the context of marriage and divorce; as opposed to what is relevant and material under subsection (a)(3), Testator's intention "that the transfer[s] be in lieu of a testamentary provision." *See* SDCL § 29A-3-301(a)(3). This context and

[13] While the circuit court concluded Casey's alleged conversation was a statement for purposes of SDCL § 29A-2-301(a)(3), it is not because it is not a statement in regards to Testator's intent that the transfers made to Lynda were in lieu of a testamentary provision. (CI at 855; COL 12, 17.)

the time of the conversation demonstrate Humble's recollection is far too attenuated to support the Estate's burden under SDCL § 29A-2-301(a)(3). As such, the circuit court's conclusion that Humble's recollection of his conversation with Jerry about his upcoming marriage to Lynda qualified as a statement under Section 29A-2-301(a)(3) is reversible error. (CI at 855; COL 12, 17.)

The Estate's focus on Lynda's claim for the Elective Share is also irrelevant and immaterial because Lynda's choice to pursue an Elective Share is not material or relevant to the Estate's burden under SDCL § 29A-3-301. *See* Restatement (Third) of Property (Wills & Dona. Trans.) § 9.5 Cmt. B (Am. Law Inst. 2003). The Elective Share and Intestate Share are not exclusive remedies. *See also In re Estate Ferguson*, 130 S.W.3d 656, 660-61 (Mo. Ct. App. 2004) (discussing that an elective share and intestate share are not mutually exclusive remedies). Lynda's choice to pursue the elective remedy has no bearing on whether Jerry intended for the transfers in question to be in lieu of a testamentary provision.[14]

Lastly, the circuit court's consideration and conclusions in regard to the fact that Jerry wanted the ranch to stay within the family is irrelevant and immaterial to the Estate's burden under Section 29A-2-301(a)(3), and constitutes reversible error. (CI at 855-56; COL 14, 16,

[14] Nothing in either SDCL §§ 29A-2-301 or 29A-2-201 indicates that an elective share and intestate share are mutually exclusive. In fact, the only reason Lynda filed for an elective share was because of the imminent statute of limitations that would have prevented her from pursuing the remedy at all.

and 17.) South Dakota Codified Law 29A-2-301(a)(3) does not consider Testator's testamentary intent; rather, it considers Testator's intent in regards to the transfers made and whether they were in lieu of a testamentary provision. *See* SDCL 29A-2-301(a)(3); *see supra* pg. 8 n. 6. The inference provided by Lynda's testimony certainly aligns with, or may be attributed to, Jerry's testamentary intent, but has nothing to do with Jerry's intent in regard to the transfers made to Lynda.

VII. CONCLUSION

There is no evidence on record to show that Jerry intended for the transfers made to Lynda outside of the Last Will and Testament were intended to be in lieu of a testamentary provision. As such, Appellant asserts that Lynda is owed an intestate share. Based upon the foregoing, Appellant respectfully request that this Court reverse the circuit court's decision and direct the circuit court to grant her Petition for an Intestate Share from the Estate of Jerry Simon.

VIII. REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument in this matter.

IX. CERTIFICATE OF COMPLIANCE

Pursuant to S.D.C.L. §15-26A-66(b)(4), I certify that Appellant's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 5,655 words and 27,764 characters. I have relied on the word and character count of our processing system used to prepare this Brief. The original Appellant's brief and all copies are in compliance with this rule.

Dated this 26 day of September, 2022.

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

By: _____

Elliot J. Bloom
Conor P. Casey
P.O. Box 9579
Rapid City, SD 57709
Tel: (605) 721-2800
E-mail: ebloom@blackhillslaw.com
ccasey@blackhillslaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2022, I sent to:

Michael W. Strain
STRAIN MORMAN LAW FIRM,
P.O. Box 729
Sturgis, SD 57785
(605)-347-3624
mike@mormonlaw.com
Attorneys for Appellee

By Odyssey e-filing and serve, a true and correct copy of Appellant's Brief relative to the above-entitled matter.

/s/ Elliott J. Bloom
Elliott J. Bloom

APPENDIX

APPENDIX

TABLE OF CONTENTS

STATE OF SOUTH DAKOTA COUNTY OF MEADE	))SS)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT 46PRO19-000046

In the Matter of the Estate of JERRY L. SIMON, Deceased.	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER**

The above entitled matter came before this Court for trial on the 13th day of May, 2021 and the 25th day of June, 2021, at 8:30 a.m. respectively, at the Meade County Courthouse, Sturgis, South Dakota. Petitioner, Lynda Simon, appeared personally and by and through her attorney, Elliot Bloom of Beardsley Jensen & Lee in Rapid City, South Dakota. Respondent, Estate of Jerry L. Simon, is represented by and through its attorney, Michael W. Strain of Strain Morman Law Firm in Sturgis, South Dakota.

The Court having heard testimony, reviewed the pleadings, files, records, and other evidence in this matter, and being fully informed in the premises, does hereby make and enter its Findings of Fact and Conclusions of Law and Order as follows:

FINDINGS OF FACT

1. The Jerry L. Simon Estate ("Estate") was created after the death of Jerry L. Simon ("Decedent") on September 28th, 2019.
2. Steve Elgen was appointed as the Personal Representative of the Estate.
3. That Decedent was the son of Dale and Jean Simon and subsequently married to Judith Simon. Prior to January 31st, 1979, the Simon Ranch, Inc., was formed, with Dale, Jean,

Jerry, and Judith Simon, and Homer Ayres as the owners of the stock of the corporation. (Exhibit A).

4. As of January 27th, 1982, Dale, Jean, Jerry, and Judith Simon were the sole owners of the stock of Simon Ranch, Inc. (Exhibit A). That on or about June 9th, 1987, Decedent and Judith Simon were divorced. As part of the divorce decree, Judith Simon retained ownership of the stock registered in her name in Simon Ranch, Inc. (Exhibit B).
5. That after the divorce was finalized, Simon Ranch, Inc., purchased the retained shares of Judith Simon. (6/25/21: pp.34-ln.19 to pp.35-ln.3).
6. After the divorce, Decedent subsequently married Penny L. Simon. That during the course of this marriage, Penny L. Simon acquired one (1) share of Simon Ranch, Inc. (6/25/21: pp.35-ln.4-1n.15). That as a result of the divorce which was entered into on July 3rd, 2003, Penny Simon was required to transfer her one (1) share back to the Simon Ranch, Inc.
7. Through the 1990s, Dale Simon and Jean Simon began to gift and sell shares to Jerry Simon. With the transfers completed, Decedent had acquired all shares of Simon Ranch, Inc. (Exhibit B).
8. On the 3rd day of December, 2003, Jerry Simon executed a new Will devising, giving, and bequeathing to DeLynn Hanson (Simon), the only daughter of Jerry and Judith Simon, all of his property of every kind and character. (Will on file). At the time the Decedent executed his will, he did not know Petitioner Lynda Simon.
9. The largest asset of Simon Ranch, Inc. is the real estate. (Inventory on file).
10. That the only non-land asset owned by Simon Ranch, Inc., was a 2014 Ford F350 Super Duty Pickup, and a Massey Ferguson Tractor. (Exhibit F).

11. After the second divorce was finalized and after acquiring 100% of the stock in Simon Ranch, Inc., Decedent further advised his daughter that she was to receive the ranch. (6/25/21: pp.37-ln.11-ln.13). DeLynn Hanson would have been the 5th generation owner of the ranch. (6/25/21: pp.37-ln.20-ln.25). Ms. Hanson is the mother of Decedent's two (2) grandchildren, Chase, and Timber Rose. (6/25/21: pp.32-ln.8-ln.12).
12. Decedent met Petitioner, Lynda Simon, while she was dealing blackjack at the First Gold Gaming Resort in Deadwood, South Dakota, in the fall of 2005. Petitioner and Decedent bonded over their common love for horses. Petitioner and Decedent began dating in late 2005. Petitioner began living on Decedent's ranch in 2009, and Petitioner and Decedent were married on November 15th, 2011. That during the time prior to marriage to Petitioner, Decedent had conversations with Casey Humble, a neighbor and close friend. During a point in time, discussions were had between Mr. Humble and Decedent concerning the upcoming marriage of Decedent to Petitioner, Lynda Neumiller. Decedent was very direct in advising that what was going to happen to the ranch, and he advised that he had a Will, it was going to go to DeLynn, and it was intended for his grandchildren, Timber and Chase. Decedent further advised that no one else knew about the Will, and no one needed to know. (6/25/21: pp.8-ln.8 to pp.9-ln.14).
13. During his lifetime, Decedent created a substantial horse herd, along with running cattle. He began to downsize his cattle herd, and began acquiring old cows and pairs in the spring and selling them in the fall. (6/25/21: pp.10-ln.20 to pp.11-ln.18).
14. Over the course of time, Decedent had acquired at a minimum over 100-125 head of horses running on his ranch. (6/25/21: pp.11-ln.19 to pp.13-ln.8).

15. That Petitioner, when dating Decedent, reached an arrangement concerning the care of her four (4) mares. One (1) mare had died while at the ranch so when Petitioner moved to the ranch in 2009, there were only three (3) horses that she had sent to the ranch. (5/13/21: pp.46-ln.24 to pp.47-ln.5). By the time that Petitioner and Decedent were married, there were no more horses owned by Petitioner at that time. (5/13/21: pp.49-ln.20 to pp.50-ln.15).
16. All horses at the time of the marriage were in the name of Decedent through the American Quarter Horse Association (AQHA). (5/13/21: pp.55-ln.24 to pp.57-ln.2).
17. In 2014 a plan was developed to put Petitioner's name on the horses acquired by purchase and from Decedent's breeding stock, utilizing a newly developed joint membership AQHA acquired between Decedent and Petitioner. The lifetime membership was set up as a joint-tenant relationship so Petitioner would receive the ownership of the horses upon the death of Decedent.
18. After that date, all horses acquired, and foals born from Decedent's horses were put into the joint tenant membership AQHA. (5/13/21: pp.57-ln.24 to pp.59-ln.3).
19. That discussions were had concerning transferring all Decedent's horses over to the joint membership. Decedent thought that the cost would be too expensive to transfer all prior horse acquisitions and foals. (5/13/21: pp.59-ln.4-ln.21). Petitioner admitted that the plan was for Decedent to transfer the horse business over to her name during the course of the relationship. The evidence showed by the transfers of the studs, horses, and foals occurring over time confirmed that intent. (5/13/21: pp.60-ln.6). Further, all new mares that were acquired were put into the AQHA (joint tenant) ownership account. (5/13/21: pp.24-ln.11 to pp.26-ln.14).

20. That after the joint tenant AQHA account was created, between 2014 and 2019, Decedent, through Simon Ranch, Inc., incurred approximately $76,283.00 worth of horse-related expenses for the benefit of Decedent and Petitioner. Further, between 2014 and 2019, horses acquired through the use of Simon Ranch, Inc., proceeds for horse purchases was $116,156.00. (Exhibits E, E1, E2, E3, E4, E5).
21. Between 2014 and 2019, various horses were sold for the benefit of the partnership totaling $63,809.00. (Exhibit E6).
22. During the course of the marriage, Decedent placed the name of Petitioner on various motor vehicles and other items of title. On some of those items, Decedent's daughter, DeLynn Hanson, was also on the title. (Exhibit G; H).
23. That Decedent and Petitioner never had any discussions about transfer of stock certificates of Simon Ranch, Inc. (5/13/21: pp.62-ln.15-ln.22).
24. Petitioner was aware that Decedent's prior wives had ownership interests in the stock. (5/13/21: pp.62-ln.23 to pp.63-ln.12).
25. Decedent died in September 2019. A horse sale was conducted on December 4th, 2019. The value of the horses received or were the horses that were owned in joint tenancy and were either retained or sold by Petitioner at the sale for $77,026.88. (Exhibit J).
26. That the total value of the horses owned by Decedent at his date of death were sold totaling $109,250.00. (Exhibit K).
27. Over the course of the five (5) years that the AQHA joint tenancy account was created, Petitioner acquired approximately 41.35% of the value of the horses by either sale, or retention.

28. That in May of 2018, Petitioner authorized a mortgage to be placed on the NE ¼ of Section 16, Township 3N, Range 9E of the Black Hills Meridian, Meade County, South Dakota, accepting out lot 1 and lot 2. This property is owned in her maiden name, to-wit: Lynda M. Neumiller, for a line of credit for the Simon Ranch, Inc. (Exhibit 1; 5/13/21: pp.12-ln.16 to pp.13-ln.16). This mortgage was satisfied by the estate after the death of Decedent. (Exhibit 1).
29. It is noted that the title to the property in Meade County which was mortgaged was in the name of Lynda Neumiller. The property was never included as an asset of the Estate. That would suggest that the parties chose to keep real estate owned by them separate from joint ownership. (Exhibit 1). This intent is exhibited by the testimony of Petitioner who confirmed with Jean Simon, mother of Decedent, when asked by her what was going to happen to the Simon Ranch after Decedent's death, she was advised by Petitioner that the Ranch would stay in the family, and ultimately belong to Chase and Timber Hanson. (5/13/21: pp.86-ln.15 to pp.88-ln.7).

Based upon the foregoing Findings of Fact, the Court now makes and enters the following Conclusions of Law.

CONCLUSIONS OF LAW

1. Any conclusion of law deemed to be a finding of fact and vice versa shall be appropriately incorporated into the Findings of Fact or Conclusions of Law as the case may be.
2. The Court has jurisdiction over the parties and the subject matter of this action.
3. Proper notice of all relevant proceedings has been provided to all known parties pursuant to law.

4. The surviving spouse (Lynda Simon) is entitled to an elective share of the Estate. The two were married for 7 years but less than 8 years and thus Lynda is entitled to 21% of the augmented estate. § SDCL 29A-2-202.
5. Granting Petitioner's request of an intestate share goes directly against the wishes of the deceased. In awarding Lynda an intestate share, the Ranch that has been in the Estate's family for over one hundred years would have to be sold. (5/13/21: p90-l23 to p91-l2).
6. The overall statutory scheme of § SDCL 29A-2-202 takes care of the surviving spouse and allows the spouse an elective share based on the years that the couple were married.
7. That 21% of the augmented estate has not been determined as of this time.
8. Pursuant to the Will and the South Dakota Codified Laws, Lynda is due the elective share of the Estate at the rate of 21% of the augmented estate.
9. Petitioner filed a Statement of Claim requesting that she be allowed to exercise her intestate share under § SDCL 29A-2-301, since she was omitted from the Will which was drafted before the marriage of Petitioner and Decedent.
10. § SDCL 29A-2-301(a)(3) provides an exception to a subsequent spouse's entitlement to an intestate share if *"[t]he testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence."* (Emphasis added).
11. That Petitioner had no ownership interests in any of Decedent's horses when the couple was married in 2011. After they were married, Decedent took steps to create the joint tenancy ownership of Petitioner and Decedent of all newly purchased horses and of foals that were born of Decedent's existing horse herd. By creating such joint-tenancy

ownership of Decedent's assets, and subsequently-acquired horses paid for by the Simon Ranch, Inc., those transactions would qualify as transfers outside of the Will and would provide compensation to Petitioner.

12. That the testimony of Casey Humble indicated that Decedent said that Simon Ranch, Inc., which is a 5th generation ranch, was to go to DeLynn, and Decedent's grandchildren. This would qualify as a statement under § SDCL 29A-2-301(a)(3).

13. That the amount of transfer made up until Decedent's time of death, which occurred approximately five (5) years after the arrangement was made, is approximately 41.35% of the value of Decedent's horses which is determined by the sale of the horses. By comparison, under the elective share statute, Petitioner would be entitled to only 21% of the augmented estate.

14. The other evidence in this case clearly shows that Decedent intended the ranch to stay in the family, and Petitioner acknowledged that fact. Petitioner kept her real estate located in Meade County in her own name, and the Simon Ranch property was still in the ownership of Simon Ranch, Inc. No discussions were ever had concerning transfers of shares to Petitioner by Decedent. The Decedent's intent was that Simon Ranch, Inc., was to stay in the family and eventually go to DeLynn Hanson and then to the grandchildren of Decedent. Petitioner admitted that this was the arrangement between the parties. An admission against interest is binding upon that party. Although an exception to the hearsay rule, an opposing party's statement is admissible against that party. § SDCL 19-19-801(d)(2). Here, it was an admission by the declarant that the Decedent intended the Ranch to stay in the family.

15. The evidence shows that the transfers of the new foals produced by Decedent's mares, and future acquisitions to joint-tenancy ownership by Petitioner and Decedent show that Decedent intended to provide for this spouse outside of the Will, and the plan, had Decedent not expired, would have allowed the eventual total ownership of the horses to Petitioner.

16. The year before Decedent died, he reiterated to others that DeLynn and the kids were to get the Ranch, demonstrating his testamentary intent.

17. The evidence presented shows that Decedent provided for the spouse outside of the Will by his statements, transfers made, the amount of the transfers, and the other evidence presented.

ORDER

The application by Petitioner to apply SDCL 29A-2-301 for an intestate share of the Decedent's estate is hereby DENIED.

Dated this 8th day of July, 2022.

BY THE COURT:

Kevin J. Krull
Circuit Court Judge

Attest: LINDA KESZLER
Clerk
By Jen Rude
Deputy

FILED
JUL - 8 2022
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

South Dakota Codified Laws
Title 15. Civil Procedure
Chapter 15-26a. Rules of Civil Appellate Procedure (Refs & Annos)

SDCL § **15-26A-3**

15-26A-3. Judgments and orders of circuit courts from which appeal may be taken

Currentness

Appeals to the Supreme Court from the circuit court may be taken as provided in this title from:

(1) A judgment;

(2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;

(3) An order granting a new trial;

(4) Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment;

(5) An order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership, or deposit in court;

(6) Any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding; or

(7) An order entered on a motion pursuant to § 15-6-11.

Credits
Source: SDC 1939 & Supp 1960, § 33.0701; SDCL § 15-26-1; SL 1971, ch 151, § 2; SL 1986, ch 160, § 2.

Editors' Notes

COMMISSION NOTE

The Code Commission deleted "or from the district county court, or from the municipal court" after "circuit court" in the preliminary paragraph, to show the effect of SL 1973, ch 130, § 10, which abolished all district county courts and municipal courts and transferred jurisdiction to the circuit courts. See § 16-6-9.

The remedy of arrest and bail was provided by chapter 15-22, which was repealed by SL 1980, ch 165, §§ 1 to 33.

Relevant Notes of Decisions (10)
View all 220
Notes of Decisions listed below contain your search terms.

Finality of order or judgment--In general

Appealable judgment must finally and completely adjudicate all issues of fact and law presented by parties for litigation. SDCL **15-26A-3**. Smith v. Tobin, 1981, 311 N.W.2d 209.

---- Mortgage foreclosure, finality of order or judgment

Judgment ordering sale and execution of mortgaged premises was final judgment distinct from judgment of deficiency and matter pertaining to judgment ordering sale and execution could not be reviewed on appeal of judgment of deficiency. SDCL **15-26A-3**(1). Todd v. Winkelman, 1982, 320 N.W.2d 525.

Jurisdiction--In general

Attempted appeal from order from which no appeal lies confers no jurisdiction on Supreme Court, except to dismiss. SDCL **15-26A-3**. Smith v. Tobin, 1981, 311 N.W.2d 209.

---- Multiple claims or multiple parties, jurisdiction

Supreme Court lacked jurisdiction over appeal from summary judgment in favor of register of deeds on ground of sovereign immunity and declaratory judgment that right-of-way easement existed over west half, but not east half of subject property in declaratory judgment action; adjudications did not dispose of all issues and did not contain determination that final judgment had been entered. SDCL 15-6-19, 15-6-54(b), **15-26A-3**. Siefkes v. Watertown Title Co., 1987, 413 N.W.2d 377.

Order determining action and preventing judgment--In general

Statute which permits appeal from order affecting substantial right, when order in effect determines action and prevents judgment from which appeal might be taken, did not authorize appeal from circuit court's finding, on remand from federal district court, that federal habeas petitioner's confession was voluntary since only federal court could determine outcome of federal habeas corpus action after its own independent review. 28 U.S.C.A. § 2254; SDCL **15-26A-3**(2). State v. Phipps, 1987, 406 N.W.2d 146.

---- Class certification, intermediate orders

Denial of class action certification was interlocutory in nature and was not appealable as matter of right; overruling anything to the contrary in Rollinger v. J. C. Penney Company, 86 S.D. 154, 192 N.W.2d 699. SDCL **15-26A-3**. Smith v. Tobin, 1981, 311 N.W.2d 209.

Intervention

Appeal could be taken from final order denying intervention. SDCL **15-26A-3**(2). Southard v. Hansen, 1984, 342 N.W.2d 231.

Child custody

Custody award provision of divorce decree which stated that husband was awarded temporary custody of children for a period of one year, at which time custody would be reviewed, did nothing more than spell out trial court's amenability to review of custody after expiration of one year; accordingly, award fell within classification of judgments and orders that are appealable as a matter of right pursuant to statute. SDCL **15-26A-3**(4). Saint-Pierre v. Saint-Pierre, 1984, 357 N.W.2d 250.

Condemnation proceedings

Order finding necessity for Department of Transportation's resolution to take billboard was not final order, in that proceedings to determine just compensation to which owners of billboard were entitled had not been held, and therefore, owners could not appeal order as matter of right; declining to follow County of Blue Earth v. Stauffenberg, 264 N.W.2d 647 (Minn.). (Per Wuest, Acting Justice with one Justice concurring and one Justice concurring in the result.) SDCL **15-26A-3**(2), 21-35-20, 31-19-38. South Dakota Dept. of Transp. v. Freeman, 1985, 378 N.W.2d 241.

Costs and attorney fees--In general

Appeal can be taken from judgment without appealing the costs, and appeal may be taken from order taxing costs without appealing the judgment. SDCL **15-26A-3**(1, 4). Strand v. Courier, 1988, 434 N.W.2d 60.

S D C L § **15-26A-3**, SD ST § **15-26A-3**
Current through laws of the 2022 Regular Session and Supreme Court Rule 22-10

End of Document

South Dakota Codified Laws
Title 29a. Uniform Probate Code (Refs & Annos)
Chapter 29A-2. Intestate Succession and Wills (Refs & Annos)
Part 3. Spouse and Children Unprovided for in Wills

SDCL § 29A-2-301

29A-2-301. Entitlement of spouse--Premarital will

Currentness

(a) A testator's surviving spouse who married the testator after the execution of the testator's will is entitled to receive, as an intestate share, no less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate, unless:

(1) It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(2) The will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

(3) The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises abate as provided in § 29A-3-902.

Credits
Source: SL 1995, ch 167, § 2-301.

S D C L § 29A-2-301, SD ST § 29A-2-301
Current through laws of the 2022 Regular Session and Supreme Court Rule 22-10

End of Document

South Dakota Codified Laws
Title 29a. Uniform Probate Code (Refs & Annos)
Chapter 29A-3. Probate of Wills and Administration (Refs & Annos)
Part 3. Informal Probate and Appointment Proceedings--Succession Without Administration

SDCL § 29A-3-301

29A-3-301. Informal probate or appointment proceedings--Application--Contents

Currentness

(a) An informal probate proceeding is an informal proceeding for probate of a decedent's will with or without an application for informal appointment. An informal appointment proceeding is an informal proceeding for appointment of a personal representative in testate or intestate estates. Applications for informal probate or informal appointment shall be directed to the clerk of court, and verified by the applicant to be accurate and complete to the best of the applicant's knowledge and belief as to the following information:

(1) Every application for informal probate of a will or for informal appointment of a personal representative, other than a special administrator or successor representative, shall contain the following:

(i) A statement of the interest of the applicant;

(ii) The name, birthdate and date of death of the decedent, the county and state of the decedent's domicile at the time of death, and, so far as known or ascertainable with reasonable diligence by the applicant, the names and addresses of the heirs and devisees and the ages of any who are minors;

(iii) If the decedent was not domiciled in the state at the time of death, a statement showing venue;

(iv) A statement identifying and indicating the address of any personal representative of the decedent appointed in this state or elsewhere whose appointment has not been terminated;

(v) A statement indicating whether the applicant has received a demand for notice, or is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere; and

(vi) A statement that the time limit for informal probate or appointment as provided in this chapter has not expired either because three years or less have passed since the decedent's death, or, if more than three years from death have passed, circumstances as described by § 29A-3-108 authorizing late probate or appointment have occurred;

(2) An application for informal probate of a will shall state the following in addition to the statements required by subdivision (1):

(i) That the original of the decedent's will is in the possession of the court, or accompanies the application, or that a certified copy of a will probated in another jurisdiction accompanies the application;

(ii) That the applicant, to the best of the applicant's knowledge, believes the will to have been validly executed;

(iii) That the applicant believes that the instrument which is the subject of the application is the decedent's will, and that after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will or of any other unrevoked testamentary instrument relating to property having a situs in this state under § 29A-1-301, or, a statement why any such unrevoked testamentary instrument of which the applicant may be aware is not being probated;

(3) An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address, and priority for appointment of the person whose appointment is sought;

(4) An application for informal appointment of a personal representative in intestacy shall state in addition to the statements required by subdivision (1):

(i) That after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in this state under § 29A-1-301, or, a statement why any such instrument of which the applicant may be aware is not being probated;

(ii) The name, address, and priority for appointment of the person whose appointment is sought and the names of any other persons having a prior or equal right to the appointment under § 29A-3-203;

(5) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant;

(6) An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in § 29A-3-610(c), or whose appointment has been terminated by death or removal, shall adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected, state the name and address of the person who seeks appointment as successor, and describe the priority of the applicant.

(b) By verifying an application for informal probate, or informal appointment, the applicant submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the application, or for perjury, that may be instituted against the applicant.

Credits

Source: SL 1994, ch 232, § 3-301; SL 1995, ch 167, § 103; SL 2002, ch 138, § 2; SL 2006, ch 153, § 1.

Notes of Decisions (3)

S D C L § 29A-3-301, SD ST § 29A-3-301
Current through laws of the 2022 Regular Session and Supreme Court Rule 22-10

End of Document

South Dakota Codified Laws
Title 29a. Uniform Probate Code (Refs & Annos)
Chapter 29A-3. Probate of Wills and Administration (Refs & Annos)
Part 9. Special Provisions Relating to Distribution

SDCL § 29A-3-902

29A-3-902. Abatement--Order and amount

Currentness

Unless a contrary intent is indicated in the will, and except as otherwise provided in this code, shares abate in the following order: (1) property not disposed of by the will; (2) property devised to a residuary devisee; (3) property not specifically devised; and (4) all other property. Abatement within each class is in proportion to the amount of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

Credits
Source: SL 1994, ch 232, § 3-902; SL 1995, ch 167, § 130.

S D C L § 29A-3-902, SD ST § 29A-3-902
Current through laws of the 2022 Regular Session and Supreme Court Rule 22-10

End of Document

Restatement (Third) of Property (Wills & Don. Trans.) § 9.5 (2003)

Restatement of the Law - Property May 2022 Update

Restatement (Third) of Property: Wills and Other Donative Transfers

Division III. Protective Doctrines

Chapter 9. Protections Against Disinheritance

Part B. Protections Against Unintentional Disinheritance

§ 9.5 Protection of Surviving Spouse Against Unintentional Disinheritance by a Premarital Will

Comment:
Reporter's Note

(a) Under the Original or Revised Uniform Probate Code, the testator's surviving spouse is entitled to a specified share of the testator's estate if the testator's will was executed before the marriage, unless:

(1) the will or other evidence indicates that the will was made in contemplation of the marriage;

(2) the will expresses the intention that it be effective notwithstanding any subsequent marriage; or

(3) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) Under the Original Uniform Probate Code, the surviving spouse's share is the share that the spouse would have received if the testator had died intestate, but the spouse is only entitled to that share if the premarital will fails to provide for the surviving spouse. In satisfying the spouse's share, the devises made by the premarital will abate according to the rules of abatement for the payment of claims (see § 1.1, Comment *f*).

(c) Under the Revised Uniform Probate Code, the surviving spouse's share is the share that the spouse would have received if the testator had died intestate as to that portion of the testator's estate, if any, that is not devised to the testator's children of a prior marriage or their descendants (or that does not pass to such descendants under an antilapse or other statute). Any devise in the premarital will to the surviving spouse counts toward satisfying the spouse's entitlement.

Comment:

a. Source. The statutory provision protecting the testator's surviving spouse from unintentional disinheritance by a will executed before the marriage (a premarital will) originated in the Original Uniform Probate Code and was refined in the Revised Uniform Probate Code.

b. Premarital will. The statutes described in this section apply only to a premarital will, i.e., a will executed before the testator's marriage to the surviving spouse. If the testator and the surviving spouse were married to each other more than once, a premarital will is a will executed by the testator at any time when they were not married to one another. Thus, a will executed during a previous marriage to the surviving spouse is not a premarital will. However, a will executed during a previous marriage to a spouse other than the surviving spouse is a premarital will.

Comment on Subsection (a):

c. Protection against unintentional disinheritance. The statutes described in this section protect the testator's surviving spouse against unintentional disinheritance resulting from a premarital will. The earlier approach to the problem took the form of the common-law doctrines revoking a premarital will, doctrines that are obsolete and are disapproved in this Restatement. See Comment *i*. As elective-share statutes came to replace dower and curtesy (see § 9.1, Comment *c*), the elective share was initially thought to provide sufficient protection against disinheritance by a premarital will. The Original UPC provided an omitted-spouse provision in addition to the elective share. The purpose was both to reduce the frequency of elections under the elective share and to provide a share for the surviving spouse more related to the amount that the testator would probably have wanted the spouse to have, had the testator addressed the need to update the premarital will to take account of the marriage.

d. Exceptions. Because the protection afforded by these statutes only relates to unintentional disinheritance, the statutes do not apply if (1) the will or other evidence indicates that the will was made in contemplation of the marriage; (2) the will expresses the intention that it be effective notwithstanding any subsequent marriage; or (3) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence. The proponent of the will bears the burden of proof on these exceptions.

The Revised UPC expressly incorporates all three exceptions. Although the Original UPC expressly incorporates only the second and third of these exceptions, the position of this Restatement, supported by case law, is that the first exception—that the will or other evidence indicates that the will was made in contemplation of the marriage—also applies to enactments of the Original UPC. A premarital will that was made in contemplation of the marriage is presumed to express the testator's intentions regarding the share that he or she wants the devisee to take after the marriage in his or her capacity as spouse. In order to be executed in contemplation of the marriage, the will must be executed when the testator and the prospective spouse had marriage plans. Merely being romantically involved is not sufficient to establish that the will was executed in contemplation of the marriage.

In determining whether the third exception applies—whether the testator provided for the spouse by transfer outside the will with the intent that the transfer be in lieu of a testamentary provision—the court may consider all relevant evidence. The transfers outside the will can be in any form including outright gifts and will substitutes, and can be made before as well as after the marriage. The amount of the transfer may be considered in isolation or in relation to the portion of the testator's estate granted by the statute or in relation to the testator's total estate.

Comment on Subsection (b)—the Original UPC Omitted Spouse Provision:

e. Premarital will must "fail to provide" for the surviving spouse. The omitted-spouse's share under the Original UPC is the surviving spouse's intestate share—the share that the survivor would have received had the testator died intestate. In order for the survivor to be entitled to this intestate share, the testator's premarital will must "fail to provide" for the surviving spouse.

Most premarital wills devise nothing to the later-to-be spouse. On occasion, however, principally in the case of a will executed some time before a later-in-life second marriage, a testator executes a will that makes a devise to the later-to-be spouse, usually in the capacity of "friend." The express requirement that the premarital will must "fail to provide" for the surviving spouse might suggest that the spouse would not be entitled to an omitted-spouse's share in such a case because the will makes some provision for the spouse. Nearly all courts recognize that such an interpretation of the statute defeats its purpose by not taking into account the changed circumstances that the marriage represents. Some of these courts have held that, despite a devise in the premarital will to the later-to-be spouse, the surviving spouse is entitled to an omitted-spouse's share if the premarital will was not executed in contemplation of the marriage. These courts have also held that, when a premarital will contains a devise to the later-to-be spouse, the spouse bears the burden of proving that the will was *not* executed in contemplation of the marriage. Other courts have placed on the surviving spouse the burden of establishing that the premarital will was not executed in contemplation

of the marriage and also the burden of establishing that the devise in the premarital will was of an amount or value that could not reasonably represent the testator's effort to provide by will for the surviving spouse in the capacity of "spouse."

This Restatement adopts the interpretation that the surviving spouse is entitled to an omitted-spouse's share unless the premarital will containing a devise to the later-to-be spouse was executed in contemplation of the marriage. The burden of proving that the will was executed in contemplation of the marriage is on the party opposing the spouse's entitlement.

f. Satisfying the omitted-spouse's intestate share. In satisfying the omitted-spouse's intestate share, the Original UPC provides that devises made by the premarital will abate according to the ordinary rules of abatement for the payment of claims (see § 1.1, Comment *f*). Under these rules, shares of heirs and devisees abate in the following order: (1) intestate shares; (2) residuary devises; (3) general devises; (4) specific devises. The shares of heirs and devisees abate proportionately within each class.

The use of the ordinary rules of abatement creates a problem when the premarital will devises property to the later-to-be spouse. If the will was not made in contemplation of the marriage, the spouse is entitled to an omitted-spouse's share. If the devise to the later-to-be spouse was a general or specific devise, the spouse may be allowed to keep the devise and also take an omitted-spouse's share, payment of which is borne by the residue of the estate.

Illustration:

1. *Premarital will containing a devise to the testator's later-to-be spouse; later-in-life second marriage.* A, a widower, executed a will devising $25,000 to his friend, B, $100,000 to his sister, S, and the residue of his estate to the children of his former marriage, X and Y. Subsequently, A and B married each other. A later died, leaving a net probate estate worth $500,000. A was survived by B, S, X, and Y. A's premarital will was not executed in contemplation of the marriage. Under the Original UPC, B may be entitled to the $25,000 devise plus the share of A's estate she would have taken if A had left no will. If so, then B gets $275,000: the $25,000 devise plus $250,000, the share that B would have received had A died intestate (under the Original UPC, B's intestate share is one-half of the estate because A's children are not from his marriage with B; see § 2.2, Comment *b*). This $250,000 intestate share would come from the residue. So, A's children, X and Y, would take only $62,500 each.

Comment on Subsection (c)—the Revised UPC Entitlement Provision:

g. Spouse's intestate share in the portion of testator's net probate estate that does not pass to testator's children of a prior marriage or their descendants. The Revised UPC provision protecting the spouse against unintentional disinheritance is not strictly an "omitted" spouse statute. Application of the Revised UPC does not depend upon the premarital will "failing" to provide for the surviving spouse. If the premarital will makes a devise to the later-to-be spouse, the value of that devise simply counts toward satisfying the share to which the spouse is entitled (the spouse's guaranteed share). See Comment *h*.

The spouse's guaranteed share under the Revised UPC is not the spouse's intestate share in the testator's entire net probate estate, as it is under the Original UPC. Rather, it is the spouse's intestate share in the testator's net probate estate reduced by any portion that is devised to the testator's children of a prior marriage or their descendants (or that passes to such descendants under an antilapse or other statute). (The actual statutory language is more precise, limiting the spouse's guaranteed share to the intestate share in "that portion of the testator's [net probate] estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes under Sections 2-603 [the antilapse statute] or 2-604 [failure of testamentary provision] to such a child or to a descendant of such a child." See Reporter's Note.) The purpose of the change was to adjust the statute to the different

situation of a premarital will affecting a first marriage and a premarital will affecting a later-in-life second marriage, where one or both spouses are likely to be widowed with assets and children from the prior marriages.

h. Satisfying the spouse's guaranteed share. Under the Revised UPC, any devise in the premarital will to the surviving spouse counts toward satisfying the spouse's guaranteed share. If the premarital will does not make a devise to the later-to-be spouse or makes a devise of a lesser value than the spouse's guaranteed share, other devises—except devises passing to the testator's children by a previous marriage or their descendants—abate to make up any deficiency according to the rules of abatement for the payment of claims. See Comment *f*. If the premarital will makes a devise to the later-to-be spouse of an equal or greater value than the spouse's guaranteed share, the spouse is not entitled to any extra amount.

Illustrations:

2. *Premarital will to a first marriage.* When in his late 20s, A executed a will devising his entire estate to his brothers and sisters. Later, A married B. Three years later, A died in an airplane crash. A was survived by B and by his brothers and sisters. B is entitled to her intestate share in A's entire net probate estate. Under the Revised UPC, that intestate share is the entire estate. See § 2.2, Comment *a*.

3. *Premarital will containing a devise to the testator's later-to-be spouse; later-in-life second marriage.* The facts are the same as those in Illustration 1. Under the Revised UPC, B is entitled to her intestate share in $125,000 of A's $500,000 probate estate. This is because A's premarital will devised $375,000 of his $500,000 net probate estate to X and Y, his children of a former marriage. Under the Revised UPC, that intestate share is $112,500 (the first $100,000 plus 50 percent of the balance; see § 2.2, Comment *a*). B's $25,000 devise counts first toward satisfying her $112,500 intestate share, leaving a deficiency of $87,500. The devise to the testator's sister, S, abates to make up this deficiency.

The facts of Illustration 1 stipulate that A's premarital will was not executed in contemplation of the marriage. If it had been executed in contemplation of the marriage, B would not be entitled to an intestate share, but would be entitled to the $25,000 devise and, at B's option, to elect the elective share.

4. *Premarital will not containing a devise to the testator's later-to-be spouse; later-in-life second marriage.* H and W enjoyed a long and happy marriage, which produced two children, A and B. W died at age 70, survived by H, age 68. W's will devised her entire estate to H if he survived her; if not, to A and B in equal shares. H's will, executed at the same time, devised his entire estate to W if she survived him; if not, to A and B in equal shares. Some few years after W's death, H remarried. He never thought to change his will after the marriage; he assumed that W having predeceased him, his property would be divided equally between A and B. (His new wife, W-2, was financially well off.) A few months after his second marriage, H suffered a heart attack and died. H was survived by his second wife, W-2, and by A and B. H's net estate was valued at $150,000. W-2 takes nothing under the Revised UPC omitted-spouse provision. Since H devised everything to A and B, children of the former marriage, nothing is left to which W-2 is entitled as an intestate share.

i. Marriage or marriage followed by birth of issue does not revoke premarital will. Neither marriage nor marriage followed by birth of issue revokes a premarital will or any part of a premarital will. See § 4.1(b) and Comment *q*.

Reporter's Note

1. Statutory law. Protection of the decedent's surviving spouse against unintentional disinheritance by a premarital will is exclusively derived from statutory law, principally from the Revised or Original Uniform Probate Code.

a. Revised Uniform Probate Code. The Revised UPC protects the surviving spouse from unintentional disinheritance in the following provision:

> *Revised UPC § 2-301. Entitlement of Spouse; Premarital Will.*
>
> (a) If a testator's surviving spouse married the testator after the testator executed his [or her] will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he [or she] would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes under Sections 2-603 [the antilapse statute] or 2-604 [failure of testamentary provision] to such a child or to a descendant of such a child, unless:
>
> (1) it appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;
>
> (2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or
>
> (3) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.
>
> (b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under Section 2-603 or 2-604 to a descendant of such a child, abate as provided in Section 3-902.

The following states have enacted a statute based on the above provision of the Revised UPC:

Alaska: Alaska Stat. § 13.12.301

Arizona: Ariz. Rev. Stat. Ann. § 14-2301

Colorado: Colo. Rev. Stat. § 15-11-301

Hawaii: Haw. Rev. Stat. § 560:2-301

Michigan: Mich. Comp. Laws Ann. § 700.2301

Minnesota: Minn. Stat. Ann. § 524.2-301

Montana: Mont. Code Ann. § 72-2-331

New Mexico: N.M. Stat. Ann. § 45-2-301

North Dakota: N.D. Cent. Code § 30.1-06-01

South Dakota: S.D. Codified Laws § 29A-2-301

Utah: Utah Code Ann. § 75-2-301

West Virginia: W. Va. Code § 42-3-7

b. Original Uniform Probate Code. The Original UPC protects the surviving spouse from unintentional disinheritance in the following provision:

> *Original UPC § 2-301. [Omitted Spouse.]*
>
> (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.
>
> (b) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 3-902 [abatement].

The following states have enacted the above provision of the Original UPC:

Alabama: Ala. Code § 43-8-90

Connecticut: Conn. Gen. Stat. § 45a-257a

Florida: Fla. Stat. Ann. §§ 732.301

Idaho: Idaho Code § 15-2-301

Maine: Me. Rev. Stat. Ann. tit. 18-A, § 2-301

Missouri: Mo. Rev. Stat. § 474.235

Nebraska: Neb. Rev. Stat. § 30-2320

New Jersey: N.J. Stat. Ann. § 3B:5-15

South Carolina: S.C. Code Ann. § 62-2-301

Virginia: Va. Code Ann. §§ 64.1-69.1

The following states have enacted a statute that is similar to the Original UPC:

California: Cal. Prob. Code §§ 21601, 21610 to 21612 (apply to premarital will and revocable trust)

Connecticut: Conn. Gen. Stat. § 45a-257a

Pennsylvania: 20 Pa. Cons. Stat. § 2507(3)

c. Nonuniform legislation providing that subsequent marriage plus birth of issue revokes the will. The following states have enacted a nonuniform statute that protects the surviving spouse against unintentional inheritance by a premarital will.

Kansas: Kan. Stat. Ann. § 59-610

Maryland: Md. Code Ann. Est. & Trusts § 4-105

2. Comment d. Exceptions—Spouse provided for by transfer outside the will intended to be in lieu of a testamentary provision. In the following cases, the court held that the surviving spouse was not entitled to an omitted-spouse's share because the evidence established that the testator's transfers to the spouse outside of the will were intended to be in lieu of a testamentary provision:

In re Timmerman, 502 S.E.2d 920 (S.C.Ct.App.1998) (transfers to spouse outside will totaled $1,191,000; court did not indicate the total value of the testator's estate).

Estate of Bartell, 776 P.2d 885 (Utah 1989) (transfers to spouse outside will totaled $230,000; total value of the testator's remaining estate was $100,000).

Wester v. Baker, 675 So.2d 447 (Ala.Civ.App.1996) (testator "helped" in purchase of 3 parcels of land in joint tenancy with surviving spouse on which the couple lived; testator also owned another parcel of approximately 8 acres with a house located on it).

Estate of Frandson, 356 N.W.2d 125 (N.D.1984) (trier of fact determined that the value of transfers outside will of $81,000 showed that they were intended to be in lieu of a testamentary provision; testator's remaining probate estate was valued at $94,000).

Estate of Knudsen, 342 N.W.2d 387 (N.D.1984) (trier of fact determined that the value of transfers outside will of more than one-third of the testator's augmented estate showed that they were intended to be in lieu of a testamentary provision); Estate of Knudsen, 322 N.W.2d 454 (N.D.1982) (fact that the value of transfers outside will amounted to more than one-third of the testator's augmented estate was insufficient to determine as a matter of law that they were intended to be in lieu of a testamentary provision; case remanded for trial).

Estate of Taggart, 619 P.2d 562 (N.M.Ct.App.1980) (evidence was sufficient to support jury's finding that the testator intended transfers to spouse outside of will to be in lieu of testamentary provision; testator designated surviving spouse as joint tenant on a joint checking account worth $2900 and on a joint saving account worth $15,900, and designated her as beneficiary of his $400 monthly retirement-plan payments, allegedly representing 20% of his estate).

Estate of Honse, 694 S.W.2d 505 (Mo.Ct.App.1985), held that a transfer must originate with the testator to make the omitted-spouse provision inapplicable. In this case, the testator and his wife owned property as tenants by the entirety, but the property was not purchased in that form by the testator but rather was given to the testator and his surviving spouse in that form by the surviving spouse's father. Extrinsic evidence of the testator's statements indicating that he did not want his surviving spouse to get the family farm was inadmissible because it was not relevant to showing the testator's intent that a transfer be in lieu of a testamentary provision.

In the following cases, the court held that the surviving spouse was entitled to an omitted-spouse's share because the evidence failed to establish that the testator's transfers to the spouse outside of the will were intended to be in lieu of a testamentary provision:

> Becraft v. Becraft, 628 So.2d 404 (Ala.1993) (proponent of will failed to establish that $25,000 life-insurance policy payable to surviving spouse was intended to be in lieu of a testamentary provision; court stated that "[t]he size of an inter vivos gift or one that passes outside the estate in relation to the intestate share is relevant to the question of whether the gift was intended as being in lieu of a testamentary provision").
>
> Hellums v. Reinhardt, 567 So.2d 274 (Ala.1990) (proponent of will failed to establish that certain transfers of real property by testator to surviving spouse were intended to be in lieu of a testamentary provision).
>
> Estate of Beaman, 583 P.2d 270 (Ariz.Ct.App.1978) (evidence failed to establish that there were any transfers outside the will by testator to surviving spouse that were intended to be in lieu of a testamentary provision).

3. Comment d. Exceptions—Premarital will executed in contemplation of the marriage. In Estate of Dennis, 714 S.W.2d 661 (Mo.Ct.App.1986), the court held that a premarital will executed on the same day but before the marriage was executed in contemplation of the marriage. Consequently, a statute based on the Original UPC omitted-spouse provision was inapplicable.

4. Comment e. Premarital will must "fail to provide" for the surviving spouse—Original UPC. The omitted-spouse provision of the Original UPC only applies if the "testator fails to provide by will for his surviving spouse who married the testator after the execution of the will." The requirement that the will must "fail" to provide for the surviving spouse has generated litigation in cases in which a premarital will made a devise to the later-to-be spouse. Most of the cases hold or recognize that the surviving spouse is not entitled to an omitted-spouse's share if the premarital will was executed in contemplation of the marriage. The problem arises in cases in which the premarital will that made a devise to the later-to-be spouse was not executed in contemplation of the marriage.

A number of cases, including Estate of Ganier, 418 So.2d 256 (Fla.1982), Estate of Groeper v. Groeper, 665 S.W.2d 367 (Mo.Ct.App.1984), and Miles v. Miles, 440 S.E.2d 882 (S.C.1994), have held that, despite a devise in the premarital will to the later-to-be spouse, the surviving spouse is entitled to an omitted-spouse's share if the premarital will was not executed in contemplation of marriage. The courts in the *Ganier* and *Groeper* cases held that, when a premarital will contains a devise to the later-to-be spouse, the spouse bears the burden of proving that the will was not made in contemplation of the marriage. The spouse carried that burden in these two cases. Accord, In re Stephenson, 1999 WL 510776 (Mo.Ct.App.1999) (opinion not released for publication). In *Miles*, the court merely noted that there was no proof that the will was executed in contemplation of the marriage. The surviving spouses in *Ganier, Groeper, Stephenson,* and *Miles* were awarded omitted-spouse shares.

Estate of Christensen v. Christensen, 655 P.2d 646 (Utah 1982), however, held that to be entitled to an omitted-spouse's share the surviving spouse must establish that the devise in the premarital will was an amount that could not reasonably represent the testator's effort "to provide by will for his surviving spouse." In the *Christensen* case, the testator's premarital will left the bulk of his estate in trust for his granddaughter. He also executed two premarital codicils that were not executed in contemplation of the marriage and that devised stock to his later-to-be spouse worth at least $436,000. The testator's estate was worth $10 million. The court said:

> Among the [relevant] considerations … are (1) the alternative takers under the will, (2) the dollar value of the testamentary gift to the surviving spouse, (3) the fraction of the estate represented by that gift, (4) whether comparable gifts were made to other persons, (5) the length of time between execution of the testamentary

> instrument and the marriage, (6) the duration of the marriage, (7) any inter vivos gifts the testator has made to the surviving spouse, and (8) the separate property and needs of the surviving spouse. For example, if a testator's will made token gifts to various friends, one of whom married the testator years later, the original gift is not likely to qualify as a "provi[sion] by will for his surviving spouse...."
>
> > The burden of establishing that a particular testamentary gift did not "provide" for the surviving spouse for purposes of [the omitted-spouse provision] is on the surviving spouse. In order to satisfy that burden, the evidence must be sufficient to establish that the testamentary gift specified before the marriage could not reasonably represent this testator's effort "to provide by will for his surviving spouse."....
>
> .... Though amounting to only four percent of the total value of the estate, [the surviving spouse's] $436,000 testamentary gift had a substantial dollar value, the marriage occurred a relatively short time after the codicils were executed, the marriage was extremely brief, and the record suggests that the testator made significant inter vivos gifts to [the surviving spouse]. Consequently, there was substantial support for the district court's conclusion that this was not a case where the testator had "fail[ed] to provide by will for his surviving spouse," and the omitted spouse provision ... was therefore inapplicable.

655 P.2d at 650.

Accord, Keeven's Estate, 716 P.2d 1224 (Idaho 1986), where the court held that the surviving spouse was not entitled to an omitted-spouse's share. The premarital will, executed nearly a year before the marriage and not executed in contemplation of the marriage, devised one-sixth of her real property to her later-to-be husband as "my dear friend." The court said:

> It is undisputed that the decedent and [the surviving spouse] were more than just friends. They had an intimate personal relationship and were living together well before the will was executed. Decedent provided that [the surviving spouse] have a portion of her real property equal to that of one of her children. Since the vast majority of her estate consisted of her home, this is more than a token inheritance. In fact, when the statutory allowances are included, [the surviving spouse's] share of the estate far exceeds the share of any of the children. [The surviving spouse] is amply provided for by the will and by the statutory allowances and with those factors mentioned above in mind he cannot be considered an omitted spouse. The magistrate's order that [the surviving spouse] is not an omitted spouse within the meaning of [the omitted-spouse provision] is, therefore, affirmed.

Estate of Herbach, 583 N.W.2d 541 (Mich.Ct.App.1998), took an opposing view. The court in that case held, as a matter of law, that a surviving spouse is not entitled to an omitted-spouse's share if the premarital will contains any devise to the person whom the testator later married and who turned out to be the testator's surviving spouse. The court held that it was irrelevant that the jury found that the premarital will, which was executed more than a year before marriage and which contained a $50,000 devise to the spouse as a "friend," was not executed in contemplation of the marriage. The testator and his surviving spouse were subsequently married for 12 years.

5. Effect of postmarital codicil. In Estate of Ivancovich, 728 P.2d 661 (Ariz.Ct.App.1986), Byron, the testator, and Janice, his wife, neither lived nor traveled together. She lived in Scottsdale and the 80-year-old testator lived in Tucson. During their marriage, Byron executed a codicil to his holographic will devising to her his residence and $100,000. Later, Byron revoked the codicil, and destroyed it because he wanted to omit Janice from his will. On December 14, 1984, Byron died. The court held that the codicil republished the will (see § 3.4), making it "speak from the new date." "Therefore," the court said, "a post-marriage codicil to a pre-marriage will has the effect of rendering inapplicable the rights granted to a surviving spouse by an omitted spouse statute."

In Will of Marinus, 493 A.2d 44 (N.J.Super.Ct.App.Div.1985), the court held that three postmarital holographic documents, which complied with the formalities for a holographic will but which were essentially burial instructions, did not republish the testator's premarital will and thus did not render the Original UPC omitted-spouse provision inapplicable.

6. Constitutionality. Mitchell v. Owens, 402 S.E.2d 888 (S.C.1991), upheld the constitutionality of the Original UPC omitted-spouse provision against a challenge based on the equal-protection clause of the 14th Amendment.

7. Effect of election to take elective share. Estate of Cole, 328 N.W.2d 76 (Mich.Ct.App.1982), held that an election to take the elective share does not waive the surviving spouse's right to a share under the omitted-spouse provision of the Original UPC.

8. Effect of prior divorce property settlement. Estate of Beauchamp, 564 P.2d 908 (Ariz.Ct.App.1977), held that a provision in a prior divorce settlement agreement, which had been incorporated into the divorce decree, requiring the testator to execute a will leaving his entire estate to the former spouse's children did not disqualify the surviving spouse from taking a share of the estate under the Original UPC omitted-spouse provision.

9. Effect of no-contest clause. Estate of Katleman v. Crowley, 13 Cal.App.4th 51, 16 Cal.Rptr.2d 468 (Cal.Ct.App.1993), held that a no-contest clause in the testator's premarital will did not preclude application of the Original UPC omitted-spouse provision because the clause did not clearly establish that the testator contemplated the possibility of later marriage or intended to disinherit a later spouse.

10. Omitted-spouse provision does not reach assets in premarital Totten Trust. Estate of Allen v. First Presbyterian Church, 12 Cal.App.4th 1762, 16 Cal.Rptr.2d 352 (Cal.Ct.App.1993), held that the omitted-spouse provision did not reach assets in a premarital Totten Trust.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Annotated Missouri Statutes
Title XXXI. Trusts and Estates of Decedents and Persons Under Disability [Chs. 456-475]
Chapter 474. Probate Code--Intestate Succession and Wills (Refs & Annos)
Taking Against Will

V.A.M.S. 474.235

474.235. Share of omitted spouse

Currentness

1. If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will, unless it appears from the will that the omission was intentional or that the testator provided for the spouse by transfer outside the will, and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator, the amount of the transfer or other evidence.

2. In satisfying a share provided by this section, the devises made by the will abate as provided in section 473.620.

Credits
(L.1980, S.B. No. 637, p. 481, § 1, eff. Jan. 1, 1981.)

Notes of Decisions (10)

V. A. M. S. 474.235, MO ST 474.235
Statutes are current through WID 37 of the 2022 Second Regular Session of the 101st General Assembly. Constitution is current through the November 3, 2020 General Election.

End of Document

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30081

In the Matter of the Estate of
JERRY L. SIMON,
Deceased.

Appeal from the Fourth Judicial Citcuit
Meade County, South Dakota
The Honorable Kevin J. Krull
Circuit Court Judge

APPELLEE ESTATE OF JERRY SIMON'S BRIEF

Elliot J. Bloom
Conor P. Casey
FIRM,
BEARDSLEY, JENSEN & LEE,
Prof. LLC
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709-9579
ebloom@blackhillslaw.com
ccasey@blackhillslaw.com
Attorneys for Appellants

Michael W. Strain
STRAIN MORMAN LAW

P.O. Box 729
Sturgis, SD 57785
(605)-347-3624
mike@mormanlaw.com
Attorneys for Appellee

NOTICE OF APPEAL FILED August 11, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

I. PRELIMINARY STATEMENT

The Appellee, estate of Jerry L. Simon, will be referred to as "Jerry's Estate" or "Appellee," and Jerry L. Simon will be referred to individually as "Jerry" or the "Testator." Appellant Lynda Simon will be referred to as "Appellant," "Petitioner" or "Lynda." This matter was originally heard in the Circuit Court, Fourth Judicial Circuit, by Judge Kevin J. Krull. The circuit court will be referred to herein as the "circuit court" and references to the Clerk's Index will be referred to as "CI" followed by the specific page number therein. Reference to the circuit court's Finding of Fact and Conclusions of Law will be referred to as "Findings" and "Conclusions," as appropriate, with reference to the paragraph number thereof.

II. JURISDICTIONAL STATEMENT

Steve Elgin, was appointed Personal Representative of Jerry's Estate on November 13, 2019 (CI at 7). Petitioner filed a Petition for an Intestate Share on January 4, 2021 (CI at 51, 53-54) to which Jerry's Estate filed an Objection to Petition for Intestate Share on January 11, 2021 (CI at 57-58). An Inventory for Jerry's Estate was filed on February 10, 2021 (CI at 62-63). An evidentiary hearing was held on Petitioner's Petition for Intestate Share on May 13, 2021 and continued on June 25, 2021. (CI at 500, 667). The circuit court entered Finding of Fact, Conclusions on July 8, 2022, and an Order denying Petitioner's Petition for an Intestate Share and a Notice of Entry of Order was filed on July 14, 2022 (CI at 870-871). Petitioner filed her Notice of Appeal on August 11, 2022 (CI at 870-871). A hearing transcript was ordered and the Alphabetical Index was filed on August 18, 2022. Jurisdiction is property under SDCL § 15-26A-3.

III. STATEMENT OF LEGAL ISSUE

Whether the circuit court appropriately denied Petitioner's Petition for an Intestate Share under SDCL § 29A-2-301.

IV. STATEMENT OF THE CASE

Jerry and Lynda were married on November 15, 2011. (CI at 507). Jerry's Last Will and Testament was executed on December 3, 2003, and predated Jerry's relationship with Lynda which began in 2005. (CI at 510, 631). Jerry's sole heir under the Last Will and Testament is his only child, DeLynn [Simon] Hanson, and no mention is made of Lynda in the Last Will and Testament. (CI at 512-513). The circuit court denied the Lynda's Petition for an Intestate Share under SDCL § 29A-2-301. (CI at 848-856). Jerry's Estate requests this Court to affirm the circuit court's decision.

V. STATEMENT OF THE FACTS

A. Jerry and Lynda bonded over their common interest in horses

In 2005, Jerry and Lynda met at the First Gold Hotel in Deadwood, South Dakota, where Lynda was a blackjack dealer. (CI at 508-509). Because First Gold was not busy on the day they first met, Lynda was reading a horse sale catalog at the blackjack table where she was dealing. (*Id.*) Jerry, himself an avid horseman, sat down at Lynda's table and started talking to her about horses. (*Id.*) Thereafter, Jerry continued to seek out Lynda's table at First Gold for blackjack and conversation about horses. (*Id.*). When they met, Lynda owned horses of her own and was in the process of selling all of them. (CI at 543-545). After selling many, Lynda was left with four mares. (Id.). Jerry suggested Lynda move the mares to his ranch and that she could choose what stallions

she could breed with her mares. (*Id*). Jerry and Lynda split the profits on every foal that was the result of this breeding. (*Id.*). None of Lynda's four mares was at the ranch at the time that Jerry and Lynda were married. (CI at 550). While retaining ownership of her own 80-acre property at 15051 Elk Creek Road, Box Elder, South Dakota 57719, (CI at 507, 510, and 513). Lynda moved to Jerry's ranch in the spring of 2009. Lynda and Jerry were married in November 2011. (CI at 507).

B. Simon Ranch

Jerry was the fourth generation Simon to be involved in the Simon Ranch, which is located at 15905 Moreau River Road, Mud Butte, South Dakota 57758. (CI at 506, 527). This ranchland was legally owned by a family corporation, Simon Ranch, Inc. (CI at 562). Prior to ownership by Jerry, stock of Simon Ranch was owned by Dale Simon and Jean Simon, who were Jerry's parents. Jerry's first and second wives were shareholders for a while. (CI at 562-563). However, since Jerry's divorce from his second wife and Jerry's acquisition of Simon Ranch, Inc. shares from his parents, Jerry (or Jerry's Estate) has been the sole shareholder of Simon Ranch, Inc. (*Id.*)

At the time Jerry and Lynda were married, Simon Ranch, Inc. owned 1,640acres, and also leased 964 acres from the State (CI at 648-649). The condition of the ranch and fences and other improvements noticeably deteriorated under Jerry's watch as his physical condition and the finances of the Simon Ranch interfered with the needed care and maintenance. (CI at 714-716). Lynda testified that she mortgaged her own land to support the ranch, provided cash to the ranch out of her own retirement account and inheritance from her father's estate, used her own credit cards for the ranch's expenses, and even provided hay when the ranch was short for the winter. CI at 512-522). While

she may have contributed a relatively small amount to the ranch financially throughout the marriage, cross examination of Lynda and testimony of other witnesses demonstrates that the overall amount of her claimed financial support was relatively insignificant. (CI at 570-574, 705-710). An analysis of the ranch's finances by Jerry's daughter shows that the financial contribution provided by Lynda was very low compared to that provided by Simon Ranch, Inc. and Jerry. (Id.). Lynda also enjoyed the benefits of living on the Simon Ranch otherwise free of charge during her marriage to Jerry. (CI at 574-574). Further, the loans from Lynda have been repaid. (CI at 513).

C. American Quarter Horse Association joint accounts and other joint property

Jerry created a substantial horse herd along with maintaining a smaller number of cattle at the Simon Ranch. There were 100 to 125 head of horses at the ranch. At the time of Jerry and Lynda's marriage, all of the horses at Simon Ranch were registered in Jerry's name at the American Quarter Horse Association ("AQHA"). In 2014, Jerry developed a plan to add Lynda's name on horses acquired by purchase and from Jerry's breeding stock by converting her lifetime membership AQHA account to a joint AQHA membership. This joint lifetime membership was established so Lynda would have ownership in these horses and would receive ownership of these horses at Jerry's death. You can only do this one time though. (CI at 624 – 626.) After the joint account was established, all horses acquired and foals born from Jerry's horses were put into the joint AQHA membership. (CI at 523 – 525) The plan was followed as to new horses, but existing horses were not transferred to the joint AQHA account from Jerry's individual AQHA account to avoid the cost of their transfer. (CI at 525 – 526)

During the marriage, Lynda was also added as a joint tenant on various items with titles, such as motor vehicles. A small number of titled items showed Jerry, Lynda and Jerry's daughter DeLynn as joint owners. (CI at 523).

D. Conversations with Jerry on Financial and Estate Topics

Jerry was a true cowboy. Even in conversations with close friends, he rarely talked about anything other than horses. Topics such as the financial state of the Simon Ranch and estate planning were rarely, if ever discussed. The one exception in Jerry's life was a neighbor, Casey Humble. They talked almost daily. Before his marriage to Lynda, Jerry confided with Casey about his intent to marry for a third time. When questioned by Casey about the advisability of doing so and Jerry's intentions concerning ownership of Simon Ranch in the future, Jerry mentioned his existing Last Will and Testament and responded that Simon Ranch would go to DeLynn and ultimately to her children. (CI at 675 – 676; 731 – 732). Although Jerry's first two wives acquired some shares in Simon Ranch, those shares had been reacquired by the corporation and Jerry planned that DeLynn would be his successor owner of the shares. (CI at 675-676, 701-702)

E. Jerry's death and subsequent conversation with Jean Simon

Jerry died on September 28, 2019 at a time when his mother, Jean Simon, was still living. (CI at 506, 604 and 1). Lynda and DeLynn, along with DeLynn's husband and children, travelled to Spearfish to inform Jean Simon of Jerry's death. In their meeting, Jean Simon was concerned with the future of the ranch. (CI at 606). Lynda told Jean Simon in the presence of DeLynn and her family that the ranch would go to DeLynn

and her children. (Id.) In this meeting, Lynda did not suggest that the some of the property may need to be mortgaged and then sold to finance the purchase of an interest to be acquired by Lynda hersehf. (Id., 590-591). The circuit found this statement by Lynda to be a statement against interest. (CR at 855, Conclusion 14).

F. Value and disposition of the Simon Ranch horses

All of the horses were owned by Jerry and/or the Simon Ranch were sold at an auction sale conducted on December 4, 2019. The total value of the horses held in joint tenancy that were either retained by Lynda or sold at the sale was $77,026,88. (CI at 69-70). The total value of the horses owned by Jerry's Estate and sold at the auction totaled $109,250.00. (CI at 65-68) Thus, during the five years after the AQHA account was created, Lynda acquired approximately 41.35% of the value of the horses from the joint tenancy transfers.

VI. ARGUMENT

A. Standard of Review

This Court reviews a trial court's finding of fact under the clearly erroneous standard. *In Re Estate of Martin*, 201 SD 123, 635 N.W.2d 473, 476 (S.D. 2001) (quoting *In Re Estate of Jetter*, 199 SD 33, 590 N.W. 2d 254, 257.

> Under the clearly erroneous standard, the question for this Court is not whether we would have made the same findings that the trial court did, but, whether on the entire evidence, we are left with a definite and firm conviction that a mistake has been committed. That this Court may have found the facts differently had we heard the testimony is no warrant for us to substitute our

judgment for the trial court's carefully considered findings. *Estate of Long*, 1998 SD 15, 575 N.W.2d 254,256.

The issues raised by Appellant relate to the factual findings of the circuit court: Whether Jerry provided for Lynda by transfer outside the will and if the intent that the transfer be in lieu of a testamentary provision is shown by Jerry's statements or is reasonably inferred from the amount of the transfer or otherwise. This determination did not require the circuit court to "exercise judgment about the values that animate legal principles" as suggested by the Appellant. This Court should review the circuit court's decision under the clearly erroneous standard, i.e. the question for this Court is not whether it would have made the same findings that the trial court did, but, whether on the entire evidence, the Court is left with a definite and firm conviction that a mistake has been committed.

B. SDCL § 29A-2-301

The statute as issue in this case is SDCL § 29A-2-301, which states in relevant part as follows:

> A testator's surviving spouse who married the testator after the execution of the testator's will is entitled to receive, as an intestate share, no less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate, unless . . . (3) The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or otherwise.

Jerry's Estate does not argue that Jerry changed his 2003 Last Will and Testament after his marriage to Lynda or that Jerry stated that the transfers he made outside the will were to be in lieu of a testamentary provision. As such, the factual inquiries for the circuit court were twofold:

1. Did Jerry provide for Lynda by transfers outside the 2003 Last Will and Testament; and

2. Was it reasonably inferred from the amount of the transfers or other evidence that the transfers were made with the intent that they be in lieu of a testamentary provision.

Appellant does not dispute that Jerry's transfer of horses to Lynda in joint tenancy were transfers to her outside his 2003 Last Will and Testament. Rather, Appellant claims that it cannot be reasonably be inferred from the amount of the transfers or other evidence that the transfers were made with the intent that they be in lieu of a testamentary provision.

Although there is relatively little case law in any state involving omitted spouse statutes, there are statutes similar to SDCL § 29A-2-301in other states that were also were derived from the Uniform Probate Code. One state with a similar provision in Alabama. In *Ferguson v. Critopoulos*, 163 So. 2d 330 (Ala. 2014), the Supreme Court of Alabama discussed Section 43-8-90 of the Alabama Code which read as follows:

> If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision be reasonably proven.

In *Ferguson*, the Alabama Supreme Court stated "[t]he purpose of s 43-8-90 is to avoid an unintentional disinheritance of the spouse of a testator who had executed a will prior to the parties' marriage. It serve to give effect to the probable intent of the testator and protects the surviving spouse."

The Ferguson court as follows regarding a determination whether the testator provided for the surviving spouse outside the will with the requisite intent:

1. Inter vivos transfers that have been held to be "transfers" in lieu of testamentary provisions include joint-tenancy checking and savings accounts and assignments of retirement or insurance benefits;
2. The size of the inter vivos transfer or a transfer that passes outside the estate in relation to the intestate share may be a relevant comparison, but there is no requirement that the inter vivos or extra-estate gift be approximate the same as the intestate share in order to qualify as a transfer in lieu of a testamentary provision;

3. A valid prenuptial agreement is a "transfer" outside the will and constitutes sufficient proof of intent that transfer is in lieu of a testamentary provision;[1]
4. Statement made by the testator concerning transfers outside the will may be relevant to show the testator's intent that the transfers be in lieu of a testamentary provision;
5. Statements made by the testator concerning the old will in relation to the new marriage may be relevant to show the testator reexamined the will and did not change the will;
6. The separate estate of the surviving spouse may be relevant;
7. The duration of the marriage may be relevant; and
8. The beneficiaries under the will may be relevant.

After listing the above factors that may be considered, the Ferguson Court proceeded to state as follows:

> Because s 43-8-90 is designed to give effect to the provable intent of the testator and protect the surviving spouse, the above listed relevant considerations or factors are not exclusive. Other factors may also be considered. The factors relevant in one case may not be relevant in another. These factors are not a mechanical checklist to reasonably prove the testator's intent that the transfer be in lieu of a testamentary provision because the

[1] Jerry and Lynda did not have a prenuptial agreement.

circumstances and facts vary from case to case in probate proceedings such as this.

The first two factors above expose two deficiencies on Appellant's argument concerning the dollar amounts involved:

1. From the first two factors above, it is apparent that both inter vivos transfers and transfers passing outside the estate are to be considered. Appellant's analysis only considers the values of the horses held by Jerry and Lynda in the joint account at Jerry's death, and Appellant fails to consider the value of the initial joint tenancy value of the gift of horses that were not at the Simon Ranch at Jerry's death or Jerry's cost (directly or indirectly through Simon Ranch, Inc.) of feeding and caring for the horses, many of which were co-owned by Appellant. (CI at 570-574, 705-710).
2. From the second factor above, it is clear that consideration of the amount is not a simple arithmetic task. A comparison of the transfers outside the will with the value of the intestate share may be a comparison. It is also true that the comparison may not prove to be appropriate, or that the relevant value for comparison may be to a smaller portion of the value of the entire intestate amount.

The fourth *Ferguson* factor above is also relevant in this case: Statement made by the testator concerning transfers outside the will may be relevant to show the testator's intent that the transfers be in lieu of a testamentary provision.

1. First, it is important to note that such statements "may be relevant" to show the testator's intent that the transfers be in lieu of a testamentary provision. Such statements are not required or necessarily relevant.
2. Second, statements made by the testator concerning transfers outside the will may be relevant to show that the testator's intent that the transfers be in lieu of a testamentary provision. In other words, the statements by the testator concerning transfers outside of the will may (or may not) include an express statement that the transfers are in lieu of a testamentary transfer. Thus, even under the South Dakota statute, the intent that the transfer be in lieu of a testamentary provision can be shown by testator's other statements or inferred from other evidence.

The fifth *Ferguson* factor above is clearly relevant in this case: Statements made by the testator concerning the old will in relation to the new marriage may be relevant to show the testator reexamined the will and did not change the will. When quizzed by Casey Humble about the ranch "if something happens" while Jerry is married to Lynda, Jerry reaffirmed the provisions in his existing Last Will and Testament passing the ranch to his daughter DeLynn.(CI at 674-676).

The sixth *Ferguson* factor above is also relevant in this case: The separate estate of the surviving spouse may be relevant. Following the marriage to Jerry, Lynda owned a separate 80- acre property at 15051 Elk Creek Road, Box Elder, South Dakota 57719. Lynda owned horses at this location prior to her marriage to Jerry and continued to own it after his death. (CI at 507, 510, and 513). Under the seventh *Ferguson* factor above, the duration of the marriage may be relevant. In this case, Jerry was in his 70s when he

married Lynda, and the marriage lasted about 7 years. Although the SDCL § 29A-2-301 and the elective share statutes do not expressly cross-reference each other, it is informative to note that the *elective share percentage for a 7 year marriage is only 21%.*

The eighth Ferguson actor above is the beneficiaries under the will. Here, the sole beneficiary under the will is Jerry's only child, DeLynn. (CI at 512-513). Thus, under Jerry's Last Will and Testament, the Simon Ranch (legally 100% of the shares of Simon Ranch, Inc.) would pass to DeLynn, who then could pass it along to her children, thereby continuing the long-standing tradition of keeping the Simon Ranch in the family. The desire to keep the Simon Ranch in the Simon family, and not in the hands of former spouses, is evident by the redemptions of Judith Simon and Peggy Simon following their respective divorces from Jerry. (CI at 562-563). Jerry advised his daughter that she was to receive the ranch, which would make the daughter the 5th generation owner of the Simon Ranch (CI at 703). In what the circuit court found to be an admission against interest, Appellant admitted that Jerry's daughter, De Lynn was to receive the ranch and that it was to stay in the family. (CI at 855, Conclusion 14).

Appellant focuses primarily on (i) the lack of express statements by Jerry that transfers of the joint interests in the horses and titled vehicles were in lieu of a testamentary provision and (ii) the amount of the transfers relative to the size of the entire estate in asking this Court to overrule the circuit court in this matter. Appellant's statement that "no evidence, except for the amount of the transfers outside of the will, qualifies at the type of evidence contemplated in SDCL § 29A-2-301" exemplifies Appellant's incorrect narrow view of the "other evidence" language in this statute.

VII. CONCLUSION

There is an old saying: "actions speak louder than words." This is well recognized, and was adopted by the legislature when creating the phrase in 29A-2-301(a)(3) allowing for "other evidence " of the testator is intention to provide for spouse outside of the will. The methods provided were all met. The statement to Casey Humble that Lynda would not be in the will and no need to know about implies that these going to take care of her outside of the will. Second, she had no quarter horses when they were married. She had no quarter horses when she moved the ranch two years earlier. The only reasonable inference from that is that Jerry was taking care of Lynda outside of the will. She received 41% of the Estate value of the quarter horses after 8 years of marriage. Finally, Lynda admitted that the ranch was to stay with the DeLynn and the grandchildren. By that admission, she knows she's not going to be part of the ranch and therefore was taking care of outside of the estate. Her exercising now the intestate share would circumvent that admission. The trial court did not err in determining that she was taken care of outside the will because all of the evidence supported that conclusion.

VIII. REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests oral argument in this matter.

IX. CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that Appellee's Brief complies with the type volume limitations provided for in the South Dakota Codified Laws. This Brief contains 4,247 words and 25,036 characters. I have relied on the word and character count of our processing system used to prepare this Brief. This original Appellee's Brief and all copies are in compliance with this rule.

Dated this 6th day of December, 2022

STRAIN MORMAN LAW FIRM

By: /s/ Michael W. Strain

Michael W. Strain
Attorney for Estate
1134 Main Street, P.O. Box 729
Sturgis, South Dakota 57785
mike@mormanlaw.com
(605) 347-3624

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the **Appellee Estate of Jerry Simon's Brief** relative to the above-entitled matter upon the person herein next designated, all on the date below shown, and addressed as follows:

Elliot J. Bloom	[x]	U.S. Mail (postage prepaid)
Beardsley Jensen & Lee	[x]	Electronic File & Serve
PO Box 9579	[ ]	E-mail
Rapid City, SD 57709	[ ]	Hand Delivery
	[ ]	Facsimile

which address is the last address known to the subscribed.

Dated this 6th day of December, 2022.

/s/ *Michael W. Strain*
Michael W. Strain

APPENDIX

APPENDIX

TABLE OF CONTENTS

Tab

STATE OF SOUTH DAKOTA COUNTY OF MEADE	))SS)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT 46PRO19-000046

In the Matter of the Estate of JERRY L. SIMON, Deceased.	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER**

The above entitled matter came before this Court for trial on the 13th day of May, 2021 and the 25th day of June, 2021, at 8:30 a.m. respectively, at the Meade County Courthouse, Sturgis, South Dakota. Petitioner, Lynda Simon, appeared personally and by and through her attorney, Elliot Bloom of Beardsley Jensen & Lee in Rapid City, South Dakota. Respondent, Estate of Jerry L. Simon, is represented by and through its attorney, Michael W. Strain of Strain Morman Law Firm in Sturgis, South Dakota.

The Court having heard testimony, reviewed the pleadings, files, records, and other evidence in this matter, and being fully informed in the premises, does hereby make and enter its Findings of Fact and Conclusions of Law and Order as follows:

FINDINGS OF FACT

1. The Jerry L. Simon Estate ("Estate") was created after the death of Jerry L. Simon ("Decedent") on September 28th, 2019.
2. Steve Elgen was appointed as the Personal Representative of the Estate.
3. That Decedent was the son of Dale and Jean Simon and subsequently married to Judith Simon. Prior to January 31st, 1979, the Simon Ranch, Inc., was formed, with Dale, Jean,

Jerry, and Judith Simon, and Homer Ayres as the owners of the stock of the corporation. (Exhibit A).

4. As of January 27th, 1982, Dale, Jean, Jerry, and Judith Simon were the sole owners of the stock of Simon Ranch, Inc. (Exhibit A). That on or about June 9th, 1987, Decedent and Judith Simon were divorced. As part of the divorce decree, Judith Simon retained ownership of the stock registered in her name in Simon Ranch, Inc. (Exhibit B).
5. That after the divorce was finalized, Simon Ranch, Inc., purchased the retained shares of Judith Simon. (6/25/21: pp.34-ln.19 to pp.35-ln.3).
6. After the divorce, Decedent subsequently married Penny L. Simon. That during the course of this marriage, Penny L. Simon acquired one (1) share of Simon Ranch, Inc. (6/25/21: pp.35-ln.4-1n.15). That as a result of the divorce which was entered into on July 3rd, 2003, Penny Simon was required to transfer her one (1) share back to the Simon Ranch, Inc.
7. Through the 1990s, Dale Simon and Jean Simon began to gift and sell shares to Jerry Simon. With the transfers completed, Decedent had acquired all shares of Simon Ranch, Inc. (Exhibit B).
8. On the 3rd day of December, 2003, Jerry Simon executed a new Will devising, giving, and bequeathing to DeLynn Hanson (Simon), the only daughter of Jerry and Judith Simon, all of his property of every kind and character. (Will on file). At the time the Decedent executed his will, he did not know Petitioner Lynda Simon.
9. The largest asset of Simon Ranch, Inc. is the real estate. (Inventory on file).
10. That the only non-land asset owned by Simon Ranch, Inc., was a 2014 Ford F350 Super Duty Pickup, and a Massey Ferguson Tractor. (Exhibit F).

11. After the second divorce was finalized and after acquiring 100% of the stock in Simon Ranch, Inc., Decedent further advised his daughter that she was to receive the ranch. (6/25/21: pp.37-ln.11-ln.13). DeLynn Hanson would have been the 5th generation owner of the ranch. (6/25/21: pp.37-ln.20-ln.25). Ms. Hanson is the mother of Decedent's two (2) grandchildren, Chase, and Timber Rose. (6/25/21: pp.32-ln.8-ln.12).
12. Decedent met Petitioner, Lynda Simon, while she was dealing blackjack at the First Gold Gaming Resort in Deadwood, South Dakota, in the fall of 2005. Petitioner and Decedent bonded over their common love for horses. Petitioner and Decedent began dating in late 2005. Petitioner began living on Decedent's ranch in 2009, and Petitioner and Decedent were married on November 15th, 2011. That during the time prior to marriage to Petitioner, Decedent had conversations with Casey Humble, a neighbor and close friend. During a point in time, discussions were had between Mr. Humble and Decedent concerning the upcoming marriage of Decedent to Petitioner, Lynda Neumiller. Decedent was very direct in advising that what was going to happen to the ranch, and he advised that he had a Will, it was going to go to DeLynn, and it was intended for his grandchildren, Timber and Chase. Decedent further advised that no one else knew about the Will, and no one needed to know. (6/25/21: pp.8-ln.8 to pp.9-ln.14).
13. During his lifetime, Decedent created a substantial horse herd, along with running cattle. He began to downsize his cattle herd, and began acquiring old cows and pairs in the spring and selling them in the fall. (6/25/21: pp.10-ln.20 to pp.11-ln.18).
14. Over the course of time, Decedent had acquired at a minimum over 100-125 head of horses running on his ranch. (6/25/21: pp.11-ln.19 to pp.13-ln.8).

15. That Petitioner, when dating Decedent, reached an arrangement concerning the care of her four (4) mares. One (1) mare had died while at the ranch so when Petitioner moved to the ranch in 2009, there were only three (3) horses that she had sent to the ranch. (5/13/21: pp.46-ln.24 to pp.47-ln.5). By the time that Petitioner and Decedent were married, there were no more horses owned by Petitioner at that time. (5/13/21: pp.49-ln.20 to pp.50-ln.15).
16. All horses at the time of the marriage were in the name of Decedent through the American Quarter Horse Association (AQHA). (5/13/21: pp.55-ln.24 to pp.57-ln.2).
17. In 2014 a plan was developed to put Petitioner's name on the horses acquired by purchase and from Decedent's breeding stock, utilizing a newly developed joint membership AQHA acquired between Decedent and Petitioner. The lifetime membership was set up as a joint-tenant relationship so Petitioner would receive the ownership of the horses upon the death of Decedent.
18. After that date, all horses acquired, and foals born from Decedent's horses were put into the joint tenant membership AQHA. (5/13/21: pp.57-ln.24 to pp.59-ln.3).
19. That discussions were had concerning transferring all Decedent's horses over to the joint membership. Decedent thought that the cost would be too expensive to transfer all prior horse acquisitions and foals. (5/13/21: pp.59-ln.4-ln.21). Petitioner admitted that the plan was for Decedent to transfer the horse business over to her name during the course of the relationship. The evidence showed by the transfers of the studs, horses, and foals occurring over time confirmed that intent. (5/13/21: pp.60-ln.6). Further, all new mares that were acquired were put into the AQHA (joint tenant) ownership account. (5/13/21: pp.24-ln.11 to pp.26-ln.14).

20. That after the joint tenant AQHA account was created, between 2014 and 2019, Decedent, through Simon Ranch, Inc., incurred approximately $76,283.00 worth of horse-related expenses for the benefit of Decedent and Petitioner. Further, between 2014 and 2019, horses acquired through the use of Simon Ranch, Inc., proceeds for horse purchases was $116,156.00. (Exhibits E, E1, E2, E3, E4, E5).
21. Between 2014 and 2019, various horses were sold for the benefit of the partnership totaling $63,809.00. (Exhibit E6).
22. During the course of the marriage, Decedent placed the name of Petitioner on various motor vehicles and other items of title. On some of those items, Decedent's daughter, DeLynn Hanson, was also on the title. (Exhibit G; H).
23. That Decedent and Petitioner never had any discussions about transfer of stock certificates of Simon Ranch, Inc. (5/13/21: pp.62-ln.15-ln.22).
24. Petitioner was aware that Decedent's prior wives had ownership interests in the stock. (5/13/21: pp.62-ln.23 to pp.63-ln.12).
25. Decedent died in September 2019. A horse sale was conducted on December 4th, 2019. The value of the horses received or were the horses that were owned in joint tenancy and were either retained or sold by Petitioner at the sale for $77,026.88. (Exhibit J).
26. That the total value of the horses owned by Decedent at his date of death were sold totaling $109,250.00. (Exhibit K).
27. Over the course of the five (5) years that the AQHA joint tenancy account was created, Petitioner acquired approximately 41.35% of the value of the horses by either sale, or retention.

28. That in May of 2018, Petitioner authorized a mortgage to be placed on the NE ¼ of Section 16, Township 3N, Range 9E of the Black Hills Meridian, Meade County, South Dakota, accepting out lot 1 and lot 2. This property is owned in her maiden name, to-wit: Lynda M. Neumiller, for a line of credit for the Simon Ranch, Inc. (Exhibit 1; 5/13/21: pp.12-ln.16 to pp.13-ln.16). This mortgage was satisfied by the estate after the death of Decedent. (Exhibit 1).

29. It is noted that the title to the property in Meade County which was mortgaged was in the name of Lynda Neumiller. The property was never included as an asset of the Estate. That would suggest that the parties chose to keep real estate owned by them separate from joint ownership. (Exhibit 1). This intent is exhibited by the testimony of Petitioner who confirmed with Jean Simon, mother of Decedent, when asked by her what was going to happen to the Simon Ranch after Decedent's death, she was advised by Petitioner that the Ranch would stay in the family, and ultimately belong to Chase and Timber Hanson. (5/13/21: pp.86-ln.15 to pp.88-ln.7).

Based upon the foregoing Findings of Fact, the Court now makes and enters the following Conclusions of Law.

CONCLUSIONS OF LAW

1. Any conclusion of law deemed to be a finding of fact and vice versa shall be appropriately incorporated into the Findings of Fact or Conclusions of Law as the case may be.
2. The Court has jurisdiction over the parties and the subject matter of this action.
3. Proper notice of all relevant proceedings has been provided to all known parties pursuant to law.

4. The surviving spouse (Lynda Simon) is entitled to an elective share of the Estate. The two were married for 7 years but less than 8 years and thus Lynda is entitled to 21% of the augmented estate. § SDCL 29A-2-202.
5. Granting Petitioner's request of an intestate share goes directly against the wishes of the deceased. In awarding Lynda an intestate share, the Ranch that has been in the Estate's family for over one hundred years would have to be sold. (5/13/21: p90-l23 to p91-l2).
6. The overall statutory scheme of § SDCL 29A-2-202 takes care of the surviving spouse and allows the spouse an elective share based on the years that the couple were married.
7. That 21% of the augmented estate has not been determined as of this time.
8. Pursuant to the Will and the South Dakota Codified Laws, Lynda is due the elective share of the Estate at the rate of 21% of the augmented estate.
9. Petitioner filed a Statement of Claim requesting that she be allowed to exercise her intestate share under § SDCL 29A-2-301, since she was omitted from the Will which was drafted before the marriage of Petitioner and Decedent.
10. § SDCL 29A-2-301(a)(3) provides an exception to a subsequent spouse's entitlement to an intestate share if *"[t]he testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence."* (Emphasis added).
11. That Petitioner had no ownership interests in any of Decedent's horses when the couple was married in 2011. After they were married, Decedent took steps to create the joint tenancy ownership of Petitioner and Decedent of all newly purchased horses and of foals that were born of Decedent's existing horse herd. By creating such joint-tenancy

ownership of Decedent's assets, and subsequently-acquired horses paid for by the Simon Ranch, Inc., those transactions would qualify as transfers outside of the Will and would provide compensation to Petitioner.

12. That the testimony of Casey Humble indicated that Decedent said that Simon Ranch, Inc., which is a 5th generation ranch, was to go to DeLynn, and Decedent's grandchildren. This would qualify as a statement under § SDCL 29A-2-301(a)(3).

13. That the amount of transfer made up until Decedent's time of death, which occurred approximately five (5) years after the arrangement was made, is approximately 41.35% of the value of Decedent's horses which is determined by the sale of the horses. By comparison, under the elective share statute, Petitioner would be entitled to only 21% of the augmented estate.

14. The other evidence in this case clearly shows that Decedent intended the ranch to stay in the family, and Petitioner acknowledged that fact. Petitioner kept her real estate located in Meade County in her own name, and the Simon Ranch property was still in the ownership of Simon Ranch, Inc. No discussions were ever had concerning transfers of shares to Petitioner by Decedent. The Decedent's intent was that Simon Ranch, Inc., was to stay in the family and eventually go to DeLynn Hanson and then to the grandchildren of Decedent. Petitioner admitted that this was the arrangement between the parties. An admission against interest is binding upon that party. Although an exception to the hearsay rule, an opposing party's statement is admissible against that party. § SDCL 19-19-801(d)(2). Here, it was an admission by the declarant that the Decedent intended the Ranch to stay in the family.

15. The evidence shows that the transfers of the new foals produced by Decedent's mares, and future acquisitions to joint-tenancy ownership by Petitioner and Decedent show that Decedent intended to provide for this spouse outside of the Will, and the plan, had Decedent not expired, would have allowed the eventual total ownership of the horses to Petitioner.

16. The year before Decedent died, he reiterated to others that DeLynn and the kids were to get the Ranch, demonstrating his testamentary intent.

17. The evidence presented shows that Decedent provided for the spouse outside of the Will by his statements, transfers made, the amount of the transfers, and the other evidence presented.

ORDER

The application by Petitioner to apply SDCL 29A-2-301 for an intestate share of the Decedent's estate is hereby DENIED.

Dated this 8th day of July, 2022.

BY THE COURT:

Kevin J. Krull
Circuit Court Judge

Attest: LINDA KESZLER
Clerk
By Jen Rude
Deputy

FILED
JUL - 8 2022
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

§

South Dakota Codified Laws
Title 15. Civil Procedure
Chapter 15-26a. Rules of Civil Appellate Procedure (Refs & Annos)

SDCL § 15-26A-3

15-26A-3. Judgments and orders of circuit courts from which appeal may be taken

Currentness

Appeals to the Supreme Court from the circuit court may be taken as provided in this title from:

(1) A judgment;

(2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;

(3) An order granting a new trial;

(4) Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment;

(5) An order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership, or deposit in court;

(6) Any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding; or

(7) An order entered on a motion pursuant to § 15-6-11.

Editors' Notes

Credits

Source: SDC 1939 & Supp 1960, § 33.0701; SDCL § 15-26-1; SL 1971, ch 151, § 2; SL 1986, ch 160, § 2.

COMMISSION NOTE

The Code Commission deleted "or from the district county court, or from the municipal court" after "circuit court" in the preliminary paragraph, to show the effect of SL 1973, ch 130, § 10, which abolished all district county courts and municipal courts and transferred jurisdiction to the circuit courts. See § 16-6-9.

The remedy of arrest and bail was provided by chapter 15-22, which was repealed by SL 1980, ch 165, §§ 1 to 33.

Notes of Decisions (223)

S D C L § 15-26A-3, SD ST § 15-26A-3
Current through laws of the 2022 Regular Session and Supreme Court Rule 22-10

End of Document

South Dakota Codified Laws
Title 29a. Uniform Probate Code (Refs & Annos)
Chapter 29A-2. Intestate Succession and Wills (Refs & Annos)
Part 3. Spouse and Children Unprovided for in Wills

SDCL § 29A-2-301

29A-2-301. Entitlement of spouse--Premarital will

Currentness

(a) A testator's surviving spouse who married the testator after the execution of the testator's will is entitled to receive, as an intestate share, no less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate, unless:

(1) It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(2) The will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

(3) The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises abate as provided in § 29A-3-902.

Credits

Source: SL 1995, ch 167, § 2-301.

S D C L § **29A-2-301**, SD ST § **29A-2-301**
Current through laws of the 2022 Regular Session and Supreme Court Rule 22-10

End of Document

IN THE SUPREME COURT

OF THE STATE OF SOUTH DAKOTA

Appeal No. 30081

In the Matter of the Estate of

JERRY L. SIMON,

Deceased.

Appeal from the Fourth Judicial Circuit
Meade County, South Dakota
The Honorable Kevin J. Krull
Circuit Court Judge

APPELLANT LYNDA SIMON'S REPLY BRIEF

Elliot J. Bloom
Conor P. Casey
BEARDSLEY, JENSEN
& LEE, Prof. LLC
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709-9579
ebloom@blackhillslaw.com
ccasey@blackhillslaw.com
Attorneys for Appellants

Michael W. Strain
STRAIN MORMAN LAW FIRM,
P.O. Box 729
Sturgis, SD 57785
(605)-347-3624
mike@mormonlaw.com
Attorneys for Appellee

NOTICE OF APPEAL FILED August 11, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

SECONDARY SOURCES:

I. PRELIMINARY STATEMENT

The lower court's failure to apply SDCL 29A-2-301 correctly merits reversal by this Court. South Dakota law instructed the lower court to consider the reasonable inference drawn from the amount of transfers Lynda received from Jerry; however, it failed to do so. Given the lack of record evidence of Jerry's intent regarding Lynda's transfers, the amount of Lynda's transfers shows that Lynda was not provided for and is an omitted spouse. The specific language of SDCL 29A-2-301 must be followed and the lower court's error reversed. Thus, Appellant requests this Court reverse the lower court and find that Lynda is an omitted spouse entitled to an intestate share.

II. ARGUMENT

A. The Standard of Review is Based on the Legal Principles SDCL 29A-2-301 Specifies.

Appellant's challenge requires this Court to consider "legal concepts in the mix of fact and law and to exercise judgement about the values that animate legal principles." *See Huether v. Hihm Transp. Co.*, 2014 S.D. 93, ¶ 14, 857 N.W.2d 854, 860-61 (citing *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 16, 790 N.W.2d 52, 59). Most specifically, Appellant challenges the lower court's following conclusions:

> 12. That the testimony of Casey Humble indicated that Decedent said that Simon Ranch, Inc., which is a 5th generation ranch, was to go to DeLynn, and Decedent's grandchildren. This would qualify as a statement under SDCL 29A-2-301(a)(3).

13. That the amount of transfer made up until Decedent's time of death, which occurred approximately five (5) years after the arrangement was made, is approximately 41.35% of the value of Decedent's horses which is determined by the sale of the horses. By comparison, under the elective share statute, Petitioner would be entitled to only 21% of the augmented estate.

14. The other evidence in this case clearly shows that Decedent intended the ranch to stay in the family, and Petitioner acknowledged that fact. Petitioner kept her real estate located in Meade County in her own name, and the Simon Ranch property was still in the ownership of Simon Ranch, Inc. No discussions were ever had concerning transfers of shares to Petitioner by Decedent. The Decedent's intent was that Simon Ranch, Inc., was to stay in the family and eventually go to DeLynn Hanson and then to the grandchildren of Decedent. Petitioner admitted that this was the arrangement between the parties. An admission against interest is binding upon that party. Although an exception to the hearsay rule, an opposing party's statement is admissible against that party. Here, it was an admission by the declarant that the Decedent intended the Ranch to stay in the family.

15. The evidence presented shows that Decedent provided for the spouse outside of the Will by his statements, transfers made, the amount of the transfers, and the other evidence presented.

(CI at 855-56.) To determine whether Jerry intended certain transfers to Lynda were to be in lieu of a testamentary provision, this Court must exercise judgement about the values of certain legal principles; namely, the legal principles relevant to this inquiry under SDCL 29A-2-301 regarding Jerry's intent. While this inquiry necessarily mixes in facts to "animate" the legal principles within SDCL 29A-2-301, the mixing of

such facts does not somehow make the overall question before this Court "essentially factual". *See Huether*, 2014 S.D. 93, ¶ 14, 857 N.W.2d at 860-61 (citing *Stockwell*, 2010 S.D. 79, ¶ 16, 790 N.W.2d at 59).

Appellee argues that "[t]he issues raised by Appellant relate to the factual findings of the circuit court: Whether Jerry provided for Lynda by transfer outside the will and if the intent that the transfer be in lieu of a testamentary provision is shown by Jerry's statements or is reasonably inferred from the amount of the transfer or otherwise". (*See* Appellee's Brief at pg. 6.) Again, Appellant's challenge revolves around whether the record evidence was the qualified evidence required under SDCL 29A-2-301(a)(3) or otherwise proves that Jerry intended for certain transfers "be in lieu of a testamentary provision". *See* SDCL 29A-2-301(a)(3). To determine if certain types of evidence move the Estate's burden under SDCL 29A-2-301(a)(3), review of the lower court's application of law is required. The lower court's ruling contains a number of de novo errors, as to which types of evidence it did and did not consider. As such, the proper standard of review for this inquiry is de novo.

B. *The Lower Court Ignored the Most Relevant Piece of Evidence on Record: Lynda's Transfers Represented Only 7.99% of the Value of Jerry's Estate.*

Under SDCL 29A-2-301, the legislature listed three categories of evidence that qualify to show whether a testator intends for certain transfers to be in lieu of a testamentary provision:

(1) testator's statements;

(2) the reasonable inference the value of the transfers provides; and

(3) other evidence.

It was the Estate's burden to provide the lower court with evidence that fit into those three categories. *See* Uniform Probate Code § 2-301 (1993) (Reply Appx. 001) (stating the Estate had the burden to proof on the exceptions contained in subsection (a)(3)).

On the record before this Court, there is no evidence that Jerry made any statements that showed he intended for the transfers made to Lynda to be in lieu of a testamentary provision. Appellee has already admitted that Jerry never had any sort of discussion when arguing that Jerry's statements provided on this record are actually "other statements" and not statements regarding his intention that Lynda's transfers be made in lieu of a testamentary provision. (*See* Appellee's Brief at pg. 11.)

Jerry's conversation with Casey Humble does not qualify as a statement under SDCL 29A-2-301. The lower court erred when it concluded that Casey Humble's testimony regarding his conversation with Jerry was a "statement" as defined under South Dakota law. (*See* CI at 855.) Subsection (a)(3) of SDCL 29A-2-301 specifically states that the types of statements to be considered are only those which involve a ***testator's intention regarding transfers*** being in lieu of a testamentary provision. *See* SDCL 29A-2-301(a)(3). Casey's testimony

regarding his single conversation with Jerry did not involve any discussion regarding the transfers to Lynda or estate planning in general, only referred to divorce and the conversation between Jerry and Casey took place prior to any transfers being made. (CI at 674-675.) As such, the lower court's conclusion of law in this regard is de novo error. Further, to the extent that Casey's testimony may be considered "other evidence", no reasonable inference provides that Jerry's discussion with Casey meant that Lynda's transfers were to be in lieu of a testamentary provision. Casey and Jerry's conversation took place before the transfers were even made to Lynda making such an inference logically straining because Jerry never mentioned anything about future transfers. Also, the conversation took place before Jerry married Lynda and was only in regards to a potential divorce. As such, there is no evidence of any statements[1] made by Jerry as contemplated by the requirements of SDCL 29A-2-301(a)(3).

Most importantly, the lower court failed to address the most relevant evidence on record: the reasonable inference that the total value of Jerry's transfers to Lynda provided. The only reasonable inference the amount transferred to Lynda by Jerry presents is that the transfers were not intended to be in lieu of a testamentary provision. The amount of transfers represented a de minimis sum in comparison to either the

[1] Similarly, Lynda's comments regarding the ranch going to Jerry's grandchildren has nothing to do with his intent regarding the transfers he made to Lynda. (*See* Appellee's Brief at pgs. 5-6); (*See also* CI at 606.)

gross value of the estate or the intestate share she would be receiving. *See e.g. In re Estate of King*, 444 P.3d 863, 868-69 (Colo. Ct. App. 2019); *In re Estate of Ferguson*, 130 S.W.3d 656, 654 (Mo. Ct. App. 2004); *Matter of Estate of Frandson*, 356 N.W.2d 125, 127-29 (N.D. 1984); *Becraft v. Becraft*, 628 So.2d 404, 406-07 (Ala. 1993). Failing to even consider the reasonable inference the amount of transfers provides constitutes de novo error.

Furthermore, the lower court's consideration of the approximate value of the horses Lynda received by transfer, in comparison to the horses as a whole, and the comparison of the same sum to Lynda's elective share, is de novo error. (*See* CI at 855.) Subsection (a)(3) of SDCL 29A-2-301 does not instruct that a specific transfer should be compared to the relative whole from which it emanates. The narrow analysis the lower court provided in this regard ignores the intent of SDCL 29A-2-301(a)(3). *See Estate of Groeper v. Groeper*, 665 S.W.2d 367, 370 (Mo. App. 1984) (discussing that an omitted spouse statute hinges on whether an omitted spouse was "provided for" by "any means" of transfer as proven by the moving party). If the lower court would have properly applied South Dakota law it would have found that Jerry never "provided for" Lynda. Again, this is shown by the only type of evidence on record that fits a specific category in SDCL 29A-2-301(a)(3): the reasonable inference the de minimis amount of transfers provides to evince Jerry's intent regarding his transfers to Lynda. Given the outlay of law on this

issue, the de minimis amount of transfers Lynda received reflects that she is indeed an omitted spouse who was unintentionally omitted from Jerry's estate.

Similarly, SDCL 29A-2-301(a)(3) does not list comparison of a potential elective share as a relevant category of evidence that exhibits a testator's intention in regards to certain transfers made to an individual outside of the testator's will. Rightfully so, because such a comparison does not provide any reasonable inference as to a testator's intent when considering what certain transfers were intended for. Similar to the comparison of approximate value of horses, the elective share comparison provides an irrelevant inference and constitutes de novo error.

There were three categories of evidence available under SDCL 29A-2-301(a)(3) for the Estate to prove that the transfers Jerry made to Lynda were intended to be in lieu of a testamentary provision. The Estate was unable to provide any statement that showed Jerry intended for the transfers to be in lieu of a testamentary provision. In addition, the Estate failed to provide "other evidence"[2] that showed that the same transfers were intended to be in lieu of a testamentary provision. The lower court's consideration of evidence outside the categories of evidence that SDCL 29A-2-301(a)(3) identifies constitutes de novo error. Similarly, the lower

[2] The "other evidence" discussed in Conclusion of Law 14 does not provide any reasonable inferences as to what Jerry intended the transfers to Lynda to mean, for example if they were in lieu of a testamentary provision. (*See* CI 855.)

courts failure to consider the one piece of evidence that SDCL 29A-2-301(a)(3) instructed it to consider was de novo error.

C. *Alabama's Omitted Spouse Statute is Materially Different than SDCL 29A-2-301.*

Appellee's use of *Ferguson v. Critopoulos* should be disregarded because Alabama's omitted spouse statute materially differs from SDCL 29A-2-301. (*See* Appellee's Brief at pgs. 8-13.) Alabama's omitted spouse statute states in relevant part:

> If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or ***the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision be reasonably proven.***

See Ala. Code § 43-8-90 (emphasis added)(Reply.Appx. 004). The Alabama omitted spouse statute does not list specific categories of evidence like South Dakota's omitted spouse statute. *See* SDCL 29A-2-301(a)(3). Instead, Alabama's statute allows for ***any evidence*** that ***reasonably proves*** what a testator's intent might be, in regards to certain transfers. Following the statute's dictate, the *Ferguson v. Critopoulos* court looked to a number of different factors, which Appellee asks this Court to use in interpreting the issue before it. *See* 163 So.3d 330, 343-44 (Ala. 2014); (*See* Appellee's Brief at pgs. 8-13.) However, the broad consideration the Alabama statute encourages is opposite the specifically tailored instruction SDCL 29A-2-301(a)(3) provides.

This Court should not follow the *Ferguson v. Critopoulos* court because the Alabama omitted spouse statute is much broader than SDCL 29A-2-301(a)(3) and does not have specific categories for evidence to be considered. The material difference between South Dakota and Alabama's omitted spouse statute is significant for this Court's review because Appellant's challenge is based on the lower court's failure to apply South Dakota's omitted spouse statute correctly. The language of SDCL 29A-2-301(a)(3) is clear. This Court should not broaden the language of SDCL 29A-2-301(a)(3) to fit Appellee's irrelevant and immaterial evidence. Appellee had the burden to provide the lower court with evidence that fit SDCL 29A-2-301(a)(3) and failed. As such, Appellant's ask this Court to follow the language that SDCL 29A-2-301(a)(3) provides to illuminate Jerry's intent in regards to the de minimis transfers made to his wife Lynda.

III. CONCLUSION

Based on the foregoing, Appellant respectfully request this Court reverse the Fourth Circuit's order in its entirety. Lynda is an omitted spouse as defined under South Dakota law and should be entitled to an intestate share of Jerry's estate.

IV. REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument in this matter.

V. CERTIFICATE OF COMPLIANCE

Pursuant to S.D.C.L. 15-26A-66(b)(4), I certify that Appellant's Reply Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 2,223 words and 11,763 characters. I have relied on the word and character count of our processing system used to prepare this Brief. The original Appellant's Reply brief and all copies are in compliance with this rule.

Dated this 5th day of January, 2022.

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

By: _____

Elliot J. Bloom
Conor P. Casey
P.O. Box 9579
Rapid City, SD 57709
Tel: (605) 721-2800
E-mail: ebloom@blackhillslaw.com
ccasey@blackhillslaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2023, I sent to:

Michael W. Strain
STRAIN MORMAN LAW FIRM,
P.O. Box 729
Sturgis, SD 57785
(605)-347-3624
mike@mormonlaw.com
Attorneys for Appellee

by Odyssey e-filing and serve, a true and correct copy of Appellant's Reply Brief relative to the above-entitled matter.

/s/ Conor P. Casey
Conor P. Casey

APPENDIX

APPENDIX

TABLE OF CONTENTS

Uniform Laws Annotated
Uniform Probate Code (1969) Last Amended or Revised in 2019 (Refs & Annos)
Article II. Intestacy, Wills, and Donative Transfers (Refs & Annos)
Part 3. Spouse and Children Unprovided for in Wills

Unif.Probate Code § 2-301

§ 2-301. Entitlement of Spouse; Premarital Will.

Currentness

(a) If a testator's surviving spouse married the testator after the testator executed the testator's will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate the spouse would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes under Sections 2-603 or 2-604 to such a child or to a descendant of such a child, unless:

(1) it appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

(3) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under Section 2-603 or 2-604 to a descendant of such a child, abate as provided in Section 3-902.

Editors' Notes

COMMENT

Purpose and Scope of the Revisions. This section applies only to a premarital will, a will executed prior to the testator's marriage to his or her surviving spouse. If the decedent and the surviving spouse were married to each other more than once, a premarital will is a will executed by the decedent at any time when they were not married to each other but not a will executed during a prior marriage. This section reflects the view that the intestate share of the spouse in that portion of the testator's estate not devised to certain of the testator's children, under trust or not, (or that is not devised to their descendants, under trust or not, or does not pass to their descendants under the

antilapse statute) is what the testator would want the spouse to have if he or she had thought about the relationship of his or her old will to the new situation.

Under this section, a surviving spouse who married the testator after the testator executed his or her will may be entitled to a certain minimum amount of the testator's estate. The surviving spouse's entitlement under this section, if any, is granted automatically; it need not be elected. If the surviving spouse exercises his or her right to take an elective share, amounts provided under this section count toward making up the elective-share amount by virtue of the language in subsection (a) stating that the amount provided by this section is treated as "an intestate share." Under Section 2-209(a)(1), amounts passing to the surviving spouse by intestate succession count first toward making up the spouse's elective-share amount.

Subsection (a). Subsection (a) is revised to make it clear that a surviving spouse who, by a premarital will, is devised, under trust or not, less than the share of the testator's estate he or she would have received had the testator died intestate as to that part of the estate, if any, not devised to certain of the testator's children, under trust or not, (or that is not devised to their descendants, under trust or not, or does not pass to their descendants under the antilapse statute) is entitled to be brought up to that share. Subsection (a) was amended in 1993 to make it clear that any lapsed devise that passes under Section 2-604 to a child of the testator by a prior marriage, rather than only to a descendant of such a child, is covered.

Example. G's will devised the residue of his estate "to my two children, A and B, in equal shares." A and B are children of G's prior marriage. G is survived by A and by G's new spouse, X. B predeceases G, without leaving any descendants who survived G by 120 hours. Under Section 2-604, B's half of the residue passes to G's child, A. A is a child of the testator's prior marriage but not a descendant of B. X's right under Section 2-301 are to take an intestate share in that portion of G's estate not covered by the residuary clause.

The pre-1990 version of Section 2-301 was titled "*Omitted* Spouse," and the section used phrases such as "*fails* to provide" and "*omitted* spouse." The implication of the title and these phrases was that the section was inapplicable if the person the decedent later married was a devisee in his or her premarital will. It was clear, however, from the underlying purpose of the section that this was not intended. The courts recognized this and refused to interpret the section that way, but in doing so they have been forced to say that a premarital will containing a devise to the person to whom the testator was married at death could still be found to "fail to provide" for the survivor *in the survivor's capacity as spouse.* See Estate of Christensen, 665 P.2d 646 (Utah 1982); Estate of Ganier, 418 So.2d 256 (Fla.1982); Note, "The Problem of the 'Un-omitted' Spouse Under Section 2-301 of the [Pre-1990] Uniform Probate Code," 52 U. Chi. L. Rev. 481 (1985). By making the existence and amount of a premarital devise to the spouse irrelevant, the revisions of subsection (a) make the operation of the statute more purposive.

Subsection (a)(1), (2), and (3) Exceptions. The moving party has the burden of proof on the exceptions contained in subsections (a)(1), (2), and (3). For a case interpreting the language of subsection (a)(3), see Estate of Bartell, 776 P.2d 885 (Utah 1989). This section can be barred by a premarital agreement, marital agreement, or waiver as provided in Section 2-213.

Subsection (b). Subsection (b) is also revised to provide that the value of any premarital devise to the surviving spouse, equitable or legal, is used first to satisfy the spouse's entitlement under this section, before any other devises suffer abatement. This revision is made necessary by the revision of subsection (a): If the existence or amount of a premarital devise to the surviving spouse is irrelevant, any such devise must be counted toward and not be in addition to the ultimate share to which the spouse is entitled. Normally, a devise in favor of the person whom the testator *later* marries will be a specific or general devise, not a residuary devise. The effect under the pre-1990 version of subsection (b) was that the surviving spouse could take the intestate share under Section 2-301, which

in the pre-1990 version was satisfied out of the residue (under the rules of abatement in Section 3-902), *plus* the devise in his or her favor. The revision of subsection (b) prevents this "double dipping," so to speak.

Reference. The theory of this section is discussed in Waggoner, "Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code," 26 Real Prop. Prob. & Tr. J. 683, 748-51 (1992).

Historical Note. This comment was revised in 1993. For the prior version, see 8 U.L.A. 101 (Supp. 1992).

Unif. Probate Code § 2-301, ULA PROB CODE § 2-301

End of Document

Code of Alabama
Title 43. Wills and Decedents' Estates.
Chapter 8. Probate Code. (Refs & Annos)
Article 5. Spouse and Children Not Provided for in Will.

Ala.Code 1975 § 43-8-90

§ 43-8-90. Omitted spouse.

Currentness

(a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision be reasonably proven.

(b) In satisfying a share provided by this section, the devises made by the will abate as provided in section 43-8-76.

Credits
(Acts 1982, No. 82-399, § 2-301.)

Editors' Notes

COMMENTARY

Section 43-8-137 provides that a will is not revoked by a change of circumstances occurring subsequent to its execution other than as described by that section. This section reflects the view that the intestate share of the spouse is what the decedent would want the spouse to have if he had thought about the relationship of his old will to the new situation. One effect of this section should be to reduce the number of instances where a spouse will claim an elective share.

This section is like § 2-301 of the UPC except in subsection (a) "be reasonably proven" is substituted for "shown by statements of the testator or from the amount of the transfer or other evidence." Although the wording is somewhat different and the order of stating the principles is not the same, the effect of this section is in accord with former § 43-1-15 (1975) and it is clear that this section applies to a spouse of either sex. Parker v. Hall, 362 So.2d 875 (Ala 1978) declared former § 43-1-8 (1975) unconstitutional in that it only applied to wills of females. Even if former § 43-1-8 (1975) were made applicable to both males and females, it would be changed by this section.

Notes of Decisions (12)

Ala. Code 1975 § 43-8-90, AL ST § 43-8-90
Current through the end of the 2022 Regular and First Special Sessions. Some provisions may be more current; see credits for details.

End of Document