IN THE

Supreme Court

of the

State of South Dakota

No. 31106

IN THE MATTER OF THE
ESTATE OF VICTORIA O. O'FARRELL,
DECEASED

An appeal from the Circuit Court, Third Judicial Circuit
Grant County, South Dakota

The Hon. Patrick Pardy
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

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Notice of Appeal filed on June 2, 2025

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INTRODUCTION

This Appeal

This appeal relates to two orders issued by the Circuit Court in Victoria O'Farrell's probate.

July 18, 2022. The first order involved the unusual (and, as we argue, illegal) appointment of Raymond O'Farrell as the special administrator for his late wife Victoria's estate. [R.5]. The appointment was achieved without notice or a hearing, and, it placed Raymond in the role where he would assume the simultaneous role of plaintiff and defendant in his late wife's pending lawsuit against him.

Paul's initial attempt to appeal Raymond's appointment was dismissed because there were "pending motions before the circuit court to remove and replace the special administrator" which this Court deemed "pleadings related to the same subject matter,' and, consequently, belong to the same proceeding." *Estate of Victoria O. O'Farrell,* "Order Dismissing Appeal

#30532," 12/18/2024 (quoting *In re Petrik,* 2021 S.D. 49, ¶ 17).

May 22, 2025. Following dismissal of the appeal, a hearing was held seeking Raymond's removal. The Circuit Court refused to remove

Raymond as Special Administrator, on the basis that he has no conflict of interest. [R.375].

The Court's decision was based upon its conclusion that Raymond never deposited his shares of VOR, Inc., into the Trust. [R.372-374]. This conclusion, in turn, was based upon a misreading of VOR's tax filings.

The Circuit Court also concluded that Victoria's theoretical interest in the Trust was her only asset, and, if the Trust was unfunded, Victoria died without assets, and intestate. From this, the Circuit Court "grant[ed] the petition to close the probate file." [R.408:12-13].

Connor O'Farrell has taken on the role of personal representative of his father Paul's estate, and pursues this appeal on its behalf. Connor is joined in this appeal by Paul's brother Lance.

Related Matters

This appeal[1] relates to several other matters and appeals: a prior attempted appeal of Raymond's appointment in this probate;[2] an appeal about the dismissal of Victoria O'Farrell's suit against Raymond;[3] Paul's

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[1] Appeal #31106, arising from 25PRO22-11

[2] Appeal #30532, arising from 25PRO22-11 (dismissed)

[3] Appeal #30508, arising from 25CIV22-38 (dismissed)

civil lawsuit seeking to remove Raymond as Trustee and unwind VOR's corporate actions, including the sale of the O'Farrell farmland to Grand Valley Hutterian Brethren, and which is now being pursued by Paul's Estate;[4] Grand Valley's eviction action to eject Paul and his company (Skyline Cattle) from the land sold;[5] and an ag debt collection action involving Paul, Skyline, and VOR.[6]

All of these matters are interrelated, and, ultimately we seek for all of the remaining appeals and proceedings to be consolidated.

Transcript & Record

References to the settled record are denoted by [R.123]. The Circuit Court conducted a motions hearing on May 1, 2025. That Hearing Transcript is referred to by page and line number as [HT 1:23]. The Transcript is reprinted within the settled record, starting at [R.383].

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[4] *See*, 25CIV23-15; Appeal #30482; *Est. of O'Farrell v. Grand Valley Hutterian Brethren, Inc.*, 2024 S.D. 81; and Appeal #31101 (6/2/2025 unopposed petition for intermediate appeal, pending).

[5] *See*, 23CIV23-18; Appeal #30344; *VOR, Inc. v. Est. of O'Farrell*, 2025 S.D. 2

[6] *See*, 25CIV23-27; Appeal #30862 (still pending)

JURISDICTIONAL STATEMENT

Appellants appeal both of the following: (i) the Circuit Court's entry of an Order by the Hon. Dawn Elshere on 7/18/2022 [R.5]; and (ii) the Circuit Court's entry of judgment by the Hon. Patrick Pardy on 5/22/2025 [R.375].

No notice of entry was given of the first Order. Notice of entry of the second Order was issued on May 23, 2025. [R.458]. Appellants filed their notice of appeal on 6/2/2025. [R.460].

This Court has jurisdiction under SDCL 15-26A-3(1) and (4). An order appointing a special administrator is a final action upon the petition seeking appointment. *See, Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 16, 963 N.W.2d 766, 770 ("orders determining individual petitions for relief in probate actions can constitute final orders when they dispose of all issues relative to a particular petition and leave nothing for decision").

A NOTE ON APPEALABILITY OF PROBATE ORDERS

This Court denied Paul's first attempted appeal regarding the validity of Raymond's appointment.[7] The Order dismissing the appeal held that there were "pending motions before the circuit court to remove and replace

[7] Appeal #30532, arising from 25PRO22-11

the special administrator" which this Court deemed "'pleadings related to the same subject matter,' and, consequently, belong to the same proceeding." *Estate of Victoria O. O'Farrell,* "Order Dismissing Appeal #30532," 12/18/2024 (quoting *In re Petrik,* 2021 S.D. 49, ¶ 17).

In a related O'Farrell opinion issued on the same day, the majority described that dismissal as one "for *lack of jurisdiction* because it was not an appeal from *a final order.*" *Est. of O'Farrell v. Grand Valley Hutterian Brethren, Inc.*, 2024 S.D. 81, ¶ 8 (emphasis added). But the dismissal Order cited to *In re Petrik*, and the passage the Order cited to do not reflect a clear *jurisdictional* bar (nor a clear black-and-white rule of finality). Instead *Petrik* alludes to concepts of judicial economy: "When the subject matter of two petitions overlap, *it would generally be appropriate* to consider both petitions as belonging to the same proceeding...." *In re Petrik,* 2021 S.D. 49, ¶ 17.

That quoted sentence from *Petrik* has been recycled several times.[8] It ultimately traces back to a concurrence of the North Dakota Supreme Court which wrestled with the murky issue of judicial economy in probate appeals,

[8]Here is the full pedigree of that quoted sentence: *In re Petrik*, 2021 S.D. 49, ¶ 17 (quoting *In re Estate of Geier*, 2012 S.D. 2, ¶ 13 (quoting *Scott v. Scott*, 136 P.3d 892, 896-97 (Colo. 2006) (quoting *Matter of Estate of Newalla*, 837 P.2d 1373, (N.M. Ct. of App. 1992) (citing *Matter of Est. of Stuckle*, 427 N.W.2d 96, 97-103 (N.D. 1988) (Meschke, J., concurring).

including how to achieve "conservation of judicial energy and elimination of delays" when facing the situation of "multiple petitions about interrelated claims." *See, Matter of Est. of Stuckle*, 427 N.W.2d 96, 97-103 (N.D. 1988) (Meschke, J., concurring).

This Court's ultimate holding in *Petrik*[9] aligned with this Court's recent recognition that "[t]he relevant provisions of the UPC suggest a more expansive determination of the finality of probate orders" than its prior case law afforded. *In re Est. of Geier*, 2012 S.D. 2, ¶ 10.

The clear, general rule is that, "[o]nce a petition is filed, it defines a proceeding." *Id.*, ¶ 13. This rule is in service of the public policy advocated by UPC's drafters: "to avoid the result under the [prior probate code] that no order in a probate case was final until there had been full administration and closing of the estate." *In re Est. of Geier*, 2012 S.D. 2, ¶ 11.

Incidentally, the New Mexico opinion within that chain of cases (footnote 8, above) recognized the problems that arise if there is not a clear black-and-white rule about appealability of probate orders: "Thus, the

[9] David was not required to "litigate his claims…in Marlene's probate case" nor in "the separate declaratory judgment action" prior to receiving relief from an Order terminating a joint tenancy that had been issued without notice, even though the claims were interrelated. *Id.*, ¶ 10.

Probate Code teaches that as a practical matter each petition in a probate file should ordinarily be considered as initiating an independent proceeding, so that an order disposing of the matters raised in the petition should be considered a final, appealable order. Failure to permit appeal of such orders would often compel the probate proceedings to go forward under a cloud of uncertainty that would seriously impair the personal representative's efforts to administer the estate." *Matter of Est. of Newalla*, 837 P.2d 1373, 1377 (N.M. Ct.App. 1992).

Thus, a fairer reading of the dismissal Order in #30532 (and of *Petrik*) is that *all* orders in probate court "proceedings" are final and appealable, but, this Court maintains the discretion to combine related proceedings for judicial economy. Any other result would give litigants 30 days after notice of entry of an order in which to *guess* whether or not this Court will determine two proceedings to be "one" for purposes of an appeal. If the litigant guesses incorrectly, the window for an appeal will have passed. This is not the result intended by *Geier*.

Some of those uncertainties would be present here. On its face, the July 2022 order appointing Raymond meets all the definitions of a final and appealable order. But, for example, if notice of entry had been issued of the

Order, the litigants who filed the petition for Raymond's removal would be faced with a complicated decision as to whether to appeal the appointment, or defer an appeal until after the removal petition was decided *on the hope that the two matters would be considered by this Court as a single, appealable event.* No litigant can correctly make this prediction every time. But guessing cautiously means more appeals. Some type of gatekeeping function is perhaps necessary to clarify which appeals can move forward.

Notably, some states have abandoned the 'pragmatic' approach to the appealability of probate orders, and instead require probate litigants to seek Rule 54(b) certifications of probate orders unless it is otherwise clearly final. *E.g., First Tr. Co. of N. Dakota v. Conway*, 345 N.W.2d 838, 842 (N.D. 1984); *In re Est. of Heater*, 498 P.3d 883, 887 (Utah 2021). That is perhaps not needed here, but, encouraging probate litigants in this State to seek clarity via Rule 54(b) certifications may help.

In short, we take issue with the majority's dictum in *Grand Brethren* that the order appointing Raymond was not "final," and instead suggest that this Court exercised its discretion in a situation where it is "appropriate to consider both petitions" together, after both final orders were entered.

To paraphrase Justice Stucke in his original concurrence, this Court expected dismissal of the first appeal to be a situation where "[c]omprehension on appeal is usually improved by thorough development and elaboration at [a hearing] of related facts and legal problems." *Matter of Est. of Stuckle*, 427 N.W.2d 96, 97-103 (N.D. 1988) (Meschke, J., concurring).

In practice, however, the subsequent hearing held in this matter did little to improve the development of the case, and instead made it even more complicated.

STATEMENT OF THE CASE & FACTS

Since 2022, the O'Farrell family has been engaged in litigation that challenges the validity of corporate actions involving the family's farming corporation VOR, Inc., and its relation to the family's Trust. No substantive rulings have occurred in these three years. Two family members have since died (Victoria and Paul).

Unchecked, Raymond's actions ultimately led to his appointment as Victoria's special administrator; the precipitous, $3.2 million sale of nearly all of VOR's farmland; and the eviction of Paul from the farm he had helped build. A summary of background facts is found in *Estate of O'Farrell et al v.*

Grand Valley Hutterian Brethren, Inc., 2024 S.D. 81, ¶¶ 2-11. [10] We quote a few excerpts here.

In 2022, Victoria filed suit "against Raymond and her son, Kelly O'Farrell, seeking to unwind certain actions taken by Raymond on behalf of VOR and the Trust, seeking to remove Raymond as trustee of the Trust, and seeking injunctive [and other] relief." *Id.*, ¶ 6. "Victoria died in 2022 while her lawsuit was pending. After Victoria's death, Paul filed a motion to intervene in that case....The circuit court denied Paul's motion to intervene." *Id.*, ¶ 8.

Upon Victoria's death, Raymond petitioned to become the special administrator of her estate. [R.1]. The Circuit Court, by Judge Dawn Elshere, issued an Order appointing Raymond that same day. [R.5]. The parties are in agreement that no hearing was conducted; no notice was given as to Raymond's petition or his appointment; and no express waiver of a hearing occurred.

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[10] Further background facts are also found within the briefing of the related appeals, including: Appellants' Brief #30482 (pp. 15-17); Appellants' Brief #30344 (pp. 9-17); Appellants' Reply Brief #30344 (pp. 2-7); Appellant's Brief # 30532 (pp. 3-4); Appellant's Brief #30508 (pp. 4-6); Appellant's Reply Brief #30508 (pp. 1-2).

Because Victoria's lawsuit against Raymond was still pending, the appointment as Special Administrator installed Raymond into a position where he was both the plaintiff and the defendant in the same lawsuit. Raymond then directed Victoria's attorney to dismiss her lawsuit under Rule 41(a). Victoria's attorney complied. In a related appeal, this Court concluded that the voluntary dismissal was effective. *See,* Appeal No. 30508.

In his Petition for appointment, Raymond claimed that a special administrator was "necessary" because Victoria was involved in a lawsuit at the time of her death. [R.1]. Raymond's Petition gave the file number of her lawsuit, but he concealed from the Circuit Court that Raymond was the defendant in that suit. [R.1]. Raymond claimed that this "pending litigation requires immediate attention" and thus his appointment was an "*emergency.*" [R.2.]. Again, no notice was issued to anyone about this.

Upon discovering Raymond's appointment, Paul O'Farrell filed a Petition seeking removal, and, pointing out the conflict of interest. [R.13; R.19; R.23; R.29]. Paul (and then his brother Lance) sought appointment as Special Administrator. [R.11; R.28].

The Order appointing Raymond as Special Administrator did not limit his powers, but, temporally the appointment was to be self-limiting, confined "to such time as it is necessary to investigate whether the decedent has a will." [R.5]. A hearing was scheduled on the removal petition for October 7, 2022, in conjunction with Paul's parallel motion to intervene in Victoria's then-pending lawsuit. [R.31]. Although that hearing took place, it centered entirely upon the matters in 25CIV22-38 (Victoria's lawsuit), which were addressed first, and which consumed then entirety of the time allotted. It was not continued or rescheduled. Paul retained new counsel who appealed the July 2022 order of appointment.

The Petition for Removal was dormant thereafter, until dismissal of the first appeal. On March 6, 2025, Victoria's grandson Connor O'Farrell (in his capacity as personal representative of his father Paul's estate) filed a "Renewed Petition" to remove Raymond. [R.85]. In response, Raymond filed the following documents:

- a "Report of Special Administrator Closing Special Administration" [R.99];

- a "Renewed Resistance" to removal [R.109], which "incorporated ...by reference" his October 2022 resistance, found at [R.38];
- a "Supplemental Report of Special Administrator" [R.118]; and
- a "Second Supplemental Report of Special Administrator" [R.145].[11]

At the time of our first appeal, there was no indication that Raymond had undertaken a search for a Will or for assets, nor what he had found. In March 2025, Raymond initially claimed that no Will had been found. When Connor O'Farrell challenged this, Raymond revealed that he had found a copy of Victoria's Will but not the original. But he had not reported his findings or provided anyone with this information.

Search for a Will

In his original Petition for appointment, Raymond stated that he "believes that the decedent did have a Will that nominated Raymond...as Personal Representative." [*See,* R.1; Petition, ¶ 5 (filed 7/18/2022)].

[11] The attachments to the Second Supplemental Report are found at [R.135-144].

The original Order appointing Raymond indicated that Raymond's "term should be limited to such time as it is necessary *to investigate whether the decedent has a Will*, and such is offered and accepted in probate or upon determination that the decedent died intestate and intestate proceedings properly commenced." [*See,* R.5; Order, 7/18/2022] (emphasis added).

Raymond's appointment commenced in July 2022, and for the next 32 months, the Record contains no indication as to Raymond's actions regarding his search for a Will. Raymond did not offer a Will into probate, nor did he commence intestate proceedings.

After the Renewed Petition for his removal was filed on March 6, 2025, Raymond deflected from candor. His first responsive filing was a "Report" with the Court on March 13, 2025, which asserted that "a search for a Will executed by the decedent was conducted. *No Will was able to be located.*" [*See,* R.99; Report, ¶ 4] (emphasis added).

In response, Connor (*i.e.*, one of the Appellants here) questioned the plausibility of Raymond's failed search. In particular, he pushed back on Raymond's claim that no Will was found. [R.121]. He questioned whether a diligent search had been conducted and whether Raymond could impartially carry out such a search. *Id.* He also noted that it was implausible that

Victoria had executed a 95-page trust but neglected to execute a Will. *Id.* And he pointed out that it was in Raymond's self-interest that a Will not be found, since without it he would become the sole intestate heir; and they suggested that "in all probability Victoria executed a pour-over will, in line with her Trust." [*See,* R.121-122; Objection, ¶¶ 4-11].

Four days later, Raymond filed additional documents revealing (for the first time) that contrary to his March 13th Report that "no Will was able to be located," Raymond had indeed located a Will that Victoria had executed, in the form of a copy of a self-proved "Pour-Over Will" she Victoria executed on March 29, 2017. [R.136; Second Supplemental Report, Exhibit 2]. Raymond revealed that he had found this copy of the Will back in August 2022. [R.146].

The terms of the copy of her Pour-Over Will indicate that Victoria nominated Raymond as her choice of personal representative, or, Paul and Lance, jointly, or the survivor of them if Raymond is "unwilling or unable to act." [R.137; Article Three].

The terms of the Pour-Over Will also direct that the Personal Representative transfer all of Victoria's estate to the Trustee of her Trust to be added to the property of that Trust. [R.136; Section 2.01].

Connor asked the Circuit Court to make a finding that Raymond's "Report" on March 13, 2025, lacked candor; a finding that Raymond was not diligent in reporting the existence of the Will copy to the Court (which, was one of the primary purposes of his appointment); and a finding that the absence of an original instrument is not fatal to the potential pursuit of probating that Will (citing to SDCL 29A-3-402(d), which permits probating a copy if the Court is "reasonably satisfied that the will was not revoked."). [R.432-433].[12]

Connor also asked the Circuit Court to find that a purported revocation would be at odds with her lawsuit, which up until her death sought to protect the Trust into which her Will poured over. [R.433]. And, Connor asked for a finding that "Raymond's lack of candor as to the existence of a copy of Victoria's Will is further evidence of an inherent conflict of interest." [R.433].

The Circuit Court refused those requested findings.

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[12] The Circuit Court entered a finding that Raymond found "an *unsigned* Will...but not an executed Will." [R.373, Finding ¶ 10] (emphasis added). The only copy of Victoria's Will in the Record is signed, executed, witnessed, and notarized. [R.140-11].

Search for Assets

Raymond's Report claimed he was unable to locate any assets. In particular he says he has "not identified any assets in the name of the decedent." [*See,* R.99; Report, ¶ 6].

Connor pointed out that Raymond's "search" for assets would be impaired by an inherent conflict of interest. Connor also provided an extensive listing of potential assets and claims. [*See,* R.126-128; Objection, filed 3/27/2025, ¶¶ 28(a) to (f) and 29(a) to (c))].

Connor requested a finding that Victoria's Estate plausibly contains assets, including, at a minimum, her interest (and now her Estate's interest) in resolving claims related to the Trust; the claims for damages identified in Victoria's Complaint; and the relief that Paul's Complaint had theorized may be available to her Estate (which may include tort damages; punitive damages; conversion claims; and attorney's fees). [R.433-434].

The Circuit Court refused those findings.

Failure of Notice

When Paul O'Farrell filed his initial pleadings in this probate matter in September 2022, he did not specifically raise the issue of lack of notice, nor did he raise the issue of a failure to conduct a hearing.

Paul did, however, raise substantive objections regarding Raymond's appointment: Raymond's inherent conflict of interest,[13] and, Raymond's lack of candor in failing to disclose the conflict. [14] The Circuit Court found that Raymond's appointment was defective, but that Paul "waived the defect in notice by not objecting to notice for several months...." [R.372].

Raymond's New Theory That He Still Owns VOR, Inc.

Throughout these various O'Farrell proceedings, it has been generally accepted that Raymond and Victoria established a complex trust in 2011, into which they deposited substantial farming assets. This was understood to include the deposit of all of Raymond and Victoria's shares of VOR, Inc., into that Trust.

In March 2025, in response to the renewed petition for his removal, Raymond advanced a new theory: he now claims that it is legally impossible for him to have ever had a conflict of interest vis-a-viz Victoria's Estate or

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[13] [See, R.13; Petition for Removal, 9/26/2022, ¶¶ 11-19].

[14] [See, R.19; Motion to Determine Potential Conflict, 9/27/2022]. Paul brought this motion in response to a Notice of Appearance by counsel for Raymond. Until this Notice of Appearance, no attorney's name appears on any of the filings for Raymond. As Paul pointed out, serving as Raymond's counsel regarding Special Administrator matters would place Raymond's new attorney in the position of "advising [Raymond] whether or not he should proceed in litigation against himself personally as the Defendant...." *Id.*

her lawsuit because he claims he never carried out the transfer of VOR's shares into the Trust.

Instead, Raymond claims he has consistently owned the shares at all points in time since 2008. This was apparently premised "[u]pon a review of...the tax returns [*i.e.*, the K-1 forms from 2008 to 2021]...Raymond A. O'Farrell was the owner of 100% of the shares of VOR, Inc." [*See,* R.146; Second Supplemental Report of Special Administrator, ¶ 5 (filed 4/1/2025)].

This was not Raymond's position in 2022. In his "Resistance to Petition for Removal of Special Administrator," filed on 10/11/2022, Raymond states that: *"The shares of VOR, Inc., were not owned individually, but were owned 100% by the Trust."* [R.39; Resistance, ¶ 2] (emphasis added).

Raymond's 2022 admission that the VOR shares were owned by the Trust is also in line with the various parties' apparent understanding of the related cases on appeal. *See, e.g., Est. of O'Farrell v. Grand Valley Hutterian Brethren, Inc.,* 2024 S.D. 81, ¶ 3 ("In 2011, Raymond and Victoria created the Trust and 'deposited all (or most) of their assets' into the Trust, including their shares of VOR.").

At the Circuit Court level in 2023, Raymond introduced documentary evidence in the civil file demonstrating that the VOR shares had been deposited into the Trust.[15]

At the May 2025 hearing, in support of his new "tax filings" theory, Raymond's counsel introduced a series of K-1 schedules from prior tax years (2008 to 2020). They were received as Exhibits 1 through 13. [R.244-371]. On the 2008 form, Box F states, "Shareholder's percentage of stock ownership for tax year…100.00000%." [R.251].

This manner of reporting persisted from 2008 to 2020. (By its terms, the Trust was formed in 2011, and was restated in 2017, which overlaps with these years.)

Raymond and Victoria's trust document was also admitted at the hearing as Exhibit A. [R.154-244]. Within Section 1.05, the Trustors had

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[15] Within Raymond/VOR's initial filings in civil suit 25CIV23-15, Raymond/VOR attached a document entitled "Assignment Separate from Certificate," which states that on January 14, 2011, "Raymond O'Farrell and Victoria O'Farrell…assign to [themselves as] Trustees…in trust, under the Raymond and Victoria O'Farrell Living Trust…all right, title and interest in the stock of VOR, Inc…[and] all the powers, duties, and status of a shareholder in the corporation are hereby transferred to the above-listed trust entity." *See*, 25CIV23-000015; Exhibit J to "Answer", filed 4/5/2023 (which for reference was attached to the Objection filed in this matter on 5/21/2025). [R.417].

agreed that the tax reporting for the Trust could be accomplished by listing *either* of Raymond's or Victoria's Social Security numbers. In pertinent part, it states that "[d]uring any period that the trust is a Grantor Trust, *the Taxpayer Identification Number of the Trust will be either of our Social Security numbers, in accordance with Treasury Regulation Section 301.6109-1(a)(2).*" [R.158; Exhibit A, p. 1-5]. Or, in other words, the Trust intended that reporting on IRS documents could be made regarding Trust property, but using either Raymond or Victoria's Social Security numbers.[16]

In briefing for this hearing, Connor provided the Court with citations and quotations from the pertinent Treasury regulations. [R.123] (quoting 26 C.F.R. § 301.6109-1(a)(2); 26 C.F.R. § 1.671-4(b)(2)(i)(A)).

In short, Section 1.05 of the Trust and federal regulations appear to intend the use of Raymond's Social Security number to report the Trust's ownership of VOR. Or, in other words, the mere use of Raymond's Social Security number on VOR's K-1 filings could not resolve the question of ownership.

[16] A similar statement is found in the Certification of Trust that the Estate filed in the civil case on April 5, 2023: "The tax identification number of the Trust is the Social Security number of either Raymond…or Victoria…" [R.415].

Raymond did not testify. The only other evidence considered by the Court was Raymond's accountant, Gene Kiefer.

Mr. Kiefer was equivocal. After reading aloud from the tax forms as to the "100%" ownership percentages, he conceded that he "had no idea" whether or not the VOR shares were ever placed in Trust. HT 25:7.

Mr. Kiefer also conceded that "if the trust had a provision saying [Raymond and Victoria] could use their own social security numbers to report" its ownership of VOR shares for tax purposes, "I guess they could have." HT 25:15-17.

Mr. Kiefer also conceded that he had no testimony to offer as to whether the Trust was revocable or irrevocable or both. HT 26:8-11.

Mr. Kiefer was then shown a copy of the Trust (Exhibit A) and asked to review page 11, which contains Section 1.05. After reviewing this provision, Mr. Kiefer commented, "Yeah, now I understand what it's saying," and Mr. Kiefer agreed that it was "correct" that "the trust would allow one of them [Victoria or Raymond] to report [the Trust's shares of stock in VOR] under their Social Security number rather than both of them...even though it's trust property." HT 27:3-14.

And, Mr. Kiefer conceded that as it pertains to the K-1 forms for VOR that he helped prepare, that Mr. Kiefer in fact had "no idea" whether Raymond owned the shares personally or whether Victoria and Raymond were reporting the Trust's shares solely under Raymond's Social Security number pursuant to Section 1.05 of the Trust. HT 27:15-17.

Finally, Mr. Kiefer conceded that Raymond and Victoria could have contributed the shares of VOR into their Trust "without incurring...a taxable event." HT 28:2-5.

Yet from all of this, the Court found that "all tax returns [from] 2008 through 2020 identify Raymond O'Farrell as the owner of 100% of the shares of VOR, Inc," and concluded that "100% of the shares of VOR, Inc., were owned by Raymond O'Farrell at all times relevant to the Special Administration [and] there are no assets to administer." [R.372-373].

Based upon this conclusion, the Court then accepted Raymond's argument that he could not have a conflict of interest, since he had always owned VOR.

Conflict of Interest

Connor requested findings and conclusions as to Raymond's inherent conflict of interest. Connor asked the Court to find that this conflict of

interest existed from the inception of his appointment, and, that the conflict was not fully disclosed to Judge Elshere when she issued the Order of appointment, and that it impaired his ongoing ability to pursue claims on behalf of the Estate. [R.448; R.454]. Connor also asked for the Court to conclude that Raymond's tenure was void from the outset. [R.448], and that he should be replaced with Lance. [R.452].

The Circuit Court refused those findings and conclusions.

Impermissible Substantive Activity Following Petition for Removal

Raymond's March 2025 Report was submitted after the Petition for Removal was filed, and, after the Renewed Petition for Removal was filed. Specifically, the Renewed Petition was filed on March 6, 2025. [R.85-98]. Raymond's "Report" was filed a week later, on March 13, 2025. [R.99-101].

Citing to SDCL 29A-3-618 and SDCL 29A-3-611, Connor asked the Court to reject the Report as a procedural matter, because a Special Administrator is precluded from taking further substantive action after a removal petition has been filed. [R.453].

The Circuit Court also refused that finding.

The Circuit Court's Order

The Circuit Court concluded that notice of Raymond's appointment "was defective," but found that Paul waived any defect in notice by not raising it at his first opportunity. [R.372, 373; Findings 2-3; Conclusion 3].

The Circuit Court found that Victoria died intestate because "no Will was found" during a search of her home. [R.373; Findings 8; Conclusion 4].

It also found that Raymond was the 100% owner of VOR's stock at all times from 2008 to the present "as shown by the corporate tax returns"; that such shares were not deposited into the Trust; it concluded that there was therefore no conflict of interest; it concluded that the VOR stock was the only potential asset, and, that Victoria died with no other assets or claims. [R.372-374; Findings 4-7; Conclusion 5-6].

And, thus, the Circuit Court "approved" Raymond's reports; discharged him as Special Administrator; [R.374; Conclusions 7-9]; and it "grant[ed] the petition to close the probate file." [R.408; HT 33:12-13].

From these findings and conclusions, Connor appeals and assigns five errors.

LEGAL ISSUES

1.

The Probate Code contains mandatory notice provisions, as well as a separate proof-of-notice provision. *See* SDCL 29A-1-401(a) and (c). Interested parties are afforded 14 days' notice of formal proceedings. In proceedings to appoint a Special Administrator, the Probate Code contains an exception to the notice requirements in certain situations when "an emergency exists," but, the Probate Code still requires a hearing to be conducted. *See* SDCL 29A-3-614(2).

Here, the Record contains no proof of notice, and it is undisputed that a hearing did not take place and that no notice was given.

Is the Circuit Court's appointment of Raymond procedurally void? Yes, the appointment is procedurally void.

Ruling Below: The Circuit Court held that Paul waived any defect in notice by failing to raise it promptly. The Circuit Court did not address the question as to the defect of a failure of a hearing.

Authority:

- SDCL 29A-1-401(a) (14-day notice)
- SDCL 29A-1-401(c) (proof of notice)
- SDCL 29A-3-614(2) (formal proceeding for appointment of special administrator)
- *Matter of Est. of Petrik*, 2021 S.D. 49

2.

Special Administrators are "qualified" fiduciaries who may be appointed in lieu of Personal Administrators "when necessary to preserve the estate," or, "where a general personal representative cannot or should not act." SDCL 29A-3-614(2). An individual is not legally competent to serve as an executor/fiduciary of an Estate where his duties would involve prosecuting a suit which he would, at the same time, defend as an individual. More generally, collusive lawsuits are not permitted under the Rules of Civil Procedure, nor under the Rules of Professional Conduct.

Is the Circuit Court's appointment of Raymond as Special Administrator substantively void? Yes, the order appointing Raymond was substantively and legally void.

Ruling Below: The Circuit Court appointed Raymond as Special Administrator upon misleading facts, concealing Raymond's involvement in the litigation. Subsequently, at the hearing, the Circuit Court did not make any ruling as to the substantive invalidity of the appointment.

Authority:

- SDCL 29A-3-614
- SDCL 15-6-17(a)
- *Hampshire v. Powell,* 626 N.W.2d 620 (Neb. 2001)
- *Matter of Est. of Jones*, 2022 S.D. 9
- *Matter of Est. of Cutler*, 368 N.W.2d 724 (Iowa Ct. App. 1985)

3.

Special Administrators cannot continue to serve as fiduciaries when their tenure is colored by actual or apparent conflicts of interest. Nor can Special Administrators continue to serve when their tenure is marked by a lack of candor. Removal is also warranted when the petition for appointment is marked by dishonesty.

Did the Circuit Court err by refusing to remove Raymond as Special Administrator? Yes, the Court erred.

Ruling Below: The Circuit Court accepted Raymond's reports without question, it found no conflict of interest or lack of suitability, and it refused to remove him.

Authority:

- SDCL 29A-3-611
- SDCL 29A-3-618

4.

Special Administrators and Personal Representatives are statutorily precluded from taking further action after a petition for removal has been filed, except for acts to "account" and "preserve" the Estate. Here, a Petition for removal was filed in September 2022, and a Renewed Petition was filed on March 6, 2025. Thereafter, Raymond continued to attempt to carry out substantive efforts, including submitting "Reports" and seeking to close the Estate.

Did Raymond exceed his authority by submitting "Reports" and seeking to close the Estate after receiving a petition for removal? Yes, Raymond exceeded his authority.

Ruling Below: The Circuit Court permitted Raymond's reports and substantive actions in spite of the petition for removal.

Authority:

- SDCL 29A-3-611
- SDCL 29A-3-618

5.

Federal regulations permit certain trusts to report their tax filings using the Social Security number of a Trustor, even though the owner of the assets is the Trust itself. Raymond and Victoria's Trust contained a provision permitting such reporting, and, it made reference to the Treasury Regulation allowing such reporting. Their company's tax filings list Raymond as the owner. Do the tax filings of VOR, Inc., prove Raymond's ownership?

Did the Circuit Court err by concluding that VOR's tax filings proved Raymond owned VOR, rather than the Trust? Yes, the Circuit Court erred.

Ruling Below: The Circuit Court found that Raymond was the owner of 100% of the stock at all times pertinent, based upon an erroneous review of VOR's tax filings.

Authority:

- 26 C.F.R. § 301.6109-1(a)(2);
- 26 C.F.R. § 1.671-4(b)(2)(i)(A);
  (both of which permit a trust to continue filing under the social security numbers of the grantors)

STANDARD OF REVIEW

Several standards of review apply to the issues in this appeal.

- ***De novo.*** *De novo* review applies to the construction and application of statutes, rules of procedure, the Probate Code, and statutory notice requirements. *Discover Bank v. Stanley,* 2008 S.D. 111, ¶ 15; *In re Est. of Flaws*, 2016 S.D. 61, ¶ 12; *Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 16; *Abata v. Pennington Co. Bd. of Comm'rs,* 2019 S.D. 39, ¶ 9.
- ***Abuse of Discretion.*** A circuit court's appointment or removal of a special administrator (or personal representative) is reviewed for an *abuse of discretion. Matter of Est. of Jones*, 2022 S.D. 9, ¶ 33. An abuse of discretion refers to "a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Matter of Shirley A. Hickey Living Tr.*, 2022 S.D. 53, ¶ 14 (quotations and citations omitted). "[A]n error of law is never within the range of permissible choices and necessarily constitutes an abuse of discretion." *Olson v. Huron Reg'l Med. Ctr., Inc.*, 2025 S.D. 34, ¶ 18.
- ***'Clear error' as to factual findings.*** In general, *clearly erroneous* review applies to the Circuit Court's factual findings. A Circuit Court commits clear error when its "findings…are contrary to a clear preponderance of

the evidence" and, "on the entire evidence we are left with a definite and firm conviction that a mistake has been committed." *Matter of Est. of Simon*, 2024 S.D. 47, ¶ 20. It is clearly erroneous to make determinations and findings with inadequate evidence, or, when evidence on the record is missing. *Matter of Guardianship of Nelson*, 2017 S.D. 68, ¶ 17

- ***'De novo' as to certain mixed questions of law and fact.*** But, in some instances, a mixed question "requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles....[For those questions], the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed *de novo*." *Matter of Est. of Simon*, 2024 S.D. 47, ¶ 17 (quoting *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 16, 790 N.W.2d 52, 59 (quoting *Darling v. West River Masonry, Inc.*, 2010 S.D. 4, ¶ 10, 777 N.W.2d 363, 366) (cleaned up)).

ARGUMENT

1. Raymond's appointment as Special Administrator is *procedurally* invalid because of a failure of notice and a hearing

Raymond's appointment as special administrator involves the application of SDCL 29A-3-614 (requiring a hearing), as well as the notice

provisions of the Probate Code. *See, generally, Matter of Est. of Petrik,* 2021 S.D. 49, ¶ 22 (discussing and quoting 14-day notice provisions).

In this case, the lawyers representing Raymond convinced the Circuit Court to appoint him as Special Administrator without a hearing, without prior notice to anyone, without an express finding of emergency, and without notice to anyone following the appointment. Any of these defects render the appointment procedurally void.

(a) The Order is void for failure of notice

On July 18, 2022, the Circuit Court signed and filed an Order appointing Raymond as Special Administrator for his wife's Estate. [R.5]. This Order was entered seven days after her death, and, on the same day that the Petition was filed. This does not comply with the Probate Code's notice provisions.

'Formal proceedings' refer to 'proceedings conducted before a judge *with notice* to interested persons.' SDCL 29A-1-201(18) (emphasis added);

"Applying these uncomplicated statutory definitions," the Circuit Court's appointment of the Special Administrator was a formal proceeding subject to the notice and hearing requirements. *See id.* at ¶ 23. "The court may hear and determine formal proceedings…after notice in conformity with

§ 29A-1-401...." SDCL 29A-3-105. This includes 14-days advance notice of a hearing and the relief sought. *Id.* This statute contains a separate requirement that the Petitioner file *proof of compliance* with this notice requirement. *See* SDCL 29A-1-401(c) ("proof of the giving of notice shall be made on or before the hearing and filed in the proceeding").

Here, in contrast to those mandates, no notice was given; no proof of notice was filed; and, it would have been mathematically impossible for such notice to have been given.

The Circuit Court acknowledged that notice was defective.

(b) The Order is void for the failure to conduct a hearing

Furthermore, *even if an emergency existed,* the Circuit Court cannot conduct such proceedings without a hearing. The black and white text of SDCL 29A-3-614(2) provides that when a special administrator is appointed in formal proceedings, it must be done "after notice *and hearing*...." (emphasis added). The *emergency* clause dispenses only with the *notice* requirement, but *not* the *hearing* requirement.

In this case, there is no indication that a hearing took place. So, not only was there a failure to notify anyone of the Petition, and, a failure to issue

notice of a hearing, but Raymond's attorneys failed to even seek a hearing upon that Petition. Thus, the Order is void because no hearing took place.

A hearing on a probate matter is not an idle exercise, as this case demonstrates. At a hearing, the Circuit Court would have been handed a copy of Victoria's Complaint, rather than simply the numerical file number. A hearing in this case would have given the Circuit Court the opportunity to ask questions of counsel, and the Court would very likely have recognized that Raymond was not entitled to the relief he was requesting. The Circuit Court would have immediately recognized that Raymond was, in actuality, seeking to become the Plaintiff in a lawsuit against himself. The Circuit Court would have refused the maneuver.

(c) Paul did not waive defects as to notice or as to the lack of a hearing

A proper hearing is an essential element of a probate proceeding. *Matter of Estate of Petrik,* 2021 S.D. 49, ¶¶ 24, 31 ("absence of...a hearing"). The remedy for a failure of notice, or, for a failure to conduct a hearing is to "vacate the court's order...and remand the case for further proceedings." *Id.* at ¶ 31.

The Circuit Court found that Paul "waived" any objection to the notice issue by failing to raise it at his earliest opportunity. The Circuit Court did *not* make any express ruling as to the failure-of-hearing defect.

Although Paul did not expressly raise those issues, under these circumstances it cannot be said that Paul engaged in the same type of "actual participation in legal proceedings" that the litigants did in *Matter of Estate of Jones,* 2022 S.D. 9, ¶ 17. Paul *did* promptly raise the objection to Raymond's appointment, and pointed out that Raymond's role as Special Administrator was farcical, whereby he would be both plaintiff and defendant.

The appointment of Raymond was achieved as a direct result of Raymond's successful avoidance of a hearing, and his failure to give notice. If a hearing had taken place, Judge Elshere would have immediately realized that the "emergency" claimed by Raymond was preposterous, in that Raymond impermissibly sought to immediately take control of her lawsuit against him. Likewise, if notice had been issued, the adversary parties would have promptly pointed this out prior to his appointment.

The rule is that "*generally*, questions over notice must be raised at the first *reasonable* opportunity." Here, Connor and Lance ask this Court to find that they (and Paul) raised the issue at a reasonable time. And, they also ask

the Court to find that they also properly and timely raised the defect of a failure to conduct a hearing. Any other result would encourage the type of mischief that was accomplished here. They ask that the July 18, 2022, Order be vacated because it is procedurally void.

2. The order of appointment is also *substantively* invalid because of Raymond's inherent conflict of interest; it was void from the outset.

The use of a special administrator is limited to circumstances where "appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act." SDCL 29A-3-614(2). If the person seeking to be named as special administrator is not named personal representative in the will, they must be a "qualified person." SDCL 29A-3-615(b). An individual is not "qualified to serve" if they are "unsuitable." *C.f.,* SDCL 29A-3-303 (addressing personal representative qualifications). *See also,* SDCL 29A-3-611(b)(3) (disqualifying conditions for special administrator include being "incapable of discharging the duties of office" or, "intentionally misrepresent[ing] material facts in the proceedings leading to appointment").

"No one can serve as a special administratrix whom the trial court finds unsuitable. A person may be deemed unsuitable by reason of an interest in pending litigation, or bias or prejudice.....The circuit court must have confidence that the person will demonstrate the utmost loyalty, impartiality, and integrity, and that the person does not have an interest in pending litigation, or bias or prejudice, such that the appointment would be adverse to the interest of those to be served by the appointment." *Matter of Est. of Jones*, 2022 S.D. 9, ¶ 33 (quoting *In re Est. of Hutman,* 705 N.E.2d 1060, 1064-65 (Ind.Ct.App. 1999)).

An appointment of a special administrator is reserved for "circumstances where a general personal representative cannot and should not act." Here, in contrast, Raymond sought appointment under circumstances where he, *himself*, "cannot and should not act." In particular, he sought this office so that he could assume the mantle as plaintiff in a lawsuit pending against him. This is legally impermissible. It made his appointment void from the start.

One of the basic, structural requirements of a lawsuit is that there are lawyers zealously advocating *both* sides of the case. This Court has described it as "the institutional interest in vigorous development of each client's

position when the clients are aligned directly against each other in the same litigation...." *Wilcox v. Vermeulen*, 2010 S.D. 29, ¶ 35, 781 N.W.2d 464, 474 (citing SDCL 16-18 App., Rules of Prof. Conduct, Rule 1.7, cmt 17) (Meierhenry, J., and Gilbertson, C.J., concurring specially). *And, see, Southard v. Hansen,* 342 N.W.2d 231, 233 (S.D. 1984) (citing *Dehn v. Prouty,* 321 N.W.2d 534 (S.D. 1982) (likening collusion between plaintiff and defendant as "opposing parties breathing together to the detriment of another party.") *C.f.,* SDCL 15-6-17(a) (real party in interest statute).

More particularly for probate proceedings, courts "recognize the rule that a person...is not 'legally competent' to act in that capacity [as executor], where his duties would require him to prosecute on behalf of adversary litigants, a suit which he would at the same time defend as an individual." *Hampshire v. Powell*, 626 N.W.2d 620, 626 (Neb.App. 2001) (citing *In re Moss Est.*, 157 N.W.2d 883, 886 (Neb. 1968) (in turn, quoting *In re Estate of Blochowitz*, 245 N.W. 440 (Neb. 1932)).

The rule in Nebraska is that "where there exists at the time of the hearing on appointment of executor, a conflict of interest of a nature sufficiently adverse or antagonistic that the exercise of proper judicial discretion would require the immediate removal of an executor if he were

appointed, the named executor is not legally competent under [the Nebraska Probate Code][17] and should not be appointed." *In re Moss Est.*, 157 N.W.2d at 887.

Courts in Iowa and Wisconsin have similarly held that an executor's appointment is impermissible when it would place the executor at odds with himself within pending litigation. "His plain duty would be to conserve the estate. His personal interest would demand that the claim of the estate against himself be defeated. Under such conditions he could not faithfully serve two masters. There would undoubtedly exist such a conflict of interest and such hostility as would interfere with the proper administration of the estate." *Matter of Est. of Cutler*, 368 N.W.2d 724, 727 (Iowa Ct. App. 1985) (quoting *In re Zartner's Will*, 198 N.W. 363, 367 (Wis. 1924)).

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[17] The Court referred to section 30-302, R.R.S.1943, which provided that when "the court, in the exercise of a sound judicial discretion, determines that such applicant for appointment is 'incapable or unsuitable to discharge the trust,' such appointment should not be made". *In re Haeffele's Est.*, 145 Neb. 809, 813, 18 N.W.2d 228, 231 (1945) (quoting and applying section 30-302).

That Nebraska statute is substantially the same as SDCL 29A-3-303(f)(2), which states that: "No person is qualified to serve as a personal representative who is…[a] person whom the court finds *unsuitable* in formal proceedings") (emphasis added); and SDCL 29A-3-611(b)(3) (disqualifying conditions for special administrator include being "*incapable* of discharging the duties of office")

The same conclusion was reached by an Ohio court of appeals. Although the executrix "has every right to assert her personal claims...the fiduciary obligations as executrix impose upon her...a confidential relationship....Such a fiduciary must be capable of reasonable impartiality...and of reasonable zeal to further the interest of the estate as against any particular claimant." *In re Young's Est.*, 212 N.E.2d 612, 617 (Ohio Ct. App. 1964). In that case, her personal interests and claim were "antagonistic not only to the estate as such but...directly adverse to legatees and beneficiaries," and thus she was "not in a position to reasonably fulfill those obligations and is not a suitable person to act in a fiduciary capacity." *Id.*

It is not a defense that the executor's appointment was unchallenged at that time. "We perceive no good reason to permit an executor to anchor himself in office by merely floating by any meaningful examination of his suitability at the time of appointment. To do so is to put an unintended premium on the initial appointment of an executor, which is often done perfunctorily and expeditiously." *Matter of Est. of Cutler*, 368 N.W.2d at 727. *See, also, Moss*, 157 N.W.2d at 887 (noting "the absurdity that a court might

be required to appoint an executor who should be immediately removed. Such an approach glorifies form at the expense of substance.")!

The Nebraska approach treats the question of disqualification as one of judicial discretion, but, with the recognition that some conflicts of interest will be so "serious, adverse, or antagonistic to prevent appointment...." *In re Moss' Est.*, 157 N.W.2d at 887 (Neb. 1968) (citing ANNOTATION 18 A.L.R.2d 633, '*Adverse interest or position as disqualification for appointment as personal representative.*').

This is a fact-intensive inquiry. "The problem of whether a personal interest is of a nature sufficiently adverse or antagonistic to be deemed a disqualification can only be answered with reference to the nature or extent of such interest, the relationship of the parties, or other circumstances involved in the particular situation. The necessity for an accounting, the fact that an interest is disputed or contested, or in litigation, have all been considered as important elements in making such a determination." *In re Moss Est.*, 157 N.W.2d at 887.

However, as a universal rule, Courts have held that an individual is *per se* disqualified from serving as an executor when the appointment would place her in a position opposite herself in an Estate lawsuit. *E.g., Hampshire*

v. Powell, 626 N.W.2d 620, 626 (Neb.App. 2001) (prosecuting and defending same lawsuit disqualifies personal representative from office); *In re Estate of Mills*, 29 Pac. 443, 444 (Or. 1892) (administrator incapable of serving while holding real estate claim adverse to estate); *Putney v. Fletcher,* 19 N.E. 370, 370-371 (Mass. 1889) (executor unsuitable because Estate held claim against him for fraudulent conveyance); *Corey v. Corey,* 139 N.W. 509, 511 (Minn. 1913) (estate representative "unsuitable plaintiff to prosecute an action...against himself" regarding validity of prior transactions); *In re Zartner's Will*, 198 N.W. 363, 367 (Wis. 1924) (not possible for administrator to serve two masters by bringing claim against himself).

In short, Victoria's Estate, her heirs, and all of the other interested parties "are entitled to have their interests in the estate proceedings represented by someone independent of the conflicts of interest apparent here." *Matter of Est. of Cutler*, 368 N.W.2d 724, 729 (Iowa Ct. App. 1985). In that case, as with all of the other cases cited, the remedy is to "remand for the trial court's appointment of a new executor." *Id.*

Although a Circuit Court's discretion is broad, there are no circumstances under which it could appoint Raymond as special administrator, thereby installing him as caretaker of the lawsuit pending

against him personally. The Petition sought relief that was void, invalid, and illegal from the start.

3. The Circuit Court erred by failing to remove Raymond from his role as special administrator

If this Court does not find Raymond's appointment to be void based on the first two arguments (either procedurally or substantively) then, in the alternative, we seek Raymond's removal.

Removal of a special administrator is warranted for "cause." "Cause for removal exists when:

> (1) Removal is in the best interests of the estate;
>
> (2) The personal representative or the person requesting the representative's appointment intentionally misrepresented material facts in the proceedings leading to appointment; or
>
> (3) The personal representative has disregarded an order of court, has become incapable of discharging the duties of office, has mismanaged the estate, or has failed to perform any duty pertaining to the office"

SDCL 29A-3-611(b). All three are present here, but the Circuit Court refused to remove Raymond.

The most egregious is that Raymond's petition for appointment misrepresented the nature of the "emergency" by omitting mention that it the litigation was pending against him, and that he sought appointment in order to control it. He misrepresented facts leading to his appointment.

Also egregious is that Raymond concealed that he had found a copy of Victoria's Will. It was only after being pressed on this issue that he admitted to finding the copy of her 2017 Will. He mismanaged the duties of his office.

And, Raymond's legal and financial posture is at odds with Victoria's best interests. They were in litigation against each other at her death. Their financial and legal situations have not come closer together after her death. Raymond is unsuitable for this role. The Circuit Court abused its discretion by failing to remove him.

4. The Circuit Court erred by considering Raymond's "reports" and petition

By statute, a special administrator is forbidden from any further substantive conduct after the filing of a petition for removal. SDCL 29A-3-611. But after receiving notice of the petition for removal, Raymond filed a series of reports and a petition to close the estate.

Raymond was not permitted to submit these reports, file a petition, or engage in any other such activity. The Court should have refused the

reports, and thus should have procedurally refused his petition to close the Estate.

5. The Circuit Court erred by accepting Raymond's defense that he was the 100% owner of VOR, Inc., and thus immune from a conflict of interest.

Raymond's new defense about his conflict of interest is that the Trust never owned the shares of VOR, and, instead, that he owned them. From this, Raymond alleged that Victoria's Estate had no assets, on his putative assertion that the Trust was unfunded.

As an affirmative defense, Raymond bears the burden of proving this. *Clarkson & Co. v. Cont'l Res., Inc.*, 2011 S.D. 72, ¶ 12; SDCL 15-6-8(c) ("a party shall set forth affirmatively...any other matter constituting an avoidance or affirmative defense"). The Circuit Court found that Raymond had carried his burden, and at the end of the hearing stated that it "is undisputed, in that Mr. O'Farrell owned 100 percent of the shares, which appears to be the only asset [of the Estate]." HT 33:4-6. This was error.

The Circuit Court's "findings...are contrary to a clear preponderance of the evidence" and, "on the entire evidence we are left with a definite and firm conviction that a mistake has been committed." *Matter of Est. of Simon*, 2024 S.D. 47, ¶ 20.

The Circuit Court's mistake can be demonstrated in five ways: (i) the documentary exhibits do not prove Raymond was the 100% owner of VOR; (ii) the testimony did not prove Raymond was the 100% owner of VOR; (iii) Raymond previously admitted in this same probate proceeding that he had conveyed the shares into the Trust; (iv) Raymond had previously filed documents with the Circuit Court showing that he had conveyed his shares into the Trust; and (v) Raymond's defense is foreclosed by the admissions made on appeal by VOR, the Estate, and the Trust.

(i) The documents do not prove Raymond's ownership

At the hearing, Raymond introduced a series of 13 tax filings which listed Raymond as the "100%" owner of VOR, Inc. But based upon other, undisputed evidence, those filings are not conclusive proof that Raymond actually owned the VOR stock personally.

The tax filings that VOR filed are consistent with the Trust's ownership of the shares, and its reliance upon those regulations and Section 1.05 of the Trust.

The trust document[18] and IRC regulations[19] provide for filing such tax documents using the Social Security number of one of the grantors, in spite of the Trust's ownership of VOR. The filings do not prove Raymond's affirmative defense that he owned all the VOR shares, and they do not prove that he never deposited them in the Trust. The tax reporting would not indicate this either way.

(ii) The testimony does not prove Raymond's ownership

Raymond did not testify at the hearing. Instead, the only witness was his longtime CPA, Gene Kiefer. Mr. Kiefer's testimony was described in more detail above. He was equivocal and conceded all of the key issues. In summary:

- Mr. Kiefer conceded that he "had no idea" whether or not the VOR shares were placed in Trust. HT 25:7.
- After reviewing Section 1.05 of the Trust, Mr. Kiefer agreed that "the trust would allow one of them [Victoria or Raymond] to report [the Trust's shares of stock in VOR] under their

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[18] See, Living Trust, Section 1.05 [R.157]. See, also, Certification of Trust for the Raymond and Victoria O'Farrell Living Trust, dated January 14, 2011 (dated 3/29/2017 (stating "The tax identification number of the trust is the Social Security Number of either Raymond A. O'Farrell or Victoria O. O'Farrell.") [R.415].

[19] 26 CFR 301.6109-1(a)(2); 26 C.F.R. § 1.671-4(b)(2)(i)(A) (both of which permit a trust to continue filing under the social security numbers of the grantors)

Social Security number rather than both of them...even though it's trust property." HT 27:3-14.

- Mr. Kiefer had "no idea" whether Raymond owned the shares personally or whether Victoria and Raymond were reporting the Trust's shares solely under Raymond's Social Security number pursuant to Section 1.05 of the Trust. HT 27:15-17.

Mr. Kiefer's testimony is insufficient to prove that Raymond continued to own all of VOR's stock from 2008 to the present. It is insufficient to prove that Raymond never deposited those shares into Trust. Instead, Mr. Kiefer conceded that the K-1 filings were not probative on this point, and that he simply did not know.

Beyond his discussion of the K-1 filings, Mr. Kiefer's only other testimony was that either he or Raymond had concerns about transferring the shares of VOR into Victoria's name because of potential tax consequences. HT 23:7-19.

But as to this point, Mr. Kiefer conceded that Raymond and Victoria could have contributed the shares of VOR into their Trust "without incurring...a taxable event." HT 28:2-5. And, in spite of any misgivings about tax consequences, Mr. Kiefer was unable to provide any testimony confirming that such a transfer to Victoria did not occur. Further, he also

could not provide testimony either way on the question of whether Raymond transferred VOR stock into the Trust. He simply did not know.

Mr. Kiefer's testimony was insufficient to prove Raymond's ownership.[20]

(iii) Raymond admitted in his probate pleadings that he did not own the VOR shares

Raymond claimed in his probate pleadings that the shares of VOR were owned by the Trust. This is binding upon Raymond, and forecloses his new-found theory to the contrary.

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[20] The Circuit Court's holding is clearly erroneous in light of the testimony. But this topic also appears to be a mixed question of fact and law that fits within the realm of *de novo* review. *E.g., Matter of Est. of Simon*, 2024 S.D. 47, ¶ 17. The concept of tax reporting for a Trust "requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles." *Id.*

Here, the inquiry requires the application of basic, legal logic: *can we take tax forms at face value?* Based upon the language of the Trust and the revenue regulations, no, and, nothing the witness offered can overcome this.

In the alternative, the inquiry is *de novo* because it requires nothing more than an application of contract terms [the Trust's Section 1.05] and Treasury Regulations. *Plains Com. Bank, Inc. v. Beck*, 2023 S.D. 8, ¶ 26, *reh'g denied* (Mar. 29, 2023) (trust instrument reviewed *de novo*); *Lakota Cmty. Homes, Inc. v. Randall*, 2004 S.D. 16, ¶ 11 [federal regulations reviewed *de novo*].

On multiple occasions, this Court has held that statements made in pleadings are binding as judicial admissions against that party. *Standard Cas. Co. v. Boyd,* 71 N.W.2d 450, 455 (S.D. 1955); *Goff v. Goff*, 37 N.W.2d 251, 252 (S.D. 1949); *Englund v. Berg,* 8 N.W.2d 861, 862 (S.D. 1943). Once made, that party is "not at liberty to dispute as between themselves and [the opposing party]." *Standard Cas. Co. v. Boyd,* 71 N.W.2d 450, 455 (S.D. 1955) (citing *Englund v. Berg,* 8 N.W.2d 861, 862 (S.D. 1943).

> 'The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions, but *judicial* admissions; *i.e.*, they are not a means of evidence but a waiver of all controversy and therefore a limitation of the issues. Neither party may dispute beyond these limits.' 'It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings, and that the facts which are admitted by the pleadings are taken as true for the purpose of the action. So, admissions in the pleadings may render proof of the admitted facts unnecessary, *and if countervailing evidence, either through inadvertence or the tacit consent of the parties, is admitted it is entitled to no consideration.*'

Englund v. Berg, 8 N.W.2d 861, 862 (S.D. 1943) (first quoting and citing WIGMORE ON EVIDENCE, §§ 1064 and 2589; and then quoting 49 CORPUS JURIS 124; and citing BANCROFT'S CODE PLEADING, § 429) (emphasis added).

In his "Resistance to Petition for Removal of Special Administrator," filed on 10/11/2022, Raymond stated that: "The shares of VOR, Inc., were not owned individually, but were owned 100% by the Trust." *See,* Resistance, ¶ 2.

In his more recent filings, Raymond offered a "Renewed Resistance to Petition for Removal of Special Administrator." [R.109-113, filed 3/20/2025]. On page 1, his attorneys adopted Raymond's 2022 Resistance: "The original Resistance to Petition for Removal of Special Administrator is incorporated herein by reference." [R.109, filed 3/20/2025].

No explanation was given for the new assertion that Raymond never deposited the VOR shares into the Trust, other than the statements contained on the tax filings.

Of note, Raymond did not submit an affidavit nor testimony explaining that the VOR shares were never deposited.

SDCL 29A-1-310 may be applicable here. It provides that:

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

From this, the Court can accept Raymond's 2022 probate pleadings as Raymond's position on the issue, and treat them as if they were Raymond's affidavit, under oath.

(iv) Raymond's position is at odds with his prior litigation positions and filings

Raymond's contention is a new creation. The idea that he always owned the VOR shares and never deposited them is contrary with Raymond's prior litigation positions, not just within the probate filings in 2022, but also within his litigation filings in 2023.

When the Estate submitted its Answer in Paul's lawsuit, its attorneys attached a copy of the 2011 Assignment by which Raymond and Victoria placed their VOR shares into the Trust.[21] Likewise, the contentions in the Answer concede the same. *See,* 25CIV23-15, "*Answer, Counterclaim, and Motions of VOR, Inc., Estate of Victoria O'Farrell, and the Raymond and Victoria Living Trust,* " filed 4/5/2023, at ¶ 15 ("the stock in VOR, Inc. that was in the Revocable Trust is no longer there").

[21] 25CIV23-000015; Exhibit J to "Answer", filed 4/5/2023 (and attached here)

(v) Raymond's position is at odds with prior appellate briefing submitted by the Estate, VOR, and the Trust

Admissions made in appellate briefs are binding as judicial admissions. *In re Estate of Tallman,* 1997 S.D. 49, ¶¶ 12-13; *Tuttle v. Tuttle,* 399 N.W.2d 876, 878 n.2 (S.D. 1987); *Reichert v. Reichert,* 90 N.W.2d 403, 405 (S.D. 1958). *See, also, Tunender v. Minnaert*, 1997 S.D. 62, ¶ 35 (Sabers, J., dissenting).

Raymond persisted in his same, prior position in 2024 during the appeal of Paul's civil action. In that appeal, VOR, the Trust, and the Estate jointly filed an appellees' brief which admitted that the shares of VOR were deposited into the Trust. *See,* Appeal #30482. Here is the first paragraph of the statement of facts from their brief:

STATEMENT OF THE FACTS

1. The Relationship between the Farm Property, the Revocable Trust, and VOR.

Raymond and Victoria O'Farrell owned approximately 1,000 acres of farmland in Grant County, South Dakota (the "Farm Property"). (SR 12.) Raymond and Victoria then put that Farm Property into a corporation named VOR, Inc. (SR 12.) Raymond and Victoria owned all the shares of VOR and deposited all shares of VOR into the Revocable Trust, which was a revocable trust created in 2011. (SR 8, 12, 230-325.)

Appellees' Brief, #30482, p. 6, filed 1/19/2024.[22] In this passage, Raymond cites to page 12 of the Settled Record, namely, Paragraph 25 of Paul's Complaint which alleges that Raymond and Victoria deposited all of the VOR shares into the Trust.

Neither side disputed this premise, and this Court adopted the same understanding in its opinion. "In 2011, Raymond and Victoria created the Trust and 'deposited all (or most) of their assets' into the Trust, including their shares of VOR." *Est. of O'Farrell v. Grand Valley Hutterian Brethren, Inc.*, 2024 S.D. 81, ¶ 3.

Neither the Record nor Raymond's prior filings are consistent with his ongoing ownership of all of the VOR stock. The Circuit Court's findings are erroneous, as was its conclusion that the ownership issue exonerated Raymond.

[22] On pages 8-9 of the same Brief, the three Appellees (the Trust, VOR, and the Estate) assert and acknowledge that Raymond O'Farrell was principal of each entity: the president of VOR, the special administrator of the Estate, and the Trustee of the Trust.

CONCLUSION

Connor and Lance ask for this Court to vacate the July 18, 2022, Order appointing Raymond as Special Administrator and remand for further proceedings directing the appointment of Lance.

They also ask for the May 22, 2025, Judgment to be reversed. Raymond's appointment was either void from the outset, or he is unsuitable and should be removed. And, the Circuit Court's findings as to Raymond's purported ownership of VOR are unsupported by the Record and contrary to his prior litigation filings.

Dated this 17th day of July, 2025.

HOVLAND, RASMUS &
BRENDTRO, PROF. LLC

/s/ Daniel K. Brendtro
Daniel K. Brendtro
Mary Ellen Dirksen
Benjamin M. Hummel
PO Box 2583
Sioux Falls, South Dakota 57101-2583
Attorneys for Appellants,
Lance and Connor O'Farrell

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing approximately 9,889 words, exclusive of the Table of Contents, Table of Authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2025, I electronically filed the foregoing via the Odyssey File and Serve system with the Supreme Court Clerk, which will send notice to Appellee's Counsel and counsel for interested parties.

For those interested parties not represented by counsel, I also hereby certify that on this 17th day of July, 2025, I sent a copy of the foregoing via U.S. Mail to the following:

Marcie Reyelts
24700 W. 265th St.
Paola, KS 66071
Potential Interested Party

Rita O'Farrell
4657 Melbourne Ave., #13
Los Angeles, CA 90027,
Potential Interested Party

Ascension Point Recovery Services, LLC
200 Coon Rapids Blvd. Suite 200
Coon Rapids, MN 55433
Potential Interested Party

I also hereby certify that on this 17th day of July, 2025, I sent a bound copy of the foregoing to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

APPELLANTS' APPENDIX

TABLE OF CONTENTS

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
)		
COUNTY OF GRANT)		THIRD JUDICIAL CIRCUIT

****

25PRO22-000011

ESTATE OF	*	
VICTORIA O. O'FARRELL,	*	ORDER APPOINTING
Deceased.	*	SPECIAL ADMINISTRATOR

****

Upon consideration of the petition for the appointment of a special administrator, the court finds:

1. The venue is proper in this court and it is proper to appoint the petitioner, Raymond A. O'Farrell, as Special Administrator without further notice for the reasons presented in the petition for appointment as Special Administrator without bond. The court is satisfied that at the time of decedent's death, she was involved as a party in a lawsuit in Grant County, South Dakota, (25CIV22-000038), and also, there appears to be pending negotiations involving possible foreclosure proceedings that would have considerable adverse effects on the estate of the decedent. Pursuant to SDCL 29A-3-614, petitioner is an interested person, and it is necessary to protect the estate of the decedent pending the search for a Will and determination of whether the decedent died testate or intestate.

2. The decedent died on the 11th day of July, 2022.

3. The decedent was domiciled at death in Grant County, South Dakota.

4. The appointment of a Special Administrator is necessary to protect the estate pending the search for a Will and determination of the proper probate proceedings.

IT IS ORDERED:

A. The findings are made a part of this order.

B. Raymond A. O'Farrell is appointed as Special Administrator of the estate of Victoria O. O'Farrell with the powers of a general personal representative until such time as the duties have been completed.

The personal representative's term should be limited to such time as it necessary to investigate whether the decedent has a Will, and such is offered and accepted in probate or

upon determination that the decedent died intestate and intestate proceedings properly commenced.

And letters shall be issued to the special administrator to serve without bond.

BY THE COURT:

7/18/2022 3:00:58 PM

Attest:
Reichling, Sandy
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF GRANT	)	THIRD JUDICIAL CIRCUIT

	*	25PRO22-000011
ESTATE OF	*	
	*	JUDGMENT DENYING PETITION TO
VICTORIA O. O'FARRELL,	*	REMOVE SPECIAL ADMINISTRATOR,
Deceased.	*	ADOPTING REPORTS OF SPECIAL
	*	ADMINISTRATOR, CLOSING SPECIAL
	*	ADMINISTRATION, AND DISCHARGING
	*	THE SPECIAL ADMINISTRATOR

This matter having come on for hearing on the Estate of Paul O'Farrell's Renewed Petition to Remove Special Administrator, and Raymond O'Farrell's Petition to have his Reports of Special Administrator accepted, the Special Administration closed, and Raymond O'Farrell discharged as Special Administrator, before the Court on May 1, 2025, in Grant County, South Dakota, and Dan Brendtro having appeared on behalf of the Estate of Paul O'Farrell, and George Boos having appeared on behalf of Raymond O'Farrell, Special Administrator, and the Court having reviewed the file, listened to the arguments of the parties, and heard the testimony of the only witness either party chose to call, and the Court having entered Findings of Fact and Conclusions of Law, it is now hereby

ORDERED, ADJUDGED, AND DECREED as follow:

1. Petition to remove Raymond O'Farrell as Special Administrator of the Victoria O. O'Farrell Estate is denied.
2. The Reports of the Special Administrator are approved.
3. The Special Administration of the Estate of Victoria O. O'Farrell is closed.
4. Raymond O'Farrell is discharged as the Special Administrator of the Estate of Victoria O'Farrell.

BY THE COURT:

Attest:
Schuelke, Cathy
Clerk/Deputy

5/22/2025 7:37:11 AM

Hon. Patrick Pardy
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF GRANT	)	THIRD JUDICIAL CIRCUIT

	*	25PRO22-000011
ESTATE OF	*	
	*	FINDINGS OF FACT AND
VICTORIA O. O'FARRELL,	*	CONCLUSIONS OF LAW
Deceased.	*	
	*	

The Estate of Paul O'Farrell's Renewed Petition to Remove Special Administrator, and Raymond O'Farrell's Petition to have his Report of Special Administrator accepted, the Special Administration closed, and Raymond O'Farrell discharged as Special Administrator, having come on for hearing before the Court on May 1, 2025, in Grant County, South Dakota, and Dan Brendtro having appeared on behalf of the Estate of Paul O'Farrell, and George Boos having appeared on behalf of Raymond O'Farrell, Special Administrator, and the Court having reviewed the file, listened to the arguments of the parties, and heard the testimony of the only witness either party chose to call, the Court does hereby make the following Findings of Fact:

FINDINGS OF FACT

1. Raymond O'Farrell is the spouse of the decedent, Victoria O. O'Farrell and has priority to serve as to the special administrator of his wife's Estate.
2. Proper notice of Raymond O'Farrell's Petition for Special Administration was not provided to all the interested parties.
3. Paul O'Farrell waived the defect in notice by not objecting to notice for several months and appearing and participating in the special administration.
4. All shares of VOR, Inc. were owned 100% by Raymond O'Farrell at all times material to these proceedings as shown by the corporate tax returns.
5. Victoria O'Farrell signed tax returns for several years representing that Raymond O'Farrell owned 100% of the shares of VOR, Inc.
6. Victoria O'Farrell signed the tax returns referred above during the same period of time that The Raymond and Victoria O'Farrell Living Trust was established.
7. All tax returns filed for tax years 2008 through 2020 identify Raymond O'Farrell as the owner of 100% of the shares of VOR, Inc. The tax returns signed by Victoria

APP 4

O'Farrell were for the years 2013 through 2020, except 2015, which was signed by Raymond O'Farrell.

8. Victoria' O'Farrell died intestate on July 11, 2022. A search of the marital home was conducted, and no Will was found. Correspondence was sent to Paul O'Farrell and Lance O' Farrell, requesting any information they might have regarding the existence and location of any Will of Victoria. No response was received. The three additional children were contacted and no information regarding the existence of an executed Will was received. On the same day as Raymond's appointment as Special Administrator, inquiries were directed to Evan D. Anema, of Estates Planning Solutions Law Firm, LLC, in search of an original Will. That firm was responsible for preparing the trust and related estate planning, including the drafting of a Will for Victoria. No original documents were located.
9. Raymond O'Farrell was unable to find any assets belonging to Victoria O'Farrell.
10. Raymond O'Farrell was able to locate an unsigned Will that had been prepared for Victoria O'Farrell, but not an executed Will.
11. There were no assets owned by Victoria O'Farrell separately to pass through the Estate of Victoria O'Farrell.
12. Victoria O'Farrell was a resident of Grant County, South Dakota.
13. Any Findings of Fact stated by the court in the oral decision rendered by the court on May 1, 2025, are incorporated herein by reference.

Based upon the above Findings of Fact, the Court now makes and enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction over this Grant County probate.
2. Raymond O'Farrell has priority to be the Special Administrator of the Estate of Victoria O'Farrell.
3. Notice for the appointment of the Special Administration was defective, but the defect was waived by Paul O'Farrell.
4. A diligent search for an original Will executed by the decedent was conducted subsequent to Victoria's death and subsequent to Raymond's appointment as Special Administrator of her estate. No original Will was located.

5. 100% of the shares of VOR, Inc. were owned by Raymond O'Farrell at all times relevant to the Special Administration.
6. There are no assets to administer in the Special Administration or the Estate of Victoria O. O'Farrell.
7. The reports of the Special Administrator are approved.
8. The Special Administration is closed.
9. Raymond O'Farrell is discharged as a Special Administrator of the Estate of his wife, Victoria O. O'Farrell.
10. Any Conclusions of Law stated by the court in the oral decision rendered by the court on May 1, 2025, are incorporated herein by reference.

Let Judgment enter accordingly.

BY THE COURT:

Attest:
Schuelke, Cathy
Clerk/Deputy

5/22/2025 7:37:31 AM

Hon. Patrick Pardy
Circuit Court Judge

STATE OF SOUTH DAKOTA)
: : §§§
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

THE ESTATE OF VICTORIA O'FARRELL, Deceased.	25PRO22-11 **OBJECTION TO PROPOSED FINDINGS AND CONCLUSIONS**

1. Connor O'Farrell, an interested party by virtue of his appointment as personal representative of the Estate of Paul O'Farrell, and joined by Skyline Cattle Co., another interested party, object to the proposed "Findings of Fact and Conclusions of Law" offered by the Special Administrator.
2. The proposed findings and conclusions are not supported by the Record or proper application of law, including, but not limited to:
    a. The only witness who testified at the May 1, 2025, hearing could not confirm whether or not the tax filings were dispositive of ownership, nor whether Raymond was an actual owner of the shares.

Filed: 5/21/2025 3:57 PM CST Grant County, South Dakota 25PRO22-000011

b. The trust document[1] (and IRC regulations[2]) provide for filing returns using the tax identification number of one of the grantors, in spite of the existence of the trust.

c. Thus, the tax filings for VOR as filed are how they would look if the Trust was its shareholder and simply continued to use Raymond's social security number, which is what Raymond and Victoria declared in a Certification of Trust which they executed in 2017 (attached).[3]

d. Thus, the evidence received (at best) leaves open any conclusion as to whether the VOR shares were deposited into the Trust. It is error to conclude from this Record that Raymond owned the VOR shares.

e. Furthermore, a finding that Raymond always owned the VOR shares and never deposited them is clearly at odds with the Record, and

[1] *See,* Living Trust, Section 5.02. *See, also,* Certification of Trust for the Raymond and Victoria O'Farrell Living Trust, dates January 14, 2011 (dated 3/29/2017 (stating "The tax identification number of the trust is the Social Security Number of either Raymond A. O'Farrell or Victoria O. O'Farrell.") (and attached here)

[2] 26 CFR 301.6109-1(a)(2); 26 C.F.R. § 1.671-4(b)(2)(i)(A); 26 C.F.R. § 1.671-4(b)(2)(i)(A) (all of which permit a trust to continue filing under the social security numbers of the grantors)

[3] *See,* Certification of Trust for the Raymond and Victoria O'Farrell Living Trust, dates January 14, 2011 (dated 3/29/2017 (stating "The tax identification number of the trust is the Social Security Number of either Raymond A. O'Farrell or Victoria O. O'Farrell.") (and attached here)

at odds with Raymond's prior litigation positions. In 2011, Raymond and Victoria executed an assignment (attached here) that placed their VOR shares in Trust, and, such document has been on file since at least April 2023 (because Raymond's/VOR's counsel filed this Assignment into the Record).[4] Raymond and VOR are judicially estopped from claiming otherwise.

f. It is error to conclude that Victoria died intestate. Instead, the Record indicates that Victoria did, indeed, execute a Will;[5] and, the absence of an original does not preclude probate of the copy.[6]

g. It is also error to conclude that Victoria had no assets. The Complaints and Amended Complaint in civil files 25CIV23-000015 and 25CIV22-000038 outline substantial claims which would constitute assets.

3. These objecting parties are concurrently filing their own proposed findings and conclusions.

---

[4] 25CIV23-000015; Exhibit J to "Answer", filed 4/5/2023 (and attached here)

[5] The copy of the Will was filed into the Record by Raymond's counsel on 4/1/2025; Exhibit 2.

[6] *See,* SDCL 29A-3-402(d).

CONCLUSION

These objection parties ask for this Court to refuse the Findings and Conclusions offered by the Special Administrator, and to adopt their findings and conclusions, proposed separately from this Objection

Dated this 21st day of May, 2025.

HOVLAND, RASMUS,
BRENDTRO, PLLC

/s/ Daniel K. Brendtro
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326 E. 8th Street, Suite 107
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dbrendtro@hovlandrasmus.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on the 21st day of May, 2025, a true and correct copy of the foregoing was filed and served through the Odyssey File & Serve System upon:

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Filed: 5/21/2025 3:57 PM CST Grant County, South Dakota 25PRO22-000011

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/s/ Daniel K. Brendtro
Daniel K. Brendtro

Certification of Trust for the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011

This Certification of Trust is signed by all the currently acting Trustees of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, as restated on March 29, 2017, who declare:

1. The Trustors are Raymond A. O'Farrell and Victoria O. O'Farrell. The trust is revocable by the Trustors, acting jointly and not separately.
2. The Trustees of the trust are Raymond A. O'Farrell (whose address is 46658 143rd St., Marvin, South Dakota 57251) and Victoria O. O'Farrell (whose address is 46658 143rd St., Marvin, South Dakota 57251). The signature of one Trustee is sufficient to exercise the powers of the Trustee.
3. The Trustee Succession provisions are set forth in Article Three of the trust.
4. The tax identification number of the trust is the Social Security number of either Raymond A. O'Farrell or Victoria O. O'Farrell.
5. Title to assets held in the trust will be titled as:

   Raymond A. O'Farrell and Victoria O. O'Farrell, Trustees of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, and any amendments thereto.

6. An alternative description will be effective to title assets in the name of the trust or to designate the trust as a beneficiary if the description includes the name of at least one initial or successor Trustee, any reference indicating that property is being held in a fiduciary capacity, and the date of the trust.
7. Excerpts from the trust document that establish the trust, designate the Trustee, and set forth the powers of the Trustee will be provided upon request. The powers of the Trustees include the power to acquire, sell, assign, convey, pledge, encumber, lease, borrow, manage, and deal with real and personal property interests.
8. The terms of the trust provide that a third party may rely upon this Certification of Trust as evidence of the existence of the trust and is specifically relieved of any obligation to inquire into the terms of this trust or the authority of my Trustee, or to see to the application that my Trustee makes of funds or other property received by my Trustee.
9. The trust is revocable and has not been revoked, modified, or amended in any way that would cause the representations in this Certification of Trust to be incorrect.
10. The trust is not under court supervision.

March 29, 2017

Raymond A. O'Farrell
Raymond A. O'Farrell, Trustee

Victoria O. O'Farrell
Victoria O. O'Farrell, Trustee

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF MINNEHAHA)

On this day, March 29, 2017, before me personally appeared Raymond A. O'Farrell and Victoria O. O'Farrell, as Trustees, personally known to me (or proved to me on the basis of satisfactory evidence) to be the individuals whose names are subscribed to the foregoing Certification of Trust, and acknowledged that they executed the same as their voluntary act and deed for the purposes therein contained.

Witness my hand and official seal.

[Seal]

EVAN ANEMA
NOTARY PUBLIC
SOUTH DAKOTA

Evan Anema
Evan Anema, Notary Public South Dakota
My commission expires: 8/26/2021

ASSIGNMENT SEPARATE FROM CERTIFICATE

For value received, Raymond O'Farrell and Victoria O'Farrell, of Marvin, South Dakota, Grant County, assign to Raymond O'Farrell and Victoria O'Farrell, Trustees, or their successors in trust, under the Raymond and Victoria O'Farrell Living Trust, dated January 14, 2011, and any amendments thereto, all right, title and interest in the stock of VOR, Inc., a South Dakota corporation, standing in assignor's name on the books of such corporation.

Assignor irrevocably appoints the president or any officer of said corporation to transfer such shareholder's interest on the books of the corporation.

By transfer of the said ownership interest herein, all the powers, duties and status of a shareholder in a corporation are hereby transferred to the above-listed trust entity. The said trust entity by executing below hereby agrees to abide by and to be bound by the terms and conditions of the By-Laws of VOR, Inc., a South Dakota corporation, dated _____, and any subsequent amendments thereto. The undersigned specifically agrees that after the death of the Assignor, the shares owned by a revocable trust shall still be subject to any divestiture and redemption provisions of any applicable By-Laws, Shareholder Agreement, or other agreement of the shareholders, as if the shares were directly owned by the Assignor.

In witness, I have executed this assignment at Sioux Falls, South Dakota, on January 14, 2011.

ASSIGNORS:

Raymond O'Farrell
Raymond O'Farrell

Victoria O'Farrell
Victoria O'Farrell

ASSIGNEE:

Raymond O'Farrell
Raymond and Victoria O'Farrell Living Trust
By: Raymond O'Farrell, Trustee

Subscribed and sworn to before me on January 14, 2011.

Renee Mettler
Notary Public - South Dakota

My commission expires: 2/26/2016

RENEE METTLER
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

STATE OF SOUTH DAKOTA)
: : §§§
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

THE ESTATE OF VICTORIA O'FARRELL, Deceased.	25PRO22-11 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A hearing was held on May 1, 2025, the Hon. Patrick Pardy presiding, at the Courthouse in Grant County, South Dakota, where the Court took up and considered the following requests for relief pertaining to the office of Special Administrator:

(i) the Special Administrator's "Report of Special Administrator Closing Special Administration" (including a "Supplemental Report of Special Administrator" filed 3/21/2025 and a "Second Supplemental Report of Special Administrator" filed 4/1/2025, with exhibits thereto);

(ii) an Objection to the Report filed 3/27/2025;

(iii) a Renewed Petition to Remove Special Administrator (including, by reference, the original "Petition for Removal, filed 9/26/2022; and

(iv) "Renewed Resistance to Petition for Removal of Special

Administrator" filed 3/30/2025 (which incorporated the original "Resistance to Petition for Removal of Special Administrator" filed 10/11/2022).

Noting their appearances were George Boos for Raymond O'Farrell, Special Administrator; and attorney Daniel K. Brendtro for Connor O'Farrell, Lance O'Farrell, and the individuals identified as plaintiffs in the related civil matter 25PRO23-15.

The Court having reviewed the file (including all of the probate pleadings listed above and filed to-date, and information attached or incorporated by reference thereto), listened to the arguments of the parties, and heard the testimony of the witness, now therefore, the Court does hereby make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

General Findings

1. Raymond O'Farrell is the spouse of the decedent, Victoria O. O'Farrell, who died on July 11, 2022.
2. Victoria O'Farrell was a resident of Grant County, South Dakota.
3. On July 18, 2022, the Circuit Court signed and filed an Order appointing Raymond as Special Administrator for his wife's Estate.
4. This Order was entered seven days after her death, and, on the

same day that Raymond's Petition was filed.

Failure of Notice

5. The Circuit Court did not conduct a hearing on the Petition for Appointment.
6. Raymond gave no notice to any party of his Petition, nor of his appointment, and, no proof of any notice was filed.
7. The Order appointing Raymond recited the existence of an emergency, but the Circuit Court did not make express findings that such an emergency existed. [1]
8. Thus, not only was there a failure to notify anyone of the Petition, and, a failure to issue notice of a hearing, but Raymond failed to even seek a hearing upon that Petition.
9. Any of these would be sufficient to render the Order "void," as discussed further in the Conclusions of Law.
10. However, when Paul O'Farrell filed his initial pleadings in this probate matter in September 2022, he did not raise the issue of lack of notice, nor did he raise the issue of a failure to conduct a

[1] And, in any event, even if an emergency existed, the Circuit Court cannot conduct such proceedings without a hearing. The plain text of SDCL 29A-3-614(2) provides that when a special administrator is appointed in formal proceedings, it must be done "after notice ***and hearing***...." (emphasis added). The *emergency* clause dispenses only with the *notice* requirement, but *not* the *hearing* requirement.

hearing. As discussed further below in the Conclusions, this constituted a waiver by Paul, for failing to raise the issue "at his first opportunity."

Conflict of Interest

11. Even though Paul did not raise any *notice* objections, however, Paul *did* raise several *substantive issues* regarding the validity of Raymond's appointment and his tenure as Special Administrator, including as to a conflict of interest and Raymond's failure to disclose this in his Petition. Paul raised these issues in his first three filings (on 9/26/2022 and 9/27/2022), and the pertinent contents of which can be summarized as follows:

    (i) *For Raymond's Removal due to Conflict of Interest.* Paul sought Raymond's removal, via a "Petition for Removal..." filed on 9/26/2022. Paul's Petition for Removal provided extensive detail about Victoria's lawsuit and claims against Raymond, asserting and recognizing that her lawsuit "creates a conflict of interest...[which] renders Raymond unable to be a fiduciary in the decedent's estate [and that] Raymond is unable to fulfill his fiduciary duty as Special

Administrator." [2]

(ii) *That Raymond's Petition was Defective for Failing to Candidly Disclose the Conflict.* And on the following day, Paul also raised the issue that Raymond's Petition for appointment was defective, insofar as it "references that [Victoria] was involved in [lawsuit 25CIV-38] but fails to advised the Court that [Raymond] is also the defendant." [3]

(iii) *For Paul's (and then Lance's) Appointment.* Simultaneously with the removal petition (i.e., filed at the same time on the same date), Paul sought appointment as Special Administrator via a "Petition for Appointment..." filed on 9/26/2022. Paul amended this Petition to include a request to serve as

[2] *See,* Petition for Removal, 9/26/2022, ¶¶ 11-19.

[3] *See,* Motion to Determine Potential Conflict, 9/27/2022. This motion was brought in response to a Notice of Appearance by counsel for Raymond. Until this Notice of Appearance, no attorney's name appears on any of the filings for Raymond. In this Motion on 9/27/2022, Paul asked the Court to determine the existence of a conflict of interest regarding Raymond's new counsel. As Paul pointed out in his Motion to Determine Conflict, serving as Raymond's counsel regarding Special Administrator matters would place Raymond's new attorney in the position of "advising [Raymond] whether or not he should proceed in litigation against himself personally as the Defendant...." *Id.*

co-Special Administrators with his brother Lance O'Farrell.[4]

12. For purposes of its Findings of Fact, the Court takes special note of SDCL 29A-1-310, which provides that "Except as otherwise specifically provided in this code, ***every document filed with the court under this code…shall be deemed to include an oath***, affirmation, or statement to the effect ***that its representations are true*** as far as the person executing itor filing it knows or is informed, ***and penalties for perjury may follow*** deliberate falsification in the document." From this, the Court concludes that its findings may properly embrace any statement made in any document filed from the inception of this Probate to the present, whether or not made by formal affidavit.

13. Also of special note for this particular proceeding is that his "Resistance to Petition for Removal of Special Administrator," filed on 10/11/2022, **Raymond states that: "The shares of VOR, Inc., were not owned individually, but were owned 100% by the Trust."** *See,* Resistance, ¶ 2 (emphasis added).

14. This assertion (which the Court finds to be a judicial admission) is

[4] *See,* "Supplement to Petition for Appointment…" filed 10/3/2022, in which Paul "alternatively…moves the Court to appoint" Paul and Lance, jointly.

in contrast to Raymond's more recent assertion that "[u]pon a review of...the tax returns [*i.e.*, the K-1 forms from 2008 to 2021]...Raymond A. O'Farrell was the owner of 100% of the shares of VOR, Inc." *See,* Second Supplemental Report of Special Administrator, ¶ 5 (filed 4/1/2025).

15. Raymond's admission that the VOR shares were owned by the Trust is also in line with the various parties' apparent understanding of this case.[5]

16. At the hearing, Raymond introduced a series of tax filings, which were received as Exhibits 1 through 13, showing K-1 entries.

17. Those tax filings include a "Schedule K-1" form (also known as Form 1120S) for VOR, Inc., issued to Raymond for the years from 2008 to 2020. On those forms, Box F states, "Shareholder's percentage of stock ownership for tax year...100.00000%." This manner of reporting persisted from 2008 to 2020. (By its terms, the Trust was formed in 2011, and was restated in 2017, which overlaps with these years.)

18. In addition to the pleadings on file, and those tax filings, the Court

[5] *See, e.g., Est. of O'Farrell v. Grand Valley Hutterian Brethren, Inc.,* 2024 S.D. 81, ¶ 3 ("In 2011, Raymond and Victoria created the Trust and 'deposited all (or most) of their assets' into the Trust, including their shares of VOR.")

has also reviewed Victoria and Raymond's Trust, which was received as Exhibit A at the hearing.

19. The question presented by Raymond is whether a designation of ownership on a K-1 is dispositive of actual ownership of VOR shares, particularly in light of the fact that Raymond conceded in his initial pleading on 10/11/2022 that "**[t]he shares of VOR, Inc., were not owned individually, but were owned 100% by the Trust.**" *See,* Resistance, ¶ 2 (emphasis added).[6]

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[6] The Court notes, as well, that in Raymond/VOR's initial filings in civil suit 25CIV23-15, Raymond/VOR attached a document entitled "Assignment Separate from Certificate," which states that on January 14, 2011, "Raymond O'Farrell and Victoria O'Farrell...assign to [themselves as] Trustees...in trust, under the Raymond and Victoria O'Farrell Living Trust...all right, title and interest in the stock of VOR, Inc...[and] all the powers, duties, and status of a shareholder in the corporation are hereby transferred to the above-listed trust entity." *See,* 25CIV23-000015; Exhibit J to "Answer", filed 4/5/2023 (which for reference is attached to the Objection filed in this matter on 5/21/2025, at page 8).

Although the Court did not expressly take judicial notice of the related proceedings, the Court finds that it is permitted to consider any documents which are "incorporated by reference" into the parties' pleadings, whether expressly, or "effectively...by referencing it." *Nooney v. StubHub, Inc.,* 2015 S.D. 102, ¶ 8.

The Objection filed on 3/27/2025 includes a reference to the "related civil file, 25CIV23-15." and that "the family's Trust is the subject of ongoing litigation." ¶¶ 3, 9. That Objection then expressly incorporates both lawsuits by detailing all of the relief sought by Victoria in her lawsuit, as well as the claims in Paul's lawsuit that pertain to Victoria and her Estate. ¶¶ 28(a) to (f) and 29(a) to (c)). Likewise, Paul's original Petition in 2022 includes a reference to Victoria's lawsuit, 25CIV22-38. *See,* Petition for Removal, ¶ 4. So did Raymond's original Petition. *See,* Petition, ¶ 5 (filed 7/18/2022).

Although not necessary for the resolution of these questions, the Court finds that it would be proper to consider those ancillary pleadings in those lawsuits, in light of the fact that the current probate proceedings make reference to them, including for the purpose of

20. The Court reviewed Exhibit A, which is the Trust. It contains a provision in Section 1.05 which states, in part, that "[d]uring any period that the trust is a Grantor Trust, **the Taxpayer Identification Number of the Trust will be either of our Social Security numbers, in accordance with Treasury Regulation Section 301.6109-1(a)(2).**" *See,* Exhibit A. Or, in other words, the Trust intended that reporting on IRS documents could be made regarding Trust property, but using either Raymond or Victoria's Social Security numbers. A review of the pertinent regulations confirms that using Raymond's Social Security number to report the Trust's ownership of VOR is permitted by the IRS.

21. Thus, the mere use of Raymond's Social Security number on VOR's K-1 filings does not resolve the question of ownership.

22. The witness called by Raymond at the hearing (accountant Gene Kiefer) did not offer testimony from which the Court could conclude with any certainty that Raymond owned the VOR shares, rather than the Trust.

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identifying judicial admissions and documents attached to the pleadings, and for which the authenticity does not appear to dispute.

23. Instead, Mr. Kiefer was equivocal. He conceded that he "had no idea" whether or not the VOR shares were placed in Trust. HT 25:7.

24. Mr. Kiefer also conceded that "if the trust had a provision saying [Raymond and Victoria] could use their own social security numbers to report" its ownership of VOR shares for tax purposes, "I guess they could have." HT 25:15-17.

25. Mr. Kiefer also conceded that he had no testimony to offer as to whether the Trust was revocable or irrevocable or both. HT 26:8-11.

26. Mr. Kiefer was then shown a copy of the Trust (Exhibit A) and asked to review page 11 of the Trust, containing Section 1.05. After reviewing this provision, Mr. Kiefer commented, "Yeah, now I understand what it's saying," and Mr. Kiefer agreed that it was "correct" that "the trust would allow one of them [Victoria or Raymond] to report [the Trust's shares of stock in VOR] under their Social Security number rather than both of them...even though it's trust property." HT 27:3-14.

27. And, Mr. Kiefer conceded that as it pertains to the K-1 forms for VOR that he helped prepare, that Mr. Kiefer in fact had "no idea" whether Raymond owned the shares personally or whether

Victoria and Raymond were reporting the Trust's shares solely under Raymond's Social Security number pursuant to Section 1.05 of the Trust. HT 27:15-17.

28. Finally, Mr. Kiefer conceded that Raymond and Victoria could have contributed the shares of VOR into their Trust "without incurring…a taxable event." HT 28:2-5.

29. From this, the Court cannot conclude that Raymond owned 100% of the shares of VOR at all times from 2008 to 2021.

30. To summarize, the trust document[7] (and IRC regulations[8]) provide for filing returns pertaining to trust assets using the tax identification number of one of the trustees, in spite of the existence of the trust, and in spite of the trust's ownership of the reported asset.

31. Thus, the tax filings for VOR presented as Exhibits 1 through 13 are no different than how they would look if the Trust was its shareholder and simply continued to use Raymond's social security number. Notably, this is what Raymond and Victoria

[7] *See,* Living Trust, Section 5.02.

[8] 26 CFR 301.6109-1(a)(2); 26 C.F.R. § 1.671-4(b)(2)(i)(A); 26 C.F.R. § 1.671-4(b)(2)(i)(A) (all of which permit a trust to continue filing under the social security numbers of the grantors)

declared in a Certification of Trust which they executed in 2017.[9]

32. Thus, the evidence received (at best) leaves open any conclusion as to whether the VOR shares were deposited into the Trust, but in light of Raymond's earlier admission that the VOR shares were indeed deposited into the Trust.

33. Since his personal ownership of the shares (as shown by tax returns) was Raymond's only defense as to the non-existence of a conflict of interest regarding Victoria's claims against him, the Court does not have a sufficient factual basis to conclude that such a conflict did not exist.[10]

34. Instead, the Court finds that at the time Raymond sought

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[9] *See,* Certification of Trust for the Raymond and Victoria O'Farrell Living Trust, dated January 14, 2011 (executed 3/29/2017 (stating "The tax identification number of the trust is the Social Security Number of either Raymond A. O'Farrell or Victoria O. O'Farrell.").

That document is attached to the Objection filed on 5/21/2025, but was originally introduced into the civil file by Raymond/VOR, as an attachment to their Answer. *See,* 25CIV23-000015; Exhibit I to "Answer", filed 4/5/2023. Again, the Court finds that it can take notice of the pleadings in the related civil file because they were incorporated, but, this document is not essential to its ruling because it merely restates the premise found in Section 1.05 of the Trust, namely, that Victoria and Raymond intended to use either of their Social Security numbers to report income related to trust assets on IRS filings.

[10] The Court acknowledges that Raymond attempted to elicit testimony from Mr.Kiefer about the fact of Raymond's personal ownership of VOR shares, but, Mr. Kiefer's possible knowledge cannot overcome his admission that he simply "had no idea" whether or not the VOR shares were placed in Trust. HT 25:7.

appointment, he was under a conflict of interest, due to Victoria's pending lawsuit, and because he was seeking the powers by which to control Victoria's litigation against him.

35. Raymond's subjective belief that Victoria's suit was meritless did not remove the conflict. This is because *even if* Raymond could present facts and law in support of his theories, he could *not* impartially resolve those issues from the vantage point of both plaintiff in defendant to resolve this legal issue.

36. The conflict existed at the outset, at the time of his Petition, prior to his appointment, and, the conflict was not disclosed. Raymond achieved appointment and then used his authority to command the dismissal of Victoria's lawsuit against him, without prejudice in October 2022. The Court makes Conclusions of Law as to this conflict issue, below.

Search for a Will

37. Raymond's Petition declared that he "believes that the decedent did have a Will that nominated Raymond…as Personal Representative." *See,* Petition, ¶ 5 (filed 7/18/2022).

38. The original Order appointing Raymond indicated that Raymond's "term should be limited to such time as it is necessary to investigate whether the decedent has a Will, and such is offered

and accepted in probate or upon determination that the decedent died intestate and intestate proceedings properly commenced." *See,* Order, 7/18/2022.

39. Raymond did not offer a Will into probate, nor did he commence intestate proceedings.

40. Nor did Raymond promptly make filings with the Court to report his findings and efforts to locate a Will.

41. Even after the Renewed Petition for Removal was filed in March 2025, Raymond deflected from candor. He filed a "Report" with the Court on March 13, 2025, which asserted that "a search for a Will executed by the decedent was conducted. No Will was able to be located." *See,* Report, ¶ 4.

42. In response, the petitioners now seeking Raymond's removal questioned Raymond's claim that no Will was found; they questioned whether a diligent search had been conducted; they questioned whether Raymond could impartially carry out such a search; they claimed it was implausible that Victoria had executed a 95-page trust but neglected to execute a Will; they pointed out that it was in Raymond's self interest that a Will not be found, since he would become the sole intestate heir; and they suggested that "in all probability Victoria executed a pour-over will, in line

with her Trust." *See,* Objection, ¶¶ 4-11.

43. In response, Raymond then filed additional documents revealing for the first time that contrary to his March 13th Report, Raymond had, indeed, located a Will that Victoria had executed, in the form of a copy of a self-proved "Pour-Over Will" that Victoria executed on March 29, 2017. *See,* Second Supplemental Report, Exhibit 2. Raymond revealed that he had found this copy in August 2022.

44. The terms of the copy of her Pour-Over Will indicate that Victoria nominated Raymond as her choice of personal representative, or, Paul and Lance, jointly, or the survivor of them if Raymond is "unwilling or unable to act." *See,* Article Three.

45. The terms of the Pour-Over Will also direct that the Personal Representative transfer all of Victoria's estate to the Trustee of her Trust to be added to the property of that Trust. *See,* Section 2.01. And, if the Trust is not in effect, the alternate disposition directs creation of a new trust, under the same "provisions" and "terms" as the Living Trust. *See,* Section 2.02.

46. The Court finds that Raymond's "Report" on March 13, 2025, lacked candor. The Court finds that Raymond was not diligent in reporting the existence of the Will copy to the Court, which, was one of the primary purposes of his appointment.

47. The Court also finds that the non-existence of an original is not fatal to the potential pursuit of probating that Will. See, SDCL 29A-3-402(d) (probate of a copy is permissible if the Court is "reasonably satisfied that the will was not revoked.") The Court does not make findings at this time as to any possible revocation, but, the Court does note that the Will is a pour-over will into her Trust, and, at the time of her death, Victoria was in a lawsuit seeking to enforce the Trust.)

48. The Court also finds that Raymond's lack of candor as to the existence of a copy of Victoria's Will is further evidence of an inherent conflict of interest.

Search for Assets

49. Raymond's Report claims he was unable to locate any assets. In particular he says he has "not identified any assets in the name of the decedent." *See,* Report, ¶ 6.

50. The Court finds that any such search that Raymond conducted would be impaired by a potential conflict of interest.

51. The Court finds that Victoria's Estate plausibly contains assets, including, at a minimum, her interest (and now her Estate's interest) in resolving claims related to the Trust. In addition, the Court finds that the Estate's plausible assets include those claims

for damages identified in Victoria's Complaint, and the relief identified in Paul's lawsuit (which were outlined in the Objection, filed 3/27/2025, ¶¶ 28(a) to (f) and 29(a) to (c)). The Complaints seek equitable relief, In addition to equitable relief in which the Estate has an interest, the complaints in both matters detail damages that can be claimed by Victoria (tort damages; punitive damages; attorney's fees; conversion).

52. The Court finds that Raymond has an inherent conflict of interest in determining the validity of any such claims, even if his self-interested position (that no claims exist) could ultimately be found to be correct.

53. The Court finds that this conflict of interest existed from the inception of his appointment, and, that the conflict was not fully disclosed to the Circuit Court that accepted his Petition for appointment, and that it impaired his ability to pursue claims on behalf of the Estate.

54. The Court finds that a plausible basis exists regarding potential assets of the decedent, such that the Report's finding on this is not accepted

55. The Court further finds the portions of the Special Administrator Report as to a search for assets exceed the scope of any possible

appointment, and that the asset findings can be rejected on this ground, too.

56. And, the Court finds that the Report was submitted after a Petition for Removal and Renewed Petition for Removal had been filed, which stripped the Special Administrator from seeking further relief.

57. Specifically, the Renewed Petition was filed on March 6, 2025. Raymond's "Report" was filed a week later, on March 13, 2025. Filing the Report was not permitted by the Probate Code.

58. A Special Administrator is prohibited from taking any further action once a petition to remove him has been filed. *See,* SDCL 29A-3-618 (which incorporates SDCL 29A-3-611). Per those statutory mandates, once a petition for removal is filed, Raymond cannot file a "report" or do anything else other than to "account" and "preserve" the estate until the removal petition is resolved. The Report can be rejected altogether on this basis.

59. Further, the Report is offered by Raymond, whose capacity had been questioned at the time of the objection. The motion to evaluate his mental condition was pending in the related civil file, 25CIV23-15, and would provide another alternate basis to reject the Report.

60. Any Findings of Fact stated by the court in the oral decision rendered by the court on May 1, 2025, are incorporated herein by reference, except those which conflict with those findings here.

61. Based upon those findings, the Court now makes the following conclusions.

CONCLUSIONS OF LAW

General Conclusions

62. The Court has subject matter jurisdiction over this Grant County probate.

63. Connor O'Farrell, an interested party by virtue of his appointment as personal representative of the Estate of Paul O'Farrell, and joined by Skyline Cattle Co., another interested party, and joined by Lance O'Farrell, lodged a timely objection to Raymond's Report of Special Administrator, and, filed valid petitions seeking Raymond's removal, and the successor appointment of Paul and/or Lance.

Failure and Waiver of Notice

64. The Court's findings and conclusions at the hearing are incorporated here. In short, there was a total failure of notice, and a failure to conduct a hearing, but, Paul waived defects in notice by failing to object at his first opportunity.

65. Probate proceedings must proceed with fidelity to notice requirements. This requires that they be "in conformity with" SDCL 29A-1-401's mandate that "notice shall be given...by mailing [or delivering] a copy of the notice of hearing and of the petition at least fourteen days before the time set for the hearing...." SDCL 29A-1-401(a)(1) and (2). This statute contains a separate requirement that the Petitioner file **proof of compliance** with this notice requirement. *See* SDCL 29A-1-401(c) ("proof of the giving of notice shall be made on or before the hearing and filed in the proceeding"). "As a rule of statutory construction, we have determined that 'shall' is the operative verb in a statute, it is given 'obligatory or mandatory' meaning." *Discover Bank v. Stanley*, 2008 SD 111, ¶ 21 (interpreting civil litigation rule).

66. Here, in contrast to those mandates, no notice was given; no proof of notice was filed; and, it would have been mathematically impossible for such notice to have been given. If the Probate Code had been followed, the Petition and a Notice of Hearing should have been mailed to the interested parties at least "fourteen days before the time set for the hearing." SDCL 29A-1-401(a)(1) and (2).

67. No notice was issued, but even if Raymond's attorneys had sent such notice and filed it with the Court, the relief obtained here could not comport with the notice requirements. The Order was issued on July

18, 2022, and the Petition is signed and dated the same day, July 18, 2022, *i.e.,* less than 14 days.

68. Further, this was just seven days following Victoria's death, so the Circuit Court had not even had jurisdiction over her Estate for 14 days at the time of this Order. If the ordinary notice process had been followed, the *earliest* the hearing could have taken place would be on July 25, 2022, absent some affirmative act by the Circuit Court to shorten the notice requirements. The Order would be void for failure of notice of the Petition.

69. No steps were taken to adjust or eliminate the notice provisions of the Probate Code. There are statutory mechanisms by which parties can (in limited circumstances) waive notice. But those statutes were not followed.

70. For example, SDCL 29A-1-402 provides that "a person…may **waive** notice by a writing signed by the person or the person's attorney and filed in the proceeding." (emphasis added). No such waiver appears in the Record.

71. The Special Administrator statute also contains a mechanism by which the Circuit Court can dispense with notice, but that statute was not followed either. In pertinent part, SDCL 29A-3-614(2) provides that "[i]f it appears to the court that an emergency exists, appointment may

be ordered without notice." But the Circuit Court did not make express findings that such an emergency existed. Nor do the facts here suggest an emergency.

72. Furthermore, *even if an emergency existed,* the Circuit Court cannot conduct such proceedings without a hearing. The black and white text of SDCL 29A-3-614(2) provides that when a special administrator is appointed in formal proceedings, it must be done "after notice ***and hearing***...." (emphasis added). The *emergency* clause dispenses only with the *notice* requirement, but <u>*not*</u> the *hearing* requirement.

73. In this case, there is no indication that a hearing took place. So, not only was there a failure to notify anyone of the Petition, and, a failure to issue notice of a hearing, but Raymond's attorneys failed to even seek a hearing upon that Petition. Thus, the Order would be void because no hearing took place.

74. A hearing on a probate matter is not an idle exercise, as this case demonstrates. At a hearing, the Circuit Court would have been handed a copy of Victoria's Complaint, rather than simply the numerical file number. A hearing in this case would have given the Circuit Court the opportunity to ask questions of counsel, and the Court would very likely have recognized that Raymond was not entitled to the relief he was requesting. The Circuit Court would have immediately

recognized that Raymond was, in actuality, seeking to become the Plaintiff in a lawsuit against himself. The Circuit Court would have refused the maneuver.

75. Finally, no notice was given of the Circuit Court's order of appointment. This, too, is problematic, because no interested party would have any other way to learn what Raymond was doing. Further, the Order would not become "final" until thirty days after notice of its entry. *Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 19. Absent notice before or after, the Order was a rogue document upon which nobody should yet rely.

76. In sum, the Order was issued to a party who failed to comply with the Probate Code's notice provisions. It was issued without a Hearing. And no notice was given after its entry.

77. Timely notice is an essential element of a probate proceeding. *See, In re Estate of Schuldt*, 457 N.W.2d 837, 840 (S.D. 1990). A proper hearing is an essential element of a probate proceeding. *Matter of Estate of Petrik,* 2021 S.D. 49, ¶¶ 24, 31 ("absence of...a hearing").

78. Ordinarily, the remedy for a failure of notice, or, for a failure to conduct a hearing is to "vacate the court's order...and remand the case for further proceedings." *Id.* at ¶ 31.

79. However, Paul did not raise the notice defects at his earliest

opportunity.

80. "Generally, questions over ... notice must be raised at the first reasonable opportunity or they are waived. Moreover, actual participation in legal proceedings waives irregularities in notice and service procedures and even a lack of formal notice." *Matter of Est. of Jones*, 2022 S.D. 9, ¶ 17.

81. By failing to raise the lack of notice issue, Paul waived this defect.

82. However, at Paul's earliest opportunity, Paul *did* raise the problem of Raymond's conflict of interest, including that Raymond had failed to disclose the conflict in his Petition. Accordingly, the Court concludes that this issue is still reviewable.

Raymond's Conflict of Interest

83. The use of a special administrator is limited to circumstances where "appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act." SDCL 29A-3-614(2).

84. If the person seeking to be named as special administrator is not named personal representative in the will, they must be a "qualified person." SDCL 29A-3-615(b).

85. An individual is not "qualified to serve" if they are "unsuitable." *C.f.,* SDCL 29A-3-303 (addressing personal representative qualifications). *See also,* SDCL 29A-3-611(b)(3) (disqualifying conditions for special administrator include being "incapable of discharging the duties of office" or, "intentionally misrepresent[ing] material facts in the proceedings leading to appointment").

86. "No one can serve as a special administratrix whom the trial court finds unsuitable. A person may be deemed unsuitable by reason of an interest in pending litigation, or bias or prejudice.....The circuit court must have confidence that the person will demonstrate the utmost loyalty, impartiality, and integrity, and that the person does not have an interest in pending litigation, or bias or prejudice, such that the appointment would be adverse to the interest of those to be served by the appointment." *Matter of Est. of Jones*, 2022 S.D. 9, ¶ 33 (quoting *In re Est. of Hutman,* 705 N.E.2d 1060, 1064-65 (Ind.Ct.App. 1999)).

87. Raymond's Petition for special administrator did not seek to cure the statutory situation of "circumstances where a general personal representative cannot and should not act." Instead, Raymond was seeking appointment under circumstances where he, himself, *cannot and should not act*. In particular, he sought this office by directly telling the Court that his appointment was necessary in order to handle Victoria's

lawsuit against him. As his Petition stated, "Appointment of a special administrator is necessary because: At the time of decedent's death, she was involved as a party in a lawsuit in Grant County, South Dakota (25CIV22-38)...." *See,* Petition, ¶ 5 (filed 7/18/2022).

88. Raymond proposed, by his Petition, that he could assume the mantle as plaintiff in a pending lawsuit against him. This is legally impermissible, and, it made his appointment void from the start.

89. One of the basic, structural requirements of a lawsuit is that there are lawyers zealously advocating *both* sides of the case. Our Court has described it as "the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation...." *Wilcox v. Vermeulen*, 2010 S.D. 29, ¶ 35, 781 N.W.2d 464, 474 (citing SDCL 16-18 App., Rules of Prof. Conduct, Rule 1.7, cmt 17) (Meierhenry, J., and Gilbertson, C.J., concurring specially). *And, see, Southard v. Hansen,* 342 N.W.2d 231, 233 (S.D. 1984) (citing *Dehn v. Prouty,* 321 N.W.2d 534 (S.D. 1982) (likening collusion between plaintiff and defendant as "opposing parties breathing together to the detriment of another party.") *C.f.,* SDCL 15-6-17(a) (real party in interest statute).

90. More particularly for probate proceedings, courts "recognize the rule that a person...is not 'legally competent' to act in that capacity [as

executor], where his duties would require him to prosecute on behalf of adversary litigants, a suit which he would at the same time defend as an individual." *Hampshire v. Powell*, 626 N.W.2d 620, 626 (Neb.App. 2001) (citing *In re Moss Est.*, 157 N.W.2d 883, 886 (Neb. 1968) (in turn, quoting *In re Estate of Blochowitz*, 245 N.W. 440 (Neb. 1932)).

91. The rule in Nebraska is that "where there exists at the time of the hearing on appointment of executor, a conflict of interest of a nature sufficiently adverse or antagonistic that the exercise of proper judicial discretion would require the immediate removal of an executor if he were appointed, the named executor is not legally competent under [the Nebraska Probate Code][11] and should not be appointed." *In re Moss Est.*, 157 N.W.2d at 887.

92. Courts in Iowa and Wisconsin have similarly held that an executor's appointment is impermissible when it would place the executor at odds

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[11] The Court referred to section 30—302, R.R.S.1943, which provided that when "the court, in the exercise of a sound judicial discretion, determines that such applicant for appointment is 'incapable or unsuitable to discharge the trust,' such appointment should not be made". *In re Haeffele's Est.*, 145 Neb. 809, 813, 18 N.W.2d 228, 231 (1945) (quoting and applying section 30-302).

That Nebraska statute is substantially the same as SDCL 29A-3-303(f)(2), which states that: "No person is qualified to serve as a personal representative who is...[a] person whom the court finds **unsuitable** in formal proceedings") (emphasis added); and SDCL 29A-3-611(b)(3) (disqualifying conditions for special administrator include being "**incapable** of discharging the duties of office")

with himself within pending litigation. "His plain duty would be to conserve the estate. His personal interest would demand that the claim of the estate against himself be defeated. Under such conditions he could not faithfully serve two masters. There would undoubtedly exist such a conflict of interest and such hostility as would interfere with the proper administration of the estate." *Matter of Est. of Cutler*, 368 N.W.2d 724, 727 (Iowa Ct. App. 1985) (quoting *In re Zartner's Will*, 198 N.W. 363, 367 (Wis. 1924)).

93. The same conclusion was reached by an Ohio court of appeals. Although the executrix "has every right to assert her personal claims...the fiduciary obligations as executrix impose upon her...a confidential relationship....Such a fiduciary must be capable of reasonable impartiality...and of reasonable zeal to further the interest of the estate as against any particular claimant." *In re Young's Est.*, 212 N.E.2d 612, 617 (Ohio Ct. App. 1964). In that case, her personal interests and claim were "antagonistic not only to the estate as such but...directly adverse to legatees and beneficiaries," and thus she was "not in a position to reasonably fulfill those obligations and is not a suitable person to act in a fiduciary capacity." *Id.*

94. It is not a defense that the executor's appointment was unchallenged at the time of appointment. "We perceive no good reason to permit an

executor to anchor himself in office by merely floating by any meaningful examination of his suitability at the time of appointment. To do so is to put an unintended premium on the initial appointment of an executor, which is often done perfunctorily and expeditiously." *Matter of Est. of Cutler*, 368 N.W.2d at 727. *See, also, Moss*, 157 N.W.2d at 887 (noting "the absurdity that a court might be required to appoint an executor who should be immediately removed. Such an approach glorifies form at the expense of substance.")

95. Here, in particular, no formal hearing was held, and thus there was not an opportunity to challenge Raymond's conflict at the time of appointment.

96. However, in Paul's first opportunity, he did so. The conflict issue was promptly raised in Paul's September 26, 2022, and September 27, 2022, filings.

97. It is clear to the Court that Raymond should never have been appointed in the first place.

98. The question, then, is what to do about it.

99. The Nebraska approach treats the question of disqualification as one of judicial discretion, but, with the recognition that some conflicts of interest will be so "serious, adverse, or antagonistic to prevent appointment...." *In re Moss' Est.*, 157 N.W.2d at 887 (Neb. 1968) (citing

ANNOTATION 18 A.L.R.2d 633, '*Adverse interest or position as disqualification for appointment as personal representative.*'). This is ordinarily a fact-intensive inquiry. "The problem of whether a personal interest is of a nature sufficiently adverse or antagonistic to be deemed a disqualification can only be answered with reference to the nature or extent of such interest, the relationship of the parties, or other circumstances involved in the particular situation. The necessity for an accounting, the fact that an interest is disputed or contested, or in litigation, have all been considered as important elements in making such a determination." *In re Moss Est.*, 157 N.W.2d at 887.

100. However, as a universal rule, Courts have held that an individual is *per se* disqualified from serving as an executor when the appointment would place her in a position opposite herself in an Estate lawsuit. *E.g., Hampshire v. Powell*, 626 N.W.2d 620, 626 (Neb.App. 2001) (prosecuting and defending same lawsuit disqualifies personal representative from office); *In re Estate of Mills*, 29 Pac. 443, 444 (Or. 1892) (administrator incapable of serving while holding real estate claim adverse to estate); *Putney v. Fletcher,* 19 N.E. 370, 370-371 (Mass. 1889) (executor unsuitable because Estate held claim against him for fraudulent conveyance); *Corey v. Corey,* 139 N.W. 509, 511 (Minn. 1913) (estate representative "unsuitable plaintiff to prosecute an

action…against himself" regarding validity of prior transactions); *In re Zartner's Will*, 198 N.W. 363, 367 (Wis. 1924) (not possible for administrator to serve two masters by bringing claim against himself).

101. Although a Circuit Court's discretion is broad, there are no circumstances under which it could have appointed Raymond as special administrator with purview over his wife's lawsuit against him, because it would install him as a fiduciary caretaker of pending claims against him personally. The Petition sought relief—Raymond's appointment--that was void, invalid, and illegal from the start.

102. The Court thus concludes that the Estate and all interested parties "are entitled to have their interests in the estate proceedings represented by someone independent of the conflicts of interest apparent here." *Matter of Est. of Cutler*, 368 N.W.2d 724, 729 (Iowa Ct. App. 1985). In that case, as with the other cases cited, the remedy was to "remand for the trial court's appointment of a new executor." *Id.*

103. Accordingly, in its discretion, the Court concludes that Raymond must be removed as Special Administrator, and that the removal is retroactive to his appointment.

104. All of Raymond's acts as Special Administrator are deemed void.

Raymond's Defense: 100% Ownership of VOR

105. Raymond's defense as to the conflict of interest is that he owned 100% of the VOR shares.

106. As an affirmative defense, Raymond bore the burden of proving it.

107. The Court finds, above, that this assertion has not been proven. As a result, the Court concludes that Raymond's purported ownership of 100% of the VOR shares is not a sufficient basis upon which to eliminate the conflict of interest.

108. The trust document[12] (and IRC regulations[13]) provide for filing returns using the tax identification number of one of the grantors, in spite of the existence of the trust.

109. Thus, the Court concludes that the tax filings for VOR as filed are how they would look if the Trust was its shareholder and simply continued to use Raymond's social security number.

110. The Court further concludes that Raymond's contention that he always owned the VOR shares and never deposited them is new, and is

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[12] *See,* Living Trust, Section 5.02. *See, also,* Certification of Trust for the Raymond and Victoria O'Farrell Living Trust, dates January 14, 2011 (dated 3/29/2017 (stating "The tax identification number of the trust is the Social Security Number of either Raymond A. O'Farrell or Victoria O. O'Farrell.") (and attached here)

[13] 26 CFR 301.6109-1(a)(2); 26 C.F.R. § 1.671-4(b)(2)(i)(A); 26 C.F.R. § 1.671-4(b)(2)(i)(A) (all of which permit a trust to continue filing under the social security numbers of the grantors)

clearly at odds with the Record, and with Raymond's prior litigation positions.

111. In 2011, Raymond and Victoria executed an assignment (attached here) that placed their VOR shares in Trust, and, such document was offered by Raymond as an attachment to his Answer in Paul's lawsuit.[14]

112. Further Raymond claimed in his Resistance to the original removal Petition that the shares of VOR were owned by the Trust.

113. In his "Resistance to Petition for Removal of Special Administrator," filed on 10/11/2022, **Raymond states that: "The shares of VOR, Inc., were not owned individually, but were owned 100% by the Trust."** *See,* Resistance, ¶ 2 (emphasis added).

114. For purposes of this proceeding, Raymond is judicially estopped from claiming otherwise, and, the Court also deems these to be judicial admissions. In short, the Court refuses to use inconclusive tax filings and equivocal testimony from Raymond's own witness to override what was apparently regarded by all of the parties as a central truth to the various pieces of this family litigation. *See, e.g., Est. of O'Farrell v. Grand Valley Hutterian Brethren, Inc.,* 2024 S.D. 81, ¶ 3 ("In 2011,

[14] 25CIV23-000015; Exhibit J to "Answer", filed 4/5/2023 (and attached here)

Raymond and Victoria created the Trust and 'deposited all (or most) of their assets' into the Trust, including their shares of VOR.")

115. The Court concludes that SDCL 29A-1-310 applies here, which provides that "Except as otherwise specifically provided in this code, ***every document filed with the court under this code…shall be deemed to include an oath***, affirmation, or statement to the effect ***that its representations are true*** as far as the person executing itor filing it knows or is informed, ***and penalties for perjury may follow*** deliberate falsification in the document." From this, the Court concludes that its findings may properly embrace any statement made in any document filed from the inception of this Probate to the present, whether or not made by formal affidavit.

116. Raymond did not testify at the hearing; however, Raymond's October 11, 2022, statement in his Resistance is deemed to be a representation he made under penalty of perjury, and, thus presumably what he would have said if he did testify, namely, that "**[t]he shares of VOR, Inc., were not owned individually, but were owned 100% by the Trust.**"

117. In conclusion, the Court concludes that there is no basis upon which to extinguish Raymond's conflict of interest upon a theory that the tax filings show the Trust never owned VOR's stock.

Replacement of Special Administrator

118. Paul's original filing was amended in October 2022 to seek, in the alternative, that Lance O'Farrell be named as co-Special Administrator, with Paul. Paul has since died.

119. Victoria's Will, although not yet accepted to probate, appears to nominate Lance O'Farrell as the alternate executor, including if Raymond is unable to serve, and if Paul does not survive.

120. Accordingly, the Court names Lance O'Farrell as the Successor Special Administrator, to serve until such time as the Court resolves whether this is a testate proceeding under Victoria's Will, or an intestate proceeding.

121. He will serve without bond, upon filing an Acceptance, and Letters shall issue. If Lance refuses, then the Court will conduct further proceedings to name a Special Administrator.

Refusing Raymond's Report

122. Raymond's Report and Supplements were all submitted after a Petition for Removal and after the Renewed Petition for Removal had been filed.

123. This stripped the Special Administrator from seeking further relief or taking further actions, save for those specially reserved in

the probate removal statute.

124. Specifically, the Renewed Petition was filed on March 6, 2025. Raymond's "Report" was filed a week later, on March 13, 2025. Filing the Report was not permitted by the Probate Code.

125. A Special Administrator is prohibited from taking any further action once a petition to remove him has been filed. *See,* SDCL 29A-3-618 (which incorporates SDCL 29A-3-611). Per those statutory mandates, once a petition for removal is filed, Raymond cannot file a "report" or do anything else other than to "account" and "preserve" the estate until the removal petition is resolved. Other than the portions of the Report detailing the search for and discovery of the Pour-Over Will, the Report can be rejected altogether on this basis.

126. Further, the Report is offered by Raymond, whose capacity had been questioned at the time of the objection. The motion to evaluate his mental condition was pending in the related civil file, 25CIV23-15, and would provide another alternate basis to reject the Report.

127. Raymond's Report(s) suggest that no Will was found, and that she died intestate, but he did find a copy of an executed pour-over will, and the Court concludes this is erroneous.

128. Raymond's Report(s) suggest that Victoria's estate has no

assets, which the Court concludes is in error.

129. Raymond's Report is refused, and the objections to it are sustained.

Conclusion

130. In short, it would be error for this Court to conclude, as Raymond urges, that Victoria died intestate, with no assets, and, to close the Estate. It also would be error to conclude that Raymond has no conflict of interest.

131. Instead, the Record indicates that Victoria did, indeed, execute a Will;[15] that it may still be valid and enforceable; the absence of an original does not preclude probate of the copy;[16] that the Estate holds plausible claims that would constitute Estate assets; that Raymond had an inherent conflict of interest at the outset which he failed to disclose in his Petition; that his inherent conflict and his failure to disclose the conflict render his appointment void; that Raymond is thus removed from office, retroactive to his appointment; and that Lance O'Farrell is a suitable party to serve as Special Administrator, and shall be so named.

[15] The copy of the Pour-Over Will was filed into the Record by Raymond's counsel on 4/1/2025; Exhibit 2.

[16] *See,* SDCL 29A-3-402(d).

Let Judgment enter accordingly.

BY THE COURT:

Submitted as proposed findings and conclusions this 22nd day of May, 2025.

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 31106

IN THE MATTER OF THE ESTATE OF VICTORIA O. O'FARRELL

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

HONORABLE PATRICK PARDY
Presiding Judge

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Notice of Appeal was filed June 2, 2025

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INTRODUCTION

After filing multiple petitions in relation to the appointment of the special administrator and the removal of Raymond O'Farrell as the special administrator—in September 2022—the Appellants never attempted to have those matters heard, and, instead, waited until 2023 to file an appeal related to the appointment of the special administrator back in July of 2022. After Appellants' 2023 appeal was dismissed, the Appellants set a hearing for April 3, 2025 (subsequently rescheduled to May 1, 2025) to request the removal of Raymond O'Farrell as the special administrator of Victoria O'Farrell's Estate. At that hearing, nearly three years after Appellants' original petition for removal, Appellants presented no evidence.

At the May 1, 2025, hearing, the trial court expressly described Appellants' lack of evidence: "Mr. Brendtro, you and your client have not provided any evidence outside of briefing in this file" and "there's been allegations of conflicts, but there's no evidence in this file that the Court believes either meets the standard of affidavit testimony or something." (R. 408.)

At the hearing, the special administrator, Raymond O'Farrell, did present uncontroverted evidence, which included testimony of the O'Farrell family accountant. The court weighed the evidence and found: (1) Victoria's Estate had no assets; (2) Victoria never owned any shares of Raymond's corporation (VOR); and (3) Appellants had waived any procedural defects of the appointment of Raymond.

The Appellants continue this litigation in Victoria's Estate for an unknown reason. Victoria's dismissed lawsuit, that the Appellants claim as Victoria's sole "asset" and reason for Raymond's conflict of interest, was dismissed at the trial court level and affirmed by this Court. Appellants never even provided a copy of Victoria's dismissed lawsuit for the trial court in this probate matter. If the settled record did contain Victoria's lawsuit, it would show that Victoria's dismissed lawsuit incorrectly premised its allegations based upon Victoria owning 50% of the VOR shares. In short, the continuation of this litigation is wasteful.

OTHER O'FARRELL FAMILY CASES

The Appellants rely on Victoria's dismissed lawsuit[1] to support a continuation of this special administration and Raymond's removal.

Additionally, this Court currently has an intermediate appeal before it regarding the Estate of Paul O'Farrell's lawsuit against various parties in relation to VOR transactions (which includes the allegations of Victoria's dismissed lawsuit).

Finally, this Court recently affirmed the trial court's judgment against the Estate of Paul O'Farrell and Skyline Cattle Company (Paul's company) in the amount of $1,290,545.88 and attorney fees of $18,509.13 in favor of VOR.

The Appellants never moved to consolidate any of these other O'Farrell matters with the probate matter subject to this appeal. Further, the Appellants

[1] This Court affirmed the dismissal of Vicotria's lawsuit on December 18, 2024. (App. 1-2, Appeal #30508, arising from 25CIV22-38.)

never timely requested the trial court in this matter take judicial notice of any facts or resolutions from the various other O'Farrell family cases.

PRELIMINARY STATEMENT

Appellants, Connor O'Farrell, as personal representative of the Estate of Paul O'Farrell, and Lance O'Farrell, an interested party, will be referred to collectively as "Appellants"; Appellees will be referred to as follows: the Raymond and Victoria O'Farrell Living Trust as "Trust," the Estate of Victoria O'Farrell as "Victoria's Estate," Raymond O'Farrell as the Special Administrator of Victoria's Estate as "Raymond," and VOR, Inc. as "VOR"; Paul O'Farrell, now Estate of Paul O'Farrell, is an interested party and will be referred to as "Paul" or "Paul's Estate"; the interested parties, if referred to, will be by their full names. The hearing transcript will be referred to as "HT" followed by the appropriate page and line number; the Appendix for this brief as "App."; and for consistency's sake, Appellants' manner of referencing the settled record will be used: "R.__".

JURISDICTIONAL STATEMENT

A. Jurisdiction for this appeal.

Appellees agree with Appellants' jurisdiction statement.

B. Response to Appellants' continued argument related to the first appeal of Victoria's Estate.

Appellants spend pages 5-10 of their appellant brief arguing the Court's holdings in relation to the first appeal of this case, *Estate of Victoria O. O'Farrell*, #30532, and the appeal of *Est. of Paul O'Farrell v. Grand Valley Hutterian Brethren, Inc.*, 2024 S.D. 81. Appellants' arguments related to these other

decisions by the Court are not relevant to this appeal, not allowed, and need not be addressed by this Court or the Appellees.

STATEMENT OF LEGAL ISSUES

1. **Whether the Trial Court abused its discretion when it held Appellants waived the procedural notice defect in the order appointing Raymond O'Farrell as Special Administrator.**

No, the Trial Court did not err when it found Appellants waived their procedural argument regarding Raymond O'Farrell's appointment as special administrator.

SDCL 29A-3-614
SDCL 29A-3-611
Matter of Estate of Jones, 2022 S.D. 9, 970 N.W.2d 520
Action Mechanical, Inc. v. Deadwood Historic Preservation Com'n, 2002 S.D. 121, 652 N.W.2d 742

2. **Whether the Trial Court abused its discretion when it did not remove Raymond O'Farrell as a Special Administrator, and closed the special administration of Victoria's Estate.**

No, the Trial Court did not err.

SDCL 29A-3-611
SDCL 29A-3-618
SDCL 15-6-52
Matter of Estate of Jones, 2022 S.D. 9, 970 N.W.2d 520
Graff v. Children's Care Hospital and School, 2020 S.D. 26, 943 N.W.2d 484
Matter of Estate of Williams, 348 N.W.2d 471 (S.D. 1984)
State v. Miranda, 2009 S.D. 105, 776 N.W.2d 77

3. **Whether this appeal is moot when Appellants rely on Victoria's dismissed lawsuit and have started their own lawsuit including the same claims.**

Yes, this appeal is moot.

Netter v. Netter, 2019 S.D. 60, 935 N.W.2d 789

STATEMENT OF THE CASE

On July 18, 2022, the trial court entered an Order appointing Raymond as special administrator to Victoria's Estate. (R. 5-6.) The clerk of courts first issued letters of special administration on July 21, 2022. (R. 7.) Then, on July 22, 2022, the judge signed letters of special administration. (R. 8.)

On September 26, 2022, Paul filed a petition asking the trial court to appoint him as a special administrator. (R. 11-12.) On September 26, 2022, Paul also filed a petition for removal of special administrator, pursuant to SDCL 29A-3-611, wherein Paul alleged Raymond should be removed as the special administrator because Raymond was named a defendant in Victoria's lawsuit before she died. (R. 13-15.) Paul filed "proof of notice" of these various petitions on September 26, 2022. (R. 26-27.)

On October 3, 2022, Paul filed a supplement to this Petition for appointment of special administrator—wherein Paul asked the trial court to "alternatively" appoint himself and Lance as co-special administrators. (R. 28.)

On October 7, 2022, the trial court entered an order that stated the petitions filed by Paul would be heard on October 18, 2022.[2] (R. 31.)

Paul also filed motions in Victoria's lawsuit asking to intervene (App. 3-5, Appeal #30508, arising from 25CIV22-38) and noticed it for the same one-hour hearing date of October 18, 2022 (App. 6-7, Appeal #30508, arising from 25CIV22-38)—the trial court heard that issue first. For that issue, Paul called

[2] Paul's counsel submitted the proposed notice and order for hearing to the trial court, after requesting a one-hour hearing on the various petitions via email on September 27, 2022.

witnesses and presented evidence for more than three hours. (App. 8-20, Appeal #30508, arising from 25CIV22-38.) After that evidence, the trial court asked Paul about rescheduling his petitions within the probate. However, Paul never set a new hearing date for his petitions.

On November 7, 2023, Paul appealed the appointment of Raymond O'Farrell as the special administrator (R. 54), and this Court dismissed the appeal because of Paul's pending petition to remove Raymond O'Farrell as a special administrator (R. 83.) This Court's dismissal was issued on December 18, 2024. (App. 1-2, Appeal #30508, arising from 25CIV22-38.)

Following the December 18, 2024, dismissal of this first appeal, Paul renewed his petition to remove Raymond as special administrator on March 6, 2025, approximately two and a half years after the original petition to remove Raymond as special administrator. (R. 85.) Following Paul's renewed petition to remove Raymond as special administrator, the special administrator responded with the following pleadings and exhibits to account for his actions regarding Victoria's Estate:

- Report of Special Administrator, Closing Special Administration (R. 99);
- Renewed Resistance to Petition for Removal of Special Administrator (R. 109);
- Supplemental Report of Special Administrator (R. 118);
- Second Supplemental Report of Special Administrator (R. 145).

The special administrator's renewed resistance explained that Raymond O'Farrell owned 100% of the shares of VOR when such shares were transferred to

the Trust in 2011, and that Raymond continued that 100% ownership after the shares were held by the Trust. (R. 110.) This was in response to the Appellants' original petition for removal that stated that Raymond only owned 50% of the shares of VOR, and that Victoria owned the other 50%. (R. 13.) Raymond's 100% ownership of the VOR shares was also pled by Raymond in 2022 in response to Appellants' original petition to remove him. (R. 39.)

After the pleadings between the parties, a hearing was held on May 1, 2025, in relation to the petition to remove Raymond as special administrator and petition to close the estate. At the hearing, Appellants presented no evidence. Raymond presented evidence through his accountant describing his sole ownership of the VOR shares. (R. 390-403.) At the hearing, that testimony was unrefuted.

The trial court entered findings of fact and conclusions of law and judgment on May 22, 2025. (R. 372, 375.) The findings and conclusions and judgment were proposed on May 9, 2025 (App. 21-24), and Appellants did not object to those findings and conclusions as required by SDCL 15-6-52(a). Instead, after the statutory deadline had passed, and one day before the judge entered the findings of fact and conclusions of law and judgment, Appellants submitted an objection. (R. 410.) The next day, Appellants submitted their own findings and conclusions. (R. 418.) The trial court entered its findings of fact, conclusions of law, and judgment that same day. (R. 372-374.)

STATEMENT OF THE FACTS

Appellants did not attempt to present any evidence to establish any facts in support of their renewed petition to remove Raymond as a special administrator.[3] Further, the various comments in Appellants' brief (including in their "Statement of the Case & Facts") that are derogatory of Raymond have never been proven through any evidence and are not facts—they are merely a recital of allegations by Appellants' attorney from a dismissed lawsuit. Lastly, Appellants incorrectly state that there have been no "substantive rulings" in relation to the various lawsuits—this statement is plainly not true. There was a substantive ruling in this very matter now on appeal, where the trial court considered evidence and made findings. Additionally, there was a substantive ruling in the recently affirmed summary judgment proceeding in *CHS Capital, LLC v. Skyline Cattle Co., and Paul O'Farrell, and VOR, Inc.*, 25CIV.23-27—where Appellants had the opportunity to present evidence and appeal on the issue of a question of fact, but chose not to do so. It is true that Appellants' conduct in these matters has been void of any admissible evidence—instead, they consistently rely merely on allegations and unproven disparaging comments.

In relation to this appeal, the following facts overlap with the statement of the case and form the basis for the trial court's ruling against the Appellants.

A. Facts related to the Trial Court's finding of waiver.

The trial court walked through the facts that supported its legal conclusion

[3] The lack of evidence includes never providing Victoria's dismissed lawsuit to the trial court for review.

that Appellants waived any purported procedural defects of the original order appointing Raymond as special administrator of Victoria's Estate:

- "July 18, 2022, the petition for appointment of special administrator was filed. Acceptance was on that same date, and the order appointing was the same date." (R. 386; HT p. 11:8-10.)
- "July 22nd of 2022, the letters of special administration were . . . signed by Judge Elshere." (R. 386; HT p. 11:11-12.)
- "September 19th, there was a notice of appearance filed by the Plaintiffs' attorney, David Geyer . . . on behalf of Paul O'Farrell." (R. 386; HT p. 11:14-15.)
- "[O]n September 26th, David Geyer filed a petition for appointment of special administrator." (R. 386; HT p. 11:16-17.)
- "On September 27th, 2022, [on behalf of Paul O'Farrell, David Geyer] filed a petition for removal of special administrator," Raymond O'Farrell, and the petition was "[u]nder 29A-3-6-11" for " 'Removal for cause.' " The petition did not include anything regarding a procedural defect for "lack of notice." (R. 386; HT p. 11:18-20.)
- "On September 27th, 2022, Paul had actual notice of the appointment" of special administrator, Raymond O'Farrell, "because he had filed [a petition] for a removal." (R. 386; HT p. 11:22-24.)

- "On September 27th, 2022, [Paul O'Farrell] filed a motion to determine a potential conflict." (R. 386-387; HT pp. 11:25-12:1.)
- "On October 3rd, Paul filed a supplemental petition for appointment of a special administrator." (R. 387; HT p. 12:2-3.)
- "On October 4th, [Paul O'Farrell filed an objection] to the notice of appearance of the Schoenbeck & Erickson law firm." (R. 387; HT p. 12:4-5.)
- "On October 4th, a notice and order for hearing was filed by the Court" in relation to the petitions filed by Paul. (R. 387; HT p. 12:6-7.)
- "[O]n October 4th, Paul filed a notice of hearing, which was set for [October 18, 2022]." (R. 387; HT p. 12:8-9.)
- "On October 11th, Paul's attorney issued a subpoena to a witness for the [October 18] hearing." (R. 387; HT p. 12:10-11.)
- "On October 18th, Paul and his attorney participated in a hearing that lasted over three hours, and never raised the issue of notice" in regard to the petition to remove Raymond O'Farrell as the special administrator. (R. 387; HT p. 12:12-14.)
- "On [November 7, **2023**], a notice of appeal was filed by Paul's new attorney, Mr. Brendtro, and the notice issue is raised for the first time before the South Dakota Supreme Court. That appeal was dismissed based on the motions to remove the special

administrator" still pending. (R. 387; HT p. 12:15-19 (emphasis added).)

B. Raymond's 100% ownership of VOR shares.

The evidence proves that Raymond O'Farrell was the owner of all VOR shares before the Trust, during the Trust, and after Victoria's death.

Before the Trust, from 2008 to 2011, Gene Kiefer testified to the fact that Raymond was the 100% owner of the shares, as shown through regular tax work, and testified to the process in which Raymond acquired the shares. (R. 392-399.) The genesis for Raymond's 100% ownership of the VOR shares began when Raymond was a shareholder in a different corporation, O'Farrells, Inc. (R. 398.) That corporation was set to dissolve, and the assets of that corporation were transferred into four or five sub-s corporations. (R. 398-399.) To complete that transaction without tax consequences, ownership and assets had to stay in place for each one of those sub-s corporations. (R. 398-399.) From the outset of VOR, Raymond owned 100% of VOR as a subsidiary-s corporation of the original O'Farrell corporation. (R. 398-399.) If Raymond transferred any of those shares to Victoria, there would have been substantial tax consequences, and he was advised against it. (R. 399.) It was purposeful that Raymond owned 100% of the VOR shares. (R. 399.)

From 2011 through Victoria's death, Raymond never transferred any of his separate property of the VOR shares to Victoria or anyone else. (R. 404.) There is no evidence that Victoria ever owned a share of VOR. (R. 404.) Instead, the evidence supported that Victoria repeatedly signed federal tax forms that continued to show that Raymond was the 100% owner of VOR shares. (R. 404.)

C. Victoria's Estate has no assets.

The response by Appellants to reports of the special administrator included no evidence of any assets that were held by Victoria's Estate. (R. 120-130.) Instead, the Appellants only listed the claims in Victoria's dismissed lawsuit. (R. 120-130.) The evidence at the hearing established no assets, and the Appellants provided no evidence to establish that the claims in the dismissed lawsuit are an asset of Victoria's Estate. As such, Appellants did not provide any value to these claims based upon any evidence. The Appellants merely described that the claims, at one point, existed in Victoria's dismissed lawsuit.

D. Filings after the hearing.

Following the May 1 hearing, proposed findings of fact and conclusions of law and a proposed order were filed with the court on May 9, in accordance with SDCL 15-6-52(a). (App. 21-24.) Under SDCL 15-6-52(a), the Appellants had five days, or until May 16, to object and file their own proposed findings and order. The Appellants did not do so. The Appellants filed an objection on May 21, eight days later, and their proposed findings of fact and conclusions of law on May 22, nine days later. (R. 410, 418.) Both Appellants' filings were after the statutory period—the objection filed the day before the signed order and the proposed findings filed the day of the signed order.

Within those findings of fact and conclusions of law, the Appellants made the argument—for the first time—that there were judicial admissions by Victoria's Estate in relation to the VOR shares. (R. 423-426.)

STANDARD OF REVIEW

In regard to the trial court's appointment of Raymond as special administrator, this Court reviews the trial court's appointment of a special administrator under an abuse of discretion standard. *Matter of Estate of Jones*, 2022 S.D. 9, ¶33, 970 N.W.2d 520, 531.

The trial court's findings of fact are subject to the clearly erroneous rule:

> The question is not whether this Court would have made the same findings that the trial court did, but whether on the entire evidence we are left with a definite and firm conviction that a mistake has been committed. This Court is not free to disturb the lower court's findings unless it is satisfied that they are contrary to a clear preponderance of the evidence. Doubts about whether the evidence supports the court's findings of fact are to be resolved in favor of the successful party's version of the evidence and of all inferences fairly deducible therefrom which are favorable to the court's action.

Matter of Estate of Simon, 2024 S.D. 47, ¶20, 11 N.W.3d 36, 41.

> When deciding cases involving a mixed question of law and fact, the proper standard of review is dependent upon the nature of the inquiry:
>
> > If application of the rule of law to the facts requires an inquiry that is "essentially factual"— one that is founded "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct"—the concerns of judicial administration will favor the [trial] court, and the [trial] court's determination should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.

Id. at ¶17.

ARGUMENT

The Appellants base their appeal upon no evidence.

In three years, the Appellants have not provided any evidence in support of their various displeasures with the special administration of Raymond. Instead, Appellants' entire position revolves around the dismissed lawsuit of Victoria. There is no evidence in Victoria's Estate regarding the merits of that lawsuit or the effect of Victoria's death upon that lawsuit. The Appellants never even provided the complaint from Victoria's dismissed lawsuit to the trial court in this probate matter.

Based upon the undisputed evidence, the Appellants waived any procedural defects of the appointment of the special administration. In addition, the trial court correctly found no conflict of interest existed to remove Raymond as the special administrator. The lawsuit relied upon the incorrect theory that Victoria owned 50% of the VOR shares with no supporting facts. The trial court's findings of fact and conclusions of law were based upon the evidence—of which the Appellants presented none.

1. The procedural defects appointing Raymond as Special Administrator were waived by Appellants.

The Appellants' argument ignores their own actions. The purpose of the legal doctrine of waiver is to prevent litigants from attempting exactly what the Appellants seek to do. The Appellants acted to the contrary and sat in silence on the purported procedural defects for more than two years. Instead, the Appellants filed a petition to remove Raymond soon after he was appointed and

expressly failed to raise any procedural issues with the order that appointed Raymond.

It was not mischievous for Raymond to act as the special administrator of his wife's estate. The Appellants' starry-eyed viewpoint of Victoria's dismissed lawsuit does not control. The evidence controls, of which the Appellants offered none at the latest hearing or any other to substantiate their conclusory and derogatory remarks against Raymond.

a. Applicable law

SDCL 29A-3-614 describes the process for the appointment of a special administrator:

> A special administrator may be appointed:
>
> > (1) Informally by the clerk on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative or, if a prior appointment has been terminated, as provided in § 29A-3-609; or
> >
> > (2) In a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

This Court has held the following:

> "Generally, questions over . . . notice must be raised at the first reasonable opportunity or they are waived. Moreover, actual participation in legal proceedings

> waives irregularities in notice and service procedures and even a lack of formal notice."

Matter of Estate of Jones, 2022 S.D. 9, ¶17, 970 N.W.2d 520, 527 (citations omitted).

As it relates to who can serve as a special administrator, this Court has held the circuit court has "discretion to determine if a special administrator is 'necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act.'" *Id.*, at ¶33. Further, this Court has stated, "[T]he '[circuit] court must have confidence that the person will demonstrate the upmost loyalty, impartiality, and integrity, and that the person does not have an interest in pending litigation, or bias or prejudice, such that the appointment would be adverse to the interest of those to be served by the appointment.'" *Id.*

Lastly, a special administrator may be removed when the evidence establishes that:

> (b) Cause for removal exists when:
>
> > (1) Removal is in the best interests of the estate;
> >
> > (2) The personal representative or the person requesting the representative's appointment intentionally misrepresented material facts in the proceedings leading to appointment; or
> >
> > (3) The personal representative has disregarded an order of court, has become incapable of discharging the duties of office, has mismanaged the estate, or has failed to perform any duty pertaining to the office.

SDCL 29A-3-611(b)(1), (2), and (3).

In *Jones*, this Court discussed the issue of waiver in regard to the lack of notice for a probate hearing:

> Nevertheless, we decline to address Doug and Jessica's procedural claim because Doug and Jessica have waived the issue concerning the lack of notice for hearing on the Petition. "Generally, questions over ... notice must be raised at the first reasonable opportunity or they are waived. Moreover, actual participation in legal proceedings waives irregularities in notice and service procedures and even a lack of formal notice." *State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶31, 785 N.W.2d 272, 282 (internal citation omitted). In *State v. Fifteen Impounded Cats*, this Court held that the defendant waived her claim of insufficient notice because she actually participated in the hearings without any objection to the sufficiency of notice. *Id.* ¶32, 785 N.W.2d at 283; see also *Wollenburg v. Conrad*, 246 Neb. 666, 522 N.W.2d 408, 411–12 (1994) (holding that notice may be waived through unequivocal conduct such as voluntary appearance or filing a lawsuit); *Mattingly v. Charnes*, 700 P.2d 927, 928 (Colo. App. 1985) ("One who is notified, appears, and participates in a hearing, cannot later be heard to complain as to the sufficiency of notice he received.").

Jones, at ¶17.

Generally, the law on waiver is as follows:

> The doctrine of waiver is applicable where one in possession of any right, whether conferred by law or by contract, and with full knowledge of the material facts, does or forbears the doing of something inconsistent with the exercise of the right. To support the defense of waiver, there must be a showing of a clear, unequivocal and decisive act or acts showing an intention to relinquish the existing right.

Action Mechanical, Inc. v. Deadwood Historic Preservation Com'n, 2002 S.D. 121, ¶18, 652 N.W.2d 742, 749.

b. Analysis

The trial court found that Appellants waived their procedural defects as to the original appointment of Raymond because of the actions Appellants took following that appointment. The Appellants disagree that their actions constituted waiver. However, the finding of waiver is supported by the undisputed facts of the Appellants' actions.

i. The Trial Court's ruling applies to any procedural defect of the original appointment of Raymond.

Appellants' concern with the finding of waiver stems from the language of SDCL 29A-3-614. Specifically, the argument that the circuit court could appoint Raymond without notice if there is an emergency, but was still required to have a hearing. This is a strained reading of the statute. If there is no notice, what would a hearing accomplish?

Appellants contend a hearing would have fleshed out more about Victoria's dismissed lawsuit. However, there is no burden described by SDCL 29A-3-614 that would have led to additional questioning regarding the emergency. The argument is wholly speculative and not based on any evidence. Rather, it is supported only by Appellants' conjecture.

Further, it does not change that the trial court heard this argument from counsel at the hearing and specifically rejected it because the trial court found that the acts of Appellants constituted waiver. The trial court incorporated its oral rulings into its finding of facts and conclusions of law. (R. 372-374.) Therefore, the absence of the trial court expressly stating that the waiver applied to SDCL 29A-3-614's purported requirement of a hearing is of no consequence.

ii. The Appellants waived their right to object to the procedure of Raymond's appointment as Special Administrator.

The doctrine of waiver applies to both the notice and hearing requirement of the original petition appointing Raymond as a special administrator. The law wholly supports that the doctrine of waiver is not limited to only notice, as such a result would not be logical.

When the trial court ruled, it specifically laid out the facts of Appellants' actions that constituted waiver:

- "July 18, 2022, the petition for appointment of special administrator was filed. Acceptance was on that same date, and the order appointing was the same date." (R. 386; HT p. 11:8-10.)
- "July 22nd of 2022, the letters of special administration were . . . signed by Judge Elshere." (R. 386; HT p. 11:11-12.)
- "September 19th, there was a notice of appearance filed by the Plaintiffs' attorney, David Geyer . . . on behalf of Paul O'Farrell." (R. 386; HT p. 11:14-15.)
- "[O]n September 26th, David Geyer filed a petition for appointment of special administrator." (R. 386; HT p. 11:16-17.)
- "On September 27th, 2022, [on behalf of Paul O'Farrell, David Geyer] filed a petition for removal of special administrator," Raymond O'Farrell, and the petition was "[u]nder 29A-3-6-11" for " 'Removal for cause.' " The petition did not include anything regarding a procedural defect for "lack of notice." (R. 386; HT p. 11:18-20.)

- "On September 27th, 2022, Paul had actual notice of the appointment" of special administrator, Raymond O'Farrell, "because he had filed [a petition] for a removal." (R. 386; HT p. 11:22-24.)
- "On September 27th, 2022, [Paul O'Farrell] filed a motion to determine a potential conflict." (R. 386-387; HT pp. 11:25-12:1.)
- "On October 3rd, Paul filed a supplemental petition for appointment of a special administrator." (R. 387; HT p. 12:2-3.)
- "On October 4th, [Paul O'Farrell filed an objection] to the notice of appearance of the Schoenbeck & Erickson law firm." (R. 387; HT p. 12:4-5.)
- "On October 4th, a notice and order for hearing was filed by the Court" in relation to the petitions filed by Paul. (R. 387; HT p. 12:6-7.)
- "[O]n October 4th, Paul filed a notice of hearing, which was set for [October 18, 2022]." (R. 387; HT p. 12:8-9.)
- "On October 11th, Paul's attorney issued a subpoena to a witness for the [October 18] hearing." (R. 387; HT p. 12:10-11.)
- "On October 18th, Paul and his attorney participated in a hearing that lasted over three hours, and never raised the issue of notice" in regard to the petition to remove Raymond O'Farrell as the special administrator. (R. 387; HT p. 12:12-14.)

- "On [November 7, **2023**], a notice of appeal was filed by Paul's new attorney, Mr. Brendtro, and the notice issue is raised for the first time before the South Dakota Supreme Court. That appeal was dismissed based on the motions to remove the special administrator" still pending. (R. 387; HT p. 12:15-19 (emphasis added).)

There is no record of any argued procedural defect prior to Appellants' first appeal that this Court dismissed. (R. 11-15, 19-25, 28-30.)

To counter, the Appellants argue that waiver should not apply because Appellants did not engage "in the same type of 'actual participation in legal proceedings' that the litigants did in *Matter of Estate of Jones*." (Appellants' Brief, p. 37.) Appellants then claim that the action of filing an objection to Raymond's appointment as special administrator was proof that Appellants did not waive the procedural arguments to Raymond's appointment.

In *Jones*, this Court reviewed whether the circuit court erred when it allowed a petition to be heard on the removal of a special administrator when that petition was not noticed for that hearing. 2022 S.D. 9, ¶¶15-18, 970 N.W.2d 520, 526-7. The Appellants in *Jones* participated in that hearing, and this Court found that it was a waiver of the notice issue through participation. *Id.* at ¶18. When describing the reason that participation in the hearing waived any notice issue, this Court cited to several cases, including a Nebraska case, *Wollenburg v. Conrad*, 246 Neb. 666, 522 N.W.2d 408, 411-12 (1994). *Jones*, at ¶17. This Court cited *Wollenburg* with the following: "holding that notice may be waived through unequivocal conduct such as voluntary appearance or filing a lawsuit." *Id.*

The holding in *Jones* and this Court's cite to *Wollenburg* fits within the same framework of the general South Dakota law on waiver. The person must have knowledge of a right and there must be a clear and unequivocal act relinquishing that right. *Action Mechanical, Inc.*, at ¶18.

First, the original objection of Raymond's appointment shows the Appellants had knowledge of Raymond's appointment and its lack of hearing or notice. However, the original objection contained no argument or position that identified any procedural issues with Raymond's appointment. Instead, Appellants argued that Raymond had a conflict of interest because of Victoria's lawsuit that alleged the shares of VOR were owned 50% by Raymond and 50% by Victoria. (R. 13-15.)

Second, when given another opportunity to have a hearing on the original objection, and after the first hearing never addressed the petition due to other matters, Appellants did not set it for a new hearing. Further, at the hearing on the original objection, the Appellants never made any mention of any perceived issue with the procedure of the appointment of Raymond. Instead, Victoria's Estate sat idle without any filings by the Appellants until their first appeal, that this Court dismissed.

Appellants had the right to object to the procedure used in the appointment of Raymond, but chose to go another route, both after Raymond was originally appointed and for another two and a half years following his appointment. The act of filing an objection that raised no procedural issues, then allowing the special administration to continue for two and half years, constituted an unequivocal act by Appellants relinquishing the right to object to

the original appointment. The procedural argument was waived, and Appellants' conclusory and derogatory remarks cannot act to revive it.

2. Raymond's appointment as Special Administrator was not void, and the evidence did not support his removal under SDCL 29A-3-611.

Apart from the waived procedural attack, Appellants are attempting to void a special administrator that had been in place for approximately 30 months by claiming Victoria's lawsuit made Raymond unsuitable to be the special administrator at the outset. Appellants attempt this without providing any evidence. Additionally, the Appellants' brief contains no legal explanation for how the order appointing Raymond is "void," as their petition was for removal of Raymond as special administrator, and removal under SDCL 29A-3-611 is the only legal process for a special administrator with a conflict of interest. Apart from the missing legal citations, there are several reasons why the trial court's findings of fact are supported by the evidence, and Appellants' legal argument of *unsuitability* fails.

First, Appellants' argument that Victoria's lawsuit makes the special administration void ignores that the lawsuit is dismissed and that Victoria's lawsuit had no effect on Raymond upon her death or before her death, as Raymond separately owned 100% of the shares of VOR.

Second, there was no evidence presented that Victoria's Estate has any assets. The lack of assets in Victoria's Estate supports the trial court's closing of the special administration, because with no assets, what purpose could it conceivably serve.

Third, the appointment of special administrator was temporally limited to "such time as it is necessary to investigate whether the decedent has a will." (R. 5.) The appointment of Raymond as special administrator, and any perceived issues, disregard that an investigation for a will occurred and there was no evidence offered that a will exists that operated in any manner, except to pour any assets into the Trust or to Raymond. Based upon the evidence, the trial court correctly ruled that the special administration should be closed following Raymond's investigation for a will.

a. Applicable law

The *Jones* case provides the discretion that the trial court adheres to in South Dakota regarding unsuitability of a personal representative:

> The circuit court has discretion to determine if a special administrator is 'necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act.' SDCL 29A-3-614; see also *In re Est. of Hutman*, 705 N.E.2d 1060, 1064–65 (Ind. Ct. App. 1999) ("No one can serve as a special administratrix whom the trial court finds unsuitable. A person may be deemed unsuitable by reason of an interest in pending litigation, or bias or prejudice[.]")

Jones, at ¶33.

> In determining who shall pursue a wrongful death claim on behalf of an estate, the "[circuit] court must have confidence that the person will demonstrate the utmost loyalty, impartiality, and integrity, and that the person does not have an interest in pending litigation, or bias or prejudice, such that the appointment would be adverse to the interest of those to be served by the appointment."

Id.

When the trial court is faced with a petition to remove a special administrator, SDCL 29A-3-611 controls:

> (a) Any interested person may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in § 29A-3-607, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration, or to preserve the estate. If removal is ordered, the court shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.
>
> (b) Cause for removal exists when:
>
> > (1) Removal is in the best interests of the estate;
> >
> > (2) The personal representative or the person requesting the representative's appointment intentionally misrepresented material facts in the proceedings leading to appointment; or
> >
> > (3) The personal representative has disregarded an order of court, has become incapable of discharging the duties of office, has mismanaged the estate, or has failed to perform any duty pertaining to the office.
>
> (c) Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile who is requesting appointment either personally or of a nominee as personal representative, may obtain removal of another who was appointed personal representative in this state to administer local assets.

b. Analysis

The trial court correctly found that Raymond was suitable to operate as the special administrator to Vicotria's Estate. Apart from making conclusory statements regarding Victoria's lawsuit, the Appellants provided no evidence to support Raymond was unsuitable.

i. Can the original appointment be ruled void or must Appellants follow SDCL 29A-3-611?

To begin, the Appellants' brief claims that the suitability of a special administrator is "fact intensive," then also claims that it is a per se rule that a special administrator cannot serve if he is a defendant in an action by the deceased. There is no "per se" law in South Dakota. To the contrary, and as noted in Appellants' brief, South Dakota law provides that the trial court has discretion to determine if pending litigation makes a special administrator suitable or not: "A person **may be deemed** unsuitable by reason of an interest in pending litigation, or bias or prejudice." *Jones*, at ¶33 (emphasis added).

Further, the Appellants rely on *Hampshire v. Powell*, a Nebraska appellate case, to support that Raymond's appointment should be void. However, the Appellants do not include the following sentence from their legal cite that states:

> If the personal representative has a conflict, the proper procedure would be for the interested beneficiary to petition the court for removal of the personal representative pursuant to Neb.Rev.Stat. § 30–2454 (Reissue 1995) or to plead and prove that an exception to the general rule applied.

626 N.W.2d 620, 626 (Neb.App. 2001).

This sentence describes that the proper method does not include voiding the special administrator appointment, rather it is to plead and *prove* the

exception to the general rule or seek removal through the Nebraska removal statute, which mirrors SDCL 29A-3-611. SDCL 29A-3-611 requires the trial court to find a reason for cause to remove the special administrator, after a hearing on said petition. It requires evidence. It is true that Appellants pled the purported conflict of interest, but undisputedly made no attempt to *prove* it at the hearing.

Additionally, SDCL 29A-3-618 follows the procedure in the *Hampshire* case where it describes the manner in which a special administrator may be terminated—none of which includes a voiding of the original appointment and, instead, limits potential termination to "SDCL 29A-3-608 to SDCL 29A-3-611, **inclusive**." (emphasis added.) When applying the correct standard under SDCL 29A-3-618, the trial court made findings of fact that were not clear errors, and the trial court did not abuse its discretion in not removing Raymond as the special administrator.

Even though Appellants did not present evidence to support removal, Raymond did present evidence that established his special administration had no conflict of interest, that Victoria's Estate had no assets, and that he fulfilled his role as defined by the order appointing him as special administrator.

ii. The evidence established that Raymond owned 100% of the VOR shares.

The Appellants' central complaint about Raymond's appointment as special administrator is based upon Victoria's dismissed lawsuit against Raymond. However, the Appellants never included that complaint in the record with their requests to remove Raymond. (R. 13-15, 85-98, 120-134.) The trial court did not abuse its discretion when Appellants failed to provide the alleged

dismissed lawsuit as evidence of a conflict of interest. The Appellants' record in front of the trial court is all that this Court reviews. Appellants are assigned "the ultimate responsibility for presenting an adequate record on appeal" to this Court, and to the trial court. *Graff v. Children's Care Hospital and School*, 2020 S.D. 26, ¶16, 943 N.W.2d 484, 489. "Where the trial court record is incomplete," as in the lack of Victoria's dismissed lawsuit, this Court operates under the "presumption . . . that the circuit court acted properly." *Id.*

Even though the Appellants provided no evidence of a conflict outside of their remarks and statements in briefs describing the dismissed lawsuit, Raymond provided uncontroverted evidence that established that Victoria never owned any shares of VOR, thus her original complaint did not create any conflict of interest for Raymond.

To begin, under the terms of the Trust, Raymond was entitled to freely negotiate his shares in any manner he preferred as separately held property:

> **(c) Addition or Removal of Trust Property**
>
> **Either of us may add property to the trust. Both of us, acting jointly may remove any property from the trust. Each of us, acting alone, may remove our own separate property from the trust. Community property removed from the trust will retain its character as community property.**

(R. 157 (emphasis not by Appellees).)

Next, the evidence established that Raymond always owned the VOR shares, even when they were held in the Trust after it was established in 2011. The Trust language is what creates the *dual* ownership—by the Trust and Raymond. Victoria's dismissed lawsuit wholly operated under the incorrect premise that Victoria owned half of the VOR shares. (R. 13-15.)

Further, Raymond's response to the renewed petition to remove him briefly described that he was 100% owner of the shares, even when the Trust held them, and this was also part of Raymond's response to Appellants' original petition requesting his removal in 2022. (R. 110-111, 39.)

The Appellants' argument regarding the VOR shares is based on the incorrect premise that Raymond could not own the shares when they were held in the Trust. The Trust expressly describes the process of separate property being held by the Trust.

As noted above, the evidence established through the testimony of the family accountant that Raymond was always the 100% owner of the shares, even after the Trust held them. The fact that the family accountant did not have specific knowledge of Raymond transferring his shares to the Trust does not operate to transfer any of Raymond's shares to Victoria.

To be more specific, the testimony by Mr. Keifer included the origin of the VOR shares as Raymond's, the advice to not transfer any shares to Victoria, and the lack of evidence showing any transfers to Victoria. (R. 396, 398-399, 404.) It was not merely tax forms that established Raymond's ownership in the VOR shares. It was the unrefuted testimony of the accountant describing the origin of the shares and why the shares would never have been transferred to Victoria, personally. (R. 398-399.) In response, the Appellants provided no evidence that Victoria owned any shares of VOR. And, in this appeal, the Appellants do not claim that Victoria owned any shares, they merely complain that the Trust held them—which is inconsequential given the Trust's express language regarding separate property. It was not an abuse of discretion by the trial court to weigh the

evidence and make the finding of fact that Raymond owned 100% of the VOR shares.

For the first time, and after the statutory period to object to proposed findings and conclusions of law lapsed (SDCL 15-6-52(a)), Appellants contended that this position by Raymond was inconsistent from previous statements of Raymond in various pleadings. Because of this inconsistency, Appellants' claim Raymond is judicially estopped from now making this argument. Again, this argument was not properly presented to the trial court at the hearing and within the statutory time to object to the proposed findings of fact and conclusions of law and, thus, cannot be the basis for an argument on appeal. *Action Mechanical, Inc.*, at ¶50. Further, even if Appellants timely filed proposed findings of fact and objecting to Raymond's proposal, SDCL 15-6-52(a) does not allow Appellants to introduce new arguments and evidence. The Appellants chose to not timely make this argument or present evidence to the trial court, even though Raymond explained his position on the shares in his response to their renewed objection and to the original petition. (R. 110, 39.)

Beyond its improper nature of never being provided to the trial court, the argument misses the distinction within the Trust regarding separate property. Raymond does not contend the Trust was not funded with his shares of VOR, and the trial court never made that ruling. The previous statements regarding the VOR shares being placed in the Trust are not disputed and do not contradict that Raymond was the 100% owner of such shares. Appellants had the opportunity to contest that evidence, but chose not to do so.

iii. The Trial Court correctly found that Victoria's Estate had no assets.

The only argument proffered by Appellants regarding assets in Victoria's Estate was claims they contend were a part of her dismissed lawsuit. Again, the Appellants provided no evidence to support the basis of that lawsuit—that Victoria owned 50% of the shares of VOR. Further, even if Appellants had evidence of Victoria owning 50% of the shares of VOR, the Appellants did not describe the effect of the validity of any claims related to the shares after her passing.

Specifically, following Victoria's death, Raymond, as the surviving trustor, has the "power to appoint all or any portion of the principal and undistributed income remaining in the Marital Trust among our descendants." (R. 181.) Therefore, even if Victoria held shares of VOR individually, the Trust does not support that those shares would result in any distribution to Victoria's Estate. To the contrary, the language of the Trust supports Raymond's ability to appoint principal and undistributed income of those potential VOR shares to any of Raymond and Victoria's descendants.

Without any evidence of Victoria's Estate holding any assets, the trial court correctly weighed the evidence and did not commit clear error when making that finding of fact. The fact that Victoria's Estate does not have any assets supports that it was not an error of law that the trial court closed Raymond's special administration or denied removing him.

iv. The Trial Court correctly ruled that the evidence supported that Raymond fulfilled his duty as a Special Administrator to search for a will.

Appellants take issue with the trial court's finding of fact that Raymond diligently looked for a will. However, based upon the evidence presented, this finding of fact was not clear error. Further, it supports that Raymond's duty as special administrator had been fulfilled.

The trial court was presented with evidence from Raymond that his counsel searched for a will immediately after the death of Victoria. (R. 135-143, 145-146.) This included communicating with the attorney that drafted the Trust. (R. 142-143.) In that communication, the attorney who drafted the Trust told Raymond's counsel that his law office did not have the original will, only a copy. (R. 142.) The copy of that will appointed Raymond as a personal representative and disbursed the assets of Victoria to the Trust. (R. 136-141.)

Appellants claim that it was mischievous behavior for Raymond to not immediately inform the court or other parties of this communication. However, the evidence does not support any mischievous wrongful behavior by Raymond.

First, the will merely creates a pour over into the Trust, so the Estate of Victoria would be without any assets, if she had any. Then, the will appoints Raymond as the personal representative. In short, it does not have any effect on any argument by the Appellants.

Second, the disclosure of the will was not late or mischievous, it was disclosed when Appellants finally set a hearing for their petition to remove Raymond. The fact that these communications and copy of a will were not disclosed at a different time prior to the hearing is not evidence of any wrongful

behavior. It also ignores that Raymond's counsel wrote to Appellants requesting information of a will back in August 3, 2022. (R. 135.) Apart from the Appellants' claim of poor timing of its disclosure, the Appellants did not present any evidence supporting any intentional wrongful behavior by Raymond. As this Court has described, removal of a personal representative (or special administrator) requires more than these accusations of irregularities in management of the special administration:

> Irregularities in management which are not harmful to the estate will be overlooked, and "[i]f the court can readily remedy a matter of complaint, no removal will be ordered."

Matter of Estate of Williams, 348 N.W.2d 471, 474 (S.D. 1984) (citations omitted).

Third, Appellants did not attempt to provide any evidence as to how Raymond's search for a will was defective or harmful to the Estate. In fact, the one type of will that Appellants believed Victoria had (a pour over will into the Trust) is the exact copy of a will that was located and disclosed.

v. The Trial Court correctly found that Raymond did not misrepresent facts.

Appellants claim that Raymond misrepresented facts by not disclosing the full caption of the lawsuit Victoria had against him when she passed—like all of Appellants' comments, they decided not to present any evidence of misrepresentation. Appellants never called Raymond to the stand or had anyone testify to how that was misleading or made with any deceiving intent. At worst, this was a human error that does not support removal. *Id.*

Additionally, the basis for Victoria's lawsuit—that she owned 50% of the shares was proven false at the hearing. The purported "misrepresentation" resulted in no harm to Victoria's Estate. *Id.*

vi. The Trial Court did not err by considering Raymond's responses and evidence.

Appellants argue that Raymond should not have been allowed to respond to the allegations against him through his filings of reports and petitions, following Appellants' renewed petition to remove him. On its face, this argument is bizarre. Under this theory, an accused personal representative or special administrator would have no due process or ability to defend themselves.

Apart from being constitutionally strained, it ignores the plain text of SDCL 29A-3-611, which allows the personal representative (or special administrator) "to account, to correct maladministration, or to preserve the estate." Raymond's reports and petition to close the special administration were necessary to account for his actions and to preserve Victoria's Estate from wasteful litigation. They were allowed by law, and to argue otherwise would improperly narrow the statute to the point of rendering language in the statute meaningless (" 'We should not adopt an interpretation of a statute that renders the statute [or part of it] meaningless.' " *State v. Miranda*, 2009 S.D. 105, ¶23, 776 N.W.2d 77, 83 (citations omitted)).

3. Appellants' issues with Raymond's appointment as Special Administrator are moot.

Appellants' various complaints about Raymond serving as the special administrator all stem from Victoria's dismissed lawsuit. This ignores that the

lawsuit was dismissed, and that this Court affirmed the dismissal. It further ignores that Appellants have started their own litigation against several defendants that includes the claims from Victoria's dismissed lawsuit.

a. Applicable law

The mootness doctrine was recently described in *Netter v. Netter*:

> "This Court renders opinions pertaining to actual controversies affecting people's rights." *Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, ¶ 12, 922 N.W.2d 784, 787. The Court will generally not rule on an issue if a decision "will have no practical legal effect upon an existing controversy." *Id.* ¶ 14, 922 N.W.2d at 788. In other words, the Court will not decide a moot case.[2] "A moot case is one in which there is no real controversy or which seeks to determine an abstract question which does not rest on existing facts or rights, with the result that any judicial determination would have no practical or remedial effect."

2019 S.D. 60, ¶9, 935 N.W.2d 789, 791.

b. Analysis

The Appellants cite law and make all their arguments in support of their appeal, as if Victoria's dismissed lawsuit is still pending. It is not. There is undisputedly no conflict of Raymond as special administrator in relation to that dismissed lawsuit—as it is no longer pending. There would be no practical effect to remove Raymond as special administrator because of a dismissed lawsuit. Further, the allegations and remedies requested in Victoria's lawsuit are included in the lawsuit by Paul against several defendants (which is currently with this Court on an intermediate appeal, No. 31101).

Additionally, the matter is moot because of Raymond's 100% ownership of VOR shares. Evidence at the hearing established that Raymond's ownership of

VOR shares continued through the transfer into the Trust. Because Victoria's dismissed lawsuit was based upon her owning 50% of the shares, this finding of fact further affirms the dismissal of Victoria's lawsuit.

Next, even if Victoria had shares of VOR, upon her death, those shares would operate under the martial trust and not Victoria's Estate. There is no evidence that Victoria's Estate would have any interest in her shares—if she were to have any.

There is no real controversy in this matter. At best, if Victoria had any shares of VOR, her death ended any interest she would have in those shares. Further, even if her lawsuit had any merit, it has been dismissed, and Appellants started their own lawsuit.

CONCLUSION

Raymond respectfully asks this Court to affirm the trial court's findings of fact and conclusions of law, as they are supported by the evidence presented to the trial court. The Appellants continued use of unsupported allegations and derogatory comments cannot control. Therefore, this Court should affirm the trial court's rulings denying Appellants' petition to remove Raymond as special administrator, and closing the special administration of Victoria's Estate.

DATED this 9th day of September, 2025.

Respectfully submitted,

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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 8,726 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 9th day of September, 2025.

SCHOENBECK & ERICKSON, PC

___/s/ Joe Erickson_____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 9, 2025, I served a true and correct copy of the foregoing *Appellees' Brief* via electronic means on the following:

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APPENDIX
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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

VICTORIA O'FARRELL, in her Individual capacity and as Trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017, and amended August 26, 2021, Plaintiff and Appellee,	ORDER DISMISSING APPEAL #30508
THE ESTATE OF PAUL O'FARRELL, Plaintiff-Intervenor and Appellant,	
vs.	
RAYMOND O'FARRELL, in his individual capacity and as Trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017, and amended August 26, 2021, and KELLY O'FARRELL, Defendants and Appellees.	

The Court considered all the briefs filed in the above-entitled matter, together with the appeal record and oral argument of the parties, and concluded that the dismissal of the underlying action without prejudice via a notice of voluntary dismissal under SDCL 15-4-41(a)(1)(A), was a permissible act by plaintiff's counsel. *See Swenson v. Brown*, 2009 S.D. 64, 771 N.W.2d 313 (an attorney has an "ethical obligation to take the necessary steps to protect a deceased client's interests immediately following the client's

death."} Because the underlying action was dismissed before this appeal was initiated, it is now

ORDERED that the appeal be and it is hereby dismissed.

DATED at Pierre, South Dakota, this 18th day of December 2024.

BY THE COURT:

Steven R. Jensen, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

PARTICIPATING: Chief Justice Steven R. Jensen, Justices Janine M. Kern, Mark E. Salter, Patricia J. DeVaney and Scott P. Myren.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

DEC 18 2024

Clerk

STATE OF SOUTH DAKOTA	IN THE CIRCUIT COURT
COUNTY OF GRANT	THIRD JUDICIAL CIRCUIT
VICTORIA O'FARRELL, in her individual capacity and as Trustee of the Raymond and Victoria O'Farell Living Trust dated January 14, 2011, restated March 29, 2017 and amended August 26, 2021, Plaintiff, and PAUL O'FARRELL, Plaintiff-Intervenor, vs. RAYMOND O'FARRELL, in his individual capacity and as Trustee of the Raymond and Victoria O'Farell Living Trust dated January 14, 2011, restated March 29, 2017 and amended August 26, 2021, and KELLY O'FARRELL, Defendants.	25CIV22-000038 MOTION TO INTERVENE TO PROTECT THE INTEREST OF PAUL O'FARRELL

COMES NOW, Paul O'Farrell, by and through his attorney of record, David A. Geyer of the Delaney, Nielsen & Sannes, P.C. law firm of Sisseton, South Dakota pursuant to South Dakota law including SDCL 15-6-24(a)(2) moves this Court for its Order as follows:

1. Paul O'Farrell, the son of Plaintiff and Defendant Raymond O'Farrell, residing in Grant County, South Dakota, requests permission to intervene in the above captioned matter to protect his interest as a beneficiary of the Raymond and Victoria O'Farrell Living Trust.

2. In accordance with SDCL 15-6-24(a)(2), Paul O'Farrell claims an interest relating to the property or transaction which is the subject of the lawsuit now pending before this Court, and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.

3. Paul O'Farrell's interest is not adequately represented by existing parties.

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4. Paul O'Farrell's interest align with the interest of the Plaintiff. Pursuant to SDCL 15-6-24(c) this motion to intervene is being served on counsel for the Plaintiff and counsel for the Defendants.

5. That in accordance with 15-6-24(c) attached hereto as Exhibit "A" and incorporated herein by reference is a copy of the pleading setting forth the claims and defenses upon which Paul O'Farrell's right of intervention is sought.

WHEREFORE, Paul O'Farrell respectfully moves this Court for its order finding that Paul O'Farrell has an interest relating to the property or transaction which is the subject of this action and that Paul O'Farrell is so situation that the disposition of the action may as a practical matter impair or impede Paul O'Farrell's ability to protect that interest and that the Court approve Paul O'Farrell's requested relief.

Dated this 23 day of September 2022.

DELANEY, NIELSEN, & SANNES, P.C.

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520 2nd Avenue East
Sisseton, South Dakota 57262
605-698-7084

Filed: 9/29/2022 4:02 PM CST Grant County, South Dakota 25CIV22-000038
- Page 265 -

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 29 day of September 2022, a true and correct copy of the Motion to Intervene to Protect the Interest of Paul O'Farrell was served via electronic transmission by the Odyssey File and Serve system by the undersigned this date as follows, to-wit:

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Lee Schoenbeck
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Watertown, SD 57201

Joseph Erickson
PO Box 1325
Watertown, SD 57201

I, the undersigned, hereby certify that on the 29 day of September 2022, a true and correct copy of the Motion to Intervene to Protect the Interest of Paul O'Farrell was served via First Class Mail, postage prepaid, by the undersigned this date as follows, to-wit:

Kelly O'Farrell
46658 143rd Street
Marvin, SD 57251

David A. Geyer

STATE OF SOUTH DAKOTA	IN THE CIRCUIT COURT
COUNTY OF GRANT	THIRD JUDICIAL CIRCUIT
VICTORIA O'FARRELL, in her individual capacity and as Trustee of the Raymond and Victoria O'Farell Living Trust dated January 14, 2011, restated March 29, 2017 and amended August 26, 2021, Plaintiff, and PAUL O'FARRELL, Plaintiff-Intervenor, vs. RAYMOND O'FARRELL, in his individual capacity and as Trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017 and amended August 26, 2021, and KELLY O'FARRELL, Defendants.	25CIV22-000038 NOTICE AND ORDER FOR HEARING

Paul O'Farrell, the Plaintiff-Intervenor in the above-entitled matter, having filed with this Court his Motion to Intervene, requesting the Court to hear said motion and enter its order granting the requested relief,

IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. That the Motion to Intervene will be heard by the Judge of the above entitled Court on the 18th day of October 2022 at 2:00 o'clock p.m. at the courtroom in the Courthouse in Watertown, Codington County, South Dakota.

2. Notice of the hearing shall be given by mailing a copy of this Notice and Order to any interested party or their attorney of record forthwith.

Dated this __ __ day of October 2022.

10/7/2022 1:00:33 PM

BY THE COURT:

Robert L. Spears

Honorable Robert Spears
Circuit Court Judge

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF GRANT	THIRD JUDICIAL CIRCUIT
Victoria O'Farrell, in her individual capacity and as Trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017, and amended August 26, 2021, Plaintiff, vs. Raymond O'Farrell, in his individual capacity and as Trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017, and amended August 26, 2021, and Kelly O'Farrell, Defendants.	Motions Hearing 25CIV22-000038

BEFORE: **THE HONORABLE ROBERT L. SPEARS**
Circuit Court Judge
Watertown, South Dakota
October 18, 2022, at 2:06 p.m.

APPEARANCES:

For the Plaintiff: **MR. ALEX HAGEN**
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Sioux Falls, South Dakota 57104

APPEARANCES CONTINUED:

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INDEX

(WHEREUPON, the following proceedings were duly had:)
THE COURT: The record should reflect that my name is Circuit Court Judge Robert Spears. And I have two files set for a hearing at the same time. They are both Grant County civil files that are being heard by consent of the parties involved and all the attorneys involved here in Courtroom 219 located in Watertown, South Dakota.

The cases are Victoria O'Farrell versus Raymond O'Farrell and Kelly O'Farrell. This is file number 25CIV22-0038. And the other file on my docket for the same time this afternoon is the matter of the Estate of Victoria O'Farrell. This is Grant County probate number 25PRO22-0011. Between these two files, there are several motions pending before the Court and set for hearing this afternoon.

Counsel, please note your formal appearance on this record starting with the plaintiffs and the moving parties first, please.

MR. GEYER: David Geyer appearing with and on behalf of Paul O'Farrell, the petitioner in the Estate and the intervenor in the lawsuit.

MR. HAGEN: Alex Hagen on behalf of Victoria.

MR. SCHOENBECK: Your Honor, Lee Schoenbeck appearing on behalf of Raymond O'Farrell and I am joined by co-counsel.

MS. JENNEN: Susan Jennen on behalf of Raymond O'Farrell.

THE COURT: Thank you.
MR. HIEB: Then Jack Hieb on behalf of Kelly O'Farrell in the action for intervention.
THE COURT: All right. And anybody else?
MR. SCHOENBECK: For the record, Your Honor, George Boos is also co-counsel and he is here with us.
MR. BOOS: Yes, Your Honor. I am the attorney of record in the matter of the special administration of the Vicki O'Farrell estate file.
THE COURT: All right. Thank you, everyone. And there's several other people seated in my courtroom. Is there going to be any testimony or witness testimony this afternoon during these two hearings?
MR. GEYER: Yes, Your Honor.
THE COURT: All right. Then on the Court's own motion, I will sequester such witnesses until they testify. That sequestration order brought forth by the Court's motion applies to both sides. So what that means in plain simple English, other than parties and the attorneys, if you are going to be a witness in these proceedings, you will have to have a seat outside the courtroom until you're called as a witness.

All right. Anything else that the Court needs to address before we start with the hearings?
MR. GEYER: Not that I'm aware of, Your Honor.

MR. SCHOENBECK: Your Honor, I just wonder which file we are taking first. I have an opening statement with respect to the intervention motion if that's what we will hear first.

THE COURT: All right. Let's take file number 25 22-0038 first simply because that's the one that appears on my calendar first and I can only call one file up at a time electronically on this system.

All right. And, Mr. Geyer, you filed -- you're the moving party in this file; am I correct?

MR. GEYER: Yes, Your Honor. Which file? I'm sorry. I was opening a binder.

THE COURT: That's okay. 25CIV22-0038 simply because that file appears on my calendar first.

MR. GEYER: Yes.

THE COURT: And that's the one I have on the screen.

MR. GEYER: I guess since Mr. Schoenbeck stated that he wants an opening statement, I guess I would make the comment that we are going to provide the testimony today that shows that Mr. O'Farrell, Paul O'Farrell, has an interest in the current lawsuit such to allow him to intervene to protect his interests. He is a trustee under the trust of Victoria O'Farrell and Raymond O'Farrell which he is named in the heading.

Due to that, Your Honor, and also based upon the

MR. SCHOENBECK: Your Honor, I think it's moot now because the only thing that would remain is the estate. There's no lawsuit pending.

THE COURT: All right. I just wanted to make sure. That's why -- it's been a long day and so far a long week. And it's only 5:30 on Tuesday afternoon for this Court with everything going on. I just wanted to make sure I covered everything.

Any questions about the Court's ruling this afternoon?

MR. GEYER: Just to be clear, Your Honor, you denied my client's --

THE COURT: Motion to intervene.

MR. GEYER: What about motion for removal and petition for an appointment.

THE COURT: Well, do we need a hearing on November 4th on that?

MR. GEYER: We do, Your Honor. Again, so now the motion to intervene is out. We don't have an issue with that.

THE COURT: Right.

MR. GEYER: I just -- so I don't have any problem -- I mean, we want to have our day in court on that, Your Honor. Obviously, this ran long and we run into the same 90-day problem on the suggestion of death. And we'd ask for an extension on that until after the hearing.

MR. SCHOENBECK: That's -- he's not -- I am not sure what he's talking about. The law on the suggestion of death applies to the pending lawsuit so that has nothing to do with a petition to --

THE COURT: Removal for personal representatives.

MR. SCHOENBECK: Yeah, that's got -- there's no need --

THE COURT: That can be made at almost any time.

MR. GEYER: But, Your Honor, the underlying lawsuit is not dismissed. I mean, you didn't dismiss Victoria's claims against Raymond O'Farrell and Kelly O'Farrell, correct?

THE COURT: I denied the motion to intervene. That's what was in front of me.

MR. GEYER: Sure. But that -- my intent was and I believe it's in the document was to have him intervene, but there's still the plaintiff Victoria O'Farrell. And her estate still has until the 25th to substitute. I mean, if the special administrator -- I mean, Raymond O'Farrell has until the 25th to substitute himself against himself in that lawsuit. And that's what we want to do. We want to have Raymond O'Farrell removed.

THE COURT: Well, based on what I heard, he's not going to do that, so --

MR. GEYER: Right. So but the problem we have is --

THE COURT: So if he's not going to do that, then you can bring a motion to have him removed as a personal

representative at any time.

MR. GEYER: We have that, Your Honor, in front of you. That was also going to be heard today.

THE COURT: All right. So I'll reschedule that for November 4th.

MR. GEYER: But the problem is, is that will already be past the time for the 90 days in the civil file for the estate to substitute itself. So, essentially, it would make the whole procedure moot. That's what I've been --

THE COURT: Mr. Schoenbeck?

MR. SCHOENBECK: Your Honor, it's interesting because what the Court noted about why it didn't make any sense to let him intervene is actually -- parallels exactly with the problem with that lawsuit, which is he could do what he did under the trust.

The fact that he doesn't have standing is it will equally -- whoever is assessing that estate should make the exact same assessment, wait a minute, he can do what he can do, that lawsuit doesn't make any sense. And that lawsuit will expire on Monday. And it should expire for all the reasons the Court said that applied to Paul trying to intervene.

And so they have a frivolous claim that they are now trying to -- and, actually, they should have never bought the motion to intervene and taken up all this time with

that. They could have had a hearing but they didn't want to on the motion to substitute --

MR. GEYER: That does not true.

MR. SCHOENBECK: That actually is true.

MR. GEYER: That's not true.

MR. SCHOENBECK: It absolutely is true. The Court asked us which file to take first. They should have dismissed their motion to intervene. That was a ridiculous claim to start with. We could have had a hearing this afternoon on substituting special administrators. And we'd have that fight. And we are still going to have that fight whenever they want to have it.

And they can make that motion any time as to any assets that -- and, by the way, they are going to have the exact same problem. Paul has to sue himself in the estate because he owes the estate a pile of money, over a million bucks.

MR. GEYER: The problem is, Your Honor, is Raymond O'Farrell is the one who is sitting in the way of Victoria's claim against him. I mean, it's a self-serving position that he's put himself in to stop himself from being sued by Victoria.

THE COURT: Did he have priority over as personal representative in this case?

MR. GEYER: No one's presented a will. So I don't believe

there's any designation of him. I have not seen a will. If there is a will, I don't know about it. He didn't appoint himself as special administrator -- or as personal representative. He appointed himself as special administrator. He has not presented a will and has not substituted himself as personal representative. And, I mean, if the parties wanted to --

THE COURT: All right. I will hear the removal of the personal representative, special administrator on November 4th. That's as soon as I can hear it. Whatever else happens on the deadlines, that's not the Court's problem.

MR. GEYER: Okay. So just to the clear, the Court is denying a motion for an extension on the 90 days, Your Honor?

THE COURT: Yes.

MR. GEYER: Okay.

THE COURT: This should have been brought to my attention much earlier than it did. Anything else?

MR. SCHOENBECK: No, Your Honor. Thank you.

THE COURT: All right. Mr. Schoenbeck, you are --

MR. GEYER: I just want to say --

THE COURT: -- the prevailing party on the order that I just entered on the motion to intervene. Prepare an orders consistent with the oral pronouncement that I made

earlier a few minutes ago. I will sign it as soon as I see it, findings of facts and conclusions of law, unless waived. Thank you. Court will be in recess.

(WHEREUPON, the foregoing proceedings concluded.)

STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF DAY)

I, KELLI LARDY, RPR, an Official Court Reporter and Notary Public in the State of South Dakota, Third Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings in the above-entitled matter and that Pages 1 through 154, inclusive, are a true and correct copy, to the best of my ability, of my stenotype notes of said proceedings had before the HONORABLE ROBERT L. SPEARS, Circuit Court Judge.

Dated at Watertown, South Dakota, this 20th day of January, 2023.

/s/ Kelli Lardy
KELLI LARDY, RPR
Certified Court Reporter

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Filing Description	FINDINGS OF FACT AND CONCLUSIONS OF LAW
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Case Number	25PRO22-000011
Case Style	Estate of VICTORIA O O'FARRELL
Date/Time Submitted	5/9/2025 12:51 PM CST
Filing Code	PROPOSED DOCUMENT
Filing Description	JUDGMENT DENYING PETITION TO REMOVE SPECIAL ADMINISTRATOR, ADOPTING REPORTS OF SPECIAL ADMINISTRATOR, CLOSING SPECIAL ADMINISTRATION, AND DISCHARGING THE SPECIAL ADMINISTRATOR
Filed By	Jennifer Frederick
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IN THE

Supreme Court

of the

State of South Dakota

No.31106

IN THE MATTER OF THE
ESTATE OF VICTORIA O. O'FARRELL,
DECEASED

An appeal from the Circuit Court, Third Judicial Circuit
Grant County, South Dakota

The Hon. Patrick Pardy
CIRCUIT COURT JUDGE

APPELLANTS' REPLY BRIEF

Submitted by:
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---

Notice of Appeal filed on June 2, 2025

Appellees

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TABLE OF AUTHORITIES

South Dakota Supreme Court Opinions

Other State Court Cases

Statutes

Secondary Sources

INTRODUCTION

Is This How Lawyers Should Act? Is This What Lawyers Can Do?

At its core, this appeal invites the Court (and counsel) to reflect upon the conduct and tactics we should expect from practicing attorneys. It also raises questions about the limits of judicial action.

Can an "emergency order" be granted without a hearing, and, without either prior *or* subsequent notice to anyone? Can a Circuit Court exercise emergency powers without first declaring the emergency? Can a Circuit Court install the same person to act as both plaintiff and defendant in the same lawsuit?

And, if Circuit Courts cannot do these things, is it improper for lawyers to even seek such relief? Shouldn't lawyers know enough about the law to realize that the same person cannot serve as the lone plaintiff and defendant in the same case? Is it proper for a lawyer to submit an "emergency" petition to a Circuit Court which disguises and suppresses key information?

Yes, emergencies will occur. Our Circuit Courts will be asked—on rare and unique occasions—to exert their substantial powers of law and equity to fix or avert problems. But the law does not allow a Circuit Court to

wield emergency power without meaningful consideration of the emergent issues. The law does not permit emergency powers to be used without a declaration of an emergency. And the law does not allow a Circuit Court to fix proven emergencies without careful steps designed to alert interested parties after-the-fact about what the Court has done.

If the law does not permit such things, it is impermissible for a lawyer to try and convince a Judge to do those things. These are fundamental problems that made Raymond's appointment void *from the outset*.

The invalidity of Raymond's appointment is a legal issue which is distinct and separate from the question of his removal from office. The first seeks to declare the office vacant from day one. The other seeks to remove the officeholder based upon statutory unfitness.

These are not dependent upon each other. But the Record supports both: the invalidation of his appointment and his removal from office.

ARGUMENT-IN-REPLY

Raymond's factual posture in this litigation is not much different than gaslighting. Every time Raymond is accused of doing something wrong, he first denies it, then blames others, and then changes the facts. He also now complains that "derogatory remarks" are being made about him, *but without identifying a single remark that he claims is 'derogatory.' See, Raymond's Brief,* pp. 8; 15; 23; 36.[1]

There are no "derogatory" remarks in our opening brief. Instead, Raymond protests our efforts to call out the wrongdoing which he refuses to admit.

In Raymond's view, it was "not mischievous" to seek appointment as a fiduciary of his wife's estate, in order to gain control of her lawsuit against him, and serve as both plaintiff and defendant. *Raymond's Brief,* p. 15.

In Raymond's view, it is now legally possible for a Trust to "hold" assets without "owning" the assets. *Raymond's Brief,* p. 11. He cites no authority for his new legal theory, advanced for the first time on appeal.

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[1] Raymond's non-specific protest about derogatory remarks occurs four times: page 8 ("various comments…that are derogatory of Raymond;" page 15 ("derogatory remarks against Raymond"); page 23. ("derogatory remarks"); page 36 ("derogatory comments")

In Raymond's view, he sees no conflict of interest in being the person who 'tries' to find his wife's Will, and, being the person who would inherit her entire estate, intestate, if no Will is found.

In Raymond's view, he sees no conflict of interest in evaluating which legal claims Victoria's Estate may still hold against him.

And yet, here we are. In reality, there are numerous problems with Raymond's conduct, numerous problems with his original appointment, and, numerous problems with his ongoing fitness to serve as the fiduciary of Victoria's Estate. All of these problems are *facially apparent from the Record*, meaning that they required no further documentation or testimony.

No amount of contortions by Raymond can save him from the basic problem that nobody in his position could *ever* capably serve as the fiduciary of this Estate.[2] And nobody in his position would have ever been appointed, if a hearing had taken place, where Raymond would have been required to produce *evidence* about his "emergency."

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[2] Collusive conduct between a plaintiff and defendant subverts the machinery of justice. This Court has likened it to "opposing parties breathing together to the detriment of another party." *Southard v. Hansen*, 342 N.W.2d 231, 233 (S.D. 1984) (citing *Dehn v. Prouty*, 321 N.W.2d 534 (S.D. 1982)).

1. A hearing to declare an emergency is not a mere formality.

Perhaps the greatest irony of Raymond's argument is found in his footnote #3, where he faults us for "never providing Victoria's...lawsuit to the court for review." *See,* Raymond's Brief, p. 8, n.3. Yet, ten pages later, Raymond tries to defend his own failure to convene a hearing when seeking appointment, by asking rhetorically, "*[W]hat would a hearing accomplish?*" *See, Raymond's Brief,* p. 18.

Raymond answers his own question. If the existence of Victoria's lawsuit was a statutory "emergency" meriting appointment of a Special Administrator, then, at a minimum, Raymond needed to heed his own argument and "provide Victoria's lawsuit to the Court for review." And if he had done so, it would have taken Judge Elshere less than a minute to catch on to what Raymond was up to: asking a Circuit Court to enter an order making him the plaintiff in an existing lawsuit against himself. In short, *that's* what a hearing would accomplish. It would have forced Raymond to bring scrutiny to his preposterous plan.

Raymond spends the majority of his brief arguing that the assertions about his conflict of interest and unsuitability are insufficiently *evidenced.*

We disagree. The case against Raymond is facially apparent from the Record.

2. Raymond's conflict of interest is "facially apparent from the Record"

In his Circuit Court briefing and pleadings, Raymond did not dispute *any* of the basic facts relating to his conflict of interest; indeed, he conceded most of them. Raymond tried to sidestep the facts of his conflict using a new theory: that the Trust never existed, and thus the conflict could not exist.

On appeal, however, Raymond now takes a different position: that the existence of his conflict was not properly *evidenced*. Raymond is wrong about this. The Record is replete with undisputed evidence of his conflict and unsuitability. Thus, we argued below that Raymond's conflict of interest was "facially apparent from the Record." [R.396; HT 14:15-16].

The Record at that point included over a hundred pages of filings, including numerous admissions made by Raymond. Among the filings were Raymond's deceptively vague Petition for appointment;[3] the original petition for removal (outlining the conflict of interest with Victoria's claims);[4] Raymond's original response to that petition (which does not

[3] R.1-2.

[4] R.13-15, 28.

refute the conflict, and instead claims Raymond is permitted to be plaintiff and defendant and subjectively claims that Victoria's lawsuit lacks merit);[5] the renewed Petition for removal (which incorporates the prior pleadings and again points out that Raymond's conflict existed from the outset);[6] Raymond's 'Report' and 'Resistance' (claiming that no "true" conflict exists because he didn't find a Will, and because the Trust never owned VOR's stock).[7]

These filings also contain Raymond's assertion, under oath, that he found "no assets *in the name of* Victoria O'Farrell" and "no Will." In response, we pointed out that Raymond has an inherent conflict of interest that prevents him from impartially "searching" for a Will[8] and impartially "identifying and evaluating" Estate assets.[9] We also offered a detailed listing of all of Victoria's potential *claims,* including those against Raymond.[10]

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[5] [R.38-41].

[6] [R.85-98].

[7] [R.99-100].

[8] [R.122, ¶ 10-11] ("Raymond's claim that he is the 'sole beneficiary' of Victoria's Estate is true *only* of no Will is found, and he thus has a self-interest in *not* finding a Will. There is no good reason to believe that Raymond could impartially carry out a diligent search for her Will.")

[9] [R.126, ¶ 27]

[10] [R.126-128].

"[E]very document filed with the Court under [the Probate Code] shall be deemed to include an oath…that its representations are true…." SDCL 29A-1-310.

The Record within *this* Probate demonstrates that Raymond had a fundamental conflict of interest between his own interests and those of Victoria's Estate.

- In his initial pleadings on removal, Raymond *conceded* the existence of the lawsuit as well as the existence of Victoria's claims against him. [R.39; ¶ 4] (admitting that Victoria's lawsuit "contains the allegations reflected in Paragraphs 4, 9, 15, 16, and 17" of the Petition for Removal).[11] Or, in other words, even without Victoria's complaint admitted as an exhibit, it was already sufficiently part of the Record.
- In those same initial pleadings, Raymond then narrowed the dispute into one which was *legal*, not factual. In particular, Raymond claimed, as a matter of law, that it was permissible for

[11] The Petition for Removal outlined Victoria's claims, including tort claims ("conversion," "civil conspiracy;" and "fiduciary duty"); removal of Raymond as Trustee; corporate malfeasance ("waste and mismanagement" of VOR's assets); and interference with her Estate plan as a product of undue influence by Kelly O'Farrell.

him to be both plaintiff and defendant: "...Raymond has the ability and the right to evaluate the allegations [in Victoria's Complaint] and make the appropriate decisions [about her lawsuit]." [R.40, ¶ 13].

- The Record also shows that even after Victoria's lawsuit was dismissed, the same inherent conflict of interest remains, as a result of Paul's lawsuit. In his briefing, Raymond *concedes* that Paul's lawsuit seeks to assert "the allegations and remedies requested in Victoria's lawsuit." *See,* Raymond's Brief, pp. 35. Raymond is not capable of simultaneously wearing the fiduciary hats for Victoria's Estate, the Trust, and VOR with respect to ongoing claims against him.
- Further, the Record identifies "numerous items of potential damages, claims, and relief" which Victoria's Estate could have an interest in pursuing against Raymond (including damages for conversion; tortious interference; emotional distress; punitive damages; attorney's fees; equitable relief; restoration of VOR into the Trust; and unwinding the land sale). [R.126—128]. Instead,

Raymond submitted a Report claiming Victoria has no assets. Raymond is not suited to investigate or bring any such claims.[12]

- And, the Record shows that Raymond has an inherent conflict of interest in searching for an original Will. He has an interest in 'not' finding it.

As a matter of law, and on the basic, conceded facts, Raymond's conflict of interest is facially apparent on this Record.

Raymond's appointment began with a conflict of interest, and, that the conflict of interest has evolved and grown. He cannot reliably fulfill *any* of the duties of his office: he cannot impartially search for an original Will; he cannot impartially evaluate claims that Victoria's Estate holds against him; and he cannot impartially act for the Estate within litigation involving his own wrongdoing. His conflict of interest merits his removal.

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[12] Raymond cannot evaluate claims against himself. *See, e.g., Est. of Sullivan, 463* P.3d 1248, 1249-50 (Haw. Ct. App. 2020), *as amended* (Aug. 20, 2020) (inherent conflict prevents fiduciary of an estate "with respect to evaluating issues related to a legally-cognizable claim against the personal representative himself because his self-interest creates a conflict with his fiduciary duties to the estate.")

3. Raymond's unsuitability is also "facially apparent from the Record"

The Record also demonstrates that Raymond is *unsuitable* to hold his office, for reasons independent from the question of his conflict.

- The Record includes Raymond's petition seeking appointment, which on its face is vague and deceptive, and crafted in such a way to conceal the fact that he was asking to become the plaintiff and defendant in the same lawsuit.[13] On appeal, Raymond's lawyers now chalk this up to "human error." But this is a new argument on appeal, and notably, Raymond offered no testimony or evidence at the hearing in support of his 'human error' theory.
- The Record also demonstrates that Raymond lacks the candor to serve as the fiduciary of this Estate. Raymond first claimed that he searched for a Will but found none.[14] He offered nothing further. On its face, this first filing made it appear as if Victoria died intestate. But when he was pressed on the veracity of this, Raymond finally revealed (over two-and-half years since his

[13] Misrepresenting facts "in the proceedings leading to appointment" is disqualifying. SDCL 29A-3-611(b)

[14] [R.99; ¶ 4]. What Raymond's first filings claims is that "a search for a Will executed by the decedent was conducted. No Will was able to be located."

appointment) that he had *indeed* found a verified copy of Victoria's Will. And, further, Raymond offered no evidence in support of a finding that the reason for the missing original was because she had revoked it.[15] This copy of Victoria's Will can be offered to probate, under SDCL 29A-3-402(d). (Victoria's Will named her son Lance as her successor Personal Representative,[16] and, thus it was Lance's intention to offer that Will into probate and seek appointment; but that plan was precluded by the Circuit Court's precipitous order declaring intestacy and closing the probate.)

- Raymond also refused to submit to a Rule 35(a) examination pertaining to his mental faculties. This, too, is a strike against him.

The Record demonstrates that Raymond is unsuitable to continue as fiduciary of this Estate.

4. Raymond failed to prove that the VOR shares were never placed in Trust

At the Circuit Court level, Raymond's only responsive argument to his conflict of interest was his new theory that the Trust was never funded. But at the hearing, his accountant acknowledged he did not know one way or

[15] [R.145-146].

[16] [R.137]

the other whether this had occurred, and conceded that the name listed on a K-1 did not prove Raymond's theory.

The Circuit Court was then left with the remaining Record within *this* Probate, which showed Raymond making a series of judicial admissions that the shares of VOR were indeed owned by the Trust.

For example, Raymond made the following admission in the Record on 10/11/2022, admitting that he transferred VOR stock *into the Trust*:

> 2. Denied. The shares of VOR, Inc. were not owned individually, but were owned 100% by the Trust. The shares were transferred into the Trust by Raymond and held separately by Raymond in the Trust.

See, [R.39; *Resistance to Petition for Removal of Special Administrator*].

Raymond followed that admission with a similar admission in the next paragraph of his Resistance, explaining again that he had assigned the VOR shares *into the Trust*:

> 3. Denied. See the response to Paragraph 2 above. Additionally, Raymond assigned the shares to the Trust, and they would have been held as his separate property within the Trust.

See, [R.39; *Id.*].

Those filings were made by Raymond in October 2022. In his March 2025 filing, Raymond he asked for his "original Resistance" to be "incorporated herein by reference." [R.109].

Thereafter, Raymond did not offer any testimony or affidavit from himself showing that he did *not* convey his VOR stock into the Trust. He couldn't have without perjuring himself, and instead advanced the K-1 theory via his accountant.[17]

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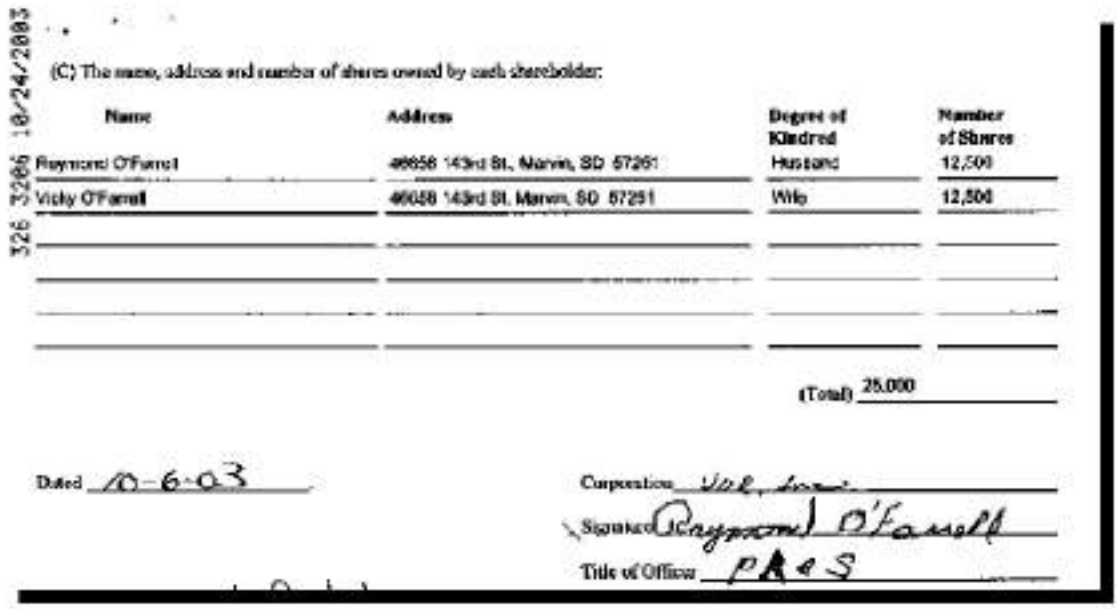
[17] And although the issue of *Victoria's* ownership of VOR stock was beyond the necessary scope of the removal hearing, we also point out that Raymond's argument that Victoria never owned VOR stock is refuted by Raymond's own corporate filings for VOR in 2003, showing that he and Victoria each held 12,500 shares:



326 3286 10/24/2003

(C) The name, address and number of shares owned by each shareholder:

Name	Address	Degree of Kindred	Number of Shares
Raymond O'Farrell	46656 143rd St, Marvin, SD 57251	Husband	12,500
Vicky O'Farrell	46656 143rd St, Marvin, SD 57251	Wife	12,500

(Total) 25,000

Dated 10-6-03

Corporation VOR, Inc.

Signature Raymond O'Farrell

Title of Office PRES

See, "Qualification for Family Farm Corporation and Authorized Farm Corporation;" VOR, Inc., filed at sdsos.gov on 10/24/2003. Incidentally, Exhibit A to that same filing is a copy of the 1/13/2003 Quit Claim Deed conveying the (now-disputed) farm land from the prior O'Farrell family corporation into VOR, Inc.

Nor did Raymond attempt to explain or dispute any of his collateral statements in the other appeals and lawsuits. Nor does Raymond argue with the premise that such statements are binding on him as judicial admissions. *See In re Estate of Tallman,* 1997 S.D. 49, ¶¶ 12-13.

Raymond is judicially estopped from adopting conflicting positions in parallel lawsuits. *Wilcox v. Vermeulen*, 2010 S.D. 29, ¶ 10.

It was clearly erroneous to find that the Trust never owned VOR's stock. And it was also clearly erroneous to find that this ownership issue removed all other conflicts of interest inherent in Raymond's role as a fiduciary for Victoria's Estate.

5. Raymond invents a new premise in trust law: "dual ownership" whereby a Trust 'holds' assets without 'owning' the assets.

On appeal, Raymond now appears to recognize the futility of his K-1 theory (a theory which not even his own accountant could corroborate).

He pivots into a new theory on appeal, now claiming that "Raymond was always the 100% owner of the shares, even after the Trust held them." *See, Raymond's Brief,* p. 30. Raymond argues that the Trust created "dual ownership—by the Trust and Raymond." *See, Raymond's Brief,* p. 29. Raymond says that any arguments to the contrary are "based on the

incorrect premise that Raymond could not own the shares when they were held in the Trust." *See, Raymond's Brief,* p. 30.

Raymond offers no legal authority for his new proposition. And there isn't any. Once property is submitted to a trustee, the trustee owns the entirety of that asset. There are no "dual" ownership arrangements with a Trust. *See, Schroeder v. Herbert C. Coe Tr.,* 437 N.W.2d 178, 183 (S.D. 1989) (quoting RESTATEMENT (SECOND) OF TRUSTS § 102(4), and Comment f (1959)) ("A trustee cannot accept a trust in part and disclaim in part....If the trustee accepts the trust as to a part of the trust property, this is an acceptance of the trust of the whole trust property.")

6. Raymond misunderstands the notion of an Estate with "no" assets, versus an Estate whose assets "pour over" into a Trust

Embedded within Raymond's appellate posture is his assertion that Victoria's pour-over Will is meaningless. Raymond states it like this: "the Will *merely* creates a pour over into the Trust, so the Estate of Victoria would *be without any assets, if she had any.*" *Raymond's Brief,* p. 32 (emphasis added).

Raymond misunderstands a pour-over Will. If an Estate has assets, then it is the duty of the Estate's fiduciary to distribute those assets to the

proper heirs. When an Estate is governed by a pour-over Will, then its heir is the pour-over Trust, and those assets are distributed to the pour-over Trust. The existence of the pour-over structure does not *extinguish* the assets; it directs them into a Trust.

Raymond's statement is erroneous. At best, it is further evidence that he should be removed.

7. Paul did not waive his notice and hearing arguments as to Raymond's appointment.

Both Raymond and the Circuit Court conflate (or misapply) the concept of waiver with regard to Raymond's appointment proceeding.

Raymond's appointment proceeding commenced with his Petition on 7/18/2022[18] and concluded with the Circuit Court's order on 7/18/2022.[19] Raymond *should* have then issued notice of entry of that Order, which would then commence the 30-day period to appeal the final order appointing Raymond. But Raymond did *not* issue such notice, and, the appeal limitation period never formally commenced.

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[18] [R.1-3].

[19] [R.5-6].

Over two months later, Paul discovered Raymond's secretive appointment and filed a petition to remove him. The matter was set for hearing, but the Circuit Court considered other matters first at the hearing, and then ran out of time, and the removal petition was not pursued further at that time.

During the first appeal, this Court concluded that the *removal and replacement* questions should be resolved prior to appealing the appointment of Raymond, insofar as the "pending motions to remove and replace the special administrator…are 'pleadings related to the same subject matter' and consequently belong to the same proceeding." [R.83; "Order Dismissing Appeal"].

The concept of waiver does not apply to these facts, for one of two reasons.

First, in our view, Raymond's appointment was a discrete proceeding that started nearly as soon as it had terminated.[20] Thus, no party had a

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[20] Under well-settled precedent, "orders determining individual petitions for relief in probate actions can constitute final orders when they dispose of all issues relative to a particular petition and leave nothing for decision." *Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 16. The Order appointing Raymond "disposed of all issues relative to" his Petition and left "nothing for decision." The appointment process is a discrete proceeding unto itself. And, as we explained in our opening brief (to which Raymond elected not to respond), the issue is not

chance to assert issues about notice or the need for a hearing *during* the appointment proceedings because Raymond orchestrated and pursued them in secret. *Nobody* had notice of the proceeding, and so nobody had any ability to object to any of the procedural or substantive defects during that proceeding, which concluded with the issuance of an Order.

We acknowledge this Court appears to reject that theory, and instead has indicated that the appointment proceeding was part-and-parcel of the later-filed removal proceedings.

If so, then the *second* argument against waiver is that the time for bringing the procedural and substantive defects about the appointment *was at the first hearing conducted upon those matters*. The first hearing to substantively address these issues was held on May 1, 2025.

In other words, under the *first* formulation above, we agree that Paul didn't raise the notice and hearing issue prior to the appeal because the "proceeding" at which Paul could have raised any objections had long-since concluded, in July 2022.

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one of *jurisdiction*, but of *economy*. The *Petrik* case and its forebears do not identify a black-and-white rule, and instead invite a balancing of judicial economy: "it would *generally* be appropriate to consider both petitions as belonging to the same proceeding." ¶ 17 (emphasis added).

Or, under the *second* formulation, the removal proceedings and the appointment objections needed to be addressed all at the same time, and, the Record demonstrates that this did not occur until the May 1, 2025, hearing at which time all of the issues were addressed *for the first time.*

Both of those formulations are distinct from the situation in *Matter of Estate of Jones*, 2022 S.D. 9. In that case, all of the interested parties were participating at all stages of the pertinent "proceeding," namely, the one commenced by the filing of a petition for appointment of special administrator. An earlier hearing had been scheduled and then canceled due to illness. Meanwhile, the petitioners engaged in discovery for their petition, which resulted in a motion to compel which was then noticed for hearing. At this hearing (and while the Petition for special administrator was still pending), the circuit court addressed the substance of the Petition. Doug and Jessica's lawyer appeared at the hearing and "addressed the merits of the Petition at the…hearing without any mention that a hearing had not been noticed" on the petition itself. *Id.* at ¶ 18. This participation was deemed a waiver.

In contrast to *Jones*, the appointment "proceeding" in this case was over and done with in July 2022. Paul and his counsel were not present to

raise any objections, in part because no notice was given, and in part because there was no hearing at which to raise such defects.

Furthermore, there it is undisputed that *none* of these issues were addressed or resolved at the October 2022 hearing, either. (That is why this Court dismissed the first appeal.)

But the Circuit Court made an erroneous finding to the contrary, namely, that "on October 18[, 2022,] Paul and his attorney *participated in a hearing that lasted over three hours and never raised the issue of notice*" in regard to the petition to remove Raymond. [R.387; HT, 12:12-14].

This 'three hour' finding is inaccurate. When Paul filed a petition for removal, he noticed the petition for hearing. But on the slated hearing date, no hearing was conducted upon that petition, because of time constraints.[21] The "three-hour hearing" was devoted entirely to the merits of the pending

[21] Judge Spears said that he would take up the civil file first "simply because that file appears on my calendar first…and that's the one I have on the screen." [Appeal # 30508; A.R. 572; HT 6:13-16]. The removal petition was not addressed upon its merits because the civil matter took the entirety of the time allotted, and Judge Spears advised he would "hear the removal" at a later date. [Appeal #30508; A.R. 718; HT 152:8-9].

motions in the civil file. There was no hearing on the probate matters at that time. [22]

The first and only hearing did not occur until May 1, 2025, which was the first time at which the Circuit Court "addressed the merits of the Petition [for Removal]," and, at which time Paul's Estate also raised the issue of defects related to appointment.[23] This is not a waiver.

The rest of Raymond's (and the Circuit Court's) analysis of waiver suggests that the content of *petitions and objections* filed prior to the hearing are dispositive of waiver. But neither the *Estate of Jones* case nor any other case on the issue of waiver has confined the matter to the *initial pleadings.*

Furthermore, any analysis of waiver needs to examine Raymond's own conduct. In the Order appointing him, his term was limited to the time necessary to locate a Will. As Raymond would reveal *two-and-a-half years later,* he had already conducted the entirety of this search for a Will by

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[22] The Circuit Court's finding regarding a "three-hour hearing" is curious, because the transcript of that hearing is not found in the probate Record. The only way for the Circuit Court to make that finding would have been to take judicial notice of Victoria's lawsuit file. Since that judicial notice appears to have occurred, then Raymond's protests about the failure to introduce Victoria's Complaint as an exhibit are moot.

[23] On the face of the appointment filings, including the Order, it was not immediately clear whether or not the Circuit Court had actually conducted a hearing. It was through the appeal process that it became certain that no such hearing took place.

August 2022. Yet Raymond failed to inform the Court of this, and continued to occupy the office for years longer than he should have, and all the while *concealing* the existence of a certified copy of Victoria's Will.

In short, the Circuit Court's application of waiver is based upon an erroneous factual finding. This is not analogous to *Estate of Jones*. Paul raised the issue of Raymond's defective appointment twice: the first time via a still-timely appeal[24] from what appeared to be a final order; and the second time at a hearing which addressed the merits of these issues *for the first time*. It is an unusual case, for sure, but it is not an example of waiver.

8. Raymond failed to raise any 'timeliness' issues at the Circuit Court level regarding Conner's objection and proposed findings.

On pages 12 and 30, Raymond argues that the Appellants were "untimely" in submitting their objection and proposed findings to the

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[24] "A notice of entry of judgment gives to a party the power to set running the time after which his adversary may not appeal and assures each party that the statutory period of time within which he may appeal does not commence to run until his adversary has given such notice." *Havlik v. Havlik*, 2014 S.D. 84, ¶ 10 (quotations omitted). At the time, Paul's attempted appeal appeared to be a valid, still-timely mechanism by which to challenge the appointment defects, and it did not reflect an intentional relinquishment of Paul's right to challenge those defects. Indeed, the first appeal was refused as *premature*, not because of its substance.

Circuit Court. Raymond claims (without authority) that this creates a judicial estoppel.

But Raymond failed to object to the timeliness of those submissions at the Circuit Court level. Moreover, the Circuit Court did not reject these filings as untimely. Thus, these filings were a valid attempt to give the Circuit Court "an opportunity to correct any claimed error." *Matter of Est. of Tank*, 2023 S.D. 59, ¶ 31. These filings attempted to show the Court the same thing that had been argued at the hearing: that Raymond's conflict and unfitness were "facially apparent from the Record."

9. The removal of Raymond is not moot

Raymond's last argument is 'mootness.' He frames this issue very narrowly, arguing that all of the complaints about Raymond "stem from Victoria's dismissed lawsuit." *See, Raymond's Brief,* p. 34.

But as shown above in Sections 2 and 3, the issues of Raymond's ability to continue serving as a fiduciary are far broader than Victoria's lawsuit. Furthermore, we can't lose sight of the fact that it was Raymond who directed the dismissal of that lawsuit. And, the dismissal was *without* prejudice. Whether Victoria's Estate should re-assert the lawsuit is a decision to be made by a competent fiduciary, who cannot be Raymond.

Raymond describes the mootness doctrine as one "which seeks to determine an abstract question which does not rest on existing facts or rights." *Netter v. Netter,* 2019 S.D. 60, ¶ 9. But Raymond's ongoing role as the fiduciary of Victoria's Estate is actively preventing the Estate from considering whether to pursue her claims. Nothing about this is abstract.

Raymond continues to carry out the mischief that he sought from the outset: to wield the power of Victoria's Estate in a manner most favorable to him. The time has come for this to stop.

CONCLUSION

In this case, the lawyers representing Raymond used a defective proceeding to secure his appointment as Special Administrator, a position that he was incapable of holding. Thereafter, Raymond has carried out his office under an inherent, intractable conflict.

When his appointment and fitness were challenged, Raymond turned the hearing into a narrow, misguided referendum on his K-1 filings, which the Circuit Court mistakenly took as evidence disproving his conflict-of-interest. The Circuit Court then compounded the error by making findings far beyond the scope of the proceedings, concluding that Victoria died intestate, with no assets, and, as the Trustor of a Trust that never was.

All of this was error. Raymond should be removed, *ab initio;* the entirety of the Order should be vacated; and the case should be remanded for further proceedings to appoint Lance as Personal Representative.

Dated this 9th day of October, 2025.

HOVLAND, RASMUS,
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing approximately 4,993 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2025, I electronically filed the foregoing via the Odyssey File and Serve system with the Supreme Court Clerk, which will send notice to Appellee's Counsel and counsel for interested parties.

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For those interested parties not represented by counsel, I also hereby certify that on this 9th day of October, 2025, I sent a copy of the foregoing via U.S. Mail to the following:

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I also hereby certify that on this 9th day of October, 2025, I sent a bound copy of the foregoing to the Supreme Court Clerk at the following address:

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/s/ Daniel K. Brendtro
One of the attorneys for Appellants