

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF
THE SIX CATARACTS TRUST.

APPEAL FROM THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE MANDI MOWERY
Judge

KIMBERLY A. DORSETT of
Richardson, Wyly, Wise,
Sauck & Hieb, LLP
Aberdeen, South Dakota

CASEY D. MARSHALL
SHAD E. CHRISTMAN of
Bassford Remele P.A.
Sioux Falls, South Dakota

Attorneys for appellee Donald
Netter as Family Trustee of The
Six Cataracts Trust.

COREY DENEVAN
SHANNON FALON of
Denevan Falon Prof. LLC
Sioux Falls, South Dakota

Attorneys for appellants
Arianna Netter and S.N.

ARGUED
AUGUST 27, 2026
OPINION FILED **09/23/26**

MYREN, Justice

[¶1.] Donald Netter filed a petition requesting the circuit court to modify the definitions of the types of trustees for a trust. Donald's daughter, Arianna, opposed Donald's petition and filed a counterpetition. The circuit court denied Donald's petition and Arianna's counterpetition. Arianna filed a notice of appeal. Donald moved to dismiss Arianna's appeal and then filed a notice of review. We dismissed Arianna's appeal but allowed Donald's cross-appeal to proceed with instructions to the parties to brief whether this Court retains appellate jurisdiction over a notice of review after the principal appeal is dismissed. We now dismiss for lack of jurisdiction.

Factual and Procedural Background

[¶2.] Edward Netter established The Six Cataracts Trust (the Trust) in 1992. The primary purpose of the Trust was to benefit Edward's son, Donald, and Donald's children. The Trust provided for a "disinterested trustee" and a "family trustee." Donald has been the family trustee since the Trust's inception.

[¶3.] After the original disinterested trustee passed away and the successor disinterested trustee resigned, Donald hired South Dakota Trust Company (SDTC) as the disinterested trustee. In 2013, SDTC filed a petition in circuit court requesting an order modifying the Trust to make SDTC a directed trustee that would receive investment and distribution instructions from a specified investment trust advisor. SDTC, as disinterested trustee, and Donald, as family trustee, filed waivers and consents to that 2013 petition. Arianna was a minor when the 2013 petition was filed. Donald asserted that because he had the same interest in the

Trust as his daughters, he qualified as a virtual representative of his daughters in the proceedings, and neither they nor any other party needed to receive notice.*

Because there were no objections, the circuit court concluded that “all notice otherwise required by the applicable law” had been provided, and it entered an order modifying the Trust agreement as requested in the 2013 petition.

[¶4.] In May 2025, Donald filed a petition in the circuit court requesting various modifications to the Trust agreement regarding the definitions of the disinterested trustee and family trustee. Arianna, who had reached the age of majority when Donald filed his 2025 petition, was served a copy of his petition. In response, she filed an objection and a counterpetition asserting that she did not know the Trust had been modified in 2013 until she received Donald’s 2025 petition. She challenged the validity of the 2013 order, claiming the order was obtained by fraud and should be vacated “pursuant to SDCL 15-6-60(b)” because neither she nor her mother had received notice of the 2013 proceedings. Arianna also asserted that Donald and SDTC misrepresented to the circuit court that the 2013 modifications would not violate a material purpose of the Trust.

[¶5.] Donald opposed Arianna’s counterpetition, arguing that Arianna’s request to have the 2013 order vacated was barred by res judicata because the circuit court had concluded in its 2013 order “that Notice has been served on the required parties appropriately through the provisions of South Dakota ‘Virtual

* Donald’s assertion was premised on the application of South Dakota’s virtual representation statute in effect in 2013 (SDCL 55-3-35). This version of that statute was repealed in 2017.

Representation Statutes.” He also argued that Arianna’s claims were barred by the one-year limitation in SDCL 15-6-60(b) for claims based on fraud.

[¶6.] Following a hearing, the circuit court denied Donald’s petition and Arianna’s counterpetition. Notice of entry of the circuit court’s order denying both petitions was given on July 28, 2025. On August 15, 2025, Arianna filed a timely notice of appeal, but failed to serve all necessary parties. After the time to perfect an appeal had expired, Donald filed a motion to dismiss Arianna’s appeal, noting her procedural failure. Two days later, Donald filed a notice of review. Arianna subsequently filed a motion to dismiss her appeal. We dismissed Arianna’s appeal but directed that Donald’s cross-appeal could proceed with instructions to the parties “to brief the question of whether this Court has jurisdiction to consider Appellees’ notice of review after the dismissal of Appellant’s appeal.”

Decision

[¶7.] “Appellate jurisdiction can never be presumed but must affirmatively appear from the record.” *Wetch v. Midcontinent Media, Inc.*, 2026 S.D. 34, ¶ 18, 36 N.W.3d 603, 607 (quoting *Dudley v. Huizenga*, 2003 S.D. 84, ¶ 19, 667 N.W.2d 644, 650). The Legislature determines this Court’s appellate jurisdiction; thus, “[t]he right to appeal is statutory and . . . does not exist in the absence of a statute permitting it.” *Berwald v. Stan’s, Inc.*, 2025 S.D. 33, ¶ 25, 24 N.W.3d 420, 429 (quoting *Wegner v. Siemers*, 2018 S.D. 76, ¶ 4, 920 N.W.2d 54, 55); *see also* S.D. Const. art. V, § 5 (“The Supreme Court shall have such appellate jurisdiction as may be provided by the Legislature[.]”).

[¶8.] SDCL 15-26A-3 is the principal source of this Court’s appellate jurisdiction. SDCL 15-26A-4 is a court rule that specifies how to invoke this Court’s jurisdiction under a direct right of appeal. SDCL 15-26A-6 provides that an appeal from an order or judgment identified in SDCL 15-26A-3 “must be taken within thirty days after the judgment or order shall be signed, attested, filed and written notice of entry thereof shall have been given to the adverse party.” These sections do not preclude multiple parties from filing notices of appeal in the same proceeding. However, “timely filing and service of a notice of appeal is a jurisdictional prerequisite to perfecting an appeal.” *Stock v. Garrett*, 2025 S.D. 8, ¶ 23, 17 N.W.3d 848, 856 (citation omitted). *See also* SDCL 15-26A-4 (“Failure of an appellant to take any step other than timely service and filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal.”)

[¶9.] SDCL 15-26A-22 is a court rule that provides a method by which “[a]n appellee *may* obtain review of a judgment or order in the same action which may adversely affect him[.]” (Emphasis added.) To be timely, a notice of review must be filed “within twenty days after the service of the notice of appeal.” *Id.*

Consequently, a notice of review may be filed after the time to file a notice of appeal under SDCL 15-26A-6 has expired. But a notice of review is not a stand-alone vehicle to invoke our appellate jurisdiction and is thus dependent upon a properly perfected notice of appeal. Further, SDCL 15-26A-22 does not supplant the ability of any party to file and serve a timely notice of appeal from any judgment or order from which an appeal may be taken under SDCL 15-26A-3.

[¶10.] Arianna filed a timely notice of appeal. However, she did not accomplish the service required by SDCL 15-26A-4. Simply put, an appellant must satisfy the filing and service requirements to invoke the Court's jurisdiction. *Stock*, 2025 S.D. 8, ¶ 23, 17 N.W.3d at 856. Donald recognized this failure and filed a motion to dismiss Arianna's appeal. Arianna also recognized that this Court had not acquired jurisdiction of the appeal and filed her own motion to dismiss. There is no indication that her motion was anything other than a genuine response to the service failure identified in Donald's motion to dismiss, rather than an effort at gamesmanship.

[¶11.] Donald never filed his own notice of appeal. Instead, he filed a notice of review two days after filing his motion to dismiss Arianna's appeal. That notice of review was ineffective because it was based on a notice of appeal that was not perfected. Even if we were to liberally construe the notice of review as a notice of appeal, it could not invoke our appellate jurisdiction because it was filed after the time to file a notice of appeal had expired under SDCL 15-26A-6. We dismiss because our appellate jurisdiction has not been validly invoked.

[¶12.] JENSEN, Chief Justice, and SALTER, DEVANEY, and GUSINSKY, Justices, concur.