Appeal No. 29580

In the

Supreme Court of the State of South Dakota

IN THE MATTER OF THE ESTATE OF NEIL WILLIAM SMEENK

DENISE L. SCHIPKE-SMEENK

Appellant

Appeal from the Circuit Court
Fourth Judicial Circuit
Butte County, South Dakota

The Honorable Michael W. Day

Notice of Appeal filed March 8, 2021

BRIEF OF APPELLANT DENISE L. SCHIPKE-SMEENK

Talbot Wieczorek
Katelyn Cook
Gunderson, Palmer, Nelson & Ashmore, LLP
506 Sixth Street
Rapid City, SD 57709
Telephone: (605) 342-1078
E-mail: tjw@gpna.com
Attorneys for Appellant, Denise Schipke-Smeenk

John W. Burke
Kimberly Pehrson
Thomas Braun Bernard & Burke, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702
Telephone: (605)-348-7516
E-mail: jburke@tb3law.com
kpehrson@tb3law.com
Attorneys for Appellee, Ryan Smeenk

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Citations to the record will appear as "(CR ___)" with the page number from the Clerk's Appeal Index. Citations to Appellant Denise Schipke-Smeenk's appendix will be designated as "(APP___)" followed by the appropriate page number. Citations to the hearing transcripts will be designated as "(HT___)" with the hearing date and appropriate page and line number. The trial court's February 2, 2021 Findings of Fact and Conclusions of Law shall be designated as ("FOF") or ("COL"), followed by the appropriate paragraph.

Appellant Denise Schipke-Smeenk will be referred to as "Denise" and Appellee Ryan Smeenk shall be referred to as "Ryan." Decedent Neil William Smeenk shall be referred to as "Neil."

JURISDICTIONAL STATEMENT

Denise appeals from the trial court's Order Denying Motion for Approval and Payment of Claim dated February 5, 2021. (APP 001). This Order incorporated the court's Findings of Fact and Conclusions of Law filed on February 2, 2021. (APP 001). Notice of Entry of this Order was filed on February 5, 2021. (CR 837). Denise timely filed notice of appeal on March 8, 2021. (CR 894).

The Order is one that may be appealed pursuant to SDCL § 15-26A-3. Notice of Appeal was filed within the time limits of SDCL § 15-26A-6. Therefore, this Court has jurisdiction to consider the issues raised on appeal.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. Was Denise, as Personal Representative, required to bring her claim within four months of her appointment as Personal Representative, and was the information contained in her notice compliant with SDCL § 29A-3-804?

The trial court found that because Denise's creditor's claim was known to herself as Personal Representative, she was required to bring her claim within four months of her appointment as Personal Representative. (APP 010, COL (a), ¶ 21). The trial court also found Denise's Motion to Approve Claim did not provide the information required by SDCL § 29A-3-804. (APP 011, COL (a), ¶ 29).

- *Goetz v. State*, 2001 S.D. 138, ¶ 15, 636 N.W.2d 675, 681
- SDCL § 29A-3-801
- SDCL § 29A-3-803
- SDCL § 29A-3-804

II. Did Denise fail to establish she has an inadequate remedy at law, so as to entitle her to seek specific performance?

The trial court found Denise failed to establish she has an inadequate remedy at law. (APP 013, COL (b), ¶ 4).

- *Lass v. Erickson*, 74 SD 503 (1952)
- *McCollam v. Cahill*, 2009 S.D. 34, ¶ 15, 766 N.W.2d 171, 176–77
- *First Fed. Sav. & Loan Ass'n of Rapid City v. Wick*, 322 N.W.2d 860, 862 (S.D. 1982)

III. Did the trial court err in its application of SDCL § 21-9-3 to prevent the enforcement of specific performance against Neil?

The trial court applied SDCL § 21-9-3 to prevent Denise from utilizing specific performance against Neil because it would not be "just and reasonable" to Neil. (APP 014, COL (b), ¶ 9).

- 71 Am. Jur. 2d Specific Performance § 61
- 71 Am. Jur. 2d Specific Performance § 91

STATEMENT OF THE CASE

This is an appeal from the circuit court, Fourth Judicial Circuit, the Honorable Michael W. Day, Circuit Court Judge, presiding. Neil died on June 14, 2019. (CR 1). Denise filed her petition for formal probate, as Neil's surviving spouse, on July 15, 2019, seeking that Neil's August 25, 2017 Will be admitted to probate. (CR 1). Ryan filed his own petition for formal probate, asking the Court to instead admit Neil's April 19, 2019 Will to probate. (CR 38). After a court hearing in October of 2019, the April 19, 2019 Will was admitted to probate and Denise was appointed as the Personal Representative of the Estate. (CR 241).

On April 8, 2020, Denise filed a "Motion for Approval of Claim," setting forth the nature of her claim against the Estate, founded upon the 2017 Agreement. (APP 048). On December 3, 2020, the parties appeared before the trial court for a motions and evidentiary hearing to present evidence and argument regarding Denise's Motion for Approval of Claim. On December 19, 2020, the trial court entered an Order requiring the parties submit proposed findings of fact and conclusions of law simultaneously. (CR 751). Ryan's proposed findings of fact and conclusions of law incorporated new legal authority and new legal arguments not previously advanced prior to the filing. (CR 772).

The trial court filed its Findings of Fact and Conclusions of Law on February 2, 2021 and incorporated them into its Order denying Denise's Motion for Approval of Claim which was signed and filed on February 5, 2021. (APP 001). Because the trial court adopted many of Ryan's proposed new legal authority and arguments, Denise filed

a Motion for Reconsideration on March 8, 2021. (CR 845).[1] Denise now respectfully appeals from the Court's February 5, 2021 Order denying her Motion for Approval of Claim.

STATEMENT OF FACTS

Neil was married to Denise for nineteen years before his death. During those years, the couple made long term financial plans with each other. Among those plans were estate plans for both of them. On August 25, 2017, Denise and Neil executed mutual wills ("2017 Will"), as well as an Agreement to Execute Mutual Wills (the "Agreement"). (APP 003, FOF (a), ¶ 4; APP 044). The Agreement included language prohibiting either party from amending, or revoking their Will without written consent of the other. (APP 045, ¶ VII).

Subsequently, Neil and Denise's marriage ran into troubles due to Neil's chronic alcoholism. (APP 004, FOF (b), ¶ 15). Denise testified she had to ask Ryan and his sister, Brandy, to check on Neil when she was out of town because he started to fall frequently and she was concerned about his safety. (Oct. HT 57:23-58:19; 62:7-14). Ryan and Denise discussed getting Neil admitted to detox to deal with his drinking. (Oct. HT 58:20-59:4; 60:24-61:13). Ryan testified Neil's siblings sat down with Neil to discuss his drinking and that Neil was drinking a quarter bottle of whiskey every day, sometimes more. (Dec. HT 85:5-14; 86:4-11). Ryan had even attempted to get a guardianship over his father because he was so concerned about Neil's ability to make decisions for himself. (Dec. HT 84:18-21).

[1] Denise filed the Motion for Reconsideration as it was unclear whether this constituted a final order based on *In re Est. of Geier*, 2012 S.D. 2, ¶ 15, 809 N.W.2d 355, 359.

Neil's sister discussed how terrible it was to see Neil's drinking progress and how she sympathized with how difficult it would have been for Denise to have to deal with it every day. (Oct. HT 96:19-97:6). Neil's grandson testified Neil and Denise's relationship was good, and "in the earlier years, like, 2015-2017, before he really started drinking hard, it was usually pretty good." (Dec. HT 92:6-10). He also testified in the later years, Neil's drinking just got "worse and worse" and that Neil would drink so much that "his whole body would start shaking and he would collapse to the ground." (Dec. HT 92:14-22). Neil's brother testified he could not get Neil to stop drinking and there were times he found Neil and he was so drunk he could not stand. (Dec. HT 121:19-122:5).

On April 19, 2019, Neil changed his Will without seeking approval from Denise and then filed for divorce (the "2019 Will"). This 2019 Will was eventually admitted to probate by the trial court following the October 2019 hearing. (CR 241). Denise did not give her written consent to the 2019 Will as required by the Agreement. (Dec. HT 9:4-11). Denise filed no responsive pleadings to the divorce filing. (Dec. HT 21:16-19), and Neil's divorce attorney testified they were working on an "amicable resolution of the divorce" that could have included reconciliation. (Dec. HT 104:23-105:4). The trial court entered multiple findings of fact indicating Neil and Denise would not have reconciled. (APP 004-005, FOF (b), ¶¶ 17, 20, 23). However, the trial court did not include as a finding of fact Denise's testimony that Neil had conferred with her that he wanted to try to work matters out. (Dec. HT 20:19-21:9). Unfortunately, before the divorce was finalized or it became clear whether the parties would reconcile, Neil committed suicide on June 14, 2019. (APP 006, FOF (b), ¶ 23).

After Neil's death, on July 15, 2019, Denise filed a Petition for Formal Probate, seeking appointment as personal representative and seeking permission to probate the 2017 Will. (CR 1). On August 8, 2019, Ryan filed his own Petition for Formal Probate and Appointment of Personal Representative, asking the court to appoint him as Personal Representative and seeking the trial court's permission to probate the 2019 Will. (CR 38). On October 31, 2019, the parties attended an evidentiary hearing to address which Will would be admitted to probate and who would be appointed to serve as personal representative. Following the hearing, the trial court entered an Order appointing Denise as Personal Representative and admitting the 2019 Will to probate, incorporating its Findings of Fact and Conclusions of law in that Order. (CR 241; 185).

Once appointed as Personal Representative, on December 12, 2019, Denise sent the required statutory notice to the Department of Social Services ("DSS"). (APP 061). That same day, Denise signed another notice notifying unknown creditors of the Estate to bring their claims within four months or their claims would be forever barred. (CR 254). This four-month deadline for unknown creditors ran April 16, 2020. (APP 003, FOF (a), ¶ 9). Denise has not sent notice to any "known" creditors. (CR 876, ¶ 7).

On April 8, 2020, Denise filed a "Motion for Approval of Claim," setting forth the nature of her claim against the Estate, founded upon the 2017 Agreement. (APP 048). On December 3, 2020, the parties appeared before the trial court for a motions and evidentiary hearing to present evidence and argument regarding Denise's Motion for Approval of Claim. The trial court filed its Findings of Fact and Conclusions of Law on February 2, 2021. (APP 002). Denise appeals these findings.

STANDARD OF REVIEW

For civil cases not tried before a jury, the trial court is required to enter findings of fact and conclusions of law. *In re Est. of Palmer*, 2007 S.D. 133, ¶ 12, 744 N.W.2d 550, 553 (citing SDCL §15–6–52(a)). The trial court's findings of fact are reviewed under the clearly erroneous standard of review. *Northstream Invs., Inc. v. 1804 Country Store Co*., 2007 S.D. 93, ¶ 8, 739 N.W.2d 44, 47 (citing *Myers v. Eich*, 2006 SD 69, ¶ 18, 720 N.W.2d 76, 82) (additional citations omitted). The trial court's conclusions of law are reviewed under the de novo standard of review. *Id.* (citing *Credit Collection Services, Inc. v. Pesicka*, 2006 SD 81, ¶ 5, 721 N.W.2d 474, 476). Mixed questions of law and fact are reviewed de novo. *Id.* (citing *Johnson v. Light*, 2006 SD 88, ¶ 10, 723 N.W.2d 125, 127).

ARGUMENT AND AUTHORITIES

I. THE TRIAL COURT ERRED IN DETERMINING DENISE'S NOTICE OF CLAIM WAS UNTIMELY.

In its Conclusions of Law, the trial court found:

> Because this Court has found that Denise's creditor's claim is known to herself as Personal Representative, she was required to bring her claim within four months of her appointment as Personal Representative-April 9, 2020. However, even if the deadline for unknown creditors applies to her claim, it would only have extended it for a short period of time-to April 16, 2020.

(APP 010, COL (a) ¶ 21). However, in coming to this conclusion, the trial court misconstrued the plain language of the statutes governing the issues and relied upon case law distinguishable from the case at bar. Because of this, the trial court's findings should be overturned.

A. The trial court's findings as to the timing of Denise's claim violate the rules of statutory construction.

The jurisprudence behind statutory construction is well-settled. Per this Court, there are two primary rules of statutory construction. First, "the language expressed in the statute is the paramount consideration." *Goetz v. State*, 2001 S.D. 138, ¶ 15, 636 N.W.2d 675, 681. Second, "if the words and phrases in the statute have plain meaning and effect, [the Court] should simply declare their meaning and not resort to statutory construction." *Id.* Construction of a statute is a question of law. *Bertelsen v. Allstate Ins. Co.*, 2009 S.D. 21, ¶ 1, 764 N.W.2d 495, 497.

"The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute." *Goetz*, 2001 S.D. 138, ¶ 15 (citing *Appeal of AT&T Information Systems*, 405 N.W.2d 24, 27 (SD 1987)). To determine the intent of a statute, the court should look to "what the legislature said, rather than what the court[] think[s] it should have said, and the court must confine itself to the language used." *Id.* at ¶ 15. Thus, "when the language of a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Id.*

When a court must result to statutory construction, "the intent of the legislature is derived from the plain, ordinary and popular meaning of statutory language." *R.B.O. v. Congregation of the Priests of the Sacred Heart, Inc.*, 2011 S.D. 87, ¶ 22, 806 N.W.2d 907, 914 (quoting *State Auto Insurance Cos. v. B.N.C.*, 2005 S.D. 89, ¶ 18, 702 N.W.2d at 386; *State v. Johnson*, 2004 S.D. 135, ¶ 5, 691 N.W.2d 319, 321-22)). A court may not ordinarily, "under the guise of judicial construction, add modifying words to the statute or change its terms." *City of Sioux Falls v. Ewoldt*, 1997 S.D. 106, ¶ 13, 568 N.W.2d 764,

767 (quoting *State v. Franz*, 526 N.W.2d 718, 720 (SD 1995)). Further, a court may determine the intent of a statute from the statute as a whole, as well as other enactments relating to the same subject. *Dahn v. Trownsell*, 1998 S.D. 36, ¶ 14, 576 N.W.2d 535, 539 (quoting *Moss v. Guttormson*, 1996 SD 76, P10, 551 N.W.2d 14, 17) (citing *US West Communications, Inc. v. Public Utilities Comm'n*, 505 N.W.2d 115, 122-23 (SD 1993)) (citations omitted). A court will give deference the body administering a statute, but can overrule the construction if it is deemed to be incorrect or erroneous. *Croell Redi-Mix, Inc. v. Pennington Cty. Bd. of Comm'rs*, 2017 S.D. 87, ¶ 20, 905 N.W.2d 344, 350 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82 (1984)).

The statutes at issue fall within Chapter 29A-3. This chapter sets forth various deadlines by which a personal representative must abide. For example, upon appointment, a personal representative must give notice of her appointment to the decedent's heirs and devisees within fourteen days. SDCL § 29A-3-705(a). In that same timeline, a personal representative must also notify DSS she has been appointed so DSS may submit an affidavit pursuant to SDCL § 29A-3-1201, indicating whether DSS has incurred an indebtedness by paying for decedent's medical assistance or care. SDCL §§ 29A-3-705; 29A-3-817. These duties are separate and apart from a personal representative's duty to deal with creditors of the decedent's estate.

Creditor claims are governed by a wholly separate section of the code—§29A-3, part 8. Creditor claims consist of two separate categories: known creditors and unknown creditors. A creditor is "known" when "the personal representative is aware that the creditor has demanded payment from the decedent or the estate or if the personal

representative is otherwise aware of the decedent'' obligation." SDCL § 29A-3-801(d). All other creditors are unknown. A personal representative deals with these claims differently. For unknown creditors:

> A personal representative upon appointment may publish a notice to creditors once a week for three successive weeks in a legal newspaper in the county in which the proceeding is pending giving the personal representative's name and address and notifying creditors of the decedent to present their claims within four months after the date of the first publication of the notice or the claim may be barred.

See SDCL § 29A-3-801(a) (emphasis added). As is clear from the plain language of this statute, a personal representative may publish so as to bar any unknown creditor claims not made within four months of the date of first publication. *Id.* This is an optional step for the personal representative, as made clear by the use of the word "may." *Id.* If the personal representative does not elect to do this publication, then unknown creditors may make claims within three years of the decedent's death. SDCL § 29A-3-803(a).

As to known creditor claims:

> Except as provided in subsection (c), a personal representative shall give written notice by mail or other delivery to a creditor of the decedent, who is either known to or reasonably ascertainable by the personal representative, informing the creditor to present the claim within four months after the date of the personal representative's appointment, or within sixty days after the mailing or other delivery of the written notice, whichever is later, or be forever barred.

SDCL § 29A-3-801(b). Per this statute, a personal representative must give notice to known creditors to bar the claim. *Id.* If that creditor does not present its claim within either four months of the personal representative's appointment, or within sixty days after the mailing or other delivery of the written notice, that known creditor's claim is barred.

Id. At no point does the plain language of this statute set any deadline where a personal representative must "mail" or otherwise "deliver" written notice to known creditors. *Id.*

Instead, the only deadline that is actually set with regard to creditor claims is set forth in SDCL § 29A-3-803. This statute provides:

> All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> (1) As to creditors barred by publication, within the time set in the published notice to creditors;
>
> (2) As to creditors barred by written notice, within the time set in the written notice;
>
> (3) As to all creditors, within three years after the decedent's death.

SDCL § 29A-3-803(a). Thus, unknown creditors' claims are barred if they are not presented by the time set within any publication, assuming the personal representative elects to do this publication. *Id.* Known creditors' claims are barred if they are not presented by the time set within the written notice sent to them if the personal representative elects to send a notice. *Id.* All other creditors, including known creditors who do not receive a written notice, are barred by the ultimate three-year limitation. *Id.* Again, nothing in this statute requires a personal representative give notice to known creditors within any deadline.

In this case, the trial court made the following Conclusions of Law:

> Because this Court has found that Denise's creditor's claim is known to herself as Personal Representative, she was required to bring her claim

> within four months of her appointment as Personal Representative-April 9, 2020. However, even if the deadline for unknown creditors applies to her claim, it would only have extended it for a short period of time-to April 16, 2020.

(APP 010, COL (a), ¶ 21). The trial court apparently created its own "known creditor deadline," stating:

> Nor is there any dispute that Denise knew the deadline for presenting known creditors' claims—she presented DSS with notice and signed a notice to unknown creditors on December 12, 2019. . ."

(APP 008, COL, (a) ¶ 13).

In its Findings of Fact, the trial court appeared to conclude that DSS constituted a known creditor, stating:

> Following her appointment as personal representative on December 9, 2019, Denise began sending written notices to known creditors and publishing notice to unknown creditors.

(APP 003, FOF (a) ¶ 7).

These findings are all inconsistent with the record in the case and the clear statutory scheme. First, the trial court incorrectly construed the Notice sent to DSS as a written notice to a known creditor. This Notice is statutorily required to be filed by every personal representative within fourteen days of appointment. SDCL § 29A-3-705(a). As a part of this Notice, Denise also advised DSS that <u>if</u> it had a claim, it needed to be filed within four months. (APP 061). However, the trial court then relied only on this Notice to make its determination that as of the date the Notice was sent to DSS, Denise was also then on notice of her claim and must also file also file it by the same deadline.

Such a finding is inaccurate and in direct contradiction to clear statutory procedure. As set forth above, a known creditor must file a claim only after receiving

written notice advising that known creditor to file. SDCL § 29A-3-801(b). DSS has never been a known creditor and is not reflected in the record as a known creditor. This general statutory notification is DSS specific and does not operate as notice to Denise under the statutes. In doing this, the trial court essentially created a new requirement, unique only to personal representatives, that as soon as they give notice to the first known creditor, their deadline for their own claims begin to run. If the Legislature intended to impose this requirement, it would have done so. It is not appropriate for the trial court to legislate, relying only upon one paragraph in a statutorily required DSS notice.

However, even if it is true Denise had personal knowledge, there is still no statutorily imposed deadline dictating when she is required to mail or otherwise deliver notice to known creditors. Instead, 801(b) simply states that a personal representative must provide notice—but there is absolutely no statutory requirement that this notice be "mailed" or otherwise "delivered" in any time frame or any "known creditor deadline" to speak of.

Tellingly, instead of following the statutory procedure, the trial court relied upon "Courts in other jurisdictions" which have "prevented personal representatives/creditors from using notice statutes to their benefit." (APP 009, COL (a), ¶ 18). However, there is no evidence in the record to support the trial court's findings that Denise was attempting to utilize these notice statutes to her benefit or was otherwise utilizing them strategically. While the trial court cited this concern as further reasoning for imposing the deadlines it did, the trial court is essentially legislating.

A personal representative's actual knowledge of their own claim is not held to any different standard in our statutory scheme than any other known creditor claim. If the

legislature wanted to impose a separate or higher standard for claims held by personal representatives, it could have done so.[2] *Holborn v. Deuel Cty. Bd. of Adjustment*, 2021 S.D. 6, ¶ 35 ("It is not this Court's role to fill in the statutory gaps we think the Legislature left out") (citing *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d. 600, 611 (holding "[t]he intent of a statute is determined from what the legislature said, rather than what the courts think it should have said")). By imposing a standard of its own, the trial court violated the strict rules of statutory construction and erred in finding Denise's claim was time-barred.

B. Judicial estoppel does not bar Denise's claim.

The trial court relied on the principle of judicial estoppel in determining Denise is bound by either the time frame applicable to unknown creditors, or by the time frame that would be established if the letter to DSS constituted a letter to a known creditor. Such reliance was improper for multiple reasons.

1. The elements of judicial estoppel are not met.

The articulated elements of judicial estoppel do not support the conclusion that Denise is estopped from invoking the plain language of the statute. In its Conclusions of Law, the trial court articulated the elements of judicial estoppel as follows:

> (1) The [party's] latter position must be clearly inconsistent with the earlier one;
>
> (2) The earlier position was judicially accepted, creating the risk of inconsistent legal determinations;

[2] For example, see the statute relied upon by the *Mead* court (discussed below) which actually does set a deadline by which a personal representative must send notice to known creditors.

(3) The party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped; and

(4) The inconsistency must be about a matter of fact, not law.

(APP 007, COL (a) ¶ 11) (citing *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 12, 908 N.W.2d 170, 175).

With regard to the first element, Denise did not present inconsistent positions to the trial court. The trial court relies on the "Notice to South Dakota Department of Social Services of Appointment of Personal Representative of the Estate of Neil William Smeenk, Deceased" in finding Denise was barred by the known creditor deadline, stating:

> Nor is there any dispute that Denise knew the deadline for presenting known creditors' claims—she presented DSS with notice and signed a notice to unknown creditors on December 12, 2019. . .

(APP 008, COL (a) ¶ 13) (APP 061). However, as explained above, this Notice sent to DSS was not sent as a notice to a known creditor, but instead was sent because a personal representative is required to provide DSS notice.

A creditor is "known" if "the personal representative is aware that the creditor has demanded payment from the decedent or the estate or if the personal representative is otherwise aware of the decedent's obligation." SDCL § 29A-3-801. First, DSS does not meet this definition of a known creditor because at no point did DSS ever demand payment from the estate, and at no point did Neil ever have an obligation to DSS—as evidenced by the fact DSS never filed a claim. Further, the plain language of the Notice to DSS makes clear it was not a notice to a known creditor in that it clearly states "If you claim to be a creditor of the above-entitled estate. . ." (APP 061). Thus, contrary to the trial court's findings, Denise never sent a notice to any known creditor—thus, she cannot

be found to be taking an inconsistent position in not filing her own claim because no known creditors have received notice, and as such, no deadline to file a claim ever began to run.[3]

As it relates to the second element, because Denise has not presented an inconsistent position, the trial court did not accept any such position. Denise has not sought to bar any known creditor's claims for untimeliness; therefore, if she files a claim at any time within three years from Neil's death or within the time set in a written notice, her position that the claim should be paid would not be inconsistent with any position the trial court had already accepted.

The third and fourth elements become largely irrelevant after determining there was no inconsistent position judicially accepted. There is no evidence that if any creditor presented a claim to Denise in her capacity as personal representative, it would be denied because it is time-barred. Therefore, Denise would not reap an unfair advantage or impose an unfair detriment upon another creditor.

Rather, judicial estoppel almost seems to suggest that Ryan, as challenger to Denise's Motion for Approval and Payment of Claim, should be judicially estopped from denying the existence or validity of the claim. Ryan argues a claim cannot be made because it was not done in compliance with SDCL § 29A-3-804. However, Ryan has acknowledged Denise has a claim against the Estate. (CR 460). The trial court

---

[3] Although the court contemplated Denise may be attempting to side-step any timing requirement by extending herself extra time to file claims (*see* APP 008, COL (a), ¶ 14) that conclusion is unsupported by the record, and importantly, does not establish an inconsistent position. Denise has not disallowed any claims for timing reasons from either known or unknown creditors. Therefore, her attempt to pay herself as a known creditor is not inconsistent with any of her actions in this matter to date.

acknowledged and accepted that position. (APP 008, COL (a), ¶ 13). If Ryan now takes the position that a claim does not exist, he would derive an unfair advantage and Denise would suffer an unfair detriment if he is not estopped.

Finally, the alleged inconsistency is not one of fact as is required to assert judicial estoppel. The trial court found the inconsistency in fact was "when Creditor Denise had notice of her claim for purposes of starting the non-claim clock." (APP 008, COL (a), ¶ 17). The trial court held that "when" accrual of claim occurs is a question of fact. *Id.* However, the matter of "when" Denise's or any other known creditor's notice period starts is clearly determined by law—by the plain language of the statutes at issue.

Because the elements of judicial estoppel are not met, the trial court erred in relying upon it to deny Denise's Motion for Approval of Claim.

2. The cases relied upon by the trial court in support of its judicial estoppel holding are inapposite.

Although the trial court noted it was "particularly persuaded" by *Mead v. Barton*, the application of that case to the one at hand is inapposite because the Michigan Compiled Laws upon which the *Mead* court relied are markedly different from those found in South Dakota Codified Law. (APP 009, COL (a), ¶ 19) (citing *Mead*, 885 N.W.2d 316, 318 (Mich. Ct. App. 2016).[4] In *Mead*, the Court of Appeals of Michigan considered a personal representative's untimely claim against a decedent's estate. *Id.* Similar to the case at hand, the personal representative did not send herself written notice as a known creditor. *Id.* at 319. However, unlike South Dakota's statute (which does not impose a time limit within which a personal representative must mail notice to known

[4] Westlaw also refers to this case as *In re Schwein Estate*, 314 Mich. App. 51, 54, 885 N.W.2d 316, 317 (2016).

creditors), Michigan's code specifically includes a statutory deadline where a personal representative must provide notice to all known creditors, stating it must be done "at the time of publication [of notice] or during the 4 months following publication." *Id.* at 320 (quoting Mich. Comp. Laws Ann. § 700.3801).

In Michigan, a known creditor given this notice is then statutorily barred from making a claim against the estate either one month after receiving the written notice from the personal representative or four months after the publication of notice to creditors. *Id.* (quoting Mich. Comp. Laws Ann. § 700.3803(1)).[5] Therefore, under Michigan law, any known creditor who receives notice will be barred from bringing a claim no more than five months after the publication of notice to creditors. The *Mead* court determined the personal representative had notice and was not required to provide written notice to herself and her time for filing a claim began at the time she published notice. *Id.* at 322.

First, this strict time limit for providing notice to known creditors does not exist under South Dakota's creditor claim statutes—thus, it was inappropriate for the trial court to impose a time limit regarding these claims that was not set by the South Dakota Legislature. Second, as discussed above, unlike the *Mead* case, Denise would not be deriving an unfair advantage over other known creditors if she were to formally present a claim. Therefore, because the statutes upon which the *Mead* court relies are markedly and substantively different than the statutes at issue here, the trial court erred in relying upon *Mead* to reach its conclusions.

---

[5] It is also important to note that the Michigan Compiled Laws contains a statute that requires a claim by a personal representative against the estate shall be in a prescribed form. *See* Mich. Comp. Laws Ann. § 700.3804(3). South Dakota law contains no such specification.

Next, the Missouri case cited by the trial court is also distinguishable from the case *sub judice*. In *Adams v. Braggs,* the Missouri Court of Appeals considered whether a personal representative may be reimbursed from an estate for her individual payments for the decedent's funeral expenses if she never filed a claim. (APP 009, COL (a), ¶ 20) (citing *Adams*, 739 S.W.2d 744). Just like *Mead, supra,* the Missouri statutes at issue are significantly different from South Dakota's. *See id.* at 745-46. The Missouri law discussed in *Adams* does not appear to distinguish between known or unknown creditor, but rather imposes a bar against all claims against an estate not filed with the probate court or personal representative within six months after publishing notice. *Id*. at 745. Furthermore, the Missouri probate code, similar to Michigan's, provides a specified means by which a personal representative may present claims against an estate. *Id.* at 745-46; Mo. Ann. Stat. 473.423 (West).

In *Adams*, the Missouri Court of Appeals did not need to consider whether a personal representative is subject to a different notice requirement because notice applied to all potential claimants equally. *Adams*, 739 S.W.2d at 746. Rather, it applied the plain language of the statute to determine that because the personal representative did not file her claim under the proper rules within the statutory time frame, she was barred from bringing the claim. *Id.* Thus, just like the *Mead* case, the *Adams* case is not on point because the statutes at issue are wholly different than those in the case at bar in that they actually impose a statutory deadline to provide notice to known creditors.

Similarly, the Pennsylvania law discussed in *In re Cohen's Estate*, also cited by the trial court, likewise fails to address the difference between providing notice to known versus unknown creditors, and instead focuses on a claimant's responsibility to provide

notice of her claim to the personal representative, which happened to be herself. (APP 009, COL (a), ¶ 20) (citing *Cohen,* 364 A.2d 888, 890). In discussing the spirit of the claims limitation law, the Supreme Court of Pennsylvania noted that a claimant, be it a personal representative or not, is required to present the claim to give all people who have an interest in the estate notice of her claim. *Id.*

The trial court also relied upon *In re Hoover's Estate* for the proposition that a claimant who is also a personal representative may be held to the time limits in non-claim statutes despite a lack of notice prescribed by statute. (APP 009, COL (a), ¶ 20) (citing *Hoover,* 180 P. 275 (Kan. 1919)). The Supreme Court of Kansas relied on the construction of a compilation of statutes. *Id.* at 277. The court noted a personal representative (therein referred to as executor) "has notice of the existence of the claim, and his serving upon himself a notice in writing of that claim cannot serve any useful purpose." *Id.* It likely for this reason Kansas had a statute relating specifically to claims brought by personal representatives, which required them to either proceed against co-personal representatives or to file his claim upon which the court would appoint a suitable person to manage the defense on behalf of the estate. *Id.* However, despite the personal representative's failure to do this, the court still held "his failure [to follow this statute] will not operate as an estoppel, and will not defeat him when he seeks to procure an allowance of his claim," and that the personal representative's claim against the estate "was not barred by any statute of nonclaim or of limitations." *Id.* at 278. Again, this case is not on point for the analysis at hand.

Each of these cases relies on construction of the applicable statutes in the states' probate codes. None of them had statutory schemes similar to those in South Dakota and

applicable here. This case should be determined based on the plain language of South Dakota Codified Law chapter 29A-3 as it relates to a personal representative's duties and powers—not cases from other jurisdictions that rely on completely different statutory schemes. Under the plain meaning of SDCL § 29A-3-801, a known creditor is to receive a written notice from the personal representative specifying the creditor's time limit upon which it may bring claims against the estate. SDCL § 29A-3-801. The plain terms of SDCL § 29A-3-803 provide that creditors who receive written notice will not have their claims barred until the time set in the written notice. SDCL § 29A-3-803. In this case, no written notice has been provided to known claimants setting forth a claims deadline, therefore, that deadline has not passed, and as such, the trial court erred in finding Denise's claim was time-barred.

C. The trial court erred in determining formal presentment of Denise's claim was required.

The trial court's ruling regarding Denise's alleged failure to comply with the statutory notice requirements places form over substance. By stating Denise's April 8, 2020 Motion to Approve Payment of Claim was (1) untimely; and (2) did not provide enough information, the trial court ignored various governing statutes.

First, SDCL § 29A-3-807(b) gives a personal representative the power to pay any valid claim without formal presentation to the court, stating "The personal representative at any time may pay any valid claim that has not been barred, with or without formal presentation. . ." *Id.* (Emphasis added). The plain language of this statute makes clear Denise could have paid her own claim without formal presentation to the trial court. The general claims presentation statute, SDCL § 29A-3-804 does not change this:

(a) Claims against a decedent's estate may be presented by either of the following methods:

(1) The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court and mail or deliver a copy thereof to the personal representative. The claim is deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the clerk of court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the nature of the security shall be described. Failure to describe correctly the nature of the security or uncertainty, or the due date of a claim not yet due does not invalidate the presentation;

(2) The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subject to jurisdiction, to obtain payment of the claim. The claim is deemed presented on the date the proceeding is commenced.

SDCL § 29A-3-804(A)(1-2) (emphasis added). Thus, SDCL § 29A-3-807's discretion regarding formal presentation of claims is harmonious with SDCL § 29A-3-804 because both statutes use "may" instead of "shall" when discussing how a claim may be presented. Nothing in SDCL § 29A-3-804 requires a claimant make a statement of claim—it just provides guidance to creditors as to *how* to file a statement of claim should they choose to do so.

Even though these statutes make clear there was no requirement for Denise to formally present her claim to the trial court for approval, as she did with her April 8, 2020 Motion, she chose to do so for multiple reasons. First, SDCL § 29A-3-713 provides:

> Any sale or encumbrance to the personal representative, the personal representative's spouse, agent or attorney, or any corporation or trust in which the personal representative has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure, unless:
>
> (1) The will or a contract entered into by the decedent expressly authorized the transaction; or
>
> (2) The transaction is approved by the court after notice to interested persons.

Id. (Emphasis added). By presenting the trial court with her claim for its approval, Denise not only wanted to ensure it was not a voidable transfer, but also did so in the interest of transparency to ensure that all heirs, including Ryan, were on notice of her claim. She did so despite the fact formal presentment of her claim was not required. These facts clearly contradict the trial court's concern that Denise was utilizing the notice statutes to receive an unfair benefit.

The trial court's reading of the notice statute would have the result of benefiting personal representatives could simply convey all the property to her own claim based on the breach of contract and force someone to then bring a claim to void that transaction. No Notice of Claim would be required for Denise to pay herself. The trial court's interpretation of the statutes results in a mechanism wherein personal representatives will be encouraged to pay themselves prior to filing requests with the court for approval voiding the argument that somehow a statement of claim needed to be filed or was not sufficient to satisfy the court or statute.

Further, under either scenario (formal or informal presentation) Denise's claim was not barred and was timely under SDCL § 29A-3-801. Even assuming, *arguendo*, that the shortest deadline—the unknown creditor deadline of April 16, 2020—applied to

Denise (which Denise stringently denies, as set forth above), her Motion for Approval of Claim still was filed prior to that four-month deadline. Thus, even if Denise was estopped from claiming that she did not have written notice of the claim, she still acted within the four-month deadline. Therefore, the trial court erred in finding Denise's claim was time-barred.

D. Even assuming formal presentation of a claim is required, the trial court erred in determining that Denise's Motion for Approval and Payment of Claim did not comply with the requirements set forth in SDCL §29A-3-804.

In addition to finding Denise was time-barred from filing, the trial court also found Denise's Motion did not provide the necessary information required by SDCL § 29A-3-804. (APP 012, COL (a) ¶ 30). This statute provides:

> The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, **or** may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court and mail or deliver a copy thereof to the personal representative.
>
> ***
>
> If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the nature of the security shall be described. Failure to describe correctly the nature of the security or uncertainty, or the due date of a claim not yet due does not invalidate the presentation.

SDCL § 29A-3-804(1)(emphasis added). Denise's Motion meets these requirements. Denise is represented by an attorney, who by law is her agent, and whose name and address was included in the Motion. It details the nature of the claim as it specifically includes the contractual language at issue, which states that the decedent, per this Agreement, was to devise all property to Denise, which belies the trial court's finding that Denise "failed to describe [her claim] at all." (APP 011, COL (a), ¶ 27). To the extent Denise failed to describe correctly the nature of the uncertainty, the statute

contemplates this and specifically provides that it does not invalidate her presentation of claim.

Furthermore, such a strict interpretation of this statute violates the rules of construction specifically provided in South Dakota's Probate Code:

> The South Dakota Uniform Probate Code shall be liberally construed and applied to promote simplification, clarification, and efficiency in the law of decedent's estates, guardianship and conservatorship, and multiple-party accounts and other nonprobate transfers.

SDCL § 29A-1-102 (emphasis added). The trial court's findings do not promote simplification or efficiency in the law of estates.

Not only is such a strict interpretation of this statute contrary to our own statutes, it is also contrary to jurisprudence from across the country. Many jurisdictions that have adopted section 3-804 of the Uniform Probate Code have found a claim to be sufficient if it substantially complies with statutory requirements. *See Peterson v. Marston*, 362 N.W.2d 309, 310 (Minn. 1985) (letter to estate's attorney constituted substantial compliance with 3-804 and claim was found to be valid); *Strong Bros. Enterprises v. Estate of Strong*, 666 P.2d 1109, 1112 (Colo. App. 1983) ("Requiring only substantial compliance with the notice provision preserves the bargained-for obligation of the parties without interfering with a speedy and final distribution of the estate"); 34 C.J.S. Executors and Administrators § 563 ("A statute governing the manner of filing or presentation must be observed, but substantial compliance with the provisions of such statutes may be sufficient. Such a statute should be applied to facilitate the settlement of estates without unduly restricting the rights of timely claimants who, in good faith, endeavor to comply with statutory requirements").

Further, other states have noted a claim is sufficient under the statute if it satisfies a "notice-pleading" standard which would have applied had the claimant chosen to proceed directly with a civil action. *See Quinn v. Quinn*, 772 P.2d 979, 981 (Utah Ct. App. 1989) ("[Section 3–804(1)(a)] does not require the claim to be drafted with more precision than a civil complaint. 'It would be anomalous to conclude that a claimant who opts for the less formal method of asserting a claim pursuant to [section 3–804] must give more detailed notice than would be required in an adequate complaint'"). Essentially, in its holdings, the trial court held Denise to strict compliance with the statute for the contents of her notice, but ignores other statutory language by imposing its own deadline whereby she would have had to provide notice to known creditors. This approach is inconsistent. The trial court erred in finding Denise's claim was insufficient under SDCL § 29A-3-804.

In summary, for the following reasons, the trial court erred when it found Denise's claims were time-barred and that her Motion for Approval lacked sufficient information to satisfy SDCL § 29A-3-804:

1. There is no "known creditor deadline," and the imposition of such violates the plain statutory language at issue and the clearly established rules of statutory construction;

2. Judicial estoppel is inapplicable because the elements are not satisfied;

3. The cases relied upon by the trial court are distinguishable in that they have completely different statutory schemes than South Dakota;

4. Denise's claim was timely presented; and

5. Denise's claim contained the information required by SDCL § 29A-3-804.

II. THE TRIAL COURT ERRED IN DETERMINING DENISE FAILED TO ESTABLISH SHE HAS AN INADEQUATE REMEDY AT LAW.

In its Conclusions of Law, the trial court found that even had Denise provided what it considered to be adequate notice, she still was not entitled to specific performance because she did not present adequate evidence to support that she lacked an adequate remedy at law. (APP 013, COL (b) ¶ 3-4). Such findings were in error.

A. South Dakota precedent recognizes specific performance as the appropriate remedy for the breach of an agreement to execute wills.

Contrary to the trial court's findings, Denise did meet her burden to show entitlement to the remedy of specific performance. This Court has noted the proper remedy for a breach of a contract to make wills, such as the Agreement at issue here, is specific performance:

> A person may make a valid agreement to make a disposition of his property by will. It is within the jurisdiction of equity to require the equivalent of specific performance of such an agreement after the death of the promisor by requiring transfer of his property in accordance with the terms of the agreement. The circuit court has general equity jurisdiction, S.D. Const. art. V, § 14, and thus unquestionably has power pending administration of the estate to adjudicate the equitable issues presented with relation to the existence of a contract to make a will.

Lass v. Erickson, 74 SD 503 (1952) (emphasis added). Multiple other courts have also held similarly. *Estate of Chapman*, 239 N.W.2d 869 (Iowa 1976); *Mosloki v. Gamble*, 191 Minn. 170 (Minn. 1934); *Janetta v. Janetta*, 205 Minn. 266 (1939); *Bennington v. McClintick*, 253 S.W.2d 132 (Missouri 1952); *Pruss v. Pruss*, 245 Neb. 521 (Neb. 1994); *Matter of Gosmire's Estate*, 331 N.W.2d 562, 568 (S.D. 1983) (specific performance of oral contract to devise property in exchange for provision of services was appropriate); *see also* SDCL § 21-9-1 (allowing for specific performance of an obligation). There can be no question Denise is entitled to the benefit of her contractual agreement with Neil,

including specific performance of the terms. Thus, it is clear specific performance is appropriate in this circumstance.

B. Denise established she lacks an adequate remedy at law.

The trial court erred in finding Denise failed to show she lacked a legal remedy at law. Neil sold his ranch on a contract for deed. (APP 003, FOF (a), ¶ 4). As a result of this, Neil received payments pursuant to the terms of the contract for deed. (Dec. HT 28:16-29:1). As was set forth at the December 3, 2020 hearing, the majority of the Estate in question is the right to receive these proceeds under the contract for deed. (Dec. HT 46:24-47:5). While the trial court interpreted this as simply a right to receive payments (i.e. something that could be addressed by money damages), money damages would be an insufficient remedy.

First, such an interpretation wholly overlooks the executory nature of a contract for deed. A contract for deed is an executory contract; thus, the Estate maintains legal title to the land while the purchaser holds equitable title. *First Fed. Sav. & Loan Ass'n of Rapid City v. Wick*, 322 N.W.2d 860, 862 (S.D. 1982). If the purchaser defaults and fails to continue making these payments, Denise/the Estate would then hold both legal and equitable title to the real property. Thus, the property of the Estate is not the proceeds from this contract for deed—instead, the property of the Estate is the unique, real property subject to the contract for deed. And, as is clearly established in South Dakota precedent, "the presumed remedy for the breach of an agreement to transfer real property is specific performance." *McCollam v. Cahill*, 2009 S.D. 34, ¶ 15, 766 N.W.2d 171, 176–77 (citing *Wiggins v. Shewmake*, 374 N.W.2d 111, 115 (S.D.1985) (citing SDCL § 21–9–9); *see also Estate of Gosmire*, 331 N.W.2d 562, 67 (SD 1983); *Endres v.*

Warriner, 307 N.W.2d 146 (SD 1981) (so long as mutuality of remedy exists, specific performance is appropriate). Thus, not only is specific performance the appropriate remedy for a breach of an agreement to execute wills, it is also the appropriate remedy when the subject of the agreement is a unique piece of property—i.e., the ranch.

Second, while if this was the second of the two parties to reciprocal wills to pass away, money damages may be appropriate, such is not the case here. At that point, if the second spouse is the one to have breached the contract, it is abundantly clear what would have been in the estate had they not breached. However, where, as here, the first person passing away is the one to breach, it is not possible to know what property would be left in Denise's Estate or what the impact of her being bound to leave her property pursuant to the Agreement would have. The only practical way of enforcing the Agreement between Denise and Neil in this situation is by specific performance. Denise acknowledges by specific performance she too remains bound to the contract to make wills and the obligation to transfer the property of her estate to the personal recipients, Neil's children and her children (Dec. HT 22:13-23:1).

Should this Court adopt the trial court's reasoning, the first spouse could always breach the agreement and leave the second spouse without that equitable remedy because as is a matter of law, it is impossible to make a determination of what the value of the Estate might be upon the second person's death, as well as what the surviving spouse's consumption of the Estate might be during the time that they are still alive. Furthermore, the breach by the first to die also prevents the final subsequent heirs from receiving the benefit intended by the Agreement. If there is no specific performance, no obligation exists for the surviving spouse to comply with the Agreement.

Therefore, the trial court erred in finding Denise failed to establish she lacked an adequate remedy at law.

III. THE TRIAL COURT ERRED IN ITS APPLICATION OF SDCL § 21-9-3 TO PREVENT THE ENFORCEMENT OF SPECIFIC PERFORMANCE AGAINST NEIL.

The trial court erred when it found enforcement of the Agreement would be unjust or unreasonable to Neil. (APP 014, COL (b), ¶ 9). Enforcing specific performance in this case would not be unjust or unreasonable. In general:

> Specific performance will not be decreed unless the contract that the plaintiff seeks to enforce is a fair and equitable one. Thus, courts will refuse to grant a decree of specific performance if the plaintiff was guilty of unfair or inequitable conduct in securing the contract, if he or she took inequitable advantage of the other party to the agreement, or if the plaintiff's conduct has been unconscientious, inequitable, or characterized by bad faith.

71 Am. Jur. 2d Specific Performance § 61.

While a court can refuse to require specific performance in instances where subsequent events "have worked great and unexpected hardship," reliance upon these events to avoid specific performance is only appropriate if they "were such as not to be within the reasonable contemplation of the parties at the time of the execution of the contract." 71 Am. Jur. 2d Specific Performance § 98. These subsequent events or hardship "cannot be self-inflicted or caused through inexcusable neglect on the part of the persons seeking to be excused or exonerated from specific performance." 71 Am. Jur. 2d Specific Performance § 90. "Mere hardship resulting from miscalculations or from contingencies that might have been foreseen and for which the plaintiff is not at fault will not ordinarily prevent specific enforcement." 71 Am. Jur. 2d Specific Performance § 91. Importantly:

> [T]he mere fact that the defendant made a bad trade or bargain is not sufficient to defeat an application for specific performance if no fraud, mistake, or overreaching is alleged; it is not the province of equity to undo a bargain merely because it is hard. Mere hardship alone, or the mere fact that the contract was improvident when made, is not sufficient to preclude relief if it is otherwise unobjectionable. There must be something more than the fact that a party has made a bad trade.

Id.

The trial court made multiple findings on why enforcement of the Agreement against Neil would be unjust and unreasonable. (APP 014-015, COL (b), ¶¶ 7-12). Still, at no point did the trial court ever find the Agreement between Neil and Denise to be invalid, or that Denise procured this Agreement through duress, bad faith, undue influence, or the like. Instead, every single finding is based upon events subsequent to the parties' Agreement. *Id.* The trial court noted that Neil attempted to divorce Denise, that he intended to disinherit her, and that neither Denise nor Neil "intended for their relationship to struggle so significantly." (APP 015, COL (b), ¶ 12). Further, the trial court made no findings that the relationship struggles between the parties were unforeseeable or outside of the "reasonable contemplation" of the parties at the time they entered into the Agreement. 71 Am. Jur. 2d Specific Performance § 98. Divorce or relationship struggles are always possibilities in a marriage. To relieve Neil of his contractual obligation simply because he ultimately ended up making a "bad trade" is not appropriate or supported by law.

In making this finding, the trial court disregarded the main reason that Denise and Neil's relationship fell apart—Neil's pervasive drinking problem. The record is replete with testimony, from witnesses on both sides of the litigation, as to how severe Neil's alcoholism was. Denise testified she had to ask Ryan and his sister, Brandy, to check on

Neil when she was out of town because he started to fall a lot and she was concerned about his safety. (Oct. HT 57:23-58:19; 62:7-14). Ryan and Denise discussed getting Neil admitted to detox to deal with his drinking. (Oct. HT 58:20-59:4; 60:24-61:13). Ryan testified four of Neil's siblings had sat down with Neil to discuss his drinking and that Neil was drinking a quarter bottle of whiskey every day, and sometimes more. (Dec. HT 85:5-14; 86:4-11). Ryan had even attempted to get a guardianship over his father because he was so concerned about Neil's ability to make decisions for himself. (Dec. HT 84:18-21).

Neil's sister discussed how terrible it was to see Neil's drinking progress and how she sympathized with how difficult it would have been for Denise to have to deal with it every day. (Oct. HT 96:19-97:6). Neil's grandson testified Neil and Denise's relationship was good, and "in the earlier years, like, 2015-2017, before he really started drinking hard, it was usually pretty good." (Dec. HT 92:6-10). He also testified t in the later years, Neil's drinking just got "worse and worse" and that Neil would drink so much that "his whole body would start shaking and he would collapse to the ground." (Dec. HT 92:14-22). Neil's brother testified he could not get Neil to stop drinking and there were times he found Neil and he was so drunk he could not stand. (Dec. HT 121:19-122:5). Furthermore, in the trial court's earlier Findings of Fact and Conclusions of Law dated November 25, 2019 (which were incorporated into those subject to this appeal), it specifically found that Neil had a "severe" drinking problem and that "Neil's drinking caused a severe strain on the marital relationship." (APP 023, ¶¶ 47-48).

Essentially, in denying Denise the remedy of specific performance, the trial court's findings allow Neil to take advantage of a "self-inflicted" hardship to avoid

specific performance of the Agreement—in violation of the rules of specific performance—and despite the fact the Court made no findings that Denise acted inappropriately or in bad faith. 71 Am. Jur. 2d Specific Performance § 90. Equity would require the trial court to make a determination of who and what caused the deterioration of the relationship. In this instance, despite its earlier findings that it was Neil's drinking that strained the relationship, the trial court has determined that essentially Denise is to blame for the deterioration of the relationship, so it would be unequitable to enforce the agreement she had with Neil. Yet, no evidence supports that Denise is a wrongdoer here.

The trial court's holdings create even further injustice to Denise because while a party who is disallowed specific performance can typically seek her remedy at law (*see Watters v. Ryan*, 31 S.D. 536, 141 N.W. 359, 364 (1913) (cited in APP 015, COL (b) ¶ 12), the trial court's incorrect holdings with regard to the sufficiency and timing of Denise's notice arguably prevents her from doing so, leaving Denise with no remedy to speak of.

Denise requests specific performance of the Agreement, and does so with clean hands and a willingness to fulfill her end of the bargain (with no findings by the trial court to the contrary). Instead, the trial court's findings allow Neil to disregard a risk he knowingly and willingly took in entering into a will contract with a spouse, simply because the trial court does not like the outcome. This refusal to allow Denise to seek specific performance is incongruous with the law. Therefore, Denise respectfully requests this Court find the trial court erred in erred in applying SDCL § 21-9-3 to prevent the enforcement of specific performance against Neil.

CONCLUSION

The trial court incorrectly applied the law to its findings of fact. With regard to the trial court's findings regarding the timing and sufficiency of notice provided by Denise, Denise respectfully submits that these findings are in error for multiple reasons. There is no statutory "known creditor deadline," and imposition of such by the trial court violates both the plain statutory language at issue and the established rules of statutory construction. Second, judicial estoppel does not apply because the elements are not satisfied. Third, the cases relied upon by the trial court are distinguishable in that they are from states that have completely different statutory schemes than South Dakota. Next, Denise's claim was timely presented. Finally, Denise's claim contained the information required by SDCL § 29A-3-804. For all of these reasons, the trial court's conclusions of law are erroneous and should be set aside.

With regard to the trial court's findings as to the equity and specific performance, the trial court erred in concluding both that Denise did not meet her burden to show that she lacks an adequate remedy at law, but also that enforcement of the Agreement would be "unjust" to Neil. Specific performance is the appropriate remedy given the nature of the Agreement between the parties and the type of property. Finally, enforcement of the Agreement is not unjust to Neil because the change in circumstances was not outside of the "reasonable contemplation" of the parties, as is required for a court to deny specific performance.

Therefore, Denise respectfully requests this Court find the claim was timely, that specific performance entering the contract proper and for further proceeding.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument in this case.

Dated: May 6, 2021.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Talbot J. Wieczorek*

Talbot J. Wieczorek
Katelyn A. Cook
Attorneys for Denise Schipke-Smeenk,
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Telefax: (605) 342-9503
E-mail: tjw@gpna.com

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellant's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Brief for Appellant, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of contains 9,975 words. I have relied upon the word count of our word processing system as used to prepare this Brief for Appellant. The original Brief for Appellant and all copies are in compliance with this rule.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Talbot J. Wieczorek*
Talbot J. Wieczorek

CERTIFICATE OF SERVICE

I hereby certify on May 6, 2021, the foregoing **BRIEF OF APPELLANT DENISE L. SCHIPKE-SMEENK** was filed with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 E. Capitol Avenue
Pierre, SD 57501-5070
SCClerkBriefs@ujs.state.sd.us

and the **BRIEF OF APPELLANT DENISE L. SCHIPKE-SMEENK** was served by electronic mail and mailed by U.S. Mail to the following:

John W. Burke
Kimberly Pehrson
Thomas Braun Bernard & Burke, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702
Telephone: (605)-348-7516
E-mail: jburke@tb3law.com
kpehrson@tb3law.com
Attorneys for Appellee, Ryan Smeenk

By: */s/ Talbot J. Wieczorek*
Talbot J. Wieczorek

APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT

In the Matter of the Estate of	)	09PRO19-000013
NEIL WILLIAM SMEENK,	)	**ORDER DENYING MOTION FOR APPROVAL AND PAYMENT OF CLAIM**
Deceased.	)	

The above-captioned matter came before the Court on December 3, 2020 for an evidentiary hearing on the *Motion for Approval and Payment of Claim* filed by Personal Representative Denise L. Schipke-Smeenk. Talbot J. Wieczorek appeared on behalf of Denise L. Schipke-Smeenk; John W. Burke and Kimberly S. Pehrson appeared on behalf of Ryan Smeenk. The Court having listened to and reviewed the testimony and evidence presented, having reviewed the parties' submissions, and having considered the arguments of counsel, it is hereby:

ORDERED that, in accordance with the Court's *Findings of Fact and Conclusions of Law* entered on February 2, 2021, the *Motion for Approval and Payment of Claim* is DENIED.

BY THE COURT:

Signed: 2/5/2021 9:53:52 AM

Honorable Mike Day
Fourth Circuit Court Judge

Attest:
Schmoker, Laura
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT

In the Matter of the Estate of	09PRO19-000013
NEIL WILLIAM SMEENK,	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
Deceased.	

On December 3, 2020, a Motions Hearing was held before the Honorable Judge Michael W. Day on Personal Representative Denise Smeenk's Motion to Allow Claim and Ryan Smeenk's Objection to Approval of the Claim. Denise Smeenk appeared, represented by Talbot Wieczorek of Gunderson Palmer Nelson & Ashmore, LLP. Ryan Smeenk appeared, represented by John Burke and Kimberly Pehrson of Thomas Braun Bernard & Burke, LLP. The parties filed post hearing submissions. This Court having considered the testimony, evidence, briefs and post hearing submissions from both parties, with good cause showing, now adopts and enters these Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Any Finding of Fact more appropriately labeled as a Conclusion of Law, or vice versa, is to be considered as such.

2. This Court's previous Findings of Fact dated November 25, 2019 are hereby incorporated in these Findings of Fact as if stated here in full.

3. This Court incorporates the entirely of the testimony and evidence admitted during the hearing held on December 3, 3030, as well as the prior submission of the parties. By agreement of the parties, this Court further relies, as appropriate, upon the testimony and evidence admitted at the earlier evidentiary held on October 31, 2019.

a. SDCL Chap. 29A–3 Nonclaim Statutes

4. The Estate of Neil Smeenk's primary asset is the proceeds from a contract for deed whereby Neil sold his family ranch. In conjunction with the parties' execution of the Agreement to Execute Mutual Wills in 2017, Neil signed an Assignment of Contract for Deed wherein he assigned directly to his wife, Denise Smeenk, the right to one-half of the proceeds he was receiving from the sale of his family's ranch. Therefore, regardless of the outcome of this dispute, Denise will receive approximately half of their marital property.

5. Denise Smeenk is a creditor of the Estate pursuant to her breach of contract claim based upon the 2017 Agreement to Execute Mutual Wills.

6. By order of this Court, Denise also serves as Personal Representative of the Estate. In her capacity as Personal Representative, Denise had knowledge of her own claim as a creditor, making her a known creditor of the Estate.

7. Following her appointment as Personal Representative on December 9, 2019, Denise began sending written notices to known creditors and publishing notice to unknown creditors.

8. On December 12, 2019, Denise sent the Department of Social Services (hereafter "DSS") a notice of her appointment as Personal Representative. This notice informed DSS to bring all claims against Neil's Estate within four months of her appointment or sixty days after the mailing or other delivery of the written notice, whichever was later. In this Notice, pursuant to her duties as Personal Representative, Denise advised DSS that if it failed to bring its claim within that period, the claim would be forever barred. Four months from December 12, 2019 was April 12, 2020. As of that date, the statute of repose in SDCL 29A-3-803 ran as to DSS's creditor's claims.

9. Also on December 12, 2019, Personal Representative Denise signed another notice informing unknown creditors "to file their claims within four months after the date of the first publication of this notice" or be forever barred. She published the notice in the Black Hills Pioneer[1] beginning on December 16, 2019. Four months from December 16, 2019 was April 16, 2020. Therefore, unknown creditors were required to present their claims to the Estate on or before that date or "be forever barred."

10. Denise's Notice to DSS, Notice to Unknown Creditors, and Affidavit of Publication are filed with this Court. This Court has accepted these notices and will rely upon them if creditors who have been properly notified attempt to bring untimely claims against Neil's Estate.

[1] The Black Hills Pioneer is the legal notice newspaper for Butte County.

11. Personal Representative Denise did not send written notice to herself, a known creditor of the Estate, pursuant to SDCL 29A-3-801(b). Rather, on April 8, 2020, Denise moved this Court to approve her breach of contract claim under SDCL 29A-3-713. SDCL 29A-3-713 sets forth the procedure a Personal Representative must follow when she has a substantial conflict of interest. In her Motion, Denise specifically states she "moves this Court for the Payment of a Claim..." She submitted this Motion in her capacity as Personal Representative.

12. Consideration of Denise's Motion for Approval of Claim requires this Court to determine whether Denise, in her capacity as a creditor to the Estate, timely and properly presented her creditor's claim.

13. Denise testified that she knew about her claim the day that Neil passed away—June 14, 2019.

14. Apart from her April 8, 2020 Motion for Approval of Claim, Denise did not submit any document to present her creditor's claim between December 9, 2019 and the April 9, 2020 deadline for known creditor claims or the April 16, 2020 deadline for unknown creditor claims.

b. Equity

15. Before he committed suicide in June 2019, Neil's marriage to Denise was severely strained. This was especially true in the later years of their relationship. Neil battled with substance abuse and depression, which caused Denise extreme frustration.

16. In the months leading up to his death, Neil discussed his depression with Denise and others. On occasion, Neil mentioned that he wanted to take his own life.

17. By March 2019, Neil's and Denise's marriage had deteriorated to such a degree that Neil moved out of the marital home. In a subsequent letter, dated March 22, 2019, Denise acknowledged that she knew Neil considered their marriage over.

18. From March 2019 until he took his life in June, Neil moved from house to house, relying on relatives and friends to provide him with a place to stay. He did not move back in with Denise. At one point, he stayed with his daughter, Brandy Mooney. At other times, he stayed with his son, Ryan Smeenk.

19. While Neil was staying with Brandy, he expressed his desire to divorce Denise and stated that he intended to change his Will "so that it would be better for Ryan and [her]." After Neil told Brandy that he desired to get divorced, Brandy considered having Neil meet with an attorney that Brandy had used in the past. However, given that Brandy's lawyer practiced a considerable distance from Belle Fourche, Brandy recommended that Neil find a closer attorney. Neil then sought assistance from his brother, Stephen Smeenk. Stephen directed him to the Lynn Jackson Law Firm. Neil also asked Ryan, who then helped him as well.

20. In early April 2019, Neil met with Lynn Jackson attorney Drew Skjoldal regarding estate planning and then met with Lynn Jackson attorney Jeffery D. Collins regarding getting a divorce. After Neil retained Mr. Collins to represent him for the purpose of the divorce, Mr. Collins wrote to Denise on April 8, 2019 to advise that he was representing Neil regarding their "recent separation and mutual decision to end [their] marriage." He also requested information to assist with equitable division of the martial assets. According to Mr. Collins, he referred to the divorce as a "mutual decision" in his letter because that was his understanding after conferring with Neil. Denise testified that Neil told her about his decision to hire a divorce attorney prior to receiving Mr. Collins' letter. Around that time, on April 12, 2019, Denise wrote to Neil. Her letter recounted her perception of Neil's emotional struggle with their separation and expressed that Neil's decision to seek legal counsel meant that he had no interest in reconciliation.[2]

21. On April 19, 2019, Neil went to his lawyer to execute certain legal documents. Ryan accompanied him. In the morning, Neil signed the 2019 Will, which explicitly disinherited Denise. In the afternoon, Neil met with Mr. Collins and, Mr. Collins issued a divorce Complaint against Denise. Denise admitted service of the Summons and Complaint on April 25, 2019, thereby commencing the divorce action.

22. Neil's pending divorce is strong evidence of his intent to disinherit her. However, nothing could communicate his testamentary intent more than the language of his 2019 Will, in which he declares he "wish[ed] for Denise Schipke-Smeenk to receive the least amount of my estate as is allowable by South Dakota law." Neil was adamant about preventing Denise from inheriting his assets. In fact, while discussing his estate plan with his attorney, Neil slammed his hand down on the table and declared, "I want my kids to have what's mine."

---

[2] Her April 12, 2019 letter specifically stated: "[O]nce you decided to go to a lawyer that pretty much says to me that you have no desire to work on this relationship."

23. As summer 2019 approached, the situation between Neil and Denise did not improve. By that time, most of their family—including Ryan Smeenk (Neil's son), Brandy Mooney (Neil's daughter), Kurtis Mooney (Neil's grandson), and Stephen Smeenk (Neil's brother)—knew that divorce was imminent. Sadly, before their divorce was finalized, Neil's situation overwhelmed him, and he committed suicide.

24. Following Neil's death, the relationship between Denise and Ryan went from generally disagreeable to openly hostile.

CONCLUSIONS OF LAW

a. SDCL Chap. 29A-3 Nonclaim Statutes

1. Generally, the manner of notice a Personal Representative is required to give to a decedent's creditors is dictated by whether they are (i) unknown creditors; or (ii) creditors that are "known or reasonably ascertainable" to the Personal Representative. SDCL 29A-3-801(a).

2. With regard to unknown creditors, the Personal Representative may publish notice in a legal newspaper in the proper county for three consecutive weeks. Notice using this method runs from "the date of the first publication of notice[,]" meaning that creditors must present their claims within four months of that date. SDCL 29A-3-801(a).

3. If the creditors are "known or reasonably ascertainable," however, "a personal representative shall give written notice by mail or other delivery...informing the creditor to present the claim within four months after the date of the personal representative's appointment or within sixty days after the mailing or other delivery of the written notice, whichever is later, or be forever barred." SDCL 29A-3-801(b).

4. "A creditor is known if the personal representative is aware that the creditor has demanded payment from the decedent or the estate or if the personal representative is otherwise aware of the decedent's obligation." SDCL 29A-3-801(d).

5. Because Denise is both Personal Representative of Neil's Estate and a holder of a creditor claim, Creditor Denise is a creditor known to herself.

6. Notice given under SDCL 29A-3-801(b) triggers the nonclaim clock for known creditors. In her capacity as Personal Representative, Denise never mailed or

delivered written notice to herself as a creditor[3] as she was required to under SDCL 29A-3-801(b).

7. At the absolute latest, Denise, in her capacity as a creditor, had actual notice of her breach of contract claim, including the requirements associated with presenting her claim, on December 12, 2019 when she sent her notice to DSS and signed the general notice to unknown creditors.

8. Both notices warn the creditors that failure to timely assert their claims means they will be "forever barred." Denise acknowledged this when she signed the general notice to unknown creditors under oath.

9. "The question whether to apply principles of judicial estoppel is a mixed question of law and fact, which [the South Dakota Supreme Court] review[s] de novo." *Wyman v. Bruckner*, 2018 17, ¶ 12, 908 N.W.2d 170, 175.

10. "The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather it is the intentional assertion of an inconsistent position that perverts the judicial machinery." *Wyman*, 2018 S.D. 17, ¶ 11, 908 N.W.2d at 175.

11. "Courts have observed that 'the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle[.]" *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 1815, 149 L. Ed. 2d 968 (2001) (quotations omitted). However, generally, four elements should be present for judicial estoppel to apply: (1) The latter position must be clearly inconsistent with the earlier one; (2) The earlier position was judicially accepted, creating the risk of inconsistent legal determinations; (3) The party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped; and (4) The inconsistency must be about a matter of fact, not law. *Wyman*, 2018 S.D. 17, ¶¶ 11–12, 908 N.W.2d at 175.

12. Denise, in her capacity as a creditor, received actual notice of her claim against the Estate on December 12, 2019. Therefore, it would be inequitable to allow Denise in her capacity as Personal Representative to indefinitely extend the timeframe for presenting her claim by claiming lack of notice. This is especially true because Denise owes fiduciary duties to the Estate to maintain a clean record of all claims and remain faithful to the statutes in SDCL chap. 29A–3. *See* SDCL 29A-3-703 (providing that a personal representative assumes a duty to act in the best interests of the estate).

13. The first two elements of judicial estoppel—which require a judicially-accepted inconsistency—are met. There is no dispute that Creditor Denise knew that

[3] Although mailing to oneself or hand delivery to oneself seem absurd the statutory language is clear.

her contract claim existed. Denise testified that she first realized she had a claim well over a year ago—"[t]he day that [Neil] died." Nor is there any dispute that Denise knew the deadline for presenting known creditors' claims—she presented DSS with notice and signed a notice to unknown creditors on December 12, 2019, which was then subsequently published in the Black Hills Pioneer. This Court has acknowledged and adopted the existence of Creditor Denise's contract claim, her knowledge of the Estate's assets and liabilities, and her actual notice of the timeline for bringing creditor claims. Concluding that Creditor Denise did not have notice under SDCL 29A-3-801(b) while also imposing her notice on other creditors "create[s] the risk of inconsistent legal determinations." *Wyman*, 2018 S.D. 17, ¶ 12, 908 N.W.2d at 175.

14. The third element, unfair advantage, is also met. Personal Representative Denise cannot suspend triggering her own non-claim period by delaying sending written notice to herself without resulting inequity. Denise, in her capacity as Personal Representative, had absolute control over who received notice and when. *See* SDCL 29A-3-801(b). Absent judicial estoppel, this power could potentially allow her to extend her claim period well beyond the legislatively-prescribed four months. SDCL 29A-3-801(b) *(notice)*; SDCL 29A-3-803 *(limitations period)*.

15. Over a year has passed since Denise sent her notice to DSS and published notice to unknown creditors. Allowing her to side step a deadline, whether it be April 9, 2020 or April 16, 2020, that has already lapsed by at least nine months would render an inequitable result. If this Court were to rule to the contrary, such a decision would disregard the clear import of SDCL 29A-3-801.

16. Notwithstanding the fact that this Court is confined to the requirements outlined in SDCL 29A-3-801, Creditor Denise's claim against the Estate cannot be extended without frustrating the speedy and efficient settlement of estates that the nonclaim period exists to encourage. *See, e.g., 34 C.J.S. Executors & Administrators* § 540 (2020 update) (providing the various purposes for nonclaim limitation periods). Beyond that, and perhaps most importantly, if this Court were to allow Denise's creditor's claim to stand, it would allow her to derive an unfair advantage over other untimely creditors, resulting in inequity. *See In re Estate of Pina*, 443 N.W.2d 627, 631 (S.D. 1989) (preventing a personal representative from benefiting herself "at the expense of other creditors."). For these reasons, the third element—unfair advantage—is met. *See Wyman*, 2018 S.D. 17, ¶ 12, 908 N.W.2d at 175.

17. The fourth and final element—that the inconsistency be rooted in fact—is also satisfied. *See Wyman*, 2018 S.D. 17, ¶ 12, 908 N.W.2d at 175. At its heart, the crux of the issue before this Court is decided based on when Creditor Denise

had notice of her claim for purposes of starting the nonclaim clock. *See Spencer v. Estate of Spencer, 2008 S.D. 129, ¶ 16, 759 N.W.2d 539, 544.* While determining whether a triggering event is sufficient for accrual is a question of law, the question of "*when* accrual occurs is a question of fact[.]" *See, e.g., East Side Lutheran Church of Sioux Falls v. Next, Inc.*, 2014 S.D. 59, ¶ 11, 852 N.W.2d 434, 439 (emphasis in original). Knowledge and notice are questions of fact. *See, e.g., Schott v. S.D. Wheat Growers Ass'n*, 2017 S.D. 91, ¶ 14, N.W.2d 359, 362 (explaining that knowledge in assumption of the risk defenses is typically a question of fact.); *West Cent. Elec. Coop. v. James River Broadcasting Co.*, 393 N.W.2d 83, 87 (S.D. 1986) (holding, in the constructive notice context, that "[w]hether or not notice is given or received is a question of fact.) Because the final element of the *Wyman* test is met, judicial estoppel is appropriate.

18. This Court does not stand alone in its holding. Courts in other jurisdictions have prevented personal representatives/creditors from using notice statutes to their benefit.

19. This Court is particularly persuaded by the holding in *Mead v. Barton*, 885 N.W.2d 316, 318 (Mich. Ct. App. 2016) when analyzing notice requirements for individuals who are both personal representatives and creditors to estates. In *Mead*, the personal representative published a notice to creditors in a newspaper but failed to timely present her own creditor claim. When the personal representative took steps to distribute the settlement to herself, the other heirs objected on the basis that the time for her creditor claim had expired. The probate court agreed with the personal representative, holding that her claim was timely presented. On appeal, however, the Michigan Court of Appeals disagreed. *Id.* at 322. While the court was unwilling to require the personal representative to send notice to herself to start the clock, it recognized that a joint creditor/personal representative must be held to some deadline. As a result, the court held that the personal representative was bound to the four-month notice period she published to the other creditors months prior. *Id.* at 322–23. The court adopted this position, in part, because it feared another construction of the statute would permit the personal representative extra time to bring a creditor's claim. *Id.* at 322.

20. Courts in Missouri, Pennsylvania, and Kansas have engaged in similar statutory interpretation. *See Adams v. Braggs*, 739 S.W.2d 744, 745–47 (Mo. Ct. App. 1987) (holding that a personal representative that has a claim against the estate must file the claim "within six months after the first published notice of letters testamentary or of administration[.]"); *In re Cohen's Estate*, 364 A.2d 888, 891 (Pa. 1976) ("While the letter of the act does not cover the situation in the instant case, the spirit of the law required that [the personal

representative] give notice of her claim and her failure to do so bars her claim."); *In re Estate of Hoover,* 180 P. 275, 277 (Kan. 1919).

21. Because this Court has found that Denise's creditor's claim is known to herself as Personal Representative, she was required to bring her claim within four months of her appointment as Personal Representative—April 9, 2020. However, even if the deadline for unknown creditors applies to her claim, it would only have extended it for a short period of time—to April 16, 2020.

22. While it is true that Denise submitted her April 8, 2020 Motion for Approval and Payment of Claim before the deadline for known creditors, that document does not satisfy the stringent requirements in SDCL 29A-3-804. SDCL 29A-3-804 requires Denise to present her claim by either (1) delivering or mailing to the personal representative a written statement of claim indicating its basis, the name and address of the claimant, and the amount claimed; or (2) filing a written statement of the claim, in the form prescribed by rule, with the clerk of the court and mailing or delivering a copy thereof to the personal representative. SDCL 29A-3-804.

23. This Court notes that an "or" separates the choices in SDCL 29A-3-804(a)(1). Therefore, a claimant is required to make a selection between the two options presented. The South Dakota Supreme Court has stated that "the word 'or' . . . ordinarily joins a disjunctive list to communicate a choice between exclusive possibilities." *Buffalo Chip,* 2020 S.D. 63, ¶ 48, __ N.W.2d at __ , __(Kern, J., concurring). This concept is consistent with South Dakota Supreme Court precedent. On many occasions, the Supreme Court has declined to loosen statutory requirements or insert additional elements into statutes when the options are joined by "or." *See, e.g., In re Estate of Flaws (Flaws I),* 2016 S.D. 61, ¶¶ 27, 28, 885 N.W.2d 580, 588 (interpreting SDCL 29A-2-114(c) that lists four methods by which a child could establish the identity of her father separated by "or" as an exclusive list); *State v. Armstrong,* 2020 S.D. 6, ¶ 17, 939 N.W.2d 9, 14 (interpreting the word "directly" in SDCL 22-22-45 as it applies to a disjunctive list and not recognizing options outside of the legislatively-provided list); *State v. Bosworth,* 2017 S.D. 43, ¶ 23, 899 N.W.2d 691, 697–98 (interpreting SDCL 22-11-28.1 as a list of "alternatives" and noting that it uses "or to cover two types of instruments" without recognizing a third option).

24. Even if such a Motion could be considered an adequate statement of claim, Denise did not present it as a claimant under SDCL 29A-3-804. Rather, she moved "for approval of payment of claim" under SDCL 29A-3-713 as the Personal Representative. Denise's failure to act in the proper capacity is significant. While some jurisdictions permit a creditor to substantially comply with the statutory requirements for presentation, they have also scrutinized

the capacity under which a joint personal representative/creditor acts. *See, e.g., In re Estate of Sheridan,* 117 P.3d 39, 40, 43 (Colo. App. 2004) ("[Personal Representative] Jarret filed two claims as a creditor of the estate." The items Jarret submitted do not "contain sufficient information to satisfy the most basic requirements of § 15–12–804.").

25. Personal Representative Denise's actual knowledge of her own claim does not excuse this requirement. If it did, creditors known to the Personal Representative would never be required to present their claims.

26. Denise's Motion for Approval of Payment of Claim, which she submitted as the Personal Representative under SDCL 29A-3-713, suggests that Denise, as a creditor, had already presented a claim for the Court to approve. However, a presentation of a creditors claim is a condition precedent to such a Motion. *See, e.g., Pasley v. American Underwriters, Inc.,* 433 N.E.2d 838, 840 (Ind. Ct. App. 1982) (holding that the nonclaim presentation requirements were a condition precedent that, if not satisfied, "preclude[d] recovery when the condition is not met.").

27. In addition to the aforementioned, Denise's Motion also failed to include information expressly required by SDCL 29A-3-804, including the amount of her claim. The presentation statute is clear on this point, and mandatory. "If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the nature of the security shall be described. Failure to describe correctly the nature of the security or uncertainty, or the due date of a claim not yet due does not invalidate the presentation[.]" SDCL 29A-3-804 (emphasis added). In her Motion, Denise did not fail "to describe correctly" the value of her claim. Rather, she failed to describe it at all. Consequently, the safeguard in SDCL 29A-3-804 is inapplicable.

28. Recognizing that Denise, as a creditor, failed to comply with the plain language of SDCL 29A-3-804(a)(1), Denise asks this Court to turn to excerpts from varying other documents to determine the nature of her claim.[4] None of these documents state the uncertainty of Denise's claim or even attempt to discuss its value.

29. Importantly, even if these documents, when read together, did discuss the uncertainty of Denise's claim as a creditor, SDCL 29A-3-804(a)(1) expressly

[4] In addition to her Motion, Denise relies on the following documents: (1) Denise's July 12, 2019 Petition for Formal Probate; (2) Denise's October 16, 2019 Brief in Support of Denise's Petition; (3) A Transcript from the October 31, 2019 Evidentiary Hearing; and (4) A November 25, 2019 Letter from Talbot Wieczorek to Drew Skjoldal.

requires that the creditor deliver the document to the Personal Representative. Denise submitted these documents prior to her appointment as Personal Representative. Documents submitted before a personal representative was appointed cannot constitute presentation to the Personal Representative. Consequently, Creditor Denise did not satisfy the requirements of the first presentation option in SDCL 29A-3-804(a)(1).

30. Denise's second presentation option as a claimant was to file a written statement of the claim "in the form prescribed by rule, with the clerk of the court and mail or deliver a copy thereof to the Personal Representative." SDCL 29A-3-804(a)(1) (referring to Form 3-804 adopted by the South Dakota Supreme Court). Much of the information required by the form is absent from Denise's Motion. Consequently, Denise's Motion also fails to satisfy the requirements of the second presentation option in 29A-3-804(a)(1).

31. The South Dakota Supreme Court has strictly construed the statutes in SDCL Chapter 29A–3 routinely. In 2018, for instance, the Supreme Court strictly interpreted SDCL 29A-3-803, the statute immediately preceding SDCL 29A-3-804 involving the same general subject matter. *See Huston,* 2018 S.D. 73, ¶ 28, 919 N.W.2d at 365 (strictly construing SDCL 29A-3-803 and forever barring all untimely claims).

32. This Court finds that Creditor Denise did not timely and properly present a creditor's claim on or before April 9, 2020 or April 16, 2020. As noted previously, the nonclaim limitations period within SDCL Chap. 29A–3 is strictly enforced. *Huston,* 2018 S.D. 73, ¶ 28, 919 N.W.2d at 365 (forever barring all untimely claims under SDCL 29A-3-803).

33. "South Dakota's nonclaim statute applies to *all* claims 'which arose before the death of the decedent.'" *Huston,* 2018 S.D. 73, ¶ 19, 919 N.W.2d at 363 (quoting SDCL 29A-3-803(a)) (emphasis in original). This includes contingent claims arising "out of an agreement made during [the decedent's] lifetime" even though a decedent "could have modified his will to 'make things right' at any time while he was still alive." *Id.* 2018 S.D. 73, ¶ 23, 919 N.W.2d at 364.

34. Creditor Denise's breach of contract claim falls within the meaning of "all claims" under SDCL 29A-3-803. Almost nine months have passed since Personal Representative Denise's deadline for creditor claims. The same is true for the date of publication to unknown creditors. Because Creditor Denise's four-month period has long passed, her claim is barred.

b. Equity

1. Denise requests specific performance, a remedy that lies in equity. *Crawford*

v. Carter, 52 N.W.2d 302, 322 (S.D. 1952).

2. Specific performance is an extraordinary remedy. *Crawford,* 52 N.W.2d at 322. Extraordinary remedies "should never be granted, except where the evidence is clear and convincing." *Knudsen v. Jensen*, 521 N.W.2d 415, 418 (S.D. 1994).

3. To be entitled to specific performance, Denise is required to establish, by clear and convincing evidence, that she has no adequate legal remedy. *See Rindal v. Sohler*, 2003 S.D. 24, ¶ 12, 658 N.W.2d 769, 772 ("Specific performance is an equitable remedy, and an essential element of equitable relief is the lack of an adequate remedy at law."); *Williams v. Brinkman*, 2016 S.D. 50, ¶ 22, n. 11, 883 N.W.2d 74, 84, n. 11.

4. Denise has failed to establish that she has an inadequate remedy at law. As the movant, Denise carried the burden of proving that element. *See Brinkman*, 2016 S.D. 50, ¶ 22, n. 11, 883 N.W.2d at 84, n. 11 (inadequate legal remedy is an essential element). Her failure to meet this burden, or even raise the issue, is fatal. Inadequacy of a movant's legal remedy "is the very foundation for the jurisdiction to decree specific performance." *Leisch v. Baer*, 24 S.D. 184, 123 N.W.719 (1909). Thus, her equitable remedy fails from the onset.

5. Even if this Court assumed that Denise has proven that any legal remedy would be inadequate, specific performance is nevertheless inappropriate. Denise focused on the underlying validity of the 2017 Agreement at the hearing, but the question before this Court is not necessarily validity, but rather, enforceability. To specifically enforce the 2017 Agreement, such an action must be "just and reasonable" as to Neil.

6. SDCL 21-9-3 states that specific performance cannot be enforced against a party to a contract in any of the following cases:

> (1) If he has not received an adequate consideration for the contract;
> **(2) If it is not to him, just and reasonable;**
> (3) If his assent was obtained by misrepresentation, concealment, circumvention, or unfair practice of any party, to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled;
> (4) If his assent was given under the influence of mistake, misapprehension, or surprise, except that where the contract provides for compensation in case of mistake, a mistake within

> the scope of such provision may be compensated for, and the contract specifically enforced in other respects, if proper to be so enforced.
>
> (Emphasis added).

7. Neil did everything he could to disinherit Denise and then divorce her. His intent is reflected by (i) his 2019 Will in which he declared that Denise receive the smallest possible amount legally permitted; (ii) the lengths he took to divorce Denise; and (iii) the numerous statements Neil made to others about his intent. By spring 2019, Neil's and Denise's marriage had almost certainly unraveled beyond repair.

8. Importantly, Denise admitted that if Neil had approached her, she might have consented to Neil changing his estate plan in light of their imminent divorce.[5] In fact, on cross-examination, she testified that she "wouldn't have had any objection to" Neil changing his Will in connection with the divorce. If Neil had survived, Neil and Denise would have equitably divided the marital estate pursuant to their divorce—or, as Denise testified, they would have "split the estate." This Court attributes significance to Denise's admission concerning the appropriateness of releasing the parties from their obligations under the 2017 Wills. Denise presumably made these admissions because her relationship with Neil had deteriorated, therefore frustrating the purpose of the Agreement to Execute Mutual Wills. It is not unlikely that the change in circumstance between them was so fundamental that it may have even destroyed the consideration upon which the original agreement rested—a defect that permits recession. *See Talley v. Talley*, 1997 S.D. 88, ¶ 42, 566 N.W.2d 846, 853–54 (allowing rescission "for breaches which are substantial and relate to a material part of the contract.")

9. In weighing the equities to assess what is "just and reasonable," this Court must also contemplate the fact that regardless of her creditor claim, Denise acknowledges that she will receive one-half of what Neil and Denise collectively held because she will be receiving half of the proceeds from the sale of Neil's family ranch pursuant to the Assignment of Contract for Deed. As a consequence of this assignment, Denise admits that, for all practical purposes, Neil's Estate consists of his right to the other half of the proceeds. Allowing Denise to inherit the other half of Neil's assets by awarding specific performance of the 2017 Agreement to Execute Mutual Wills would result in her inheriting nearly everything. Considering the turbulent circumstances surrounding their separation, this result would not be "just and equitable" as to Neil.

---

[5] Q: "You would have been open to him changing his will?" A: "Yes."

10. Notably, specific performance is not merely unjust and unreasonable as to Neil. It may also be unjust as to Denise. There is no dispute that if the 2017 Agreement is enforced, Denise would be legally obligated to provide for Neil's children in her own Will—meaning she could never change that document. Forcing Denise to provide for Ryan and Brandy as beneficiaries long into the future even though Denise and Ryan openly resent each other makes little sense indeed. This is particularly true considering that Denise's life might drastically change in ways this Court cannot realistically hypothesize. For instance, if Denise chooses to remarry, she may be required to disinherit her future husband or risk him taking his elective share, an action that would result in a breach of her contractual obligations.

11. In fashioning a just result in equity, this Court is afforded considerable discretion. *Donat v. Johnson*, 2015 S.D. 16, ¶ 32, 862 N.W.2d 122, 133 ("[A] trial court has broad discretion in fashioning an equitable remedy."). In exercising that discretion, this Court is mindful of the drastic change in Neil's and Denise's relationship between 2017 and 2019. Less than two years after they executed the 2017 documents, Neil had moved out, filed for divorced, and executed a new Will completely disinheriting Denise.

12. Finally, as the party requesting equitable relief, Denise has not only accepted a higher evidentiary burden; she has also opened the door to a broader discussion of equity. "Equity will not decree specific performance of a contract when it would work [an] injustice, and where...it is obvious that the contracting parties never expected or intended the results that have followed their action." *Watters v. Ryan*, 31 S.D. 536, 544, 141 N.W. 359, 363 (1913). When Neil and Denise went to their attorney in 2017 to finalize the Agreement to Execute Mutual Wills, neither of them intended for their relationship to struggle so significantly. It is therefore inequitable to specifically perform the 2017 Agreement to Execute Mutual Wills.

CONCLUSION

After considering of the foregoing, with good cause showing, the Motion for Approval and Payment of Claim is hereby **DENIED**.

Dated this 2nd day of February, 2021.

BY THE COURT:

Hon. Michael W. Day
Presiding Circuit Court Judge

ATTEST:

LAURA SCHMOKER

Laura Schmoker
Clerk of Court

BY:
Deputy Clerk of Court

FILED
FEB 02 2021
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

STATE OF SOUTH DAKOTA : SS		IN CIRCUIT COURT
COUNTY OF BUTTE :		FOURTH JUDICIAL CIRCUIT
In the Matter of the Estate of	)	PRO. NO. 09PRO19-000013
	)	**FINDINGS OF FACT AND**
NEIL WILLIAM SMEENK,	)	**CONCLUSIONS OF LAW**
	)	
Deceased.	)	

This matter having come on for an evidentiary hearing before the Court on October 31, 2019, to determine whether Decedent Neil William Smeenk's 2017 Will or his 2019 Will should be admitted to formal probate, as well as to determine who is qualified and should be appointed as personal representative of the Estate. Petitioner Denise L. Schipke-Smeenk appeared in person and through her counsel, Tyler C. Wetering and Talbot J. Wieczorek. Petitioner Ryan William Smeenk appeared in person and through his counsel, N. Drew Skjoldal and Cassidy M. Stalley. The parties submitted prehearing briefs and post hearing proposed findings of fact and conclusions of law. This Court having heard the evidence and considered and reviewed all of the documents introduced into evidence, and the Court being fully advised as to the premises, does now hereby make and enter the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Any finding of fact more appropriately labeled as a conclusion of law, or vice versa, is to be considered as such for purposes of the record.

2. The Court incorporates the entirety of the admissible testimony and evidence, admitted or taken at the hearing held on October 31, 2019 in Butte County, South Dakota, as well as the prior submissions of the parties.

3. Neil William Smeenk ("Neil") died on June 14, 2019.

4. At the time of his death Neil was domiciled in Butte County, South Dakota.

5. At the time of his death, Neil Smeenk was married to Denise L. Schipke-Smeenk (Denise). They had been married since 2000 and had started dating in the fall of 1995 and resided together since the spring of 1996.

6. This was the second marriage for both.

7. Denise had two children from a previous marriage: a daughter, Dominique Heinert and a son, Demian Heinert.

8. At the time of his death, Neil had a son, Ryan William Smeenk ("Ryan"), and a daughter, Brandy Ruth Mooney ("Brandy").

9. When Neil and Denise were married, Neil had a ranch.[1] The parties lived at the ranch.

10. Ryan and Brandy grew up and worked with Neil on the ranch.

11. When Denise first resided with Neil, Ryan was a senior in high school.

12. At that time, Ryan and Neil had a strong father-son relationship.

13. From the beginning of Neil and Denise's relationship, Ryan felt that Denise did not like him and that these negative feelings put a strain on Ryan's relationship with his father.

[1] Neil acquired the family ranch in 1989.

14. Although Denise denies any resentment or dislike towards Ryan, she told Neil's older sister, Joanne Johnson, at some point in the early stages of their relationship, that she (Denise) resented Ryan.

15. Ryan admits that his relationship with Denise has been difficult and also admits to saying unkind things to and about Denise throughout the years.

16. Neil and Denise worked on the ranch. Denise also added funds to Neil and Denise's joint account by working other jobs throughout the relationship.

17. In 2009 Denise and Neil visited with Neil's long time attorney Wesley W. Buckmaster. Mr. Buckmaster was an attorney practicing law in Belle Fourche, South Dakota and practiced law in the area of estate planning among others.

18. Mr. Buckmaster's notes from the meeting with Neil and Denise reflect that a will was drafted leaving Denise a life estate in the ranch if Neil should predecease Denise with the ranch then going to Neil's children.[2]

19. In 2011 the ranch was sold pursuant to a contract for deed.

20. Ryan had a joint business with his father approximately ten years ago. The business was an excavating business that performed such work as installing water lines, digging out basements, digging cisterns and other excavation operations and projects.

21. Ryan eventually took over and ran the business. The business failed financially leaving Ryan to pay approximately $80.000 in back taxes. As part of the business failure Neil had to pay approximately $80,000 in equipment loans.

[2] The 2009 will is no longer in existence.

22. Ryan contends one of the reasons for the failure of the business was that Neil was taking income from the business and using it for the ranch. Ryan had a confrontation with Neil over this issue.

23. After selling the ranch, Neil decided to buy a truck stop/service station operation in Newell, South Dakota. Although Denise was not in favor of this purchase she worked at the business as did one of her children.

24. This business, known as the "212/79", was not a successful operation.

25. Neil and Denise sought the services of Attorney Buckmaster for advice on the operation.

26. In March of 2017, when meeting with Mr. Buckmaster concerning the business operation, Denise brought up the need for the parties to update their estate plan.

27. While Denise was the only one present at the meeting with Mr. Buckmaster, Neil had advised her that she should inquire as to what would be needed for updating their wills.

28. Mr. Buckmaster's notes reflect that Ryan was to be left out as a beneficiary under the wills and that he would recommend reciprocal wills to Neil and Denise.

29. Neil and Denise had a joint meeting with Mr. Buckmaster on July 24, 2017. During the meeting, they discussed the estate plan. In said meeting Mr. Buckmaster's notes reflect that the estates were to go pursuant to the reciprocal wills to the surviving spouse. Upon the death of the surviving spouse, the estate of the surviving spouse was to be split 50% to Neil's children and 50% to Denise's children. As to Denise's children

their 50% would be divided equally, 25% each. As to Neil's children, their 50% would be divided 40% to Brandy and 10% to Ryan.

30. At the meeting with Mr. Buckmaster it was determined Ryan would not be left out of the will but his share would be less than provided for his sister since he had already received support from Neil in an attempt to support Ryan in the excavating business.

31. Denise wanted Neil's 2009 Will to be revised to ensure that she and her children, Dominique C. Heinert and Demian B. Heinert, would be provided for if Neil passed away.

32. Based on his conversation with Denise, Mr. Buckmaster suggested doing "identical simple reciprocal wills," with "an agreement to Will to guarantee that the step-kid(s) get what the parents want."

33. As part of their estate planning in July 2017, Mr. Buckmaster also discussed with Neil and Denise an Agreement to Execute Mutual Wills, an Assignment of Contract for Deed, and Quit Claim Deed.

34. On August 1, 2017, Mr. Buckmaster mailed to Neil and Denise for review: Last Wills and Testament, Powers of Attorney, an Assignment of Contract for Deed, Quit Claim Deed, and an Agreement to Execute Mutual Wills.

35. On August 25, 2017, Neil and Denise returned to Mr. Buckmaster's office to execute these documents.

36. On August 25, 2017, Neil signed a Last Will and Testament ("2017 Will").

37. The 2017 Will appoints Denise to act as personal representative.

38. On August 25, 2017, Neil signed an Agreement to Execute Mutual Wills, which provided, among other things, that the parties "agree not to revoke or amend the Last Wills which each party has executed contemporaneously with and in reliance upon this Agreement without the express consent of the other party."

39. On August 25, 2017, Neil signed an Assignment of Contract for Deed.[3]

40. On August 25, 2017, Neil signed a Quit Claim Deed.

41. Mr. Buckmaster had known Neil for years and knew that Neil was not an individual that could be forced to do something he did not want to do and had no question about his capacity to execute and understand the documents at the time of their execution.

42. Mr. Buckmaster opined that on August 25, 2017, Neil was competent and that he was not under any duress or undue influence when he executed his Last Will and Testament, the Assignment of Contract for Deed, the Quit Claim Deed, and the Agreement to Execute Mutual Wills.

43. Mr. Buckmaster confirmed these were the documents executed in his office by Neil and Denise.

44. After the execution of the 2017 will, Ryan discovered that the will had been changed and had a conversation with his father concerning the new will.

45. Ryan contends his father expressed some reluctance to execute the 2017 will.

46. In a text exchange with Denise, Ryan complained about the fact that his father raised past business issues with him and that he had been cut out of the will.

[3] Neil assigned a one-half interest in the Contract for Deed to Denise.

Denise informed Ryan in a response that she stood up for him and made sure he was back in the will.

47. Neil had a drinking problem. For at least the last year of his life Neil's drinking problem was severe.[4]

48. Neil's drinking caused a severe strain on the marital relationship.

49. In late March 2019, Denise moved out of the marital bedroom she shared with Neil to another bedroom in the house. Soon thereafter, Denise and Neil separated.

50. Neil left the marital home and stayed with Ryan and other family members.

51. On or about April 25, 2019, Denise admitted personal service of a Summons and Complaint for divorce.[5]

52. Although Denise hired a lawyer for the divorce proceeding she never filed and answer to the complaint as she and Neil were working on a possible reconciliation or an agreeable division of the property.

53. On April 19, 2019, Neil executed a Last Will and Testament ("2019 Will"), which expressly revoked all prior wills and codicils.

54. The 2019 Will contains an attestation clause.

55. The 2019 Will expressly provides:

> I [sic] married at the time of making this Will. However, my wife, Denise Schipke-Smeenk, and I are separated and we are in the process of dissolving our marriage. Upon the conclusion of our divorce action, I wish to make clear that Denise Schipke-Smeenk is not to receive any distribution under this Will. If my death occurs prior to the finalization of our divorce

[4] On August 31, 2018 Ryan filed an Application for Emergency Commitment regarding Neil. Neil was committed to Detox. The matter was dismissed on September 4, 2018 upon the recommendation of the Detox counselor. See 09IVC18-000007.

[5] See 09DIV19-000015.

action, I wish for Denise-Schipke-Smeenk to receive the least of my estate as is allowable by South Dakota law.

56. The 2019 Will appoints Ryan Smeenk to act as personal representative.

57. No evidence was presented that Neil lacked testamentary intent or capacity, was unduly influenced, or under duress when he executed his April 19, 2019 Last Will and Testament.

58. Denise did not consent to the 2019 Will.

59. On June 12, 2019, Denise sought an involuntary commitment of Neil for his continued alcohol abuse.[6]

60. On July 12, 2019, Denise filed a Petition for Formal Probate of Will, Determination of Heirs, and Appointment of Personal Representative and submitted Neil's 2017 Will for probate.

61. On August 8, 2019, Ryan filed a Petition for Formal Probate and Appointment of Personal Representative, seeking to probate Neil's 2019 Will and having Ryan appointed as personal representative.

62. On August 22, 2019, Denise filed an objection to Ryan's Petition for Formal Probate, objecting to the probate of Neil's Last Will and appointment of Ryan as personal representative.

63. Denise's objection was based exclusively "on the grounds that the [Last] Will is invalid pursuant to the Agreement to Execute Mutual Wills dated August 25, 2017[.]"

---

[6] See 09IVC19-000004. Unfortunately, Neil took his own life on June 14, 2019 and the matter was dismissed.

64. Ryan filed an objection to Denise's Petition for Formal Probate on September 11, 2019, on the grounds that Denise was not qualified to act as a personal representative under SDCL 29A-3-203(f)(2), and that it would be improper for this Court to submit the 2017 Will for probate, as it was not Neil's last will.

65. Denise requests that even if the 2019 will be placed into formal probate she should still be appointed Personal Representative.

66. All payments coming into the estate through the Contract for Deed are made to Denise and Neil jointly.

67. There exists joint debts in the name of both Neil and Denise for their joint ranching and business activities. These include debt of approximately $94,000 with a bank left over from the ranching operation and a credit card debt still left over from the 212/79 operation that was incurred buying gasoline for the station. These debts are joint obligations.

68. There is also debt associated with the residence both by mortgage and other debts for improvements on the residence. These debts are also joint obligations of Neil and Denise.

69. The Personal Representative will be required to work with joint debtors and financial institutions to arrange proper payments and to account for assets.

70. While Ryan claims that he can set aside his 24 years of animosity towards Denise and work with her, his testimony in that regard was not credible as he exhibited continuing hostility towards Denise including making at least one offensive post on Facebook after he discovered the contents of the 2017 will made by Neil.

71. Ryan has already decided Denise would only be entitled to 50% of the estate.

72. Ryan has already decided to contest the contract to make a will executed in 2017.

73. Denise is aware of all the debts and all of the assets of the estate and is a joint debtor on all of the debt. Denise is in the best position to efficiently account for all debts and assets of the estate.

74. Denise has agreed that she will serve without a personal representative fee and if the 2017 will or the contract to make reciprocal wills is challenged she will pay for costs related to the resolution of that issue from her own funds unless she prevails.

75. Ryan agrees to serve as personal representative without a fee but he would use estate funds to challenge the 2017 will and the contract to make reciprocal wills.

76. The appointment of Ryan as personal representative would result in increased costs and difficulty in processing the estate and could result in decision making being made upon hostility towards the possible beneficiary of the estate (Denise).

77. The appointment of Ryan as personal representative would be unsuitable as he is unfit to serve in that capacity given his past history with Denise and his determination to take a position on the contract to make wills.

78. The appointment of Denise as personal representative would be suitable as she is fit to serve in that capacity.

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 more appropriately labeled as a finding of fact, or vice versa, is to be considered as such for purposes of the record.

2. The Court has jurisdiction of the parties and subject matter. Venue is proper.

3. A "formal testacy proceeding is a proceeding conducted before the court to establish a will[.]" SDCL 29A-3-401.

4. A will is defined as:

> An instrument, including a codicil, executed with testamentary intent and in the manner prescribed by this code, including an instrument which (i) disposes of property on or after the testator's death, (ii) appoints a personal representative, (iii) revokes or amends another will, (iv) nominates a guardian or conservator, or (v) expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

SDCL 29A-1-201(52).

5. Any person over the age of 18 and of sound mind may execute a will. SDCL 29A-2-501.

6. A will may be revoked "[b]y executing a subsequent will that revokes the previous will or part expressly or by inconsistency[.]" SDCL 29A-2-507(a)(1).

7. When a subsequent will makes a complete dispositions of a testator's estate, "[t]he testator is presumed to have intended a subsequent will to replace rather than supplement a previous will." SDCL 29A-2-507(c). "If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the subsequent will is operative on the testator's death." SDCL 29A-2-507(c).

8. If a will is self-proved, the will satisfies the requirements for execution, without testimony of any attesting witnesses, upon filing the will and the acknowledgment and affidavits annexed or attached to it. SDCL 29A-3-406.

9. SDCL 29A-3-407 sets forth the burden of proof, in relevant part, in contested cases:

> Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate. If a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.

10. Neil's 2019 Will contains an attestation clause, which substantially conforms to the requirements of SDCL 29A-2-504, making it a self-proved will.

11. Ryan has met his burden of establishing prima facie proof of due execution of the 2019 Will. SDCL 29A-2-504; 29A-3-406.

12. Ryan has also met his burden of establishing prima facie proof of death and venue. SDCL 29A-3-201.

13. Neil's 2019 Will expressly revokes all prior wills, including the 2017 Will.

14. Neil's 2019 Will makes a complete disposition of his estate.

15. Denise has failed to rebut the presumption, by clear and convincing evidence, that the 2019 Will replaces, rather than supplements, the 2017 Will.

16. Therefore, the Court concludes the 2019 Will is the only will operative on Neil's death and is thus entitled to probate. SDCL 29A-2-507(c).

17. Denise has not raised, let alone met, her burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation of the 2019 Will.

18. Instead, Denise contests the probate of the 2019 Will on the sole grounds that it was made in violation of a contract to execute mutual wills.

19. SDCL 29A-2-514 authorizes parties to enter into contracts not to revoke their wills for agreements executed on or after July 1, 1995. SDCL 29A-2-514. The only case in South Dakota that contemplates the effect of a breach of contract claim on the validity of a previously executed reciprocal will is *Beveridge v. Bailey*, 53 S.D. 98, 220 N.W. 462 (1928). This case notes the issue, but does not discuss the status of the former will, stating that the parties agreed the surviving spouse was entitled to change her estate plan. *Beveridge*, 53 S.D. 98, 220 N.W. at 464. Consequently, the dispute was based solely in contract.

20. However, other states in the Eighth Circuit have addressed the issue. In Arkansas, a contract not to a revoke a will does not destroy the parties' freedom to execute subsequent wills. In *Allen v. First Nat. Bank of Batesville*, Mr. and Mrs. Edwards executed reciprocal wills. "By Mrs. Edwards' will, she left all her personal property to Mr. Edwards, and she left all her real property to the church, subject to a lift estate in Mr. Edwards." The only difference between this will and her husband's was the name. 230 Ark. 201, 203, 321 S.W.2d 750, 751 (1959). In 1955, five years after the couple executed the first wills, Mr. Edwards executed another will purporting to revoke his previous will. *Id.* The second will made several notable changes to Mr. Edwards' estate plan. After Mr. Edwards' death, the 1955 will was admitted into probate. Later

that year, his "collateral heirs [] filed a complaint in Probate Court [] as heirs to the estate." *Id.* 230 Ark. at 205, 321 S.W.2d at 752. Among other things, the parties disputed the validity of the second will due to the contract not to revoke the first will that was created when Mr. and Mrs. Edwards elected to execute a reciprocal estate plan. When confronting with this issue, the Arkansas court held that **"[t]here is no such thing as an irrevocable will.** Ark.Stats. § 60–406 provides that a will can be revoked by another will and only so with exceptions which do not apply here." *Allen v. First Nat. Bank of Batesville*, 230 Ark. 201, 210, 321 S.W.2d 750, 755 (1959) (emphasis added).

21. In Iowa, a contract not to a revoke a will does not destroy the parties' freedom to execute subsequent wills. In *Re Estate of Chapman*, 239 N.W.2d 869 (Iowa 1976). In that case, the court was confronted with deciding whether the instruments executed in 1962 by Bernard R. Chapman and his wife Hilda Chapman executed joint and mutual wills in 1962. Then, in 1969 after his wife died, Bernard executed a subsequent will in violation of the terms of the first wills. 239 N.W.2d at 870. The trial court refused to probate Bernard's 1969 will, holding that his 1962 instrument should be probated as his last will. The Iowa Supreme Court reversed, holding **"[a] will becomes effective only at the testator's death. Until that time, it may always be revoked.** This rule is not changed because, in revoking a will, the testator may violate a contract not to do so." *Matter of Chapman's Estate*, 239 N.W.2d 869, 872 (Iowa 1976) (emphasis added).

22. In Minnesota, a contract not to a revoke a will does not destroy the parties' freedom to execute subsequent wills. In *Mosloski v. Gamble*, the plaintiff's father and mother, pursuant to a compact, made mutual and reciprocal wills. After the mother's death in 1924 and the probate of her will, the father remarried and later died. 191 Minn. 170, 173, 253 N.W. 378, 380 (1934). In 1925, prior to his death, the father made a second will in which he revoked his

reciprocal will. *Id.* When faced with determining the consequences of revoking a reciprocal will, the court held that **"it is the contract and not the will that is irrevocable.** The authorities generally hold that the will may be revoked, but the contract stands and will be enforced by equity if it be a valid contract and such enforcement is necessary for the prevention of fraud." *Mosloski*, 191 Minn. 170, 175, 253 N.W. at 381 (citing *In Menke v. Duwe*, 117 Kan. 207, 230 P. 1065, 1070 (quotation omitted) (emphasis added)). This position is upheld in *Jannetta v. Jannetta*, 205 Minn. 266, 267, 285 N.W. 619, 622 (1939) (holding **"[w]ills are revocable, but contracts to make wills are irrevocable without the consent of the parties"** (emphasis added)).

23. In Missouri, a contract not to a revoke a will does not destroy the parties' freedom to execute subsequent wills. In *Bennington v. McClintick*, James and Julia Miller consulted an attorney about making wills in 1946. 253 S.W.2d 132, 133 (Mo. 1952). Julia Miller died on May 11, 1949, and James W. Miller died on November 28, 1949. *Id.* Thirteen days after the death of his wife, James Miller executed a new will naming the defendants as beneficiaries. *Id.* In that case, the court held that notes allegedly left by Julia Miller regarding her wishes for the distribution of certain property were not binding on James Miller. 253 S.W.2d at 135. The Missouri Court of Appeals upheld this position in another case. See *Owens v. Savage*, 518 S.W.2d 192, 200 (Mo. App. 1974) ("Many courts, unfortunately, in dealing with legal instructions that are both wills and contracts, and which contain joint and mutual promises that they are to be irrevocable, have succumbed to using loose language to the effect that they are irrevocable wills. Saying that they are irrevocable will is like saying black is white, long is short, or good is evil. The conceptual nature of wills is that they are ambulatory. **They do not speak until death, and therefore they may be revoked**." (emphasis added)).

24. In Nebraska, a contract not to a revoke a will does not destroy the parties' freedom to execute subsequent wills. In *In the Matter of Estate of Elizabeth Middaugh*, the decedent died on February 9, 1964. "She left a will which was duly executed on November 17, 1960. Th executors named in the will [] filed a petition for the probate of the will. The nieces and nephews of Frank Middaugh, the deceased husband of the decedent, filed objections to the probate of the will." *In re Middaugh's Estate*, 179 Neb. 25, 26, 136 N.W.2d 217, 219 (1965). The objections were based on the fact that Frank and Elizabeth Middaugh executed reciprocal will pursuant to an oral agreement that each would leave his entire estate to the other and that the survivor would leave his entire estate to the nieces and nephews of the two of them, living at the death of the survivor, share and share alike." *Id.* "It was asserted that because of the making of the reciprocal will by Frank Middaugh on August 1, 1952, and his death without changing the same, the reciprocal will of Elizabeth Middaugh, also executed on August 1, 1952, became irrevocable, and that her subsequent will executed on November 17, 1960, was a violation of the oral agreement and the reciprocal wills made pursuant thereto. The last will of Elizabeth Middaugh materially changed the distribution of her estate to the benefit of her nieces and nephews and to the detriment of the nieces and nephews of Frank Middaugh, contrary to and in violation of her oral agreement and the reciprocal wills executed pursuant thereto." *In re Middaugh's Estate*, 179 Neb. 25, 26–27, 136 N.W.2d 217, 219 (1965). The court held that **"[a] reciprocal will, like any other, is revoked by the execution of a later will."** *Id.* 179 Neb. at 27, 136 N.W.2d at 219 (emphasis added). The Nebraska Supreme Court upheld this position in another case. *See McKinnon v. Baker*, 220 Neb. 314, 370 N.W.2d 492 (1985) ("The limit on nonconsensual changes ended at the death of one of the parties. Anna had a right to modify her will after Lester's death. It may further be said that **execution of reciprocal or mutual wills,**

without more, can be no bar to their modification or revocation even when both parties are aware of the terms of each will." *Id.* 220 Neb. At 317, 370 N.W.2d at 494 (citing *Kimmel v. Roberts,* 179 Neb. 8, 136 N.W.2d 208 (1965) (emphasis added))).

25. In North Dakota, a contract not to a revoke a will does not destroy the parties' freedom to execute subsequent wills. In *O'Connor v. Immele*, Ella Sweeney and Daniel Sweeney "executed reciprocal wills in pursuance of an agreement so to do[.]" 77 N.D. 346, 348, 43 N.W.2d 649, 651 (1950). "Ella C. Sweeney died on February 17, 1945, leaving an estate of the value of approximately $20,000 to which Daniel F. Sweeney succeeded under the provisions of her reciprocal will of October 5, 1936[.]" *Id.* 77 N.D. at 349, 43 N.W.2d at 651. "[T]hereafter, on July 11, 1945 Daniel C. Sweeney revoked the reciprocal will made by him and executed a new will in which he designated his niece Frances Immele as the sole beneficiary[.]" *Id.* The court held that **"[a] will made in accordance with [an] agreement [to execute reciprocal wills], however, may be revoked and the revoking will admitted to probate."** *O'Connor v. Immele*, 77 N.D. 346, 353, 43 N.W.2d 649, 654 (1950) (emphasis added).

26. The Nebraska Supreme Court has flirted with the position that the existence of an agreement not to revoke prevents revocation of reciprocal wills. However, its rule remains consistent with the majority view. In *Powell v. Am. Charter Fed. Sav. & Loan Ass'n*, the "decedent and her husband executed a single-instrument joint and mutual will. The will was executed in Minnesota, their place of residence." *Id.* 245 Neb. at 553, 514 N.W.2d at 329. "On October 15, 1989, decedent's husband died, and the joint will was probated in Minnesota." *Id.* 245 Neb. at 553, 514 N.W.2d at 330. "After her husband's death, decedent moved to Nebraska, where she resided until her death on February 9, 1991." *Id.* 245 Neb. at 554, 514 N.W.2d at 330. "After her husband's death, decedent conveyed the Minnesota real property to appellants and

herself as joint tenants." *Id.* 245 Neb. at 553, 514 N.W.2d at 330. The Nebraska Supreme Court determined that Minnesota law applied to the probate of the estate because Minnesota had the most significant connection with the estate. *Id.* 245 Neb. at 557, 514 N.W.2d at 332. When discussing the effect of joint wills, the Supreme Court restated the law thus: "A joint will is a single instrument which is executed by two parties and which represents their respective wills. **Although the joint will is a testamentary instrument, it may also be a contract or evidence of a contract between the two parties. The contract may be an agreement to devise, and it may include an agreement not to revoke the wills."** *Id.* 245 Neb. at 557, 514 N.W.2d at 332 (emphasis added). It further stated that "[t]he contract and the will, although one document, are distinct and separate and are governed by different legal principles. Accordingly, a will is revocable because it is ambulatory in nature and does not become effective until the death of the testator. **The surviving testator therefore may revoke the will, but the survivor or the survivor's estate may be subject to an action for breach of the contract** if the survivor had agreed not to revoke the terms of the will." *Powell v. Am. Charter Fed. Sav. & Loan Ass'n*, 245 Neb. 551, 558, 514 N.W.2d 326, 332 (1994) (citations omitted) (emphasis added). In the end, the court found "it is impossible to determine whether decedent violated her contractual duties by defeating the purpose of the will." *Id.* 245 Neb. at 563, 514 N.W.2d at 335. Consistent with that position, it reversed and remanded the lower court for further proceedings. *Id.*

27. Denise cites *Pruss v. Pruss*. *Pruss* reiterates the rule that there is no such thing as an irrevocable will. However, there may be a contract action when an agreement not to revoke is breached. The Nebraska Supreme Court has also considered the position that a decedent may not revoke a reciprocal will. In that case, Bessie and Albert Pruss executed mutual and reciprocal wills in September 1980. In November 1980, the attorney who drafted the estate plan encouraged

the parties to re-executed the documents to "correct some deficiencies he perceived in the will." 245 Neb. 521, 524, 514 N.W.2d 335, 340 (1994). The couple amended the document shortly after. The November 1980 will included a provision concerning inter vivos gifts from Bessie to her children and grandchildren. 245 Neb. at 527, 514 N.W.2d at 341. It stated that these gifts "shall not constitute a violation of the agreement which I have entered into with my husband, ALBERT B. PRUSS, nor shall it constitute a violation of the terms of my Will and my husband's Will if I elect to make gifts prior to the time of my death, in equal amounts to all of my children (with one child's share to be divided equally between my grandchildren, (MICHAEL PRUSS and CAROLYN PRUSS), whether or not said children are named as residuary beneficiaries under my Will." *Id.*

"Contemporaneously with the execution of both Albert's and Bessie's November 1980 wills, several land conveyances occurred." *Id.* "Albert died approximately 2 months after the November 1980 wills were executed. His November 1980 will was admitted to probate, and his estate was distributed according to its terms without objection." Id. 245 Neb. 521, 527, 514 N.W.2d 335, 342 (1994). In March 1983, Bessie executed a new will (1983 will) which affect[ed] appellants' proportional shares in her estate as compared to her November 1980 will. Bessie stated in her 1983 will that she was revoking the November 1980 because that will did not accurately reflect her wishes and because Francis did not correctly represent to her what the November 1980 will purported to do." *Id.* 245 Neb. at 528, 514 N.W.2d at 342.

"Bessie died in 1990, and her 1983 will was offered for probate. [T]he 1983 will affect[ed] the shares that appellants, Albert, Francis and Richard, would have received pursuant to the terms of the November 1980 wills. [Consequently, the] Appellants filed suit in district court requesting that the court impose a constructive trust on Bessie's estate pursuant to the

terms of the November 1980 wills and to have an accounting ordered with respect to inter vivos gifts Bessie may have made contrary to the terms of the November 1980 wills." 245 Neb. at 530, 514 N.W.2d at 343. After a trial, the district court issued a judgment in favor of appellees.

The court made several findings in support of its judgment. Among these findings was the court's determination that, contrary to appellants' contentions, the November 1980 wills did not prohibit Bessie from changing her testamentary disposition with regard to her personal property or giving unequal inter vivos gifts from such personal property to the children after Albert's death." 245 Neb. 521, 530, 514 N.W.2d 335, 343. The Nebraska Supreme Court held that **"[t]he contract becomes irrevocable as to the surviving spouse upon the death of the other and the probate of the deceased spouse's contractual will."** *Pruss v. Pruss*, 245 Neb. 521, 532, 514 N.W.2d 335, 344 (1994) (emphasis added) (citing *Kimmel v. Roberts,* 179 Neb. 25, 136 N.W.2d 217 (1965); *Kerper v. Kerper,* 780 P.2d 923 (Wyo.1989)). However, it made a point to clarify that **"the contract does not make the wills irrevocable because wills, by their nature, are ambulatory and may be revoked at any time."** *Pruss v. Pruss*, 245 Neb. 521, 532, 514 N.W.2d 335, 344 (1994) (emphasis added).

28. It is axiomatic that "a testator has the privilege and right to dispose of his property as he chooses within limits and in the manner fixed by statute." *Matter of Estate of Burk*, 468 N.W.2d 407, 412 (S.D. 1991).

29. And the Supreme Court of South Dakota has explicitly recognized that "a claim for breach of contract to devise property ***is a claim in contract***" and cannot be asserted as grounds for contesting the probate of a later will. *Matter of Estate of Green*, 516 N.W.2d 326, 329 (S.D. 1994) (emphasis added). *See also In re Middaugh's Estate*,

136 N.W.2d 217 (Neb. 1965); *Matter of Prehoda's Estate,* 309 N.W.2d 516, 519 (Iowa Ct. App. 1981).

30. This is because "***it is the contract that is irrevocable, not the will.***" *Matter of Estate of Green*, 516 N.W.2d at 329 (citing *In re Farley's Estate*, 24 N.W.2d. 453, 457-58 (Iowa 1946) (emphasis added)).

31. Under SDCL 29A-3-105, this Court has jurisdiction over "any other action or proceeding concerning a succession or to which an estate, through a personal representative, may be a party, including actions to determine title to property, and of any action or proceeding in which property distributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent."

32. This Court finds the reasoning in the above-cited authorities persuasive and concludes that an alleged violation of an agreement to execute mutual wills cannot be asserted as grounds for contesting the probate of a later revoking will.

33. Therefore, Neil's 2019 Will is entitled to probate and shall be admitted as the Last Will and Testament of Neil William Smeenk.

34. This Court is not making a final conclusion on whether the Agreement to Execute Mutual Wills cannot be challenged and that determination is left for another day.

35. "A formal proceeding for adjudication regarding the priority or qualification of an applicant for appointment as personal representative, or of a person previously appointed personal representative in informal proceedings, is governed by § 29A-3-402[.]"[7] SDCL 29A-3-414(a). "In other cases, the petition shall contain or adopt the statements required by subsection

[7] SDCL 29A-3-414(a) governs issues concerning the testacy of the decedent is or may be involved.

29A-3-301(a)(1) and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter." SDCL 29A-3-414(a).

36. "After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative, any person having or claiming priority for appointment as personal representative, the court shall determine who is entitled to appointment under § 29A-3-203,[8] make a proper appointment and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under § 29A-3-611." SDCL 29A-3-414(b).

37. "Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order: (1) The person with priority as determined by a probated will, including a person nominated by a power conferred in a will; (2) The surviving spouse of the decedent who is a devisee of the decedent; (3) Other devisees of the decedent; (4) The surviving spouse of the decedent; (5) Other heirs of the decedent; (6) Forty-five days after the death of the decedent, any other qualified person." SDCL 29A-3-203.

38. "An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in subsection (a) apply except that: (2) In case of objection to appointment of a person, other than one whose priority is determined by will, by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to the heirs and devisees whose interests in the estate appear to be worth in total

[8] See next section "*ii. Objections*" for more information on the requirements of SDCL 29A-3-203.

more than half of the probable distributable value, or, in default of this accord, any qualified person." SDCL 29A-3-203(b)(2).

39. "**Formal proceedings are required to appoint a personal representative in any of the following situations: (1) When there is a person with a higher priority who has not renounced or waived the right by appropriate writing filed with the court**[.]" SDCL 29A-3-203(e)(1). (emphasis added). "**No person is qualified to serve as a personal representative who is**: (1) Under the age of eighteen; **(2) A person whom the court finds unsuitable in formal proceedings;** or (3) A bank or trust company not qualified to do trust business or exercise trust powers in this state." SDCL 29A-3-203(f)(1)-(3).

40. This court's Findings of Fact, "whether based on oral or documentary evidence, may not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." SDCL 15-6-52(a). "Under the statutory standard, "[c]lear error exists only when, upon a review of all of the evidence in the record, we are left with a definite and firm conviction a mistake has been made." *In re Estate of Catron*, 2001 S.D. 57, ¶ 11, 627 N.W.2d 175, 177 (quoting *Even v. City of Parker*, 1999 S.D. 72, ¶ 9, 597 N.W.2d 670, 674). Statutory interpretation and application are questions of law reviewed under the de novo standard of review. *In re Estate of Flaws*, 2016 S.D. 60, ¶ 18; 885 N.W.2d 336, 342.

41. Under SDCL 29A-3-203(a)(1), a person who has been nominated as personal representative in the will has priority for appointment.

42. Ryan was nominated as personal representative in Neil's 2019 Will.

43. Denise was nominated as personal representative in Neil's 2017 Will.

44. Ryan and Denise are both over the age of eighteen.

45. Denise has objected to Ryan's appointment on the basis that Ryan is unsuitable.

46. Ryan has objected to Denise's appointment on the basis that Denise is unsuitable.

47. Pursuant to SDCL 29A-3-203(f)(2), no person is qualified to serve as a personal representative if the Court finds that person is unsuitable.

48. "Suitable" is not defined by the UPC or SDCL Ch. 29A.

49. Hostility between the beneficiaries and the nominated representative does not, by itself, make the representative unsuitable. *Matter of Estate of Unke*, 1998 S.D. 94, 583 N.W.2d 145, 151, n.5.

50. Suitability is determined by analyzing a person's "temperament, experience[,] and sagacity to discharge the trust with fidelity, prudence[,] and promptness[,] ... having regard to the special conditions of each estate and those interested in it as creditors, legatees, and next of kin." *In re Estate of Franta*, 2013 WL 491530, at *1 (Minn. Ct. App. Feb. 11, 2013).

51. This Court finds that Ryan is unsuitable to serve has personal representative of Neil's estate and administer the probate of his 2019 Will.

52. Ryan openly admitted that his relationship with Denise has been tense and strained; he admitted that he has said unkind things to and about Denise.

53. Ryan's admissions are evidence of his lack of temperament. This Court finds that Ryan does not have the sagacity to administer his father's will with fidelity,

prudence, and promptness, having regard to the special conditions of his father's estate and those interested in it as creditors, legatees, and next of kin.

54. Denise requests that even if the 2019 will be placed into formal probate she should still be appointed Personal Representative.

55. All payments coming into the estate through the Contract for Deed are made to Denise and Neil jointly. There currently exists joint debts in the name of both Neil and Denise for their joint ranching and business activities. These include debt of approximately $94,000 with a bank left over from the ranching operation and a credit card debt still left over from the 212/79 operation that was incurred buying gasoline for the station. These debts are joint obligations. There is also debt associated with the residence both by mortgage and other debts for improvements on the residence. These debts are also joint obligations of Neil and Denise.

56. The Personal Representative will be required to work with joint debtors and financial institutions to arrange proper payments and to account for assets.

57. While Ryan claims that he can set aside his 24 years of animosity towards Denise and work with her, his testimony in that regard was not credible as he exhibited continuing hostility towards Denise including making at least one offensive post on Facebook after he discovered the contents of the 2017 will made by Neil.

58. Ryan has already decided Denise would only be entitled to 50% of the estate. Ryan has already decided to contest the contract to make a will executed in 2017.

59. Denise is aware of all the debts and all of the assets of the estate and is a joint debtor on all of the debt. Denise is in the best position to efficiently account for all

debts and assets of the estate. Denise has agreed that she will serve without a personal representative fee and if the 2017 will or the contract to make reciprocal wills is challenged she will pay for costs related to the resolution of that issue from her own funds unless she prevails.

60. Ryan agrees to serve as personal representative without a fee but he would use estate funds to challenge the 2017 will and the contract to make reciprocal wills.

61. The appointment of Ryan as personal representative would result in increased costs and difficulty in processing the estate and could result in decision making being made upon hostility towards the possible beneficiary of the estate (Denise). The appointment of Ryan as personal representative would be unsuitable as he is unfit to serve in that capacity given his past history with Denise and his determination to take a position on the contract to make wills.

62. This Court concludes that Denise is suitable to serve has personal representative of Neil's estate and administer the probate of his 2019 Will, and she is appointed to serve as Personal Representative.

63. This Court finds that Denise does have the sagacity to administer her late husband's will with fidelity, prudence, and promptness, having regard to the special conditions of his estate and those interested in it as creditors, legatees, and next of kin.

Let Judgment be entered accordingly.

Dated this 23rd day of November, 2019

BY THE COURT:

Michael W. Day
Circuit Court Judge

Attest:
Schmoker, Laura
Clerk/Deputy

FILED

NOV 25 2019

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By

COPY

AGREEMENT TO EXECUTE MUTUAL WILLS

This Agreement is entered into the 25th day of August, 2017, at Belle Fourche, Butte County, South Dakota, by and between **NEIL W. SMEENK and DENISE L. SCHIPKE-SMEENK.** The parties reside at 18295 Winkler Road, Newell, Butte County, South Dakota.

WITNESSETH:

I. The parties hereto are husband and wife.

II. Each party agrees to provide for the disposition of any and all property which each party may die possessed by the execution of a Last Will separate but contemporaneously with the execution of this Agreement. The separate Will of each party will devise and bequeath all property, excepting only certain specific bequests which are identified in Article IV of each Last Will and Testament to the other party as surviving spouse. If a party should die leaving no spouse, the estate of the surviving spouse shall pass to **DOMINIQUE C. HEINERT (25%), DEMIAN B. HEINERT (25%), BRANDY RUTH MOONEY (40%), and RYAN WILLIAM SMEENK (10%).**

III. **NEIL W. SMEENK** has the following children, issue of a prior marriage, to-wit:
BRANDY RUTH MOONEY, an adult
RYAN WILLIAM SMEENK, an adult

IV. **DENISE L. SCHIPKE-SMEENK** has the following children, issue of a prior marriage, to-wit:
DOMINIQUE C. HEINERT an adult
DEMIAN B. HEINERT, an adult

V. Each party agrees that contemporaneously with the execution of this Agreement and in consideration thereof, they shall execute a separate Last Will consistent with Paragraph 2.0 above. Each acknowledges receipt of a copy of the Last Will and Testament of the other and the full opportunity to review the same prior to the execution of this Agreement.

In addition, **NEIL W. SMEENK** agrees to execute an Assignment of Contract for Deed whereby **DENISE L. SCHIPKE-SMEENK** shall receive an undivided one-half (1/2) interest in and to the **NEIL W. SMEENK** (Seller) to **MATHERN** Contract for Deed dated the 10th day of November, 2011. **DENISE L. SCHIPKE-SMEENK,** as the Assignee, shall become the owner of an undivided one-half (1/2) interest in and to the interest of **NEIL W. SMEENK** in said Contract for Deed including the proceeds receivable.

VI. The parties agree that all jointly owned property shall remain jointly owned between these parties only and the parties shall not transfer, attempt to transfer, assign or add additional parties to ownership of any asset. This provision applies to all property excepting only the Specific Bequests identified in Article IV in each of the parties' separate Last Will.

VII. The parties agree not to revoke or to amend the Last Wills which each party has executed contemporaneously with and in reliance upon this Agreement without the express written consent of the other party.

Each party agrees to do no act that would have the effect of compromising in any material way the purposes and intents of this Agreement. No party shall make substantial gifts favoring one or more but not all of the ultimate beneficiaries. The ultimate beneficiaries are the parties for children.

VIII. Each party agrees to include in their Last Will executed pursuant to this Agreement a reference to this Agreement.

IX. This Agreement is executed in triplicate and one (1) copy of this Agreement, together with the original Wills executed pursuant to this Agreement, are to be deposited in the family safe or safety deposit box or with Buckmaster Law Offices, PC or its successor.

X. This Agreement may not be nullified in whole or in part nor shall it be amended without the advance written consent of both parties.

IN WITNESS WHEREOF, the parties have executed this Agreement at Belle Fourche, Butte County, South Dakota, on the date first above written.

Dated this 25th day of August, 2017.

NEIL W. SMEENK

STATE OF SOUTH DAKOTA)
) **SS.**
COUNTY OF BUTTE)

On this the 25th day of August, 2017, before me, the undersigned Notary Public, personally appeared **NEIL W. SMEENK** known to be or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY PUBLIC
MY COMMISSION EXPIRES:_____

(SEAL)

WESLEY W. BUCKMASTER
Notary Public, Butte County, SD
My Commission Expires
January 22, 2019

Dated this 25TH day of August, 2017.

Denise L Schipke-Smeenk
DENISE L. SCHIPKE-SMEENK

STATE OF SOUTH DAKOTA)
) **SS.**
COUNTY OF BUTTE)

On this the 25TH day of August, 2017, before me, the undersigned Notary Public, personally appeared **DENISE L. SCHIPKE-SMEENK** known to be or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Wesley W Buckmaster
NOTARY PUBLIC
(SEAL) **MY COMMISSION EXPIRES:**
WESLEY W. BUCKMASTER
Notary Public, Butte County, SD
My Commission Expires
January 22, 2019

STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF BUTTE FOURTH JUDICIAL CIRCUIT

In the Matter of the Estate of	)	09PRO19-000013
	)	
NEIL WILLIAM SMEENK	)	**MOTION FOR APPROVAL AND**
	)	**PAYMENT OF CLAIM**
Deceased.	)	
	)	
	)	

COMES NOW, Denise L. Schipke-Smeenk, as Personal Representative the Estate of Neil William Smeenk, by and through her attorney, Tyler C. Wetering of Gunderson, Palmer, Nelson & Ashmore, LLP, and moves this Court for the Payment of a Claim pursuant to SDCL § 29A-3-713 as follows:

1. Denise L. Schipke-Smeenk was appointed Personal Representative of the Estate of Neil William Smeenk by Order of Formal Probate and Appointment of Personal Representative dated December 9, 2019.
2. The Order of Formal Probate and Appointment of Personal Representative dated December 9, 2019, admitted decedent's Last Will and Testament dated April 9, 2019, to probate.
3. An Agreement to Execute Mutual Wills dated August 25, 2017, (the "2017 Agreement" has previously been filed with this court.
4. The 2017 Agreement provided:

> Each party agrees to provide for the for the disposition of any and all property which each party may die possessed by the execution of a Last Will separate but contemporaneously with the execution of this Agreement. The separate Will of each party will devise and bequeath all property, excepting only certain specific bequests with are identified in Article IV of each Last Will and Testament to the other party as surviving spouse.

5. Contemporaneous with the execution of the 2017 Agreement, the decedent executed a Last Will and Testament dated August 25, 2017, (the "2017 Will") which has previously been filed with this court.
6. The 2017 Will provides for the disposition of the decedent's estate in the same manner as the 2017 Agreement.
7. This Court's Findings of Fact and Conclusions of Law dated November 23, 2019, found that the 2017 Agreement was executed by Neil William Smeenk. (See Finding #38).
8. Further this Court found that attorney Wes Buckmaster oversaw the execution of the 2017 Agreement and 2017 Will and testified that he had no question about Neil's capacity to execute and understand the documents at the time of their execution and further that Neil was not under any duress or undue influence at the time of the execution of the 2017 Agreement and 2017 Will. (See Findings # 41 and 42).
9. Counsel for the Personal Representative has asked whether counsel for Ryan Smeenk has any evidence that Neil Smeenk lacked capacity at the time of executing the 2017 Will and associated documents. No evidence has been provided.
10. The 2017 Agreement created a binding contractual obligation for the disposition of the decedent's estate. Neil Smeenk was contractually obligated to follow the 2017 Agreement. The estate is also so obligated.

11. Denise L. Schipke-Smeenk, as Personal Representative, intends to fulfil the contractual obligations of the estate by disposing of the Estate as provided for in the 2017 Agreement and 2017 Will.

12. The Personal Representative is seeking court approval of the disposition of the decedent's estate as provided in the 2017 Agreement and 2017 Will pursuant to SDCL § 29A-3-713.

WHEREFORE, Petitioner respectfully requests this Court approve the disposition of the Estate of Neil William Smeenk as provided in the 2017 Agreement and 2017 Will.

Dated this 8th day of April, 2020.

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

/s/ Tyler C. Wetering
Tyler C. Wetering
Attorney for Denise L. Schipke-Smeenk
P. O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078
twetering@gpna.com

CERTIFICATE OF SERVICE

Tyler C. Wetering, attorney, states that on the 8th day of April, 2020, I sent, by first-class mail, postage prepaid, a true and correct copy of the **Motion for Approval and Payment of Claim** to the following person:

Brandy Ruth Mooney
28854 225th Ave.
Martin, SD 57551

And served by electronic services via Odyssey File & Serve and electronic mail to:

N. Drew Skjoldal
Cassidy Stalley
Lynn, Jackson, Shultz & Lebrun, P.C.
909 St. Joseph Street, Suite 800
Rapid City, SD 57701-3301
Attorneys for Ryan William Smeenk

/s/ Tyler C. Wetering
Tyler C. Wetering

STATE OF SOUTH DAKOTA		IN CIRCUIT COURT
COUNTY OF BUTTE		FOURTH JUDICIAL CIRCUIT
In the Matter of the Estate of	)	09PRO19-000013
	)	
NEIL WILLIAM SMEENK	)	**BRIEF IN SUPPORT OF MOTION FOR**
	)	**APPROVAL AND PAYMENT OF CLAIM**
Deceased.	)	

Denise L. Schipke-Smeenk, as Personal Representative of the Estate of Neil William Smeenk, by and through her attorneys, Tyler C. Wetering and Talbot J. Wieczorek of Gunderson, Palmer, Nelson & Ashmore, LLP, respectfully submits this Brief in Support of Motion for Approval and Payment of Claim.

PROCEDURAL BACKGROUND

This matter has previously been before the Court on a lengthy evidentiary hearing regarding the appointment of the Personal Representative. An approximately four hour hearing was held on that issue on October 31, 2019. As a result of that hearing, this Court entered Findings of Fact and Conclusions of Law on November 25, 2019. As a law of the case, citations to the Findings of Fact and Conclusions of Law will be made to the findings paragraphs as FOF and to the conclusions paragraphs by citing to COL[1].

FACTS

Denise Schipke-Smeenk ("Denise") and Neil Smeenk ("Neil") executed mutual and reciprocal wills in 2017 (the "2017 Wills"), as well as an Agreement to Execute Mutual Wills (the "Agreement"). FOF ¶ 33-36, ¶ 38. This Agreement included a provision wherein neither

[1] Pending in front of this Court are various questions regarding discovery due from the attorney for the deceased. The Personal Representative reserves the right to supplement this Brief if the Court should resolve those issues prior to resolving this pending Motion.

party would be able to revoke or alter the estate plan absent the signed consent of the other party. FOF ¶ 32, ¶ 38. In April 2019, Neil executed a new will without Denise's knowledge or consent (the "2019 Will"). FOF ¶ 53, ¶ 58.

After a court hearing in October of 2019, the 2019 Will was admitted to probate, and Denise was appointed as the Personal Representative of the Estate. COL ¶ 33, ¶ 62. The proponents of the 2019 Will have not challenged the existence or validity of the 2017 Agreement to Execute Mutual Wills. FOF ¶ 64 (objecting to the 2017 Will only insomuch as it was not truly the last will, making no claim that the contract was invalid). Counsel for the Personal Representative has requested the other heirs provide any information they would have to show that the 2017 Agreement to Execute Mutual Wills is potentially invalid. *See Affidavit of Talbot Wieczorek dated June 8, 2020*. No information has been forthcoming that undermines the validity of the 2017 Agreement to make reciprocal wills. Denise, acting as the Personal Representative, has a duty to honor contractual obligations upon the Estate.

ARGUMENT

A. There is an enforceable contract and no grounds exist that allow the estate to reject the contract.

In an evidentiary hearing this Court findings show that there was a contract between Neil Smeenk and Denise Schipke-Smeenk. FOF ¶ 38-43. The essential elements of a contract are as follows:

(1) Parties capable of contracting;
(2) Their consent;
(3) A lawful object; and
(4) Sufficient cause or consideration.

See SDCL § 53-1-2.

This Court heard testimony from Mr. Buckmaster, the attorney who drafted the 2017 documents, that Mr. Buckmaster knew Neil for years and that Mr. Buckmaster had no doubt as to Neil's capacity to execute the document at the time the documents were executed. FOF ¶ 41-42. The parties were capable of contracting as knowledgeable adults. They both met with Mr. Buckmaster, went over the documents and were capable of consenting. FOF ¶ 28-43. As such, from the Court's findings, it is clear the parties were capable of contracting and they consented to the contract.

Regarding element three, lawful object, an Agreement to make reciprocal wills is clearly a lawful object. South Dakota laws make clear that contracts regarding succession are allowed. *See SDCL § 29A-2-514*. State law provides that a contract regarding succession wills be valid if it is established in one of three ways. It can be established by "(i) provisions of a will stating material provisions of the contract, (ii) express reference in a will to a contract and extrinsic evidence providing the terms of the contract, or (iii) writing signed by the decedent evidencing the contract." *Id*. In this situation, all three alternative methods are met.

Neil Smeenk's 2017 Will in Article V subsection B states as follows:

> My wife **DENISE L. SCHIPKE-SMEENK** and I have entered into a Contract to Will contemporaneously with the execution of our respective Last Wills and Testament on the date indicated below. We have agreed therein that an exchange for reciprocal distribution of our property to the survivor between us, we will each commit ourselves to dispose of our estates as reflected by the Last Wills and Testament executed contemporaneously with that agreement.
>
> *See Exhibit 4 of October 31, 2019 hearing* (emphasis in original).

This language qualifies under subpart (i) of the statute as it shows a provision of the will stating the material provisions in the contract. Also, this language in conjunction with the written contract and other information produced at the hearing, qualifies under subpart (ii) as the will makes a specific reference to the contract and there exists extrinsic evidence providing the terms

of the contract. Finally, the Agreement to Execute Mutual Wills, which was introduced at the evidentiary hearing as Exhibit 3, satisfies the statutory requirements found under subsection (iii) as it constitutes a writing signed by the decedent evidencing the contract.

The final element of the contract is sufficient cause or consideration. As noted in Neil Smeenk's 2017 Will, Article V, he acknowledges that he and Denise agree to an exchange "for reciprocal distribution of our property to the survivor between us, we will each commit ourselves to dispose our estates as reflected by the Last Wills and Testament executed contemporaneously with that agreement." *See Exhibit 4, Neil Smeenk 2017 Will marked October 31, 2019 hearing*. Thus, it is clear here the parties agreed to be bound by an Agreement that obligated them to pass their property in a certain manner at the death of the first spouse. This constitutes good consideration as good consideration can include any benefit incurred on a promisor or any prejudice suffered or agreed to be suffered by any person where they are legally bound to comply. *See SDCL § 53-6-1. See also SDCL § 53-6-2* (Legal obligation resting on a moral obligation originating some benefit that results in the promisor prejudice that constitutes value consideration).

The South Dakota Supreme Court has noted that in an estate contest any one of the following items could actually be considered good consideration: release of a current or future claim, the desire to avoid being deposed, desire to prevent future expenses, prevent personal grief, desire to prevent emotional trauma associated with a dispute. *Estate of Meiswender* 2003 SD 50, ¶ 23 660 N.W. 2d 249. See also, *Kuhn v. Kuhn* 281 N.W. 2d 230, 236 (ND 1979) (Holding that mutual promises between a husband and wife are considered adequate consideration).

The estate knows of no evidence supporting an argument that the Agreement to Execute Mutual Wills is invalid. Both parties signed the Agreement voluntarily. No evidence has been provided to counter the contract. Since the hearing, no evidence has been discovered that questions the contract enforceability. As such, the contract is binding upon the Estate of Neil Smeenk and the Personal Representative has the duty to fulfill contract obligations of the estate. SDCL § 29A-3-703; § 29A-3-807.

B. South Dakota law allows specific performance to be granted as a remedy for breach of contract and it is an appropriate remedy for breach of a contract to make reciprocal wills

South Dakota allows the remedy of specific performance on contracts. SDCL § 21-9-1 states: "The specific performance of an obligation may be compelled, except as otherwise provided in the statutes relating to such remedy." A contract to make a will is not excluded by statute, and therefore, a contract to make a will may be enforced by specific performance in the state of South Dakota.

Specific performance on the terms of the 2017 Will, to enforce the terms of the Agreement, is the appropriate remedy for the breach of the Agreement to Execute Mutual Wills. In this Court's November 25, 2019, order referenced numerous cases from multiple states, addressed contracts to make wills. Many of the cases cited by the Court refer to specific performance or constructive trusts on the terms of original will pursuant to the contract. *See Estate of Chapman*, 239 N.W.2d 869 (Iowa 1976), *Mosloki v. Gamble*, 191 Minn. 170 (Minn. 1934), *Janetta v. Janetta*, 205 Minn. 266 (1939), *Bennington v. McClintick*, 253 S.W.2d 132 (Missouri 1952), and *Pruss v. Pruss*, 245 Neb. 521 (Neb. 1994). South Dakota law allows the remedy of specific performance following a breach. SDCL § 21-9-1. Therefore, pursuant to

contract law, this Court should approve the Motion and allow the assets to pass by the 2017 Will terms by specific performance of the terms of the mutual and reciprocal 2017 Wills.

This Court's November order cited to *Janetta v. Janetta*, for the law that "wills are revocable, but contracts to make wills are irrevocable without the consent of the parties." *See* COL ¶ 22, citing *Janetta v. Janetta*, 205 Minn. 266, 267 (1939). The court in *Janetta* noted that specific performance on the contract is the appropriate remedy to such a breach. *Id.* at 622. In *Janetta*, a husband and wife executed mutual wills. 285 N.W. at 620. After the wife's death, the husband created a new will. *Id*. The second will was offered to probate and was challenged by the heirs under the first will. *Id*. at 621. The heirs also requested specific performance on the contract to make a will. *Id.* The defendants countered that the plaintiffs were not entitled to specific performance. *Id*. The court held the Defendant's claim was incorrect. *Id*. ("The children would have been entitled to specific performance of the agreement between the father and the mother to make joint and mutual wills. . ."). The court went on to say,

> The action for specific performance is not to set aside or nullify the will or to enforce a prior will made pursuant to the contract. Wills are revocable, but contracts to make wills are irrevocable without the consent of the parties. *It is the contract which is enforced*. . .

Id. at 622 (emphasis added).

This Court also cited to *In re Estate of Chapman* for the law that "[a] will becomes effective only at the testator's death. Until that time, it may always be revoked. This rule is not changed because, in revoking a will, *the testator may violate a contract not to do so*." COL ¶ 21 (citing *Matter of Chapman's Estate*, 239 N.W.2d 869, 872 (Iowa 1976) (emphasis added)). The *Chapman* court goes on to say,

> This does not mean the testator may escape his contractual obligations by the expedient of revoking a will designed to carry them out. It simply means the remedy lies elsewhere. *Under various circumstances courts have allowed damages for breach of contract,*

> *decreed specific performance in an equitable action, and impressed a trust on the testator's property for the benefit of those favored in repudiated mutual will*.

Id. at 872 (emphasis added).

The Court of Appeals of Michigan in *In re VanConett Estate* held that beneficiaries of a will made pursuant to a contract to make a will had the right to seek specific performance of the contract. 262 Mich. App. 660 (2004). A married couple executed reciprocal wills and a contract to make reciprocal wills. After the first death, the surviving spouse changed his will. *Id*. at 662. The beneficiaries under the mutual wills brought suit for specific performance on the terms of the mutual wills. *Id*. On appeal, the court was satisfied with the evidence of a valid contract to make a will, wherein each will stated they were made pursuant to a contract to make a will, each will was signed, and each will had mirror provisions for what to do following the first spouse's death. *Id*. at 664. The court notes that, "the decedent had the right to revoke his will but he could not revoke the parties' contract. *So, to the extent any subsequent wills contradicted the contract, plaintiffs have a right to seek specific performance*." *Id*. at 666 (emphasis added).

The Court of Appeals of South Carolina ordered specific performance of a contract to make a will in *Wright v. Trask*. 329 S.C. 170, 495 S.E.2d 222 (Ct. App. 1997). A grandson sued his grandfather for specific performance of an oral agreement to make a will devising Trask's ranch to Wright. "The usual remedy afforded the beneficiary of the contract to make a will is an action for specific performance." *Id*. at 183 (*citing* Coleman Karesh, Wills 56 (1977)). The court granted the request for specific performance on the contract to make a will. *Id*. at 184 (*citing Flowers v. Roberts*, 220 S.C. 110, 66 S.E.2d 612 (1951) (holding that specific performance of a contract to make a will is well within the sound discretion of the court)).

Here, the Court has been presented the Agreement to Execute Mutual Wills, signed by her and Neil Smeenk. The Agreement references the material dispositions of the wills. The wills

reference the Agreement. Moreover, the evidence shows that the contract is valid. Specific performance is therefore a viable remedy. SDCL § 21-9-1.

Specific performance is the remedy to be used when a contract to make a will was breached by execution of a will in violation of the contract. *See Estate of Chapman*, 239 N.W.2d 869; s*ee also Estate of Graham*, 690 N.W.2d 66. This conclusion is supported by other jurisdictions. *See* Wright v. Trask. 329 S.C. 170, 495 S.E.2d 222 (Ct. App. 1997), *In re VanConett Estate*, 262 Mich. App. 660 (2004). Specific performance is the appropriate remedy to prevent a testator from shirking contractual obligations. *See Graham*, at 74. Neil breached the contract he entered into with Denise by creating the 2019 Will. The appropriate remedy is specific performance on the terms of the Agreement essentially giving effect to the 2017 Will terms.

CONCLUSION

Denise requests that this Court approve the motion for claim pursuant to SDCL § 29A-3-713 and direct specific performance of the terms of the Agreement to Execute Mutual Wills that was executed concurrently with the 2017 Last Will and Testament of Neil Smeenk.

Dated this 9th day of July, 2020.

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

/s/ Talbot J. Wieczorek
Talbot J. Wieczorek
Attorney for Denise L. Schipke-Smeenk
P. O. Box 8045
Rapid City, SD 57709-8045
Phone: (605) 342-1078
Email: *tjw@gpna.com*

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2020, a true and correct copy of **BRIEF IN SUPPORT OF MOTION FOR APPROVAL AND PAYMENT OF CLAIM** was sent, by first-class mail, postage prepaid on the following:

Brandy Ruth Mooney
28854 225th Ave.
Martin, SD 57551

And served by electronic services via Odyssey File & Serve and electronic mail to:

John W. Burke
Kimberly Pehrson
Thomas Braun Bernard & Burke, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702
Attorneys for Ryan William Smeenk

/s/ Talbot J. Wieczorek
Talbot J. Wieczorek

STATE OF SOUTH DAKOTA		IN CIRCUIT COURT
COUNTY OF BUTTE		FOURTH JUDICIAL CIRCUIT
In the Matter of the Estate of	)	
	)	
NEIL WILLIAM SMEENK	)	09PRO19-000013
	)	
Deceased.	)	

Notice to South Dakota Department of Social Services of Appointment of Personal Representative of the Estate of Neil William Smeenk, Deceased

Notice now is hereby given that on December 9, 2019, in the circuit court of Butte County, South Dakota, Denise L. Schipke-Smeenk was appointed as personal representative of the above-entitled estate. On behalf of the personal representative, the undersigned attorney certifies that the information required by SDCL § 29A-3-705(c) has been provided to the Department.

If you claim to be a creditor of the above-entitled estate, you are notified pursuant to SDCL § 29A-3-801(b) that you must file any claim within four (4) months of the personal representative's appointment, or sixty (60) days after the mailing or other delivery of this written notice, whichever is later, or your claim will be forever barred. Claims may be filed with the personal representative or filed with the clerk of courts, with a copy of the claim mailed to the personal representative.

Dated this 12 day of December, 2019.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

Tyler C. Wetering
Attorneys for Estate
P. O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078

The Personal Representative is:
Denise L. Schipke-Smeenk
18291 Winkler Road
Newell, SD 57760

Filed: 12/12/2019 12:39 PM CST Butte County, South Dakota 09PRO19-000013

Proof of Notice

Tyler C. Wetering states that on the 12 day of December, 2019, he sent a true and correct copy of the **Notice to Department of Social Services of Appointment of Personal Representative** by first-class mail addressed as follows:

South Dakota Department of Social Services
Office of Recoveries and Investigations
700 Governors Drive
Pierre, SD 57501-2291

Tyler C. Wetering

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT

In the Matter of the Estate of	)	
	)	PRO19-13
NEIL WILLIAM SMEENK,	)	
	)	EVIDENTIARY HEARING
Deceased.	)	

BEFORE: THE HONORABLE MICHAEL W. DAY
Circuit Court Judge
Belle Fourche, South Dakota
October 31, 2019, at 8:00 a.m.

A P P E A R A N C E S:

FOR RYAN WILLIAM SMEENK: MR. N.DREW SKJOLDAL
MS. CASSIDY M. STALLEY
Attorneys at Law
909 St. Joseph St. Ste. 800
Rapid City, SD 57701-3301

FOR DENISE SCHIPKE-SMEENK: MR. TYLER C. WETERING
MR. TALBOT J. WIECZOREK
Attorneys at Law
P. O. Box 8045
Rapid City, SD 57709

foundation. And it's not authenticated, because we don't know what the date of this document is.

THE COURT: She's testified to the foundation. Overruled. You may proceed.

Q (By Mr. Wetering, continuing) Denise, can you tell me about this exchange taking place between you and Ryan.

A (Crying.) Sorry.

THE COURT: Let's take a short recess.

(WHEREUPON, a brief recess was taken.)

THE COURT: You may continue.

Q (By Mr. Wetering, continuing) Denise, we were discussing a document that's marked as Exhibit 11. And I had asked you if you could tell me what was going on in that -- at the time of that exchange with Ryan.

A I was down in Dallas, Texas, visiting my aunt -- Oh, sorry. I was down in Dallas, Texas, visiting my aunt and uncle and cousins during that time.

Q And it looks -- In the first message that's present at the top of that page, there was a -- you're texting Ryan about Neil's drinking?

A Yes.

Q And can you -- Can you tell me about the incident that you're discussing in this message.

A He just was drinking a lot at this point.

Q And by "he". . .?
A Neil. And -- So I left that morning, and he -- for the airport. And he had to deal with a roofer. And from the time I drove from the farm to the Rapid City airport and then called him, he could hardly carry on a conversation. And --
Q And you think this was due to his having been drinking?
A Yes. You could always tell on the phone when he was drinking. But, yes.
Q So it looks like you're informing Ryan of the condition that Neil was in while you're in Dallas. There's reference to "falling a lot again so I'm worried." Can you tell me about that.
A Yes. He started falling a lot. And so anyhow, I just wanted to let both the kids know that I was gone and asked him to check on him.
Q You asked Ryan to check on Neil?
A Yes.
Q On the second page of that document, there's a reference to some paperwork.
A And this was later. Yes. This was -- This was later in the summer. So after this -- the little face with the tear, then that conversation took place about getting Neil put into detox.

Q And the paperwork you're referring to is what exactly?
A Well, we were under the impression that we could get paperwork at the courthouse that would allow us to involuntarily put him into treatment.
Q To require Neil to go into treatment? And did you get that paperwork that you referred to?
A No. Because the only thing that they had was involuntary treatment for mental illness. So it wasn't what they had --
Q So after going to the courthouse, you didn't think the paperwork they had applied to Neil's situation?
A Not -- Not totally. I didn't know how to get him on mental illness.
MS. STALLEY: Your Honor, I'm going to object to this line of questioning. Again, I don't believe it's relevant to the issues before the Court.
THE COURT: Why is this relevant?
MR. WETERING: It goes to, in part, Ryan's suitability to serve. And I want to talk about -- There's a section in the affidavit that he filed with his initial objection that is also referring to this same trip.
THE COURT: All right. Thank you. Objection overruled.
Q (By Mr. Wetering, continuing) And there -- Now, there

was an affidavit that was filed along with Ryan -- or along with the initial objection that was filed by Ryan. It's already in the record. But I'd like to mark this again as Exhibit 12.

(Exhibit 12 is marked for identification.)

Q (By Mr. Wetering, continuing) As I stated, Denise, the document that I've marked Exhibit 12 is Ryan's affidavit that's already in the record. Have you previously had a chance to review that affidavit?

A Yes.

Q On page 2 of that document, under the heading Future of Dad's Estate, Number 2, there is an assertion that -- or an allegation, I guess -- or it's Ryan's position in this affidavit that she, being you, Denise, knew that Neil was struggling and chose not to get him help. And then there's a reference to a planned trip where it was thought that Neil shouldn't be left alone. Is the trip -- As far as you know, is the trip referred to in that affidavit the same trip that you were on when the text messages that are Exhibit 11 were exchanged? Was it that Dallas, Texas, trip?

A Yes.

Q And in Exhibit 11, it looks like there's a discussion between you and Ryan about this paperwork where you

ask Ryan if he'd picked up the documents at the courthouse.

A Uh-hmm.

Q And do you remember what -- I mean, his response was "No." Then, did you pick those documents up?

A Yes. That's when I found out it was -- Fred Lamphere wasn't there, who I'd been talking to. But one of his deputies, I told him what I wanted, and what he handed me was the committal on mental. And I said, "Isn't there any for alcohol?" And he said, "No."

Q Did you -- And that was an attempt to help Neil, maybe even against his will, with his drinking problem?

A Yes. Because he refused to stop and get help.

Q Okay. Now, in that same -- in that same section, there's reference to a text message exchange with Neil's other daughter Brandy related to Neil's drinking. And do you recall -- Do you recall having that exchange?

A Yes. It was not my finest hour. But yes, I do.

Q So you don't deny that text conversation referred to between you and Brandy happened?

A No.

Q Can you tell me the reason -- the reason why you said the things that you said.

A Because I'd been trying to get the family to

understand how serious it was. And this -- his drinking had gotten out of hand. I'd been living with it for six months, him drinking all day long. And this was a break for me to go down and visit my family so --

Q That's enough, Denise.

A When it came -- When she sent me the text about how I shouldn't leave her dad alone, you know, I'd been with him for six months, taking care of him, cleaning up his messes.

Q How did you feel about Neil's drinking?

A It was destroying him. The man I love was disappearing in front of my eyes, and I couldn't get him to stop.

Q Denise, that's enough.

A Okay.

Q Let's take a second here.

A Sorry.

MR. WETERING: That's okay.

I'd like to move to admit Exhibits 11 and 12.

MR. WIECZOREK: No objection.

THE COURT: Exhibits 11 and 12 will be received.

(Exhibit 13 is marked for identification.)

Q (By Mr. Wetering, continuing) Are you okay, Denise?

A Yes.

just as normal.
Q Relationships -- I'm sorry, ma'am. Relationships change just because people get older and take different responsibility; correct?
A My family's pretty consistent in their family ties.
Q My question is: You recognize relationships change just because of time?
A Yes. Uh-hmm.
Q Correct?
A Yes.
Q And are you -- Do you know what debts Neil had at the time he died?
A Not really, no.
Q Do you know what assets Neil had at the time he died? What property -- personal property or real property he owned at the time he died?
A At the time he died, I think the only thing they owned was the house that they were living in.
Q And you loved your brother?
A Yes.
Q It's got to be hard watching him go through the alcoholism?
A It's terrible.
Q Yeah. And you're not here saying that Denise somehow was against him seeking treatment, are you?

A I'm not. I think -- but I think she could have been more active earlier.
Q And when Denise says how terrible it was to live with a man that was drinking that hard, you don't disagree with that?
A I don't disagree. I sympathize.
Q And, you know, sometimes you've heard the phrase "tough love;" correct?
A Uh-hmm.
Q You have to answer out loud. I'm sorry, ma'am. You have to answer out loud.
A Oh. Yes.
Q And telling somebody, "If you don't stop drinking you got to get out of the house," that could be tough love?
A Yes. But why -- why would she do it that way?
Q Well, were you there?
A No.
Q Do you know what it was like every morning getting up and watching somebody you love start drinking right away?
A For one thing, he didn't start drinking in the morning. He would be good until evening.
Q How do you know that, ma'am?
A Because I talked to him.

STATE OF SOUTH DAKOTA)
) IN CIRCUIT COURT
COUNTY OF BUTTE) FOURTH JUDICIAL CIRCUIT

In the Matter of the Estate of)
NEIL WILLIAM SMEENK,) Motions Hearing
vs.) PRO19-13
Deceased.)

BEFORE: THE HONORABLE MICHAEL W. DAY
Circuit Court Judge
Belle Fourche, SD 57717
December 3, 2020, at 9:00 a.m.

A P P E A R A N C E S:

FOR RYAN WILLIAM SMEENK: MR. JOHN BURKE and
KIMBERLY PEHRSON
Attorneys at Law
4200 Beach Drive Ste. 1
Rapid City, SD 57702

FOR DENISE SCHIPKE-SMEENK: MR. TALBOT J. WIECZOREK
Attorney at Law
P.O. Box 8045
Rapid City, SD 57709

the agreement and the will should be enforced? Is that what you're asking the Court to do?

A Yes.

Q Now, if you look at that agreement to execute wills on the second page under VII, it states the parties agree not to revoke or amend the will without the expressed written consent of the other party. Do you see that?

A Yes.

Q Did you ever give Neil written consent to change the will?

A No, he never even told me he did.

Q When did you find out the will was changed?

A The day that he died.

Q How did you find out?

A Through a text from Ryan.

Q And those texts were previously marked in the first hearing?

A I believe so.

Q Now, as personal representative, do you know of any grounds to refute the enforcement of the contract?

A I do not.

(WHEREUPON, Exhibit 17 was marked by the court reporter.)

Q I'm going to show you what's been marked as Exhibit 17. Can you identify what that is.

A Yes.
Q And, in fact, it talks later about trying to get involuntary commitment of Neil; correct?
A Correct.
Q Did Ryan attempt to do that?
A Yes, Ryan did do that.
Q Were you supportive of that?
A Yes, 100 percent.
MR. WIECZOREK: Your Honor, I would move for admission of 20.
THE COURT: Any objection?
MR. BURKE: No objection.
THE COURT: Exhibit 20 will be received.
(WHEREUPON, Exhibit 21 was marked by the court reporter.)
Q (By Mr. Wieczorek, continuing) Ms. Smeenk, I'm going to show you what's been marked as Exhibit 21. Can you tell the Court what that is.
A This is when Neil -- Neil came over in May --
Q When you say, "Neil came over" --
A Came over from Will's. Came to the farm. And he was having trouble with his phone and needed help getting it back online and we spent the day together and he spent the night and we talked about how things were going. And he says -- he says, "Don't you think that we can work this

out? And, if not, don't you think you and I can sit down and talk about how we're going to split the estate" --

Q Okay. Sorry.

A That's okay.

Q When you say, "work this out," what was he talking about?

A Our marriage.

Q Meaning reconcile?

A Yes.

Q And then -- so what was the follow-up to that conversation?

A So the follow-up was that I said, "Well, I'll contact my lawyer and have her" -- I think we were supposed to make some kind of -- I don't know. I don't know what it was called. We were supposed to answer the divorce thing that he had sent me. And so I called Ms. Williams and told her that we were going to try to work it out between ourselves and we weren't going to proceed with filing whatever she wanted to file. I can't remember what that was called.

Q Okay. So who -- on the top there is an e-mail. Did you get a copy of that e-mail from your counsel?

A Yes, from Terri. Yes, from Mrs. Williams.

Q And then who is that e-mail from on page 1 of exhibit --

A Jeff Collins.

Q And who was Jeff Collins?

A He was Ryan's first attorney.
Q And he's giving you -- what's it say there -- an open extension to answer?
A "We have no objection to an indefinite extension to file a responsive pleading to allow the parties to attempt to reach an amicable resolution, which was always our client's preference."
MR. WIECZOREK: Your Honor, I would move for admission of 21.
THE COURT: Any objection?
MR. BURKE: No, Your Honor.
THE COURT: Exhibit 21 will be received.
Q (By Mr. Wieczorek, continuing) Going back to the will you -- in 2017 that you executed -- is it your understanding that you can't change that will at this point?
A Correct. Because I would need Neil's consent and his signature to change it.
Q Okay. And you agree to be bound by it?
A Yes, that's the purpose of it. That was the purpose of it in the first place.
Q That was your and Neil's agreement?
A Yes.
Q And so you're asking the Court to enforce that agreement?

A Yes, sir.

MR. WIECZOREK: That's all I have, Your Honor.

THE COURT: Mr. Burke, are you going to cross-examine?

MR. BURKE: Yes, Your Honor.

THE COURT: All right. Thank you.

CROSS-EXAMINATION

BY MR. BURKE:

Q Denise, my name is John Burke. We haven't met before today, have we?

A Yes, at that -- well, we didn't meet.

Q I tend to talk loud but I will do that, if it helps the court reporter as well.

I am going to jump a little out of order, Denise, for this reason. Right before I got up, you were asked about the e-mail -- Exhibit 21 -- that Jeff Collins had responded to your attorney about an extension. Do you recall that?

A Yes.

Q And your testimony was -- and I won't burden the court reporter to read it back, because I'm guessing she's pretty good and she got it. But Mr. Wieczorek kind of jumped in before you finished your answer. But when you said that Neil had come down to your place to visit about what's going on --

A Mm-hmm.

Q -- you actually started to say, "and split the estate."

Q Okay. And this is the contract you were asked a few questions about on direct. Do you recall that?
A Yes.
Q In a nutshell, would it be fair to say -- had you ever encountered a document like that before you did this agreement to execute mutual wills with Neil? Had you ever encountered something like that before?
A No, because I never made wills before.
Q You had never had a will before 2017?
A Well, the 2009, yes.
Q Okay. So there had been that one before?
A (Nods head.)
Q Okay. And then I'm going to have you turn to -- Denise, I'm going to show you what you guys marked at the last hearing as Exhibit 5. Do you recognize that document?
A I signed a contract for deed.
Q Okay. And do you know generally what happened in that document?
A Yes. I was assigned the other half of the contract.
Q Right. And so in other words those contract proceeds were coming in Neil's name; right? Before this.
A Yes, sir.
Q And in 2017, Neil transferred the right to receive half of those proceeds directly to you in your own name; is that fair?

A Yes.
Q If you guys are married and you have mutual wills, why was there a need to do that document? Why was there a need to get half of those proceeds under your name?
A I have no idea. Wes Buckmaster is our lawyer. I'm not a lawyer. These are the papers that he had us sign. That would be a question for him.
Q Well, I think it's a question for you for the reason that -- you signed the legal document. Are you telling me you don't know why you signed it?
A No, I know why I signed it. But the purpose of it was -- yeah. Neil was assigning the other half to me.
Q Did you not desire to have half of the contract for deed proceeds in your name all along as a measure of protection so that half of that value of the ranch is definitely in your name?
A No. I didn't realize it wasn't until we signed this paperwork.
Q Okay. Did you -- did you have to exchange anything with Neil for him to sign this document? Something they call "consideration." In other words, did you give something to Neil in trade for him assigning half of those proceeds?
MR. WIECZOREK: I am going to object to the extent it calls for legal conclusion.
THE COURT: Overruled.

those things? Do you agree with that?
A Conversations that I had with Will -- you need to hear it in the whole context. It wasn't like I was telling him to go outside. He talked many times about he didn't have anything to live for, you know, and that kind of thing. And so that conversation probably took place a year or so before he actually killed himself. He was talking about it again.
And the only thing that -- the comforting thing to the family was he always would say, "Well, my dad always told me that it was the worst thing that a person could do." And he swore to all of us that he would never do it.
So it was an evening that he was going on and on again and I was working and, you know, and I just couldn't be there all the time. So, yes, we talked about it.
And I said -- it was a -- it wasn't an angry conversation. It was a conversation that we had. I asked him -- I said, you know, "I can't worry about this every day. That if this is something that you choose to do, I cannot stop you." I said, "But please don't do it here where I will have to find you." So it was not vindictive. It was not mean. It was a conversation that we had as a husband and wife.
Q Do you agree with me that for all practical purposes, the majority of Neil's estate, if you will, consists of --

and I think that was in an answer to one of your interrogatories -- the right to his half of the proceeds from the sale of the ranch. That's the majority of what's there in terms of assets; is that fair?

A Yes.

Q And as a result of the assignment of contract for deed that we talked about, you've already carved out one half of that is going to be yours no matter what happens here?

A Exactly.

Q That's your understanding; right?

A Yes.

Q So would you agree with me that when you and Neil sold the ranch, that that is most of what comprised your estate; correct?

A Yes.

Q You already will receive under that assignment -- I believe it's your position -- already half of the estate is coming to you, again, no matter what happens here; correct?

A Right.

Q And so if we shift to the agreement to execute wills -- now, that's your Exhibit 3 that we talked about early on.

A Yes.

Q And I think Mr. Wieczorek asked you questions like, "Do you understand that you're bound by it? Do you intend to adhere to it?" and all of those things; right?

executed the will?
A Yeah. Dad did not like to drive in Rapid or Spearfish or anywhere with a lot of traffic.
Q Mr. Smeenk, can you look at these and see if you recognize them.
(WHEREUPON, Exhibit 33 was marked by the court reporter.)
Q (By Mr. Wieczorek, continuing) can you look through them and see if you recognize those.
A Yes, I recognize them.
Q And is this an e-mail exchange or e-mails you received and response you had to Lynn Jackson?
A Yes.
Q It appeared at this time -- which the top e-mail is dated to you from Mr. Skjoldal -- May 20 of 2019 that your Uncle Steve had some concerns about your father. Were you aware of the concerns before the e-mail?
A Before the e-mail? I knew Dad was drinking more than he should, yeah. And, in fact, I went out to get -- it was later than that I tried to get guardianship or tried to get him help again.
Q Okay. Where was he living at this time?
A With Will, my cousin.
Q Will Johnson?
A Yes, sir.

Q And page -- the third page of that document about two thirds of the way down you have a reply that comes from you, Ryan. Do you see that?
A Yes.
Q Where you're saying that four of your aunts and uncles were going to sit down with him -- "with him," you mean your dad?
A Yes.
Q And so did they ever get a chance to sit down with him and try to go over things?
A I'm pretty sure they did, yeah. That would have been end of May. I think there was -- I'm not 100 percent. But I think there was -- they talked to him at least on the phone.
Q So had your father expressed to you a question or fact that he didn't feel he had anything to live for when he was drinking?
A No.
Q Okay.
A He told me suicide is not the way out. My father told me that -- sorry -- "that's a chickenshit's way out" is what my father told me.
Q And that was kind of a standard thing -- your dad believed that?
A Yeah.

Q So was the concern your aunt and uncles had at the time -- was it just that he was drinking or that he could actually be harmful to himself?
A The drinking.
Q How bad had it gotten?
A Well, to normal standpoint, not real bad, because Dad just drank every day. Quarter bottle of whiskey. Didn't take him much to get pretty tipsy, I guess.
Q So at this time, he was drinking every day a quarter bottle of whiskey?
A And sometimes more certain days.
Q How long had he been living at Will's this time?
A Now, you're talking this May 20th?
Q Yeah.
A Probably off and on for a month. He would go to Will's and then he would come back to our place for a couple -- three days and then go back to Will's. Just kind of bouncing.
Q And he was living at Will's when he passed away?
A Yeah.
MR. WIECZOREK: That's all I have.
THE COURT: Thank you.
Mr. Burke?
MR. BURKE: Only a couple questions, Your Honor.

A Yes.
Q What would you do when you stayed with them all summer?
A Help them with any chores that needed done. Usually in that time, Grandpa and I would be in the hayfield. Yeah, just had a good summer.
Q And what did you observe in terms of Neil and Denise's relationship during those summers?
A A good one most of the time. In the earlier years, like, 2015 to 2017, before he really started drinking hard, it was usually pretty good.
Q Okay.
A And then in the later years, it just started to get worse and worse.
Q And during -- when his drinking was getting worse, did Neil have any kind of physical issues that you saw?
A Yes.
Q What would those be?
A He would get the shakes. He would, like -- his whole body would start shaking and he would collapse to the ground.
Q And was that while he was drinking or when he was sober?
A While he was drinking.
Q And did you see how Denise treated Neil when he would have that kind of shaking and falling to the ground?
A Yes.

recognize that?
A Yes.
Q And what is Exhibit 21?
A It is an e-mail from me to the response to Terri indicating we have no objection to an indefinite extension to allow the parties to reach an amicable resolution of the divorce.
Q Okay. And, Mr. Collins, without getting into communications, was it your understanding that Neil Smeenk desired to get divorced?
A Yes.
MR. WIECZOREK: I'm objecting to foundation, Your Honor.
THE COURT: At what time period?
Q (By Mr. Burke, continuing) At the time that you served the summons and complaint and were communicating with Ms. Williams about an extension.
THE COURT: Objection overruled.
Go ahead.
A Yes.
MR. BURKE: I don't have anything else.

CROSS-EXAMINATION

BY MR. WIECZOREK:
Q Mr. Collins, as you know, I represent Ms. Smeenk in this matter. You used the term "amicable resolution of the divorce."

A Yes.
Q Reconciliation would be an amicable resolution of an action, wouldn't it?
A Yes.
Q And you conferred with Mr. Ryan Smeenk's counsel regarding your testimony today before you came to the hearing?
A Yes.
Q You did not do the estate plan; correct?
A I did not.
Q Do you still have the summons in front of you?
A Nope. Okay.
Q On the second page of the summons, it references the statutory automatic stay?
A Yes.
Q Is it your contention that changing -- making material changes in your will is allowable under the automatic stay?
A I believe you can make material changes to your will under the automatic stay. In addition, the automatic stay doesn't take effect until service.
Q Did Mr. Burke tell you there had been discussion about that this morning?
A Yes.
Q Were you aware there was a sequestration order in place?
A No.

assume that's the attorney that they put on the case.
Q Yeah. But this is -- this is after that. This is -- this e-mail is dated May 20, 2019. Where this e-mail to Ryan says "Your uncle Steve -- " Are you Ryan's only uncle Steve?
A Yes.
Q " -- called and you were worried about Neil"?
A Yes, I was worried about him continually.
Q Okay. And is this when you went to Bennett and Main after you made the contact with Lynn Jackson?
A This was May 20th. I think Bennett and Main was before that.
Q Okay.
A I don't remember the exact date. But Shirley and Joanne and Lynn and I went to Bennett and Main.
Q Was it after Neil had left the house that you went to Bennett and Main?
A My recollection is that it was, yes.
Q Okay. Sounds like his alcoholism was pretty bad at that time?
A Yes.
Q And you had been for a while trying to get him to clean up, so to speak?
A Yes.
Q And pretty difficult, I'm sure?

A Yes.
Q Yeah. In fact, you talk about going over to his house and finding him in the landing to the house. Was the fact that he couldn't stand up because he was drunk?
A I would assume so, yes. He acted pretty inebriated.
Q Pretty devastating to see your brother like that?
A Yes.
Q Can you imagine what it was like having been married to him for almost 20 years and seeing him like that every day?
MS. PEHRSON: Objection. Speculation.
THE COURT: Sustained.
Q (By Mr. Wieczorek, continuing) And so you thought it was bad enough that you and your siblings went to Bennett and Main to try to get Neil committed?
A To see what we needed to do to get things -- get some way to help him to get better.
Q Okay. So I appreciate you discussing that with me. It's been hard, I think, on everybody to watch that happen.
You talk a little bit -- I want to move on to a different subject. You said that you thought that Neil was good with money?
A He was earlier, I know. I know at the end he didn't have any.
Q Okay. Was he a guy that would agree to be bound by a contract and understand what a contract was?

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29580

IN THE MATTER OF THE ESTATE OF NEIL WILLIAM SMEENK

DENISE SCHIPKE–SMEENK,
Individually, and as Personal Representative,
Appellant,

vs.

RYAN SMEENK,
Appellee.

Appeal from the Circuit Court
Fourth Judicial Circuit
Butte County, South Dakota

THE HONORABLE MICHAEL W. DAY

APPELLEE'S BRIEF

Notice of Appeal Filed: March 8, 2021

Attorneys for Appellant Denise Schipke–Smeenk, Individually

And

Appellant Denise Schipke–Smeenk, as Personal Representative of the Estate of Neil W. Smeenk

Talbot J. Wieczorek
Katelyn A. Cook
Gunderson Palmer Nelson & Ashmore, LLP
506 Sixth Street
Rapid City, SD 57701

Attorneys for Appellee Ryan Smeenk

John W. Burke
Kimberly S. Pehrson
Thomas Braun Bernard & Burke, LLP
4200 Beach Drive – Suite 1
Rapid City, SD 57702

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

<u>STATUTES</u>:

PRELIMINARY STATEMENT

Throughout Appellee's Brief, Interested Party/Appellee, Ryan Smeenk (Neil Smeenk's son), is referred to as "Ryan." Appellant, Denise Schipke–Smeenk (Neil's estranged spouse), is referred to as either "Personal Representative Denise" or "Creditor Denise" depending on the capacity in which she acted. The decedent, Neil Smeenk, is referred to as "Neil."

The settled record is denoted "SR," followed by the appropriate pagination. Exhibits are denoted as "EX." The circuit court entered Findings of Fact and Conclusions of Law on November 23, 2019 and on February 2, 2021, which are designated as "FOF" or "COL" as appropriate followed by the SR citation.

JURISDICTIONAL STATEMENT

Denise Schipke–Smeenk appeals the circuit court's *Order Denying Motion for Approval and Payment of Claim* ("*Order*") entered on February 5, 2021, in two capacities: (1) as a creditor of the Estate of Neil W. Smeenk; and (2) as its Personal Representative. *SR 894 (Notice of Appeal)*. Because the circuit court's *Order* resolved all issues with respect to Denise's creditor claim, it is a final *Order* as contemplated by SDCL 15-26A-3. *See In re Estate of Geier, 2012 S.D. 2, 809 N.W.2d 355.* Personal Representative Denise/Creditor Denise timely filed her *Notice of Appeal* pursuant to SDCL 15-26A-6. *SR 894.*

STATEMENT OF THE ISSUES

I. WHETHER DENISE, IN HER CAPACITY AS A CREDITOR OF THE ESTATE, TIMELY AND PROPERLY PRESENTED HER CREDITOR CLAIM.

The circuit court held that Creditor Denise's claim was time barred under SDCL 29A-3-803.

Huston v. Martin, 2018 S.D. 73, 919 N.W.2d 356.

In re Estate of Pina, 443 N.W.2d 627 (S.D. 1989).

Montgomery v. Big Thunder Gold Mine, 531 N.W.2d 577 (S.D. 1995).

Wyman v. Bruckner, 2018 S.D. 17, 908 N.W.2d 170.

SDCL 29A-3-803.

SDCL 29A-3-804.

II. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT DECLINED TO ORDER SPECIFIC PERFORMANCE OF THE 2017 AGREEMENT.

The circuit court held that Creditor Denise failed to raise, much less meet, her burden of showing the "inadequate remedy at law" element of specific performance. Further, the circuit court held that even if she had attempted to prove an inadequate remedy at law, specific performance of the 2017 Agreement would be inequitable not only to Neil, but also to Denise.

J. Clancy v. Khan Comfort, 2021 S.D. 9, 955 N.W.2d 382.

Rindal v. Sohler, 2003 S.D. 24, 658 N.W.2d 769.

SDCL 21-9-3.

STATEMENT OF THE CASE AND FACTS[1]

Introduction

This case involves a dispute between Denise Schipke–Smeenk (Neil's estranged spouse) and Ryan Smeenk (Neil Smeenk's son) regarding the proper distribution of Neil's estate ("Estate"). The primary asset of the Estate is one half of the proceeds from a *Contract for Deed*, whereby Neil sold his family ranch. *SR 647-48.* In 2017, Neil assigned half of these proceeds to Denise outright. *SR 136–38.* Therefore, regardless of the outcome of this dispute, Denise will receive one half of Neil's assets. *Id.* This appeal is before the Court because Denise seeks the other half of the proceeds, which is contrary to Neil's desire. *SR 540–45 (2019 Will) ("I wish for Denise Schipke–Smeenk to receive the least amount of my estate as is allowable by South Dakota law.").*

Denise holds the title of Personal Representative, but it is Ryan who is defending Neil's Estate. Denise's dual capacity as creditor and Personal Representative has created a serious conflict of interest. This is apparent even in her *Notice of Appeal*, which she filed both as a creditor *and* as the Personal Representative. *SR 894.* Personal Representative Denise is actively using her position as a fiduciary to advance her time-barred creditor claim even though doing so directly contradicts the *Last Will & Testament of Neil W. Smeenk* ("*2019 Will*") that she is obligated to administer and comes at the expense of the other interested parties to whom she owes fiduciary duties. *SR 540–45 (2019 Will).*

[1] Due to the intertwined nature of the facts and procedural history in this case, the Statement of the Facts and Statement of the Case have been combined.

Background

The genesis of Denise's alleged creditor claim—and by extension, the origin of this dispute—occurred in 2017 when Neil and Denise executed mutual *Last Wills & Testaments* and an *Agreement to Execute Mutual Wills* ("*2017 Agreement*"). *SR 129–35 (2017 Will); SR 551–54 (2017 Agreement).* The *2017 Agreement* seemingly existed to prevent Neil and Denise, as husband and wife, from executing any further estate planning documents without the other's consent. *SR 189–90 (FOF ## 36, 38).* In the years that followed, Neil and Denise's marriage unraveled and, in 2019, Neil commenced a divorce action. *SR 191(FOF # 51).* In conjunction with his divorce proceeding, Neil executed a second *Last Will & Testament*—the *2019 Will*—disinheriting Denise. *Id. (FOF ## 53–55).* A few months later, Neil's situation overwhelmed him and, sadly, he took his own life. *SR 191–92 (FOF ## 53, 60, n. 6).*

After Neil passed away, Denise and Ryan (Neil's son) tussled over which *Will* was controlling—the *2017 Will* in which Neil named Denise as his heir or the *2019 Will* disinheriting Denise. *SR 321-22.* Denise petitioned the circuit court to admit the *2017 Will* into formal probate. *Id. (FOF # 60).* Ryan petitioned for admission of the *2019 Will*. *SR 192 (FOF # 61).* Ultimately, the circuit court admitted the *2019 Will* and appointed Denise as Personal Representative. *SR 197 (COL # 16 admitting 2019 Will); SR 210 (COL #62 appointing Denise).* Neither Ryan nor Denise have appealed these determinations.

Almost immediately after Denise was appointed as Personal Representative, she began sending notices to creditors. *SR 805 (FOF # 7).* On December 12, 2019, she

provided notice to the Department of Social Services ("DSS"), a known creditor per SDCL 29A-3-801(b). *SR 255–56.* That notice required DSS to bring its claims by April 9, 2020 or be forever barred. *Id.* She also provided unknown creditors with a similar notice by publication beginning on December 16, 2019. *SR 257 (Affidavit of Publication).* Pursuant to the published notice, unknown creditors had to present their claims to the Estate by April 16, 2020. *Id.*

Despite admitting that she was aware of her creditor claim since Neil passed away in June of 2019, Denise never presented a claim as a creditor, in any form, and certainly not in accordance with SDCL 29A-3-804. However, on April 8, 2020, Personal Representative Denise—not Creditor Denise—filed a *Motion for Approval and Payment of Claim* ("*Motion for Approval*") requesting that the Court distribute Neil's Estate per the *2017 Will*. *SR 258–60.* She did this because, in her view, the *2017 Agreement* "created a binding contractual obligation for the disposition of the decedent's estate." *SR 259 (Motion ¶ 10).* Notably, in the *Motion for Approval*, Denise did not make clear that she was the creditor and only generically requested that the Court "approve the disposition of the Estate of Neil William Smeenk as provided in the *2017 Agreement* and *2017 Will*." *Id.*

Given that the April 9, 2020 and April 16, 2020 deadlines to present creditor claims had passed—deadlines that Personal Representative Denise set by sending her notices—Ryan objected to Personal Representative Denise's *Motion for Approval* because she had not timely and properly presented her creditor claim. *SR 460–63.* Ryan requested that the circuit court deny the *Motion for Approval* because no claim had been

presented within the statute of repose in SDCL 29A-3-803. *Id.* Denise resisted this objection. *SR 497–505.*

The circuit court set an evidentiary hearing on the *Motion for Approval* for December 3, 2020 to determine: (i) whether Denise's claim was enforceable; and (ii) whether specific performance was appropriate. *SR 602 (12/3/20 hearing transcript).* On February 2, 2021, it denied Personal Representative Denise's *Motion for Approval* on the basis that Creditor Denise's claim had not been timely and properly presented. *SR 814 (COL # 32).* Alternatively, the circuit court declined to specifically perform the *2017 Agreement* on the grounds that: (i) Denise did not prove her case; and (ii) it would be inequitable to grant specific performance.[2] *SR 815 (COL ## 4, 5).*

After the circuit court's ruling, and despite an *Order* declaring that her creditor claim was denied, Creditor Denise nevertheless filed a *Statement of Claim* on February 12, 2021. *SR 840–43.* Then, just forty-five minutes before she filed her *Notice of Appeal* stripping the circuit court of jurisdiction, Denise filed a *Motion to Reconsider*, a supportive *Memorandum in Support of Motion for Reconsideration*, and an *Affidavit*. *SR 845 (Motion); SR 848–74 (Memorandum); SR 876–90 (Affidavit); SR 894 (Notice of*

[2] In her *Brief of Appellant*, Denise states that the circuit court "required" that the parties submit simultaneous findings, inferring that she perhaps was not agreeable to simultaneous findings. *Appellant's Brief at 3.* But, as the record demonstrates, the circuit court allowed the parties to submit simultaneous findings because counsel for Denise stated that doing so was "fine with [him.]" *SR at 606.* Counsel for Denise also claims that Ryan's proposed findings incorporated "new legal authority" and "new legal arguments . . . ." *Brief of Appellant at 3.* Denise does not identify which arguments and legal conclusions she perceives as new. Regardless, this claim is belied by the record. *SR 740–56.*

Appeal). Denise did not seek a hearing on the *Motion to Reconsider*, only seeding the record with additional documents and sworn testimony that she had not presented to the circuit court. Because this was not a proper method to develop a settled record, this additional evidence—which Denise makes reference to in the *Brief of Appellant*—should not be considered by this Court. *See Brief of Appellant at 6.*

STANDARD OF REVIEW

Factual findings are reviewed under the deferential clear error standard. *In re Estate of Gaaskjolen, 2020 S.D. 17, ¶ 39, 941 N.W.2d 808, 818.* Conclusions of law are reviewed de novo. *J. Clancy v. Khan Comfort, 2021 S.D. 9, ¶ 30, n. 11, 955 N.W.2d 382, 393, n. 11*. The decision to grant or deny a request for specific performance—like all equitable determinations—must be reviewed for an abuse of discretion, which "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Gartner v. Temple, 2014 S.D. 74, ¶ 7, 855 N.W.2d 846, 850.*

"[O]nce a notice of appeal has been filed, a trial court is restrained from entering any order that would change or modify the judgment on appeal or have the effect of interfering with review of the judgment." *Tosh v. Schwab, 2007 S.D. 132, ¶ 33, 743 N.W.2d 422, 431.* In light of this, when reviewing the circuit court's February 2, 2021 *Findings of Fact and Conclusions of Law* for error, this Court should disregard affidavits and information that the circuit court did not have an opportunity to consider. Indeed, as this Court recently noted, developing a factual record through affidavits and information filed with the clerk "does not allow proffered information to be tested by the rules of

evidence or the adversarial process." *In re Estate of French, 2021 S.D. 20, ¶ 12, n. 3, 956 N.W.2d 806, 810, n. 3.*

ARGUMENT

This Court should affirm the circuit court for two equally legitimate reasons. First, the circuit court properly held that Creditor Denise failed to timely and adequately present her creditor claim to the Estate. Second, it appropriately declined to afford Creditor Denise the extraordinary remedy of specific performance. Either holding, standing alone, is sufficient to affirm the circuit court's decision; therefore, Denise must overcome both to prevail.

I. WHETHER DENISE, IN HER CAPACITY AS A CREDITOR OF THE ESTATE, TIMELY PRESENTED HER CREDITOR CLAIM.

Within SDCL chapter 29A-3, there is a nonclaim statute that requires all claims be brought against a decedent's estate within a prescribed time-period. *SDCL 29A-3-803.* This time period is ordinarily controlled by the date on the notices or the date of the personal representative's appointment. *SDCL 29A-3-801.* As this Court recently held, the timeline is strictly enforced. *See Huston v. Martin, 2018 S.D. 73, ¶ 28, 919 N.W.2d 356, 365 (forever barring all untimely claims under SDCL 29A-3-803).* For reasons that are unclear, Creditor Denise failed to timely and properly present her claim to the Estate despite having notice of that deadline. Therefore, her claim is forever barred. *SDCL 29A-3-803.*

A. Presentation of a creditor claim under SDCL 29A-3-804.

Just like any other creditor of the Estate, Creditor Denise was required to comply with the presentation requirements in SDCL 29A-3-804 to preserve her breach of contract

claim. SDCL 29A-3-804, the "presentation statute," provides:

> (a) Claims against a decedent's estate may be presented by either of the following methods:
>
> (1) *The **claimant may deliver or mail** to the personal representative **a written statement of the claim** indicating its basis, the name and address of the claimant, and the amount claimed, **OR may file a written statement of the claim**, in the form prescribed by rule,*[3] ***with the clerk of the court and mail or deliver a copy thereof to the personal representative**.* The claim is deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the clerk of court. *If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated.* If the claim is secured, the nature of the security shall be described. Failure to describe correctly the nature of the security or uncertainty, or the due date of a claim not yet due does not invalidate the presentation;
>
> (2) ***The claimant may commence a proceeding against the personal representative*** in any court where the personal representative may be subject to jurisdiction, to obtain payment of the claim. The claim is deemed presented on the date the proceeding is commenced.
>
> (b) No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of death in any court.

SDCL 29A-3-804 (emphasis added.)

SDCL 29A-3-804 is similar to the language this Court considered in *Montgomery v. Big Thunder Gold Mine*, 531 N.W.2d 577, 579 (S.D. 1995) and more recently, in

[3] The "form prescribed by rule" referenced in SDCL 29A-3-804(a)(2) is Form 3-804, *Statement of Claim (General)*, (*See* Appendix at page APP 07), adopted by this Court via court rule. *See SDSC Feb. 21, 1997 Rule 97–43.* Creditor Denise did not submit this form.

Hallberg v. Board of Regents, 2019 S.D. 67, ¶¶ 15–16, 937 N.W.2d 568, 574. As with those cases, the word "may" in SDCL 29A-3-804 does not mean that Creditor Denise is free to choose between the options in SDCL 29A-3-804 or some alternative method of presentation as she so desires. Instead, Denise—as a claimant—*may* select a method in SDCL 29A-3-804, or she *may* choose not to present her claim at all.[4] *See Montgomery, 531 N.W.2d at 579*. Creditor Denise did not submit a statement of claim as contemplated by SDCL 29A-3-804(a)(1) prior to the circuit court's *Order* barring her claim. Nor did she commence a suit against herself as the Personal Representative. *SDCL 29A-3-804(a)(2).* Her failure to follow the prescribed statutory methods means that she has elected not to present her claim at all.

Recognizing this, Denise now argues that *Personal Representative* Denise's *Motion for Approval* was not simply a motion to approve an existing claim, but also somehow amounted to substantial compliance with *Creditor* Denise's obligations under SDCL 29A-3-804. Indeed, Personal Representative Denise's *Motion for Approval* is the

[4] Indeed, it is well-accepted that "the word 'or' . . . ordinarily joins a disjunctive list to communicate a choice between *exclusive* possibilities." *State v. Buffalo Chip, 2020 S.D. 63, ¶ 48, 915 N.W.2d 387, 401(Kern, J., concurring) (emphasis added).* This concept is not controversial. On many occasions, this Court has declined to loosen statutory requirements or insert additional elements into statutes when the options are joined by "or." *See, e.g., In re Estate of Flaws (Flaws I), 2016 S.D. 61, ¶¶ 27, 28, 885 N.W.2d 580, 588 (interpreting SDCL 29A-2-114(c), a statute that lists four methods by which a child could establish the identity of her father separated by "or" as an exclusive list); State v. Armstrong, 2020 S.D. 6, ¶ 17, 939 N.W.2d 9, 14 (interpreting the word "directly" in SDCL 22-22-45 as it applies to a disjunctive list and not recognizing options outside of the legislatively-provided list); State v. Bosworth, 2017 S.D. 43, ¶ 23, 899 N.W.2d 691, 697–98 (interpreting SDCL 22-11-28.1 as a list of "alternatives" and noting that "or . . . cover[ed] two types of instruments" without recognizing a third option).*

only document in the record submitted during the appropriate period that even hints at presentation of a creditor claim. *SR 258–61*.[5] The circuit court was correct in denying the *Motion for Approval* for at least three reasons.

First, Denise moved the circuit court "for the Payment of a Claim pursuant to SDCL § SDCL 29A-3-713" as the Personal Representative of the Estate, *not* as a *claimant* seeking to present a claim under SDCL 29A-3-804. *Id.* In that document, she repeatedly reaffirmed the capacity under which she was acting. *See Id. (Motion for Approval ¶ 9 ("Counsel for the Personal Representative has asked….")); Id. ¶ 11 ("Denise L. Schipke-Smeenk, as Personal Representative, intends …."); Id. ¶ 12 ("The Personal Representative is seeking….").*[6]

Denise's failure to act in the proper capacity is significant. Even jurisdictions that permit a creditor to substantially comply with the statutory requirements for presentation have scrutinized the capacity under which a joint personal representative/creditor acts. *See, e.g., In re Estate of Wickham, 670 P.2d 452, 453 (Colo. Ct. App. 1983) ("Acting individually, Wickham prepared a claim against the estate….") (emphasis added); In re Estate of Sheridan, 117 P.3d 39, 40 (Colo. Ct. App. 2004) ("Jarret filed two claims as a creditor of the estate.") (emphasis added).* This makes sense because a personal

[5] In the *Brief of Appellant*, Denise acknowledges that the presentation of a creditor claim is governed by SDCL 29A-3-804. *Brief of Appellant at 24.* Ryan agrees.

[6] In the *Brief of Appellant*, Denise routinely refers to herself only as "Denise" without any distinction as to the capacity in which she acted or the capacity for whom a given argument is made (i.e., Personal Representative Denise on behalf of the Estate, or Creditor Denise on behalf of her personal financial interests).

representative has a fiduciary obligation to remain fair and neutral to all creditors and interested parties. *See In re Estate of Pina, 443 N.W.2d 627, 631 (S.D. 1989) (declining to allow a PR/Creditor to "benefit himself at the expense of the other creditors.").* Permitting personal representatives to present creditor claims contradicts this Court's position that "*[c]reditors* bear the burden to take action to protect their interests within the time limitation."[7] *See, e.g., In re Estate of Ginsbach, 2008 S.D. 91, ¶ 13, 757 N.W.2d 65, 68 (emphasis added).*

Second, but equally important, Personal Representative Denise's *Motion for Approval* is not a proper presentation because presentation of a creditor claim is necessarily a condition precedent of its approval under SDCL 29A-3-713, and approval is the purpose of Personal Representative Denise's *Motion for Approval*. Stated more directly, the *Motion for Approval* implies that it seeks approval of a claim that was already actually presented—when, in fact, that was not the case. *Cf. Pasley v. American Underwriters, Inc., 433 N.E.2d 838, 840 (Ind. Ct. App. 1982) (holding that having an estate opened and an administrator appointed within the limitations period was a condition precedent that, if not satisfied, "preclude[d] recovery when the condition is not met.").*

Third, and finally, Personal Representative Denise's *Motion for Approval* is

[7] Formal presentation of a creditor claim is required even if the personal representative has actual knowledge of the claim. Indeed, if personal knowledge of the personal representative nullified the need to present creditor claims under SDCL 29A-3-804, then known creditors would never be required to present their claims to the Estate. *See SDCL 29A-3-801(b) (requiring known creditors to present their claims within a certain period); SR 813 (COL # 25).*

legally insufficient because it did not include pertinent details about her claim. The presentation statute is quite clear on this point: "If a claim is not yet due, *the date when it will become due shall be stated*. If the claim is contingent or unliquidated, *the nature of the uncertainty shall be stated*. If the claim is secured, *the nature of the security shall be described*. *Failure to describe correctly* the nature of the security or uncertainty, or the due date of a claim not yet due does not invalidate the presentation[.]" *SDCL 29A-3-804(a)(1) (emphasis added).* Denise did not fail "to describe *correctly*" these aspects of her claim; rather, she failed to describe them at all. *See Id. (emphasis added).*

Denise was required to: (1) identify herself as a creditor; (2) state the amount claimed; (3) explain whether her claim was liquidated or unliquidated; and (4) indicate whether the claim is due or not yet due.[8] Her *Motion for Approval* accomplished none of these things. All a creditor might learn from it is that Neil executed an *Agreement* in 2017 that could potentially impact the inheritance of the beneficiaries in the *2019 Will*. *SR 258–60*. Since creditors recover *before* beneficiaries, Personal Representative Denise's *Motion* is largely meaningless to them. Upon review of this document, creditors would likely not even realize that Denise is an alleged creditor in the first place, much less appreciate that she is attempting to claim nearly the *entirety* of the Estate's assets. *Id.*

[8] Other information might also be helpful when presenting a claim of this nature, including: (1) the location, value, and description of the land subject to the *Contract for Deed*; (2) the parties to the *Contract for Deed*; (3) the amount left due on the *Contract for Deed*; and (4) the terms of payment.

To gloss over these infirmities, Denise argues that she—presumably as the Personal Representative and not as a creditor—had the authority "at any time" to pay "any valid claim that *has not been barred*, with or without formal presentation." *SDCL 29A-3-807(b) (emphasis added).* While it is conceivable that SDCL 29A-3-807(b) allows a personal representative to pay a valid claim before it has been presented, it only applies to claims that are not yet barred by the statute of repose in SDCL 29A-3-803. Here, Personal Representative Denise did not elect to pay the claim before it was barred as untimely. Therefore, SDCL 29A-3-807 is inapplicable.

Personal Representative/Creditor Denise attempts to march this Court down a parade of horribles by suggesting that she, as a creditor, cannot be expected to fulfill her presentation obligation under SDCL 29A-3-804 because such a rule will somehow entice other joint personal representative/creditors to simply pay their claims under SDCL 29A-3-807 regardless of validity. This seems to imply that such personal representatives would not give consideration to their fiduciary duties. But, as the Legislature aptly stated in that same statute, a personal representative who pays a claim without regard to its validity renders herself "personally liable to any other claimant." *SDCL 29A-3-807(b).* Should future personal representatives elect to proceed in this manner, they do so at their own peril. Because Creditor Denise did not comply—or even substantially comply—with the requirements of SDCL 29A-3-804, this Court should affirm the circuit court's holding that she failed to present her alleged breach-of-contract claim.

B. Whether Creditor Denise was given adequate notice under SDCL 29A-3-801.

Because Creditor Denise failed to properly present her claim, she now argues that

she lacked adequate notice of the presentation requirement. *SDCL 29A-3-801(b).* At its heart, Creditor Denise's argument is a thinly veiled attempt to use her position as the Personal Representative to resurrect a stale creditor claim. Creditor Denise wants this Court to determine that because she failed to give *herself* notice, she should be permitted extra time to present her claim. This Court should decline that invitation for two reasons: (1) Creditor Denise did have notice; and (2) judicial estoppel prevents this theory.

i. Creditor Denise did have notice under SDCL 29A-3-801.

Generally, the method of notice to creditors is controlled by whether the creditors are considered unknown or known. *See SDCL 29A-3-801(a), (b).*[9] With respect to unknown creditors, the Personal Representative may publish notice in a legal newspaper in the proper county for three consecutive weeks. *Id. at (a).* Notice under this method runs from "the date of the first publication of notice[,]" meaning that creditors must present their claims within four months of that date. *Id.*

If the creditor is "known or reasonably ascertainable," however, the Personal Representative must give the creditor written notice as outlined in SDCL 29A-3-801(b). That statute explains:

> [A] personal representative ***shall*** give written notice *by mail* ***or other delivery*** to a creditor of the decedent, who is either known to or reasonably

[9] There are also three exceptions to providing notice to a creditor. Those exceptions, listed in SDCL 29A-3-801(c), apply when:

> (1) The creditor has presented a claim against the estate;
> (2) The creditor has been paid in full;
> (3) The creditor was neither known to nor reasonably ascertainable by the personal representative within four months after the personal representative's appointment.

> ascertainable by the personal representative, *informing the creditor to present the claim within four months after the date of the personal representative's appointment, or within sixty days after the mailing or other delivery of the written notice,* whichever is later, or be forever barred.

SDCL 29A-3-801(b) (emphasis added). "A creditor is known if the personal representative is aware that the creditor has demanded payment from the decedent or the estate or if the personal representative is otherwise aware of the decedent's obligation." *SDCL 29A-3-801(d).* As noted above, Denise is both Personal Representative of Neil's Estate *and* holder of a creditor claim. There is no dispute, as the circuit court found, that Creditor Denise is a creditor known to herself. *SR 801 (COL # 5).*

This Court need not look further than Denise's *Notice to the Department of Social Services*, dated December 12, 2019, when assessing whether Creditor Denise received adequate notice under SDCL 29A-3-801(b). *SR 255.* In that document, counsel for Denise declared: "If you claim to be a creditor of the above-entitled estate, you are notified pursuant to SDCL 29A-3-801(b) that you must file any claim within four (4) months of the personal representative's appointment, or sixty (60) days after the mailing or other delivery of this written notice, whichever is later, or your claim will be forever barred." *Id.* This notice—which articulates the identical presentation requirements that statutorily apply to Creditor Denise as a known creditor—was submitted on behalf of Denise and filed with the circuit court. *Id.* Even Denise agrees that documents received or filed by attorneys in this case are relevant when assessing compliance with SDCL chapter 29A-3. *See Brief of Appellant at 24 (stating that an attorney is "by law" an agent of the client for purposes of presentation).* This notice should, therefore, be

considered adequate to give Creditor Denise notice "by other delivery" that she needed to present her claim by April 9, 2020. *See SDCL 29A-3-801(b).*[10]

Interestingly, Personal Representative Denise also filed a second notice—this one related to unknown creditors—that should have notified her that creditors had to take formal steps to present their claims to the Estate. *SR 254.* That document, titled *Notice to Creditors of Formal Probate and Appointment of the Personal Representative*, cautioned that "[c]reditors of decedent must file their claims within four (4) months after the date of the first publication of this notice or their claims may be barred." *Id.* There is no question that Denise received this document—in fact, she actually signed it. *Id.*

In light of this, Creditor Denise's argument that she did not have notice is disingenuous. Even more disconcerting, Denise requests that this Court apply "the strict rules of statutory construction" with respect to the notice statute (SDCL 29A-3-801(b)) while at the same time urging that SDCL 29A-3-804 merely provides "guidance" regarding the available methods of presentation. *Brief of Appellant at 14, 22.* If substantial compliance is truly all that is required with respect to presentation, then it would seem that that same construction should also apply to her notices.

If this Court affirms the circuit court's holding that Creditor Denise had notice when she, as Personal Representative, delivered the notice to DSS, then she had four

[10] Personal Representative/Creditor Denise argues that DSS is not a known creditor. *Brief of Appellant at 9.* However, tellingly, in the notice that she mailed to DSS, Denise specifically cited SDCL 29A-3-801(b)—the precise statute and subsection thereof that concerns notice to known creditors. *SR 255 ("if you claim to be a creditor of the above-entitled estate, you are notified pursuant to SDCL 29A-3-801(b) . . . .").*

months from her December 9, 2019 appointment as Personal Representative to present her claim—April 9, 2020. *See SDCL 29A-3-801(b).* Creditor Denise did not do so; therefore, her claim is barred. *See SDCL 29A-3-803(a); see Huston, 2018 S.D. 73, ¶ 28, 919 N.W.2d at 365 (barring a contingent fraud claim as untimely under SDCL 29A-3-803).*

ii. Principles of judicial estoppel prevent Creditor Denise from arguing she did not have notice.

Even if Denise did not receive notice as contemplated by SDCL 29A-3-801, the circuit court did not err in holding that judicial estoppel nevertheless bars her argument. This is because: (i) Creditor Denise's actual notice cannot be reasonably questioned; and (ii) it would be absurd to allow Denise (as creditor) to gain from her failure to give notice (as Personal Representative). *See SDCL 29A-3-703 (providing that a personal representative assumes a duty to act in the best interests of the estate).*

"The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather it is the intentional assertion of an inconsistent position that perverts the judicial machinery." *Wyman v. Bruckner, 2018 S.D. 17, ¶ 11, 908 N.W.2d 170, 175*. "Courts have observed that 'the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle[.]'" *New Hampshire v. Maine, 532 U.S. 742, 750, 121 S. Ct. 1808, 1815, 149 L. Ed. 2d 968 (2001)*. Generally, for judicial estoppel to apply, four elements should be present.

(1) The latter position must be clearly inconsistent with the earlier one.
(2) The earlier position was judicially accepted, creating the risk of inconsistent legal determinations.

(3) The party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped.
(4) The inconsistency must be about a matter of fact, not law.

Wyman, 2018 S.D. 17, ¶¶ 11–12, 908 N.W.2d at 175.

The first two elements of judicial estoppel—which require a judicially-accepted inconsistency—are easily met. There is no dispute that Creditor Denise knew that her contract claim existed. *SR 808* (*COL # 5).* Her contract claim arises from the very document that she has spent months zealously urging the circuit court to enforce. *SR 82–91 (Brief in Supp. of Denise's Petition for Formal Probate); SR 106–11 (Reply Brief in Support of Objection to Aug. 2, 2019 Petition).* Nor is there any dispute that she knew the timeline for presenting creditors' claims: (i) she signed the notice to unknown creditors on December 12, 2019 that included the timeline for presenting claims; and (ii) sent out notice to DSS with the exact timeline for presenting known creditor claims. *SR 254 (12/12/19 Notice to Creditors of Formal Probate); SR 255 (12/12/19 DSS Notice).* In those notices, Personal Representative Denise advised that failure to bring creditor claims within the prescribed period meant they would "be forever barred." *Id.*

The circuit court's factual findings—reviewed by this Court for clear error—are compelling. The court explicitly found that it had "accepted [Personal Representative Denise's] notices and will rely upon them if creditors who have been properly notified attempt to bring untimely claims against Neil's Estate." *SR 805 (FOF # 10). See, e.g., Huston, 2018 S.D. 73, ¶ 28, 919 N.W.2d at 365 (barring untimely creditor claims).* The circuit court also recognized the inconsistency of Creditor Denise's position that she lacked knowledge that only she, as Personal Representative, could give herself. More

specifically, the circuit court determined that "[c]oncluding that Creditor Denise did not have notice under SDCL 29A-3-801(b) while also imposing her notices on other potential creditors would certainly 'creat[e] the risk of inconsistent legal determinations.'" *SR 809–10 (COL # 13) (quoting Wyman, 2018 S.D. 17, ¶ 12, 908 N.W.2d at 175).* The circuit court's reasoning is sound and should be upheld, particularly since the opposite conclusion can be reached only by effectively ignoring reality. Therefore, the first and second elements of judicial estoppel—a judicially accepted inconsistency—are met.

The third element, unfair advantage, is likewise satisfied. *See Id.* If Personal Representative Denise can avoid sending written notice to herself to delay triggering her own non-claim period, inequity will surely follow. Denise, in her capacity as Personal Representative, had absolute control over who received notice and when. *See SDCL 29A-3-801(b) ("A <u>personal representative</u> shall give written notice….") (emphasis added).* Applying Denise's logic, personal representatives would be allowed to lay in the weeds, waiting months—or potentially even years—before sending themselves notice, all the while extending their claims period well beyond the legislatively-prescribed four months. *SDCL 29A-3-801(b) (notice); SDCL 29A-3-803 (limitations period).*

Indeed, theoretically, Personal Representative Denise could elect to *never* deliver herself notice, thereby taking advantage of the "catch all" three-year statutory period for creditors without notice.[11] *See SDCL 29A-3-803(a)(3).* This is precisely the rule that

[11] Although, presumably, her failure to do so would violate the mandatory language in SDCL 29A-3-801 *("A personal representative <u>shall</u> give written notice….") (emphasis added).*

Personal Representative/Creditor Denise now advocates for. *Brief of Appellant at 11*. Such a rule not only allows Creditor Denise the ability to extend the nonclaim period in a manner that would be unavailable to similarly situated creditors who do not have personal representative status; it also permits her to frustrate the speedy and efficient settlement of estates that the nonclaim period exists to encourage. *See, e.g., SDCL 29A-1-102 ("The South Dakota Uniform Probate Code shall be liberally construed and applied to promote simplification, clarification, and efficiency in the law[.]") In re Estate of Ginsbach, 2008 S.D. 91, ¶ 13, 757 N.W.2d at 68 ("Public policy requires that estates of decedents be speedily and finally determined.").*

The interested parties and creditors of the Estate are entitled to review an accurate inventory of creditor claims compiled within the statutorily prescribed nonclaim period. Such a list assists them and the circuit court in assessing the claimants' respective rights and priorities, a task that becomes difficult if the Personal Representative is permitted to drastically extend her nonclaim period to the detriment of others. For this reason, other courts have looked warily upon such attempts. *See, e.g., Mead v. Barton, 885 N.W.2d 316, 318 (Mich. Ct. App. 2016).*

Finally, permitting this type of manipulation can result in procedural gamesmanship that this Court has not looked favorably upon. *See Excel Underground v. Brant Lake Sanitary Dist., 2020 S.D. 19, ¶ 28, 941 N.W.2d 791, 800 (declining to allow a party to use the summary judgment statutes to "unilaterally exonerate themselves from liability[.]").* Unsurprisingly, this Court has a history of rejecting similar attempts by joint personal representative/creditors who try to benefit themselves "at the expense of

other creditors." *See In re Estate of Pina, 443 N.W.2d 627, 631 (S.D. 1989).* Personal Representative Denise serves as a fiduciary to Neil's Estate. *SDCL 29A-3-703.* Any attempt to extend the statute to her own benefit would result in an egregious breach of her duties, a position that should require her "to do right" by the heirs of the Estate. *See In re Estate of Howe, 2004 S.D. 118, ¶ 67, 689 N.W.2d 22, 36 (Sabers, J., concurring in part & dissenting in part).* Indeed, one can only imagine how Personal Representative Denise would proceed if another creditor attempted to present a creditor claim in this matter, particularly if the creditor claim would effectively divest her of her claim to the entirety of the Estate. For these reasons, the third element (unfair advantage) is met.

The fourth and final element—that the inconsistency be rooted in fact—is also satisfied. *See Wyman, 2018 S.D. 17, ¶ 12, 908 N.W.2d at 175.* The inconsistency, ultimately, involves *when* Creditor Denise had notice of her claim for purposes of starting the nonclaim clock. *See Spencer v. Estate of Spencer, 2008 S.D. 129, ¶ 16, 759 N.W.2d 539, 544.* While determining whether a particular triggering event is sufficient for accrual is a question of law, the question of "*when* accrual occurs is a question of fact[.]" *See, e.g., East Side Lutheran Church of Sioux Falls v. Next, Inc., 2014 S.D. 59, ¶ 11, 852 N.W.2d 434, 439 (emphasis in original).* Knowledge and notice are very often questions of fact. *See, e.g., Schott v. S.D. Wheat Growers Ass'n, 2017 S.D. 91, ¶ 14, 906 N.W.2d 359, 362 (explaining that knowledge in assumption of the risk defenses is typically a question of fact.)*; *West Cent. Elec. Coop. v. James River Broadcasting Co., 393 N.W2d 83, 87 (S.D. 1986) (holding, in the constructive notice context, that "[w]hether or not notice is given or received is a question of fact.)* The question of Creditor Denise's

notice, therefore, is a question of fact, and the final element of the *Wyman* test is met. *See Wyman, 2018 S.D. 17, ¶ 12, 908 N.W.2d at 175.*

Denise vigorously pursued appointment as the Personal Representative. Because she succeeded, she was tasked with administering the Estate in accordance with the rules. *SR 1, 60.* Denise's argument with respect to notice under SDCL 29A-3-801 is nothing more than her attempt to use her position as the Personal Representative to save her time-barred creditor claim. This effort is inconsistent with her duties as the Personal Representative. Because Creditor Denise did, in fact, receive adequate notice under SDCL 29A-3-801, and because principles of judicial estoppel prevent her from using notice as a sword against the very estate she undertook fiduciary duties to administer, this Court should reject Denise's interpretation of SDCL 29A-3-801 and affirm the circuit court's determination that Creditor Denise had until April 9, 2020 to present her claim.

II. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT DECLINED TO ORDER SPECIFIC PERFORMANCE OF THE *2017 AGREEMENT*.

Aside from the circuit court correctly ruling that Creditor Denise's claim is time-barred, the circuit court did not abuse its discretion when it rejected Denise's request for specific performance. The circuit court found that Creditor Denise did not raise—much less meet—her burden of showing that she lacked an adequate remedy at law (i.e., money). *SR 815 (FOF # 4).* In fact, and dispositive of the issue, she did not even propose a finding on that element. *SR 755–71 (Denise's proposed findings)*. *See also State v. Rodriguez, 2020 S.D. 68, ¶ 34, 952 N.W.2d 244, 254 ("Nor did [appellant] submit proposed findings of fact and conclusions of law to preserve whatever issue he*

was attempting to raise."); Davi v. Class, 2000 S.D. 30, ¶ 33, 609 N.W.2d 107, 115 ("The State did not propose a finding that trial counsel did not err in failing to hire and use a serological expert and the State did not file a notice of review."). An inadequate legal remedy is a prerequisite to specific performance. *J. Clancy, Inc., 2021 S.D. 9, ¶ 44, 955 N.W.2d at 397.* But even if Denise somehow proved this, the circuit court correctly held that she failed to show that specific performance would be "just and reasonable" as to the person against whom it was sought—Neil. *SR 833–34 (COL ## 7–12); see also SDCL 21-9-3 (emphasis added).*

A. Denise failed to raise or prove an element of her case.

It is well established that specific performance is an extraordinary remedy. *Crawford v. Carter, 52 N.W.2d 302, 322 (S.D. 1952).* Extraordinary remedies "should never be granted, except where the evidence is clear and convincing." *Knudsen v. Jensen, 521 N.W.2d 415, 418 (S.D. 1994).* Therefore, Denise was required to establish by clear and convincing evidence that she had no adequate legal remedy. *See Rindal v. Sohler, 2003 S.D. 24, ¶ 12, 658 N.W.2d 769, 772 ("Specific performance is an equitable remedy, and an essential element to equitable relief is the lack of an adequate remedy at law."); Williams v. Brinkman, 2016 S.D. 50, ¶ 22, n. 11, 883 N.W.2d 74, 84, n. 11.*

Denise did not establish that she had an inadequate remedy at law. *See Brinkman, 2016 S.D. 50, ¶ 22, n.11, 883 N.W.2d at 84, n. 11 (inadequate legal remedy is an essential element).* Her failure to meet this burden (or even properly raise the issue before the circuit court) is fatal because inadequacy of a movant's legal remedy "is the very foundation for the jurisdiction to decree specific performance." *Leisch v. Baer, 24*

S.D. 184, 123 N.W. 719 (1909). This Court recently reaffirmed this principle by holding that failure to argue the "inadequate legal remedy" element is not just preferred, it is required. *J. Clancy, Inc., 2021 S.D. 9, ¶ 44, 955 N.W.2d at 397.*

Further, while Denise cites various estate cases for the proposition that specific performance is the "presumed remedy" for the breach of an agreement to transfer real property, this argument ignores: (1) that Denise is still required to prove each element of her case; (2) that she does not seek enforcement of a purchase agreement or a deed transferring real property, but instead seeks to enforce a contract—the *2017 Agreement*. In the end, because Creditor Denise did not even raise an element of her case, the doors of equity are closed to her.

B. Specific performance is inappropriate.

Even if Denise had demonstrated that she lacked an adequate remedy at law, the circuit court was correct to decline specific performance. Denise remains focused on the underlying validity of the *2017 Agreement*, but, as the circuit court noted, the question before the circuit court "[wa]s not necessarily validity, but rather enforceability." *See Brief of Appellant at 31; SR 815 (COL #5).* To specifically perform—or *enforce*—the *2017 Agreement*, courts must adhere to the following statute:

> Specific performance cannot be enforced against a party to a contract in any of the following cases:
>
> (1) If he has not received an adequate consideration for the contract;
> (2) *If it is not, as to him, just and reasonable*;
> (3) If his assent was obtained by misrepresentation, concealment, circumvention, or unfair practice of any party, to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled;
> (4) If his assent was given under the influence of mistake,

> misapprehension, or surprise, except that where the contract provides for compensation in case of mistake, a mistake within the scope of such provision may be compensated for, and the contract specifically enforced in other respects, if proper to be so enforced.

SDCL 21-9-3 (emphasis added). In other words, by statute, specific performance is not appropriate unless such an action is "just and reasonable" as to Neil. *See Id.*

Without citing SDCL 21-9-3 or *any* South Dakota case law, Denise nevertheless requests reversal because, in her opinion, the circuit court allowed "Neil to take advantage of a 'self-inflicted' hardship to avoid specific performance of the Agreement." *Brief of Appellant at 32–33*. Setting aside that Denise has provided no authority indicating that the requirements of SDCL 21-9-3 are legally nullified by a "self-inflicted hardship," or that Neil's alcoholism was in fact "self-inflicted," Ryan disagrees with Denise's portrayal of alcoholism—a mental disorder—as "self-inflicted" or some type of conscious choice that Neil made.

Denise also complains that the circuit court's decision creates an "injustice" because, according to her, it strips her of a remedy. *Id.* at 33. That is incorrect. The circuit court did not strip Denise of a remedy. Rather, she elected the remedy of specific performance and made no attempt to argue that she might be entitled to money damages. That was her decision. *See, e.g., Excel v. Brant Lake Sanitary Dist., 2020 S.D. 19, ¶¶ 15–30, 941 N.W.2d 791, 800–01 (declining to relieve a party from the unintended consequences of a tactical decision not to move for summary judgment).* For that reason, in the event of reversal, this Court should confine Denise to the sole remedy she requested from the onset—specific performance.

Finally, Denise argues that the circuit court did not consider whether relationship

struggles were within "the reasonable contemplation" of the parties at the time they signed the agreement. *Brief of Appellant at 31*. Denise is simply incorrect in this regard. Not only did the circuit court consider this issue; it specifically entered a finding on it, stating: "When Neil and Denise went to their attorney in 2017 to finalize the Agreement to Execute Mutual Wills, neither of them intended for their relationship to struggle so significantly." *SR 834 (COL # 12).*

Denise also makes the bold statement that "[n]o evidence supports that Denise is a wrongdoer here." *Brief of Appellant at 33.* Even a cursory review of the record demonstrates that this statement is far from true. Long before Neil committed suicide in June 2019, Neil's marriage to Denise was severely strained. This was especially true in the later years of their relationship. *SR 693 (Kurtis Mooney (grandson): "[I]n the later years" it got "worse and worse.").* Neil battled with alcohol abuse and depression, which caused Denise extreme frustration. *SR 191 (FOF # 48 ("Neil's drinking caused a severe strain on the marital relationship.").* Denise sometimes refused to assist Neil as he struggled with his alcoholism. For example, when Neil would fall due to intoxication, Denise would, at times, choose to ignore him and leave him lying on the ground. *SR 894 (Kurtis Mooney (grandson): "There was a couple of times where we were left just to help him up and she wouldn't want to help him.").* Sometimes, this meant that Denise's teenage grandson, Kurtis Mooney, would have to help Neil. *Id.* One time, Neil injured himself so severely that he required stitches. *SR 728 (Brandy Mooney (daughter): "It was gushing blood so bad my pajama pants were soaked in blood.").*

In the time leading up to Neil taking his own life, Denise was fully aware that

Neil was contemplating suicide. *SR 530* (*12/3/20 CT Ex. 20—Brandy/Denise 7/2018 Facebook Messages—Denise: "He's been suicidal for the past couple years.")*.* At one point, Denise went so far as to tell Neil that if he decided to kill himself, he should do it outside. *SR 546 (Ex. 26—text messages between Denise and her sister Sally).* Despite concerns that Neil might harm himself if left alone, Denise took extended vacations in the time leading up to his suicide. *Motions Hearing (12/3/20) at Ex. 20 (7/16/18 Brandy/Denise Facebook Message).* On one occasion, when Neil's daughter (Brandy Mooney) confronted Denise about leaving him alone, Denise responded by stating: "This trip was a gift and he fucking drinks wether [sic] I'm there or not so if he plans to blow his fucking brains out there's not much I can do about that drunk decision but thanks for the advice." *SR 530 (12/3/20 CT Ex. 20—Brandy/Denise 7/2018 Facebook Messages).*

By March 2019, Neil and Denise's marriage had deteriorated to such a degree that Neil was forced to move out of their marital home. Denise demanded that Neil leave, telling him "to get the fuck out of [her] house." *SR 730.* Denise then proceeded to remove their bed from the home and throw it outside in the snow. *SR 631 (Denise acknowledging throwing bed in snow).* In a subsequent letter, dated March 22, 2019, Denise acknowledged that, at this point, she knew Neil considered their marriage over. *SR 525 (Ex. 18 (3/22/19 letter) ("[Y]ou now feel our marriage is over.")*

After Denise threw Neil out of their home in March 2019, he was effectively homeless, moving from house to house, relying on relatives and friends to provide him a home until his suicide in June 2019. *SR 632 (living with relatives); Id. (never moved back in with Denise).* At one point, he stayed with his daughter, Brandy Mooney. *Id.* At

other times, he stayed with his son, Ryan. *Id.* While Neil was staying with Brandy, he expressed his desire to divorce Denise and stated that he intended to change his Will "so that it would be better for Ryan and [her]." *SR at 731.*

In early April 2019, Neil met with Lynn Jackson attorney Drew Skjoldal regarding estate planning and then met with Lynn Jackson attorney Jeffery D. Collins regarding getting a divorce.[12] *SR 699–90.* After Neil retained Mr. Collins to represent him in divorce, Mr. Collins wrote to Denise (on April 8, 2019) to advise that he was representing Neil regarding their "recent separation and *mutual decision* to end [their] marriage." *SR. 534–35 (Ex. 22 (Apr. 8 Collins/Denise Letter)) (emphasis added).* He also requested information from Denise to assist with equitable division of the marital assets. *Id.*

On April 19, 2019, Neil went to his lawyer to execute certain legal documents. *SR 673.* In the morning, Neil signed the *2019 Will*, which explicitly disinherited Denise. *SR 708 (Will signed in morning); SR 540–45 (Ex. 25 (2019 Will)).* In the afternoon, Neil met with Mr. Collins and Mr. Collins issued a divorce *Complaint* against Denise. *SR 708 (Complaint executed in afternoon); SR 536–37 (Ex. 23 (Divorce Complaint)).* Denise admitted service of the *Summons* and *Complaint* on April 25, 2019, thereby commencing

[12] In Denise's *Brief of Appellant*, she states that Mr. Collins stated that Neil and Denise "were working on an 'amicable resolution of the divorce' that could have included reconciliation." *Id.* at 5. To the contrary, counsel for Denise asked Mr. Collins whether "[r]econciliation would be an amicable resolution of an action," not whether Neil and Denise actually had that intention. *CT 104–105.*

the divorce action. *SR 538 (Ex. 24 (Denise Admission of Service)).*[13]

As the summer of 2019 approached, the situation between Neil and Denise did not improve. Most of their family, including Ryan Smeenk (Neil's son), Brandy Mooney (Neil's daughter), Kurtis Mooney (Neil's grandson), and Stephen Smeenk (Neil's brother), knew that divorce was imminent. *SR 672 (Ryan); SR 731 (Brandy); SR 693 (Kurtis: it got "worse and worse.")*; *SR 716 (Stephen (brother): "He was done. He had had enough. The marriage was over.").* Sadly, before their divorce was finalized, Neil committed suicide. *SR 192 (FOF # 59, n. 6).*

Following Neil's death, Denise's relationship with Neil's children (and in particular, her relationship with Ryan) went from generally disagreeable to openly hostile. At one point, Denise told her sister that she was "about ready to go dig [Neil] up and bring him home[.] Wouldn't that frost their ass?" *SR 546 (Ex. 26 (Sally/Denise Text Message)).* In that same conversation, Denise also reflected upon a statement she had made to Neil in which she suggested that if it came to that, Neil should kill himself outside. *Id.* Because, ultimately, he took his life outside, Denise told her sister that "maybe Neil had listened to me for once." *Id.*

In weighing the equities to assess what was "just and reasonable" as to Neil, it was appropriate for the circuit court to attribute significance to Denise's testimony at the December 3, 2020 hearing, during which Denise admitted that had their divorce been

---

[13] Denise claims that "Ryan had even attempted to get a guardianship over his father because he was so concerned about Neil's ability to make decisions for himself." *Brief of Appellant at 32.* That is misleading. In actuality, Ryan testified that he tried to get a guardianship because Neil "was drinking more than he should" and a guardianship would enable him to "make [Neil] go to a doctor against his will." *SR 673, 685.*

finalized, they would have "split the estate." *SR 621–22.* Considering that Neil assigned her one-half of the assets from the Contract for Deed outright, Neil and Denise have already accomplished that objective. *SR 136–39 (Assignment of Contract for Deed). SR 629–30.* Allowing Denise (through specific performance of the 2017 Agreement) to inherit the other half of Neil's assets would result in her inheriting nearly everything. Considering the turbulent circumstances surrounding their separation, the circuit court was correct in holding that such a result would not be "just and reasonable" as to Neil. *SR 815 (COL #5).* This is especially true considering that Denise openly admitted that if the 2017 Agreement was enforced, she could have spent all of Neil's assets during her lifetime. *SR 651 (Denise: "I could be a bitch and [spend the money].")* Such an action would have undermined not only the *2019 Will* (which names Neil's children as his beneficiaries), but also the purpose of the 2017 *Agreement* (which was executed, in part, to provide for their mutual heirs).

Similarly, at the December 3, 2020 hearing, Denise agreed that if Neil had approached her about changing his *2017 Will*, she "would have been open to" that proposition in light of their pending divorce. *SR 664.* In fact, on cross-examination, she testified that she "wouldn't have had any objection to" Neil changing his *2017 Will* in connection with the divorce. *SR 646.* This is presumably because Neil and Denise's deteriorating marital relationship frustrated the purpose of the *2017 Agreement* (to provide for their heirs as *husband* and *wife*) so plainly and completely that even Denise could not deny the reasonableness of reconsidering it. *See Mueller v. Cedar Shore Resort, 2002 S.D. 38, ¶ 42, 643 N.W.2d 56, 70 (providing the elements of frustration of*

purpose).[14]

Notably, the circuit court did not simply hold that specific performance was unjust and unreasonable as to Neil; it also recognized that such a result may also be unjust as to <u>*Denise*</u>. *SR 817 (FOF # 10).* There is no dispute that if the *2017 Agreement* had been enforced, Denise would have been legally obligated to provide for Neil's children in her own Will—meaning she could *never* change that document. *SR 675 (Brandy: "tied together forever").* Forcing Denise to provide for Ryan and Brandy as beneficiaries long into the future even though Denise and Ryan openly resent each other makes little sense. *SR 187 (FOF # 14 (Denise resents Ryan)); SR 193 (FOF # 70 (Ryan resents Denise)).* This is particularly true considering that Denise's life might drastically change in ways the circuit court—or this Court—cannot realistically hypothesize. For instance, if Denise chooses to remarry, would she be required to disinherit her future husband or risk him taking his elective share, an action that would result in Denise breaching her contractual obligations?

Further, in determining a just result in *equity*—an area in which the circuit court is afforded wide latitude—the court was mindful of the drastic change in Neil and Denise's relationship between 2017 and 2019. *See Donat v. Johnson, 2015 S.D. 16, ¶ 32, 862 N.W.2d 122, 133 ("[A] trial court has broad discretion in fashioning an equitable remedy.").* Less than two years after they executed the 2017 documents, not only had

[14] These changes were also fundamental enough to destroy the consideration upon which the original agreement rested—a defect that permits recession. *See Talley v. Talley, 1997 S.D. 88, ¶ 42, 566 N.W.2d 846, 853–54* (*allowing recission "for breaches which are substantial and relate to a material part of the contract.").*

Denise forced Neil out of the marital home (including throwing their bed outside in the snow), Neil had: filed for divorce; executed a new Will completely disinheriting Denise; and committed suicide. *See, e.g., SR 632 (never moved back in with Denise); SR 536–37 (Ex. 23 (Divorce Complaint)); SR 540–45 (Ex. 25 (2019 Will)).*

In South Dakota, "[e]quity will not decree specific performance of a contract when it would work [an] injustice, and where . . . it is obvious that the contracting parties never expected or intended the results that have followed their action." *Watters v. Ryan, 31 S.D. 536, 544, 141 N.W. 359, 363 (1913).* Even Denise recognizes that specific performance might not be appropriate if subsequent events "were such as not to be within the reasonable contemplation of the parties." *Brief of Appellant at 30.* Certainly, when Neil and Denise (as husband and wife) went to their attorney in 2017 to execute the *Agreement*, neither of them anticipated that matters would go so awry. And yet, they did. The circuit court recognized this and did not abuse its discretion when it declined to order specific performance of the *2017 Agreement*.

CONCLUSION

Based upon the foregoing, Ryan respectfully requests that this Court affirm the circuit court in all respects.

REQUEST FOR ORAL ARGUMENT

Appellee Ryan Smeenk, by and through his counsel, respectfully requests the opportunity to present oral argument before this Court.

Dated this 8th day of June, 2021.

Respectfully submitted,

THOMAS BRAUN BERNARD & BURKE, LLP
Attorneys for Appellee, Ryan Smeenk

By: /s/ John W. Burke .
John W. Burke
Kimberly S. Pehrson
4200 Beach Drive – Suite 1
Rapid City, SD 57702
Tel: 605.348.7516
E-mail: jburke@tb3law.com

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Appellee's Brief* complies with the type volume limitation provided for in SDCL 15-26A-66. *Appellee's Brief* was prepared using Times New Roman typeface in 12-point font and contains 9,135 words. I relied on the word count of our word processing system used to prepare *Appellee's Brief* and the original and all copies are in compliance with this rule.

THOMAS BRAUN BERNARD & BURKE, LLP
Attorneys for Appellee, Ryan Smeenk

By: /s/ John W. Burke .
John W. Burke
Kimberly S. Pehrson
4200 Beach Drive – Suite 1
Rapid City, SD 57702
Tel: 605.348.7516
E-mail: jburke@tb3law.com

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2021, I served a true and correct copy the foregoing *Appellee's Brief* relative to the above-entitled matter via e-mail and U.S. Mail (2 copies) on the following individuals:

Talbot J. Wieczorek / Katelyn A. Cook
Gunderson Palmer Nelson & Ashmore, LLP
506 Sixth Street
Rapid City, SD 57701

And via U.S. Mail on the following individuals:

Brandy Ruth Mooney	Dominique Sterrett	Damian Heinert
28854 225th Ave.	1088 2nd Avenue	18291 Winkler Road
Martin, SD 57551	Deer Trail, CO 80105	Newell, SD 57760

/s/ John W. Burke .
John W. Burke

APPENDIX

STATE OF SOUTH DAKOTA

COUNTY OF BUTTE

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

In the Matter of the Estate of	)	09PRO19-000013
	)	
NEIL WILLIAM SMEENK	)	**MOTION FOR APPROVAL AND**
	)	**PAYMENT OF CLAIM**
Deceased.	)	
	)	
	)	

COMES NOW, Denise L. Schipke-Smeenk, as Personal Representative the Estate of Neil William Smeenk, by and through her attorney, Tyler C. Wetering of Gunderson, Palmer, Nelson & Ashmore, LLP, and moves this Court for the Payment of a Claim pursuant to SDCL § 29A-3-713 as follows:

1. Denise L. Schipke-Smeenk was appointed Personal Representative of the Estate of Neil William Smeenk by Order of Formal Probate and Appointment of Personal Representative dated December 9, 2019.
2. The Order of Formal Probate and Appointment of Personal Representative dated December 9, 2019, admitted decedent's Last Will and Testament dated April 9, 2019, to probate.
3. An Agreement to Execute Mutual Wills dated August 25, 2017, (the "2017 Agreement" has previously been filed with this court.
4. The 2017 Agreement provided:

> Each party agrees to provide for the for the disposition of any and all property which each party may die possessed by the execution of a Last Will separate but contemporaneously with the execution of this Agreement. The separate Will of each party will devise and bequeath all property, excepting only certain specific bequests with are identified in Article IV of each Last Will and Testament to the other party as surviving spouse.

5. Contemporaneous with the execution of the 2017 Agreement, the decedent executed a Last Will and Testament dated August 25, 2017, (the "2017 Will") which has previously been filed with this court.

6. The 2017 Will provides for the disposition of the decedent's estate in the same manner as the 2017 Agreement.

7. This Court's Findings of Fact and Conclusions of Law dated November 23, 2019, found that the 2017 Agreement was executed by Neil William Smeenk. (See Finding #38).

8. Further this Court found that attorney Wes Buckmaster oversaw the execution of the 2017 Agreement and 2017 Will and testified that he had no question about Neil's capacity to execute and understand the documents at the time of their execution and further that Neil was not under any duress or undue influence at the time of the execution of the 2017 Agreement and 2017 Will. (See Findings # 41 and 42).

9. Counsel for the Personal Representative has asked whether counsel for Ryan Smeenk has any evidence that Neil Smeenk lacked capacity at the time of executing the 2017 Will and associated documents. No evidence has been provided.

10. The 2017 Agreement created a binding contractual obligation for the disposition of the decedent's estate. Neil Smeenk was contractually obligated to follow the 2017 Agreement. The estate is also so obligated.

11. Denise L. Schipke-Smeenk, as Personal Representative, intends to fulfil the contractual obligations of the estate by disposing of the Estate as provided for in the 2017 Agreement and 2017 Will.

12. The Personal Representative is seeking court approval of the disposition of the decedent's estate as provided in the 2017 Agreement and 2017 Will pursuant to SDCL § 29A-3-713.

WHEREFORE, Petitioner respectfully requests this Court approve the disposition of the Estate of Neil William Smeenk as provided in the 2017 Agreement and 2017 Will.

Dated this 8th day of April, 2020.

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

/s/ Tyler C. Wetering
Tyler C. Wetering
Attorney for Denise L. Schipke-Smeenk
P. O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078
twetering@gpna.com

CERTIFICATE OF SERVICE

Tyler C. Wetering, attorney, states that on the 8th day of April, 2020, I sent, by first-class mail, postage prepaid, a true and correct copy of the **Motion for Approval and Payment of Claim** to the following person:

Brandy Ruth Mooney
28854 225th Ave.
Martin, SD 57551

And served by electronic services via Odyssey File & Serve and electronic mail to:

N. Drew Skjoldal
Cassidy Stalley
Lynn, Jackson, Shultz & Lebrun, P.C.
909 St. Joseph Street, Suite 800
Rapid City, SD 57701-3301
Attorneys for Ryan William Smeenk

/s/ Tyler C. Wetering
Tyler C. Wetering

Filed: 4/8/2020 5:14 PM CST Butte County, South Dakota 09PRO19-000013

STATE OF SOUTH DAKOTA		IN CIRCUIT COURT
COUNTY OF BUTTE		FOURTH JUDICIAL CIRCUIT
In the Matter of the Estate of	)	
	)	
NEIL WILLIAM SMEENK	)	09PRO19-000013
	)	
Deceased.	)	

Notice to South Dakota Department of Social Services of Appointment of Personal Representative of the Estate of Neil William Smeenk, Deceased

Notice now is hereby given that on December 9, 2019, in the circuit court of Butte County, South Dakota, Denise L. Schipke-Smeenk was appointed as personal representative of the above-entitled estate. On behalf of the personal representative, the undersigned attorney certifies that the information required by SDCL § 29A-3-705(c) has been provided to the Department.

If you claim to be a creditor of the above-entitled estate, you are notified pursuant to SDCL § 29A-3-801(b) that you must file any claim within four (4) months of the personal representative's appointment, or sixty (60) days after the mailing or other delivery of this written notice, whichever is later, or your claim will be forever barred. Claims may be filed with the personal representative or filed with the clerk of courts, with a copy of the claim mailed to the personal representative.

Dated this 12 day of December, 2019.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

Tyler C. Wetering
Attorneys for Estate
P. O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078

The Personal Representative is:
Denise L. Schipke-Smeenk
18291 Winkler Road
Newell, SD 57760

Filed: 12/12/2019 12:39 PM CST Butte County, South Dakota 09PRO19-000013

Proof of Notice

Tyler C. Wetering states that on the 12 day of December, 2019, he sent a true and correct copy of the **Notice to Department of Social Services of Appointment of Personal Representative** by first-class mail addressed as follows:

South Dakota Department of Social Services
Office of Recoveries and Investigations
700 Governors Drive
Pierre, SD 57501-2291

Tyler C. Wetering

Form 3-804
Statement of Claim (General)
Appendix to SDCL Ch. 29A-3

State of South Dakota
County of <COUNTY>

In Circuit Court
<CIRCUIT> Judicial Circuit

Estate of
<DECEDENT>
Deceased

<FILE NO>

Statement of Claim

Claimant makes claim against the estate as follows:

Description of Claim	Due Date, If Not Yet Due	Amount

TOTAL CLAIM $_____

[This claim is unsecured.]
[This claim is secured by _____.]
[This claim is contingent ofr unliquidated because _____.]
Dated _____.

_____
<CLAIMANT>
<CLAIMANT'S ADDRESS>
<CLAIMANT'S TELEPHONE NUMBER>

Note:

SDCL 29A-1-310 provides:

> Except as otherwise specifically provided in this code, every document filed with the court under this code including applications, petitions, and demands for notice, shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and penalties for perjury may follow deliberate falsification in the document.

The use of a verification with this form is for the practitioner decision based upon their interpretation of this statute.

Averill, *Uniform Probate Code*, 2nd Ed., West's Nutshell Series, states:

> [T]he penalties of perjury are applicable to any deliberate falsification of any document filed with the court. The mere filing of an application, petition or demand for notice is deemed to include a verification of its veracity. The threat of perjury prosecution under this provision has broad application. Although perjury penalties will in all likelihood never be strictly or conscientiously enforced, the provision will serve as a psychological bar against misuse of the Code's procedure.
>
> Significantly, verifications are apparently deemed to be a part of every filing even though the verification itself is absent from the document. This might mean, therefore, that the verification need not even be on the document thereby eliminating the need for

notarization of documents filed with the Court. [See 18 Uniform Probate Code Notes (Joint Editorial Board for the Uniform Probate Code)].

[State of _____
County of <COUNTY> ss.

Note:
SDCL 29A-1-310 provides: Subscribed and sworn to before me on _____.

_____
Notary Public, State of _____
My commission expires:_____

(Seal)]
<ATTORNEY>
<ATTORNEY'S ADDRESS>
<ATTORNEY'S TELEPHONE NUMBER>

[State of _____
County of <COUNTY> ss.

<CLAIMANT>, being duly sworn, verifies the statements contained in the Claim are true to the best of the claimant's knowledge, information, and belief.

_____
<CLAIMANT>

Subscribed and sworn to before me on _____.

_____
Notary Public, State of _____
My commission expires:_____

(Seal)]

Form 3-804
Statement of Claim (General)
Appendix to SDCL Ch. 29A-3

Your Personal Notes:

When to Use This Form:
See SDCL 29A-3-804.
How to Use This Form:
The claim is presented by:
1. Filing with the clerk of courts and mailing to the personal representative, or
2. Mailing or delivery of the claim to the personal representative, or
3. By commencing a proceeding against the personal representative.

If the claim is not yet due, the date when it will become due should be stated. If the claim is contingent or unliquidated, the nature of the uncertainty should be stated. If the claim is secured, the security should be described. SDCL 29A-3-804.
Comment:
The time limitations specified in SDCL 29A-3-803 do not apply to liability claims against the decedent or the personal representative to the extent that they are "protected by liability insurance," or any proceeding to

enforce any mortgage, pledge, or other lien upon property of the estate.

You may wish to file proof of notice with the clerk when the statement of claim is mailed to the personal representative.

This form was adopted by the South Dakota Supreme Court, Rule 97-43.

Note:

SDCL 29A-1-310 provides:

> Except as otherwise specifically provided in this code, every document filed with the court under this code including applications, petitions, and demands for notice, shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and penalties for perjury may follow deliberate falsification in the document.

The use of a verification with this form is for the practitioner decision based upon their interpretation of this statute.

Averill, *Uniform Probate Code*, 2nd Ed., West's Nutshell Series, states:

> [T]he penalties of perjury are applicable to any deliberate falsification of any document filed with the court. The mere filing of an application, petition or demand for notice is deemed to include a verification of its veracity. The threat of perjury prosecution under this provision has broad application. Although perjury penalties will in all likelihood never be strictly or conscientiously enforced, the provision will serve as a psychological bar against misuse of the Code's procedure.
>
> Significantly, verifications are apparently deemed to be a part of every filing even though the verification itself is absent from the document. This might mean, therefore, that the verification need not even be on the document thereby eliminating the need for notarization of documents filed with the Court. [See 18 Uniform Probate Code Notes (Joint Editorial Board for the Uniform Probate Code)].

Appeal No. 29580

In the
Supreme Court of the State of South Dakota

IN THE MATTER OF THE ESTATE OF NEIL WILLIAM SMEENK
DENISE L. SCHIPKE-SMEENK

Appellant

Appeal from the Circuit Court
Fourth Judicial Circuit
Butte County, South Dakota

The Honorable Michael W. Day

Notice of Appeal filed March 8, 2021

REPLY BRIEF OF APPELLANT DENISE L. SCHIPKE-SMEENK

Talbot Wieczorek
Katelyn Cook
Gunderson, Palmer, Nelson & Ashmore, LLP
506 Sixth Street
Rapid City, SD 57709
Telephone: (605) 342-1078
E-mail: tjw@gpna.com
Attorneys for Appellant, Denise Schipke-Smeenk

John W. Burke
Kimberly Pehrson
Thomas Braun Bernard & Burke, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702
Telephone: (605)-348-7516
E-mail: jburke@tb3law.com
kpehrson@tb3law.com
Attorneys for Appellee, Ryan Smeenk

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

I. THE TRIAL COURT ERRED IN DETERMINING DENISE'S CLAIM WAS UNTIMELY.

The trial court erred in multiple ways regarding Denise's claim. First, the trial court erred when it found that because Denise's creditor's claim was known to herself as Personal Representative at the time she sent the statutorily required notice to DSS, she was required to bring her claim within four months of her appointment as Personal Representative. (APP 010, COL (a), ¶ 21). In doing so, the trial court essentially created its own claims deadline for claims held by personal representatives. The trial court made this finding despite the fact (1) the statutory deadline for Denise never began to run based on the plain language of the statute; and (2) even if the deadline had begun to run, Denise timely filed her Motion for Approval and Payment of Claim within the trial court's self-imposed deadline. Additionally, the trial court found Denise's Motion for Approval and Payment of Claim did not provide the information required by SDCL § 29A-3-804. (APP 011, COL (a), ¶ 29). Finally, the trial court erred in determining Denise's claim was barred by judicial estoppel. (APP 009, COL (a), ¶ 17).

A. Denise's claim was timely and contained adequate information so as to comply with statute.

Ryan does not address Denise's arguments as to the trial court's error in self-imposing a "known creditor" deadline, despite the fact that doing so is directly contrary to the plain language of SDCL § 29A-3-803. Instead, Ryan asks this Court to simply ignore the trial's court's error in creating its own deadline while at the same time insisting that this Court require absolute, strict compliance with the other statutes at issue

pertaining to the contents of a claim. Ryan's position is both inequitable and inconsistent in that Ryan only insists on strict statutory compliance when it benefits him to do so.

The trial court's interpretation of the statutes at issue is inconsistent and violates the rules of statutory construction. The first main statute at issue, SDCL § 29A-3-803(a) provides:

> As to known creditor claims:
>
> > Except as provided in subsection (c), a personal representative shall give written notice by mail or other delivery to a creditor of the decedent, who is either known to or reasonably ascertainable by the personal representative, informing the creditor to present the claim within four months after the date of the personal representative's appointment, or within sixty days **after the mailing or other delivery of the written notice**, whichever is later, or be forever barred.

SDCL § 29A-3-801(b) (emphasis added). The trial court found that under this statute, even though Denise did not actually provide notice to herself (APP 006-007, COL (a) ¶ 6), the time clock for submitting her claim still began to run when she sent a courtesy notice to DSS because she subjectively was aware of her claim. At no point in this statute is there any reference to there being a "subjective" knowledge component of when a known creditor must file a claim, and at no point does this statute operate as a complete "known creditors" deadline as the trial court held.

The second statute, SDCL § 29A-3-804, provides:

> The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, **or** may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court and mail or deliver a copy thereof to the personal representative.
>
> ***
>
> If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the nature of the security shall be described. Failure to describe correctly the nature of the security or

uncertainty, or the due date of a claim not yet due does not invalidate the presentation.

SDCL § 29A-3-804(1)(emphasis added).

While first overlooking the explicit requirement that a creditor be provided written notice in order to start the deadline to make a claim per SDCL § 29A-3-801(b), the trial court then took a completely different approach and required strict compliance with the requirements of SDCL § 29A-3-804(1), finding that despite the fact that Denise submitted a motion to approve the claim, she failed to provide the exact information required by SDCL § 29A-3-804. Thus, in one instance, in interpreting SDCL § 29A-3-801(b), the trial court ignores clear statutory language (to Denise's detriment), and then, in interpreting SDCL § 29A-3-804(1), strictly construes the statutory language (also to Denise's detriment). Such an approach to interpreting these statutes is directly contrary to the rules of statutory construction and the requirement that the Court "declare the meaning of the statute as clearly expressed." *Goetz v. State*, 2001 S.D. 138, ¶ 16, 636 N.W.2d 675, 681. The trial court further violated the rules of statutory construction by creating its own claims deadline, unique only to personal representatives, which provides that as soon as a personal representative gives notice to the first known creditor, the deadline for his or her own claims begin to run. If the Legislature intended to impose this requirement, it would have done so. It is not appropriate for the trial court to legislate, relying only upon one paragraph in a statutorily-required DSS letter.

Tellingly, in his response, even though Ryan acknowledges that Denise never actually delivered notice to herself to start the deadline, Ryan argues that the notice Denise sent to DSS should still count as notice to her—arguing that substantial compliance with SDCL § 29A-3-801(b) is sufficient. *See* Appellee's Br., pg. 16.

However, in the same breath, he then goes on to argue against the sufficiency of Denise's Notice of Claim, arguing that strict compliance should be required. Importantly then, if the trial court's holding that Denise's claim was untimely is in error (since she never received written notice as required by 801(b)), then Denise still has time within the ultimate three-year bar set forth in SDCL § 29A-3-803(a) to file her claim. This completely moots the remainder of Ryan's arguments as to the sufficiency of her Notice of Claim because she can (and already has) filed a new statement of claim.

Because the trial court's findings violate the clearly established rules of statutory construction, this Court should reverse the trial court's finding that Denise's claim was untimely, and thus, barred.

B. The trial court erred in finding that judicial estoppel barred Denise's claim.

The trial court found Denise is judicially estopped from asserting her claim. (APP 009, COL (a), ¶ 17). However, because not all of the necessary elements of judicial estoppel are present, the trial court erred in its finding.

In order to apply the theory of judicial estoppel, the court must find that Denise would derive an "unfair advantage" if not estopped. *See Wyman v. Bruckner*, 2018 SD 17, ¶¶ 11-12, 908 N.W.2d 170, 175. Importantly, "the gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather it is the intentional assertion of an inconsistent position that perverts the judicial machinery." *Id.* (citing *Hayes v. Rosenbaum Signs & Outdoor Advert., Inc*., 2014 S.D. 64, ¶ 14, 853 N.W.2d 878, 882). The trial court erroneously found this element was satisfied because Denise's alleged failure to provide notice "*could* potentially allow her to extend her claim period well beyond the

legislatively-prescribed four months." (APP 008, COL (a), ¶ 14) (emphasis added). However, while the trial court and Ryan rely upon a parade of horribles that *could* have happened or could have perverted the "judicial machinery," *there is absolutely no evidence of it occurring in this case.*

Ryan argues that judicial estoppel was appropriate in this case because "it would be absurd to allow Denise (as creditor) to gain from her failure to give notice (as Personal Representative)." *See* Appellee's Br., pg. 18. Ryan argues that Denise's interpretation of the claim statutes could allow her to allow her to "avoid sending written notice to herself to delay triggering her own claim period." *See* Appellee's Br., pg. 19. Ryan further accuses Denise of "lay[ing] in the weeds—waiting months—or potentially even years—before sending [notice to creditors]." *See* Appellee's Br., pg. 20. However, there is simply no evidence in the record to show that Denise was attempting to strategically utilize the claim statutes in her favor—which is shown by Ryan's wholesale failure to cite to any part of the actual record to support his argument. *See* Appellee's Br., pg. 19-21. When looking at the factual record before the trial court, it is clear the opposite is actually true; instead of attempting to take advantage of the notice requirements or "lay in the weeds," Denise made multiple efforts to comply.

First, out of an abundance of caution, Denise filed her Motion for Approval and Payment of Claim seeking the trial court's approval *within the four-month window improperly imposed by the trial court.*[1] While Ryan and the trial court disregarded this

[1] The trial court found that Denise's claim needed to be submitted within four months of her letter to DSS, making the due date April 12, 2020. (APP 003, FOF (a), ¶ 8). Despite the trial court's unfounded concerns that Denise was attempting to utilize the claim statutes strategically and to her advantage, she filed her Motion for Approval and

Motion because it was deemed to be insufficient, it is wholly disingenuous for Ryan or any of the other heirs to argue that they were not aware of the claim being made. Second, Denise filed a second notice of claim in February of 2021 following the trial court's ruling to again preserve her claim pending the outcome of this appeal.

Importantly, the legislature specifically included a mechanism to prevent a personal representative from strategically withholding claims, in that it specifically included a three-year deadline within which all claims, personal representative or otherwise, must be brought. *See* SDCL § 29A-3-803(a)(3). Therefore, it was inappropriate for the trial court to attempt to step into the shoes of the Legislature and impose additional requirements for claims of personal representatives by requiring the claims be brought within four months of his or her subjective knowledge of a claim.

Thus, the trial court's findings with regard to judicial estoppel are clearly erroneous because there is nothing other than pure speculation in the record to support that Denise somehow had an unfair advantage or otherwise utilized "gamesmanship" to her advantage. Therefore, because the elements required to apply judicial estoppel are not met, this Court should find the trial court erred in apply judicial estoppel to Denise's claim.

II. THE TRIAL COURT ERRED IN DETERMINING DENISE FAILED TO ESTABLISH SHE HAS AN INADEQUATE REMEDY AT LAW.

The trial court found that Denise failed to properly establish that she lacked an adequate remedy at law, and as such, was not entitled to specific performance of the 2017 Agreement. (APP 013, COL (b), ¶ 4). However, such a holding completely disregards

---

Payment of Claim on April 9, 2020, still within this improperly imposed four-month window. (APP 050).

the abundance of case law dictating that specific performance is the appropriate remedy to enforce a contract to make wills, and the fact that the subject of the 2017 Agreement was the disposition of the property within the estate, which undeniably, consists solely of real property.

Notably, in Ryan's response, he does nothing to distinguish the clearly established precedent in South Dakota that provides that specific performance is the appropriate remedy for a breach of a contract to make wills. *See Lass v. Erickson,* 74 SD 503 (1952) ("It is within the jurisdiction of equity to require the equivalent of specific performance of such an agreement after the death of the promisor by requiring transfer of his property in accordance with the terms of the agreement"). This is the appropriate remedy because, as even acknowledged by Ryan, Denise's future is uncertain, which makes it impossible to ascertain what the Estate might look like at the time of her death, and thus, impossible to ascertain what her monetary damages would be as a result of Neil's breach. *See* Appellee's Br., pg. 31 (noting that Denise's life may drastically change in ways this Court "cannot realistically hypothesize"). This alone is sufficient to show that Denise cannot be adequately compensated by monetary damages.

Second, the trial court's finding that Denise failed to properly raise the issue of specific performance disregards the character of the property in the estate which is the subject of this litigation and the subject of the 2017 Agreement. Ryan essentially argues that Denise's claim for specific performance fails because she did not specifically testify that she lacked an adequate remedy at law. However, South Dakota law is straightforward—when the contract relates to real property, the inadequacy of a remedy at law is presumed, completely negating Ryan's argument. *See Jacobson v. Gulbransen,*

2001 S.D. 33, ¶ 29, 623 N.W.2d 84, 91 ("Specific performance is '[t]he presumed remedy for the breach of an agreement to transfer real property[.]'") (Quoting *Wiggins v. Shewmake*, 374 N.W.2d 111, 114 (S.D.1985)); *see also Johnson v. Sellers*, 2011 S.D. 24, ¶ 22, 798 N.W.2d 690, 696. With regard to this presumption, this Court has explained:

> The rule is that, where the contract relates to personal property, the complaint must allege special reasons bringing the contract within some of the exceptions to the general rule that specific performance of such contracts will not be granted; but, in contracts for the sale of land, the authorities hold that an allegation that the remedy at law is inadequate is unnecessary, since it is apparent from the nature of the subject-matter.

Steensland v. Noel, 28 S.D. 522, 134 N.W. 207 (1912). Other courts hold similarly, holding that when the gravamen of a contract, such as the 2017 Agreement in this case, is real property, specific performance is presumed to be the appropriate remedy. *See P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 159 P.3d 870 (Idaho 2007) (citing *Fullerton v. Griswold*, 136 P.3d 291, 294 (Idaho 2006)) ("Specific performance is an extraordinary remedy that can provide relief when legal remedies are inadequate. The *inadequacy of remedies at law is presumed in an action for breach of a real estate purchase and sale agreement* due to the perceived uniqueness of land")(emphasis added); *Severson v. Elberon Elevator, Inc.*, 250 N.W.2d 417, 423 (Ia. 1977) (citing *Dee v. Collis*, 235 Iowa 22, 24, 15 N.W.2d 883, 885 (1944) (stating "[c]ourts assume that money damages do not constitute an adequate remedy for the breach of a real estate contract and grant specific performance without an actual showing of inadequacy of the legal remedy"); *Tierney v. Four H Land Co. Ltd. P'ship*, 288 Neb. 586, 594, 852 N.W.2d 292, 299 (Neb. 2014) (citing *Mohrlang v. Draper*, 219 Neb. 630, 365 N.W.2d 443 (1985)) ("Where a contract relates to real property, the inadequacy of a remedy at law is assumed").

For example, in *Gleason v. Gleason*, the Court of Appeals of Ohio was tasked with deciding whether a decedent's son, who sued seeking specific performance of an alleged oral promise to transfer certain land to him, adequately proved his entitlement to specific performance. 64 Ohio App. 3d 667, 582 N.E.2d 657 (1991). With regard to the sufficiency of his showing, the *Gleason* court noted:

> Specific performance is only available where there is no adequate remedy at law. In the case *sub judice, appellee presented absolutely no evidence on the issue of why there was no legal remedy*—e.g. damages—which could adequately compensate him. Generally, in the absence of such evidence a court must assume that a legal remedy exists and refuse to grant specific performance.
>
> There is an exception to that affirmative duty to prove that no legal remedy is adequate. "[W]here land is the subject matter of the agreement, the jurisdiction of equity to grant specific performance does not depend upon the existence of special facts showing the inadequacy of a legal remedy in the particular case." 71 American Jurisprudence 2d (1973) 144, Specific Performance, Section 112. "'Contracts involving interests in land . . . generally are specifically enforced because of the clear inadequacy of damages at law for breach of contract.'" 11 Williston on Contracts (3 Ed.1968) 673 (internal citations omitted).

Id. at 672. Because of this, the *Gleason* court found that the claimant's failure to present evidence to prove that legal remedies were inadequate did not prevent him from seeking specific performance. *Id.*

Here, the record before the trial court is clear—the asset of the Estate is real property being sold via a contract for deed. (APP 003, FOF (a), ¶ 4; Dec. HT 28:16-29:1)). The purpose of the 2017 Agreement was to dictate the disposition of the Estate, and thus, the real property. Because the remedy for a breach of a contract involving real property is assumed to be specific performance, the trial court erred in determining that Denise failed to meet her burden to show entitlement to specific performance.

III. THE TRIAL COURT ERRED IN ITS APPLICATION OF SDCL § 21-9-3 TO PREVENT SPECIFIC PERFORMANCE AGAINST NEIL.

The trial court found that enforcement of the 2017 Agreement against Neil would be unjust and unreasonable under SDCL § 21-9-3. (APP 013-015, COL (b), ¶¶ 6-12). The trial court reasoned that Neil's intent changed, that their relationship had deteriorated, and that "neither [Neil nor Denise] intended for their relationship to struggle so significantly." (APP 015, COL (b) ¶¶ 7, 8, 12). However, these findings are in error because enforcement of the 2017 Agreement is not inequitable to Neil. Instead, the obligations under the 2017 Agreement were reciprocal in nature in that both Denise and Neil promised the same thing. To argue that Neil should be released from his contractual obligations (when Denise is fully willing to uphold her reciprocal obligation) completely defeats the purpose of a contract.

A similar situation could occur in any number of contractual relationships. For example, two attorneys could agree to open a practice together, and in doing so, sign a partnership agreement wherein both parties agree to purchase a building together and agree that upon the happening of a various conditions, that they will deed their interest in the building back to other partner. If, after signing the partnership agreement, one of the two partners began drinking heavily and no longer desired to be in the partnership, the trial court's ruling in this case would essentially allow that partner to keep her interest with no repercussion while preventing the other partner from demanding specific performance to receive the full interest in the building.

Further, the trial court's conclusion that "the contracting parties never expected or intended the results that have followed their action" is incorrect. (APP 015, COL (b), ¶ 12) (citing *Watters v. Ryan*, 31 SD 536, 544, 141 N.W. 359, 363 (1913)). A court should

not refuse specific performance as a result of contingencies that might have been foreseen. 71 Am. Jur. 2d Specific Performance § 91. In any relationship, it is entirely foreseeable that there may come a point where the parties may no longer get along—this is evidenced by the wealth of breach of contract cases caused by parties not getting along. To conclude that divorce was outside of the reasonable contemplation of a married couple executing their estate plans is illogical. Both Neil and Denise were well-aware of their reciprocal obligations upon signing the 2017 Agreement, and any argument to the contrary is simply unsupported by the record. While their relationship following the execution of this document was contentious as a result of Neil's alcoholism and Denise's reaction to it, this should not allow Neil to evade his obligations under the 2017 Agreement.

Therefore, the trial court erred in applying SDCL § 21-9-3 to prevent Denise from seeking specific performance of the 2017 Agreement.

CONCLUSION

Denise's claim was timely submitted and should not be barred by judicial estoppel. Further, because the property at issue is real property, it is presumed that specific performance is the appropriate remedy. Thus, the trial court erred in determining Denise failed to establish an inadequate remedy at law. Finally, the trial court erred in utilizing SDCL § 21-9-3 to allow Neil to escape his contractual obligations because enforcement of the contract would not be inequitable to him. Therefore, Denise respectfully requests this Court reverse the trial court's findings.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellant's Reply Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Reply Brief for Appellant, excluding the table of contents, table of cases and any certificates of service or compliance contains 3,392 words. I have relied upon the word count of our word processing system as used to prepare this Reply Brief for Appellant. The original Reply Brief for Appellant and all copies are in compliance with this rule.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Talbot J. Wieczorek*
Talbot J. Wieczorek

CERTIFICATE OF SERVICE

I hereby certify on July 8, 2021, the foregoing **REPLY BRIEF OF APPELLANT DENISE L. SCHIPKE-SMEENK** was filed with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 E. Capitol Avenue
Pierre, SD 57501-5070
SCClerkBriefs@ujs.state.sd.us

I further certify that the REPLY BRIEF OF APPELLANT DENISE L. SCHIPKE-SMEENK was served by electronic mail and mailed by U.S. Mail to the following:

John W. Burke
Kimberly Pehrson
Thomas Braun Bernard & Burke, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702
Telephone: (605)-348-7516
E-mail: jburke@tb3law.com
kpehrson@tb3law.com
Attorneys for Appellee, Ryan Smeenk

and mailed by U.S. Mail to the following:

Brandy Ruth Mooney
28854 225th Ave.
Martin, SD 57551

Dominique Sterrett
1088 2nd Avenue
Deer Trail, CO 80105

Damian Heinert
18291 Winkler Road
Newell, SD 57760

By: */s/ Talbot J. Wieczorek*
Talbot J. Wieczorek