IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27935

KAREN LEE WYMAN, Personally and as Personal Representative of the Estate of Barbara Ann Morris,

Plaintiff/Appellant,

vs.

PAMALA BRUCKNER,

Defendant/Appellee.

Appeal from the Circuit Court
Third Judicial Circuit
Beadle County, South Dakota

THE HONORABLE CARMEN A. MEANS

APPELLANT'S BRIEF

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Notice of Appeal filed July 22, 2016

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JURISDICTIONAL STATEMENT

This appeal concerns two Beadle County cases that were consolidated for discovery and trial by an order signed and filed by the circuit court on May 27, 2016. [1] (CIV-SR72.) Plaintiff/Appellant Karen Wyman and Defendant/Appellee Pamala Bruckner filed cross-motions for partial summary judgment. After orally ruling in Bruckner's favor, the circuit court entered an order on June 20, 2016 denying Wyman's motion and granting partial summary judgment to Bruckner. (App. 002.) Wyman then voluntarily dismissed her remaining claims. (CIV-SR160.) On July 12, 2016, the circuit court signed and filed a final judgment. (App. 001.) On July 14, 2016, Bruckner served notice of entry of the final judgment. (CIV-SR164.) On July 22, 2016, Wyman filed a timely notice of appeal from the final judgment, including the denial of her motion for partial summary judgment and the grant of Bruckner's motion for partial summary judgment. (CIV-SR181.)

STATEMENT OF THE ISSUES

1. Shortly before Barbara Morris passed away, her daughter and attorney-in-fact Bruckner wrote and signed $218,700 in checks for the benefit of Bruckner's family members. Morris's power of attorney did not expressly mention self-dealing; it merely stated that Bruckner could do many things relating to Morris's property including giving or receiving it as a gift. Does authorization to receive property constitute clear and unmistakable language expressly authorizing Bruckner to give self-dealing gifts to others?

   The circuit court ruled from the bench that the transfers were lawful because the language clearly authorized Bruckner to receive self-dealing gifts and this ability implicitly authorized Bruckner to give self-dealing gifts to others.

   Studt v. Black Hills Federal Credit Union, 2015 S.D. 33, 864 N.W.2d 513
   Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431

[1] The settled record includes pleadings from the probate and civil actions, which were consolidated. To distinguish between the two, Wyman will cite to the probate pleadings as "PRO-SR___" and the civil pleadings as "CIV-SR__."

2. Also shortly before Barbara Morris passed away, Bruckner wrote and signed $6,377.16 in checks for her own benefit. Was the language in the power of attorney stating Bruckner could give or receive gifts sufficient to clearly and unmistakably authorize Bruckner to give self-dealing gifts to herself?

   The circuit court ruled from the bench that the transfers were lawful because the language clearly authorized Bruckner to receive self-dealing gifts.

   Studt v. Black Hills Federal Credit Union, 2015 S.D. 33, 864 N.W.2d 513
   Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431

3. On October 29, 2014, Bruckner became Morris's power of attorney. On November 12, 2014 Morris opened an account naming Bruckner and Wyman each as 50% POD beneficiaries. On December 17, 2014, Morris and Bruckner signed an account change adding Bruckner as a joint owner. Shortly before Morris died, Bruckner wrote and signed checks totaling over $200,000 for the benefit of Bruckner's family members and Bruckner. After Morris died, Bruckner gave $175.00 to her son-in-law and transferred $29,070.31 to herself. Should Bruckner be precluded from asserting her survivorship rights either because she made unauthorized transfers while Morris was still alive or because adding her as a joint owner was an impermissible self-dealing act?

   The circuit court ruled from the bench that adding Bruckner as a joint owner was not self-dealing and that Bruckner's transfers were authorized by Morris's power of attorney, so she was entitled to assert her survivorship rights.

   Johnson-Batchelor v. Hawkins, 450 N.W.2d 240 (S.D. 1990)
   In re Estate of O'Keefe, 1998 S.D. 92, 583 N.W.2d 138
   Papke v. Harbert, 2007 S.D. 87, 738 N.W.2d 510
   In re Estate of Mayer, 664 N.E.2d 583 (Ohio App. 1995)

STATEMENT OF THE CASE

Karen Lee Wyman is the personal representative of her mother's--Barbara Ann Morris's—estate. Morris's estate is being probated in Beadle County, Third Judicial Circuit. Acting in her personal and representative capacities, Wyman filed a petition in the probate action (02PRO15-000028) and a civil action (02CIV15-000176), alleging, among other things, that her sister Pamala Bruckner had breached fiduciaries duties as Morris's attorney-in-fact by writing over $200,000 in checks to Bruckner's family members and for Bruckner's own benefit shortly before Morris's death and by

transferring the remaining account balance to herself after Morris's death. (PRO-SR36 ¶¶ 29-34; CIV-SR4 ¶¶15-18.) These funds would have been shared equally between Wyman and Bruckner if they had passed through Morris's estate. (App. 018, Item III.)

On May 27, 2016, the two cases were consolidated for discovery and trial. At a hearing on June 14, 2016, Judge Means orally denied Wyman's motion for partial summary judgment and orally granted Bruckner's motion for partial summary judgment concerning breach of fiduciary duty. (App. 005-008.) Judge Means concluded that Morris's power of attorney authorized Bruckner to engage in self-dealing and thus the checks and transfers Bruckner made for her own benefit and her family members' benefit were lawful. On June 20, 2016, the circuit court entered a written order. (App. 002.) Wyman then voluntarily dismissed the remaining claims. On July 12, 2016, the circuit court entered a final judgment. (App. 001.) On July 22, 2016, Wyman appealed. (CIV-SR181.)

STATEMENT OF THE FACTS

Morris was born on March 16, 1941, and was the mother of Wyman and Bruckner. (PRO-SR31 ¶ 1; PRO-SR71 ¶ 2.) On March 25, 2014, shortly after Morris's husband had passed away and Morris's 73rd birthday, Morris completed an estate plan including a trust and will. (App. 012-023.) At that time, Morris was living in Florida, close to Wyman. Morris designated Wyman as trustee of the trust, and personal representative of the estate. (App. 013 § 4; App. 020, Item VI.) With the exception of some personal items, the estate's assets were to go to Morris's trust. (App. 012 §§ 2-3.) The trust's assets were to be distributed following Morris's death to Wyman and Bruckner in equal shares: "Upon the death of BARBARA ANN MORRIS, this Trust shall terminate and the remaining corpus, principal and accrued interest shall be

distributed to Grantor's two (2) daughters, PAMALA JEAN BRUCKNER and KAREN LEE WYMAN, equally, per stirpes." (App. 018, Item III.)

In that same timeframe, Morris was diagnosed with bladder cancer. In fall 2014, Morris's diagnosis became terminal, and she moved from Florida to South Dakota, where she lived with Bruckner. (PRO-SR32 ¶¶ 10-11; PRO-SR71 ¶¶ 2, 4.) In October 2014, Bruckner contacted an attorney and asked him to prepare a power of attorney for Morris appointing Bruckner as attorney-in-fact. (PRO-SR142; PRO-SR147.) The attorney sent the power of attorney to Bruckner with instructions to have Morris sign the document before a notary. (PRO-SR143.) The attorney spoke to Bruckner, but not Morris. (PRO-SR142.) On October 29, 2014, Morris signed the power of attorney naming Bruckner as attorney-in-fact. (PRO-SR120.)

Morris's power of attorney was 2.5 pages of dense, single-spaced language that would be difficult reading for anyone, much less an elderly person suffering with terminal cancer who had never met the document's drafter. (App. 009-011.) For economy of space, Wyman will not restate the entire document here, but it can be found in the Appellants' Appendix. (*Id.*) The relevant portion of the power of attorney document states:

> Not to limit the full extent of the power and authority herein granted but merely to emphasize certain powers, said attorney-in-fact shall have full, unrestricted power and authority as follows:
>
> To handle, manage, lease, sell, purchase, convey, exchange, give or receive as a gift, loan, encumber, possess, use, consume, abandon or otherwise deal in or with, in any manner, all or any portion of my real or personal property, including any interest I may have therein, whether now owned or hereafter acquired, whatsoever and wheresoever located; and to do any act or thing necessary or convenient to complete any transaction involving any of my said real or personal property, previously commended or transacted by me; to execute any and all contracts, deeds, plats, leases,

> notes, instruments of encumbrance, and documents of any nature or kind whatsoever with regard to any such real or personal property; to disclaim, renounce or place in trust any and all such real or personal property; to demand, receive, compromise and forgive any and all rents, income, moneys, refunds, proceeds, real and personal property whatsoever, without limitation as to kind or type of property or amount or dollar value of the same; to pay all debts, expenses, taxes insurance and other obligations, whatsoever; all the same as I could do if personally present;

(App. 009.)

On November 12, 2014, Morris opened a checking/saving account at Dakotaland Federal Credit Union (the "Dakotaland account"). (App. 024.) The Dakotaland account was opened as a payable on death ("POD") account naming Wyman and Bruckner as equal POD beneficiaries. (*Id.*) But on December 17, 2014, Morris and Bruckner both signed an account change authorization making Bruckner a joint owner of the Dakotaland account. (App. 026.) All funds deposited in the account at that time and thereafter, however, were provided by Morris. Bruckner never contributed any of her personal funds to the Dakotaland account. (PRO-SR33 ¶ 15; PRO-SR71 ¶ 2.) Morris died on March 12, 2015. (PRO-SR31 ¶ 2; PRO-SR71 ¶ 2.)

Before Morris passed away, Bruckner engaged in a series of transactions for the benefit of her family members and herself. On January 22, 2015, approximately two months before Morris passed away, Bruckner withdrew a $10,000 cashier's check, no. 519791, from the Dakotaland account payable to Stewart Title to assist Bruckner's daughter Alissa Orban with the purchase of a new home. (PRO-SR112; PRO-SR108 ¶ 5.) From March 3 to 11, 2015—the day before Morris died—Bruckner wrote and signed numerous checks directly payable to her family members, including her husband, John Bruckner, her daughters Alissa Orban and Sarah Miller, her sons-in-law, Jason Orban and Nathan Miller, and her grandchildren, Noah Miller, Anthony Miller, Keegan Miller, and

Payton Miller. (PRO-SR123 to PRO-SR136.) These gifts of Morris's money by Bruckner to Bruckner's immediate family members totaled $218,700.00:

No. 519791	Stewart Title/Alissa Orban	1-22-15	$10,000.00
Check No. 3023	Nathan Miller	3-8-15	$100.00
Check No. 3024	Noah Miller	3-8-15	$50.00
Check No. 3025	Anthony Miller	3-8-15	$50.00
Check No. 3026	Keegan Miller	3-8-15	$50.00
Check No. 3027	Payton Miller	3-8-15	$50.00
Check No. 3029	Jason Orban	3-10-15	$100.00
Check No. 3030	Alissa Orban	3-10-15	$1,500.00
Check No. 3031	Sarah Miller	3-10-15	$1,500.00
Check No. 3032	John Bruckner	3-10-15	$5,000.00
Check No. 3033	John Bruckner	3-10-15	$300.00
Check No. 3034	John Bruckner	3-11-15	$200,000.00
Total checks to Bruckner's family before Morris died:			**$218,700.00**

(*Id.*; PRO-SR33 ¶ 17; PRO-SR71 ¶ 2.)

In addition, just days before Morris passed away on March 12, 2015, Bruckner wrote the following checks to pay Bruckner's auto and student loans:

Check No. 3021	TD Auto Finance	3-4-15	$2,000.00
Check No. 3028	LendKey Tech.	3-10-15	$4,377.16
Total checks for Bruckner before Morris died:			**$6,377.16**

(PRO-SR113 to PRO-SR114; PRO-SR108 ¶¶ 6-7.)

After Morris passed away on March 12, 2015, Bruckner wrote two checks. On March 13, 2015, Bruckner wrote and signed Check No. 3035 payable to her son-in-law Nathan Miller for $175.00. (PRO-SR137.) On March 14, 2015, Bruckner wrote and signed Check No. 3036 payable to Kuhler Funeral Home for $5,066.10. (PRO-SR138.) Wyman does not dispute the legitimacy of the check to Kuhler Funeral Home. On June 24, 2015, Bruckner closed the Dakotaland account and transferred all the remaining funds to herself in three transfers of $5.00; $5,640.61; and $23,424.70. (PRO-SR139 to PRO-

SR141.) These final three transfers of Morris's funds by Bruckner to herself totaled $29,070.31. (*Id.*; PRO-SR33 ¶ 18 and PRO-SR71 ¶ 2.)

Wyman filed a motion for partial summary judgment contending that Morris's power of attorney did not authorize self-dealing, and thus Bruckner's transfers constituted breach of fiduciary duty as a matter of law. Bruckner filed a cross-motion for partial summary judgment contending that Morris's power of attorney authorized the transfers. Both motions were heard on June 14, 2016. In a bench ruling, the circuit court held that the plain language of the power of attorney allowed Bruckner to give and receive gifts to herself. (App. 005-008.) It further held that the same language implicitly authorized Bruckner to give gifts to her own family members: "my thought is that if essentially she could have made a gift to herself that always authorize[s] her to give gifts to other[s], and these people were not just [Bruckner's] family, they were [Morris's] family. (App. 007.) The circuit court therefore granted Bruckner's motion and denied Wyman's motion. (App. 002.) This appeal followed.

STANDARD OF REVIEW

The grant or denial of a summary judgment motion is subject to de novo review. *North Star Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 12, 873 N.W.2d 57, 61 (denial reviewed de novo); *In re the Matheny Family Trust*, 2015 S.D. 5, ¶ 7, 859 N.W.2d 609, 611 (grant reviewed de novo). "'On appeal, this Court can read a contract itself without any presumption in favor of the trial court's determination.'" *Estate of Lien v. Pete Lien & Sons, Inc.*, 2007 S.D. 100, ¶ 10, 740 N.W.2d 115, 119 (quoting *A-G-E Corp. v. SD Dept. of Trans.*, 2006 S.D. 66, ¶ 15, 719 N.W.2d 780, 786). "'Cases involving the interpretation of written documents are particularly appropriate for disposition by

summary judgment, such interpretation being a legal issue rather than a factual one.'" *Id.* (quoting *Kimball Inv. Land, Ltd. v. Chmela*, 200 S.D. 6, ¶ 7, 604 N.W.2d 289, 292).

In addition, the "'existence of a fiduciary duty and the scope of that duty are questions of law for the court.'" *Bienash v. Moller*, 2006 S.D. 78, ¶ 12, 721 N.W.2d 431, 434 (quoting *Ward v. Lange*, 1996 S.D. 113, ¶ 12, 553 N.W.2d 246, 250). When the relevant facts are undisputed, whether a fiduciary duty was breached is also appropriate for summary judgment. *Id.* ¶ 27, 721 N.W.2d at 437 (affirming summary judgment finding that attorney-in-fact breached fiduciary duties by self-dealing transactions). Here, both sides moved for partial summary judgment.

ARGUMENT

The parties' cross-motions for summary judgment on breach of fiduciary duties show that this case raises important legal questions concerning powers of attorney. The circuit court unfortunately answered these questions incorrectly and contrary to this Court's decisions in *Bienash v. Moller*, 2006 S.D. 78, 721 N.W.2d 431, and *Studt v. Black Hills Federal Credit Union*, 2015 S.D. 33, 864 N.W.2d 513. *Bienash* and *Studt* establish that language authorizing an attorney-in-fact to make gifts is not enough to authorize *self-dealing* gifts to herself or her family members. To protect principals and reduce the temptation for abuse, *Bienash* and *Studt* require the ability to self-deal—that is, to make gifts to, or transactions that benefit, the attorney-in-fact herself or her own family members--to be expressly articulated in the power of attorney itself using clear and unmistakable language.

The circuit court disregarded this rule by concluding that language it interpreted as authorizing Bruckner to receive self-dealing gifts herself also implicitly authorized her to give $218,700 in self-dealing gifts to Bruckner's family members. *Bienash* and *Studt*

leave no room for an implicit authorization of any form of self-dealing, and thus even assuming *arguendo* that Bruckner was authorized to *receive* self-dealing gifts, this does not satisfy the requirement of a clear and unmistakable express authorization for Bruckner to *give* self-dealing gifts to others, including a $200,000 check to Bruckner's husband the day before Morris died.

In addition, with regard to the transfers Bruckner made for her own benefit, the circuit court erred by concluding that the ability to receive gifts authorized Bruckner to receive *self-dealing* gifts. Receiving is the mirror image of giving. *Studt* establishes that even authorizing an attorney-in-fact to make gifts to any person does not satisfy the requirement of an express authorization to make *self-dealing* gifts. This shows that language permitting Bruckner to receive gifts merely authorized her to receive gifts for Morris's benefit rather than authorizing Bruckner to receive self-dealing gifts for her own benefit.

Bruckner's addition to the Dakotaland account as a joint owner has no impact on the validity of the transfers that occurred while Morris was alive because it is undisputed that Bruckner contributed no funds to that account and therefore, with regard to each other, Morris owned these funds until her death. (PRO-SR33 ¶ 15; PRO-SR71 ¶ 2.) Moreover, Bruckner's breach of her fiduciary duties by making unauthorized transfers while Morris was alive should preclude her from relying on her survivorship rights concerning the account. The circuit court thus should have granted Wyman's motion for partial summary judgment and allowed Morris's estate to recover the funds that Bruckner transferred from the account for the benefit of Bruckner's family and Bruckner herself while Morris was alive, and allowed Wyman to recover 50% of the post-death transfers.

1. Morris's power of attorney did not clearly and unmistakably authorize Bruckner to make self-dealing gifts to her family.

Bruckner does not dispute that, shortly before Morris passed away, Bruckner wrote and signed checks totaling $218,700 from the Dakotaland account to Bruckner's husband, daughters, sons-in-law, and grandchildren. (PRO-SR84 ¶ 15; CIV-SR103 (admitting Wyman's undisputed facts 1-7).) Gifts to these family members constitute self-dealing. *See In re Trust Fund Created under the Terms of the Last Will and Testament of Joseph Baumgart*, 2015 S.D. 65, ¶¶ 29-31, 868 N.W.2d 568, 576 (trustees cannot lease trust property to people related by blood or affinity); *In re Estate of Stevenson*, 2000 S.D. 24, ¶ 11, 605 N.W.2d 818, 821 (trustee could lead trust property to herself, husband, or husband's cousin unless self-dealing was authorized). For example, there can be no doubt that Bruckner's gratuitous transfer of $200,000 to her husband created a conflict between her personal interests and her fiduciary duties to Morris. (PRO-SR56; *Estate of Stevenson*, 2000 S.D. 24, ¶ 9, 605 N.W.2d at 821 (self-dealing is any act that places fiduciary's personal interest in conflict with obligations to principal).)

The circuit court erroneously concluded that Morris's power of attorney authorized Bruckner to give these self-dealing gifts to Bruckner's family members based on the phrase "give or receive as a gift" that appears buried in a list of actions Bruckner was permitted to take for Morris's benefit. But this Court's previous decisions concerning powers of attorney establish that this language did not authorize Bruckner to make *self-dealing* gifts to family members.

This Court has long recognized that powers of attorney can be abused and therefore "'must be strictly construed and strictly pursued.'" *Bienash*, 2006 S.D. 78, ¶ 13, 721 N.W.2d at 435 (quoting *In re Guardianship of Blare*, 1999 S.D. 3, ¶ 14, 589

N.W.2d 211, 214). The rationale for this strict construction is that self-dealing represents a radical departure from normal fiduciary duties. Fiduciaries must "'act in all things wholly for the benefit of the trust.'" *In re Estate of Moncur*, 2012 S.D. 17, ¶ 9, 812 N.W.2d 485, 487 (quoting *Willers v. Wettestad*, 510 N.W.2d 676, 680 (S.D. 1994)). They "'must act with utmost good faith and avoid any act of self-dealing[.]'" *Bienash*, 2006 S.D. 78, ¶ 14, 721 N.W.2d at 435 (quoting *In re Estate of Stevenson*, 2000 S.D. 24, ¶ 9, 605 N.W.2d at 821). Consequently, "[i]n order for self-dealing to be authorized, *the instrument* creating the fiduciary duty must provide 'clear and unmistakable language' authorizing self-dealing acts." *Id.* ¶ 14, 721 N.W.2d at 435 (emphasis added). If "the power to self-deal is not specifically articulated in the power of attorney, that power does not exist." *Id.*

This Court recently reapplied these principles in *Studt*. The power of attorney in *Studt* authorized the attorney-in-fact "[to] make gifts, in my name to *any* person or organizations." 2015 S.D. 33, ¶ 4 n.1, 864 N.W.2d at 514 (emphasis added). The attorney-in-fact argued that "any person" included himself, and thus he was authorized to change beneficiary designations to himself. *Id.* ¶ 8, 864 N.W.2d at 515. This Court disagreed. Even though the power of attorney's language was broad and general and seemingly encompassed gifts to the attorney-in-fact, this Court held that "it cannot be presumed that the power of attorney conferred the power to self-deal absent explicit language. Therefore, we hold that [the attorney-in-fact] lacked the power to self-deal because the power of attorney did not contain clear and unmistakable language authorizing self-dealing." *Id.* ¶ 13, 864 N.W.2d at 516. *Studt* establishes that the

language in Morris's power of attorney authorizing Bruckner to give Morris's property as a gift does not clearly and unmistakably authorize Bruckner to make self-dealing gifts.

The circuit court and Bruckner therefore relied upon the language allowing Bruckner to receive property as a gift. As discussed below, this language does not clearly and unmistakably permit Bruckner to receive self-dealing gifts because it should be interpreted to mean that Bruckner was permitted to receive gifts to Morris on Morris's behalf. But putting that issue aside for the moment and assuming *arguendo* that this language authorized Bruckner to receive a self-dealing gift, language authorizing Bruckner to receive self-dealing gifts does not clearly and unmistakably authorize her to give self-dealing gifts to others. This is significant because $218,700 of the transactions at issue were not funds that Bruckner "received," but rather they were self-dealing checks that Bruckner gave to others, including a $200,000 gift to her husband. (PRO-SR56.)

The plain meaning of the term "receive" is to accept or take property oneself, rather than to give it to someone else. *See* Black's Law Dictionary (10th Ed.) at 1460 ("receive" means "To take (something offered, given, sent, etc.); to come into possession of or get from some outside source <to receive presents>"). The circuit court acknowledged this distinction between receiving and giving, but concluded that the power to receive gifts implicitly authorized Bruckner to give self-dealing gifts to others: "if essentially she could have made a gift to herself that always authorize[s] her to give gifts to others." (App. 007.) In so doing, however, the circuit court ignored this Court's directive that "[b]ecause we are required to strictly construe language in a power of attorney, it cannot be presumed that the power of attorney conferred the power to self-deal absent explicit language." *Studt*, 2015 S.D. 33, ¶ 13, 864 N.W.2d at 516. Strictly

construed, the phrase "*receive* as a gift" falls far short of a clear and unmistakable express authorization to *give* self-dealing gifts to others, and thus the $218,700 in checks Bruckner wrote to her family members was an unauthorized breach of fiduciary duty. *See id.* ¶ 10, 864 N.W.2d at 516 (if the power to self-deal is not specifically articulated in an instrument that power does not exist).

The circuit court's holding presumes that a principal's authorization for an attorney-in-fact to receive gifts herself always means the principal also intended to authorize the attorney-in-fact to have the ability to give self-dealing gifts to others. The principle of strict construction established by *Bienash* and *Studt*, however, does not permit a court to make that presumption nor does it allow an attorney-in-fact to cut corners by transforming an express authorization to receive gifts into an implied ability to distribute the principal's money to others. Indeed, it is not unusual for people to desire to make monetary gifts to their children, but have no desire to give such gifts to their son-in-law or daughter-in-law or others. *Studt* stated that "'if the power to self-deal is not *specifically articulated* in the power of attorney, that power does not exist.'" *Studt*, 2015 S.D. 33, ¶ 10, 864 N.W.2d at 516 (quoting *In re Estate of Stevenson*, 2000 S.D. 24, ¶ 15, 605 N.W.2d at 822) (emphasis in *Studt*). Morris's power of attorney did not specifically articulate the power to give self-dealing gifts to others, and thus the circuit court erred by implying that power based on the ability to receive gifts.

The $200,000 gift Bruckner made to her husband the day before Morris passed away demonstrates the importance of requiring self-dealing powers to be specifically articulated in the power of attorney. There is no evidence in the record that this gift was in Morris's best interests. Moreover, even Bruckner does not contend that Morris

instructed Bruckner to give $200,000 to Bruckner's husband while Morris was still alive. Rather, Bruckner contends that Morris wanted *Bruckner* to have the funds in the account *after* Morris died.[2] (PRO-SR197 ¶ 4.) This type of large, deathbed transfer understandably raises questions from other family members. This Court is also aware that elder abuse is a significant enough issue that the Legislature recently passed a statute creating a new cause of action. *See* SDCL § 26-46-13. These concerns are why *Bienash* and *Studt* require abilities to self-deal to be specifically articulated in clear and unmistakable language in the power of attorney, and thus the circuit court erred by concluding that the ability to *receive* a gift impliedly provided Bruckner with a different ability—the power to *give* the vast majority of Morris's account to Bruckner's husband and other members of Bruckner's family. Accordingly, the circuit court erred by granting summary judgment to Bruckner, and this Court should reverse and direct judgment in favor of Wyman concerning the $218,700 in transfers Bruckner made to others while Morris was still alive.

A. Bruckner cannot rely on extrinsic evidence to establish authority to self-deal.

Bruckner has attempted to avoid this result by asserting in an affidavit that Morris wanted her to have the funds in the Dakotaland account after Morris died. The circuit court, however, correctly recognized that it was not allowed to consider that type of parol evidence. (App. 005.) *Studt* makes this rule very clear. In *Studt*, the attorney-in-fact asked the circuit court to consider an affidavit from the drafter of the power of attorney

[2] Wyman disputes this contention because Morris's estate plan and the account opening document treated Wyman and Bruckner equally. (App. 018, Item III; App. 024.) But because the power to self-deal must be articulated in the power of attorney itself, the parties' dispute about the extrinsic evidence concerning Morris's intent is irrelevant to this appeal.

concerning the meaning of the language he drafted. *Studt*, 2015 S.D. 33, ¶¶ 3 &14, 864 N.W.2d at 514, 517. The circuit court rejected this attempt to use parol evidence to prove authorization to self-deal, and this Court affirmed:

> [In *Bienash*] we adopted a bright-line rule that oral, extrinsic evidence is inadmissible to "raise a factual issue." *Bienash*, 2006 S.D. 78, ¶¶ 24, 27, 721 N.W.2d at 437. An affidavit is merely oral evidence reduced to writing. Therefore, the affidavit is inadmissible to determine whether [the deceased principal] intended to allow [the attorney-in-fact] to self-deal.

Id. ¶ 14, 864 N.W.2d at 517. As *Bienash* recognized, this bright-line rule is justified to reduce the temptations that attorneys-in-fact face to engage in unauthorized self-dealing and because it is easy for principals and drafters to include language in a power of attorney expressly addressing the extent to which self-dealing is or is not permitted. *Bienash*, 2006 S.D. 78, ¶ 21, 721 N.W.2d at 436 (quoting *Kunewa v. Joshua*, 924 P.2d 559, 565 (Hawaii 1996)).

Consideration of Bruckner's affidavit is also precluded by this Court's repeated statement that the authorization to self-deal requires clear and unmistakable language in the power of attorney itself. *Studt*, 2015 S.D. 33, ¶ 10, 864 N.W.2d at 515; *Bienash*, 2006 S.D. 78, ¶ 14, 721 N.W.2d 435. A party who has to appeal to parol evidence, such as an affidavit, to establish authorization to self-deal by definition cannot satisfy *Studt* and *Bienash*'s requirement of clear and unmistakable language authorizing self-dealing in the power of attorney itself. Accordingly, because Morris's power of attorney did not contain clear and unmistakable language authorizing Bruckner to give self-dealing gifts to others, Bruckner's affidavit concerning Morris's intent is completely immaterial.

B. Bruckner contributed no funds to the Dakotaland account and thus her status as a joint account owner does not justify the transfers Bruckner made from that account while Morris was alive.

Bruckner's status as a joint owner of the Dakotaland account is also irrelevant because it is undisputed that Morris contributed all the funds to the Dakotaland account and that the $218,700 in transfers occurred while Morris was alive. While both joint owners are alive, joint owner A only has ownership rights vis-a-vis joint owner B to the funds, if any, that joint owner A deposited in an account: "It is generally accepted that a party to a joint bank account may only withdraw funds without liability to his co-depositor when in fact he is the real owner of the money." *Johnson-Batchelor v. Hawkins*, 450 N.W.2d 240, 241 (S.D. 1990). Real ownership is based on the contributions that each joint owner made to the account. In *Johnson-Batchelor*, the court determined that a husband and wife had "each made equal contributions to the total amount of funds in the account." *Id.* at 241-42. Consequently, the husband "was the owner of only half of the funds in the savings account, not all of them. Therefore, [the husband] was entitled to dispose of only half of the funds in the savings account without incurring liability to [his wife]." *Id.* at 242. Here, Bruckner did not contribute any funds to the Dakotaland account, and thus her status as a joint account owner did not permit her to withdraw any of Morris's funds from the account while Morris was alive without incurring liability to Morris. *See* SDCL § 29A-6-103(1) ("A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.").

Here, even Bruckner has not contended that clear and convincing evidence exists that Morris intended Bruckner to own the funds in the Dakotaland account during Morris's lifetime. To the contrary, Bruckner's own affidavit asserted that Morris

"wanted to add me as a joint owner of her checking account, because she wanted me to have her checking account *when she died.*" (PRO-SR197 ¶ 4 (emphasis added).) Bruckner likewise asserted in her summary judgment brief that by designating Bruckner as a joint owner, Morris "made the decision that the funds in the account would belong to her daughter, Pamala Bruckner, *upon Barbara Morris' death.*" (PRO-SR188 (emphasis added).) Although Wyman disputes whether Morris actually wanted Bruckner to have all the funds after Morris died because Morris's estate plan divided her property equally between Wyman and Bruckner, and Morris had designated Wyman as a 50% POD beneficiary of the account, that dispute is immaterial to this appeal. For purposes of this appeal, the important point is that Bruckner herself did not contend that Morris meant Bruckner to own the funds in the account while Morris was still alive, and Bruckner is not entitled to a better version of the facts than her own affidavit. *St. Pierre v. State*, 2012 S.D. 151, ¶ 23, 813 N.W.2d 151, 158; *Jarauld Cnty. v. Huron Med. Ctr., Inc.*, 2004 S.D. 89, ¶ 35, 685 N.W.2d 140, 148.

Moreover, even if Bruckner had contested this point, *Studt* and *Estate of Stevenson* establish that, for an attorney-in-fact, the only admissible clear and convincing evidence of an intent to allow the attorney-in-fact to take the principal's funds from a joint account during the principal's lifetime for the attorney-in-fact's personal purposes would be clear and unmistakable language articulating that ability in the power of attorney itself. *Studt*, 2015 S.D. 33, ¶ 10, 864 N.W.2d at 816 (quoting *Estate of Stevenson*, 2000 S.D. 24, ¶ 15, 605 N.W.2d at 822).

Accordingly, Bruckner's status as a joint owner of the Dakotaland account is irrelevant to the transactions that occurred while Morris was alive. Whether it was lawful

for Bruckner to transfer $218,700 from that account to Bruckner's family members in the days before Morris died depends on whether clear and unmistakable language exists in Morris's power of attorney authorizing that type of self-dealing. Morris's power of attorney, however, at most authorized Bruckner to receive gifts herself, and thus the circuit court should have granted Wyman's motion on behalf of Morris's estate to recover the $218,700 in self-dealing transfers Bruckner made to others while Morris was alive. *See Studt*, 2015 S.D. 33, ¶ 15, 864 N.W.2d at 517 (affirming summary judgment that attorney-in-fact engaged in unauthorized self dealing); *Bienash*, 2006 S.D. 78, ¶ 27, 721 N.W.2d at 437 (affirming summary judgment that attorney-in-fact engaged in unauthorized self dealing).

C. If Bruckner's transfers were improper, she may not escape the consequences of her wrongdoing by claiming all of the misappropriated funds based on survivorship rights or "tracing."

Bruckner argued, however, that even if she breached her fiduciary duties by making unauthorized transfers, Morris's estate should not recover any funds. Bruckner argued the circuit court should instead require any unauthorized transfers to be returned to the Dakotaland account and then pass entirely to Bruckner based on her survivorship rights as a joint owner. In other words, Bruckner asked the circuit court to impose no consequences on her whatsoever even if it concluded that she had breached her fiduciary duties as attorney-in-fact by making over $200,000 in unauthorized self-dealing transfers. The circuit court did not reach this argument due to its erroneous conclusion that the power of attorney permitted Bruckner to make self-dealing transfers to others, but this Court should have little trouble rejecting Bruckner's argument for multiple reasons.

Bruckner is a 50% beneficiary of Morris's estate. Consequently, to the extent that Morris's estate makes a net recovery after taking into account attorney fees and expenses, Bruckner would share 50% of that net recovery. (PRO-SR40, Item III.) Bruckner is arguing that, even if she is found to have breached her fiduciary duties, she should be able to keep all of the unauthorized transfers and does not have to share *any* of the funds with her sister through Morris's estate. The Court should bear this in mind if Bruckner suggests that Wyman's lawsuit is based on greed.

One basis for Bruckner's argument is that SDCL § 29A-6-104(1) provides that a joint owner is entitled to sums remaining on deposit at the time the other joint owner dies:

> Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created.

SDCL § 29A-6-104(1). This statute does not apply to the $218,700 in transfers Bruckner made to her family members before Morris died. Those funds were not "sums remaining on deposit at the death of" Morris due to Bruckner's own unauthorized self-dealing transfers to her family members while Morris was still alive. The statute says nothing about the status of funds misappropriated while the joint owner was alive and recovered in a lawsuit long after the owner in question has died and the account has been closed. Bruckner argues that the Court should ignore this timing issue on the theory that, if this Court voids the transfers due to Bruckner's wrongdoing, logical consistency requires it to assume the transfers never occurred and thus treat the funds as though they were sums remaining on deposit when Morris died.

But South Dakota law has never allowed tortfeasors to benefit from their own wrongdoing. Bruckner's misappropriation of funds while Morris was alive should

therefore preclude her from asserting survivorship rights concerning the Dakotaland account based on unclean hands and the well-established principle that wrongdoers should not profit from their own wrongdoing. *See In re Estate of O'Keefe,* 1998 S.D. 92, ¶ 10, 583 N.W.2d 138, 140 ("One of the established principles of equity is 'that an individual should not be allowed to profit through his or her own wrongdoing."); *Cruz v. Groth*, 2009 S.D. 19, ¶ 10, 763 N.W.2d 810, 813 ("Moreover, tortfeasors should not be able to profit from their wrongdoing by obtaining credit on damages against their victims' independent benefits."); *Talley v. Talley*, 1997 S.D. 88, ¶ 29, 566 N.W.2d 846, 852 (person with unclean hands is not entitled any equitable relief). Bruckner may contend this results in a windfall to Morris's estate, but, as this Court noted when discussing the collateral source rule, "'[i]f there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing.'" *Papke v. Harbert*, 2007 S.D. 87, ¶ 62, 738 N.W.2d 510, 531 (quoting *Moore v. Kluthe & Lane Ins. Agency, Inc.*, 234 N.W.2d 260, 269 (S.D. 1975)). This Court should not relieve Bruckner of all responsibility for her wrongdoing by allowing her to assert survivorship rights concerning funds she transferred to others in breach of her fiduciary duties.

Bruckner's argument should also be rejected because it creates perverse incentives for fiduciaries and joint owners by wrongly undermining the rule that funds in a joint account belong to the depositor of the funds during their lifetime. If Bruckner's argument were accepted, a joint owner who had contributed no funds to a joint account but knew that the other owner was nearing death could intentionally convert the entire account before the other owner died, knowing that if their wrongdoing was discovered

and a judgment was obtained against them, there would be no consequences because they would be allowed to keep the funds based on their survivorship rights. The law should encourage fiduciaries to carefully fulfill their duties, rather than insulating them from responsibility for wrongdoing.

Although these well-established principles of South Dakota law are more than sufficient to reject Bruckner's argument, Wyman notes that Ohio has held, on similar facts, that the breaching account owner forfeited survivorship rights. In *In re Estate of Mayer*, 664 N.E.2d 583 (Ohio App. 1995), the deceased joint owner, Hedwig Mayer, had created a bank account naming her niece, Jane Markwood, as a joint owner. While the aunt was alive, the niece transferred $300,000 from the joint account to an account in the niece's sole name.[3] *Id.* at 584. The Ohio Court of Appeals described the question as "what happens to the survivorship rights of a co-owner who is not the depositor of the funds in a joint and survivor account when that co-owner transfers funds out of the account during the lifetime of the one who funded the account." It held that the niece should forfeit her survivorship rights and allowed the estate to recover the funds: "[the niece] thereby forfeits her survivorship rights to the funds, and the law operates to impose a constructive trust on these funds. [The niece] must account for this money to the decedent's estate." *Id.* at 585. Well established principles of South Dakota law likewise lead to the conclusion that Bruckner forfeited her survivorship rights by making

[3] The niece also transferred $350,000 from a joint account at one institution to another joint account. Because this transfer did not affect the aunt's ownership interest, the niece did not forfeit survivorship rights concerning the $350,000. 664 N.E.2d at 585 ("Since the decedent established valid joint and survivor bank accounts, [the niece's] transfer of money to the same type of account at a different institution is not enough to defeat her survivorship rights.").

unauthorized transfers from the Dakotaland account while Morris was alive. Morris was the one harmed by the unauthorized transfers and so her estate should recover the funds.

Bruckner also argued that she was entitled to any funds she improperly transferred instead of Morris's estate based on a principle she called "tracing" that was supposedly established by the *Johnson-Batchelor* decision. This is wrong. *Johnson-Batchelor* used tracing to help a wife victimized by her husband's misappropriation of funds from a joint account recover the misappropriated funds from a third-party. *Johnson-Batchelor* never said that perpetrators of unauthorized transfers could rely on tracing to escape the consequences of their own wrongdoing.

Johnson-Batchelor concerned a joint savings account to which a husband and wife had each contributed half of the funds and therefore each owned half of the funds. 450 N.W.2d at 241-42. After the husband's death, the wife discovered that, while the husband was alive, he had "appropriated $39,080.28 in excess of the one half amount he was entitled to appropriate from the joint savings account." *Id.* at 241. He had purchased CDs in his name and the name of his daughter from his first marriage. *Id.* This Court held that the victimized wife had "an interest in the CDs in the amount of $39,080.28" because she was "entitled to trace or follow these funds into these CDs insofar as those funds represent her interest in that account." *Id.* at 242. *Johnson-Batchelor* thus supports Wyman's right as Morris's personal representative to recover funds on behalf of Morris's estate that Bruckner misappropriated from the Dakotaland account while Morris was alive even if those funds are now held by Bruckner's family members. *Johnson-Batchelor* in no way suggests that wrongdoers who breach their fiduciary duties may take

advantage of tracing. That would be contrary to the principle that wrongdoers should not escape the consequences of their wrongdoing.

Finally, the simple fact is Bruckner closed the joint account and it no longer exists. Any recovery from Bruckner belongs to Morris's estate, not a closed account. Morris's estate plan dictates that any net recovery is divided equally among Bruckner and Wyman. This Court should reject Bruckner's attempt to use her status as a joint owner of the closed Dakotaland account to recover amounts that Bruckner herself misappropriated.

2. Morris's power of attorney did not clearly and unmistakably authorize Bruckner to make self-dealing gifts to herself because it is possible for an attorney-in-fact to receive property belonging to the principal for the principal's benefit.

Bruckner also made two transfers for her own benefit totaling $6,377.16 while Morris was still alive. (PRO-SR113 to PRO-SR114; PRO-SR108 ¶¶ 6-7.) These transfers raise an important question whether language permitting an attorney-in-fact to receive a gift constitutes clear and unmistakable language authorizing the attorney-in-fact to make self-dealing gifts to herself. The circuit court held that it did by reasoning that it could not think of another rational interpretation of the ability to receive gifts. (App. 005.) In so doing, the circuit court failed to recognize that receiving is simply the reverse of giving, and that just as this Court has held that authorizing an attorney-in-fact to make gifts to any person does not authorize *self-dealing* gifts, so, too, authorizing an attorney-in-fact to receive gifts is not an express authorization to accept *self-dealing* gifts.

As discussed above, *Bienash* and *Studt* firmly establish that language authorizing an attorney-in-fact to make gifts—even to any person—is insufficient to authorize self-dealing gifts. *See Studt*, 2015 S.D. 33, ¶¶ 11-13, 864 N.W.2d at 516; *Bienash*, 2006 S.D. 78, ¶ 15, 721 N.W.2d at 435. Similarly, *Estate of Stevenson* held that a broad

authorization to a trustee to lease trust property "'in any and all other ways in which any natural person could deal with [h]er own property'" authorized the trustee to lease the property, but did not authorize her to make self-dealing leases. 2000 S.D. 24, ¶¶ 16-17, 605 N.W.2d at 822. These cases recognize that activities such as giving or leasing the principal's property can be done for the principal's benefit rather than in a self-dealing manner, and thus an authorization to give or lease the principal's property does not clearly and unmistakably authorize *self-dealing* gifts or leases. *E.g., id.* ¶ 17, 605 N.W.2d at 822 ("Therefore, the grant of these powers [to lease the property] does not authorize [the trustee] to engage in self-dealing by leasing the property to herself, her husband, or a relative. Clearly, it does not 'expressly' or 'specifically' authorize self-dealing as claimed."). It merely authorizes the attorney-in-fact to undertake that activity for the principal's benefit, not the attorney-in-fact's benefit: "Although these provisions provide the trustee with the *powers* to deal with the trust property as if it were her own, the powers must always be used *for the trust* and its beneficiaries, not for the trustee." *Id.* (emphasis is original).

Estate of Stevenson, *Bienash*, and *Studt* are built on the bed-rock principle that fiduciary agents must "'act in all things wholly for the benefit of the trust.'" *In re Estate of Moncur*, 2012 S.D. 17, ¶ 9, 812 N.W.2d at 487 (quoting *Willers*, 510 N.W.2d at 680). That is why these decisions presume that when a document authorizes a fiduciary agent to make a gift, lease property, or sell property, the agent is just authorized to give, lease, or sell for the principal's benefit rather than the agent's. Conversely, allowing an agent to undertake these activities for the agent's benefit is a potentially dangerous exception to fiduciary principles, and that is why these decisions *require* the power to give, lease, or

sell in a self-dealing manner to be expressly and specifically articulated rather than presumed.

The same should be true of the ability to receive gifts. When receiving a gift is authorized in a power of attorney, this means that the agent--standing in the shoes of the principal--receives a gift for the principal's benefit by, for example, accepting a gift to the principal from a third-party and depositing that gift in the principal's account. Bruckner argued that it is logically impossible for an attorney-in-fact to receive a gift on Morris's behalf because the power of attorney concerns items that are already Morris's property. Bruckner's argument fails to recognize that the power of attorney deals not only with property in Morris's possession when the power of attorney was signed, but also interests in property "hereafter acquired" by Morris. It is difficult to imagine more appropriate language to authorize an attorney-in-fact to take possession on behalf of the principal of gifts intended for the principal than "receive as a gift." In addition, Morris's power of attorney authorized her agent to disclaim a gift of her behalf. The powers to receive or disclaim are complementary and are not indicative of intent to authorize self-dealing. In light of an attorney-in-fact's ability to receive gifts for a principal rather than herself, it certainly cannot be said that the ability to receive property as a gift clearly and unmistakably includes receiving self-dealing gifts.

Allowing the circuit court's interpretation of "receive as a gift" to stand would set a dangerous precedent. It would allow an attorney-in-fact to give the principal's property to himself or herself without an express reference to "self-dealing" or an express statement that the attorney-in-fact "may make gifts *to himself or herself*" based merely on the insertion of the phrase "give or receive" in the midst of a long list of other activities

that the attorney-in-fact can only perform for the principal's benefit. Morris's power of attorney is a prime example. It provides:

> Not to limit the full extent of the power and authority herein granted but merely to emphasize certain powers, said attorney-in-fact shall have full, unrestricted power and authority as follows:
>
> To handle, manage, lease, sell, purchase, convey, exchange, give or receive as a gift, loan, encumber, possess, use, consume, abandon or otherwise deal in or with, in any manner, all or any portion of my real or personal property, including any interest I may have therein, whether now owned or hereafter acquired, whatsoever and wheresoever located; and to do any act or thing necessary or convenient to complete any transaction involving any of my said real or personal property, previously commended or transacted by me; to execute any and all contracts, deeds, plats, leases, notes, instruments of encumbrance, and documents of any nature or kind whatsoever with regard to any such real or personal property; to disclaim, renounce or place in trust any and all such real or personal property; to demand, receive, compromise and forgive any and all rents, income, moneys, refunds, proceeds, real and personal property whatsoever, without limitation as to kind or type of property or amount or dollar value of the same; to pay all debts, expenses, taxes insurance and other obligations, whatsoever; all the same as I could do if personally present;

(App. 009.) The record shows Morris never met the drafter because the power of attorney was requested by, and mailed to, Bruckner. (PRO-SR142, PRO-SR143.) Given this Court's past conclusion that authorizing an attorney-in-fact to make gifts is insufficient to authorize self-dealing gifts, merely adding the words "or receive" to "give" should likewise be deemed insufficient to clearly and unmistakably authorize self-dealing. Otherwise, the holdings of *Bienash* and *Studt* could be undermined by the use of "or receive" to justify self-dealing in the absence of clear and unmistakable language authorizing self-dealing. This Court should reverse the circuit court's conclusion that the power of attorney authorized Bruckner to make gifts for her own benefit while Morris was alive.

3. Summary judgment on the post-death transfers to Bruckner's son-in-law and herself should be reversed either because Bruckner forfeited her survivorship rights or because her addition to the account as an owner should be voided.

After Morris died, Bruckner transferred $175.00 to her son-in-law Nathan Miller, (PRO-SR137), and a total of $29,070.31 to herself. (PRO-SR139 to PRO-SR141; PRO-SR33 ¶ 18 and PRO-SR71 ¶ 2.) These post-death transfers should also be reversed because Bruckner forfeited her survivorship rights by making unauthorized transfers while Morris was alive as described above. These funds that were remaining in the Dakotaland account when Morris died should therefore be distributed to Bruckner and Wyman according to Morris's 50% POD designations on the Dakotaland account, so Wyman individually is entitled to summary judgment for $14,622.65.[4]

Alternatively, the post-death transfers should be reversed because Bruckner's addition as a joint owner to the Dakotaland account should be voided as a self-dealing act. Bruckner became Morris's fiduciary on October 29, 2014, when Morris signed the power of attorney. (App. 011.) Bruckner was aware that she was Morris's fiduciary because Bruckner was the one who asked an attorney to prepare the power of attorney, and the attorney sent the document to Bruckner for Morris to sign. (PRO-SR142 to SR143; PRO-SR147.) Bruckner's addition as a joint owner occurred approximately two months later, on December 17, 2014. (App. 026.) Morris and Bruckner both signed the

[4] Wyman has no objection to Morris's estate recovering the entire amount of the post-death transfers, which would also ultimately result in the net proceeds being shared by Bruckner and Wyman as beneficiaries of the estate. Wyman concluded that she was the proper plaintiff to recover the post-death transfers because *Bienash* permitted a POD beneficiary to pursue a claim against an attorney-in-fact for making a self-dealing change that reduced the POD beneficiary's interest in CDs. *Bienash*, 2006 S.D. 78, ¶ 7, 721 N.W.2d at 433. In contrast, Morris was the individual directly harmed by Bruckner's pre-death self-dealing transfers, and thus it is appropriate for Morris's estate to pursue recovery of the pre-death transfers.

account change, so each was a party to the transaction. *Id.* Only one month before the account change, on November 12, 2014, Morris had designated Wyman and Bruckner as equal POD beneficiaries. (PRO-SR46.) Adding Bruckner as a joint owner negated Wyman's 50% POD interest, and gratuitously increased Bruckner's interest in Morris's funds remaining in the account at Morris's death from 50% to 100%. After Morris's death, Bruckner used her status at joint owner to transfer $29,070.31 to herself and $175.00 to her son-in-law.

Bruckner argued, and the circuit court agreed, that, even though the Bruckner's addition gratuitously increased her interest in the Dakotaland account, that transfer was not a self-dealing transaction because Morris signed the account change herself and thus Bruckner did not use her authority as attorney-in-fact for the transfer. This ruling, however, is contrary to *Studt* and *Bienash* because it allows fiduciaries to use parol evidence to validate a self-dealing transaction. If allowed to stand, it would enable fiduciaries to gratuitously transfer assets to themselves simply by convincing their principal to sign the relevant document.

Bienash recognized that attorneys-in-fact, like other fiduciaries, "'must avoid any act of self-dealing.'" *Bienash*, 2006 S.D. 78, ¶ 14, 721 N.W.2d at 435. The circuit court's decision assumes that attorneys-in-fact are free to engage in self-dealing transactions whenever the attorney-in-fact does not have to sign the principal's name. This is incorrect. Fiduciaries must "'act in all things wholly for the benefit of the trust.'" *In re Estate of Moncur*, 2012 S.D. 17, ¶ 9, 812 N.W.2d at 487 (quoting *Willers*, 510 N.W.2d at 680). A fiduciary does not get to act for their own benefit in some instances but not others. Once Bruckner became Morris's attorney-in-fact, it was her duty to

"avoid any act of self-dealing that places h[er] personal interest in conflict with h[er] obligations" to Morris. *In re Estate of Stevenson,* 2000 S.D. 24, ¶ 9, 605 N.W.2d at 821.

In addition, *Bienash* and *Studt* prohibit the use of parol evidence to justify a self-dealing transaction. *Bienash* held that an attorney-in-fact cannot orally testify that the principal approved self-dealing. *Bienash*, 2006 S.D. 78, ¶ 24, 721 N.W.2d at 437 ("we conclude that the appropriate rationale for this Court is to adopt a bright-line rule that no oral extrinsic evidence will be admitted to raise a factual issue" concerning a principal's intent to allow self-dealing). *Studt* extended this rule to affidavits. *Studt*, 2015 S.D. 33, ¶ 14, 864 N.W.2d at 517 ("An affidavit is merely oral evidence reduced to writing. Therefore, the affidavit is inadmissible to determine whether [the principal] intended to allow [the attorney-in-fact] to self-deal.").

Bruckner conceded that the account change document is merely extrinsic evidence: "The December 17, 2014 *Account Change Authorization* is written extrinsic evidence." (CIV-SR100.) Any affidavit from Bruckner is also impermissible extrinsic evidence. The circuit court erred by relying on this extrinsic evidence to approve Bruckner's addition as a joint owner. *Studt* and *Bienash* establish that Bruckner's addition as a joint owner must stand or fall on whether the power of attorney itself clearly and unmistakably authorized self-dealing. As discussed above, it did not, and thus Bruckner's addition to the account as a joint owner should be voided.

Bruckner argued that this rule makes it impossible for someone like Morris to give gifts to a daughter who is Morris's fiduciary. This is incorrect. Morris had multiple options if she wanted to make significant gifts to Bruckner. Morris could have asked for the original power of attorney to clearly and unmistakably authorize self-dealing

activities. Even if the original power of attorney did not, Bruckner contends Morris was still competent when the account change authorization was signed. With that in mind, Morris could have simply removed Wyman as a POD beneficiary, and Bruckner would not have had to sign the account change form. Morris also could have amended her power of attorney at that time or signed a new power of attorney clearly authorizing self-dealing. Alternatively, if an attorney-in-fact knows they want to make gifts to children, they could appoint a third-party as their attorney-in-fact, which would avoid a conflict of interest entirely. *Bienash* recognized that principals and drafters can easily accommodate self-dealing issues, so the Court should reject Bruckner's contention that adhering to *Bienash* and *Studt* will make family gifts impossible. Accordingly, either because Bruckner's addition as a joint owner was voidable self-dealing or because she forfeited her survivorship rights by making unauthorized transfers before Morris died, Wyman is entitled to $14,622.65, which is 50% of Bruckner's post-death, self-dealing transfers

CONCLUSION

This Court has unyieldingly required clear and unmistakable language expressly authorizing a self-dealing activity in a power of attorney itself before an attorney-in-fact may self-deal. The circuit court therefore erred by concluding that the ability to "receive" gifts implicitly authorized Bruckner to make self-dealing gifts to others, and Morris's estate is entitled to judgment concerning the $218,700 in checks that Bruckner wrote to her family members shortly before Morris passed away.

Studt and *Bienash* also establish that authorizing an attorney-in-fact to make gifts is not sufficient to authorize self-dealing gifts. Similarly, authorizing an attorney-in-fact to receive gifts merely authorizes the attorney-in-fact to receive gifts on the principal's

behalf, so Morris's estate is entitled to judgment concerning the $6,377.16 in transfers Bruckner made for her own benefit while Morris was alive.

Last, with regard to the $29,245.31 in self-dealing transfers Bruckner made after Morris's death, Wyman is entitled to judgment for half of that amount, or $14,622.65, either because Bruckner forfeited her survivorship rights due to her breaches of fiduciary duty or because Bruckner's addition to the Dakotaland account was itself an impermissible self-dealing act.

Accordingly, Wyman respectfully requests that the Court reverse the partial summary judgment in Bruckner's favor and order the entry of judgment for Morris's estate and Wyman.

Dated this ___ day of October, 2016.

WOODS, FULLER, SHULTZ & SMITH P.C.

By_____

James A. Power
Matthew P. Bock
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Email Jim.Power@woodsfuller.com
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 8,804 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this ____ day of October, 2016.

WOODS, FULLER, SHULTZ & SMITH P.C.

By_____

James A. Power
Matthew P. Bock
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Email Jim.Power@woodsfuller.com
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of October, 2016, I electronically served via e-mail, a true and correct copy of the foregoing Appellant's Brief to the following:

Lee Schoenbeck
Joshua G. Wurgler
Schoenbeck Law
PO Box 1325
Watertown, SD 57201
Email: lee@schoenbecklaw.com
Attorneys for Appellee

_____
One of the Attorneys for Appellant

APPENDIX

A. Judgment

B. Partial Summary Judgment

C. Excerpts from Summary Judgment Hearing Including Judge Means' Ruling

D. Morris's Power of Attorney

E. Morris's Will

F. Morris's Trust Agreement

G. Dakotaland Form Designating Wyman and Bruckner a POD Beneficiaries

H. Dakotaland Account Change Transaction Among Bruckner and Morris

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF BEADLE	)	THIRD JUDICIAL CIRCUIT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

02CIV 15-0176

KAREN LEE WYMAN, Personally and as Personal Representative of the Estate of Barbara Ann Morris,

Plaintiff,

v.

PAMALA BRUCKNER,

Defendant.

JUDGMENT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

By an Order dated June 20, 2016 and filed June 21, 2016, the Court granted Pamala Bruckner's motion for partial summary judgment and denied Karen Lee Wyman's motion for partial summary judgment in this consolidated action. The parties have stipulated to the dismissal of Wyman's remaining claims with prejudice in the consolidated actions (CIV 15-0176 and PRO 15-0028). Therefore:

IT IS HEREBY ORDERED AND ADJUDGED that judgment be entered in favor of Defendant Pamala Bruckner, and that Plaintiff Karen Lee Wyman take nothing, and that Bruckner recover of Wyman costs in this action in the amount of $131.79, to be hereinafter inserted by the clerk.

Signed: 7/12/2016 10:12:24 AM

Hon. Carmen Means
Circuit Court Judge

Attest:
JOAN NETTINGA
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	ss:	
COUNTY OF BEADLE	)	THIRD JUDICIAL CIRCUIT

KAREN LEE WYMAN,	)	
	)	Civ. 15-176
Plaintiff,	)	
	)	PARTIAL SUMMARY JUDGMENT
v.	)	
	)	
PAMALA BRUCKNER,	)	
	)	
Defendant.	)	
	)	

Cross Motions for Partial Summary Judgment having come on before the Court on the 14th day of June, 2016, in the courtroom of the Beadle County Courthouse, the Honorable Carmen Means presiding, and Plaintiff Karen Lee Wyman, having appeared through her attorneys of record, Matthew Bock and James Power, and Defendant Pamala Bruckner, having appeared personally and with her attorneys Lee Schoenbeck and Joshua Wurgler, and the Court having reviewed the parties' filings, and listened to the argument of counsel, it is now hereby

ORDERED, ADJUDGED, AND DECREED that the *Power of Attorney* language clearly and unmistakably authorized the agent, Pamala Bruckner, to give or receive gifts from the property of the Principal, her mother, Barbara Morris, and therefore Plaintiff's *Motion for Partial Summary Judgment* that Pamala Bruckner breached her fiduciary duty and engaged in self-dealing is denied, and Defendant's *Motion for Partial Summary Judgment* is granted;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint account created at Dakota Federal Credit Union by Barbara Morris on December 17, 2014, did

not involve an exercise of the power under the *Power of Attorney* by Pamala Bruckner, who only signed her own name in her own personal capacity to the document.

Signed: 6/20/2016 1:08:19 PM

Attest:
JOAN NETTINGA
Clerk/Deputy

Hon. Carmen Means
Circuit Court Judge

Filed on: 6/21/2016 BEADLE County, South Dakota 02CIV15-000176

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

:SS

COUNTY OF BEADLE) THIRD JUDICIAL CIRCUIT

* *

Karen Lee Wyman, Personally and as Personal Representative of the Estate of Barbara Ann Morris,
Plaintiff,

Civ. 15-176
Pro. 15-028

v.

Pamala Bruckner,
Defendant.

Motion Hearing

* *

BEFORE: The Honorable Carmen Means,
Circuit Court Judge in and for the
Third Circuit, State of South Dakota,
Huron, South Dakota.

APPEARANCES:

Mr. James Power
Mr. Matthew Bock
Woods, Fuller, Shultz & Smith
PO Box 5027
Sioux Falls, SD 57117

For the Plaintiff

Mr. Lee Schoenbeck
Mr. Joshua Wurgler
Schoenbeck Law Office
PO Box 1325
Watertown, SD 57201

For the defendant

Proceedings were held June 14, 2016
Beadle County Courthouse

whole body of law is based upon a disagreement between the owners of a joint account about who gets how much, that never existed here.

THE COURT: Well, I want to make it clear that my decision is not based on which daughter I think was closer to the mother or whose relationship was better, I don't think I'm allowed to consider those things when I consider the power of attorney and the grant that it gave to Pam as the attorney in fact. That being said, I think I have to read the plain language and read what it means. I understand that there is a body of law in South Dakota that says self dealing must be explicit, but I don't know how -- I don't think there's any other meaning that I can give the language in the power of attorney other than it authorized self dealing because it allowed Pam to both give and receive gifts from Barbara's property, and if I -- I don't know what other meaning I can give that language other than to say it doesn't have any meaning at all because it didn't use the word self dealing. To my mind the undisputed facts that are before the Court are that the power of attorney both gave Pam Bruckner the power to give gifts to others but also to receive gifts herself from Barbara's estate and personal property, not estate, she was alive at that time, but from her property Pam was allowed to receive gifts for herself, and if that doesn't authorize self dealing I don't know what language does other

than if you actually use the words self dealing in your power of attorney which I guess would have removed any issue in this matter, but I don't know how I give those -- that phrase meaning other than to say it authorizes self dealing. Based on that and the undisputed facts that are before the Court it would seem to me that the transactions prior to death that happened, the 225,000 or so transactions were authorized by the power of attorney and so I'm not going -- I'm going to grant summary judgment for Miss Bruckner in this matter as relates to those which means to me I don't need to get to the issue of tracing and I don't need to get to the issue of where those funds should go if I set aside those transactions. I don't believe it's appropriate to set those aside, I believe that they were authorized under the power of attorney and to say otherwise to me takes away the meaning of the clause that existed. I understand respondent's argument that what it would mean is that she could receive gifts on Barb's behalf as opposed to receive gifts herself, I don't find that that's what that language means. It seems to me that it's clear and unequivocal that Pam can both give gifts to others and she can receive gifts herself from Barbara's property. And so based on the undisputed material facts it would seem appropriate to grant summary judgment for Miss Bruckner. That being said, I always find it difficult when there are so many issues and cross issues, so I'm going to

address both counsel and see if there are any issues then that I would be leaving unresolved by my decision. Mr. Schoenbeck from your perspective?

MR. SCHOENBECK: Can I go second?

THE COURT: All right, it doesn't matter. So from the petitioner's perspective, are there other issues out there that I haven't addressed in this decision that I yet need to address?

MR. BOCK: Judge, just understand the give and receive means that Pam can receive herself and then the give can be to family members? Because the receive was only about $6,000 in transactions.

THE COURT: I do understand that, but my thought is that if essentially she could have made a gift to herself that always authorize her to give gifts to others, and these people were not just Pam's family, they were Barbara's family. It could be the self dealing in the sense of she was giving to her own family and I understand that but if I find and I do find that if the power of attorney authorize her to do so then I'm granting summary judgment for Miss Bruckner. Mr. Schoenbeck, from your perspective are there other issues?

MR. SCHOENBECK: Just one I'd ask the Court to address if the Court's of mind to because it's sort of a little bit on an unrelated track and just in case there's an appeal and that would be whether or not the Court finds that

Barb creating the joint account agreement is an exercise of the power of attorney.

THE COURT: Right. And I didn't know that I needed to go there because I was not voiding these transactions, however I do agree Mr. Schoenbeck, that Barbara Morris creating the account where she made Pam a joint owner is not a self dealing act, the fact that Pam signed the document was Pam signing the document as a joint owner but not as a power of attorney for Barbara Morris and it would be my finding that Barbara Morris acted on her own accord when she started that.

MR. SCHOENBECK: Thank you, your Honor.

THE COURT: So if there need to be findings on that that would be what they would be. All right. We'll be in recess. Thank you both -- thank you all.

(Proceedings concluded.)

Prepared by:
Vaughn P. Beck
Attorney at Law
PO Box 326
Ipswich, SD 57451
605-426-6319

DURABLE POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that I, Barbara A. Morris, currently of PO Box 261, Wolsey, South Dakota 57384, do hereby make, constitute and appoint my daughter, Pamela Bruckner, currently of PO Box 261, Wolsey, SD 57384, to be my true and lawful attorney-in-fact, for me and in my name, place and stead, to do each and every act and thing, whatsoever, in regard to reserving no power in myself, whatsoever.

Not to limit the full extent of the power and authority herein granted but merely to emphasize certain powers, said attorney-in-fact shall have full, unrestricted, power and authority as follows:

To handle, manage, lease, sell, purchase, convey, exchange, give or receive as a gift, loan, encumber, possess, use, consume, abandon or otherwise deal in or with, in any manner, all or any portion of my real or personal property, including any interest I may have therein, whether now owned or hereafter acquired, whatsoever and wheresoever located; and to do any act or thing necessary or convenient to complete any transaction involving any of my said real or personal property, previously commenced or transacted by me; to execute any and all contracts, deeds, plats, leases, notes, instruments of encumbrance, and documents of any nature or kind whatsoever with regard to any such real or personal property; to disclaim, renounce or place in trust any and all such real or personal property; to demand, receive, compromise and forgive any and all rents, income, moneys, refunds, proceeds, real and personal property whatsoever, without limitation as to kind or type of property or amount or dollar value of the same; to pay all debts, expenses, taxes, insurance and other obligations, whatsoever; all the same as I could do if personally present;

To handle and deal with all of my monies, cash, accounts, and similar items; to make deposits to or withdrawals from any of my bank, savings & loan, or similar accounts; to write or negotiate checks, drafts or similar instruments on any such account; to cash, redeem, invest or reinvest in savings certificates, certificates of deposit, saving bonds, including U.S. Savings Bonds, money market certificates, treasury notes or bills, mutual funds, money market accounts, annuity funds, retirement accounts and any other such similar investments; to buy, sell, assign, encumber or otherwise deal in any stocks, stock options or rights (including the related stock voting and proxy voting rights), bonds, debentures, notes, securities or similar property, whether traded over the

counter, on the open market, or otherwise; and to invest in any venture or activity whatsoever; all the same as I could do if personally present;

To purchase, maintain, surrender, assign, cash, borrow against, collect on, cancel or otherwise deal in any kind or type of insurance, in any amount, including but not being limited to life insurance (on my life, or on the life of anyone I may have an insurable interest in), health, hospital, medical, nursing home or similar insurance, disability insurance, property, casualty, liability, automobile or similar insurance and any other insurance that I may be interested in if personally present;

To institute, defend, intervene in, compromise, settle and complete any and all civil, criminal or administrative proceedings and similar actions or matters, for or on my behalf;

To deal, correspond and/or negotiate with, execute all documents (applications, returns, forms, etc.), relating to any governmental or regulatory agency or authority, including but not being limited to any federal, foreign, state, county, township, city, school or similar body, the Internal Revenue Service, Social Security Administration, Veteran's Administration, state or federal medicare, medicaid and SSI authorities, civil service agencies, the U.S. Dept. of Agriculture and it's agencies (FmHA, ASCS, CCC, etc.), state and local real estate and other taxing authorities, and all similar and other agencies and authorities; to collect, receive, endorse, deposit, spend, pay, refund, compromise, or other-wise deal in all checks, payments, benefits, refunds or monies whatsoever from any such agency or authority; all the same as I could do if personally present;

To represent me before any office of the Internal Revenue Service for the following tax matter: Individual Income Tax (Form 1040 and attached forms and schedules), Corporate Income Tax (Form 1120 and attached forms and schedules), Fiduciary Income Tax (Form 1041 and attached forms and schedules), Gift Tax (Form 709 and attachments), Estate Tax (Form 706 and attachments), Employment Taxes (FICA, withholding, etc.), Information Returns (Forms 1065, 1099's, W-2's, etc.), and all other tax matters, for the years or periods, from calendar year, 2000, through the present calendar year, and thereafter; my attorney-in-fact is authorized to receive confidential information and to perform any and all acts that I can perform with respect to the above specified tax matters (specifically including the power to receive refund checks and the power to sign returns, forms and all documents, whatsoever), including the power to deal and negotiate with the IRS, pay, compromise and settle all such taxes, interest and penalties, if any, and the power to receive originals or copies of all notices and all other written communications in proceedings involving the above tax matters;

To have absolute and unrestricted access, either by way of written or oral request, to all of my records, papers, safety deposit and similar boxes, information or any other matter or thing that pertains to me or any of my business or personal affairs; the same as I could obtain if personally present; and

To make any health care decisions for me and on my behalf which I could make if I had decisional capacity to do so, including but not being limited to the approval of, consent to,

withdrawal of any consent, or rejection of any medical or psychological care, treatment or procedure, whatsoever, including any such decision pertaining to my possible entry into any medical facility, hospital or nursing home, and including all matters involving artificial nutrition or hydration, or life prolongation, subject only to the limitations prescribed by applicable law.

I grant and give my said attorney-in-fact full power and authority to do and perform each and every act and thing whatsoever, as fully as I could do if present, with full power of substitution and revocation, I am hereby ratifying and confirming all that my said attorney-in-fact shall lawfully do or cause to be done by virtue of this Power of Attorney given to Pamela Bruckner.

This Power of Attorney shall not be affected by disability of the principal and shall continue until terminated or revoked in writing, or as otherwise provided by law.

My said attorney-in-fact shall be authorized to make and present photocopies of this Power of Attorney, which photocopies shall have the same force and effect as any original hereof.

This Power of Attorney, and all actions and decisions of my said attorney-in-fact shall bind upon me, my heirs, personal representatives, administrators, successors and assigns.

WHEREOF, I have hereunto set my hand and seal at _____, _____ County, South Dakota, this _____ day of October, 2014.

Barbara A. Morris

Barbara A. Morris

STATE OF SOUTH DAKOTA)
:ss
COUNTY OF Beadle)

On this the 29th day of October, 2014, before me, the undersigned officer, personally appeared Barbara A. Morris, known to me 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.

Seal (SEAL)

Notary Public, South Dakota

My commission expires:
8-9-2017

Last Will and Testament

OF

BARBARA ANN MORRIS

I, BARBARA ANN MORRIS, residing in Brevard County, Florida, being of sound mind and memory, do make, publish and declare this my Last Will and Testament, and hereby revoke all former Wills and Testaments and Codicils thereto by me made.

1. I direct the payment of all my unsecured legal debts and funeral expenses.

2. I devise certain items of tangible personal property not otherwise specifically disposed of by this Will, excluding money and items used in my trade or business, if any, to the persons listed on the last dated writing made for this purpose, signed by me, and in existence at the time of my death. Such writing shall have no significance apart from its effect on the distribution of my property by this Will. In the event no such list is discovered within thirty days after the appointment of my Personal Representative, then, and in that event, it shall be presumed that I left no such writing and all my personal property shall pass in accordance with the other provisions of this Will.

3. I give, devise and bequeath all of the rest and remainder of my estate and property, real, personal and mixed, wheresoever the same may be situated and of whatsoever kind or character of which I may die, seized and possessed, or to which I may be or become in any way entitled or have any interest, or over which I may have any power of appointment, to the Trustee of the "BARBARA ANN MORRIS TRUST", which was established under that certain Trust Agreement heretofore executed by me, as Grantor and as Trustee, on the 6th day of March, 2014, for distribution as provided therein.

PRO 15:28
Circuit Court, Third Judicial Circuit
BEADLE COUNTY, SOUTH DAKOTA
FILED 6/2/15 Peggy Hotchkin
Clerk / Deputy

4. I hereby appoint my daughter, KAREN LEE WYMAN, Personal Representative of this my Last Will and Testament, and in connection therewith, I direct that she be relieved of any requirement for the giving of bond, and if notwithstanding this direction, any bond is required by law, statute or rule of Court, no sureties be required thereon. In the event my said daughter shall not survive me or for any reason be unable to serve or cease to act as such Personal Representative, I hereby appoint my daughter, PAMALA JEAN BRUCKNER as Personal Representative hereof, waiving bond as aforesaid.

5. I confer upon the Personal Representative of this my Last Will and Testament, with respect to the management and administration of my property in my estate, the following discretionary powers in addition to the powers and authority otherwise granted by law, without limitation by reason of specification.

a. To retain any such property for such period of time as she may deem advisable, without liability for depreciation or loss; to deposit any monies at any time constituting a part of my estate, in one or more banks, savings or commercial, in such form of account, whether or not interest bearing and without limitation as to the amount of any such account, or in the discretion of the Personal Representative, to hold any such monies uninvested.

b. To lease real property for such period of time, with or without an option to purchase, and upon such terms as she may deem advisable.

c. To borrow money for any purpose whatsoever and to mortgage real property and pledge personal property as security for such loans.

d. To sell, exchange or otherwise dispose of any or all of my property, real or personal, at public or private sale, at any time and from time to time, and for such consideration, and upon such terms, including terms of credit, as she may deem advisable.

6. For the purpose of this Will, a person shall not be deemed to have survived me if he or she dies before the expiration of ten days following the date of my death, and I hereby declare that I shall be deemed to have survived such person and this Will and all of its provisions shall be construed upon that assumption and basis.

IN WITNESS WHEREOF, I, BARBARA ANN MORRIS, have to this my Last Will and Testament, subscribed my name and set my seal, this 31 day of May, 2014.

Barbara Ann Morris (SEAL)
BARBARA ANN MORRIS

Signed, sealed, published and declared by BARBARA ANN MORRIS, the Testatrix, above-named, to be her Last Will and Testament, in our presence, and we at her request and in her presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses, this 31 day of May, 2014.

Edward L. Stahley residing at Rockledge, Florida
Edward L. Stahley

Valerie J. Righenzi residing at Merritt Island, Florida
Valerie J. Righenzi

[illegible] residing at Merritt Island

STATE OF FLORIDA
COUNTY OF BREVARD

We, BARBARA ANN MORRIS, EDWARD L. STAHLEY, VALERIE J. RIGHENZI and _____, the Testatrix and witnesses respectively, whose names are signed to the attached and foregoing instrument, being first duly sworn, do hereby declare to the undersigned officer that the Testatrix signed the instrument as her Last Will and Testament, and that she signed voluntarily, and that each of the witnesses, in the presence of the Testatrix, at her request, and in the presence of each other, signed the Will as a witness and that to the best of the knowledge of each witness, the Testatrix was at the time 18 or more years of age, of sound mind and under no constraint or undue influence.

_____
BARBARA ANN MORRIS, Testatrix

_____
Edward L. Stahley, Witness

_____
Valerie J. Righenzi, Witness

_____
Witness

Sworn to, subscribed and acknowledged before me by BARBARA ANN MORRIS, the Testatrix, and sworn to and subscribed before me by EDWARD L. STAHLEY, VALERIE J. RIGHENZI, and _____ the witnesses, this 5th day of _____, 2014.

_____
Edward L. Stahley
Notary Public - State of Florida
At Large

EDWARD L. STAHLEY
MY COMMISSION # EE 014284
EXPIRES: March 24, 2018

REVOCABLE TRUST AGREEMENT

THIS AGREEMENT made this 21 day of _____, 2014, between BARBARA ANN MORRIS, hereinafter referred to as the Grantor, and BARBARA ANN MORRIS, hereinafter referred to as the Trustee.

ITEM I: STATEMENT OF PURPOSE AND BENEFICIARIES

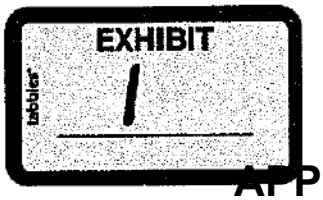
A. Grantors have established this Trust to be known hereafter as the "BARBARA ANN MORRIS TRUST", in order to provide a means for the management of certain of Grantor's properties and perhaps the proceeds of insurance upon the Grantor's life, for the management of such further property interests as may be deposited with the Trustee by Grantor, and for the maintenance, comfort and support of Grantor during her life and of Grantor's family after Grantor's death, all in the manner hereinafter provided.

B. Grantor has created this Trust by depositing with the Trustee the property described in Schedule A, which is annexed hereto. From time to time, additional property, perhaps including policies of life insurance, may be deposited with Trustee if accepted by her for administration under this instrument. Grantor by Grantor's will may direct that a part or all of Grantor's estate and property over which Grantor has a power of appointment, shall be delivered to Trustee for administration by her under this agreement, after Grantor's death.

ITEM II: RECEIPT AND COVENANTS OF TRUSTEES

A. Trustee acknowledges receipt of the property described in Schedule A.

B. Trustee will manage, invest and reinvest the property described in Schedule A and will hold any policies of life insurance deposited with Trustee, and will receive, manage, invest



and reinvest such additional property as may be deposited with Trustee and accepted by her, and all of the proceeds of that property, upon the uses and for the purposes hereafter set forth. The Trustee has the power and authority to buy, sell, and transfer real and personal property, mortgage real property and pledge personal property.

C. Trustee will accept and will administer as part of the Trust Estate whatever property is to be delivered to Trustee under the provisions of Grantor's Will to be administered.

D. Trustee will use her best effort to collect when due, and thereafter will administer in accordance with the terms of this instrument, the proceeds of all policies of insurance made payable to Trustee. Trustee shall have no responsibility to pay premiums upon those policies, nor to pay the principal or the interest of any loans secured by her except in her discretion to the extent of income and other assets of the Trust. The insurance companies that shall have issued the policies shall have no responsibility other than to pay to Trustee the proceeds of the policies when they become due and payable. Trustee shall not be required to take any legal proceedings concerning the policies until Trustee is indemnified to her sole satisfaction.

E. Either Grantor or any Trustee shall have the power to designate an agent as having the authority to sign on any bank, savings and loan, brokerage, mutual fund, or other account held by this Trust. Said authorized signer may be a Successor Trustee that has not yet assumed the duties of Trustee. Said agent shall act in a fiduciary capacity and shall be accountable to the Trust; however, any financial institution or other third person who deals with the authorized signer may rely upon all actions taken by the authorized signer as binding the Trust without inquiry. The

authority granted to the authorized signer shall survive the incapacity or death of the Grantor, but may be revoked by the Trustee. The power herein granted shall include the power to execute a Power of Attorney.

F. Upon the death of Grantor, the Trustee shall make such gifts of the tangible personal property of the Grantor as may be directed by the Grantor's Will, or as may be directed by a list, letter, or other writing of the Grantor permitted by the Will (whether or not probated). The cost of storing, packing, shipping and insuring any tangible personal property gift prior to delivery to its intended recipient shall be paid by the Trust.

ITEM III: DISPOSITIVE PROVISIONS

The Trustee shall administer this Trust for the purpose of paying the net income, at least annually or more often as directed by the Grantor, to BARBARA ANN MORRIS, until the death of BARBARA ANN MORRIS. The Trustee shall also, if requested by the Grantor, pay from the Corpus or principal of this Trust, such amounts as may be deemed necessary by Grantor for the support and maintenance of the said BARBARA ANN MORRIS. Upon the death of BARBARA ANN MORRIS, this Trust shall terminate and the remaining corpus, principal and accrued interest shall be distributed to Grantor's two (2) daughters, PAMALA JEAN BRUCKNER and KAREN LEE WYMAN, equally, per stirpes.

ITEM IV: LIFETIME RESERVATIONS BY GRANTOR

During Grantor's life, Grantor shall have the right to do the following acts:

A. To revoke this instrument entirely and to receive from the Trustee all of the Trust property remaining after making payment or provision for payment of all expenses connected with the administration of this Trust.

B. From time to time to amend this instrument in any and every particular; provided, however, that the duties and responsibilities of the Trustee shall not be changed without the written consent of the Trustee.

C. From time to time to withdraw from the operation of this Trust any part or all of the Trust property.

D. Upon written request by Grantor, Trustee will assent to or join in the execution of any instrument provided to her by Grantor and designed to enable Grantor to exercise any of the rights reserved by the provisions of this item.

E. Grantor reserves the right to reside upon any property placed into this trust as Grantor's permanent residence during Grantor's life, it being the intent of this provision to preserve in Grantor the requisite beneficial interest and possessory right in and to such real property, to comply with Section 196.031 and Section 196.041 of the Florida Statutes, such that Grantor's possessory right constitutes in all respects, "equitable title to real estate," as that term is used in Section 6, Article 7 of the Constitution of the State of Florida.

ITEM V: ADMINISTRATION IN THE EVENT OF INABILITY TO SERVE

In the event the Trustee, shall be unable to act as Trustee during the term of this Trust, Grantor hereby designates her daughter, KAREN LEE WYMAN, to act as Successor Trustee, during such period of inability to serve. In the event KAREN LEE WYMAN, fails to survive or for any reason be unable to act or shall cease to act as Successor Trustee, Grantor hereby designates her daughter, PAMALA JEAN BRUCKNER to act as Successor Trustee during such period of inability to serve. In the event that the Trustee is restored to the ability to serve, said Trustee shall reassume the duties as Trustee of the Trust and the said KAREN LEE WYMAN or

the said PAMALA JEAN BRUCKNER, shall no longer act as Successor Trustee. A written statement from a medical doctor shall be sufficient to establish "ability or inability of a trustee to serve."

ITEM VI: ADMINISTRATION AFTER GRANTOR'S DEATH

After the death of the Grantor, Grantor hereby designates KAREN LEE WYMAN, to act as successor Trustee, who shall as soon as practicable distribute the remaining corpus and principal in accordance with the terms and provisions of ITEM III herein. In the event KAREN LEE WYMAN, fails to survive or for any reason be unable to act or shall cease to act as Successor Trustee, Grantor hereby designates PAMALA JEAN BRUCKNER, to act as Successor Trustee, who shall as soon as practicable distribute the remaining corpus and principal in accordance with the terms and provisions of ITEM III herein.

ITEM VII: PAYMENT OF THE ESTATE TAXES

The Grantor directs that the Trustee shall have the power to pay a portion of any Federal Estate taxes owed by the estate of either of the Grantor, in the proportion that the value which those assets of this Trust constituting a part of the gross estate of said Grantor bears to her total gross estate.

ITEM VIII: ADDITIONS TO TRUST

From time to time further real and personal property may be deposited with the Trustee hereunder; and the Grantor may direct by the provisions of her last Will, that some portion of her probate estate shall pass to the Trustee named herein to be administered under the terms of this Trust Agreement after the death of Grantor.

ITEM IX: AMENDMENTS TO TRUST

All amendments to this Trust, including the addition of other property to the Trust and the changing of beneficiaries, their respective shares, and plan of distribution, shall be made by an instrument in writing signed by the Grantor and served upon the Trustee, and the original of such instrument shall be attached to the original of this Trust Agreement and maintained in the possession of the Trustee.

ITEM X: APPLICABLE LAW CLAUSE

This instrument has been prepared and executed in the State of Florida, and the Grantor and Trustee is a resident of the State of Florida. All questions concerning the meaning and intentions of the terms of this instrument and concerning its validity and all questions relating to performance under it shall be judged and resolved in accordance with the laws of the State of Florida.

IN WITNESS WHEREOF, the Grantor and Trustee has hereunto set her hand and seal and have caused these presents to be executed this 25th day of MARCH, 2014.

Edward L. Stanley, Witness

Barbara Ann Morris (SEAL)
BARBARA ANN MORRIS

Valerie J. Righenzi, Witness
(As to Grantor)

"GRANTOR"

Signed, sealed and delivered
in the presence of:

Edward L. Stanley, Witness

Barbara A. Morris (SEAL)
BARBARA ANN MORRIS

Valerie J. Righenzi, Witness
(As to Trustee)

"TRUSTEE"

STATE OF FLORIDA
COUNTY OF BREVARD

BEFORE ME personally appeared BARBARA ANN MORRIS Grantor and Trustee in the foregoing Revocable Trust Agreement, to me well known, and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged before me that she executed the same for the purposes therein expressed.

WITNESS my hand and official seal this 25th day of MARCH, 2014.

EDWARD L. STAHLEY
MY COMMISSION # EE 841528
EXPIRES: March 22, 2015
Bonded Thru Budget Notary Services

Edward L. Stahley
Notary Public - State of Florida
At Large

Signed, sealed, published and declared by the above named Grantor and Trustee in the presence of us who have seen the Grantor and Trustee sign this instrument, and who have affixed our names as attesting witnesses hereto, in her presence, at her request, and in the presence of each other, this day and year last above written.

Edward L. Stahley residing at Rockledge, Florida

Valerie J. Righenzi residing at Merritt Island, Florida

residing at

SCHEDULE "A" TO REVOCABLE TRUST AGREEMENT

DATED MARCH 25, 2014

BETWEEN BARBARA ANN MORRIS, GRANTOR

AND

BARBARA ANN MORRIS, TRUSTEE

---

1. HOUSE AT 585 PARKSIDE AVE, MERRITT ISLAND, FL 32953.

2.

3.

4.

Dakotaland FEDERAL CREDIT UNION

EXHIBIT a

LOANLINER

ACCOUNT CARD

Member No: 59690-0

MEMBER APPLICATION AND OWNERSHIP INFORMATION

Member/Owner: BARBARA A MORRIS	
Street: 244 CATALPA AVE SE PO BOX 261	SSN/TIN: 524-46-7603
City/State/Zip: WOLSEY, SD 57384	Driver's Lic. No: M620-061-41-596-0
Home Phone: (605) 350-8822 ☐ Listed ☐ Unlisted	Date of Birth: Mar 16, 1941
Work Phone:	Password: ALEXANDER
E-mail:	Membership Eligibility: Membership Group
Employer:	

ACCOUNT OWNERSHIP

Designate the ownership of the accounts and responsibility for the services requested.

☒ Individual ☐ Joint Account with Rights of Survivorship ☐ Joint Account without Rights of Survivorship

Joint Owner:	SSN/TIN:
Street:	Driver's Lic. No:
City/State/Zip:	Date of Birth:
Home Phone: ☐ Listed ☐ Unlisted	Password:
Work Phone:	E-mail:
Joint Owner:	SSN/TIN:
Street:	Driver's Lic. No:
City/State/Zip:	Date of Birth:
Home Phone: ☐ Listed ☐ Unlisted	Password:
Work Phone:	E-mail:
Joint Owner:	SSN/TIN:
Street:	Driver's Lic. No:
City/State/Zip:	Date of Birth:
Home Phone: ☐ Listed ☐ Unlisted	Password:
Work Phone:	E-mail:

ACCOUNT DESIGNATIONS

☒ Payable on Death (POD)/Trust Account ☐ All Accounts ☐ Designate Specific Accounts _____

Beneficiary/POD Payee: KAREN WYMAN
Street:
City/State/Zip: MERRITT ISLAND FL 00000

Beneficiary/POD Payee: PAMALA BRUCKNER
Street:
City/State/Zip: WOLSEY SD 00000

☐ UTMA/UGMA (as custodian for _____ (minor) under the Uniform Transfers/Gifts to Minors Act)
Minor's SSN/TIN:

☐ Agency Print Name of Agent: _____
Signature _____ Date: _____

☐ Other: ☐ All Accounts ☐ Designate Specific Accounts _____ ☐ See Account Authorization Card

ACCOUNT TYPE

All of the terms, conditions, form of account ownership, account selection and other information indicated on this Card apply to all of the accounts listed unless the Credit Union is notified in writing of a change.

	Suffix		Suffix
☒ Share/Savings:		☐ Money Market:	
☒ Share Draft/Checking:		☐ HSA:	
☐ Share Certificate/Certificate:		☐ Other:	

The account number for each of the accounts listed consists of the suffix added to the end of the Member Number listed in the "MEMBER APPLICATION AND OWNERSHIP INFORMATION" section. If this Card applies to more than one account of the same type, more than one suffix will be listed for that account type.

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ACCOUNT SERVICES

- ☐ Payroll Deduction/Direct Deposit:
- ☐ Audio Response:
- ☐ Overdraft Protection (Indicate transfer priority.):
- ☐ ATM Card: ☐ Debit Card:
- ☐ PC Access/Internet Banking:
- ☒ Other: **Under separate agreement**

TIN CERTIFICATION AND BACKUP WITHHOLDING INFORMATION

Under penalties of perjury, I certify that:

(1) The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued), and

(2) I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and

(3) I am a U.S. citizen or other U.S. person. For federal tax purposes, you are considered a U.S. person if you are: an individual who is a U.S. citizen or U.S. resident alien; a partnership, corporation, company, or association created or organized in the United States or under the laws of the United States; an estate (other than a foreign estate); or a domestic trust (as defined in Regulations section 301.7701.7).

Certification Instructions. Cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. Cross out item 3 and complete a W-8 BEN if you are not a U.S. person.

AUTHORIZATION

By signing below, I/we agree to the terms and conditions of the Membership and Account Agreement, Truth-in-Savings Disclosure, Funds Availability Policy Disclosure, if applicable, and to any amendment the Credit Union makes from time to time which are incorporated herein. I/We acknowledge receipt of a copy of the agreements and disclosures applicable to the accounts and services requested herein. If an access card or EFT service is requested and provided, I/we agree to the terms of and acknowledge receipt of the Electronic Fund Transfers Agreement and Disclosure. *The Internal Revenue Service does not require your consent to any provision of this document other than the certifications required to avoid backup withholding.*

X Barbara A. Morris	11/12/14	X	
Signature	Date	Signature	Date
X		X	
Signature	Date	Signature	Date

FOR CREDIT UNION USE ONLY ☐ See Account Change Card ☐ See Insurance Beneficiary Card

Date of Membership:	Opened/App'd by:	Member Verification:
☐ Credit Report	☐ Check Verify	☐ PIN Request
☐ Access Card	☐ Audio Response	☐ PC Access/Internet Banking

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Dakotaland FEDERAL CREDIT UNION

EXHIBIT 3

Account Change Authorization

Member | Owner: Barbara Morris Member Number: 59690-0 Employee Initials: BW
Date: 12-17-14

CHANGE IN JOINT OWNERS:

Adding Joint Owner (requires signatures of all owners | joint owners) #21148-4

Name: Pamela Bruckner SSN: 525-19-0900
Address: PO Box 261 DOB: 9-11-1960
City, State, Zip: Dolby SD 57384 Driver's License: 00754227
Phone Number: 605-412-0199 Secure Word: Martin

Removal of Joint Owner (requires the signature of the individual being removed from the account)

Name: _____

NAME CHANGES: (requires only signature that the name change affects and documentation to support name change)

Current Name: _____ Updated Name: _____

Departments to Notify: ☐ Member Services: ☐ Consumer Loans: ☐ Card Services: ☐ FICS:

BENEFICIARY DESIGNATION (requires signatures of all owners | joint owners)
List all account beneficiaries below. This will override any previous beneficiary designated.

Name: _____ Name: _____
City, State, Zip: _____ City, State, Zip: _____
Name: _____ Name: _____
City, State, Zip: _____ City, State, Zip: _____

CHECKING SUFFIX CHANGES

Adding a checking suffix (requires signatures of all owners | joint owners:) ☐

Closing a checking suffix (requires signature of one owner:) ☐ Reason for closing: _____

ACCOUNT DEMOGRAPHIC CHANGES (requires signature of one account owner or employee verified)

Name: _____ New email address: _____
New Address: _____ Phone Number: _____
City, State, Zip: _____ Departments to Notify: ☐ Member Services: ☐ FICS
How Member was Verified (required:) _____
If change affects more than one account, please list: _____

Account Information Disclosure (requires signature of all owners | joint owners)

I authorize _____ to receive account information until I revoke this authorization in writing.

I revoke authorization for _____ to receive account information.

By signing below, I/We agree to the changes on the account and I/We understand that this is a modification of the original account agreement. I/We also acknowledge that I/we have received all disclosures at the time the account was established and any amendments to those disclosures.

X Barbara A. Morris 12/17/14
Signature: Date: Signature: Date:

X Pamela Bruckner 12/17/14
Signature: Date: Signature: Date:

Everything We Do, We Do for *You!*

APP 026

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 27935

KAREN LEE WYMAN, Personally and as Personal Representative of the Estate of Barbara Ann Morris,

Plaintiff and Appellant,

vs.

PAMALA BRUCKNER,

Defendant and Appellee.

Appeal from the Circuit Court
Third Judicial Circuit
Codington County, South Dakota

HONORABLE CARMEN MEANS
Presiding Judge

APPELLEE'S BRIEF

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PRELIMINARY STATEMENT

Appellant Karen Lee Wyman will be referred to as "Wyman;" Appellee Pamala Bruckner as "Bruckner;" decedent Barbara Morris, mother of Bruckner and Wyman, as "Morris;" the motions hearing transcript as "HT" followed by the appropriate page number; and the Appendix for this brief as "App."

For consistency's sake, this brief will follow Appellant's manner of referencing the settled record: the probate pleadings will be referred to as "PRO-SR__" and the civil pleadings as "CIV-SR__."

JURISDICTIONAL STATEMENT

This is an appeal from a Partial Summary Judgment and Judgment entered after a June 14, 2016, motions hearing. App. 1-3. The Partial Summary Judgment was entered on June 20, 2016, App. 2-3, and the Judgment was entered on July 12, 2016, App. 1. The motions for partial summary judgment were heard before the Honorable Carmen Means in a motions hearing in the Third Judicial Circuit Court, Beadle County. Plaintiff Karen Lee Wyman filed a Notice of Appeal on July 1, 2016. PRO-SR 202.

STATEMENT OF LEGAL ISSUES

1. Morris owned an account at Dakotaland Federal Credit Union, and she signed a Dakotaland bank form that made Bruckner joint owner of the account. Bruckner signed her own name on the same form, accepting joint ownership of the account. At the time, Pamala Bruckner was attorney-in-fact for her mother, Barbara Morris. Did Morris have legal authority to create the joint account?

   The circuit court's Partial Summary Judgment was that Barbara Morris had authority to create the joint account, and that Bruckner's signing of the account form was not an exercise of the power of attorney; rather, Bruckner signed her own name in her own capacity in the account form.

SDCL 43-4-2, 43-4-4, 43-4-7;
Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431;
Studt v. Black Hills Fed. Credit Union, 2015 S.D. 33, 864 N.W.2d 513; and
Estate of Stevenson, 2000 S.D. 24, 605 N.W.2d 818.

2. In summary judgment, a party who does not dispute a material fact is deemed to have admitted it. Bruckner filed additional material facts concerning Morris's intent that Wyman did not dispute. The additional material facts show Morris intended to let Bruckner write the checks she wrote on the joint account. Could the circuit court decide an intent issue based upon those undisputed facts?

   The circuit court did not address this issue.

   SDCL 15-6-56(c);
   Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15;
   Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431; and
   Hein v. Zoss, 2016 S.D. 73, ---N.W.2d---.

3. After Morris made Bruckner joint owner of the Dakotaland account, Bruckner wrote several checks on the account. Were Bruckner's check-writing acts permissible acts of a joint owner?

   South Dakota statutory law gives a joint owner authority to write checks on the joint account.

   SDCL 29A-6-101 through 29A-6-104;
   Johnson-Batchelor v. Hawkins, 450 N.W.2d 240 (S.D. 1990); and
   McDonough v. Kahle, 1999 S.D. 14, 588 N.W.2d 600.

4. The power of attorney gave Bruckner the authority to "give or receive as a gift . . . all or any portion of my real or personal property . . . ." Does that language constitute clear and unmistakable language authorizing Bruckner to self-deal?

   The circuit court's Partial Summary Judgment was that the power of attorney clearly and unmistakably authorized Bruckner to give or receive gifts from Morris's property, and therefore the checks Bruckner wrote on the Dakotaland account to her family and herself were permitted self-dealing and did not constitute breaches of Bruckner's fiduciary duties.

   Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431;
   Prunty Const., Inc. v. City of Canistota, 2004 S.D. 78, 682 N.W.2d 749; and
   Estate of Stevenson, 2000 S.D. 24, 605 N.W.2d 818.

5. Bruckner disbursed the bulk of the funds in the joint account the day before Morris died. If Bruckner should not have disbursed the funds, what should their disposition be?

> The circuit court did not reach this issue. Under the *Johnson-Batchelor v. Hawkins* case, it is appropriate to use the concept of tracing to honor Morris's intent—that the funds go to Bruckner.
>
> *Johnson-Batchelor v. Hawkins*, 450 N.W.2d 240 (S.D. 1990).

STATEMENT OF THE CASE

This appeal originated from two Beadle County cases (a probate case and a civil case) brought by Wyman personally and as personal representative of Morris's estate. The two cases were consolidated for discovery and trial on May 27, 2016. (PRO-SR 200-01.)

In her claims, Wyman alleged that Morris's act of adding Bruckner as a joint owner to the Dakotaland account was a product of undue influence. (PRO-SR 31-37; App. 4-9.) Wyman voluntarily dismissed that claim on July 8, 2016, so there is no longer an allegation that Morris acted because of undue influence. (App. 10-11; App. 1.)

Wyman's remaining claims allege that Bruckner breached her fiduciary duties when Morris made her a joint owner of the Dakotaland account and when Bruckner disbursed funds from that account. (PRO-SR 31-37; CIV-SR 2-7; App. 10-11; App. 1.) Wyman also alleged that Bruckner committed conversion when Morris made her a joint owner of the Dakotaland account and when Bruckner thereafter disbursed funds from that account.

At a June 14, 2016, hearing, the circuit court considered Wyman's and Bruckner's cross-motions for partial summary judgment. The court denied Wyman's and granted Bruckner's. (App. 2-3.) On June 20, 2016, the circuit court issued a partial summary judgment that Morris's addition of Bruckner as a joint owner to the Dakotaland account did not involve an exercise, by Bruckner,

of the power of attorney, who signed her own name in her personal capacity to the account form. (App. 2-3.) The circuit court also ruled that Bruckner had authority under the power of attorney to give or receive gifts from Morris's property, and that Bruckner had not breached her fiduciary duty or engaged in self-dealing. (App. 2-3.)

Wyman subsequently dismissed her claims of undue influence, with prejudice, and a final judgment on all claims was entered on July 12, 2016.[1]

STATEMENT OF THE FACTS

Karen Lee Wyman left her mother as a teenager, and, with some exceptions, didn't disclose her whereabouts to her mother, Barbara Morris, for many years.[2] Wyman lived a transient lifestyle through several states, and did not stay in contact with Morris, which was hard on Morris.[3]

Morris had a close relationship with her daughter Pamala Bruckner, Bruckner's husband, John, and Morris's granddaughters, Sarah, Alissa, and Angela.[4] When Morris found where her other daughter, Wyman, was living in Florida, Morris moved to Florida in an attempt to establish a relationship with her, and Morris lived there for a little over one year.[5] In September of 2014, Morris, suffering from terminal cancer, asked Bruckner to take her back to South Dakota, and, within three weeks' time, Morris returned to South Dakota to live with her daughter, Bruckner.[6]

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[1] App. 001.
[2] CIV-SR 113, ¶ 3.
[3] CIV-SR 114, ¶ 4.
[4] *Id.*, ¶ 5.
[5] *Id.*, ¶ 6.
[6] *Id.*, ¶ 7.

Morris had no relationship with Wyman's children, and only the brief relationship described above with Wyman.[7]

On October 29, 2014, Barbara Morris executed a power-of-attorney before Lori Woodruff, a notary public and employee of Dakotaland Federal Credit Union.[8] The power-of-attorney named Morris's daughter, Pamala Bruckner, as attorney-in-fact.[9] On November 12, 2014, Morris opened a payable-on-death account (the "Dakotaland account") at Dakotaland Credit Union.[10] At that time, she named both Bruckner and Wyman as p.o.d. beneficiaries.[11]

On December 17, 2014, Morris decided to give Bruckner joint ownership of the Dakotaland account and to eliminate Wyman as a p.o.d. beneficiary on the account.[12] Morris drove to Huron to pick Bruckner up at work and took her to lunch.[13] Over lunch, Morris explained that she wanted to make Bruckner joint owner because she wanted Bruckner to have the account when Morris died.[14] The mother/daughter pair drove to Dakotaland Credit Union after lunch, and Morris had the bank staff fill out an "Account Change Authorization" form.[15] Morris signed the form herself, effecting her wishes.[16]

Barbara Morris intended to give the Dakotaland account in joint ownership to her daughter, Pamala Bruckner, and Morris intended Bruckner to have survivorship rights over the account. Wyman didn't dispute those facts.

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[7] *Id.*, ¶ 8.
[8] App. 12-14.
[9] *Id.*
[10] App. 15-16.
[11] *Id.*
[12] App. 17.
[13] PRO-SR 197, ¶ 3.
[14] *Id.*, ¶ 4.
[15] *Id.*, ¶ 5.
[16] *Id.*, ¶ 5.

Wyman argued that those facts are not admissible, but Wyman never offered contradictory facts.[17]

Bruckner does not dispute the expenditure of funds listed on pages 5-7 of Wyman's Brief. The $10,000 cashier's check to Stuart Title was something Morris wanted to do to help her granddaughter, Alissa Orban, purchase a new home, so Bruckner picked the check up at Morris's direction.[18] The $2,000 payment on Bruckner's car was a check Morris knew about and had discussed with Bruckner because Bruckner's car was used so much in caring for Morris.[19]

The $100 check to Nathan Miller was reimbursing him for groceries he purchased when they visited Morris.[20] The four $50 checks to Morris's great-grandchildren, the Miller children, were to pay them for helping take care of Morris, which was a payment Morris knew and approved of.[21] The check to Landkey Technologies was a payment Morris wanted to make for Bruckner's online classes, which Morris wanted Bruckner to finish.[22]

The $100 check to Jason Orban was to reimburse for groceries during a time period when there were a lot of people there as Morris was dying, although she was still alert and able to talk with the family during this time period.[23]

The $1,500 checks to Alissa Orban and Sarah Miller are checks Morris knew about and wanted written to them because they spent two weeks at the end of Morris's life being a constant caregiver for her.[24]

---

[17] CIV-SR 122-23.
[18] CIV-SR 114, ¶ 9.
[19] *Id.*, ¶ 10.
[20] *Id.*, ¶ 11.
[21] *Id.*, ¶ 12.
[22] *Id.*, ¶ 13.
[23] *Id.*, ¶ 14.
[24] CIV-SR 115, ¶ 15.

The $5,000 check to John Bruckner was because Morris was concerned she was being a financial burden due to the assorted kinds of expenses it cost to have her there.[25] The $300 check to John was reimbursement for the plumber who made the bathroom handicap assessable for Morris.[26]

With respect to the $200,000 check, Bruckner talked to Morris and told Morris that she was going to transfer the money because Morris had already told Bruckner on a number of occasions that the money was Bruckner's and Bruckner could do whatever she wanted with it.[27] At this point in time, they knew Morris was very close to the end.[28] Bruckner thought Wyman would be after the money, so she transferred it.[29]

STANDARD OF REVIEW

"This Court reviews entry of summary judgment de novo." *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (citing *Adrian v. Vonk*, 2011 S.D. 84, ¶ 8, 807 N.W.2d 119, 122). On appeal, this Court "determine[s] only whether a genuine issue of material fact exists and whether the law was correctly applied. *Id.* (citing *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804). If any legal basis to support the court's ruling appears, this Court must affirm. *Plato v. State Bank of Alcester*, 1996 S.D. 133, ¶ 3, 555 N.W.2d 365, 366 (citation omitted); *see also Hass*, ¶ 11, 816 N.W.2d at 101 ("If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.").

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[25] *Id.*, ¶ 16.
[26] *Id.*, ¶ 17.
[27] *Id.*, ¶ 18.
[28] *Id.*, ¶ 18.
[29] *Id.*, ¶ 18.

"The existence of a fiduciary duty and the scope of that duty are questions of law for the court." *Bienash v. Moller*, 2006 S.D. 78, ¶ 12, 721 N.W.2d 431, 434 (quoting *Ward v. Lange*, 1996 SD 113, ¶ 12, 553 N.W.2d 246, 250).

ARGUMENT

There are five reasons supporting Bruckner's position in this appeal. Under any of the reasons this Court relies upon, Bruckner prevails. First, Morris had the right to give Bruckner joint ownership of Morris's Dakotaland account. Second, in an issue related to the first, Wyman did not raise on appeal or dispute the fact that Morris intended for Bruckner to have the account. Third, Bruckner, once she became joint owner, had authority to write checks on the account as an owner, and did not need the authority of her power of attorney to write checks on the account. Fourth, Bruckner's power of attorney gave her permission to self-deal. Consequently, she had authority under the power of attorney to write checks to herself and family from the Dakotaland account. Fifth, because it has not been disputed that Morris intended Bruckner to have the joint Dakotaland account when Morris died, the principal of tracing means the funds should go to Bruckner as Morris intended.

I. Morris had legal authority to create a joint account out of her Dakotaland account.

Morris opened a new account at Dakotaland Federal Credit Union on November 12, 2014. (App. 15-16.) She was sole owner on the account. Morris had legal authority to transfer ownership of her personal property to any person. SDCL 43-4-2. Morris engaged in a voluntary transfer of the Dakotaland account

into joint ownership. SDCL 43-4-4.[30] Morris gave Bruckner joint ownership over the account when Morris voluntarily executed the "Account Change Authorization." SDCL 43-4-7.[31]

Wyman does not dispute that Morris had the authority to add Bruckner as a joint owner to the Dakotaland account. While Wyman initially brought an undue influence claim challenging the validity of Morris's decision to add Bruckner as a joint owner, Wyman voluntarily dismissed her undue influence claim, with prejudice, thereby acknowledging that Morris's act was legitimate. (App. 4-9, Complaint; App. 10-11, Stipulation.)

Instead, Wyman's attack on the joint ownership is the argument that Bruckner committed an act of self-dealing when she accepted a gift that Morris voluntarily gave Bruckner. It was not self-dealing for Morris to voluntarily gift joint ownership to Bruckner. Under the language of *Bienash v. Moller*, 2006 S.D. 78, ¶¶ 13-14, 721 N.W.2d 431, 435 (and nearly every other case that addresses self-dealing), self-dealing occurs when a principal gives a fiduciary power over the principal's property, and when the fiduciary uses the power for her own benefit.

In this case, Morris used her own power over her own bank account to gift joint ownership to her daughter, Bruckner. Bruckner did not use the power of attorney to make herself a joint owner. Consequently, Bruckner did not engage in self-dealing.

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[30] SDCL 43-4-4 states:

> A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general, except that a consideration is not necessary to its validity.

[31] SDCL 43-4-7 states:

> A grant takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor. A grant duly executed is presumed to have been delivered at its date.

In *Bienash*, the attorneys-in-fact engaged in self-dealing acts when they tried to name themselves as the payable-on-death beneficiaries on several CDs owned by the principal. *Id.*, ¶¶ 6-7, 721 N.W.2d at 433. In *Studt v. Black Hills Fed. Credit Union*, the attorney-in-fact tried to get the Credit Union to change the beneficiary on the principal's certificate of deposit. *Id.*, 2015 S.D. 33, ¶¶ 6-7, 864 N.W.2d 513, 515. In *Estate of Stevenson*, the trustee of a trust tried to lease farmland to her family. *Id.*, 2000 S.D. 24, ¶¶ 2-4, 605 N.W.2d 818, 819-20.

In each of those cases, the agents exercised their power to benefit themselves; the principal never conveyed the property. This is the opposite of the matter before you. Morris, a competent lady, chose to make a gift of a bank account by naming Bruckner as a joint owner. Morris's gifting of the Dakotaland account to Bruckner did not constitute self-dealing by Bruckner. It was not even Bruckner's act. Wyman seeks to do injustice to Morris's ability to decide, and act, with respect to Morris's bank account.

II. In summary judgment and this appeal, Wyman did not dispute the fact that Morris intended that the Dakotaland account belong to Bruckner, or that Morris intended to let Bruckner write checks on the Dakotaland account.

When a party moves for summary judgment, the party must present a statement of undisputed material facts that are admitted unless the opposing party controverts them with opposing facts. SDCL 15-6-56(c).[32]

Bruckner responded to Wyman's motion for partial summary judgment with a statement of additional undisputed material facts that Wyman did not

[32] *See also Citibank S. Dakota, N.A. v. Schmidt*, 2008 S.D. 1, ¶ 8, 744 N.W.2d 829, 832 ("the opposing party must be diligent in resisting [the motion], and mere general allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment").

dispute.[33] Each of those facts explains Morris's intent to allow Bruckner to write checks on the Dakotaland account prior to Morris's death. Under SDCL 29A-6-103(1), Bruckner had the right to write checks from funds that Morris contributed to the Dakotaland account, if it was in keeping with Morris's intent. For every check Bruckner wrote, she presented an undisputed fact that Morris permitted the check to be written. Because Morris permitted Bruckner to write the checks, there was no self-dealing. Even more, Bruckner wrote the checks in accordance with Morris's wishes and intent, and the Court should uphold Morris's intent.

In Bruckner's Motion for Summary Judgment, her Statement of Undisputed Material Facts contained the fact that Morris intended to make Bruckner a joint owner:

> On December 17, 2014, Barbara Morris picked Pamala Bruckner up at Pamala's place of work, to go to lunch, and then took Pamala Bruckner to go along to Dakotaland Federal Credit Union, where Barbara Morris instructed the bank personnel to prepare a form adding Pamala Bruckner as a joint owner.[34]

Wyman did not dispute or contradict the fact itself. Instead, she resisted the fact on the grounds of its admissibility.[35] Wyman's response to Bruckner's statement of undisputed material fact did not present a different version of the facts sufficient to create a genuine issue to be tried regarding Bruckner's intent to create a joint account.

Morris had the right to transfer the Dakotaland account into joint ownership. Wyman cited no law to the contrary on that issue, and so Wyman concedes the issue, waiving it on appeal. *Veith v. O'Brien*, 2007 S.D. 88, ¶ 50, 739 N.W.2d 15, 29.

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[33] CIV-SR 103-107.
[34] PRO-SR 185.
[35] CIV-SR 122-23.

Wyman contends that, under *Bienash v. Moller*, evidence of Morris's intent regarding the Dakotaland account is inadmissible extrinsic oral evidence that cannot be considered. Wyman is incorrect. *Bienash v. Moller* is factually different because, there, the fiduciaries engaged in self-dealing acts, and then tried to legitimize the acts by claiming the principal granted authority not found in the power-of-attorney. A case that is factually similar and therefore controlling in this appeal is this Court's recent decision in *Hein v. Zoss*, 2016 S.D. 73, ¶ 14, __ N.W.2d __.

Under *Hein*, Morris's intent regarding her decision to convey joint ownership of the Dakotaland account to Bruckner does not fall under the *Bienash* rule excluding parol evidence. In *Hein*, this Court analyzed SDCL 29A-6-103(1), which states:

> A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

Similarly, SDCL 29A-6-104 establishes that Morris's intent behind creating the joint account is at the crux of what a court must consider when deciding who owns the funds in a joint account when a joint owner dies:

> Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created.

In *Hein*, the trial court "excluded evidence of the circumstances surrounding the creation of Margaret and Zoss's joint account." *Id.*, 2016 S.D. 73, ¶ 14, __ N.W.2d __. This Court decided that the exclusion was error: "[T]he court abused its discretion by excluding evidence from Zoss regarding the

circumstances surrounding the opening of the account in 2004." *Id.* This Court explained that "by completely barring any evidence related to the establishment of the account, Zoss was prevented from introducing evidence that there was 'a different intent' from that of the statutory designation." *Id.* The facts from Bruckner's Affidavit,[36] cited above in the "Statement of the Facts" section, reveal that there is a question of fact whether Morris intended to let Bruckner expend the funds while Morris was alive.

Wyman has not raised the lack of intent issue in this appeal. Failure to raise the issue waives it. *State v. Wright*, 2009 S.D. 51, ¶ 68, 768 N.W.2d 512, 534 ("Wright never asked the circuit court to rule on the issue, and the failure to raise an issue before the circuit court constitutes a waiver of the issue on appeal.").

Consequently, evidence of Morris's intent with regard to the Dakotaland account is admissible and stands unrebutted. Bruckner did not engage in impermissible self-dealing. Instead, she carried out her mother's undisputed intent.

III. As a joint owner, Bruckner had the personal right to draft checks on the joint account and, in so doing, did not exercise her power-of-attorney.

Wyman argues that when Bruckner wrote checks on the joint account, Bruckner was breaching her fiduciary duty as Morris's attorney-in-fact. However, Wyman mistakenly assumes that Bruckner was exercising her power of attorney when she wrote the checks. The checks themselves conclusively show that Bruckner did not exercise her power-of-attorney over the checks disputed by

[36] CIV-SR 113-115.

Wyman: the checks all bear Bruckner's signature, not Morris's, or Morris's as signed by Bruckner, POA.

Bruckner had authority to write checks on the account by virtue of SDCL 29A-6-101(4): a joint account is "any account payable on request to one or more of two or more parties. . . ." A "party" is "any person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account." SDCL 29A-6-101(7). A "payment" is a "payment of sums on deposit includ[ing] withdrawal, payment on check or other directive of a party . . . ." SDCL 29A-6-101(8). A "request" is "a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures and regulations of the financial institution . . . ." SDCL 29A-6-101(12).

Consequently, Bruckner had the statutory authority, as joint owner of the Dakotaland account to write checks on the account. Her authority to write checks on the Dakotaland account was not derived from her power-of-attorney; rather, it was consequent to her ownership of the account.

Wyman argues:

> Bruckner's addition to the Dakotaland account as a joint owner has no impact on the validity of the transfers that occurred while Morris was alive because it is undisputed that Bruckner contributed no funds to that account and therefore, with regard to each other, Morris owned these funds until her death.[37]

That argument is contradicted by SDCL 29A-6-101(7), which says Bruckner, as party to the joint account, had a "present right, subject to request, to payment from a multiple-party account."

[37] Appellant's Brief, p. 9.

Morris's intent to make Bruckner joint owner is important under SDCL 29A-6-104 because that statute directed that the funds in the account belong exclusively to Bruckner when Morris died. Morris died on March 12, 2015.[38] Bruckner wrote a $200,000 check to her husband on March 11, the day before Morris died, and Bruckner wrote checks for an additional $12,700 (approximate) on March 10.[39]

Wyman argues[40] that Bruckner's transfers should be voided under SDCL 29A-6-103. But a fair reading of the statute does not support Wyman's argument:

> A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

SDCL 29A-6-103(1). Further, as the comments to that section in the UPC state,

> The section does not undertake to describe the situation between parties if one party withdraws more than that party is then entitled to as against the other party . . . . Rights between parties in this situation are governed by general law other than this part.[41]

The circuit court did not address the issue of tracing or where the funds should go if Bruckner's transactions were to be set aside.

Wyman continues that Bruckner could not "withdraw any of Morris's funds from the account while Morris was alive without incurring liability to Morris."[42] The statute Wyman relies on (SDCL 29A-6-103) did not restrict Bruckner's power of withdrawal, and the statute is relevant only to a controversy about Morris's intent. Wyman did not dispute the fact that Morris agreed with

[38] PRO-SR 1.
[39] PRO-SR 85.
[40] Appellant's Brief, p. 16.
[41] App. 30-33.
[42] Appellant's Brief, p. 16.

the withdrawals Bruckner made, and nothing in the statutes give Wyman the right to dispute the withdrawals where the original owner chose not to do so.

Arguing to the contrary, Wyman relies on the case *Johnson-Batchelor v. Hawkins*, 450 N.W.2d 240 (S.D. 1990), but it is inapposite on this point. In that case, the deceased joint tenant had purchased CDs by using more than his contribution to the joint account he held with his wife. *Id*. at 241. Once he died, the wife discovered that her contributions to the joint account had been used to buy the CDs, which had a daughter listed as beneficiary. *Id*. The wife then argued that the funds should be returned to her and this Court agreed. *Id*. at 242. The difference between *Johnson-Batchelor* and this case is that the joint owner who had contributed the funds to the account (Morris) did not dispute her joint owner's (Bruckner's) use of those funds.

Wyman relies on the Ohio case *In re Estate of Mayer*, 105 Ohio App.3d 483, 664 N.E.2d 583 (1995), to support her argument that the funds Bruckner took from the joint account should be returned to Morris's Estate automatically if Bruckner took funds that she did not contribute to the account. The problem with Wyman's argument is that *Estate of Mayer* says that a person's intent in creating a joint account is controlling when trying to determine whether it is appropriate for the other joint owner to use funds she did not contribute to the account. *Id*., 105 Ohio App. 3d at 486, 664 N.E.2d at 585. SDCL 29A-6-103(1) says the same.

Consequently, in South Dakota, if a joint owner uses funds that she did not contribute to the joint account, if challenged, the court must analyze the intent of the joint owner who did contribute the funds to see if the use was permitted. In

this case, Wyman did not factually or legally challenge Morris's intent to let Bruckner use the funds while Morris was alive.

SDCL 29A-6-104 creates a presumption that Morris intended for rights of survivorship to attach to the funds. *McDonough v. Kahle*, 1999 S.D. 14, ¶ 12, 588 N.W.2d 600, 603. Even if Wyman can show that the funds were improperly distributed, she has not shown how the survivorship rights were voided. Wyman did not argue that undue influence voids Bruckner's right to joint ownership of the account. Wyman did not argue that Morris disputed Bruckner's withdrawals. And Wyman was unsuccessful with her argument that Bruckner's ability to write checks on the joint account was limited by her fiduciary duty as attorney-in-fact.

To the contrary, the facts before the trial court showed that Morris intended for Bruckner to have survivorship rights. Wyman is attempting an end-run around Morris's intent that Bruckner have the funds by arguing about the timing under which Bruckner wrote checks on the account. But when the original owner chose not to dispute Bruckner's pre-death withdrawals using her own authority as a joint owner, nothing gives Wyman the right to do so after Morris died.

Simply put, Wyman wants money that her mother did not want her to have. If the checks had been written a day later, Wyman would have nothing to complain about; Morris's wishes would have been carried out. But because the checks were written a day or two before Morris died, Wyman seized the opportunity to attempt to get a part of the funds her mother already decided to deny her.

IV. The power-of-attorney clearly and unmistakably gave Bruckner the authority to gift Morris's property to herself and her family members.

This Court has established that the language in a power-of-attorney must be strictly construed, and that a power-of-attorney has to specifically authorize the attorney-in-fact to receive gifts from the principal's property. *Studt*, ¶ 10, 864 N.W.2d at 515-16.

Morris specifically gave Bruckner authority to make and receive gifts from Morris' personal property, pursuant to the terms of the *Durable Power of Attorney*:

> attorney-in-fact shall have full, unrestricted, power and authority . . . to . . . give or receive as a gift . . . in any manner, all or any portion of my real or personal property . . . .

The language in the power-of-attorney is fairly simple, but as our Supreme Court noted in *Bienash*, ¶ 24, 721 N.W.2d at 437, it is relatively easy to include language that authorizes the attorney-in-fact to receive gifts from the principal. The language in this power-of-attorney does just that.

It is also important to note that when a contract is interpreted, "to the extent possible . . . we must give meaning to all the provisions of the contract." *Prunty Const., Inc. v. City of Canistota*, 2004 S.D. 78, ¶ 10, 682 N.W.2d 749, 753. The language set forth in the excerpt from the power-of-attorney above is directly from the power-of-attorney signed by Morris, and every word of it must be given meaning. This rule is important because Wyman's interpretation both adds words that are not found in the power-of-attorney and disregards words that <u>are</u> part of the power-of-attorney, which is discussed below.

A power of attorney must provide "clear and unmistakable language" authorizing self-dealing acts. *Bienash*, ¶ 14, 721 N.W.2d at 435. This Court has

never stated that there is magic language that a power of attorney must contain to authorize self-dealing.

The power of attorney in this case contains language that is not often found in other powers of attorney,[43] and it gave Bruckner the authority to make gifts to herself and family. The power of attorney clearly and unmistakably gives Bruckner "full, unrestricted, power and authority . . . to . . . give or receive as a gift . . . all or any portion of my real or personal property, including any interest I may have therein . . . ."

Wyman focuses on a portion of the power of attorney's language "to give or receive as a gift" while ignoring the rest of the clause ("my real or personal property") that defines the full scope of the power.[44] The power of attorney, in its entirety, specifically gives Bruckner the full authority to give or receive as a gift any portion of Morris's property, including any interest Morris has in it. The language is directly on point with Morris's interest in and actions concerning the joint account. Bruckner had full authority to give that interest and to receive it as a gift.

Wyman argues that the gifting power only permits Bruckner to give on Morris's behalf or receive gifts on Morris's behalf. First, the gifting clause does not contain the words "on Morris's behalf." Second, Wyman's argument can't be true because it makes no sense in application. It disregards the words of the

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[43] *See, e.g.*, *Bienash v. Moller*, 2006 S.D. 78, ¶ 5, 721 N.W.2d 431, 432-33 ("the power of attorney allowed Mollers to make gifts on Duebendorfer's behalf in the amount of the annual exclusion limit pursuant to the Internal Revenue Code."); *Studt v. Black Hills Fed. Credit Union*, 2015 S.D. 33, 864 N.W.2d 513, 516 (granting the attorney in fact "[t]he power [to] make gifts, in my name, to any person or organizations, but only to the extent that my Attorney determines that my financial needs can be met, and such gifts continue to be prudent estate and tax planning devices.").

[44] Appellant's Brief, p. 12.

power-of-attorney that Bruckner could "give or receive as a gift . . . any portion of [Morris's] real or personal property." To paraphrase Wyman's interpretation: Bruckner can receive as a gift on Morris's behalf any portion of Morris's property, including any interest Morris has in it. The interpretation, particularly the additional clause "on Morris's behalf," is faulty because nobody can give Morris property that she already owns. The "on Morris's behalf" language that Wyman adds is not in the power-of-attorney, and it cannot be read in. Consequently, the only way to give full force and effect to the power of attorney's gifting language is to conclude that the language authorizes self-dealing: "[Bruckner] can give or receive as a gift . . . any portion of [Morris's] real or personal property."

Wyman also argues that even if the power-of-attorney authorized Bruckner to receive self-dealing gifts, it does not authorize her to give self-dealing gifts to others.[45] However, Wyman's argument makes a distinction that blurs the point of self-dealing law. This Court's self-dealing law is concerned with whether a fiduciary commits an act that places the fiduciary's personal interest in conflict with her obligations to the principal. *In re Estate of Stevenson*, 2000 S.D. 24, ¶ 9, 605 N.W.2d 818, 821. This Court's self-dealing law is not concerned with the particulars of the personal interest, such as whether the agent herself or her family is benefitted.

But, take note that Wyman abandons the distinction when it serves her position. For instance, on page 9, where Wyman argues that if self-dealing is authorized in the power-of-attorney, it should only be authorized as to Bruckner and should not include her family members. However, on page 10 of her Brief, Wyman changes position and asserts that self-dealing should include gifts to

[45] See Appellant's Brief, p. 12.

family members. Wyman's inconsistent arguments exist because she mistakenly focuses on the recipient of the self-dealing, as opposed to the permissibility of self-dealing. If an agent is authorized to self-deal to herself, then, logically, she is authorized to engage in a lesser version of self-dealing, such as self-dealing to a family member. The recipient of the self-dealing transaction does not appear to be a relevant consideration in this Court's case law, so, under South Dakota law, an agent can either self-deal, or she cannot.

And that makes sense. The practical effect of Wyman's argument on page 13 is that even when a power-of-attorney says "my agent has the authority to self-deal," the language would not permit gifts from the agent to her family because it does not specify who can receive the self-dealing. Going further, if the power-of-attorney said "my agent has the authority to self-deal to her husband," Wyman would argue that it did not specifically authorize a given kind of self-dealing, like writing a check from a bank account or leasing some property. There would be no end to the objections that could be made.

Further, if the term "self-deal" only permits Bruckner to gift herself from the Morris's property, as Wyman argues, then what term should be used to authorize Bruckner to gift Morris's family members? "Grandchild-deal"? "Son-in-law-deal"? As *In re Estate of Stevenson* made clear, if the power-of-attorney authorizes self-dealing, as it does in this case, then it permits self-dealing both to Bruckner and her family members. *Id.*, ¶ 11, 605 N.W.2d at 821.

V. Bruckner disbursed the bulk of the funds in the joint account the days immediately before Morris died, so it is appropriate to use the concept of tracing to ensure the funds go where Morris wanted them to go—to Bruckner.

Wyman contends that if the checks Bruckner wrote were unauthorized, then the funds should go to the Estate. Wyman's position contradicts Morris's undisputed intent—that the funds go to Bruckner. Wyman is asking this Court to override Morris's intended disposition of the funds.

Wyman argues that Morris's intent should be ignored and the funds given to the Estate because "South Dakota law has never allowed tortfeasors to benefit from their own wrongdoing."[46] The problem with Wyman's position is that Bruckner is not a tortfeasor. The benefit Bruckner received a few days before Morris died is the same benefit Bruckner received when Morris died: the funds belonged to Bruckner. Bruckner's acts imparted no new benefit to her that she would not have otherwise received. Again, Wyman is not disputing that Morris had the right to add Bruckner to the Dakotaland account as a joint owner, and that Morris intended Bruckner to have those funds when Morris died.

Wyman relies on several cases to support her argument that the funds go to the Estate. Those cases are distinguishable. In *In re Estate of O'Keefe*, 1998 S.D. 92, 583 N.W.2d 138, the Estate obtained punitives damages from certain tortfeasor-heirs. *Id.*, ¶ 5, 583 N.W.2d at 139. The tortfeasors wanted to share in the punitive damages that had been levied against them, but the circuit court ordered that they could not. *Id.*, ¶ 9, 583 N.W.2d at 140. This Court affirmed. *Id.*

Cruz v. Groth, 2009 S.D. 19, 763 N.W.2d 810, is a case that dealt with the collateral source rule and explained that "tortfeasors should not be able to profit from their wrongdoing by obtaining credit on damages against their victims' independent benefits." *Id.*, ¶ 10, 763 N.W.2d at 813.

[46] Appellant's Brief, p. 19.

In *Talley v. Talley*, 1997 S.D. 88, 566 N.W.2d 846, Anthony Talley was found to have breached a contract with his mother. *Id.*, ¶ 24, 566 N.W.2d at 852. In spite of his breach, he sought specific performance of other provisions in the contract that benefitted him. *Id.*, ¶ 30, 566 N.W.2d at 852. This Court held that "[h]e cannot now seek enforcement of those contractual provisions which benefit him when he has failed to comply with express terms as well as the intent of the parties' contracts." *Id.*

In those cases, the wrongdoers attempted to get a benefit they would not otherwise have been entitled to, which is the opposite of Bruckner's position. Keeping the funds with Bruckner honors Morris's wishes.

This Court's decision in *Johnson–Batchelor* stands for the proposition that you should honor the intent of a joint owner who contributed funds to a joint account. In that case, a husband took funds from an account he held jointly with his wife, and put them in CDs, which he created with his daughter. *Id.*, 450 N.W.2d at 241. After husband died, wife wanted to reclaim funds. *Id.* The Supreme Court provided that 50% of the funds in the new CDs would go back into the wife's name, because the funds came from her joint account, and she had not approved of the transfer. *Id.* at 241-42.

It's important to note that the Supreme Court honors the intent of the party that owned the funds. The husband wanted his money to go into the new CDs, and, since he owned half of it, that's where it stayed. The wife didn't want her funds there, she wanted her funds in her own name, so the Supreme Court used the device of tracing to see that the funds went where the owner intended them.

Because of the *Account Change Authorization* signed by Morris, we know where she intended the funds to go. She intended the funds to go to her daughter, Pamala Bruckner, upon her death. If the Court agrees with Wyman in her argument that the funds from the joint account need to be brought back to somewhere, the place they are brought back to is the account created by Morris for those funds. The tracing identified by the Supreme Court in *Johnson-Batchelor* requires that result.

CONCLUSION

There are two foundational facts in this case: Morris gave joint ownership of the Dakotaland account to Bruckner, and Morris intended Bruckner to have those funds. They are unrebutted. Bruckner's ownership of the account was legitimate, as was her authority to write checks on the account and self-deal. Upon Morris's death, all the funds were to go to Bruckner. Morris's intent has been followed and upheld. Bruckner respectfully asks this Court to affirm the circuit court decision that followed Morris's intent to give the funds to Bruckner and to deny any of them to Wyman. To do otherwise would thwart Morris's intent that the funds in the joint account go to Bruckner.

DATED this 29th day of November, 2016.

Respectfully submitted,

SCHOENBECK LAW, PC

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in SDCL 15-26A-66(b)(4). This brief was prepared using Microsoft Word 2013, with 12 point Georgia font. This brief contains 6,138 words, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificate of counsel. I relied on the word count feature in Microsoft Word 2013 to prepare this certificate.

DATED this 29th day of November, 2016.

SCHOENBECK LAW, PC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on November 29, 2016, I electronically served a true and correct copy of the foregoing Appellee's Brief via email on the following:

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APPENDIX
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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF BEADLE	)	THIRD JUDICIAL CIRCUIT

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02CIV 15-0176

KAREN LEE WYMAN, Personally and as Personal Representative of the Estate of Barbara Ann Morris,

Plaintiff,

v.

PAMALA BRUCKNER,

Defendant.

JUDGMENT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

By an Order dated June 20, 2016 and filed June 21, 2016, the Court granted Pamala Bruckner's motion for partial summary judgment and denied Karen Lee Wyman's motion for partial summary judgment in this consolidated action. The parties have stipulated to the dismissal of Wyman's remaining claims with prejudice in the consolidated actions (CIV 15-0176 and PRO 15-0028). Therefore:

IT IS HEREBY ORDERED AND ADJUDGED that judgment be entered in favor of Defendant Pamala Bruckner, and that Plaintiff Karen Lee Wyman take nothing, and that Bruckner recover of Wyman costs in this action in the amount of $131.79, to be hereinafter inserted by the clerk.

Signed: 7/12/2016 10:12:24 AM

Hon. Carmen Means
Circuit Court Judge

Attest:
JOAN NETTINGA
Clerk/Deputy

STATE OF SOUTH DAKOTA	) ss:	IN CIRCUIT COURT
COUNTY OF BEADLE	)	THIRD JUDICIAL CIRCUIT
KAREN LEE WYMAN, Plaintiff, v. PAMALA BRUCKNER, Defendant.	)	Civ. 15-176 PARTIAL SUMMARY JUDGMENT

Cross Motions for Partial Summary Judgment having come on before the Court on the 14th day of June, 2016, in the courtroom of the Beadle County Courthouse, the Honorable Carmen Means presiding, and Plaintiff Karen Lee Wyman, having appeared through her attorneys of record, Matthew Bock and James Power, and Defendant Pamala Bruckner, having appeared personally and with her attorneys Lee Schoenbeck and Joshua Wurgler, and the Court having reviewed the parties' filings, and listened to the argument of counsel, it is now hereby

ORDERED, ADJUDGED, AND DECREED that the *Power of Attorney* language clearly and unmistakably authorized the agent, Pamala Bruckner, to give or receive gifts from the property of the Principal, her mother, Barbara Morris, and therefore Plaintiff's *Motion for Partial Summary Judgment* that Pamala Bruckner breached her fiduciary duty and engaged in self-dealing is denied, and Defendant's *Motion for Partial Summary Judgment* is granted;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint account created at Dakota Federal Credit Union by Barbara Morris on December 17, 2014, did

not involve an exercise of the power under the *Power of Attorney* by Pamala Bruckner, who only signed her own name in her own personal capacity to the document.

Signed: 6/20/2016 1:08:19 PM

Attest:
JOAN NETTINGA
Clerk/Deputy

Hon. Carmen Means
Circuit Court Judge

Filed on: 6/21/2016 BEADLE County, South Dakota 02CIV15-000176

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF BEADLE	)	THIRD JUDICIAL CIRCUIT

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KAREN LEE WYMAN,	:	CIV 15-_____
Plaintiff,	:	
v.	:	COMPLAINT
PAMALA BRUCKNER,	:	
Defendant.	:	

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COMES NOW Karen Lee Wyman and for her Complaint against Pamala Bruckner asserts as follows:

1. Barbara Ann Morris was the mother of Wyman and Bruckner.
2. Morris was born March 16, 1941 and died on March 12, 2015.
3. Morris's estate is going through formal probate in the Third Judicial Circuit, Beadle County (PRO 15-00028). By Order dated and filed July 6, 2015, this Court appointed Wyman as the Estate's personal representative.
4. The July 6, 2015 Order also declared Morris's March 25, 2014 will to be a valid will and admitted it to probate. A copy of the March 25, 2014 will was attached to the Order.
5. With the exception of certain specified items of tangible person property to be listed in a separate document, paragraph 3 of the will provided that Morris's property would all go to the Barbara Ann Morris Trust (the "Trust").

6. A copy of the Trust agreement is attached to this Petition as Exhibit 1. Item VI of the agreement designated Wyman to act as successor Trustee upon Morris's death.
7. Item III of the agreement provided that, upon Morris's death, all Trust property must be distributed to Wyman and Bruckner equally.
8. This Court's July 6, 2015 Order likewise determined Morris's heirs to be Wyman and Bruckner.
9. Except for any specified items of tangible personal property, Morris intended for Wyman and Bruckner to each inherit an equal share of Morris's property.
10. In 2014, Morris moved from Florida to Wolsey, South Dakota, where she lived with Bruckner.
11. When Morris moved to South Dakota in 2014, she had terminal cancer was taking prescription pain medication including narcotics and received hospice home care while she lived with Bruckner.
12. On November 14, 2014, Morris opened a checking/savings account at Dakotaland Federal Credit Union (the "Account"). The account agreement is attached hereto as Exhibit 2. The agreement shows the Account was opened as a Payable on Death (POD) account and named Wyman and Bruckner as the POD beneficiaries.
13. On information and belief, in approximately November 2014, Bruckner obtained a power of attorney to act as Morris's Power of Attorney (POA). An

unsigned copy of the power of attorney is attached as Exhibit 3. The power of attorney form did not authorize Bruckner to engage in self-dealing.

14. On December 17, 2014, Morris and Bruckner signed an account change authorization that changed the Account from payable on death to Wyman and Bruckner to a joint account owned by Morris and Bruckner. A copy of the account change authorization is attached as Exhibit 3.

15. Upon information and belief, all funds deposited in the Account were provided by Morris. Bruckner did not contribute any of her personal funds to the Account.

16. On March 1, 2015, eleven days before Morris passed away, a $10,000 check from the Account (Check No. 3019), purportedly signed by Morris, was written payable to Bruckner. A copy is attached as part of Exhibit 4.

17. Bruckner signed numerous checks from the Account payable to family members, including but not limited to her spouse, her daughters and sons-in-law, and grandchildren. These checks included a $200,000 check (Check No. 3034) payable to Bruckner's spouse, John Bruckner, dated March 11, 2015, the day before Morris died. Copies of some of these checks are attached as part of Exhibit 4.

18. On June 24, 2015, the Account's remaining balance of $29,070.31 was transferred to another account. Upon information and belief, Bruckner initiated the transfers and is an owner of the transferee account. Copies of the transfer records are attached as Exhibit 5.

Count 1: Undue Influence

19. Plaintiff realleges paragraph 1-18 as though fully stated as part of this Count.

20. By December 17, 2014, when Bruckner was added as a joint owner to the Account, Morris was susceptible to undue influence because, among other things, her mental and physical condition had weakened as she aged.

21. When the account change authorization was signed and afterwards, Bruckner had the opportunity to exert undue influence on Morris and to effect a wrongful purpose because, among other things, Bruckner was Morris's POA and Morris was living with Bruckner.

22. Bruckner had a disposition to exert undue influence on Morris for an improper purpose.

23. Bruckner actively participated in obtaining and executing the account change authorization, including co-signing the form. Bruckner actively participated in obtaining subsequent payments to herself and her family members by accepting and/or writing checks payable to herself, her family members, or for their expenses rather than for Morris.

24. Bruckner exerted undue influence upon Morris in relation to the account change authorization and subsequent transactions for Bruckner and her family members' benefit sufficient to destroy the free agency of Morris. Morris's testamentary desire for all of her property (except certain specified, tangible personal property) to be divided equally between Bruckner and Wyman was replaced by Bruckner's desire in December 2014 and afterwards.

25. The account change authorization and subsequent transactions for Bruckner's personal benefit and the benefit of her family members produce a result clearly showing the effects of Bruckner's undue influence because the November 14, 2014 account opening agreement and Morris's estate planning documents show that she intended for all of her property (except certain specified, tangible personal property) to be divided equally between Bruckner and Wyman.

26. Bruckner unduly profits from the account change authorization and subsequent transactions for her personal benefit and the benefit of her family members because she obtained the sole benefit from the affected funds, whereas the previous account agreement and Morris's estate plan would have required Bruckner to share those funds equally with Wyman.

27. Because the account change authorization and subsequent transactions benefitting Bruckner personally or benefitting Bruckner's family members were the product of undue influence, those transactions are invalid and Bruckner should be required to compensate Wyman for the value that Bruckner diverted from the Account through undue influence.

28. Because the undue influence exerted by Bruckner included oppression, fraud, or malice—actual or presumed, Wyman is entitled to recover exemplary damages from Bruckner.

WHEREFORE, Plaintiff prays for a judgment that:

1. The December 17, 2014 account change authorization is invalid due to undue influence;
2. For compensatory and exemplary damages to Wyman in an amount to be proven at trial;
3. For pre- and post- judgment interest as provided by law;
4. For costs and disbursements incurred herein; and
5. For such other and further relief and the Court deems just and equitable.

PLAINTIFF DEMANDS TRIAL BY JURY

Dated this 9th day of September, 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James A. Power
James A. Power
Matthew P. Bock
Post Office Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone: (605) 336-3890
Fax: (605) 339-3357
E-mail: James.Power@woodsfuller.com
Attorneys for Plaintiff

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF BEADLE	)	THIRD JUDICIAL CIRCUIT

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02CIV 15-0176

KAREN LEE WYMAN, Personally and as Personal Representative of the Estate of Barbara Ann Morris,

Plaintiff,

v.

PAMALA BRUCKNER,

Defendant.

STIPULATION FOR VOLUNTARY DISMISSAL

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Pursuant to SDCL § 15-6-41(a), the parties to this case, by and through their respective counsel, stipulate that plaintiff Karen Lee Wyman , in her personal and representative capacity, may dismiss any remaining claims with prejudice that she or the Estate of Barbara Ann Morris has in the consolidated actions (CIV 15-0176 and PRO 15-0028). Wyman is not dismissing the Estate's claims and her claims for breach of fiduciary duty and/or self-dealing that were the subject of the parties' cross-motions for summary judgment and the Court's Order granting summary judgment. Pursuant to this stipulation, the Court may enter the final judgment attached as Exhibit 1 without further notice or hearing.

Filed: 7/11/2016 1:24:28 PM CST Beadle County, South Dakota 02CIV15-000176
- Page 160 -

Case Number: CIV 15-0176
Stipulation for Voluntary Dismissal

Date 7/8/16

WOODS, FULLER, SHULTZ & SMITH P.C.

By _____
James A. Power
Matthew P. Bock
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
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Attorneys for Karen Lee Wyman

Date 7/8/16

SCHOENBECK LAW

By _____
Lee Schoenbeck
Joshua G. Wurgler
P.O. Box 1325
Watertown, SD 57201
Phone (605) 886-0010
Email: Lee@Schoenbacklaw.com
Attorneys for Pamala Bruckner

Prepared by:
Vaughn P. Beck
Attorney at Law
PO Box 326
Ipswich, SD 57451
605-426-6319

DURABLE POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that I, Barbara A. Morris, currently of PO Box 261, Wolsey, South Dakota 57384, do hereby make, constitute and appoint my daughter, Pamela Bruckner, currently of PO Box 261, Wolsey, SD 57384, to be my true and lawful attorney-in-fact, for me and in my name, place and stead, to do each and every act and thing, whatsoever, in regard to reserving no power in myself, whatsoever.

Not to limit the full extent of the power and authority herein granted but merely to emphasize certain powers, said attorney-in-fact shall have full, unrestricted, power and authority as follows:

To handle, manage, lease, sell, purchase, convey, exchange, give or receive as a gift, loan, encumber, possess, use, consume, abandon or otherwise deal in or with, in any manner, all or any portion of my real or personal property, including any interest I may have therein, whether now owned or hereafter acquired, whatsoever and wheresoever located; and to do any act or thing necessary or convenient to complete any transaction involving any of my said real or personal property, previously commenced or transacted by me; to execute any and all contracts, deeds, plats, leases, notes, instruments of encumbrance, and documents of any nature or kind whatsoever with regard to any such real or personal property; to disclaim, renounce or place in trust any and all such real or personal property; to demand, receive, compromise and forgive any and all rents, income, moneys, refunds, proceeds, real and personal property whatsoever, without limitation as to kind or type of property or amount or dollar value of the same; to pay all debts, expenses, taxes, insurance and other obligations, whatsoever; all the same as I could do if personally present;

To handle and deal with all of my monies, cash, accounts, and similar items; to make deposits to or withdrawals from any of my bank, savings & loan, or similar accounts; to write or negotiate checks, drafts or similar instruments on any such account; to cash, redeem, invest or reinvest in savings certificates, certificates of deposit, saving bonds, including U.S. Savings Bonds, money market certificates, treasury notes or bills, mutual funds, money market accounts, annuity funds, retirement accounts and any other such similar investments; to buy, sell, assign, encumber or otherwise deal in any stocks, stock options or rights (including the related stock voting and proxy voting rights), bonds, debentures, notes, securities or similar property, whether traded over the

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counter, on the open market, or otherwise; and to invest in any venture or activity whatsoever; all the same as I could do if personally present;

To purchase, maintain, surrender, assign, cash, borrow against, collect on, cancel or otherwise deal in any kind or type of insurance, in any amount, including but not being limited to life insurance (on my life, or on the life of anyone I may have an insurable interest in), health, hospital, medical, nursing home or similar insurance, disability insurance, property, casualty, liability, automobile or similar insurance and any other insurance that I may be interested in if personally present;

To institute, defend, intervene in, compromise, settle and complete any and all civil, criminal or administrative proceedings and similar actions or matters, for or on my behalf;

To deal, correspond and/or negotiate with, execute all documents (applications, returns, forms, etc.), relating to any governmental or regulatory agency or authority, including but not being limited to any federal, foreign, state, county, township, city, school or similar body, the Internal Revenue Service, Social Security Administration, Veteran's Administration, state or federal medicare, medicaid and SSI authorities, civil service agencies, the U.S. Dept. of Agriculture and it's agencies (FmHA, ASCS, CCC, etc.), state and local real estate and other taxing authorities, and all similar and other agencies and authorities; to collect, receive, endorse, deposit, spend, pay, refund, compromise, or other-wise deal in all checks, payments, benefits, refunds or monies whatsoever from any such agency or authority; all the same as I could do if personally present;

To represent me before any office of the Internal Revenue Service for the following tax matter: Individual Income Tax (Form 1040 and attached forms and schedules), Corporate Income Tax (Form 1120 and attached forms and schedules), Fiduciary Income Tax (Form 1041 and attached forms and schedules), Gift Tax (Form 709 and attachments), Estate Tax (Form 706 and attachments), Employment Taxes (FICA, withholding, etc.), Information Returns (Forms 1065, 1099's, W-2's, etc.), and all other tax matters, for the years or periods, from calendar year, 2000, through the present calendar year, and thereafter; my attorney-in-fact is authorized to receive confidential information and to perform any and all acts that I can perform with respect to the above specified tax matters (specifically including the power to receive refund checks and the power to sign returns, forms and all documents, whatsoever), including the power to deal and negotiate with the IRS, pay, compromise and settle all such taxes, interest and penalties, if any, and the power to receive originals or copies of all notices and all other written communications in proceedings involving the above tax matters;

To have absolute and unrestricted access, either by way of written or oral request, to all of my records, papers, safety deposit and similar boxes, information or any other matter or thing that pertains to me or any of my business or personal affairs; the same as I could obtain if personally present; and

To make any health care decisions for me and on my behalf which I could make if I had decisional capacity to do so, including but not being limited to the approval of, consent to,

withdrawal of any consent, or rejection of any medical or psychological care, treatment or procedure, whatsoever, including any such decision pertaining to my possible entry into any medical facility, hospital or nursing home, and including all matters involving artificial nutrition or hydration, or life prolongation, subject only to the limitations prescribed by applicable law.

I grant and give my said attorney-in-fact full power and authority to do and perform each and every act and thing whatsoever, as fully as I could do if present, with full power of substitution and revocation, I am hereby ratifying and confirming all that my said attorney-in-fact shall lawfully do or cause to be done by virtue of this Power of Attorney given to Pamela Bruckner.

This Power of Attorney shall not be affected by disability of the principal and shall continue until terminated or revoked in writing, or as otherwise provided by law.

My said attorney-in-fact shall be authorized to make and present photocopies of this Power of Attorney, which photocopies shall have the same force and effect as any original hereof.

This Power of Attorney, and all actions and decisions of my said attorney-in-fact shall bind upon me, my heirs, personal representatives, administrators, successors and assigns.

WHEREOF, I have hereunto set my hand and seal at _____, _____ County, South Dakota, this _____ day of October, 2014.

Barbara A. Morris

Barbara A. Morris

STATE OF SOUTH DAKOTA)
:ss
COUNTY OF Beadle)

On this the 29th day of October, 2014, before me, the undersigned officer, personally appeared Barbara A. Morris, known to me 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.

(SEAL)

Notary Public, South Dakota

My commission expires:
8-9-2017

Dakotaland FEDERAL CREDIT UNION

EXHIBIT tabbies a

LOANLINER

ACCOUNT CARD

Member No: 59690-0

MEMBER APPLICATION AND OWNERSHIP INFORMATION

Member/Owner: BARBARA A MORRIS	
Street: 244 CATALPA AVE SE PO BOX 261	SSN/TIN: 524-46-7603
City/State/Zip: WOLSEY, SD 57384	Driver's Lic. No: M620-061-41-596-0
Home Phone: (605) 350-8822 ☐ Listed ☐ Unlisted	Date of Birth: Mar 16, 1941
Work Phone:	Password: ALEXANDER
E-mail:	Membership Eligibility: Membership Group
Employer:	

ACCOUNT OWNERSHIP

Designate the ownership of the accounts and responsibility for the services requested.

☒ Individual ☐ Joint Account with Rights of Survivorship ☐ Joint Account without Rights of Survivorship

Joint Owner:	SSN/TIN:
Street:	Driver's Lic. No:
City/State/Zip:	Date of Birth:
Home Phone: ☐ Listed ☐ Unlisted	Password:
Work Phone:	E-mail:
Joint Owner:	SSN/TIN:
Street:	Driver's Lic. No:
City/State/Zip:	Date of Birth:
Home Phone: ☐ Listed ☐ Unlisted	Password:
Work Phone:	E-mail:
Joint Owner:	SSN/TIN:
Street:	Driver's Lic. No:
City/State/Zip:	Date of Birth:
Home Phone: ☐ Listed ☐ Unlisted	Password:
Work Phone:	E-mail:

ACCOUNT DESIGNATIONS

☒ Payable on Death (POD)/Trust Account ☐ All Accounts ☐ Designate Specific Accounts _____

Beneficiary/POD Payee: KAREN WYMAN
Street:
City/State/Zip: MERRITT ISLAND FL 00000

Beneficiary/POD Payee: PAMALA BRUCKNER
Street:
City/State/Zip: WOLSEY SD 00000

☐ UTMA/UGMA (as custodian for _____ (minor) under the Uniform Transfers/Gifts to Minors Act)
Minor's SSN/TIN:

☐ Agency Print Name of Agent: _____
Signature _____ Date: _____

☐ Other: ☐ All Accounts ☐ Designate Specific Accounts _____ ☐ See Account Authorization Card

ACCOUNT TYPE

All of the terms, conditions, form of account ownership, account selection and other information indicated on this Card apply to all of the accounts listed unless the Credit Union is notified in writing of a change.

	Suffix		Suffix
☒ Share/Savings:		☐ Money Market:	
☒ Share Draft/Checking:		☐ HSA:	
☐ Share Certificate/Certificate:		☐ Other:	

The account number for each of the accounts listed consists of the suffix added to the end of the Member Number listed in the "MEMBER APPLICATION AND OWNERSHIP INFORMATION" section. If this Card applies to more than one account of the same type, more than one suffix will be listed for that account type.

D11004-e

ACCOUNT SERVICES	
☐ Payroll Deduction/Direct Deposit:	
☐ Audio Response:	
☐ Overdraft Protection (Indicate transfer priority.):	
☐ ATM Card:	☐ Debit Card:
☐ PC Access/Internet Banking:	
☒ Other: **Under separate agreement**	

TIN CERTIFICATION AND BACKUP WITHHOLDING INFORMATION

Under penalties of perjury, I certify that:

(1) The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued), and

(2) I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and

(3) I am a U.S. citizen or other U.S. person. For federal tax purposes, you are considered a U.S. person if you are: an individual who is a U.S. citizen or U.S. resident alien; a partnership, corporation, company, or association created or organized in the United States or under the laws of the United States; an estate (other than a foreign estate); or a domestic trust (as defined in Regulations section 301.7701.7).

Certification Instructions. Cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. Cross out item 3 and complete a W-8 BEN if you are not a U.S. person.

AUTHORIZATION

By signing below, I/we agree to the terms and conditions of the Membership and Account Agreement, Truth-in-Savings Disclosure, Funds Availability Policy Disclosure, if applicable, and to any amendment the Credit Union makes from time to time which are incorporated herein. I/We acknowledge receipt of a copy of the agreements and disclosures applicable to the accounts and services requested herein. If an access card or EFT service is requested and provided, I/we agree to the terms of and acknowledge receipt of the Electronic Fund Transfers Agreement and Disclosure. ***The Internal Revenue Service does not require your consent to any provision of this document other than the certifications required to avoid backup withholding.***

X Barbara A. Morris	11/12/14	X	
Signature	Date	Signature	Date
X		X	
Signature	Date	Signature	Date

FOR CREDIT UNION USE ONLY	☐ See Account Change Card	☐ See Insurance Beneficiary Card
Date of Membership:	Opened/App'd by:	Member Verification:
☐ Credit Report	☐ Check Verify	☐ PIN Request
☐ Access Card	☐ Audio Response	☐ PC Access/Internet Banking

D11004-e

Dakotaland FEDERAL CREDIT UNION

EXHIBIT tabbies 3

Account Change Authorization

Member | Owner: Barbara Morris Member Number: 59690-0 Employee Initials: DO
Date: 12-17-14

CHANGE IN JOINT OWNERS:

Adding Joint Owner (requires signatures of all owners | joint owners) #21148-4

Name: Pamela Buckner SSN: 525-19-0900
Address: PO Box 261 DOB: 9-11-1960
City, State, Zip: Volga SD 57384 Driver's License: 00754827
Phone Number: 605- 412-0199 Secure Word: Martin

Removal of Joint Owner (requires the signature of the individual being removed from the account)

Name: _____

NAME CHANGES: (requires only signature that the name change affects and documentation to support name change)

Current Name: _____ Updated Name: _____

Departments to Notify: ☐ Member Services: ☐ Consumer Loans: ☐ Card Services: ☐ FICS:

BENEFICIARY DESIGNATION (requires signatures of all owners | joint owners)
List all account beneficiaries below. This will override any previous beneficiary designated.

Name: _____ Name: _____
City, State, Zip: _____ City, State, Zip: _____
Name: _____ Name: _____
City, State, Zip: _____ City, State, Zip: _____

CHECKING SUFFIX CHANGES

Adding a checking suffix (requires signatures of all owners | joint owners:) ☐

Closing a checking suffix (requires signature of one owner:) ☐ Reason for closing: _____

ACCOUNT DEMOGRAPHIC CHANGES (requires signature of one account owner or employee verified)

Name: _____ New email address: _____
New Address: _____ Phone Number: _____
City, State, Zip: _____ Departments to Notify: ☐ Member Services: ☐ FICS
How Member was Verified (required:) _____
If change affects more than one account, please list: _____

Account Information Disclosure (requires signature of all owners | joint owners)

I authorize _____ to receive account information until I revoke this authorization in writing.

I revoke authorization for _____ to receive account information.

By signing below, I/We agree to the changes on the account and I/We understand that this is a modification of the original account agreement. I/We also acknowledge that I/we have received all disclosures at the time the account was established and any amendments to those disclosures.

X Barbara A. Morris 12/17/14
Signature: Date: Signature: Date:

X Pamela Buckner 12/17/14
Signature: Date: Signature: Date:

Everything We Do, We Do for *You!*

Last Will and Testament

OF

BARBARA ANN MORRIS

I, BARBARA ANN MORRIS, residing in Brevard County, Florida, being of sound mind and memory, do make, publish and declare this my Last Will and Testament, and hereby revoke all former Wills and Testaments and Codicils thereto by me made.

1. I direct the payment of all my unsecured legal debts and funeral expenses.

2. I devise certain items of tangible personal property not otherwise specifically disposed of by this Will, excluding money and items used in my trade or business, if any, to the persons listed on the last dated writing made for this purpose, signed by me, and in existence at the time of my death. Such writing shall have no significance apart from its effect on the distribution of my property by this Will. In the event no such list is discovered within thirty days after the appointment of my Personal Representative, then, and in that event, it shall be presumed that I left no such writing and all my personal property shall pass in accordance with the other provisions of this Will.

3. I give, devise and bequeath all of the rest and remainder of my estate and property, real, personal and mixed, wheresoever the same may be situated and of whatsoever kind or character of which I may die, seized and possessed, or to which I may be or become in any way entitled or have any interest, or over which I may have any power of appointment, to the Trustee of the "BARBARA ANN MORRIS TRUST", which was established under that certain Trust Agreement heretofore executed by me, as Grantor and as Trustee, on the ____ day of _____, 2014, for distribution as provided therein.

1

4. I hereby appoint my daughter, KAREN LEE WYMAN, Personal Representative of this my Last Will and Testament, and in connection therewith, I direct that she be relieved of any requirement for the giving of bond, and if notwithstanding this direction, any bond is required by law, statute or rule of Court, no sureties be required thereon. In the event my said daughter shall not survive me or for any reason be unable to serve or cease to act as such Personal Representative, I hereby appoint my daughter, PAMALA JEAN BRUCKNER as Personal Representative hereof, waiving bond as aforesaid.

5. I confer upon the Personal Representative of this my Last Will and Testament, with respect to the management and administration of my property in my estate, the following discretionary powers in addition to the powers and authority otherwise granted by law, without limitation by reason of specification.

a. To retain any such property for such period of time as she may deem advisable, without liability for depreciation or loss; to deposit any monies at any time constituting a part of my estate, in one or more banks, savings or commercial, in such form of account, whether or not interest bearing and without limitation as to the amount of any such account, or in the discretion of the Personal Representative, to hold any such monies uninvested.

b. To lease real property for such period of time, with or without an option to purchase, and upon such terms as she may deem advisable.

c. To borrow money for any purpose whatsoever and to mortgage real property and pledge personal property as security for such loans.

d. To sell, exchange or otherwise dispose of any or all of my property, real or personal, at public or private sale, at any time and from time to time, and for such consideration, and upon such terms, including terms of credit, as she may deem advisable.

6. For the purpose of this Will, a person shall not be deemed to have survived me if he or she dies before the expiration of ten days following the date of my death, and I hereby declare that I shall be deemed to have survived such person and this Will and all of its provisions shall be construed upon that assumption and basis.

IN WITNESS WHEREOF, I, BARBARA ANN MORRIS, have to this my Last Will and Testament, subscribed my name and set my seal, this 21st day of May, 2014.

Barbara Ann Morris (SEAL)
BARBARA ANN MORRIS

Signed, sealed, published and declared by BARBARA ANN MORRIS, the Testatrix, above-named, to be her Last Will and Testament, in our presence, and we at her request and in her presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses, this 21st day of May, 2014.

Edward L. Stahley residing at Rockledge, Florida
Edward L. Stahley

Valerie J. Righenzi residing at Merritt Island, Florida
Valerie J. Righenzi

[illegible] residing at Merritt Island, FL

3

STATE OF FLORIDA
COUNTY OF BREVARD

We, BARBARA ANN MORRIS, EDWARD L. STAHLEY, VALERIE J. RIGHENZI and _____, the Testatrix and witnesses respectively, whose names are signed to the attached and foregoing instrument, being first duly sworn, do hereby declare to the undersigned officer that the Testatrix signed the instrument as her Last Will and Testament, and that she signed voluntarily, and that each of the witnesses, in the presence of the Testatrix, at her request, and in the presence of each other, signed the Will as a witness and that to the best of the knowledge of each witness, the Testatrix was at the time 18 or more years of age, of sound mind and under no constraint or undue influence.

_____
BARBARA ANN MORRIS, Testatrix

_____
Edward L. Stahley, Witness

_____
Valerie J. Righenzi, Witness

_____
Witness

Sworn to, subscribed and acknowledged before me by BARBARA ANN MORRIS, the Testatrix, and sworn to and subscribed before me by EDWARD L. STAHLEY, VALERIE J. RIGHENZI, and _____ the witnesses, this 5th day of _____, 2014.

_____
Edward L. Stahley
Notary Public - State of Florida
At Large

EDWARD L. STAHLEY
MY COMMISSION # EE 044284
EXPIRES: March 28, 2015
Bonded Thru Budget Notary Services

4

REVOCABLE TRUST AGREEMENT

THIS AGREEMENT made this 21 day of _____, 2014, between BARBARA ANN MORRIS, hereinafter referred to as the Grantor, and BARBARA ANN MORRIS, hereinafter referred to as the Trustee.

ITEM I: STATEMENT OF PURPOSE AND BENEFICIARIES

A. Grantors have established this Trust to be known hereafter as the "BARBARA ANN MORRIS TRUST", in order to provide a means for the management of certain of Grantor's properties and perhaps the proceeds of insurance upon the Grantor's life, for the management of such further property interests as may be deposited with the Trustee by Grantor, and for the maintenance, comfort and support of Grantor during her life and of Grantor's family after Grantor's death, all in the manner hereinafter provided.

B. Grantor has created this Trust by depositing with the Trustee the property described in Schedule A, which is annexed hereto. From time to time, additional property, perhaps including policies of life insurance, may be deposited with Trustee if accepted by her for administration under this instrument. Grantor by Grantor's will may direct that a part or all of Grantor's estate and property over which Grantor has a power of appointment, shall be delivered to Trustee for administration by her under this agreement, after Grantor's death.

ITEM II: RECEIPT AND COVENANTS OF TRUSTEES

A. Trustee acknowledges receipt of the property described in Schedule A.

B. Trustee will manage, invest and reinvest the property described in Schedule A and will hold any policies of life insurance deposited with Trustee, and will receive, manage, invest

and reinvest such additional property as may be deposited with Trustee and accepted by her, and all of the proceeds of that property, upon the uses and for the purposes hereafter set forth. The Trustee has the power and authority to buy, sell, and transfer real and personal property, mortgage real property and pledge personal property.

C. Trustee will accept and will administer as part of the Trust Estate whatever property is to be delivered to Trustee under the provisions of Grantor's Will to be administered.

D. Trustee will use her best effort to collect when due, and thereafter will administer in accordance with the terms of this instrument, the proceeds of all policies of insurance made payable to Trustee. Trustee shall have no responsibility to pay premiums upon those policies, nor to pay the principal or the interest of any loans secured by her except in her discretion to the extent of income and other assets of the Trust. The insurance companies that shall have issued the policies shall have no responsibility other than to pay to Trustee the proceeds of the policies when they become due and payable. Trustee shall not be required to take any legal proceedings concerning the policies until Trustee is indemnified to her sole satisfaction.

E. Either Grantor or any Trustee shall have the power to designate an agent as having the authority to sign on any bank, savings and loan, brokerage, mutual fund, or other account held by this Trust. Said authorized signer may be a Successor Trustee that has not yet assumed the duties of Trustee. Said agent shall act in a fiduciary capacity and shall be accountable to the Trust; however, any financial institution or other third person who deals with the authorized signer may rely upon all actions taken by the authorized signer as binding the Trust without inquiry. The

authority granted to the authorized signer shall survive the incapacity or death of the Grantor, but may be revoked by the Trustee. The power herein granted shall include the power to execute a Power of Attorney.

F. Upon the death of Grantor, the Trustee shall make such gifts of the tangible personal property of the Grantor as may be directed by the Grantor's Will, or as may be directed by a list, letter, or other writing of the Grantor permitted by the Will (whether or not probated). The cost of storing, packing, shipping and insuring any tangible personal property gift prior to delivery to its intended recipient shall be paid by the Trust.

ITEM III: DISPOSITIVE PROVISIONS

The Trustee shall administer this Trust for the purpose of paying the net income, at least annually or more often as directed by the Grantor, to BARBARA ANN MORRIS, until the death of BARBARA ANN MORRIS. The Trustee shall also, if requested by the Grantor, pay from the Corpus or principal of this Trust, such amounts as may be deemed necessary by Grantor for the support and maintenance of the said BARBARA ANN MORRIS. Upon the death of BARBARA ANN MORRIS, this Trust shall terminate and the remaining corpus, principal and accrued interest shall be distributed to Grantor's two (2) daughters, PAMALA JEAN BRUCKNER and KAREN LEE WYMAN, equally, per stirpes.

ITEM IV: LIFETIME RESERVATIONS BY GRANTOR

During Grantor's life, Grantor shall have the right to do the following acts:

A. To revoke this instrument entirely and to receive from the Trustee all of the Trust property remaining after making payment or provision for payment of all expenses connected with the administration of this Trust.

B. From time to time to amend this instrument in any and every particular; provided, however, that the duties and responsibilities of the Trustee shall not be changed without the written consent of the Trustee.

C. From time to time to withdraw from the operation of this Trust any part or all of the Trust property.

D. Upon written request by Grantor, Trustee will assent to or join in the execution of any instrument provided to her by Grantor and designed to enable Grantor to exercise any of the rights reserved by the provisions of this item.

E. Grantor reserves the right to reside upon any property placed into this trust as Grantor's permanent residence during Grantor's life, it being the intent of this provision to preserve in Grantor the requisite beneficial interest and possessory right in and to such real property, to comply with Section 196.031 and Section 196.041 of the Florida Statutes, such that Grantor's possessory right constitutes in all respects, "equitable title to real estate," as that term is used in Section 6, Article 7 of the Constitution of the State of Florida.

ITEM V: ADMINISTRATION IN THE EVENT OF INABILITY TO SERVE

In the event the Trustee, shall be unable to act as Trustee during the term of this Trust, Grantor hereby designates her daughter, KAREN LEE WYMAN, to act as Successor Trustee, during such period of inability to serve. In the event KAREN LEE WYMAN, fails to survive or for any reason be unable to act or shall cease to act as Successor Trustee, Grantor hereby designates her daughter, PAMALA JEAN BRUCKNER to act as Successor Trustee during such period of inability to serve. In the event that the Trustee is restored to the ability to serve, said Trustee shall reassume the duties as Trustee of the Trust and the said KAREN LEE WYMAN or

the said PAMALA JEAN BRUCKNER, shall no longer act as Successor Trustee. A written statement from a medical doctor shall be sufficient to establish "ability or inability of a trustee to serve."

ITEM VI: ADMINISTRATION AFTER GRANTOR'S DEATH

After the death of the Grantor, Grantor hereby designates KAREN LEE WYMAN, to act as successor Trustee, who shall as soon as practicable distribute the remaining corpus and principal in accordance with the terms and provisions of ITEM III herein. In the event KAREN LEE WYMAN, fails to survive or for any reason be unable to act or shall cease to act as Successor Trustee, Grantor hereby designates PAMALA JEAN BRUCKNER, to act as Successor Trustee, who shall as soon as practicable distribute the remaining corpus and principal in accordance with the terms and provisions of ITEM III herein.

ITEM VII: PAYMENT OF THE ESTATE TAXES

The Grantor directs that the Trustee shall have the power to pay a portion of any Federal Estate taxes owed by the estate of either of the Grantor, in the proportion that the value which those assets of this Trust constituting a part of the gross estate of said Grantor bears to her total gross estate.

ITEM VIII: ADDITIONS TO TRUST

From time to time further real and personal property may be deposited with the Trustee hereunder; and the Grantor may direct by the provisions of her last Will, that some portion of her probate estate shall pass to the Trustee named herein to be administered under the terms of this Trust Agreement after the death of Grantor.

ITEM IX: AMENDMENTS TO TRUST

All amendments to this Trust, including the addition of other property to the Trust and the changing of beneficiaries, their respective shares, and plan of distribution, shall be made by an instrument in writing signed by the Grantor and served upon the Trustee, and the original of such instrument shall be attached to the original of this Trust Agreement and maintained in the possession of the Trustee.

ITEM X: APPLICABLE LAW CLAUSE

This instrument has been prepared and executed in the State of Florida, and the Grantor and Trustee is a resident of the State of Florida. All questions concerning the meaning and intentions of the terms of this instrument and concerning its validity and all questions relating to performance under it shall be judged and resolved in accordance with the laws of the State of Florida.

IN WITNESS WHEREOF, the Grantor and Trustee has hereunto set her hand and seal and have caused these presents to be executed this 25th day of MARCH, 2014.

Edward L. Stahley, Witness

Barbara Ann Morris (SEAL)
BARBARA ANN MORRIS

Valerie J. Righenzi, Witness
(As to Grantor)

"GRANTOR"

Signed, sealed and delivered
in the presence of:

Edward L. Stahley, Witness

Barbara A. Morris (SEAL)
BARBARA ANN MORRIS

Valerie J. Righenzi, Witness
(As to Trustee)

"TRUSTEE"

STATE OF FLORIDA
COUNTY OF BREVARD

BEFORE ME personally appeared BARBARA ANN MORRIS Grantor and Trustee in the foregoing Revocable Trust Agreement, to me well known, and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged before me that she executed the same for the purposes therein expressed.

WITNESS my hand and official seal this 25th day of MARCH, 2014.

EDWARD L. STAHLEY
MY COMMISSION # EE 841228
EXPIRES: March 22, 2017
Bonded Thru Budget Notary Services

Edward L. Stahley
Notary Public - State of Florida
At Large

Signed, sealed, published and declared by the above named Grantor and Trustee in the presence of us who have seen the Grantor and Trustee sign this instrument, and who have affixed our names as attesting witnesses hereto, in her presence, at her request, and in the presence of each other, this day and year last above written.

Edward L. Stahley residing at Rockledge, Florida

Valerie J. Righenzi residing at Merritt Island, Florida

residing at

SCHEDULE "A" TO REVOCABLE TRUST AGREEMENT

DATED MARCH 25, 2014

BETWEEN BARBARA ANN MORRIS, GRANTOR

AND

BARBARA ANN MORRIS, TRUSTEE

---

1. HOUSE AT 585 PARKSIDE AVE, MERRITT ISLAND, FL 32953.
2.
3.
4.

UNIFORM PROBATE CODE (1969)

(Last Amended or Revised in 2010)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

WITH COMMENTS

(Last updated: February 11, 2013)

Uniform Law Commission
National Conference of Commissioners on Uniform State Laws
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An account that is not substantially in the form provided in this section is nonetheless governed by this part. See Section 6-203 (types of account; existing accounts).

SECTION 6-205. DESIGNATION OF AGENT.

(a) By a writing signed by all parties, the parties may designate as agent of all parties on an account a person other than a party.

(b) Unless the terms of an agency designation provide that the authority of the agent terminates on disability or incapacity of a party, the agent's authority survives disability and incapacity. The agent may act for a disabled or incapacitated party until the authority of the agent is terminated.

(c) Death of the sole party or last surviving party terminates the authority of an agent.

Comment

An agent has no beneficial interest in the account. See Section 6-211 (ownership during lifetime). The agency relationship is governed by the general law of agency of the state, except to the extent this part provides express rules, including the rule that the agency survives the disability or incapacity of a party.

A financial institution may make payments at the direction of an agent notwithstanding disability, incapacity, or death of the party, subject to receipt of a stop notice. Section 6-226 (discharge); see also Section 6-224 (payment to designated agent).

The rule of subsection (b) applies to agency designations on all types of accounts, including nonsurvivorship as well as survivorship forms of multiple-party accounts.

SECTION 6-206. APPLICABILITY OF PART. The provisions of [Subpart] 2 concerning beneficial ownership as between parties or as between parties and beneficiaries apply only to controversies between those persons and their creditors and other successors, and do not apply to the right of those persons to payment as determined by the terms of the account. [Subpart] 3 governs the liability and set-off rights of financial institutions that make payments pursuant to it.

Subpart 2. Ownership As Between Parties And Others

SECTION 6-211. OWNERSHIP DURING LIFETIME.

(a) In this section, "net contribution" of a party means the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied to the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance. The term includes deposit life insurance proceeds added to the account by reason of death of the party whose net contribution is in question.

(b) During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount.

(c) A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party.

(d) An agent in an account with an agency designation has no beneficial right to sums on deposit.

Comment

This section reflects the assumption that a person who deposits funds in an account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, the person usually intends no present change of beneficial ownership. The section permits parties to accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them.

The assumption that no present change of beneficial ownership is intended may be disproved by showing that a gift was intended. For example, under subsection (c) it is presumed that the beneficiary of a POD designation has no present ownership interest during lifetime. However, it is possible that in the case of a POD designation in trust form an irrevocable gift was

intended.

It is important to note that the section is limited to ownership of an account while parties are alive. Section 6-212 prescribes what happens to beneficial ownership on the death of a party.

The section does not undertake to describe the situation between parties if one party withdraws more than that party is then entitled to as against the other party. Sections 6-221 and 6-226 protect a financial institution in that circumstance without reference to whether a withdrawing party may be entitled to less than that party withdraws as against another party. Rights between parties in this situation are governed by general law other than this part.

"Net contribution" as defined by subsection (a) has no application to the financial institution-depositor relationship. Rather, it is relevant only to controversies that may arise between parties to a multiple-party account.

The last sentence of subsection (b) provides a clear rule concerning the amount of "net contribution" in a case where the actual amount cannot be established as between spouses. This part otherwise contains no provision dealing with a failure of proof. The omission is deliberate. The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals, and not equal and undivided ownership that would be an incident of joint tenancy.

In a state that recognizes tenancy by the entireties for personal property, this section would not change the rule that parties who are married to each other own their combined net contributions to an account as tenants by the entireties. See Section 6-216 (community property and tenancy by the entireties).

SECTION 6-212. RIGHTS AT DEATH.

(a) Except as otherwise provided in this [part], on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 6-211 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 6-211 belongs to the surviving parties in equal shares, and augments the proportion to which each survivor, immediately before the decedent's death, was beneficially entitled under Section 6-211, and the right of survivorship continues between the surviving parties.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27935

KAREN LEE WYMAN, Personally and as Personal Representative of the Estate of Barbara Ann Morris,

Plaintiff/Appellant,

vs.

PAMALA BRUCKNER,

Defendant/Appellee.

Appeal from the Circuit Court
Third Judicial Circuit
Beadle County, South Dakota

THE HONORABLE CARMEN A. MEANS

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed July 22, 2016

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ARGUMENT

Attorneys-in-fact must cut square corners. They must follow the principal's intent expressed in the power of attorney rather than in their own self-serving affidavits. The foundational facts are therefore that Bruckner was Morris's attorney-in-fact before the joint account was established, Morris's power of attorney did not expressly authorize self-dealing, particularly to other family members, and Bruckner made $218,700 in self-dealing transfers to her family members while Morris was still alive. Bruckner attempts to shift the Court's attention from these facts to her own self-serving affidavits concerning Morris's intent. *Studt* and *Bienash*, however, preclude consideration of these affidavits precisely to ensure that self-dealing cases are decided on the principal's written declaration of intent in the power of attorney itself rather than after-the-fact and self-serving extrinsic evidence.

1. Bruckner's argument that she was authorized to write self-dealing checks as a joint account owner rather than the power of attorney is meritless and contrary to her summary judgment theory.

On appeal, Bruckner argues that the $218,700.00 in checks she wrote to family members, and the $6,377.16 in checks she wrote for her benefit while Morris was still alive did not rely on her authority as power of attorney, but rather on her status as a joint account owner: "[Bruckner's] authority to write checks on the Dakotaland account was not derived from her power-of-attorney; rather it was consequent to her ownership of the account." (Appellee's Brief at 14.) In fact, three of Bruckner's five main points in her brief are devoted to the argument that it was her status as a joint owner—not being Morris's attorney-in-fact—that authorized these checks. Bruckner's argument is

meritless and directly contrary to the argument she presented at summary judgment and the circuit court accepted.

Bruckner's argument is a shocking about-face. At summary judgment, she relied exclusively on her authority as attorney-in-fact to justify the checks she wrote while Morris was alive. For example:

- Bruckner's motion for summary judgment stated: "The *Durable Power of Attorney* specifically gave Pamala Bruckner authority to receive gifts from the personal property of her mother, Barbara Ann Morris." (PRO-SR182.)
- Bruckner's brief in support of the motion for summary judgment stated: "The Power of Attorney specifically authorized Pamala Bruckner to make gifts to herself from her mother's property, and so based on the language contained in the Power of Attorney, the Motion for Summary Judgment should be granted." (PRO-SR188.)

Moreover, the circuit court accepted Bruckner's argument and relied on the power of attorney as the sole basis for its decision that Bruckner was authorized to write checks while Morris was alive:

- "I believe that they were authorized under the power of attorney and to say otherwise to me takes away the meaning of the clause that existed." (PRO-SR238.)
- "[I]t is now hereby ORDERED, ADJUDGED, AND DECREED that the Power of Attorney language clearly and unmistakably authorized the agent, Pamala Bruckner, to give or receive gifts from the property of the Principal, her mother, Barbara Morris, and therefore Plaintiff's *Motion for*

Partial Summary Judgment that Pamala Bruckner breached her fiduciary duty and engaged in self-dealing is denied, and Defendant's *Motion for Partial Summary Judgment* is granted;" (CIV-SR158.)

Bruckner's new argument that she did not rely on the power of attorney contradicts the sole basis on which she argued, and the circuit court concluded, that she was authorized to spend Morris's money while Morris was alive. Bruckner's contention that she did not rely upon the power of attorney is a stunning admission that the circuit court erred in granting summary judgment to Bruckner and shows that Bruckner will take any position in her effort to win this case. Judicial estoppel, however, does not allow Bruckner to obtain summary judgment based on the power of attorney and then reverse course on appeal by arguing that the self-dealing checks written while Morris was alive were not authorized by the power of attorney but rather by her status as joint account owner. *Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc.*, 2014 S.D. 64, ¶ 15, 853 N.W.2d 878, 883.

In any event, Bruckner's new theory is meritless. It rests on the misguided assertion that a fiduciary can escape fiduciary limitations concerning self-dealing transactions merely by not expressly relying on their authority as a fiduciary. More specifically, Bruckner assumes that, even though she was Morris's attorney-in-fact when the Dakotaland account was opened and when she later wrote self-dealing checks on that account, because Bruckner did not put "POA" next to her signature on those checks, she was free from any fiduciary duties. Bruckner's theory assumes that an attorney-in-fact or trustee could purchase property from their principal at any price or lease land at any rental rate if they signed their own name without adding "POA" or "trustee."

This is not the law. Rather, fiduciaries must "'act in *all* things wholly for the benefit of the trust.'" *In re Estate of Moncur*, 2012 S.D. 17, ¶ 9, 812 N.W.2d 485, 487 (emphasis added) (quoting *Willers v. Wettestad*, 510 N.W.2d 676, 680 (S.D. 1994)). The principle that fiduciaries must always act for the benefit of their principal means that whatever rights Bruckner had as a joint owner had to be exercised consistently with her duties as Morris's attorney-in-fact, including the prohibition against self-dealing. Bruckner attempts to avoid this principle by citing *Hein v. Zoss*, 2016 S.D. 73, which was decided after the Appellant's Brief was filed, but *Hein* supports Wyman.

Bruckner seizes on *Hein*'s conclusion that a circuit court erred by excluding evidence concerning the creation of a joint account. Bruckner ignores the critical distinction between *Hein* and this case. In *Hein,* the joint account was opened in 2004, *id.* ¶ 14, but Fred Zoss did not become his mother's attorney-in-fact until 2005. *Id.* ¶ 2. *Hein* remanded to allow Fred Zoss to introduce evidence of his mother's intent concerning the creation of the joint account in 2004, a time frame before he became her attorney-in-fact: "Accordingly, the court abused its discretion by excluding evidence from Zoss regarding the circumstances surrounding the opening of the account in 2004." *Id.* ¶ 14.

Hein never said that a person who is an attorney-in-fact *before* becoming a joint account owner may ignore fiduciary duties while acting as a joint owner. This is critical because Morris's power of attorney was signed October 29, 2014, (PRO-SR120), and thus Bruckner was already Morris's fiduciary when she was added to the account on December 17, 2014. (Appellant's App. 026.) *Hein* reaffirmed that a fiduciary is "'a person who is required to act for the benefit of another person on *all matters within the*

scope of their relationship.'" *Hein*, 2016 S.D. 73, ¶ 8 (emphasis in *Hein*). Because Morris's power of attorney included bank accounts and Bruckner was Morris's attorney-in-fact before becoming a joint account owner, under *Hein* the creation and use of the Dakotaland joint account were acts within the scope of Bruckner's fiduciary relationship with Morris. Bruckner was therefore subject to fiduciary duties concerning the creation and use of that account regardless of whether she acknowledged those obligations by adding "POA" to her signature.

Recognizing that Bruckner was subject to fiduciary duties with regard to the creation and use of the Dakotaland joint account is fatal to all of Bruckner's arguments. This explains why Bruckner has such severe buyer's remorse about relying on the power of attorney before the circuit court. But even if Bruckner had not already admitted she was acting as a fiduciary when she wrote checks on the Dakotaland account, *Hein* and prior decisions establish that, because Bruckner was Morris's fiduciary concerning bank accounts and other financial matters when the Dakotaland joint account was created, Bruckner is subject to the fiduciary prohibition on self-dealing concerning the creation and use of the Dakotaland account.

2. Bruckner's self-serving affidavits do not establish that Morris wanted Bruckner to have all of the funds in the Dakotaland account either during Morris's lifetime or after her death.

Bruckner wrongly asserts that Morris intended for Bruckner to receive all the funds at issue based on assertions in Bruckner's affidavits. In reality, because Bruckner was a fiduciary when the Dakotaland account was created, this Court cannot consider Bruckner's self-serving affidavits as evidence of Morris's intent. *Studt v. Black Hills Fed. Credit Union*, 2015 S.D. 33, ¶¶ 10, 14, 864 N.W.2d 513, 516, 517 ("An affidavit is

merely oral evidence reduced to writing. Therefore the affidavit is inadmissible to determine whether [the principal] intended to allow [the attorney-in-fact] to self-deal.").

Similarly, Bruckner's attempts to explain why she wrote checks for her own benefit or to immediate family members are irrelevant because self-dealing transactions are voidable based on the conflict of interest due to the relationship of the parties to the transaction. *In re Estate of Stevenson*, 2000 S.D. 24, ¶¶ 9-11, 605 N.W.2d at 821. Self-dealing transactions thus are voidable regardless of why the fiduciary made them. *See id.* ¶ 17 (voiding self-dealing leases without examining amount of rent); RESTATEMENT (THIRD) OF TRUSTS § 78, *comment d* ("In prohibited self-dealing transactions, under the no-further-inquiry rule, it is immaterial to the question of breach of trust (as distinguished perhaps from the appropriate remedy) that the trustee has acted in good faith and for a fair consideration.").

Bruckner makes no attempt to argue that *Studt* permits a fiduciary to submit an affidavit concerning a principal's intent to permit self-dealing. Instead, she ignores *Studt*'s holding on this point and relies upon *Hein*. But, as discussed above, *Hein* is consistent with *Studt* because *Hein* merely held that a person who later became an attorney-in-fact could introduce evidence concerning the creation of a joint account before he was an attorney-in-fact. *Hein v. Zoss*, 2016 S.D. 73, ¶ 14. *Hein* affirmed the circuit court's grant of a motion in limine concerning extrinsic evidence about the principal's intent during the time period Fred Zoss was an attorney-in-fact: "Accordingly, the order appropriately excluded evidence that [the principal] intended for Zoss to self-deal." *Id.* ¶ 11. Because Bruckner was already Morris's fiduciary when the

Dakotaland account was created, both *Studt* and *Zoss* preclude consideration of Bruckner's self-serving affidavits.

Bruckner alternatively tries to avoid *Studt* by asserting that her inadmissible assertions about Morris's intent are unrebutted. Bruckner contends the statements in her second affidavit, which were then repeated in her Response to Petitioner's Statements of Undisputed Material Facts and Additional Undisputed Facts, are undisputed and established because Wyman did not file a reply to the additional "facts." Wyman, however, was not required to file a reply. SDCL § 15-6-56(c) provides that a party moving for summary judgment must submit a statement of material facts, and a party resisting summary judgment must file a response, but Rule 56(c) does not even provide for the moving party to make a reply to the resisting party's response to the statement of material facts, much less suggest that a reply is required. SDCL § 15-6-56(c).

Bruckner further suggests that, even if her assertions about Morris's intent are inadmissible, the Court should assume them to be true because Wyman did not dispute them. Bruckner cites no authority requiring Wyman to dispute inadmissible evidence. Requiring parties to discuss the content of inadmissible evidence would defeat the entire purpose of making evidence inadmissible. Wyman should not be required to submit her own inadmissible affidavit concerning Morris's intent to prevent the Court from ignoring Bruckner's inadmissible assertions. Wyman should not be punished for complying with *Studt*, nor should Bruckner be rewarded for ignoring it.

Bruckner's persistent attempts to have the Court consider her inadmissible, self-serving comments about Morris's intent demonstrate the wisdom of *Bienash* and *Studt*'s rule precluding consideration of this type of evidence. Allowing a fiduciary to use her

own affidavit to establish that a principal verbally consented to self-dealing transactions would severely undermine *Bienash* and *Studt*'s requirement that authority to self-deal must be specifically articulated in the power of attorney itself. This would be a recipe for elder abuse.

Wyman trusts that this Court can ignore Bruckner's assertions about Morris's intent based on inadmissible evidence. But because Bruckner has suggested her affidavits and her addition to the joint account are the only extrinsic evidence concerning Morris's intent, Wyman notes that Morris's estate plan appointed Wyman as trustee and personal representative and split Morris's assets equally between Wyman and Bruckner. (Appellant's App. 012-23.) When the Dakotaland account was first established, Morris designated Wyman and Bruckner as equal POD beneficiaries. (*Id.* at 024.) Without Bruckner's inadmissible affidavits, there is no competent evidence Morris understood that adding Bruckner to the account would trump Morris's previous POD designation and her estate plan. Wyman noted this undisputed evidence below and in her Appellant's Brief. (Appellant's Brief at 14 n.2; CIV-SR92 to 94.)

Bruckner also mistakenly assumes that Wyman's voluntary dismissal of her undue influence claim establishes the legitimacy of Bruckner's addition to the account. Wyman, however, may still contest the legitimacy of that act and Morris's understanding of its implications—and does contest those things—as part of the breach of fiduciary duty claim. Bruckner's arguments based on Morris's supposed intent all rest on a false foundation and should be rejected.

3. Morris did not give Bruckner ownership of the Dakotaland funds while Morris was alive.

Bruckner's response incorrectly asserts that Morris gave Bruckner ownership of the Dakotaland funds while Morris was still alive. The record and the law establish that Morris intended to, and did, retain ownership of the Dakotaland funds during her lifetime. This is significant because the vast majority of the funds at issue were transferred while Morris was alive, and because Morris owned those funds, Bruckner's transfer of them either to her family members or for her own benefit constituted prohibited self-dealing.

Bruckner's mistake is assuming that adding her to the Dakotaland account gave her ownership of the funds during Morris's lifetime. But even assuming *arguendo* that Buckner's addition to the account was lawful, Bruckner's addition does not establish that Morris intended to give the funds to Bruckner during Morris's lifetime:

> A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

SDCL § 29A-6-103(1). As the UPC comments explain: "This section reflects the assumption that a person who deposits funds in an account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, the person usually intends no present change of beneficial ownership." (Bruckner's App. 032 at *Comment*.) Consequently, even if legitimate, Bruckner's mere addition to the account does not alter the presumption that Morris intended to own the funds during her lifetime. To change that outcome, Bruckner must produce clear and convincing evidence beyond her addition to the account that Morris intended to give the funds to Bruckner during Morris's lifetime.

Moreover, as *Hein* recognized, under Section 29A-6-103(1) it is the intent Morris had when the joint account was established that matters:

> However, by completely barring any evidence *related to the establishment of the account*, Zoss was prevented from introducing evidence that there was "a different intent" from that of the statutory designation. Accordingly, the court abused its discretion by excluding evidence from Zoss *regarding the circumstances surrounding the opening of the account in 2004.*

Id. ¶ 14 (emphasis added). Because Bruckner's affidavits are inadmissible as discussed above, Bruckner has no competent evidence concerning Morris's intent when the joint account was established and thus as a matter of law cannot overcome the presumption that Morris retained ownership during her lifetime with clear and convincing evidence.[1]

In addition, with regard to Morris's intent during her lifetime, even if Bruckner's affidavits could be considered, as a matter of law they would fail to satisfy the standard of clear and convincing evidence when the account was established. Bruckner's first affidavit was unequivocally consistent with the statutory presumption that Morris retained ownership of the funds during her lifetime: "At lunch was [sic] talked, and [Morris] told me that she wanted to add me as a joint owner of her checking account, ***because she wanted me to have her checking account when she died***." (PRO-SR197 ¶ 4 (emphasis added).) Consistent with this first affidavit, Bruckner argued that, when Morris opened the account, she "made the decision that the funds in that account would belong to her daughter, Pamala Bruckner, ***upon Barbara Morris's death."*** (PRO-SR188 (emphasis added).)

[1] Bruckner claims that Wyman waived this argument by not raising it on appeal. In reality, Wyman raised this argument. (*See* Appellant's Brief at 16-17.)

On appeal, Bruckner ignores her first affidavit concerning the creation of the joint account and instead focuses upon her second affidavit asserting that Morris consented to self-dealing checks when Bruckner wrote them shortly before Morris's death. (*See* CIV-SR113 to 115.) Bruckner's second affidavit is incompetent to establish Morris's intent during her lifetime for multiple reasons. First, as explained above, it is Morris's intent when the joint account was established that matters, so the second affidavit is irrelevant. *See Hein*, 2016 S.D.73, ¶ 14. Second, because Bruckner's first affidavit unequivocally asserted that Morris wanted Bruckner to have the funds after Morris's death, Bruckner's second self-serving affidavit is insufficient as a matter of law to establish a different intent by clear and convincing evidence. *St. Pierre v. State*, 2012 S.D. 151, ¶ 23, 813 N.W.2d 151, 158. Most importantly, because Bruckner was Morris's fiduciary during this entire time period, neither of Bruckner's affidavits should be considered, which leaves no competent evidence to overcome the presumption Morris owned the funds during her lifetime. *Studt*, 2015 S.D. 33, ¶ 14, 864 N.W.2d at 517.

Bruckner attempts to avoid SDCL § 29A-6-103(1) by erroneously asserting that other joint account statutes authorized her to write self-dealing checks while Morris was alive. Bruckner relies on SDCL § 29A-6-101(7), which discusses the general right of any joint owner to write checks from a joint account. This general right protects financial institutions from claims by one joint owner that the institution improperly allowed another joint account owner to write a check. *See* SDCL § 29A-6-108.

But this general right does not govern the rights of joint owners with regard to each other. Rather, as SDCL § 29A-6-102 makes clear, the rights of joint owners with regard to each other are governed by SDCL § 29A-6-103 to -105. SDCL § 29A-6-102.

As explained above, SDCL § 29A-6-103 establishes the rule governing ownership during the joint owners' lifetimes with regard to each other, and, under the circumstances of this case, establishes that Morris retained sole ownership of the funds in the Dakotaland account during her lifetime.

In yet another attempt to escape the implications of SDCL § 29A-6-103(1), Bruckner notes that the UPC comments concerning the uniform version of that section indicate that it is merely intended to establish which joint owner owns the funds; it does not address whether the joint owner has a cause of action against the other joint owner. (Bruckner's App. 033.) The UPC comments do not help Bruckner, however, because South Dakota common law establishes that joint owner A has a cause of action against joint owner B if joint owner B withdraws funds belonging to joint owner A: "It is generally accepted that a party to a joint bank account may only withdraw funds without liability to his co-depositor when he is in fact the real owner of the money." *Johnson-Batchelor v. Hawkins*, 450 N.W.2d 240, 241 (S.D. 1990). Bruckner thus is simply wrong to assert that, merely because she was a joint owner, she had a present right to withdraw funds while Morris was alive even though Bruckner contributed nothing to the account.

Bruckner attempts to distinguish *Johnson-Batchelor* by contending that Morris did not object to Bruckner's self-dealing checks when they were written. This is absurd. Morris was literally on her deathbed when the vast majority of the checks at issue were written. For example, Bruckner wrote a $200,000 check to her husband on March 11, 2015, the day before Morris died on March 12, 2015. (Appellant's Brief at 6.) To hold that Morris's estate cannot pursue a claim for this check written the day before Morris died because Morris did not object to the checks would enable rampant financial abuse.

The rule of *Studt* and *Bienash* is not that fiduciary may self-deal unless a principal objects. The rule is just the opposite: Self-dealing is prohibited unless there is clear and unmistakable language authorizing self-dealing in the power of attorney itself.

Bruckner's attempts to avoid the principle that Morris retained ownership of the Dakotaland account funds while Morris was alive fail as a matter of law even if one assumes that adding Bruckner to the account was legitimate. Because Morris retained ownership of the Dakotaland funds during her lifetime, Bruckner's status as a joint owner did not authorize her to spend Morris's money. The legitimacy of the checks written during Morris's lifetime hinges on Bruckner's authority and restrictions as a fiduciary, not her status as a joint owner.

4. Bruckner wrongly asserts that Morris's power of attorney authorized Bruckner to write $218,700 in checks to Bruckner's family members while Morris was alive.

Amazingly, after Bruckner emphatically asserts in her first three main points that she did not rely on her authority as attorney-in-fact when she wrote $218,700 in checks to family members, Bruckner reverses course yet again and argues in her fourth main point that the ability to receive gifts in the power of attorney implicitly authorized her to make gifts to her family members. This argument fails because multiple decisions by this Court establish that self-dealing can never be implied; it must be expressly articulated in clear and unmistakable language in the power of attorney itself.

Bruckner does not contend that Morris's power of attorney expressly states that Bruckner may give *self-dealing* gifts to others. Nor could she, because the power of attorney uses the phrase "give or receive as a gift" without any express reference to self-dealing. (*See* Appellant's App. 009.) With regard to making gifts to others, the language

in Morris's power of attorney is indistinguishable from the gift language in *Studt* that this Court held insufficient to expressly authorize self-dealing gifts. *See Studt*, 2015 S.D. 33, ¶¶ 4 n.1 & 13, 864 N.W.2d at 514, 516. Bruckner therefore argues that the ability to make self-dealing gifts to her family members should be implied from the language authorizing her to receive gifts. But as soon as Bruckner begins arguing that the ability to receive gifts logically implies the "lesser power" to make self-dealing gifts to others, she has departed from the express language of the instrument and is asking this Court to authorize a form of self-dealing by implication. This is fatal to Bruckner's position because this Court has steadfastly maintained that the principle of strict construction precludes finding the power to self-deal by implication. *Id.* ¶ 13, 864 N.W.2d at 516. Consequently, "'if the power to self-deal is not specifically articulated in the power of attorney, that power does not exist.'" *Id.* ¶ 10, 864 N.W.2d at 516 (quoting *Bienash*, 2006 S.D. 78, ¶ 15, 721 N.W.2d at 435).

Bruckner alternatively argues that self-dealing is all-or-nothing, and thus if she is entitled to receive self-dealing gifts, the Court must necessarily imply that self-dealing to others is permitted. This, however, would violate the principle of strict construction established by *Studt* and *Bienash*. Furthermore, there is no logical reason why principals should be precluded from authorizing some forms of self-dealing in a power of attorney, but not others. *Bienash* specifically mentioned the ease with which language in a power of attorney can be drafted to accommodate a principal's desires concerning self-dealing. *Bienash*, 2006 S.D. 78, ¶ 21, 721 N.W.2d at 436 (quoting *Kunewa v. Joshua*, 924 P.2d 559, 565 (Hawaii 1996)). There is no inconsistency if the Court concludes that Morris's

power of attorney authorized Bruckner to receive self-dealing gifts, but did not authorize her to make self-dealing gifts to others.

Accordingly, there is no clear and unmistakable language in Morris's power of attorney expressly authorizing Bruckner to give $218,700 to her family members while Morris was alive, and thus these transactions were prohibited self-dealing. Because neither the power of attorney nor Bruckner's status as a joint account owner authorized the $218,700 in self-dealing checks to others while Morris was alive, the Court should direct the entry of summary judgment for Morris's estate on this amount.

5. The power to receive gifts does not expressly authorize receipt of self-dealing gifts

Bruckner contends the $6,377.16 in checks she wrote for her own benefit during Morris's lifetime were authorized by language in the power of attorney permitting her to receive gifts. Bruckner's arguments concerning her ability to receive gifts break no new ground. Wyman has already refuted them. *See* Appellant's Brief at 23-26. If the Court agrees that the absence of a reference to the receipt of self-dealing gifts means Bruckner could not receive gifts, then Bruckner's addition to the joint account was an invalid self-dealing act. *See id.* at 27-28. This is an independent reason to void Bruckner's survivor's rights, entitling Wyman to judgment for $14,622.65, which is 50% of Bruckner's post-death, self-dealing transfers. *Id.* at 30.

6. Bruckner's abuse of the joint account voids her survivor's rights.

Alternatively, Bruckner's breach of fiduciary duty by improperly transferring $218,700 to other family members while Morris was alive should void her survivor's rights. Bruckner contends that her receipt of these funds is not tortious and should not void her survivor's rights concerning post-death transfers because her addition to the joint

account suggests Morris intended for Bruckner to receive these funds after Morris's death. Bruckner then goes a step further and asserts that "tracing" means she should not even be responsible for the $218,700 in transfers to others during Morris's lifetime.

Bruckner asks this Court to excuse her breaches on the theory that giving $218,700 in gifts to others instead of herself, and writing those checks shortly before Morris died, are immaterial breaches. Fiduciary duties are the highest standards imposed by the law, and this Court has said that powers of attorney "'must be strictly construed *and* strictly pursued.'" *Bienash*, 2006 S.D. 78, ¶ 13, 721 N.W.2d at 435 (emphasis added) (quoting *In re Guardianship of Blare*, 1999 S.D. 3, ¶ 14, 589 N.W.2d 211, 214). Under this standard, paying $218,700 to the wrong people at the wrong time is clearly material. Holding Bruckner accountable for these breaches is not making an end run around Morris's intent. It upholds Morris's intent expressed in the power of attorney, which contains no language even remotely authorizing Bruckner to make self-dealing gifts to others, and Morris's intent to retain sole ownership of the Dakotaland funds during her lifetime. It is also consistent with Morris's intent as expressed in her estate plan.

Holding Bruckner accountable for her breaches of fiduciary duty is also supported by South Dakota cases establishing that tortfeasors should not profit from their wrongdoing. Bruckner's attempts to distinguish these cases fail, because they are based on the false assumption that she did not breach any fiduciary duties. These cases justify the forfeiture of Bruckner's survivorship rights concerning the funds she improperly transferred during Morris's lifetime and the funds remaining in the account at Morris's death. *See also In re Estate of Mayer*, 664 N.E.2d 583, 585 (Ohio App. 1995) ("The co-

owner forfeits any survivorship rights to excess withdrawals and is liable to the decedent's estate for the amount of these withdrawals.").[2] The forfeiture of Bruckner's survivor rights preempts her argument that the combination of her survivor rights and tracing means she should have no liability for improperly transferring $218,700 during Morris's lifetime. It is also another reason Wyman is entitled to judgment for $14,622.65, or half of the post-death funds.

In addition, Bruckner mischaracterizes the *Johnson-Batchelor* decision. *Johnson-Batchelor* nowhere suggests that a tortfeasor can use survivorship rights concerning a joint account to escape consequences for a breach of fiduciary duty. In *Johnson-Batchelor*, a husband withdrew some funds belonging to himself and some funds owned by his wife from a joint account and transferred them to a CD he held with his daughter. 450 N.W.2d at 241. After the husband died, the wife was allowed to recover the portion of the CD's representing the wife's funds even though the CD's were held by the daughter at that time: "[the wife] is then entitled to trace or follow the funds into these CDs insofar as those funds represent her interest in that account." *Id.* at 242. This tracing principle would allow Morris's estate, if necessary, to recover funds from the Dakotaland account held by Bruckner's family members. Tracing offers no assistance to Bruckner in avoiding the consequences of her wrongdoing.

[2] Bruckner argues *Estate of Mayer* is not on point because it recognizes that intent can change the presumption that the depositor intended to maintain sole ownership during the depositor's lifetime. 664 N.E.2d at 585. But Ohio applies the same clear and convincing standard as South Dakota. *In re Thompson's Estate*, 423 N.E.2d 90, 94 (Ohio 1981) (adopting UPC 6-103(a)). As set forth in Section 3 above, Bruckner cannot show by clear and convincing evidence that Morris intended to give Bruckner the funds during Morris's lifetime, so *Estate of Mayer* is on point.

CONCLUSION

Bruckner's attempts to cloud the issue with her affidavits and new arguments based on the joint account all fail in the face of the undisputed facts that she was Morris's attorney-in-fact before the joint account was established, and Morris's power of attorney did not expressly authorize Bruckner to write $218,700 in self-dealing checks to Bruckner's family members while Morris was still alive. The law of fiduciaries does not allow Bruckner to write $218,700 in checks to the wrong people at the wrong time and escape all consequences for that breach. Wyman respectfully requests that the Court reverse the partial summary judgment in Bruckner's favor and order entry of judgment for Morris's estate and Wyman.

Dated this 19th day of December, 2016.

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CERTIFICATE OF COMPLIANCE

I certify this brief complies with the requirements in D.S.D. L.R. 7.1 regarding the length of briefs. This brief was prepared using Word 2010, Times New Roman (12 point), and contains 4,994 words excluding the table of contents, table of authorities, and certificates of counsel. I have relied on the word count of the word-processing program to prepare this certificate.

Dated this 19th day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2016, I electronically served via e-mail, a true and correct copy of the foregoing Appellant's Reply Brief to the following:

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