
IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTATE OF
DORA LEE GAASKJOLEN, DECEASED.

Appeal No. 28884

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
PERKINS COUNTY, SOUTH DAKOTA

THE HONORABLE WARREN JOHNSON
CIRCUIT COURT JUDGE, RETIRED

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JURISDICTIONAL STATEMENT

This is an appeal by Audrey from the Trial Court’s Judgment, Findings of Fact and Conclusions of Law, the Honorable Warren Johnson, presiding. The Trial Court’s findings of fact, conclusions of law and final judgment was filed on January 3, 2019. Notice of Entry of Judgment was filed on January 3, 2019. SR 3165. Audrey filed her

Notice of Appeal on January 30, 2019. This court has jurisdiction over the action pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

- I. WAS THE TRIAL COURT’S DETERMINATION THAT DORA LEE’S DECEMBER 18, 2012 LAST WILL AND TESTAMENT THE PRODUCT OF AUDREY’S UNDUE INFLUENCE CLEARLY ERRONEOUS?

The trial court found that the will was the result of undue influence practiced upon Dora Lee by her daughter, Audrey.

Estate of Pringle, 751 N.W.2d 277, 2008 S.D. 38

In re Whitman’s Will, 45 S.D. 14, 184 N.W. 975 (1921)

Davies v. Toms, 75 S.D. 273, 280 (S.D. 1954)

- II. WAS THE TRIAL COURT’S DETERMINATION THAT DORA LEE’S OCTOBER 24, 2014 CODICIL THE PRODUCT OF AUDREY’S UNDUE INFLUENCE CLEARLY ERRONEOUS?

The trial court found that the codicil was the result of undue influence practiced upon Dora Lee by her daughter, Audrey.

Estate of Elliott, 537 N.W.2d 660 (S.D. 1995)

Davies v. Toms, 75 S.D. 273, 280 (S.D. 1954)

Black v. Gardner, 320 N.W.2d 153 (S.D. 1982)

PRELIMINARY STATEMENT

Citations to the pleadings will be referred to as Settled Record (“SR”) and the number assigned by the Clerk, and where appropriate the paragraph number or page number of the documents will be included. The trial transcript will be referred to as “TT” followed by the appropriate page number. Trial Exhibits will be referenced as “TR Ex” and the appropriate exhibit number and page. Reference to documents in the appendix will be referenced as “App.” and the appropriate page number. Depositions of five witnesses not called during trial were offered and received and were marked as trial exhibits.

Appellant Audrey Lorus will be referred to as “Audrey.” Audrey’s sister and Appellee, Vicki Penfield, will be referred to as “Vicki.” Vicki’s husband, Bill Penfield, will be referred to as “Bill.” Vicki’s son, Shane Penfield, will be referred to as “Shane.” Vicki’s daughter, Kayla Anderson, will be referred to as “Kayla.” The decedent/testator, Dora Lee Gaaskjolen, and mother of Audrey and Vicki, will be referred to as “Dora Lee.”

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests the privilege of appearing before this Court for oral argument.

STATEMENT OF THE CASE

The Circuit Court determined that Dora Lee, whose ability to communicate was impacted by expressive aphasia, nonetheless had testamentary capacity to make her will leaving her estate to her daughter, Audrey to the exclusion of her other daughter, Vicki. The trial court also determined that Dora Lee had testamentary capacity when, some twenty-two months later on advice of legal counsel, she made a codicil republishing her

will to remove any suggested taint of undue influence which her counsel advised would surely be claimed upon her death. However, the court found that Audrey had a confidential relationship with Dora Lee and that Audrey failed in rebutting the presumption of undue influence because the legal advice Dora Lee received was not independent. This is an appeal from the court's determinations that both testamentary instruments were the product of Audrey's undue influence which the court found destroyed the free will of Dora Lee

STATEMENT OF THE FACTS

Dora Lee had always treated her daughters, Audrey and Vicki, as equally as possible. Dora Lee needed home nursing care following a 2007 head injury which left her with expressive aphasia. Audrey, who was a nurse, was paid to provide 24/7 care, was allowed to live at Dora Lee's home rent free, and was further given the use of the south half of Dora Lee's ranch at no charge. To be fair, in 2008 Dora Lee assigned her leases to the north half of the ranch to Vicki. In 2009, Dora Lee gave Vicki and her husband, Bill Penfield, a below market one year lease on the north half freely allowing them to sublease at a profit which they did.

Dora Lee made sure that her gifts of money, presents or even candy were equally given to each of her grandchildren. Dora Lee was an independent woman and had lived a frugal lifestyle. (TT 666, 546). So it should have come as no surprise when, on August 28, 2012, Dora Lee refused Bill's proposal to allow Vicki's daughter, Kayla, and her husband to rent the north half to the exclusion of her four other grandchildren. (TT 671, 674). The discussion that night with Dora Lee, Audrey, Bill, Kayla and her husband, Drew, became "toxic" and resulted in an argument which was later described as a "blow

up.” (TT 652-656). The meeting ended when Dora Lee terminated Bill and Vicki’s lease and Bill walked out. (TT 664, TR Ex 107).

The “blow up” triggered an immediate response by the Penfields, namely a petition to obtain an *ex parte* conservator and possible guardian over Dora Lee. The conservator was told nothing about the blow up. (TT pp. 543, 978, 992, 999-1000). However, internal bank records revealed that the Penfields wanted to remove Audrey from the home and wanted to remove Dora Lee to a facility. (TR Ex 109, TT 993).

Steven Schaeffer, Dacotah Bank’s trust officer, confirmed that “removing Dora Lee to facility” and “removing Audrey from home with dogs and horses” were communications which came from Penfield’s attorney on August 29, 2012, the day after the blow up. (TT 992-993).

Shane Penfield alleged in his Petition for Appointment of Temporary Conservator dated August 31, 2012, that Dora Lee “is often confused and disoriented and has impaired capacity.” (TR Ex 110). On September 5, 2012, Judge Macy granted the petition after an *ex parte* hearing and appointed Dacotah Bank as temporary conservator for Dora Lee. (TR Ex 113). The petition, order and notice of entry of the order were mailed to Dora Lee.

Audrey, who was providing nearly 24/7 care for her mother, read the court papers and was outraged. Audrey contacted Rapid City attorney, John Nooney, explaining that her mother had received conservatorship papers and that her mother, Dora Lee, wanted to hire an attorney. (TT 1007). Nooney wrote a letter to Audrey on September 13, 2012 via email and explained that they needed to sort out who he would be representing as Dora Lee’s interests were not the same as Audrey’s. (TR Ex 35). Nooney’s letter explained

that if he was to represent Dora Lee, “I need to sit down and have a face-to-face meeting with her as it concerns these matters.” (TR Ex 35).

Dora Lee retained Nooney on October 13, 2012. (TT 1009; TR Ex 36; TR Ex 72). On October 25, 2012, Nooney and his associate, Marli Schippers, traveled to Meadow and met with Dora Lee in a three-hour client conference. (TR Ex 34, SDT 004374; TT 1020). Nooney testified that in that meeting, he was able to appreciate what he described as the “profound nature of Dora’s limitations to ambulate.” (TT 1010). “Her limitation of speech was profound.” Nooney explained he went to meet privately with Dora Lee because “I had to see what Dora Lee wanted done.” (TT 1020). Nooney was adamant that Audrey was not his client; his client was Dora Lee. (TT 1020).

Nooney’s testified Dora Lee wasn’t happy with the conservatorship. (TT 1020). What had happened “obviously was something that was unsettling to her.” (TT 1015). Nooney testified that Dora Lee was frustrated and disappointed and that it appeared that she felt her trust had been violated. (TT 1021).

On October 26, 2012, Nooney wrote to Dora Lee confirming that it was her desire and preference to have Audrey as her conservator, to the extent one was necessary. (TR Ex 141). Nooney told his client that the meeting “... allowed me to obtain the necessary level of comfort that you clearly are well informed as to time, place, property and persons, all of which are important.” (TR Ex 141; TT 1018-1019). In closing, he promised: “[w]e will take every necessary and appropriate step to make certain that you are properly represented” (TR Ex 141). Also on October 26, 2012, Shane moved for Dacotah Bank to be Dora Lee’s permanent conservator and had the sheriff serve Dora Lee.

After the temporary conservatorship was ordered, Vicki stopped coming out to see Dora Lee. Vicki was never told by Audrey or Dora Lee not to come, but having been spurned by Audrey and an email that she was “dead” to her sister, the contact with her mother diminished, but Vicki continued to call Dora Lee and visit.

Initially, a \$400 allowance for Dora Lee was set by the conservator, but no money was actually funded to Dora Lee’s use by the conservator until October 31, 2012. (TT 562). During that period of time, money became tight for Dora Lee. Letters were written by Mr. Nooney including one on November 8, 2012, noting that the conservator had not paid a number of continuing obligations including housekeepers and the tab at the grocery store which was necessary because no money was funded until the end of October. (TR Ex 127; TT 557).

On November 27, 2012, pursuant to the court’s directive, an evaluation and assessment was performed by Lori Casteel, RN, CSA, CCP, CCM. Casteel generated a report (TR Ex 6) which recommended that if certain matters were addressed, Dora Lee could remain at home. The alternative was a nursing home. Dora Lee told Casteel she did not want to be removed to a facility. (TR Ex 6, p. DB 988).

Yet another letter was written by Mr. Nooney on November 30, 2012 to the conservator’s legal counsel. Therein, Nooney reiterated the request made at the meeting of November 20th that the \$400 allowance was insufficient for Dora Lee’s needs. (TR Ex 128). The housekeepers still had not been paid in full. It was not until December of 2012 when, after significant pressure from Dora Lee’s lawyer, that the allowance was increased to \$1,080/month. (TT 493).

On December 4, 2012, Audrey called Kaye DeYoung, trust officer at Dacotah Bank, and advised that Dora Lee wanted to rewrite her will. (TT 309, 514; TR Ex. 87). Later that evening, Audrey called James Elsing, an attorney in Lemmon, South Dakota and stated her mom wanted a will leaving everything to Audrey to the exclusion of her sister, Vicki, and provided Elsing with information. (TT 692, 695). Audrey testified Dora Lee had told her she wanted to change her will and the reasons she wanted to disinherit Vicki. (TT 309-311). The fact that Audrey had called, provided the information, and said her mother wanted to leave everything to her was a “red flag” to Elsing. (TT 696).

On December 6, 2012, Elsing traveled to Dora Lee’s home and asked Audrey to leave and he privately discussed options other than a will with Dora Lee. Elsing then discussed the will he had drafted and its contents, the nature of gifts and dispositions of property, personal representatives, waiver of bond and related matters. (TT 700-705). Sitting at her dining room table side by side, Elsing read the will with Dora Lee as she followed along. (TT 707). Elsing asked Dora Lee what she wanted to do with her property and she said “I want it to go to Audrey.” (TT 705, 707). Elsing confirmed that Audrey was not pressuring Dora Lee. (TT 705-706). Dora Lee was not afraid that if she did not give Audrey her estate that she would not take care of her. (TT 705-706). Then he read the will to Dora Lee and asked her if this was what she wanted. Elsing testified “And there wasn’t any doubt in her mind. That’s what she wanted.” (TT 706).

Elsing said it was obvious to him that Dora Lee suffered from expressive aphasia. (TT 708). Elsing explained that in the last ten years of her life, his mother, had an “almost identical” issue of understanding what was happening, but struggled getting the words to come out. (TT 709). Elsing testified that in his judgment, Dora Lee was

processing what was happening. (TT 710). Elsing specifically asked if Audrey had twisted her arm to have her make her will, and her answers gave Elsing no doubt that she was acting freely and voluntarily. (TT 713-714). Elsing testified that he had made a will for his client who was of sound mind and free of undue influence. (TT 717).

Marli Schippers learned from Audrey that Dora Lee had changed her will and that Elsing had done the work. (TT 366-367). Schippers understood from the conversation that Audrey had told Elsing what to put in the document. Not being familiar with Elsing's competency, Schippers wanted to make sure that Dora Lee's expressions were her own and not Audrey's. (TT 1176). Schippers relayed the information to Nooney who likewise was concerned that given the confidential relationship between Audrey and her mother, the circumstances of Audrey's participation would appear suspicious. (TT 1051-1053). Nooney thought it appropriate to find another attorney to prepare a will. (TT 1052).

Audrey brought Dora Lee to Rapid City on December 11, 2012 for a doctor's visit, and on that trip, Nooney met a second time with Dora Lee. (TT 1050). Nooney visited with Dora Lee about the new will and confirmed that Dora Lee had disinherited Vicki. Dora Lee told Nooney that it was the conservatorship that made her want to change her will. (TT 1054).

That day, Nooney called two lawyers to see if they would prepare a will for Dora Lee one of whom was McClean Thompson Kerver. (TT 1052). McClean and her paralegal went to Mr. Nooney's law firm and met Dora Lee. McClean testified she was there to see if she wanted to take Dora Lee on as a client. (TT 1127). Dora Lee told McClean that Vicki Penfield was her daughter and that she wanted to disinherit her

because of her husband Bill's actions. (TR Ex 5, LJ-5; TT 1123). McClean prepared a draft of a will, but ended up not taking Dora Lee on as a client after meeting with her partners who were concerned that she would be drawn into a will contest. (TT 1127). McClean never made any determination regarding Dora Lee's capacity or undue influence. (TT 1127).

On December 14, 2012, after McClean called Audrey and advised her that she would not be able to prepare Dora Lee's will, Audrey called Elsing. (TT 1128). Audrey told Elsing that Schippers had recommended that he have more contact with Dora Lee. (TT 719). That day, Elsing prepared a list of twenty-six questions for Dora Lee. (TR Ex 1, pp. 24-25; TT 721).

After he prepared the questions, he drove down to visit Dora Lee and spent two hours with Dora Lee in private, having asked Audrey to excuse herself. (TT 724). Elsing's questions covered her family, her background, her property and what Dora Lee wanted to do with it when she died. (TT 727-735). Audrey did not have input into the questions. (TT 374). The questions were not sent in advance to Audrey or Dora Lee. (TT 722-723).

Dora Lee told Elsing during their December 14, 2012 meeting that she wanted everything to go to Audrey. (TT 732). Elsing testified that on his visit of December 6, 2012, Dora Lee had told Elsing three things that convinced her to dispose of her estate to Audrey. (TT 732). The first reason was that Vicki seldom came to visit her. (TT 732). The second reason was a dispute over the lease arrangement with Vicki's half to Kayla and Dora Lee did not want that arrangement. (TT 732-733). The third reason was when the conservatorship was filed it really hurt Dora Lee's feelings. (TT 733). Elsing

explained: “it was taking away her freedom, taking away her ability to really deal with her own affairs,...the filing of this guardianship was what – the straw that broke the camel’s back, so to speak. That made her – convinced her that she wanted everything to go to Audrey.” (TT 733).

Elsing’s questions in the meeting of December 14, 2012 confirmed that Dora Lee wanted everything to go to Audrey and not Vicki. (TT 734, TR Ex 1, pp. 24-25).

Question #24 asked: “When did you decide you wanted a new will?” Elsing recorded Dora Lee’s response: “When Vicki and Bill here last Summer to get Kayla on half land--said no.” Question #25 asked: When did you decide who you wanted to have your property when you are gone? Elsing wrote “late summer.” (TT 735) Asked if she had changed her mind about any of these things since then, Dora Lee answered: “No.” (TT 735; TR Ex 1, p. 25).

On December 18, 2012, Elsing traveled to Dora Lee’s home. (TT 751). Elsing had generated seventeen questions for her to underline to demonstrate that “she knew the nature and extent of her estate and who she wanted the estate to go to and that she was doing this because she wanted it done, not because she was maybe being coerced by Audrey.” (TT 738-739, 753). Dora Lee was able to accurately underline from a list of nine names the two persons (Vicki Penfield and Audrey Lorus) who would naturally inherit from her estate if she did not have a will assuming they survived her. (TR Ex 1, p. 27, Question #3). When asked to circle the name of the person or persons listed to whom she wanted to leave her property upon her death, from the same nine names listed below question #3, she circled only Audrey Lorus. When asked in question #12 “About when did you decide who should receive your property upon your decease? Write month and

year.” Dora Lee wrote “September 2012.” (TR Ex 1, p. 28). Dora Lee’s answers confirmed that no one had told her what she should do with her estate upon her death, that no one had ever told her who she should give her property to upon her death, and that she had been completely free to decide on her own whether she wanted a will. (TT 764).

Elsing testified that “to demonstrate freedom from coercion from Audrey Lorus,” he posed question #17 which asked: “Have you been completely free to decide on your own who shall get your property upon your decease?” To this Dora Lee underlined “Yes.” (TT 764-765). Elsing confirmed that none of the questions came from Audrey Lorus, they were his work product and Dora Lee did not see them before he met with her on December 18. (TT 768). After Dora Lee answered the questions, Elsing’s testimony turned to the will and its execution. The December 18, 2012 will was identical to that of December 6, 2012. (TT 737).

Elsing read the December 18, 2012 will to Dora Lee and it was executed before the housekeepers. Audrey was not present. Renita Van Vactor, a housekeeper, recalled signing the will as a witness and remembered seeing Dora Lee signing the will. (TR Ex 164, p. 28). Van Vactor testified: “I know Dora knew what was going on....” (TR Ex 164, pp. 7, 37).

Marlene Holtgard had cleaned for Dora Lee since 2008. Holtgard witnessed the will and recalled Elsing asking Dora Lee “is anybody forcing you to change your will and do this will, and she said no.” (TR Ex 165 pp. 26, 27, 30-31). Holtgard explained that Dora Lee wanted to have a different will “and [Dora Lee] thought it was terrible what they were doing. She’d say ‘terrible, terrible.’” (TR Ex.165, p. 44).

Dora Lee told Holtgard she did not like the fact that Vicki, Shane and Bill had brought the conservatorship because control of her money had been taken from her. (Ex 165, pp. 16, 23). Holtgard testified that their bringing the conservatorship hurt Dora Lee's feelings. (Exhibit 165, p. 19). Holtgard confirmed that there were delays in getting paid after the conservator got appointed. (Exhibit 165, p. 17). Holtgard's deposition recounted Dora Lee's frustration in the way her money was handled and that she told Holtgard: "she couldn't pay a bill without them—asking them. She couldn't do anything." (Exhibit 165, p. 19-20). "She didn't have any power over her money." (Exhibit 165, p. 20). Holtgard also confirmed that Dora Lee told her she was upset that Vicki did not come to visit. (TR Ex 165, p. 21).

To be "thorough and assuring that Dora Lee's intentions were as stated in the will" Elsing made a third set of questions and returned to Dora Lee's home on January 7, 2013. (TT 772; TR Ex 1, pp. 29-31). Dora Lee did not want to change her will that gave her estate to Audrey. (TR Ex 1, p. 31, Question H). Dora Lee said she was not pressured, encouraged or coerced by Audrey into giving her estate to her by the will. (TR Ex 1, p. 31, Question J). Dora Lee was asked if she was afraid that if she didn't make a will giving Audrey her estate that Audrey would not take care of her, to which Dora Lee answered "No." (TR Ex 1, p. 31, Question K). Dora Lee was asked if she wanted to change her will and give some of her estate to Vicki. She underlined "No." (TR Ex 1, p. 3, Question L.)

The total time Elsing spent with Dora Lee privately totaled 8.3 hours. (TT 777). Elsing opined that Dora Lee had made her will without undue influence. (TT 770). Elsing testified that Dora Lee was his client; Audrey was not. (TT 717).

One of the caregivers approved by the Conservator was Sara Weishaar who went to Dora Lee's home sixteen times from March through December of 2013 and spent 128 hours with Dora Lee. (TR Ex 169, pp. 39-40). Weishaar observed Vicki's interaction with Dora Lee and saw that Vicki would not wait for her mother to answer a question. Weishaar said: "...it caused stress because Dora Lee was trying to visit with her. She just wouldn't give her enough time to give an answer." (TR Ex 169, 17).

Vicki was not prevented from calling or visiting Dora Lee. However, "...if Vicki called and Dora Lee didn't like where the conversation was going, she would hang up on her. That was all Dora Lee." (TR Ex 169, p. 20). The only time Weishaar observed Dora Lee upset was when Vicki had called. (TR Ex 169, p. 23). From what Weishaar heard, it seemed as though Vicki was nagging her mother. (TR Ex 169, p. 29).

Because Audrey wanted Dora Lee's stress kept to a minimum, the caregivers were instructed by Audrey to monitor the situation and ask Vicki to leave if Dora Lee became stressed. (TR Ex 169, p. 18). To the suggestion that Audrey prevented Vicki from contacting Dora Lee, Weishaar testified: "They were always welcome to come out and call as long as they didn't upset Dora Lee." (TR Ex 169, p. 32). Weishaar testified: "She was sad that she couldn't have a better relationship with Vicki, but it wasn't because she was isolated, it was because Vicki – Vicki didn't act the way her mom wanted her to act, so her mom was like, I've had enough, I'm done, you know." (TR Ex 169, p. 29).

Weishaar described Audrey's caregiving as encouraging and always a loving relationship. "Dora Lee wanted to stay out of the nursing home, so Audrey did everything possible to make that wish happen." (TR Exhibit 169, pp. 22-23). Dora Lee told Weishaar she did not want to go to a nursing home, she wanted to stay at the ranch.

Even after the Supreme Court affirmed the conservatorship, litigation within the conservatorship continued. Vicki had intervened in the conservatorship action as an interested party. Vicki suspected that Dora Lee had changed her will. (TT 644). Vicki propounded discovery upon Dora Lee asking that she produce her will. (TT 1023-1024). Nooney wrote to Dora Lee on May 30, 2013 and said: “As we have previously discussed, I anticipate that upon your death that Vicki will initiate an action contesting the validity of your Last Will and Testament if in fact she has been disinherited. One way to address that prior to your death is to bring the question of your testamentary capacity and the questions of “undue influence” before the Court while you are able to testify about the same.” (TR Ex 55). In the letter, Nooney strongly suggested to Dora Lee that steps be taken to bring the matters before the court and tell the court “of your desires and the reasons behind those desires...while you are still alive and in good health.” (TR Ex 55; TT 1035).

In November of 2013, Steven Schaeffer of Dacotah Bank met with Dora Lee in her home to discuss her estate plan and the change she made to her will. (TT 968-69, 972). Dora Lee confirmed for the trust officer that she had given her estate to Audrey to the exclusion of Vicki. (TT 969). Schaeffer asked Dora Lee if the reason she was disinheriting Vicki had anything to do with the conservatorship and she said, “Yes.” (TT 974).

In its Second Annual Report and Accounting to the court dated October 6, 2014, the conservator reported that Dora Lee’s “present testamentary intent was consistent with the existing plan.” (TR Ex. 27, p. 5, Paragraph 20; TT 965). Both trust officers (De Young and Schaeffer) affirmed that they had no opinion with regard to issues related to

undue influence.” (TR Ex 27, p. 5 Paragraph 20). At trial, Schaeffer indicated that while Audrey may have influenced Dora Lee: “I couldn’t say that she destroyed her free will.” (TT 991).

On May 8, 2014, Nooney and Marli Schippers conferred regarding Dora Lee’s estate plan. (TT 1036-1037, 1151). Nooney shared with Schippers his idea that Dora Lee should make a codicil to her will. (TT 1040). The genesis of Nooney’s idea came after reading Estate of Elliott, 537 N.W.2d 660 (S.D. 1995) and its holding with respect to the doctrine of reaffirmation. (TT 1038-1041, 1044-1045; 1059-1060). “I remember reading the case and a light bulb came off in my head saying this is a good idea for Dora.” (TT 1044).

Nooney appreciated the fact that when Dora Lee testified in February of 2013 in the courtroom, “the moment was overwhelming to her. I mean, she was so intimidated.” (TT 1043). Nooney convinced himself that trying to have Dora Lee declare in open court her desires with respect to her estate plan “wasn’t going to work because of her inability to communicate in the manner that we all expect people to communicate in...”. (TT 1043). Nooney said: “I had to come up with some other idea to assist her, and that’s where the codicil came in. So that’s what—that was my end game, so to speak.” (TT 1043-1044).

Nooney described his approach to solving the problem of assuring his client’s wishes to disinherit Vicki were carried out. Nooney said: “...what we do for a living isn’t —you know, we’re not just checking boxes. We’re actually coming up with ideas and some of them are more complicated than others, I think. And the end game always was how do we make certain Dora’s wishes are followed, and that was the ultimate

objective I was trying to achieve there.” (TT 1039). Given his predictions for future concerns, Nooney testified his recommendation of a codicil republishing the will was competent legal counsel. (TT 1039).

Nooney testified Audrey Lorus had no input into the concept of the codicil and did not suggest it. (TT 1044). Nooney testified: “Audrey Lorus was never my client. Never has been. My client was Dora Lee. Audrey was but a person by which I could get information to Dora Lee is all she was.” (TT 1058).

Nooney wrote to Dora Lee on August 6, 2014, explaining he had some “ideas” he wanted to discuss with her to be “proactive” but intentionally omitted any reference to the concept of the codicil or the reason behind it knowing that Audrey was the conduit for communication and read Dora Lee’s correspondence to her. (TR Ex 56; TT 1039). On August 12, 2014, Marli Schippers drove to see Dora Lee to discuss a codicil and appointing a corporate personal representative. (TT 1042, 1151, 1153).

Schippers spent 1½ hours with Dora Lee. (TT 1156). Schippers confirmed that Audrey had no input into the plan to make a codicil. (TT 1154). Schippers also confirmed that her law firm represented Dora Lee and never represented Audrey Lorus. (TT 1154). Schippers took no directive from Audrey. (TT 1154-1155). Schippers explained that it “was pretty clear at this point that there was going to be litigation, and so really neither of the girls would be qualified to be PR, and so to save that stress, putting in place a corporate PR would be what we recommended.” (TT 1160, 1163).

Dora Lee agreed to a codicil and for Schippers to contact Mr. Elsing, her estate planning attorney. (TT 1162-1163). Schippers contacted Elsing on August 18, 2014 and he agreed to carry the plan forward. (TT 794, 1162).

Mr. Elsing vetted U.S. Bank's trust department and confirmed their expertise as well as the costs associated with acting as a personal representative. (TT 795). Elsing thought the codicil was a good idea. (TT 798-799). On October 16, 2014, Elsing prepared another set of questions for Dora Lee. (TT 799). Elsing called Audrey and made arrangements to come to Dora Lee's home, but did not discuss the particulars with Audrey. (TT 391, 802).

Elsing returned to Dora Lee's home and met privately with Dora Lee for one hour on October 16, 2014 with a set of ten questions he had generated to discuss the codicil. (TR Ex 1, pp. 47-48; TT 803-804, 810). Elsing said Dora Lee understood that her will would be challenged on grounds of capacity and/or undue influence. (TT 801). Elsing discussed the concept of the codicil with Dora Lee. (TT 807). Dora Lee agreed to a codicil as recommended. (TT 807)

After the October 16, 2014 meeting, Elsing spent an additional 2.6 hours researching and preparing another set of questions for Dora Lee. (TT 814). The work product which Elsing titled "Amending Your Will," was a series of thirty-three questions tailored for Dora Lee to underline, circle or mark the answer. (TR Ex 1, p. 57-61). Elsing explained his purpose was "another review again to establish testamentary intent and capacity and freedom from duress." (TT 815). As with the other questions, there was no input from Audrey. (TT 815).

On October 24, 2014, Elsing traveled to Dora Lee's home. That day, he spent an hour with Dora Lee reviewing the thirty- three questions, the will and the codicil. (TT 816). Elsing had arranged for Audrey to have witnesses available if the codicil was to be signed. (TT 818). Audrey was not present. (TT 818). Elsing stood next to Dora Lee who

was seated in her living room as they read the questions together and Dora Lee answered by underlining the answer. (TT 819).

Dora Lee endorsed that she wanted all of her property to go to Audrey and that no one was forcing her to change her will. (TR Ex 1, p. 60, questions #23, #27). Dora Lee underscored her answers that said that Audrey had not told her what she should do with her property after she died. (TR Ex 1, p. 60, question #29). Dora Lee acknowledged that she was giving Audrey Lorus all of her estate and not giving any of her estate to Vicki because that is what she genuinely wanted to do. (TR Ex 1, p. 61, questions #31, #32). Audrey Lorus had not told Dora Lee what she should have in her will. (TR Ex 1, p. 61, question #30). (TT 820-826).

Elsing testified he then read the will of December 18, 2012 to Dora Lee and then discussed the codicil which republished the December 18, 2012 will, read the codicil, and then Dora Lee formally executed the codicil. (TT 827; TR Ex 1, p. 69-70). Elsing opined that Dora Lee was free from undue influence and made the codicil of her own free will acting voluntarily. (TT 828-829). Also, after considering all of the documents together and integrating them, Elsing testified that Dora Lee never changed her mind with respect to disinheriting Vicki. (TT 829). Elsing told the court Dora Lee “was adamant about it.” (TT 830).

Karin Vinkemulder (Fink) was a respite caregiver and witness to the codicil of October 24, 2014. (TR Ex 167, p. 45, 50; TR Ex 1, p. 69-70). Fink recalled the questions Elsing had for Dora Lee. Fink said: “I thought it was pretty cool to watch Dora Lee answer the questions and do what she was supposed to do, and that was it and it was over.” (TR Ex 167, p. 46). Fink testified Dora Lee was not pressured or influenced in

any way by Audrey to do the codicil that she witnessed. (TR Ex 167, p. 55). Fink said Dora Lee knew what she was doing on a daily basis. (TR Ex 167, p. 55). Fink did not believe Dora Lee was “weak and could be manipulated.” (TR Ex 167, p. 55).

Nicole Kluck, a neighbor of Dora Lee’s also witnessed the Codicil. (Kluck, p. 4-7). Kluck said that Elsing would verify with Dora Lee that she understood the question that he was asking. (Kluck, p. 14). Elsing did this for every one of the 33 questions according to Kluck. (Kluck, p. 14). Elsing read the codicil to Dora Lee aloud word for word. (Kluck, p. 9). Kluck believed Dora Lee knew what she was doing when she signed the codicil. (Kluck, p. 12).

Schippers testified that Dora Lee had made known to her the reasons she was disinheriting Vicki. (TT 1152) Schippers said Dora Lee was unhappy with the conservatorship and the manner in which it was put in place. (TT 1152). According to Schippers, these reasons were the “impetus” for Dora Lee’s decision. (TT 1152). Dora Lee was unhappy that she had been put on a budget and that the conservator was slow in paying her bills and had incurred late fees and notices. (TT 1152) Schippers explained this was not how Dora Lee and her husband had operated in the past having had a track record of paying bills timely. (TT 1152-1153).

Stephen Manlove, MD a forensic psychiatrist, offered expert testimony which, along with his expert report, was received by the court. Manlove opined that Dora Lee’s free agency was not destroyed to the extent that Audrey’s will was substituted for her own. (TR Ex 140, pp 14-19; TT 921)). Manlove articulated the basis of his opinion. First, Dora Lee’s intent to disinherit Vicki remained consistent. Manlove pointed out that in her meetings with Elsing, Audrey was never present; yet, Dora Lee’s responses to his

questions over the two year time frame were consistent. (TT 922, 927). In this context, Manlove reviewed the testimony of Dora Lee's attorneys and the reasons she expressed for changing her will. Those reasons were consistent with what she reported to others including her care givers. (TT 923; 951-952). Secondly, Manlove pointed out that Dora Lee had four rational concerns which prompted her to change the will disinheriting Vicki, namely: a) the dispute over the lease, b) the conservatorship, c) Vicki's lack of visits and d) Dora Lee's real conflict with Bill confirmed by her refusal to accept efforts of Bill to apologize for the way the conservatorship evolved including Bill's written apology he had his son, Chad, deliver. (TT 922-935; TR Ex 139)

Manlove disagreed with the court's suggestion that the conservatorship really had no impact on Dora Lee. Manlove explained that Dora Lee had been an independent person. (TT 961-962). Manlove thought it was a "huge hit" to Dora Lee. (TT 963).

On March 29, 2016, Dora Lee Gaaskjoken died at her home on her ranch near Meadow, South Dakota. She was 90.

STANDARD OF REVIEW

Findings of fact are not set aside unless they are clearly erroneous. Estate of Pringle, 2008 S.D. 38, 751 N.W.2d 277, 284. The trial court's findings regarding undue influence are reviewed under the clearly erroneous standard. Id. Documentary or deposition evidence¹ is reviewed under a *de novo* standard of review. Id. Like testamentary capacity, undue influence is a mixed question of fact and law. In re Estate of Long, 846 N.W.2d 782, 2014 S.D. 26. Therefore, this court is required not only to review the circuit court's findings of fact, but also the court's application of the settled

¹ The depositions of the witnesses to the will and codicil (Holtgard, Van Vactor, Fink, and Kluck) along with the deposition of a caregiver (Weishaar) were received as exhibits.

law to those facts. Stockwell v. Stockwell, 2010 S.D. 79, P15, 790 N.W.2d 52, 58. The rule requiring a clear preponderance of the evidence to sustain a reversal does not apply where it appears that the trial court applied the wrong rules of law to the evidence.

Johnson v. Shaver, 41 S.D. 585, 596, 172 N.W. 676 (1919).

ARGUMENT

“A testator has the privilege and right to dispose of his property as he chooses within the limits and manner fixed by statute. The law does not require that he recognize his relatives equally at all.” In re Blake’s Estate, 81 S.D. 391, 398, 136 N.W.2d 242, 246 (1965). Additionally, the law “does not place obstacles in the way of the aged or infirm in the disposition of their property, provided their mentality meets accepted tests at the time of execution of the testamentary instrument and the same was not procured by the exercise of undue influence.” Id., 81 S.D. at 398, 136 N.W.2d 246. “Proof of mere opportunity to influence the mind of the testatrix, even though coupled with an interest or with a motive is not sufficient. (citations omitted). Influence, to be undue, within the meaning of the law, must be of such a character as to destroy the free agency of the testatrix and substitute the will of another person for her own.” In re Rowland’s Estate, 70 S.D. 419, 425, 18 N.W.2d 290, 293 (1945).

“A presumption of undue influence arises when there is a confidential relationship between the testator and a beneficiary who actively participates in preparation and execution of the will and unduly profits therefrom. When this presumption arises, the burden shifts to the beneficiary to show he took no unfair advantage of the decedent. However, the ultimate burden remains on the contestant to prove the elements of undue influence by a preponderance of the evidence.” In re Estate of Pringle, 751 N.W.2d 277,

289 (S.D. 2008). The presumption of undue influence can be rebutted “by showing that the one allegedly overpersuaded had independent advice that was neither incompetent nor perfunctory.” *Id.*, 751 N.W.2d at 290, ¶43, *citing* Black v. Gardner, 320 N.W.2d 153, 159 (S.D. 1982); Davies v. Toms, 75 S.D. 273, 63 N.W.2d 406 (1954).

The four elements of undue influence are: (1) decedent’s susceptibility to undue influence; (2) opportunity to exert such influence and affect the wrongful purpose; (3) a disposition to do so for an improper purpose; and, (4) a result clearly showing the effects of undue influence. Estate of Pringle, 751 N.W.2d 291, ¶44.

1. Audrey rebutted the presumption of undue influence having established Dora Lee had independent advice when contemplating her will of December 18, 2012.

Dora Lee could not make a telephone call, so she relied upon Audrey to call for her. The fact that Audrey initiated contact with attorneys for Dora Lee, in and of itself, was not a fact dispositive that Audrey was actively participating in the making of her will. That said, Audrey’s first call to Elsing on the night of December 4, 2012 directing him what was to go in the will gave reason for concern and a “red flag” of active participation. However, upon learning this had occurred, Nooney and Schippers became concerned and intervened.

The intervention by Nooney and Schippers ended any meaningful participation by Audrey as respects Dora Lee’s December 18, 2012 will. On December 11, 2012, Dora Lee consulted privately with John Nooney. Not fully knowing what Elsing had done before executing the will on December 6, 2012, but believing that Audrey had provided Elsing with the directive, Nooney met with Dora Lee and recommended a new will. Nooney called McLean Thompson-Kerver who met that same day with Dora Lee.

When McClean called Audrey and told her she could not complete Dora Lee's will, Audrey called Elsing. This time, however, Elsing was made well aware of the concerns and worked on a series of questions to assure himself that his client had capacity and was under no undue influence. The devices Elsing employed in communicating with his impaired elderly client and the patience he demonstrated reveal legal counsel which was more than perfunctory.

Over a course of multiple meetings, the questions Elsing tailored for Dora Lee assisted him in confirming his client was receiving information and understanding it. As Dora Lee provided responses, Elsing was confirming the elements of sound mind and his client's freedom from duress, coercion and undue influence. Elsing's questionnaires were tools of his own making which allowed him to discern that which his client really wanted to do with her estate and why.

On December 14, 2012, Dora Lee visited again with Elsing about her decision to change her will. Among other things, Dora Lee's answers explain: 1) when she made her decision (late Summer); 2) what prompted her decision (when she told Bill and Vicki "no" to putting Kayla on half the land); and, 3) that she had not changed her mind since then. Dora Lee was able to respond to questions which Elsing had drawn. Audrey was not present.

On December 18, 2012, with pen in her arthritic hand, Dora Lee underlined her answers or, on occasion, wrote her own words out leaving a record of what she wanted done with her estate. She wrote on Elsing's questionnaire that she decided Audrey should receive her property in September of 2012. This was consistent with the timing of the temporary conservatorship freezing her assets. After answering the questions, Dora

Lee executed her will before two housekeepers who said she was under no undue influence. Elsing returned to Dora Lee's home and his questions of January 7, 2013, served to confirm Dora Lee had not changed her mind.

The time Elsing spent with Dora Lee and the lengths to which he went to assure himself that her will would meet the legal standards was "quite amazing" as Mr. Nooney characterized it. (TT 1056). Dr. Manlove found Elsing's questions "helpful" in that they provided a way to understand what Dora Lee was really thinking. (TT 911). Dr. Manlove also found the question "unique" in that he had testified in a number of will contests, but had never seen questions documented as Elsing had done. (TT 911). So impressed with Elsing's work, Manlove copied the questions and has used them as a template in his own practice. (TT 912). Chad Penfield's wife, Sarah, a teacher explained that the use of a questionnaire for a person suffering from a condition such as expressive aphasia was a form of "modification" and "accommodation" employed to communicate with persons who are challenged. (TT 421-422).

It is hard to imagine any other process or mechanism by which Elsing could have proceeded to insure that his client was free of undue influence by Audrey. Audrey had no input into any of Elsing's questions for Dora Lee. Audrey had no ability to practice the answers with her mother before they were asked. Audrey was not present to help coach her mother answer or underline the responses. Audrey was not present when the will was executed. She did not actively participate in the December 18, 2012 will.

The trial court disregarded the testimony of the attorneys that Dora Lee was their client and found that "Dora Lee was the client in a nominal sense." (FOF #27). The trial court erred concluding this case could be distinguished from In re Estate of Pringle, 2008

S.D 38, 751 N.W.2d 277 (2008). (Conclusion of Law #30, App 013). The holding in Pringle supports the argument advanced by Audrey.

In determining whether the advice of counsel was “independent” the court in Pringle held “[w]hat is determinative is the testimony of Unke [the attorney] in regard to his representation of Mary [the decedent]. Pringle, 751 N.W.2d at 290-291. Nooney, Schippers and Elsing, each testified that their client was Dora Lee, not Audrey. It was Dora Lee to whom their ethical duties ran. (See, e.g. TR Ex 142, Letter of Nooney to Peterson 6/3/13).

For the trial court to suggest that Dora Lee was their client only “in a nominal sense” belies the clear preponderance of the evidence to the contrary and suggests that each violated his oath of attorney when they testified Dora Lee was their client. The trial court incorrectly found it was Audrey who required Nooney or Schippers to be present when the conservator met with Dora Lee. Rather, this was the request of Nooney who was protecting Dora Lee’s interests and directives including that of keeping her will confidential. Armstrong v. Armstrong, 65 S.D. 233, 240, 272 N.W. 799 (1937).

Dora Lee had independent legal advice that was neither incompetent nor perfunctory and the trial court erred in shifting the burden to Audrey to show she took no unfair advantage of Dora Lee. Even if a presumption arose, Audrey rebutted the presumption of undue influence and submitted a reasonable explanation for the disposition of Dora Lee’s estate. The court erred in finding the will of December 18, 2012 was the subject of undue influence as the preponderance of the evidence clearly showed Dora Lee’s decision was of her own free will. The will was not the result or

product of the effects of undue influence, but of Dora Lee's own desire and wish she repeatedly communicated in the confidence of her attorneys.

2. *The trial court failed to consider the controlling motives influencing the testator and in so doing, failed to apply the law of the case to the evidence.*

It has long been settled law in this state that “[i]n determining the weight that should be given to the fact that, by the terms of the will, there was what might be deemed an unnatural disposition of decedent’s property, we should and do take into consideration what appeared to have been the controlling motives influencing the actions of decedent prior to and up to the time of the making of said will.” In re Whitman’s Will, 45 S.D. 14, 16, 184 N.W.975 (1921). However, completely absent from the court’s memorandum, findings and conclusions was any mention, discussion or acknowledgement of what motivated Dora Lee to disinherit Vicki. The court ignored what Dora Lee told those persons closest to her. The court also ignored what Dora Lee privately told her lawyers.

Dora Lee’s true wish and desire was that Vicki and her family take nothing of her estate when she died. The record of her responses to the questions which were posed to her in confidential settings revealed Dora Lee’s true wishes and intentions. Dora Lee privately told Elsing three reasons she wished to exclude Vicki namely, (1) the lease dispute, (2) the conservatorship which followed, and (3) Vicki’s lack of contact. Any one of the three reasons provide a reasonable explanation for the unnatural character of her will and would be sufficient to justify disinheriting Vicki.

Elsing was not the sole person with whom Dora Lee shared her reasons for excluding Vicki. Dora Lee told Nooney on December 12, 2012 she was upset with the conservatorship and had changed her will to disinherit Vicki. She told Thompson-Kerver she wanted to disinherit Vicki because she was upset with Bill. In November of 2013,

she told the conservator she wanted to disinherit Vicki because she was upset with the conservatorship. Dora Lee told her housekeeper, Marlene Holtgard, what Vicki had done was “terrible,” that the conservatorship had hurt her feelings, and that Vicki didn’t come to visit her. Dora Lee rejected Bill’s apologies.

Verbally or by written endorsement, Dora Lee explained her decision as she visited with Elsing and consistently responded to his questions. Dora Lee did not have the questions in advance, nor did Audrey have them to prepare her for her private meetings. Dora Lee responded to questionnaires she reviewed confidentially with her attorney. Her answers memorialized her intention and state of mind. There was no proof that Audrey in any way manipulated or controlled her mother’s responses.

Dora Lee’s intentions remained consistent over time. When she made her codicil, she republished her will changing only her personal representative. Dora Lee’s answers to the questions Elsing posed on October 24, 2014 (TR Ex 1, pp. 57-61) confirmed no one was forcing her to make the codicil, that Audrey had not told her what she should have in her will, and that she genuinely wanted not to give Vicki any of her estate upon her death. Close judicial scrutiny of Dora Lee’s responses to questions going directly to the issue of undue influence established Dora Lee’s free will was not destroyed.

“Where the will contains unjust or unnatural provisions, it demands close judicial scrutiny; the onus devolves upon the proponent to prove a reasonable explanation of the unnatural character of the will; there must be fair proof that the testator had mental capacity to comprehend its import; and the court must from all the evidence, be led to believe that undue influence did not produce the unjust or unnatural disposition.” In re Rowland’s Estate, 70 S.D. 419, 426, 18 N.W.2d 290, 293 (1945). In re Whitman’s Will

directs that a court weigh the controlling motives influencing the actions of Dora Lee. This, the court failed to do.

Rather than examine what Dora Lee had told her legal counsel about the conservatorship and how it influenced her decision (statements confirmed by the housekeepers and caregivers), the trial court focused on his own view of the conservatorship. Suggesting that the conservatorship was not a big deal, the court ignored how Dora Lee felt about the conservatorship noting that “she never missed a meal and all of her basic needs were met.” (Finding of Fact #18, App 009). Instead of considering Dora Lee’s expressed reasons, the trial court chose to accept the testimony of the sheriff who served papers on Dora Lee who opined she “didn’t have a clue” about the conservatorship.

The Sheriff was admittedly unfamiliar with Dora Lee’s condition. (TT 175). He was with her for fifteen minutes. (TT 177). In spite of having no recollection of ever visting with Dora Lee, the Sheriff concluded that “she didn’t have a clue” –this, after watching the 87-year-old woman stare straight ahead and become teary eyed when he told her that her family loved her after he handed her permanent conservatorship papers. (TT 178). The trial court completely disregarded the testimony of those who had observed Dora Lee and testified that looking off into the distance was a sign that Dora Lee was upset. (TT 548). When things upset her greatly, her eyes would tear up. (TT 548). Moreover the court disregarded the undisputed testimony that the conservatorship and the manner in which it was secured upset Dora Lee and was one of the reasons she excluded Vicki.

“Ultimately, the sole question in an undue influence will challenge is simply whether the testator’s intent was displaced by a wrongdoer.” Simmons, *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D.L.Rev. 175, 206 (2015). To disregard Dora Lee’s controlling motives as required by the holding of In re Whitman’s Will was clear error failing to apply the law to the evidence. Like the proponent in In re Armstrong, 65 S.D. 241, 272 N.W. 799 (1937) involving estranged brothers, proof was adduced by Audrey showing “a reasonable explanation of the unnatural character of the will.” In re Armstrong, 65 S.D. at 241, 272 N.W. at 803. For years, Audrey had provided loving care and attention to her mother. It was Audrey who ministered to her invalid mother. Dora Lee’s reasons for disinheriting Vicki were just and rationally based.

3. *Dora Lee made her codicil republishing her will without undue influence on independent legal advice.*

“When a subsequent codicil republishes the prior will, any taint in the earlier will from undue influence is removed if there is no evidence of undue influence at the time of the subsequent codicil. Estate of Elliott, 95 S.D.O. 550, 537 N.W.2d 660 (S.D. 1995).

Dora Lee’s codicil was the “end game” of John Nooney, Dora Lee’s attorney. The genesis of the idea for the codicil was that of Nooney. While reading this Court’s opinion in Elliott, the “light bulb” came on. Nooney took no directive from Audrey with regard to the codicil. While the court found Audrey not to be a credible witness, there is not a fact in the record of the case that Audrey did anything to direct or solicit any preference to herself to make the codicil.

It was Nooney who recommended the codicil as a means by which to address what he accurately predicted as a challenge to Dora Lee’s will. It was for this reason that he did not disclose in his letter of August 6, 2014, what he self-described as a “proactive”

idea, knowing that Audrey opened and read the mail and shared it with her mother.

Schippers met with Dora Lee for an hour and a half and agreed to make the codicil.

Schippers contacted Elsing to prepare the document.

Elsing drafted the codicil. Elsing vetted the personal representative. Audrey provided no input into the codicil. She was only told of the codicil when Elsing called to schedule a time for its execution making sure that witnesses would be present and even then, Elsing did not reveal any particulars to Audrey.

In her codicil of October 24, 2014, Dora Lee republished her will of December 18, 2012. That day she reviewed and answered all of the questions Mr. Elsing had tailored for her. Elsing assured himself Dora Lee had capacity and was under no undue influence. Witnesses to the codicil confirm that she was under no undue influence. In fact, Elsing reminded Dora Lee that she could change her will and asked “Do you want to give any assets to Vicki? And her answer was just like an emphatic no. It was like – she was strong in her answer.” (TT 900).

Because Audrey did not participate in the preparation of the codicil, the court erred in finding a presumption of undue influence shifting the burden to Audrey to show that she took no unfair advantage of Dora Lee. Even if such a presumption could be satisfied, it was rebutted by the proactive independent advice Dora Lee had from her attorneys. Black v Gardner, *supra*. To prove that Audrey practiced undue influence upon Dora Lee with respect to the codicil, Audrey would have had to have known of its legal effect under Elliott. She did not.

There was absolutely no evidence that Audrey exerted any pressure or influence upon Dora Lee to make the codicil or that Audrey knew or understood its legal import

under the doctrine of reaffirmation. Nooney, Schippers and Elsing were all working for Dora Lee to see that her desires were effectuated. Each attorney testified Dora Lee was the client, not Audrey. Their testimony is determinative of the issue of representation, especially in the absence of any proof to the contrary. Estate of Pringle, 751 N.W.2d at 291.

Audrey could not have influence over that which she had no knowledge, understanding, or design. The codicil was the independent recommendation of Dora Lee's legal counsel. The advice was certainly competent, thoughtful and prescient. Good lawyers are proactive. Nooney had no idea of the exhaustive work that Elsing had done with respect to the December 18, 2012 will. (TT 1056). So, Nooney had every reason to think that the will would be challenged and had so advised Dora Lee. Given the circumstances as he understood them, the recommendation of a codicil to remove any suggestion of taint was anything but routine or perfunctory. Nooney's advice advanced the interests of his client. Likewise, Elsing's thorough evaluation of his client's intentions and confirmation that she was making her codicil freely without pressure from Audrey was nothing if it was not competent legal counsel.

Audrey had no input whatsoever into the preparation of the codicil. She was not present when it was executed. Audrey had no idea of what its legal effect would be. As of the time the codicil was made, the Elliott decision was the only reported decision which set out the doctrine of reaffirmation in South Dakota.

It is well to be mindful that just two weeks before the codicil was executed, the conservator's trust officers both reported to the court that Dora Lee's estate plan disinheriting Vicki was consistent with her intent. Later, the fiduciary approved its

protected person's attorneys' fees associated with the codicil's making. Certainly, the fiduciary would have objected to the fees for Dora Lee had they thought the legal work incompetent, the product of undue influence, or legal work performed for Audrey.

CONCLUSION

It was absolutely undisputed that serious family discord did exist, and that decedent laid the blame on Vicki, Shane and Bill. Bill knew his actions had consequences and Vicki had long suspected Dora Lee had changed her will. Bill's repeated attempts at giving an apology were never accepted by Dora Lee. Dora Lee's controlling motives remained constant from December, 2012 through 2013 up and until she made her codicil in late October of 2014. Dora Lee was adamant and the court erred in failing to consider the controlling motives which induced her to make the will and codicil. In re Whitman's Will, *supra*.

The trial court erred in applying the holding of Elliott and the doctrine of reaffirmation. Dora Lee's codicil was free of any influence of Audrey. Having no input into the making of the codicil or its legal effect, Audrey could not have a disposition to exert influence for an improper purpose, the third element of undue influence. Likewise, the fourth element of undue influence could not be met as the codicil was the result of proactive independent legal advice, not the product of the effects of undue influence.

It was in applying the law to the facts that the trial court erred in arriving at the conclusions of law and the judgment that was entered. Moreover, the clear preponderance of the evidence established that Dora Lee's will and codicil were made of her own free will and agency and not that of Audrey. The trial court's judgment should be reversed and with direction that the Last Will and Testament of Dora Lee Gaaskjolen

dated December 18, 2012, and Codicil to the Last Will and Testament of Dora Lee Gaaskjolen dated October 24, 2014, be admitted to probate.

Dated: April 1, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was drafted using Microsoft Word. The font is Times New Roman size 12, which includes serifs. The word count, according to the word processing program is 9,708. The character count without spaces is 46,582. The page count is 32 pages.

Dated this 1st day of April, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date written below, true and correct copies of APPELLANT'S BRIEF and APPENDIX were served by electronic service and first-class U.S. mail to the individuals identified below at their last known addresses:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTATE OF
DORA LEE GAASKJOLEN, DECEASED.

Appeal No. 28884

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
PERKINS COUNTY, SOUTH DAKOTA

THE HONORABLE WARREN JOHNSON
CIRCUIT COURT JUDGE, RETIRED

APPELLANT'S APPENDIX

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NOTICE OF APPEAL FILED
January 30, 2019

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STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF PERKINS)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

In the Matter of the Estate of DORA LEE GAASKJOLEN, Deceased.	File No. #52PRO16-000003 MEMORANDUM OF DECISION
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MEMORANDUM OF DECISION

The above matter came on for trial before the court on October 15-19, 2018, at the courtroom of the Perkins County Courthouse, Bison, South Dakota. U.S. Bank Trust National Association SD, Personal Representative of the Estate of Dora Lee Gaaskjolen (“Dora Lee”), appeared by counsel, John K. Nooney, Rapid City, SD. Audrey Lorus (“Audrey”), Will Proponent, appeared personally and by counsel, John Stanton Dorsey, Rapid City, SD. Vicki Penfield (“Vicki”), Will Contestant, appeared by counsel, Michael M. Hickey and Kelsey B. Parker, Rapid City, SD. The Court has considered the evidence presented and finds as follows:

FACTUAL AND PROCEDURAL BACKGROUND

Marlin and Dora Lee Gaaskjolen were successful ranchers near Meadow, South Dakota, owning some 3,000 acres of ranch and farm land. They had two daughters, Audrey and Vicki. Audrey had two children, Jeffrey and Shiloh. Vicki had three children, Chad, Shane, and Kayla. In 1990, Marlin and Dora Lee executed wills. Each left their entire estate to the other spouse, and if the other did not survive, the estate was to be divided equally between Audrey and Vicki. Each named the other to be executor, but in the event the spouse predeceased, Audrey and Vicki were designated as successor executors.

Vicki and her husband, Bill Penfield ranched near Lemmon, South Dakota, about 30 miles from the Gaaskjolen ranch. In 1998, Vicki was diagnosed with Parkinson's disease. By 2012, she could no longer drive off their ranch and depended on Bill or others to take her places, including her mother's ranch. Audrey became a registered nurse in 1991 and was employed as a charge nurse at Fountain Springs nursing home in Rapid City. In 1999, she moved to the ranch to help care for her father, Marlin, who was receiving kidney dialysis at home. When Marlin's condition worsened, Audrey drove him to Dickinson, North Dakota for treatment. Audrey's husband, Tim, joined her at the Gaaskjolen ranch in 2000. Audrey and Tim purchased a double wide trailer and located it near her parents' house.

Marlin died in 2003. Audrey remained at the ranch and provided care for Dora Lee, whose health was declining. Dora Lee had hip surgery in 1989, ulcers, skin cancer and other ailments. Additionally, she suffered a mitral valve prolapse in 2005 and received a traumatic brain injury in 2007 when she was kicked by a Longhorn heifer. She was hospitalized for several weeks, followed by weeks of physical therapy. She did not fully recover and suffered from facial aphasia, making it difficult to speak in more than one or two word responses.

In 2005, Bill Penfield divided the Gaaskjolen ranch into a north half and a south half. The north half had been leased to Tracy Wolff and Arnold Schopp. On April 24, 2008, Dora Lee assigned those leases to Vicki and the following year, Dora Lee leased the property to Bill and Vicki. The term of the lease was from January 1, 2009 to December 31, 2009, and contained an unrestricted right to sublease the property. Bill and Vicki subleased the land to Wolff and Schopp. The sublease yielded more money than was their rent obligation to Dora Lee. They deposited the excess in a special account for Dora Lee's possible future needs.

Audrey occupied the south half of the ranch but was not required to pay rent. In exchange for possession of the south half and a monthly paycheck, Audrey provided care for her mother.

Early in 2012, Audrey expressed to Vicki her desire to take over the north half as she needed more grass for her cattle and horses. At about the same time Bill and Vicki were interested in terminating the Schopp/Wolff subleases and subleasing the north half to their daughter and son-in-law, Kayla and Drew.

Marlin and Dora Lee had made every effort to treat their daughters equally and fairly. They carried this tradition to their grandchildren. When the grandchildren would visit, Dora Lee made certain each child's candy bag was equal in kind and quantity. Shane recalled that in 2004 or 2005, he received a \$5,000.00 check from his grandmother. He then learned that one of Audrey's children had defaulted on a \$5,000 loan from Dora Lee, and in order to keep everything equal, she had given a like sum to each of the other grandchildren.

Marlin and Dora Lee had always had a close and loving relationship with Bill and Vicki. The Penfield family became increasingly concerned about Dora Lee's welfare, the condition of the ranch property and Audrey's history of money mismanagement. Audrey had authority to write checks on Dora Lee's account, and according to Shane, had arbitrarily given herself raises from time to time. Audrey had a least 30 dogs and at times more than 60 horses and this caused them concerns about overgrazing and liability issues. The cow that had severely injured Dora Lee in 2007, later injured another person, which resulted in a \$100,000.00 insurance settlement. Penfields were concerned about Dora Lee being left alone in the house, while Audrey tended to her livestock. Since 2007 Vicki had been in charge of paying Dora Lee's monthly bills on her behalf, while Audrey was providing continuous personal care.

At Vicki's request, Shane Penfield visited with Dora Lee on July 3, 2012, about the possible grant of a power of attorney. During Shane's conversation with Dora Lee it became obvious that his grandmother had no idea what he was talking about, so the power of attorney idea was dropped. During this visit Shane observed that her house smelled of rotten food. There were dirty dishes, and leftover food on the counter and adult diapers on the floor and in the bathroom.

The following month, on August 10, 2012, Vicki came to the ranch to pay bills. Audrey brought up the lease issue. Audrey's testimony regarding the matter is confusing and conflicting. Audrey said her mother wanted to keep the north half in the family, and wanted to lease it to Audrey, or to Audrey and Wolff. On August 28, 2012, Bill, Kayla and Drew went to visit Dora Lee. Dora Lee said she wanted Audrey to be on the property. Bill in response became upset and left.

After this encounter, Audrey prepared a letter, purportedly signed by Dora Lee, which terminated the lease agreement between Dora Lee, Vicki and Bill. Penfields decided that legal action would be necessary both for Dora Lee's personal welfare and to protect her estate. Vicki contacted Rapid City attorney, Thomas Simmons, who prepared an emergency petition for appointment of temporary conservator. Judge Macy signed the ex parte on September 5, appointing Dacotah Bank as temporary conservator.

Audrey contacted attorney John Nooney to represent Dora Lee. Nooney required a \$10,000.00 retainer. All communications between Nooney, his associate, Marli Shippers, and their client went through Audrey. Dora Lee could only speak in two or three words to answer leading questions and could not talk on the phone. While Nooney's letters were addressed to Dora Lee, it was Audrey retrieving and opening the mail, and giving the orders to Nooney.

Audrey also testified that she shared with Dora Lee, most if not all of the e-mails between Audrey and Nooney. On September 17, 2012, Audrey sent to Vicki, Exhibit 67, the so-called "disowning letter". Audrey told Vicki that "[y]ou people remind me of a vulture picking on the bones of an animal before it's dead." Audrey considered the conservatorship to be elder abuse.

According to Audrey, Dora Lee was upset about the conservatorship, the lease dispute with Vicki and Bill and the fact that Vicki did not come to visit her after the conservatorship was in place. But Audrey's e-mails made it clear that Vicki was not welcome at the ranch after the conservatorship was filed. For example, in an email Audrey sent to Vicki, Audrey stated, "[a]s far as I am concerned I have no flesh and blood sister, after what you have done to your own mother. I'm done with you as family." Exhibit 67.

On a visit to the ranch in the fall of 2012, Sarah Penfield noticed that certain family photos of Shane and Kelly's children had been removed from Dora Lee's wall, and possibly some photos of them had been cut from group photos of the grandchildren. She knew that Dora Lee was not physically capable of removing the photos and it was unlikely that she had directed Audrey to do so.

On or about September 15, 2012, Dora Lee signed a letter to Dakotah Bank, requesting that her CD, maturing on September 24, 2012, be cashed in with the money deposited in her checking account. The conservator denied the request in view of the conservatorship. Audrey stated she was attempting to get funds for Nooney's retainer.

Dora Lee was evaluated by Frank A. Thorngren, M.D., in addition to her various physical problems, he found that she had "moderate to severe memory, orientation, problem solving, and information processing deficits, which are further complicated by her expressive aphasia." He recommended that she undergo a formal neuropsychiatric cognitive evaluation. On October 11,

2012, David A. Brooks, Ph. D., conducted a neuropsychological interview and evaluation. He found her to be “severely impaired from a neuropsychological perspective compared to age and education peers. Her responses are quite delayed and Dora is often unable to spontaneously generate words that she is searching for. It is also difficult to determine what she knows and does not know because of the word substitutions that occur.”

Despite Audrey’s claim that her mother was upset and angry about the conservatorship, the conservatorship had little impact on Dora Lee’s daily life. She never missed a meal and all of her basic needs were met. Perkins County Sheriff Kelly Serr served Dora Lee at her home on October 29, 2012, with the petition for appointment of permanent conservator and related documents. Though not required to do so, he spent about fifteen minutes attempting to explain the general nature of the conservatorship proceeding in simple terms. He concluded that “she didn’t have a clue.” She became “teary eyed” when he told her that her family loved her. She did not appear upset or angry, she “pretty much stared straight ahead.”

On November 27, 2012, Lori Casteel visited Dora Lee and conducted an assessment summary. She believed that Audrey was trying to provide appropriate care for her mother but there were some risks that needed to be addressed. She felt that Audrey was isolating Dora Lee from Vicki and recommended scheduled visits between Dora Lee, Vicki and her family. She made various recommendations, some of which were implemented.

Audrey’s testimony was confusing, evasive and contradictory. She was not a credible witness. Audrey testified that her mother told her one day that she wanted to make a new will. This occurred either at lunch or dinner and the statement came “from out of the blue”. She said there was only one conversation and that it occurred in late November of 2012. However, in an email to Nooney of October 26, 2012, Audrey wrote that a month and a half earlier her mom had

said that she wanted to change her will. She offered multiple dates when this singular conversation allegedly occurred. It is noteworthy that attorneys, Nooney and Schippers met Dora Lee for the first time at her home on October 25, 2012. At that time, Dora Lee made no mention of a desire to change her will.

Audrey contacted attorney Steve Wild in Hettinger to prepare her mother's will, but he was not interested. Audrey next contacted Lemmon attorney James Elsing on December 4, 2012. Using the information provided by Audrey in an email exchange late in the evening, he prepared a will in which Dora Lee left her entire estate to Audrey and specifically disinherited Vicki, her children and grandchildren. Prior to his arrival at the ranch, Audrey had gone over the will with Dora Lee several times. Elsing met Dora Lee at her home on December 6, 2012. He went over the will with her and discussed other options, such as joint tenancy, gifts and other estate planning options. He was satisfied that she had testamentary capacity and intent, and saw nothing to suggest the presence of undue influence. Dora Lee executed the will on December 6, 2012.

Nooney was disturbed when he learned Dora Lee had made a new will and felt that more conferences were needed, to assure the will's validity. He had also contacted two Rapid City attorneys about doing a new will but both had declined. Elsing met again with Dora Lee on December 14, 2012. At this time Elsing had prepared a list of questions which he went through with her. He returned on December 18, with an identical version of the will dated December 6, 2012, and another set of questions. Again, satisfied that Dora Lee had testamentary capacity and intent, he allowed her to execute the will. For some reason, Elsing returned to see Dora Lee at her home on January 3, 2013, with a new series of questions, which they went through together.

On February 20, 2013, Circuit Court Judge John Bastian conducted a hearing on the petition for permanent conservator. Dora Lee was called as a witness but was mostly

unresponsive to questions. She was asked if she was concerned that if Dacotah Bank was appointed as her conservator, she would be put in a nursing home. She nodded her head and stated, "Yeah". Dr. Thorngren presented his findings. Shortly thereafter, the Court granted the petition and named Dacotah Bank as permanent conservator.

Attorney Nooney appealed the decision to the South Dakota Supreme court. Given all of her language and cognitive deficits, it is doubtful that Dora Lee had any meaningful input in the appeal decision. Audrey was in charge. While the matter was on appeal, attorney Nooney decided that a codicil would be a good way to reaffirm Dora Lee's testamentary desires and also replace Audrey with a corporate personal representative, to ward off future claims of conflict of interest.

On May 31, 2013, attorney Shelley Lovrien, on behalf of Dacotah Bank, visited Dora Lee at the ranch. Dora Lee told her that she did not remember signing anything to engage an attorney and didn't know who her attorney was. Lovrien thought that Dora Lee did seem to recognize Mr. Nooney. Regarding her farm, Dora Lee said she wanted one of her daughters to use the ranch but could not articulate which one. She was very troubled by the relationship between her two daughters. She told Mrs. Lovrien that there were changes made to her will but she didn't know what they were. She said the changes were her idea, though she didn't know what attorney had drafted them. Most significantly, Dora Lee thought her children and grandchildren were the beneficiaries of her will.

The conservatorship appointment was affirmed by a unanimous court on February 26, 2014. Later in 2014, Audrey contacted Mr. Elsing to draft the codicil Nooney had suggested. Elsing met with Dora Lee on October 24, 2014, reviewed another series of questions with her,

and had her sign the codicil. This instrument reaffirmed her December 2012 testamentary disposition and named U.S. Bank as personal representative of her estate.

Between September 2012, and October 2014, attorneys Nooney and Schippers met with Dora Lee only four times. All other communications were with or through Audrey. It is apparent that Dora Lee was the client in a nominal sense. Audrey had no independent financial means to hire her own counsel. Although Dora Lee was adequately represented by Dacotah Bank attorneys and trust officers, they were forbidden by Nooney to meet with Dora Lee unless either Nooney or Schippers was present.

Dora Lee died on March 29, 2016. She was 90 years old.

ISSUE I.

TESTAMENTARY CAPACITY AND INTENT

Audrey Lorus, as proponent of the will, has the burden of proving that Dora Lee had testamentary capacity at the time she executed the December 18, 2012, will and the October 24, 2014 codicil. SDCL 29A-2-501. A person is of "sound mind" if, without prompting, he is able to comprehend the nature of his property, the persons who are the natural of his bounty and the disposition that he desires to make of such property. Estate of Long, 846 NW2d 782, 2014 S.D. 26. Attorney James Elsing and Dr. Manlove believed that Dora Lee possessed testamentary capacity and intent on both occasions. Elsing prepared and presented 3-4 sets of questions and went through them with Dora Lee. This is sufficient proof by a preponderance of the evidence that Dora Lee had testamentary capacity and intent at the relevant times. Clear and convincing evidence is not present and is not required.

II UNDUE INFLUENCE

From at least 2007 until her death, Dora Lee and Audrey had a confidential relationship. Audrey was her daily companion and often stayed overnight at her house. Audrey determined who had access to Dora Lee. “A presumption of undue influence arises when there is a confidential relationship between a testator and a beneficiary who actively participates in the preparation and execution of the will and unduly profits therefrom.” *In Re Estate of Pringle*, 2008 S.D. 38, ¶ 39 (quoting *In Re Estate of Dokken*, 2000 S.D. 9, ¶28). Although Audrey was not physically in the room when the wills and codicil were executed, she was instrumental in dealing with the attorneys and suggesting changes to the proposed will. She also arranged for the presence of witnesses on each occasion. “When this presumption arises, the burden shifts to the beneficiary to show [s]he took no unfair advantage of the decedent.” *Dokken*, at ¶28.

The facts presented before this Court are distinguishably different than the facts presented in *Pringle*, where the South Dakota Supreme Court found that there was no evidence that will proponent kept decedent from her other family. *See Pringle*, at ¶ 41. Unlike in *Pringle*, Audrey did in fact act to keep Vicki and her family from contacting Dora Lee. *See Exhibit 67*.

Dora Lee was physically and mentally susceptible to undue influence. She depended on Audrey for everything. She could not make phone calls, retrieve her own mail, use a computer, make a meal, or drive a car. It is undisputed that she wanted to remain in her own home, rather than be placed in a nursing home. Audrey was in a position to exert undue influence and she was predisposed to exert undue influence.

Further, it was Audrey who contacted all attorneys who Dora Lee had contact with. Unlike in *Pringle* where “[decedent] had independent advice when contemplating her last will

and the deeds.” *Pringle*, at ¶ 41 (see also *Black v. Gardner*, 320 N.W.2d 153, 159 (S.D. 1982))(reiterating that the presumption of undue influence can be rebutted “by showing that the one allegedly overpersuaded had independent advice that was neither incompetent nor perfunctory”) (citing *Davies v. Toms*, 75 S.D. 273 1954)).

Audrey’s feelings toward Vicki, Bill and Shane are well documented in her e-mail messages to attorney Nooney and others. Her anger and animosity toward Bank officials, Kaye DeYoung and Steven Schaeffer is well documented in her own e-mails. Dora Lee could only meet with Conservator’s Representatives when one of her attorneys was present.

In her September 13, 2012, email to Nooney, Audrey states in part. “The fear I have is that they will get total control of mom’s money, land, etc. shove her in a nursing home and I will have to leave the ranch I have sweated, busted my ass over and loved all my life. I want to be buried on this place.” On December 15th, Audrey e-mailed trust officer Steven M. Schaeffer, telling him that mom wanted \$30.00 Christmas gift checks mailed to the great grandchildren. She listed all but Shane and Kelly’s three children. The December 18, 2012 will and the October 24, 2014, codicil clearly shows the result of undue influence. Audrey stands to inherit about \$3,000,000.00 in real estate, investments and personal property. The will and codicil completely disinherit Vicki and her children. The disposition is totally contrary to the way Dora Lee had lived and treated her daughters and grandchildren.

Will Proponent, Audrey Lorus, had the burden of going forward, after evidence of a confidential relationship was established, and she failed to meet her burden.

CONCLUSION

This Court concludes that the December 18, 2012, will and the October 24, 2014, codicil were the result of undue influence practiced upon Dora Lee by her daughter, Audrey. Therefore, the will and codicil are invalid. Counsel for contestant shall propose findings of fact and conclusions of law which shall incorporate this memorandum decision by reference.

Dated this 4th day of December, 2018.

BY THE COURT:

/S/ Warren G. Johnson
Warren G. Johnson
Circuit Court Judge (Ret.)

ATTEST:

Clerk of Courts

By: _____
Deputy

(SEAL)

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF PERKINS) IN CIRCUIT COURT
 FOURTH JUDICIAL CIRCUIT

ESTATE OF
DORA LEE GAASKJOLEN,
DECEASED

52Pro.No.16-000003
Hon. Warren G. Johnson

Judgment

This matter came on for trial before the Court, Honorable Warren G. Johnson, presiding on October 15, 2018. The issues have been tried and the Court has rendered its decision and made and entered its Findings of Fact and Conclusions of Law, determining that the Last Will and Testament of Dora Lee Gaaskjolen dated December 18, 2012, and the First Codicil to the Last Will and Testament of Dora Lee Gaaskjolen dated October 24, 2014, were the result of undue influence practiced upon Dora Lee Gaaskjolen by Audrey Lorius. Therefore, it is hereby

ORDERED, ADJUDGED, AND DECREED that that the Last Will and Testament of Dora Lee Gaaskjolen dated December 18, 2012, and the First Codicil to the Last Will and Testament of Dora Lee Gaaskjolen dated October 24, 2014, were the result of undue influence practiced upon Dora Lee Gaaskjolen by Audrey Lorius, and it is further

ORDERED, ADJUDGED, AND DECREED that the Petition filed seeking to admit the December 18, 2012 Will, and the First Codicil to the Will dated October 24, 2014 is denied and this action is dismissed, and it is further

ORDERED, ADJUDGED, AND DECREED that Vicki Penfield have and recover her costs and disbursements against Audrey Lorius in the amount of

Page 1 of 2

FILED

Estate of Dora Lee Gaaskjolen
52PRO16-000003

JAN 03 2019

Judgment

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

\$_____, such costs to be taxed in accordance with law and hereinafter inserted into the Judgment by the Clerk of this Court.

Dated this 3rd day of January, 2019.

BY THE COURT:

Warren G. Johnson
HONORABLE WARREN G. JOHNSON
CIRCUIT COURT JUDGE (RET.)

ATTEST Trish Peck
TRISH PECK, CLERK OF COURTS



FILED

JAN 03 2019

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

Page 2 of 2

Estate of Dora Lee Gaaskjolen
52PRO16-000003

Judgment

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF PERKINS)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

In the Matter of the Estate of DORA LEE GAASKJOLEN, Deceased.	File No. #52PRO16-000003 FINDINGS OF FACT AND CONCLUSIONS OF LAW
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The above matter came on for trial before the court on October 15-19, 2018, at the courtroom of the Perkins County Courthouse, Bison, South Dakota. U.S. Bank Trust National Association SD, Personal Representative of the Estate of Dora Lee Gaaskjolen ("Dora Lee"), appeared by counsel, John K. Nooney, Rapid City, SD. Audrey Lorius ("Audrey"), Will Proponent, appeared personally and by counsel, John Stanton Dorsey, Rapid City, SD. Vicki Penfield ("Vicki"), Will Contestant, appeared by counsel, Michael M. Hickey and Kelsey B. Parker, Rapid City, SD. The Court has considered the evidence presented and has entered its Memorandum Decision. The Court now makes and enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

- 1) Marlin and Dora Lee Gaaskjolen were successful ranchers near Meadow, South Dakota, owning some 3,000 acres of ranch and farm land. They had two daughters, Audrey and Vicki. Audrey had two children, Jeffrey and Shiloh. Vicki had three children, Chad, Shane, and Kayla. In 1990, Marlin and Dora Lee executed wills. Each left their entire estate to the other spouse, and if the other did not survive, the estate was to be divided

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JAN 03 2019

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

equally between Audrey and Vicki. Each named the other to be executor, but in the event the spouse predeceased, Audrey and Vicki were designated as successor executors.

- 2) Vicki and her husband, Bill Penfield ranched near Lemmon, South Dakota, about 30 miles from the Gaaskjolen ranch. In 1998, Vicki was diagnosed with Parkinson's disease. By 2012, she could no longer drive off their ranch and depended on Bill or others to take her places, including her mother's ranch.
- 3) Audrey became a registered nurse in 1991 and was employed as a charge nurse at Fountain Springs nursing home in Rapid City. In 1999, she moved to the ranch to help care for her father, who was receiving kidney dialysis at home. When Marlin's condition worsened, Audrey drove him to Dickinson, North Dakota for treatment. Audrey's husband, Tim, joined her at the Gaaskjolen ranch in 2000. Audrey and Tim purchased a double wide trailer and located it near her parents' house.
- 4) Marlin died in 2003. Audrey remained at the ranch and provided care for Dora Lee, whose health was declining. Dora Lee had hip surgery in 1989, ulcers, skin cancer and other ailments. Additionally, she suffered a mitral valve prolapse in 2005 and received a traumatic brain injury in 2007 when she was kicked by a Longhorn heifer. She was hospitalized for several weeks, followed by weeks of physical therapy. She did not fully recover and suffered from facial aphasia, making it difficult to speak in more than one or two word responses.
- 5) In 2005, Bill Penfield divided the Gaaskjolen ranch into a north half and a south half. The north half had been leased to Tracy Wolff and Arnold Schopp. On April 24, 2008, Dora Lee assigned those leases to Vicki and the following year, Dora Lee leased the property to Bill and Vicki. The term of the lease was from January 1, 2009 to December 31, 2009,

and contained an unrestricted right to sublease the property. Bill and Vicki subleased the land to Wolff and Schopp. The sublease yielded more money than was their rent obligation to Dora Lee. They deposited the excess in a special account for Dora Lee's possible future needs.

- 6) Audrey occupied the south half of the ranch but was not required to pay rent. In exchange for possession of the south half and a monthly paycheck, Audrey provided care for her mother. Dacotah Bank, as Conservator, later valued these benefits to Audrey at \$6,315 per month, or \$76,000 per year.
- 7) Early in 2012, Audrey expressed to Vicki her desire to take over the north half as she needed more grass for her cattle and horses. At about the same time Bill and Vicki were interested in terminating the Schopp/Wolff subleases and subleasing the north half to their daughter and son-in-law, Kayla and Drew.
- 8) Marlin and Dora Lee had made every effort to treat their daughters equally and fairly. When they loaned money to Audrey that she could not repay, they gave sums equal to that amount to Vicki. They carried this tradition to their grandchildren. When the grandchildren would visit, Dora Lee made certain each child's candy bag was equal in kind and quantity. Shane recalled that in 2004 or 2005, he received a \$5,000.00 check from his grandmother. He then learned that one of Audrey's children had defaulted on a \$5,000 loan from Dora Lee, and in order to keep everything equal, she had given a like sum to each of the other grandchildren.
- 9) Marlin and Dora Lee had always had a close and loving relationship with Bill and Vicki. The Penfield family became increasingly concerned about Dora Lee's welfare, the condition of the ranch property and Audrey's history of money mismanagement. Audrey

had authority to write checks on Dora Lee's account, and according to Shane, had arbitrarily given herself raises from time to time. Audrey had a least 30 dogs and at times more than 60 horses and this caused them concerns about overgrazing and liability issues. The cow that had severely injured Dora Lee in 2007, later injured another person, which resulted in a \$100,000.00 insurance settlement. Penfields were concerned about Dora Lee being left alone in the house, while Audrey tended to her livestock. Since 2007 Vicki had been in charge of paying Dora Lee's monthly bills on her behalf, while Audrey was providing continuous personal care. While Audrey claimed, through her counsel, that Dora Lee had plenty of money available for the purchase of additional liability insurance, she failed to appreciate that the animals were hers and not her mothers. Dora Lee's liability arose from her ownership of the land.

- 10) At Vicki's request, Shane Penfield visited with Dora Lee on July 3, 2012, about the possible grant of a power of attorney. During Shane's conversation with Dora Lee it became obvious that his grandmother had no idea what he was talking about, so the power of attorney idea was dropped. During this visit Shane observed that her house smelled of rotten food. There were dirty dishes, and leftover food on the counter and adult diapers on the floor and in the bathroom.
- 11) The following month, on August 10, 2012, Vicki came to the ranch to pay bills. Audrey brought up the lease issue. Audrey's testimony regarding the matter is confusing and conflicting. Audrey said her mother wanted to keep the north half in the family, and wanted to lease it to Audrey, or to Audrey and Wolff. On August 28, 2012, Bill, Kayla and Drew went to visit Dora Lee. Dora Lee said she wanted Audrey to be on the property. Bill in response became upset and left.

- 12) Before this encounter, Audrey prepared a letter, dated August 20th, purportedly signed by Dora Lee, which terminated the lease agreement between Dora Lee, Vicki and Bill. The notice was mailed to Penfields on September 5th. Penfields decided that legal action would be necessary both for Dora Lee's personal welfare and to protect her estate. Vicki contacted Rapid City attorney, Thomas Simmons, who prepared an emergency petition for appointment of temporary conservator. Judge Macy signed the ex parte on September 5, appointing Dacotah Bank as temporary conservator. Penfields did not seek to obtain a future lease of the North half of the ranch.
- 13) Audrey contacted attorney John Nooney to represent Dora Lee. Nooney required a \$10,000.00 retainer. Almost all communications between Nooney, his associate, Marli Shippers, and their client went through Audrey. Dora Lee could only speak in two or three words to answer leading questions and could hardly talk on the phone. While Nooney's letters were addressed to Dora Lee, it was Audrey retrieving and opening the mail, and giving instructions to Nooney. Audrey also testified that she shared with Dora Lee, most if not all of the emails between Audrey and Nooney. On September 17, 2012, Audrey sent to Vicki, Exhibit 67, the so-called "disowning letter". Audrey told Vicki that "[y]ou people remind me of a vulture picking on the bones of an animal before it's dead." Audrey considered the conservatorship to be elder abuse.
- 14) According to Audrey, Dora Lee was upset about the conservatorship, the lease dispute with Vicki and Bill and the fact that Vicki did not come to visit her after the conservatorship was in place. But Audrey's emails made it clear that Vicki was not welcomed at the ranch after the conservatorship was filed. For example, in an email Audrey sent to Vicki, Audrey stated, "[a]s far as I am concerned I have no flesh and

blood sister, after what you have done to your own mother. I'm done with you as family."

Exhibit 67.

- 15) On a visit to the ranch in the fall of 2012, Sarah Penfield noticed that certain family photos of Shane and Kelly's children had been removed from Dora Lee's wall, and possibly some photos of them had been cut from group photos of the grandchildren. She knew that Dora Lee was not physically capable of removing the photos and it was unlikely that she had directed Audrey to do so. This was an obvious effort on Audrey's part to further alienate her mother from Vicki and her family.
- 16) On or about September 15, 2012, Dora Lee signed a letter to Dakotah Bank, requesting that her CD, maturing on September 24, 2012, be cashed in with the money deposited in her checking account. The conservator denied the request in view of the conservatorship. Audrey stated she was attempting to get funds for Nooney's retainer.
- 17) Dora Lee was evaluated by Frank A. Thorngren, M.D., in addition to her various physical problems, he found that she had "moderate to severe memory, orientation, problem solving, and information processing deficits, which are further complicated by her expressive aphasia." He recommended that she undergo a formal neuropsychiatric cognitive evaluation. On October 11, 2012, David A. Brooks, Ph. D., conducted a neuropsychological interview and evaluation. He found her to be "severely impaired from a neuropsychological perspective compared to age and education peers. Her responses are quite delayed and Dora is often unable to spontaneously generate words that she is searching for. It is also difficult to determine what she knows and does not know because of the word substitutions that occur."

- 18) Despite Audrey's claim that her mother was upset and angry about the conservatorship, the conservatorship had little impact on Dora Lee's daily life. She never missed a meal and all of her basic needs were met. Perkins County Sheriff Kelly Serr served Dora Lee at her home on October 29, 2012, with the petition for appointment of permanent conservator and related documents. Though not required to do so, he spent about fifteen minutes attempting to explain the general nature of the conservatorship proceeding in simple terms. He concluded that "she didn't have a clue." She became "teary eyed" when he told her that her family loved her. She did not appear upset or angry, she "pretty much stared straight ahead."
- 19) On November 27, 2012, Lori Casteel visited Dora Lee and conducted an assessment summary. She believed that Audrey was trying to provide appropriate care for her mother but there were some risks that needed to be addressed. She felt that Audrey was isolating Dora Lee from Vicki and recommended scheduled visits between Dora Lee, Vicki and her family. She made various recommendations, some of which were implemented.
- 20) Audrey's testimony was confusing, evasive and contradictory. She was not a credible witness. Audrey testified that her mother told her one day that she wanted to make a new will. This occurred either at lunch or dinner and the statement came "from out of the blue". She said there was only one conversation and that it occurred in late November of 2012. However, in an email to Nooney of October 26, 2012, Audrey wrote that a month and a half earlier her mom had said that she wanted to change her will. She offered multiple dates when this singular conversation allegedly occurred. It is noteworthy that attorneys, Nooney and Schippers met Dora Lee for the first time at her home on October 25, 2012. At that time, Dora Lee made no mention of a desire to change her will.

- 21) Audrey contacted attorney Steve Wild in Hettinger to prepare her mother's will, but he was not interested. Audrey next contacted Lemmon attorney James Elsing on December 4, 2012. Using the information provided by Audrey in an email exchange late in the evening, he prepared a will in which Dora Lee left her entire estate to Audrey and specifically disinherited Vicki, her children and grandchildren. Prior to his arrival at the ranch, Audrey had gone over the will with Dora Lee several times. Elsing met Dora Lee at her home on December 6, 2012. He went over the will with her and discussed other options, such as joint tenancy, gifts and other estate planning options. He was satisfied that she had testamentary capacity and intent, and saw nothing to suggest the presence of undue influence. Dora Lee executed the will on December 6, 2012.
- 22) Nooney was disturbed when he learned Dora Lee had made a new will and felt that more conferences were needed, to assure the will's validity. He had also contacted two Rapid City attorneys about doing a new will but both had declined. Elsing met again with Dora Lee on December 14, 2012. At this time Elsing had prepared a list of questions which he went through with her. He returned on December 18, with an identical version of the will dated December 6, 2012, and another set of questions. Again, satisfied that Dora Lee had testamentary capacity and intent, he allowed her to execute the will. For some reason, Elsing returned to see Dora Lee at her home on January 7, 2013, with a new series of questions, which they went through together. Elsing was apparently attempting to satisfy himself that Dora Lee still retained the necessary testamentary capacity.
- 23) On February 20, 2013, Circuit Court Judge John Bastian conducted a hearing on the petition for permanent conservator. Dora Lee was called as a witness but was mostly unresponsive to questions. She was asked if she was concerned that if Dacotah Bank was

appointed as her conservator, she would be put in a nursing home. She nodded her head and stated, "Yeah". Dr. Thorngren presented his findings. Shortly thereafter, the Court granted the petition and named Dacotah Bank as permanent conservator.

- 24) Attorney Nooney appealed the decision to the South Dakota Supreme Court. Given all of her language and cognitive deficits, it is doubtful that Dora Lee had any meaningful understanding of the appeal decision. Audrey was in charge. After the appeal was concluded, attorney Nooney decided that a codicil would be a good way to reaffirm Dora Lee's testamentary desires and also replace Audrey with a corporate personal representative, to ward off future claims of conflict of interest.
- 25) On May 31, 2013, attorney Shelley Lovrien, on behalf of Dacotah Bank, visited Dora Lee at the ranch. Dora Lee told her that she did not remember signing anything to engage an attorney and didn't know who her attorney was. Lovrien thought that Dora Lee did seem to recognize Mr. Nooney. Regarding her farm, Dora Lee said she wanted one of her daughters to use the ranch but could not articulate which one. She was very troubled by the relationship between her two daughters. She told Mrs. Lovrien that there were changes made to her will but she didn't know what they were. She said the changes were her idea, though she didn't know what attorney had drafted them. Most significantly, Dora Lee thought her children and grandchildren were the beneficiaries of her will.
- 26) The conservatorship appointment was affirmed by a unanimous court on February 26, 2014. Later in 2014, Ms. Schippers contacted Mr. Elsing to draft the codicil Nooney had suggested. Elsing met with Dora Lee on October 24, 2014, reviewed another series of questions with her, and had her sign the codicil. This instrument reaffirmed her

December 2012 testamentary disposition, only changing the named personal representative of her estate to U.S. Bank.

- 27) Between September 2012, and October 2014, attorneys Nooney and Schippers met with Dora Lee only four times. All other communications were with or through Audrey. It is apparent that Dora Lee was the client in a nominal sense. Audrey had no independent financial means to hire her own counsel. Although Dora Lee was adequately represented by Dacotah Bank attorneys and trust officers, they were forbidden by Nooney to meet with Dora Lee unless either Nooney or Schippers was present. While Audrey repeatedly complained that the Conservator was unresponsive and did not meet with Dora Lee until November 20, 2012, it was Audrey who delayed their efforts, at least in part, by prohibiting contact with Dora Lee unless counsel was present.
- 28) In early December, 2012, Dora Lee was diagnosed with cancer. Audrey told the Conservator not to tell Vicki. In January, 2013, Vicki visited her mother at the hospital. She testified that her mother was "tickled to see her" and they told each other that they loved each other. In June Vicki attempted to arrange a visit with her mother. Audrey told her a care giver had to be present. Vicki arranged for a care giver from the hospital to be present. Audrey told her it had to be a caregiver she selected. Dora Lee died at home on March 29, 2016. She was 90 years old.

CONCLUSIONS OF LAW

- 29) Vicki Penfield, as contestant of the will, has the burden of proving that Dora Lee lacked testamentary capacity or intent, undue influence, fraud, duress, mistake, or revocation, at the time Dora Lee executed the December 18, 2012, will and the October 24, 2014 codicil. SDCL 29A-3-407. A person "has a sound mind 'if, without prompting, he is

able to comprehend the nature and extent of his property, the persons who are the natural objects of his bounty and the disposition that he desires to make of such property.” *Estate of Earl W. Long*, 2014 S.D. 26, ¶18 (quoting *In re Estate of Dokken*, 2000 S.D. 9, ¶ 13). Attorney James Elsing and Dr. Manlove believed that Dora Lee possessed testamentary capacity and intent on both occasions. Elsing prepared and presented 3-4 sets of questions and went through them with Dora Lee. This is sufficient proof by a preponderance of the evidence that Dora Lee had testamentary capacity and intent at the relevant times. Clear and convincing evidence is not present and is not required.

- 30) From at least 2007 until her death, Dora Lee and Audrey had a confidential relationship. Audrey was her daily companion and often stayed overnight at her house. Audrey determined who had access to Dora Lee. “A presumption of undue influence arises ‘when there is a confidential relationship between a testator and a beneficiary who actively participates in preparation and execution of the will and unduly profits therefrom.’” *In re Estate of Pringle*, 2008 S.D. 38, ¶ 39 (quoting *Dokken*, 2000 S.D. 9, ¶ 28). Although Audrey was not physically in the room when the wills and codicil were executed, she was instrumental in dealing with the attorneys and suggesting changes to the proposed will. She told Mr. Elsing what her mom wanted and even suggested an incontestability clause. She also arranged for the presence of witnesses on each occasion. “When this presumption arises, the burden shifts to the beneficiary to show [s]he took no unfair advantage of the decedent.” *Dokken*, at ¶28 (internal citation omitted).
- 31) The facts presented before this Court are distinguishably different than the facts presented in *Pringle*, where the South Dakota Supreme Court found that there was no evidence that will proponent kept decedent from her other family. See *Pringle*, at ¶ 41. Unlike in

Pringle, Audrey did in fact act to keep Vicki and her family from contacting Dora Lee. See Exhibit 67.

- 32) Dora Lee was physically and mentally susceptible to undue influence. She depended on Audrey for everything. She could not make phone calls, retrieve her own mail, use a computer, make a meal, or drive a car. It is undisputed that she wanted to remain in her own home, rather than be placed in a nursing home. Audrey was in a position to exert undue influence and she was predisposed to exert undue influence. Further, it was Audrey who contacted all attorneys who Dora Lee had contact with. Unlike in *Pringle* where "[decedent] had independent advice when contemplating her last will and the deeds." *Pringle*, at ¶ 43 (see also *Black v. Gardner*, 320 N.W.2d 153, 159 (S.D. 1982) (reiterating that the presumption of undue influence can be rebutted "by showing that the one allegedly overpersuaded had independent advice that was neither incompetent nor perfunctory") (citing *Davies v. Toms*, 75 S.D. 273, 280 (S.D. 1954))).
- 33) Audrey's feelings toward Vicki, Bill and Shane are well documented in her email messages to attorney Nooney and others. Her anger and animosity toward Bank officials, Kaye DeYoung and Steven Schaeffer is well documented in her own emails. Dora Lee could only meet with Conservator's representatives when one of her attorneys was present. DeYoung and Schaeffer both suspected that Audrey was exercising undue influence upon Dora Lee. Ms. DeYoung, who was a certified elder care specialist and former paralegal, had concerns about the nature of the relationship between Dora Lee and Audrey. Referring to her knowledge of elder care, Ms. DeYoung saw Dora Lee had a compromised health situation. Recognizing Dora Lee was isolated by geographic distance and by her inability to hold meaningful phone conversations. Ms. DeYoung's

concerns were furthered by Audrey's domineering behavior. Ms. DeYoung explained in her testimony that an older person, if they have some cognitive or physical limitations, and are isolated or have only one person basically spending all their time with them, that person's feelings and opinions can easily be impressed upon that person. Eventually that person will think likewise.

- 34) In her September 13, 2012, email to Nooney, Audrey states in part. "The fear I have is that they will get total control of mom's money, land, etc. shove her in a nursing home and I will have to leave the ranch I have sweated, busted my ass over and loved all my life. I want to be buried on this place."
- 35) On December 15th, Audrey emailed trust officer Steven M. Schaeffer, telling him that mom wanted \$30.00 Christmas gift checks mailed to the great grandchildren. She listed all but Shane and Kelly's three children. The December 18, 2012 will and the October 24, 2014, codicil clearly shows the result of undue influence. Audrey stands to inherit about \$3,000,000.00 in real estate, investments and personal property. The will and codicil completely disinherit Vicki and her children. The disposition is totally contrary to the way Dora Lee had lived and treated her daughters and grandchildren. The preponderance of the evidence shows that Audrey Lorius's influence was such as to destroy the free agency of Dora Lee and substitute her will in place of the will of Dora Lee Gaaskjolen.
- 36) Will Proponent, Audrey Lorius, had the burden of going forward, after evidence of a confidential relationship was established, although the burden of proof remains with contestant. Audrey Lorious has failed to rebut the presumption of undue influence.
- 37) The Court has jurisdiction over the subject matter and the parties.

- 38) The Court concludes that the December 18, 2012, will and the October 24, 2014, codicil were the result of undue influence practiced upon Dora Lee by her daughter, Audrey.
- 39) Any Finding of Fact which may be deemed to be a Conclusion of Law and vice versa shall be appropriately incorporated into the Findings of Fact and Conclusions of Law as the case may be.

Let Judgment enter accordingly.

Dated this 3rd day of January, 2019.

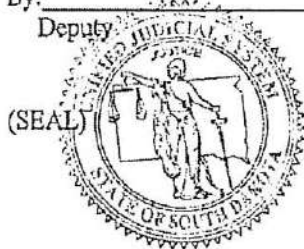
BY THE COURT:

Warren G. Johnson
Warren G. Johnson
Circuit Court Judge (Ret.)

ATTEST:

Trish Peck
Clerk of Courts

By: _____
Deputy



FILED

JAN 03 2019

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By: _____

DORA LEE GAASKJOLEN
December 14, 2012

1. Tell me about your family (husband, children, grandchildren). *Marilyn, Vicki, Audrey*
5 grandkids: Shane, Chad, Kayla,
Jeff, Shylo
2. Where do they live? *North up north*
3. What do they do? *RC, unknown*
4. Tell me about the family visiting you. *Shylo, Jeff, Chad all living in RC*
William & Harold F. Kistner - Christmas cards
Carol Nelson
5. When was last time they visited? *Shylo - last week*
Chad - couple weeks
6. Why did they come to visit? *also Marleen & Jackie*
7. What did you talk about? *Jeff - baby coming*
8. Where are we now? *Home*
9. What day is it? *Fri*
10. Where did you live as a child? *RR*
11. Where did you go to school? *Parkville City, country school, Senior HS*
12. When and where did you meet your husband? *HS - 1 year ahead*
13. Where did you and your husband live? *age 20, grandma's place in Seneca*
Newcastle - Ark. field
Bought ranch from Bertha

14. What did you and your husband do for work?

oil ranch farm

15. Describe the property that you and your husband acquired.

land, cows, horses, car - Toyota
farm machinery

16. Describe the property that you own now.

no cows, no horses, land, 1/2 to Dean Hopper - Fargo
CDs

17. What would you like to do with this property?

Don't Audrey

18. After you are gone, who would you like to have your property?

No grandkids kids

19. Do you want a will to say what happens to your property after you are gone?

yes

20. In your will do you want to state who gets your property?

Audrey
not Vicki

21. Who?

22. What property does that include?

23. Do you want your will give anyone else any property?

No, not grandchildren

24. When did you decide you wanted a new will?

When Vicki & Bill die last summer
to get Kayla on half land - said no.

25. When did you decide who you wanted to have your property when you are gone?

late summer

26. Have you changed your mind about any of these things since then?

No

DORA LEE GAASKJOLEN
December 18, 2012

1. Underline the following items that you own at this time.

Ford pickup

cows and horses

grain elevator in Bison

farm and ranch land 3,000 acres
3,000 acres

investments in Rapid City

house and farm buildings in Perkins County

checking account and CDs with Dacotah Bank Lemmon

farm land in North Dakota

about 75,000

investments with Merrill Lynch

about 450,000

Toyota car one

savings account in Bison

household furniture, goods and personal effects

2. After each of the items above that you own, state the approximate amount of each (where applicable).

3. Underline the names of the following people who naturally inherit from your estate if you do not have a will, assuming all of them survive you.

Shane Penfield

Vicki Penfield

Marleen Holtgard

Tim Lorus

Shylo Lorus

~~Audrey Lorus~~

Bill Penfield

Chad Penfield

Renita VanVactor

4. Are the names you underlined above the names of your children? Yes or no. Underline answer.

5. Do you have any other children in addition to those you identified above? Yes or no. Underline your answer.

6. Do you want a will? Yes or no. Underline answer.

7. If you make and sign a will now, do you want to reserve the right to change the will at any time you wish? Yes or no. Underline answer.

8. Do you want your will to describe who gets your property? Yes or no. Underline answer.

9. Circle the name or names of the person or persons listed above that you want to get your property upon your decease.

10. Do you want anyone else not named above to get your property upon your decease? Yes or no. Underline answer.

11. Do you want the person or persons whose name or names you have circled above to get all or just some of your property upon your decease? Underline answer of "all" or "just some."

12. About when did you decide who should receive your property upon you decease? Write month and year.

September 2012

September, 2012

13. Have you ever become undecided or doubtful or changed your mind about who should receive your property since that time? Yes or no. Underline answer.

14. Has anyone ever told you what you should do with your property upon your decease? Yes or no Underline answer.

15. Has anyone ever told you who you should give your property to upon your decease? Yes or no Underline answer.

16. Have you been completely free to decide on your own whether or not you want a will? Yes or no. Underline answer.

17. Have you been completely free to decide on your own who shall get your property upon your decease? Yes or no. Underline answer.

Dora Lee Gaaskjolen
Dora Lee Gaaskjolen

DORA LEE GAASKJOLEN

JANUARY 7, 2013

Vicki and Audrey
A. Write the names of your children:

Michael & Elizabeth
B. Do you have grandchildren from each of your children? Yes or No.
(Underline answer.)

C. Assuming all of your children and grandchildren survive you, write the names of the children and grandchildren that you want to inherit your estate.

Longson Audrey
1 person - Audrey
D. Which of the following items do you currently own? Underline "Yes" or "No" as appropriate.

checking account at Bank Of The West in Lemmon?

Yes or No

investments with Franklin Templeton Funds? Yes or No

cash investments such as CDs with Bank Of The West in Lemmon?

Yes or No *about 450,000*

investments with Merrill Lynch? Yes or No *70,000*

cash investments such as CDs with Dacotah Bank Lemmon in

Lemmon? Yes or *about 75,000*

checking account in Rapid City Bank? Yes or No

investments with Investment Centers Of America? Yes or No

checking account in Dacotah Bank Lemmon in Lemmon?

Yes or No *about 1,000*

cash investments such as CDs with Rapid City Bank?

Yes or No

E. After each of the above items that you own, write the approximate amount.

F. Which of the following items do you currently own? Underline "Yes" or "No" as appropriate. After the items that you own, write the approximate amount or quantity as applicable.

household furniture and appliances? Yes or No

hay and grain? Yes or No

farm and ranch land in Perkins County? Yes or No

horses? Yes or No

house and farm buildings in Corson County? Yes or No

ranch land in Corson County? Yes or No

cows? Yes or No

house and farm buildings in Perkins County? Yes or No

Chevrolet car? Yes or No

Ford car? Yes or No

Toyota car? Yes or No

Ford pickup? Yes or No

G. You have made a will, do you understand that you can change your will at any time that you want? Yes or No

H. In your will you give all of your estate to Audrey. Do you want to change that and give some of your estate to Vicki? Yes or No

I. Is it your decision made by yourself to give your entire estate to Audrey and none of your estate to Vicki? Yes or No

J. Did Audrey pressure you, or encourage you, or otherwise coerce you into giving your estate to her by your will? Yes or No

K. Are you afraid that if you didn't make a will giving Audrey your estate that Audrey would not take care of you? Yes or No

L. Do you want to change your will and give some of your estate to Vicki? Yes or No

M. Again, do you know that you have the right to change your will whenever you wish? Yes or No

Dora Lee Gaaskjolen
Dora Lee Gaaskjolen

Asked Audrey to leave while discussing things with Don Lee. Audrey left to feed the ducks and do some other work outside on the farm.

DORA LEE GAASKJOLEN

AMENDING YOUR WILL

OCTOBER 16, 2014 : 2pm

1. Do you know your family member? *Yes*

Who are they?

*Audrey
Vicky & Audrey*

2. If you would not have a will, who would inherit your estate?

Vicky & Audrey

3. Do you know what property you own?

List the major items of property that you own:

*Land
Money in Dakota Bank*

DATED 10/16/2014

PAGE 2 OF 2

4. Who do you want to inherit your estate? Audrey
5. Is there anyone who you do not want to inherit your estate? Yes
Who? Vicky
6. Do you want a will to direct who inherits your estate? Yes
7. Does your current will give your property to the people you want to inherit your estate? Yes
8. Do you want to change your will to give your estate to other people. leave it the same.
9. Your current will gives all of your estate to your daughter Audrey Lorus. Do you want to change this or keep it the same? Yes
10. Your current will does not give any of your estate to your daughter Vicki Penfield. Do you want to change this and give some of your estate to Vicki?

All to Audrey.


Dora Lee Gaaskjolen

Elsing-47

DORA LEE GAASKJOLEN

AMENDING YOUR WILL

OCTOBER 24, 2014 - 10am

After each question, underline, circle or mark the answer.

1. Do you have a family? Yes No

Yes

2. How many children do you have? One Two
Three Four Seven Ten

Two

3. What are the names of your children?

Mary Wolff Rhonda Lensegrav ~~Vicki Penfield~~
Lillian Flatmoe Carol Nelson Mary Ellen Fried
Audrey Lorius

4. Do you have any grandchildren? Yes No

Yes

5. Is there anyone else who is a member of your
immediate family? Yes No

No

6. Do you own any property? Yes No

Yes

7. What kinds of property do you own? Cows Grain

~~Land~~ ~~Car~~ Hay ~~Cash & Investments~~ Horses
~~Farm Machinery~~

8. How may cows do you own? None 60 225 600

9. How much grain to you own? None 4,000 bushels
of corn 4,000 bushels of wheat 100,000 pounds of
sunflowers Other

10. How much land do you own? None 570 acres
1,000 acres 1,400 acres 3,000 acres 4,050 acres

11. What kinds of cars do you own? None Chevrolet
Toyota Ford Buick Honda Hunda Jeep

12. How much hay do you own? None 45 bales
45 stacks 110 bales 600 bales Other

13. What is the total amount of your cash and investments?
Zero \$2,000 \$75,000 \$300,000 \$1,600,000

14. Where are your cash and investments located?
Here at home Bank Of Lemmon First National Bank
Dacotah Bank Dakota Plains Federal Credit Union

15. How many horses do you own? None 4 9 15

16. What farm machinery do you own? None harrow
corn planter combine tractor bailer plow

17. After you die, who do you want to have your property?

Carol Nelson Vicki Penfield Lillian Flatmoe

Mary Ellen Fried James Elsing Audrey Lorus

Mary Wolff Kelly Serr

18. Do you want Audrey Lorus to inherit your estate after you die?

Yes No
No

19. Do you want Vicki Penfield to inherit your estate after you die?

Yes No

20. Do you want your Will to state who inherits your estate? Yes No

← Dora Lee accidentally marked on "No" after underlining "Yes". I told her to cross off "No" so there would be no mistake as to her answer. JRE

21. In your Will dated December 18, 2012 you give all your estate to Audrey Lorus if she survives you by 30 days, and none of your estate to Vicki Penfield. Do you want to change that? Yes No

22. Today you are amending your Will to nominate U S Bank Trust National Association, S D of Rapid City, South

Dakota as the personal representative of your estate. Do you want to keep the other parts of your will the same?

Yes No

Yes

23. Do you want your Will to continue to give all your property to Audrey Lorus if she survives you by 30 days, and none of your property to Vicki Penfield? Yes No

Yes

24. If Audrey Lorus does not survive you by 30 days, do you want all of your property to go to Audrey's children?

Yes No

Yes

25. If neither Vicki Penfield nor Audrey Lorus survive you by 30 days, do you want any of your property to go to Vicki's children? Yes No

No

26. Are you amending your Will because you want to?

Yes No

Yes

27. Is anyone forcing or coercing you into changing your will? Yes No

No

28. Do you feel free to say "No" to making any changes in your Will? Yes No

Yes

29. Has Audrey Lorus told you what you should do with your property after you die? Yes No

No


30. Has Audrey Lorus told you what you should have in your will? Yes No

31. Are you giving all of your estate to Audrey Lorus after you die because that is what you genuinely want to do?

Yes No

32. Are you not giving any of your estate to Vicki Penfield after you die because that is what you genuinely want to do? Yes No

33. Do you understand that you can revoke or cancel your will whenever you want to? Yes No



Dora Lee Gaaskjolen

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTATE OF
DORA LEE GAASKJOLEN,

Appeal # 28884

Deceased.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
PERKINS COUNTY, SOUTH DAKOTA

The Honorable Warren G. Johnson
Circuit Court Judge, Retired

Notice of Appeal filed on January 30, 2019

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PRELIMINARY STATEMENT

In this Brief, references to the Settled Record are cited as “SR” followed by the appropriate page number. References to Appellant’s Appendix are cited as “App.” followed by the appropriate page number. Appellant Audrey Lorus is referenced as “Audrey”, Dora Lee Gaaskjolen is referenced as “Dora Lee”, and Appellee Vicki Penfield is referenced as “Vicki”.

JURISDICTIONAL STATEMENT

On January 3, 2019, the Circuit Court, the Honorable Warren G. Johnson, issued Findings of Fact and Conclusions of Law and a Judgment. App. 013-028. Notice of Entry of Order was served on January 3, 2019. SR 3165-82. Audrey filed a Notice of Appeal on January 30, 2019. SR 3228-29.

STATEMENT OF LEGAL ISSUES

- 1) Whether the circuit court erred in finding that Audrey failed to rebut the presumption of undue influence?**

The Circuit Court correctly concluded that a presumption of influence arose given Audrey’s confidential relationship with Dora Lee and Audrey’s active involvement in the drafting of the December 18, 2012 Will and the October 24, 2014 Codicil. Audrey failed to rebut that presumption by establishing that Dora Lee received independent legal advice when contemplating her Will and Codicil.

Most Relevant Authority:

In re Est. of Duebendorfer, 2006 SD 79, 721 N.W.2d 438.

In re Estate of Pringle, 2008 SD 38, 751 N.W.2d 277.

Davies v. Tom, 63 N.W.2d 406 (SD 1954).

Matter of Est. of Borsch, 353 N.W.2d 346 (SD 1984).

2) Whether the trial court failed to consider the controlling motives of Dora Lee, the decedent, prior to, and through, execution of the Will and Codicil?

The Circuit Court correctly concluded that the October 24, 2014 Codicil was a product of undue influence practiced upon Dora Lee by Audrey. Dora Lee's controlling motivations for disinheriting Vicki were impressed upon her by Audrey.

Most Relevant Authority:

Estate of Dokken, 2000 SD 9, 604 N.W.2d 487.

Matter of Est. of Borsch, 353 N.W.2d 346 (SD 1984).

Matter of Est. of Elliott, 537 N.W.2d 660 (SD 1995).

Davies v. Toms, 63 N.W.2d 406 (SD 1954).

3) Whether the trial court erred in not applying the doctrine of reaffirmation as to the Codicil?

The Circuit Court correctly concluded that the October 2014 Codicil was a result of undue influence practiced upon Dora Lee by Audrey; therefore, the doctrine of reaffirmation could not cure the taint of the December 2012 Will.

Most Relevant Authority:

Matter of Est. of Elliott, 537 N.W.2d 660 (SD 1995).

Davies v. Toms, 63 N.W.2d 406 (SD 1954).

Estate of Dokken, 2000 SD 9, 604 N.W.2d 487.

Matter of Est. of Borsch, 353 N.W.2d 346 (SD 1984).

STATEMENT OF THE CASE

This is an appeal from the Fourth Judicial Circuit, Perkins County, Judge Warren G. Johnson, presiding. Dora Lee died on March 29, 2016. On May 10, 2016, U.S. Bank Trust National Association SD (“U.S. Bank”) filed a *Petition for Formal Probate* of a Will dated December 18, 2012, and Codicil dated October 24, 2014. The Will offered for probate completely disinherited one of Dora Lee’s daughters, Vicki, and gave everything to her other daughter, Audrey. Vicki filed an objection, contesting the validity of the Will and Codicil based on testamentary capacity and undue influence by Audrey. The parties stipulated to appointment of U.S. Bank as the personal representative during the pendency of the objection.

After a five-day court trial from October 15 to October 19, 2018, the Honorable Warren G. Johnson issued a Memorandum Decision on December 4, 2018. Judge Johnson concluded that while Dora Lee did not lack testamentary capacity, she was unduly influenced by Audrey. Specifically, the circuit court held that a presumption of undue influence arose due to Audrey’s confidential relationship with Dora Lee,

Audrey failed to rebut that presumption, and that Vicki carried her burden of establishing undue influence. Consequently, the circuit court held that the December 2012 Will and October 2014 Codicil were invalid. App. 001-012. On January 3, 2019, the court issued a Judgment and Findings of Fact and Conclusions of Law. App. 013-028. From this decision, Audrey now appeals. SR 3228-29.

STATEMENT OF THE FACTS

1. Give me three reasons.

In early September 2012, Audrey learned that her nephew, Shane Penfield (“Shane”), filed for an *ex parte* temporary conservatorship for his 87-year-old grandmother, Dora Lee. SR 2510-16 (Ex.66). As detailed in the *Petition*, Shane had concerns about Dora Lee’s overall health, the care she was receiving from Audrey, her ability to understand what was going on around her, Audrey’s improper influence over Dora Lee, and the manner in which Audrey was operating and caring for Dora Lee’s ranch. *Id.*

Viewing Shane’s actions as a personal attack, Audrey began contacting attorneys to contest the conservatorship. In an email to attorney John Nooney (“Nooney”), Audrey detailed her disdain for her sister – Shane’s mother – Vicki Penfield. SR 2387-97 (Ex.37). In the

email, Audrey explains there are three primary reasons she hates her sister: 1) the conservatorship, 2) Vicki did not visit Dora Lee enough, and 3) a lease dispute between the sisters. *Id.* Less than 90 days later, Dora Lee disinherited Vicki from her estate, purportedly for these same three reasons. SR 1817-19 (Ex.1). Audrey conveyed her hatred directly to Vicki *via* an email dated September 17, 2012:

How you could do this is beyond me and I don't know how any of three of you can sleep at night. Live with yourselves you three knowing what you have done to mom and May God Have Mercy On Your Black, Cold Souls when it comes time to enter the pearly gates.

SR 2517-21 (Ex.67).

To more fully understand Audrey's feelings about her sister, it is important to explain the backstory.

2. Audrey moves to the ranch.

Dora Lee and Marlin Gaaskjolen owned a ranch near Meadow, South Dakota, which consisted of approximately 3,000 acres of ranch land.¹ SR 3423; App. 001. The Gaaskjolens raised their two daughters, Vicki and Audrey, on the family ranch in the 1940's and 50's. App. 001. When the girls left the home, they both married and had children. *Id.*

¹ The ranch has been divided and referred to as the "North Half" and the "South Half", each containing approximately 1,500 acres. SR 3426; App. 002.

Vicki married Bill Penfield (“Bill”) and they began farming and ranching just a few miles from the Gaaskjolen ranch. *Id.* In 1999, Audrey moved back to the family ranch to help care for Marlin. SR 3601; App. 002. In exchange, Audrey lived on the ranch and ran cattle on the property at no cost. *Id.* After Marlin’s death, Audrey continued to acquire more animals and use more of Dora Lee’s ranch. SR 3613-14.

In May of 2007, Dora Lee was trampled by one of Audrey’s longhorn cows. SR 3427; App. 002. Dora Lee sustained a traumatic brain injury and underwent brain surgery to remove a subdural hematoma a few weeks later. SR 3455. Around this time, Dora Lee also lost the ability to speak fluently, a condition known as “expressive aphasia”. SR 3428. Dora Lee’s primary form of communication was through head shakes or nods, or mumbling words, responding with “yes” or “no”. SR 3854, 3448; App. 002. Communication was further exacerbated by her tendency to use incorrect or substitute words when she did speak. SR 2533-36 (Ex.70).

After returning home from the hospital, Audrey, a Registered Nurse, began providing 24/7 care for Dora Lee. SR 3894. Audrey prepared meals, assisted Dora Lee with baths and toileting, helped get Dora Lee

dressed, transported Dora Lee to appointments, and provided any other care Dora Lee needed. SR 3430, 2028-39 (Ex.6). With a few exceptions, Dora Lee could not do anything without the assistance of Audrey. *Id.*

In exchange for caring for Dora Lee, Audrey started paying herself (from Dora Lee's account) a monthly wage. SR 3628. Audrey arbitrarily increased her wages over the years. SR 3440. At the time of Dora Lee's death, Audrey was being paid \$2,500 a month. SR 3628-29. In addition to the wages, Audrey was able to use the entire South Half of the ranch at no cost, and live on the ranch rent-free – a benefit to Audrey valued at over \$75,000 per year. SR 3979; App. 003. While Audrey provided in-home care for Dora Lee, Vicki was responsible for managing Dora Lee's finances. SR 3453-54. Vicki would come to Dora Lee's house at least once a month to pay bills and manage Dora Lee's affairs. *Id.* Due to Parkinson's disease, Vicki could not drive and relied on her husband, Bill, to make visits to see Dora Lee. SR 40.

Prior to the longhorn attack, Dora Lee told Vicki that she wanted Vicki and Bill to use the North Half of the property as "it was only no more than fair that we get part of it to use too any way we wanted," just as Audrey was using the South Half of the property. SR 4073. So, Dora Lee assigned her lease interest in the North Half to Vicki,

allowing Vicki to take over as lessor of the property.² SR 2069 (Ex.15); App. 002. In 2009, Vicki and Dora Lee entered into a lease, giving Vicki use of the North Half. SR 2044-47 (Ex.9). Then, Vicki and Bill sublet the North Half to Arnie Schopp and Tracy Wolff. SR 4074, 2065-68 (Ex.14), 2504-07 (Ex.64). Vicki and Bill kept the profit from the subleases in an account for Dora Lee's future needs. SR 3434; App. 002. Importantly, the lease between Vicki and Dora Lee provided, "SUBLEASE . . . The Lessee shall have the *unequivocal right to sublease the Property without the consent of the Owner.*" SR 2044-47 (Ex.9) (emphasis added).

3. The decline of Dora Lee's health in 2012.

Dora Lee's health continued to decline in 2012. SR 4074-75. In addition to the brain injury and expressive aphasia, Dora Lee suffered from severe dementia, rheumatoid arthritis, chronic atrial fibrillation, and valvular heart disease. SR 1902-38 (Ex.3). Concerned about Dora Lee's deteriorating mental³ and physical condition, Vicki and Audrey asked Shane if he would prepare a Power of Attorney for Dora Lee. SR 3436. On July 3, 2012, Shane sat down with Dora Lee to discuss a

² The North Half was being leased by Arnold Schopp and Tracy Wolff.

³ Audrey had concerns that Dora Lee was showing signs of Alzheimer's. SR 3436.

Power of Attorney. SR 3437. Dora Lee did not understand what Shane was explaining, and could not give any response. SR 3437, 3445. As a result, Shane did not feel comfortable proceeding with a Power of Attorney. SR 3437; App. 004.

Not only was Shane concerned about Dora Lee's physical and mental condition, but he was also concerned about Dora Lee's living conditions and the amount of time Dora Lee was being left unattended at home, while Audrey was out caring for all of her animals. SR 3436-38, 2510-16 (Ex.66); App. 004.

4. Audrey's mission to obtain the North Half.

As Audrey's animal herd began to grow, Audrey became determined to get control of the North Half of the property. Audrey complained to Vicki that "family" should be using the North Half, not Arnie and Tracy. SR 4076-77. At the time, Kayla, Vicki's daughter, and her husband (Drew) were looking for some land to lease. SR 4077. Vicki thought Kayla was a logical choice, given Audrey's recommendation that family use the land. *Id.* Bill approached Kayla about the idea, but Kayla was very apprehensive about leasing the property. SR 4123-24.

Despite the unequivocal ability to sublease the North Half to whomever they wanted, Vicki and Bill ran the idea by Dora Lee on August 10, 2012. SR 4078; *See* SR 2044-47 (Ex.9); App. 004. Dora Lee did not object, but Bill encouraged her to talk to Audrey about the idea. SR 4078. Apparently dissatisfied with the prospect of her niece subleasing the North Half, Audrey drafted a termination of lease between Dora Lee and Vicki for Dora Lee's signature on August 20, 2012. SR 2508-09 (Ex.65).

On August 28, 2012, Kayla, Drew, and Bill went over to Dora Lee's house for a visit. SR 4079. Audrey gleefully welcomed the visitors by declaring that Kayla and Drew would not be leasing the North Half, and that Dora Lee was terminating the lease with Vicki and Bill. SR 4125-32. Although no other grandchild was ranching at the time, Audrey said it would not be fair to the other grandchildren to allow Kayla to use the North Half. SR 3441-42. During the meeting, it became clear that Audrey had been coaching and manipulating Dora Lee. SR 4125-32. Kayla recalled, "my perception was it seemed like it had been rehearsed. Like they had done – you know, gone over this before." SR 4126.

Due to this, along with other serious concerns about Dora Lee, Shane, Vicki, and Bill sought to obtain a conservatorship for Dora Lee to protect her and her assets.⁴

5. Audrey's fight against the conservatorship.

In early September 2012, Audrey learned about the temporary conservatorship. App. 004. Determined to fight the conservatorship, Audrey contacted the law firm of Nooney & Solay, LLP (“Nooney & Solay”).⁵ On September 13, 2012, Audrey wrote to attorney John Nooney (“Nooney”), detailing her disgust towards her sister and her ultimate fear:

The fear I have is that they will get total control of mom's money, land etc. shove her in a nursing home and I will have to leave the ranch I have sweated, busted my ass over and loved all my life. I want to be buried on this place.

SR 2387-97 (Ex.37) (emphasis added). Just two days later, Audrey told Nooney to instruct the Penfields not to visit Dora Lee. SR 2780 (Ex.155).

⁴ A more detailed factual background of the conservatorship is found in *In re Conservatorship of Gaaskjolen*, 2014 SD 10, 844 N.W.2d 99.

⁵ Audrey requested both Dora Lee and Audrey be named in the suit and asked about the possibility of countersuing the Penfield's for “elderly mental abuse” because they filed for the conservatorship. SR 2768-69 (Ex.152); SR 3702-03. Audrey did not have the money to pay for a lawyer, so she attempted to cash one of Dora Lee's CD's to pay Nooney & Solay's retainer. App. 005; SR 2522-23 (Ex.68).

Mom told me at the dinner table that she no longer wants Vicki, Bill and Shane to come down here. Once you are retained I think it is a good idea to express this to them at least until this is all settled etc. as they would only stress her out more.

Id. (emphasis added). Audrey also sent a hateful message to Vicki, disowning Vicki as her sister. SR 2517-21 (Ex.67).

6. Dora Lee's mental and physical health evaluations.

As part of the conservatorship matter, Dora Lee underwent various health assessments. Lori K. Casteel, RN, CSA, CCP, CCM, a Professional Geriatric Care Manager, went to Dora Lee's house to complete an evaluation on November 27, 2012. SR 2028-39 (Ex.6). Her report detailed serious concerns about Audrey alienating Dora Lee, Audrey isolating Dora Lee from Vicki, and the need for Vicki to be able to visit her mom. *Id.* Dora Lee "became teary" and "sad" when Audrey spoke about Vicki not visiting. *Id.* "Dora Lee is isolated from one of her children and she is *saddened* by this." *Id.* (emphasis added).

On October 1, 2012, Dr. Frank Thorngren, MD, evaluated Dora Lee. SR 1902-38 (Ex.3). He reported,

Dora Lee suffers from multiple medical problems causing a variety of limitations and incapacitations. She suffers from rheumatoid arthritis, chronic atrial fibrillation with a pacemaker in place, and valvular heart disease, status post mitral valve replacement. . . . She suffers from a

traumatic brain injury sustained when she was injured by a cow in 2007 and developed an intracranial hemorrhage which required surgical evacuation. She was seen for a formal cognitive evaluation . . . *She suffers from moderate to severe memory, orientation, problem solving, and information processing deficits which are further complicated by her expressive aphasia. . . .*

Id. at 1909 (emphasis added); App. 005-006.

On October 11, 2012, Dr. Brooks, Ph.D., ABPP (RP), ABN, FACE, FACAPP, a Licensed Clinical Neuropsychologist, conducted a clinical interview and evaluation on Dora Lee. SR 2533-36 (Ex.70). He reported that Dora Lee has “significant expressive language deficits” secondary to traumatic brain injury as “Dora is often unable to find the words she wants” often times and is not verbally fluent. *Id.* The report continued,

MENTAL STATUS OBSERVATIONS: . . . Responses were often delayed and not fluent. Dora was observed to have much trouble finding the responses she wanted. *Secondary to her dense verbal aphagia (sic), she sometimes responded with nonwords or with word substitutions, making it unclear as to whether she actually knew the answer to the question or not. . . .* She was not able to respond adequately well to many other orientation questions.

Id. at 2534-35. He concluded,

[b]ased on the findings today which reflect severe expressive language deficits . . . *this woman appears to be very impaired from a neuropsychological perspective. . . . Her responses are quite delayed and Dora is often unable to spontaneously generate words that she is searching for. It*

is also very difficult to determine what she knows and does not know because of the word substitutions that occur.

Id. (emphasis added). Further illustration of Dora Lee’s limitations is seen in her “testimony” from the February 6, 2013, conservatorship hearing. SR 1956-62 (Ex.4); *See also Gaaskjolen*, 2014 SD 10 at ¶6, 844 N.W.2d at 100.

Despite Audrey’s greatest efforts to fight the conservatorship, this Court unanimously affirmed the appointment of Dacotah Bank as Dora Lee’s permanent conservator on February 26, 2014. *Gaaskjolen*, 2014 SD 10, 844 N.W.2d 99.

7. Audrey’s mission to change Dora Lee’s Will.

On October 25, 2012, attorneys Marli Schippers (“Schippers”) and Nooney traveled to Meadow to meet with Audrey and Dora Lee. SR 2147-70 (Ex.24), 2320. Neither Nooney nor Schippers have any recollection of Dora Lee asking about changing her Will. SR 4628, 4709-10. Despite having the opportunity to discuss changing her Will with *her* attorneys, Dora Lee *said nothing*. *Id.* The next day, however, Audrey sent an email to Nooney, inquiring about changing Dora Lee’s Will.

I forgot to have you look at mom’s will when you were here.
... I do want to be mom’s Power of Attorney or whatever I

can for her. *She does not want the other side to get anything from her. She is very adamant about this. . . . I also forgot to tell you that about 1 ½ months ago she told me she wants to change her will.* I don't know if she is able to do this but I did mention it to Marli and she said that she thinks she needs to wait on it.

SR 2409-10 (Ex.42).

Five or six weeks later on December 4, 2012, Audrey called Kaye DeYoung at Dacotah Bank to inform her that Dora Lee had a colonoscopy and the oncologist spotted cancer. SR 3766, SR 2584-85 (Ex.87). Audrey instructed Kaye, “don't tell Vicki about cancer per mom's wishes . . . Vicki has not called or seen Mom since August '12 . . . Not part of mom's life for many years. . . . My sister doesn't give a crap about her.” *Id.* Audrey told Kaye that she was going to find someone to change Dora Lee's Will. *Id.* And she did.

That same day, Audrey contacted attorney James Elsing (“Elsing”) and asked him to draft a Will for Dora Lee, completely disinheriting Vicki. SR 4164; App. 007. Audrey and Elsing spoke for 1.7 hours. SR 1808 (Ex.1). During that conversation, Elsing learned that Audrey disliked Vicki because of: (1) the lease issue on the North Half, (2) the conservatorship, and (3) the fact that Vicki did not visit enough. SR 4373.

Thereafter, without meeting or speaking to Dora Lee, and based solely upon his discussion with Audrey, Elsing prepared a new Will for Dora Lee, disinheriting Vicki (and her issue), and emailed it to Audrey for review, comment, and edit. SR 1809 (Ex.1). He said,

It is very important there be no mistakes in the Will, or the parties contesting the Will (documents) will point to the errors and claim (legitimately or not) that the errors or mistakes prove that Dora Lee was not of sound mind or she would have seen the mistakes and had them corrected.

Id. Audrey made various changes to the Will, and said, “Otherwise I thought it sounded good. If I think of anything else I will email you or call you okay?” *Id.* Just a short while later, Audrey emailed Elsing again,

I just remembered something someone had told me that there was a clause a person could put in a will that if anyone contests a will something to the effect that it cannot be done. Is that true? I can’t remember who it was but somebody had that in their will. Just wondering. Thanks again!

Id.

Elsing assured Audrey that the way the Will was drafted will “drive[] home the point that Dora Lee doesn’t want anything to go to that branch of the family.” SR 1810 (Ex.1). Audrey responded, “*LOL again I just thought boy if you do the will it will really piss them off.* Maybe in a way it’s a good thing.” *Id.* (emphasis added).

Two days later, Elsing traveled to the ranch and Dora Lee executed the Will. SR 1817-19 (Ex.1). Audrey arranged witnesses to come to the house so that Dora Lee could execute the Will. SR 4404. During the meeting, Elsing went through the Will with Dora Lee, and explained other options Dora Lee had. SR 4169-70.

After the Will was signed, Elsing sent Audrey an email indicating, “If the conservatorship is eliminated, accomplishing the estate planning items *we discussed could literally amount to several hundred thousand dollars difference to you.*” SR 1811 (Ex.1) (emphasis added). Audrey responded,

If the conservator thing goes in mom’s favor. We will need you to help us get it all settled like it should. You know things we can do to save mom’s money and items from going to the wrong side that I have no clue about so if you are willing we sure could use you on our side.

SR 1812 (Ex.1).

A few days later, Schippers spoke with Audrey and learned about the manner in which the new Will was drafted and executed. SR 4716.

The attorneys at Nooney & Solay harbored serious concerns about whether the Will would be valid, and sought new counsel for Dora Lee. SR 4591-92; App. 007. On December 11, 2012, Schippers called McLean Thompson-Kerver (“Thompson-Kerver”), an attorney in Rapid City, to

discuss the possibility of drafting a new Will. SR 1998 (Ex.5). On the same date, Nooney had a phone conference with Thompson-Kerver and explained the following: Kurt Solay (one of Nooney's law partners) believed Dora Lee had testamentary capacity, Dora Lee had two children, Dora Lee lived in Meadow, South Dakota, and owned 3,000 acres of land, a temporary conservatorship was obtained *ex parte*, and Dora Lee wanted to disinherit Vicki. SR 4672-73, SR 1998-2027 (Ex.5). Neither Nooney nor Schippers disclosed to Thompson-Kerver that Dora Lee had gone through multiple medical evaluations; such information Thompson-Kerver would have found valuable and necessary. SR 4681.

Audrey drove Dora Lee to Rapid City to meet with Thompson-Kerver on December 11, 2012. SR 1998-2027 (Ex.5). Thompson-Kerver had to "prod" answers out of Dora Lee based on the information she learned from Nooney. SR 4673. Thompson-Kerver administered a *Short Portable Mental Status Questionnaire*; where Dora Lee scored, *at best*, as having "moderate cognitive impairment." SR 2484 (Ex.59). Thompson-Kerver's notes reflect that Dora Lee thought she had three children: Vicki, Audrey, and Shirley, which was incorrect. SR 4667. After discussing the matter with the partners at her firm, Thompson-

Kerver declined to prepare Dora Lee's estate planning documents. SR 2469-70 (Ex.49).

In an effort to get a Will that would "hold up" in Court, the lawyers at Nooney & Solay recommended Elsing meet with Dora Lee on multiple occasions. SR 1813 (Ex.1). Audrey wrote to Elsing on December 17, 2012:

I talked with mom's lawyer in RC and they said that *as long as you have seen mom on 2 or 3 different times that she would be able to sign the will again tomorrow and it would stand up in court better.* They are saying that beings I was the one to call and tell that mom wanted to change her will that that can be grounds in court. Nobody understands that mom doesn't dial the telephone anymore and hasn't for several years. She tells me what she wants and I get it done for her. But they are saying that beings it wasn't mom that told you on the phone etc. that she wanted to change her will that there might be some problems with it. *But now that you will have seen mom more times actually three tomorrow it should be okay. But I can't be around when you talk to mom tomorrow. That way they can't say I was changing her mind while she was talking about her will to you etc. Thanks just wanted to let you know.* They said there was nothing wrong with the way the will was written just that you needed to see her more than one time beings she is an elderly person, etc. so that it stands up in court better.

Id. (emphasis added).

Just like before, Elsing did exactly what Audrey told him to do. Elsing met with Dora Lee on December 14, 2012, December 18, 2012,

and January 7, 2013. SR 1802 (Ex.1). During each meeting, Elsing had Dora Lee respond to questions on a pre-made questionnaire. App. 029-036. On December 18, 2012, Dora Lee executed an identical version (with the exception of the date) of the December 6, 2012 Will, disinheriting Vicki. SR 1862-64 (Ex.1). Again, Audrey coordinated with Elsing and the witnesses to set up the execution of the Will. SR 4405. This is the Will that was offered for probate on May 13, 2016. SR 23-25.

8. Execution of the Codicil in 2014.

On August 18, 2014, Schippers suggested to Elsing that “Dora Lee consider appointing someone other than Audrey to serve as personal representative of the estate to take the pressure and allegations of conflicts of interest off the shoulders of Audrey in probating the will.” SR 1835 (Ex.1). Elsing’s hand-written notes provide, “She and John Nooney thought it best that an independent PR be apptd. Recommended Jeff Denison.” SR 1837 (Ex.1). Again, following the recommendation of Nooney & Solay, Elsing drafted the First Codicil to the Will of Dora Lee Gaaskjolen, naming US Bank as the personal representative. SR 1865-66 (Ex.1).

Elsing's billing records reflect, "10/15/14 call Audrey Lorus and explained it may be better to have a professional service for the personal representative to handle any difficult questions or challenges that may arise in handling Dora Lee's estate, and to avoid allegations of self-serving actions." SR 1835 (Ex.1). Again, Elsing spoke with Audrey about her approval of the Codicil before even speaking with Dora Lee. SR 4725-26. Dora Lee executed the Codicil by merely marking an "X" where her signature should have been on October 24, 2014. SR 1865-66 (Ex.1). Audrey set up the witnesses for the execution of the Codicil and arranged a time for Elsing to come out to the ranch. SR 4405.

In the months before and after Dora Lee executed the Codicil, she met with various representatives from Dacotah Bank (conservator). During the meetings, Dora Lee indicated that she did not know who her attorneys were; she knew changes had been made to her Will but she did not know what they were; and Dora Lee believed that her daughters and grandchildren were beneficiaries under her Will. *See* SR 2557-58 (Ex.78), 2559-60 (Ex.79), 3055-63 (Ex.170). Dora Lee passed away on March 29, 2016 at 90 years old. SR 3158, ¶28.

STANDARD OF REVIEW

The circuit court's findings as to testamentary capacity and undue influence are given substantial deference, reviewed by this Court under the clearly erroneous standard, although documentary and deposition evidence is reviewed under the *de novo* standard. *In re Est. of Pringle*, 2008 SD 38, 751 N.W.2d 277. A finding is clearly erroneous only if, after reviewing all of the evidence, this Court is "left with the definite and firm conviction that a mistake has been made." *Id.* Any conflicting evidence "must be resolved in favor of the trial court's determinations." *Id.*

"The credibility of the witnesses, the weight to be accorded their testimony, and the weight of the evidence must be determined by the [circuit] court and we give due regard to the [circuit] court's opportunity to observe the witnesses and the evidence." *Id.* In this appeal, Vicki "is entitled to the benefit of [her] version of the evidence and of all favorable inferences fairly deducible therefrom." *Id.*

ARGUMENT

A presumption of undue influence arises where "there is a confidential relationship between the testator and a beneficiary who actively participates in preparation and execution of the will and

unduly profits therefrom.” *In re Est. of Duebendorfer*, 2006 SD 79, ¶32, 721 N.W.2d 438, 446 (internal quotations omitted). To rebut the presumption, the alleged wrongdoer must come forward with evidence that she “took no unfair advantage of the decedent.” *Id.* The ultimate burden remains on the contestant to prove the following elements of undue influence by a preponderance of the evidence:

- 1) Decedent’s susceptibility to undue influence;
- 2) opportunity to exert such influence and effect the wrongful purpose;
- 3) a disposition to do so for an improper purpose; and
- 4) a result clearly showing the effects of undue influence.

Estate of Dokken, 2000 SD 9, ¶27, 604 N.W.2d 487, 495; SDCL § 29A-3-407.

1. The Circuit Court correctly concluded that Audrey did not rebut the presumption of undue influence.

The record easily supports the Circuit Court’s finding that a presumption of undue influence existed and that Audrey failed to rebut it. SR 3159, 3161, 4771-72. The presumption of undue influence arises where: (1) there was a confidential relationship between the testator and the beneficiary, and (2) the beneficiary actively participated in the

preparation and execution of the operative documents. *In re Est. of Duebendorfer*, 2006 SD 79, ¶32, 721 N.W.2d 438, 446.

Dora Lee relied almost exclusively on Audrey for everything. SR 3821, 3854, 3894. Dora Lee relied on Audrey to eat, bathe, clean, take care of the ranch, drive her to appointments, give her medicine, and check her mail. SR 2028-39 (Ex.6). Audrey slept in Dora Lee's house, and controlled who could visit Dora Lee and when. Audrey testified that she had a confidential relationship with Dora Lee. SR 3823. Similarly, there is ample evidence in the record of Audrey's puppeteering the preparation and execution of the Wills and Codicil.

- Audrey contacted Elsing to change Dora Lee's Will, wholly disinheriting her sister, Vicki. SR 1803 (Ex.1). Audrey requested that a non-contestability clause be in the Will. SR 1809 (Ex.1).
- Elsing never spoke, emailed, called, or communicated with Dora Lee before having her sign the December 6, 2012 Will, which disinherited Vicki. *All* communications were with Audrey.
- Audrey organized the execution of the Will signed on December 6, 2012, with Elsing and the witnesses.
- Once Nooney & Solay expressed their concern about the December 6, 2012 Will, Audrey brought Dora Lee to Rapid City to find a different lawyer to draft a Will disinheriting Vicki.
- After Nooney & Solay advised Audrey that the Will would not hold up, Audrey arranged with Elsing to set up a new

execution of the same Will (disinheriting Vicki). SR 1813 (Ex.1).

- Audrey organized the execution of the December 18, 2012 Will with Elsing and the witnesses.
- After discussing the Codicil with Elsing, Audrey set up witnesses for the Codicil execution in October of 2014.⁶ SR 1835 (Ex.1).

The Circuit Court correctly found that a presumption of undue influence existed. SR 3159, 3161, 4771-72.

A. Audrey did not rebut the presumption by establishing that Dora Lee obtained independent legal advice from Nooney & Solay.

Audrey argues she rebutted the presumption because Dora Lee obtained independent legal advice when contemplating her December 18, 2012 Will and October 14, 2012 Codicil. *Appellant's Brief*, pg. 21. The presumption of undue influence can be rebutted “by showing that the one allegedly overpersuaded had independent advice that was neither incompetent nor perfunctory.” *Davies v. Tom*, 63 N.W.2d 406, 409 (SD 1954). This argument presupposes that: 1) Dora Lee asked for and received independent legal advice, and 2) Dora Lee

⁶ Audrey argues that her lack of presence during the execution of the operative documents rebuts the presumption of undue influence. This Court rejected this argument in *Matter of Est. of Borsch*, 353 N.W.2d 346 (SD 1984); *See also Restatement (Third) of Prop.: Wills and Other Donative Transfers* § 8.3 cmt. e (2010) (“The alleged wrongdoer need not be present when the donative document was executed in order to exert undue influence.”).

could engage in a meaningful conversation about her legal issues. This Court's decisions in *Davies* and *In re Estate of Pringle*, 2008 SD 38, 751 N.W.2d 277 quickly dispose of the validity of this argument.

1) Dora Lee did not ask for or receive independent advice.

Contrary to Audrey's suggestion, this case is distinguishable from *Pringle*. In *Pringle*, the testator, Mary Pringle ("Mary"), independently called her long-time lawyer to discuss changing her Will, drawing up a Power of Attorney, and drafting deeds, all of which would benefit one of her children, Ron. *Id.* at ¶¶8, 12, 13, 14. Mary had thoughtful discussions with her long-time attorney about her wishes. *Id.* After Mary's death, Mary's other children, Tom and Judy, alleged that the will was a product of Ron's undue influence. *Id.* at ¶16.

During the trial, Tom and Judy could point to no statements or actions of Ron that influenced the testator to convey her property or execute a new will. *Id.* It was undisputed that Tom and Mary stopped talking to Mary approximately four years before her death. *Id.* at ¶¶10, 11, 41. Ron, who lived over 300 miles away from Mary, did not prohibit or prevent Tom and Judy from contacting Mary. *Id.* at ¶41. This Court concluded that Ron rebutted the presumption of undue influence

because Mary had received independent legal advice from her long-time lawyer. *Id.* at ¶43.

Unlike Mary Pringle, Dora Lee did not contact her long-time attorney or have any meaningful discussions about her estate plan. “Advice implies at least apparent open-mindedness on the part of the recipient.” *Davies*, 63 N.W.2d at 409. It was physically impossible for Dora Lee to have a meaningful discussion with anyone. It was Audrey who contacted Elsing, and Nooney & Solay. It was Audrey who discussed Dora Lee’s estate plan with the attorneys. As the Circuit Court so aptly put it, “Audrey was in charge.” SR 4769, 3157. Attorneys at Nooney & Solay were attorneys for Dora Lee only in a “nominal sense.”

Between September 2012, and October 2014, attorneys Nooney and Schippers met with Dora Lee only four times. All other communications were with or through Audrey. It is apparent that Dora Lee was the client in a nominal sense. Audrey had no independent financial means to hire her own counsel. Although Dora Lee was adequately represented by Dacotah Bank attorneys and trust officers, they were forbidden by Nooney to meet with Dora Lee unless either Nooney or Schippers was present.

SR 4770, 3158; App. 009. Before and after she executed the Codicil, *she did not even know who her attorneys were*. Records from Dacotah Bank clearly show Dora Lee’s lack of understanding of her own estate

plan, who her attorneys were, and her susceptibility to be manipulated by Audrey.

In May of 2013, just six months after executing the Will that disinherited Vicki, Dora Lee did not know John Nooney was her attorney, Dora Lee thought both Vicki and Audrey were beneficiaries in her Will, Dora Lee did not know what assets she held, and Dora Lee did not have a problem with Dacotah Bank serving as the conservator. SR 2559-60 (Ex.79); App. 008. In June of 2013, Dora Lee did not know who her attorney was and did not remember signing anything to engage an attorney, she knew there were changes to her Will but did not know what they were, she did not know who the attorney was that made the changes to the Will, and she believed all of her children and grandchildren were the beneficiaries of her Will. SR 2557-58 (Ex.78).

Again in November of 2013, right after Dora Lee executed the Codicil, Steven Schaeffer met with Dora Lee at her house, along with Schippers and Audrey. SR 3055-63 (Ex.170). At the time of the meeting, Dora Lee had no recollection of changing her Will after her husband's death in 2003, had no recollection of executing the Codicil just the month before, and did not recall meeting with any lawyer. *Id.* Steven Schaeffer wrote,

It seems clear that Dora Lee could be persuaded, schooled or groomed to believe or agree to most anything. . . . I have no doubt that Audrey has discussed with her many things that would trouble her Mother and cause her much anguish. . . . It is evident that she has no clue about the farm or ranch. . . . She was not aware of who her legal counsel was. . . . As indicated previously in the transcript, she was not aware of amending her will since her husband passed or even in 2013. . . . When reminded that she did amend her will, she had no recollection of the attorney who assisted her. . . . She has no recollection either that he came out to the ranch 7-8 times regarding proposed changes to her will.

Id. Unlike the testator in *Pringle*, Dora Lee did not have meaningful discussions with any attorney. Dora Lee did not even know she had an attorney. *See* SR 2557-58 (Ex.78), 3055-63 (Ex.170).

Further, as the Circuit Court noted, unlike in *Pringle*, Audrey prevented Vicki and her family from communicating with and visiting Dora Lee. SR 2780 (Ex.155). Audrey demanded that Shane, Vicki, and Bill be prohibited from visiting Dora Lee. *Id.*, SR 3983. Audrey prevented Vicki from visiting and calling her mother. SR 3983. When Vicki would call, Audrey would tell Vicki, “Mom’s sleeping. Mom’s busy. Mom’s whatever.” *Id.* After trying to make arrangements to go visit Dora Lee, Audrey would say, “No, this isn’t convenient.” *Id.* Audrey would not allow Vicki to come over unless someone else was present,

and the witness had to be pre-approved by Audrey. SR 3984-85, 2586 (Ex.88).

Even when Dora Lee was hospitalized, Audrey tried to keep Vicki away from Dora Lee. SR 2584-85 (Ex.87). Eventually, Vicki learned that Dora Lee was hospitalized and went to go visit her mother in the hospital. SR 4085. Vicki recalled, “She was tickled to see me, and I her, and we told each other how much we loved each other and it was good.” *Id.* Dora Lee was not mad at Vicki. *Id.* Dora Lee was not mad at Vicki because of the conservatorship. *Id.* Dora Lee was not mad at Vicki because she thought Vicki was going to put her in a nursing home. *Id.* Dora Lee was not upset about what happened on August 28, 2012. *Id.* Dora Lee and Vicki just spent time together and told each other how much they loved each other. SR 4085-86.

In *Pringle*, the disinherited children had the freedom to communicate and visit their mother, but did not. Here, it was Audrey’s disdain for Vicki, Bill, and Shane and the manipulation of her old, physically and mentally weak mother that kept Vicki from Dora Lee.

2) Elsing was merely a draftsman.

In *Davies*, this Court held that a deed was properly set aside by the trial court because of undue influence. During the trial, the attorney who executed the deed testified that the grantor appeared to be acting of her own free will, and was competent to do so. *Davies*, 63 N.W.2d at 409. The lawyer asked the grantor “if she was sure she wanted to do it and specifically called her attention [to] the different method of disposition settled upon by herself and her husband . . .” *Id.* This Court, analyzing whether or not the testator received independent advice of counsel said, “*The attorney’s testimony however clearly discloses that he was called not as a counselor but as a draftsman.*” Grantor did not seek his advice on a matter of disposition of property she then was considering.” *Id.* (emphasis added).

Like in *Davies*, Elsing served merely as a draftsman or scrivener, not a counselor. Elsing would be more appropriately described as a puppet – functioning at the hands of Audrey, and lawyers at Nooney & Solay. Elsing offered no independent advice – he simply did what he was told. Elsing drafted two Wills at the direction of Audrey, and had Dora Lee sign them. Elsing drafted a Codicil at the direction of Nooney &

Solay, and had Dora Lee sign it. Dora Lee did not receive any independent advice from lawyers at Nooney & Solay, or from Elsing.

Throughout her brief, Audrey argues that Elsing's confirmation of Dora Lee's wishes *via* questionnaires refute any evidence of undue influence because the answers confirm Dora Lee's independent desire to change her Will. *See* App. 029-043. This Court, however, acknowledges the exact opposite.

Her positive assurance to the lawyer, on his inquiry, that she knew what she wanted to do, and furthermore had the right to do it, is entirely consistent with, and . . . conceivably supports the contention, that the grantor's attitude of mind was due to the coercion of appellants.

Davies, 63 N.W.2d at 409. Audrey ignores that a finding of undue influence occurs where the will of the testator *has been overcome by the wrongdoer*. *See In re Estate of Linnel*, 388 N.W.2d 881, 885 (SD 1986).

“Undue influence involves the overmastering of the testator's willpower. When undue influence is shown, the testamentary intent of an otherwise competent testator has been effectively displaced by the wrongful influence of another person.” Thomas E. Simmons, *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D. L. Rev. 175, 201 (2015). Simply verifying Dora Lee's desire to disinherit her daughter via written questionnaire is not enough to

refute the overwhelming evidence of susceptibility to, and actual exertion of, undue influence by Audrey.

This Court has made clear that an attorney “confirming” a testator’s wishes can be consistent with, and may in fact buttress a finding of, undue influence. *Davies*, 63 N.W.2d at 409.

Audrey is asking this Court to adopt a rule that would never allow a will to be challenged on the basis of undue influence if the attorney drafting the will verified what the testator’s wishes were. That cannot be the test. Indeed, under Audrey’s reading of the law, the only time undue influence would exist is where the testator expressly discloses to his/her attorney that “the only reason I’m changing my will is because my daughter is forcing me and threatening to put me in a nursing home.” Audrey’s position is self-serving, impractical, and absurd.

2. Vicki established the elements of undue influence by a preponderance of the evidence.

Even if this Court were to find that the Circuit Court erred in finding that Audrey did not rebut the presumption of undue influence, Audrey does not argue, nor does the record reflect, that the Circuit Court erred in concluding that Vicki met her burden of establishing the

elements of undue influence at the time she executed the Wills in 2012 and the Codicil in 2014.

Notably, Elsing, the attorney who drafted all of the operative documents, testified that all of the elements of undue influence existed at the time of the execution of the 2012 Wills and the 2014 Codicil.

Q: So you do agree, then, that all of the elements to establish undue influence were present in this situation.

A: Oh, I think they were.

Q: And that continued to be the case from 2012 through 2014?

A: Yes.

SR 4358. The Circuit Court's finding is certainly supported by the record.

A. Dora Lee was susceptible to undue influence.

The first element of undue influence is the susceptibility of the testator to be influenced by the beneficiary. "A testator's susceptibility to undue influence considers the weaknesses, dependence, illness, and frailty of the testator." *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D. L. Rev. at 208 (2015); *See Matter of Jones' Est.*, 320 N.W.2d 167, 169 (SD 1982) ("The poor condition of Jones' health and his age indicate that he was susceptible to influence on the

day he executed his will.”); *Borsch*, 353 N.W.2d at 350 (“evidence of physical and mental weakness is always material upon the question of undue influence.”). “Obviously, an aged and infirm person with impaired mental faculties would be more susceptible to influence than a mentally alert younger person in good health.” *Borsch*, 353 N.W.2d at 350.

There is no question that Dora Lee was susceptible to undue influence in December of 2012 and October of 2014. It is undisputed that Dora Lee suffered from multiple medical problems, making it impossible for her to care for herself. By 2012, Dora Lee was suffering from numerous serious ailments, including severe dementia; moderate to severe memory, orientation, problem-solving and information deficits; rheumatoid arthritis; chronical atrial fibrillation, valvular heart disease; expressive aphasia; and traumatic brain injury. SR 1902-38 (Ex.3), 2028-39 (Ex.6), 2533-36 (Ex.70). She was “very impaired from a neuropsychological perspective....” SR 2535 (Ex.70).

Dora Lee was 87 years old when she executed the two Wills in December of 2012 and approximately 89 when she executed the Codicil in 2014. Her medical condition, age, frailty, and dependence on Audrey rendered her highly susceptible to undue influence. Indeed, Audrey’s

own expert witness agreed: “There are several factors which made Dora Lee susceptible to undue influence: she was elderly, she was medically ill, she had difficulty communicating, and she was dependent on her daughter, Audrey.” SR 2731 (Ex.140).

B. Audrey had the opportunity to, and did, exert undue influence over Dora Lee.

The second element of undue influence is the opportunity for the beneficiary to exert undue influence over the testator. Opportunity may be shown by how much time the testator spends with the wrongdoer, whether the two share meals together, whether the wrongdoer helps the testator with various errands. *See Borsch*, 353 N.W.2d at 350. “Proximity, emotional ties, and frequent contact are synonymous with opportunity.” *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D. L. Rev. at 209.

Since 2007, Audrey provided care for Dora Lee nearly twenty-four hours a day, seven days a week. SR 3894. Audrey lived on the ranch, a few hundred yards from Dora Lee, and Dora Lee was dependent on Audrey for almost all of her activities of daily living, including: bathing, grooming, toileting, transfers to and from her wheelchair, meals, and more. SR 2028-39 (Ex.6). Audrey spent more time with Dora Lee than

any other person, and isolated Dora Lee from Vicki. *Id.*, SR 3894-95.

Again, Audrey's own expert agreed that Audrey had the opportunity to exert undue influence. SR 2732 (Ex.140).

Audrey had the opportunity to exert undue influence, and she did. It is no coincidence that Dora Lee disinherited Vicki for the same three reasons Audrey hated her sister: (1) Vicki did not visit enough, (2) the conservatorship, and (3) the lease dispute over the North Half. SR 4373-74, 4727. The evidence clearly showed that it was Audrey's feelings that were impressed upon Dora Lee. Like Kaye DeYoung said,

[A]n older person, if they have some cognitive and physical limitations, are isolated and only have one person, basically, spending all their time with them, that person's feelings and opinions can easily be impressed upon that person and pretty soon they think likewise. . . . it's documented that if a person has physical issues and is isolated, that they rely on their caregiver because they know that's where their next meal is. If they fall, they're going to be taken care of. And if they do not agree with this person in any way, shape or form, then the obvious thought that the conservator ward is going to think, 'I'm going to get put in a nursing home.'

SR 3992. It was no secret that Audrey despised Vicki. *See* SR 2387-97 (Ex.37), 2517-21 (Ex.67), 3902. She detailed her hatred towards her sister in various emails to Nooney & Solay. She posted on Facebook about her family. SR 4133 ("It said my family is going to hell and never coming back."). She removed photos of the Penfields from Dora Lee's

house. *Id.* As revenge for the conservatorship, Audrey wanted to change Dora Lee's Will. SR 3861. She thought this will really "piss them off." SR 1810 (Ex.1). Audrey didn't want "the other side" to get anything. SR 1797-1893 (Ex.1).

The decision to ultimately disinherit Vicki was completely contrary to the way Dora Lee had lived her life. SR 3441, 3462, 3465, 3891, 3901, 4017-18, 4070, 4132. Since 1990, it was Dora Lee's and her husband's (Marlin's) desire to divide their estate equally among their two daughters, Vicki and Audrey. *See* SR 1894-1901 (Ex.2), 2097-2104 (Ex.18). Dora Lee took pride in being an equitable woman, going so far as to evenly divide candies amongst her grandchildren. SR 3441. When Audrey defaulted on a loan from her parents, Dora Lee wrote Vicki a check in the amount that she and Marlin were forgiving for Audrey, to ensure her daughters were treated fairly. SR 4070. Similarly, Dora Lee wrote a check to her grandson, Shane, when another grandchild failed to pay Dora Lee back on another family loan. SR 3461. The evidence clearly established Audrey's control, manipulation, and dominance over Dora Lee.

It was clear to the Circuit Court that the three reasons given by Dora Lee to disinherit Vicki were really Audrey's controlling motivations. *In re Whitman's Will*, 45 SD 14, 184 N.W. 975 (SD 1921).

1) Audrey prohibited Vicki from visiting Dora Lee.

Although Audrey alleged that one of the reasons Dora Lee disinherited Vicki was because she did not visit Dora Lee enough, it was Audrey who believed she did not visit enough. While Vicki's ability to visit was hamstrung by her Parkinson's Disease, it was ultimately stymied almost entirely by Audrey taking steps to prevent Vicki from visiting at all. *See* SR 2028-39 (Ex.6), 2387-97 (Ex.37), 2517-21 (Ex.67), 2586 (Ex.88), 2780 (Ex.155).

Audrey did her best to isolate Dora Lee from Vicki. On September 15, 2012, Audrey instructed Nooney to communicate to Vicki, Shane, and Bill that Dora Lee did not want them to visit. SR 3697, 2780 (Ex.155). Audrey testified that Dora Lee did not want anybody visiting until the conservatorship was over. SR 3697. Yet, this was a reason Dora Lee decided to disinherit Vicki. It is no wonder the Circuit Court found Audrey's testimony confusing and evasive. SR 3155.

When Lori Casteel asked Dora Lee about Vicki, “Audrey interjected and said ‘she used to come every month to do bills’ but hasn’t seen Dora Lee since she ‘made her accusations’. Dora Lee immediately became teary and avoided eye contact. When I asked her if it makes her sad, she shook her head yes.” SR 2033 (Ex.6). Lori continued, “Dora Lee is isolated from one of her children and she is saddened by this,” and “Alienation from family is also considered a major life stressor.” SR 2035, 2038 (Ex.6). It was Audrey who prevented Vicki from visiting after September 15, 2012. SR 2780 (Ex.155). It was Audrey who was upset at Vicki for not visiting enough, despite Vicki’s inability to drive since 2009. *See* SR 2387-97 (Ex.37), 2517-21 (Ex.67), SR 4082-83.

2) Dora Lee was not upset about the conservatorship.

Although Audrey alleged that one of the reasons Dora Lee disinherited Vicki was because of the conservatorship, the evidence showed that Dora Lee was not bothered by the conservatorship, nor did she even have an understanding of what was going on. On October 29, 2012, Sheriff Kelly Serr personally came to Dora Lee’s home to effect service of the *Notice of Hearing* on the *Motion for Permanent Conservatorship*. Sheriff Serr did not bang on the door and coldly serve her with the legal notices. Instead, he sat down with Dora Lee and

discussed the conservatorship. SR 3587. He explained to Dora Lee that “she would be examined by a doctor and talked about that a conservatorship, this is really something to protect her. It protects her family. It’s nothing – it’s really something that, if it’s granted, the Court helps keep track of her finances so other people, you know, can’t take advantage of her, and it’s not a bad thing. And I told her that, you know, this is for her own protection and that – to remember her family loves her.” *Id.* Sheriff Serr did not believe Dora Lee had any understanding what was going on. *Id.* “My opinion is – or my observation is she didn’t have a clue” what was going on. *Id.* “The only emotions that I recall is when I made the comment that it’s for her own protection, remember her whole family loves her, she became a little teary eyed.” *Id.* Dora Lee was not upset or angry about the conservatorship. SR 3588.

Stephen Schaeffer, from Dacotah Bank, testified, “Dora Lee was very – *I’m told* Dora Lee was very upset about the conservatorship. When I talked to her about the conservatorship, *she was never upset about it* once she understood how they worked and what they are and they’re not the enemy that they appear to be to some people, unless they’ve been given the wrong impression. We’re here to protect them.” SR

4503 (emphasis added). Dora Lee “didn’t know much of anything about a conservatorship. But somebody had to plant in her mind extremely strong opinions about a conservatorship; about Kaye DeYoung; about Vicki, her daughter, for her to get so adamantly opposed. . . .”. SR 4504. It was Audrey who tried to convince Dora Lee that the conservatorship was a bad thing. It was Audrey who convinced Dora Lee she would be “stuffed” in a nursing home because of the conservatorship. *See* SR 2387-97 (Ex.37), 2517-21 (Ex.67), 3698, 3789.

Audrey was upset about the conservatorship because it took away her opportunity to manipulate Dora Lee’s finances, and because the allegations contained in the conservatorship application were not becoming of her. *See* SR 2510-16 (Ex.66), 3894. As a result, Audrey contacted Nooney & Solay to fight the conservatorship and wanted to countersue the Penfield’s for “elder mental abuse” because they filed for the conservatorship. SR 2768-69 (Ex.152), 3700. “Audrey did not like the conservatorship because that totally curtailed her activities.” *Id.* *See e.g.*, SR 2786-88 (Ex.160), 3840-43.

Audrey was openly and unnecessarily hostile towards Dacotah Bank employees. *See* SR 2786-88 (Ex.160), 2565-67 (Ex.82). Audrey described Kaye DeYoung as a “psycho maniac bitch or sticky sweet.

The woman is either very rude or so sweet that she makes you want to go puke in the corner. The woman needs to get her shit together”. SR 2566 (Ex.82). Steven Schaeffer described Audrey as “abusive” and “meanspirited”. SR 4487. Audrey wanted to be in charge, and she would fight anyone that got in her way. SR 3983.

3) Audrey wanted to gain control of the North Half.

Audrey claimed Dora Lee was upset about Vicki wanting to sublease the North Half to her daughter, Kayla. But Vicki’s lease allowed her sublease the property to whomever she wanted. SR 2044-47 (Ex.9). Both daughters were largely free to use their respective halves as they wished, and this had been the case since approximately 2009, when Dora Lee approached Vicki about using the North Half to make things fair between her daughters. SR 2619 (Ex.101). It was Audrey who was upset – she wanted access to the North Half. SR 3634. After learning about Kayla and Drew possibly using the land, Audrey typed up a notice to Vicki, terminating the lease between Vicki and Dora Lee. SR 2508-09 (Ex.65). Indeed, Audrey was “plumb giddy” about the idea of getting use of the North Half, and she stood to directly benefit from Dora Lee’s termination of Vicki’s lease. SR 4129.

The record clearly supports the Circuit Court's finding that Audrey had the opportunity to exert undue influence, and did indeed exert such influence, over her mother.

C. Audrey had a disposition to change Dora Lee's estate.

Next, Vicki had the burden to show that Audrey had a disposition to change Dora Lee's estate. "[A] disposition to unduly influence . . . for an improper purpose is . . . evident from . . . persistent efforts to gain control and possession of testator's property" *Borsch*, 353 N.W.2d at 350. The record is replete with evidence of the great lengths to which Audrey would go to gain control of Dora Lee's estate.

Prior to Shane's petition for the conservatorship, Audrey used Dora Lee's bank account as her own personal piggy bank, paying herself increasingly larger amounts for providing caregiving services. She was also instrumental, as detailed above, in terminating Vicki's lease for the North Half of the ranch. After the conservatorship proceeding was initiated, Audrey worked closely with Nooney & Solay to unsuccessfully contest the temporary and permanent conservatorship. Audrey hoped the Court would deny the conservatorship so Audrey could start transferring all of Dora Lee's estate to herself, "literally amounting to

several hundred thousand dollars difference to [Audrey].” SR 1811-12 (Ex.1). Audrey feared she would lose control of Dora Lee’s ranch and money. *See* SR 2387-97 (Ex.37). While her ability to control Dora Lee’s finances was hampered by the conservatorship, Audrey was not about to let that get in the way of her getting what she wanted: She orchestrated the drafting of the new Wills to disinherit Vicki, and she made all arrangements for the execution ceremonies on December 6, 2012, December 18, 2012, and October of 2014.

Audrey directed Elsing to draft a new Will, wholly disinheriting Vicki. She told him what the Will should say, he provided her with a draft, and she made edits and changes. After the hasty execution on December 6, Audrey followed Nooney & Solay’s instruction to “re-do” the Will with more precautions so it would “hold up” in court.

There can be no question that Audrey was persistent in her efforts to gain control of Dora Lee’s property.

D. The change in Dora Lee’s estate planning documents clearly shows the effect of Audrey’s undue influence.

It is undisputed that the new Will makes Audrey the sole beneficiary of Dora Lee’s estate, which is a profit to Audrey in the amount of approximately 1.5 million dollars. App. 011.

E. The elements of undue influence existed at the time the Codicil was executed.

Audrey, relying on *Matter of Est. of Elliott*, 537 N.W. 2d 660 (SD 1995) claims there was no evidence of undue influence at the time Dora Lee executed her Codicil in 2014, which serves to remove the taint of the December 2012 Will. In *Elliott*, this Court said, “[W]hen a subsequent codicil republishes the prior will, any taint in the earlier will from undue influence is removed *if there is no evidence of undue influence at the time of the subsequent codicil.*” *Id.* at 665 (emphasis added). In support of this argument, Audrey claims the perceptions of attorney Elsing and the witnesses to the Codicil are controlling on the trial court and this Court. “Elsing assured himself Dora Lee had capacity and was under no undue influence. Witnesses to the Codicil confirm that she was under no undue influence.” *Appellant’s Brief*, pg. 29.

First, as discussed above, an attorney’s perceptions are never binding in a will contest, but particularly here, Elsing’s beliefs regarding undue influence are less than helpful because he did not even know the elements of undue influence. *See* SR 4347-58. After learning and evaluating each element, Elsing testified all the elements of undue influence existed at the time of the execution of the 2014

Codicil. SR 4358. Similarly, having two lay witnesses “sign off” that a testator is free from undue influence is hardly definitive proof that such influence did not, in fact, exist.

Furthermore, the *Elliott* test cannot be met because the same evidence of undue influence that existed in 2012 and 2013 continued to exist in October of 2014: Audrey continued to reside on the ranch and provide day-to-day care of Dora Lee; she continued to isolate Dora Lee and prevent Vicki from seeing her; she remained hostile to Dacotah Bank; and, of course, she continued to benefit from the change in the Will. In addition, Dora Lee’s medical and mental state never got better; in fact, it grew worse. She was diagnosed with cancer in December 2012 and she only grew more and more susceptible to influence as time passed. SR 3158. Audrey did not present a shred of evidence to suggest that these factors did not exist in October of 2014.

Conclusion

The Circuit Court correctly found that the December 18, 2012 Will and the October 24, 2014 Codicil were invalid as they were the result of undue influence practiced upon Dora Lee by her daughter, Audrey. This ruling should not be disturbed on appeal.

Respectfully submitted this 31st day of May, 2019.

BANGS, MCCULLEN, BUTLER,
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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Appellee's counsel states that the foregoing brief is typed in proportionally spaced typeface in Century 13 point. The word processor used to prepare this brief indicated that there are a total of 9,937 words in the body of the brief.

/s/ Kelsey B. Parker
Kelsey B. Parker

CERTIFICATE OF SERVICE

The undersigned hereby certifies that May 31, 2019, the foregoing *Appellee's Brief* was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

In the Matter of the Estate of
Dora Lee Gaaskjolen, Deceased.

Appeal No. 28884

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
PERKINS COUNTY, SOUTH DAKOTA

THE HONORABLE WARREN JOHNSON
CIRCUIT COURT JUDGE, RETIRED

APPELLANT’S REPLY BRIEF

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Pursuant to SDCL 15-26A-62, Appellant Audrey Lorus makes and files her reply to the brief of Appellee Vicki Penfield. References to the Trial Transcript are cited as “TT” followed by the appropriate page number. References to the Settled Record are cited as “SR” followed by the appropriate page number. Trial Exhibits are cited as “Exh.” followed by the appropriate exhibit number.

ARGUMENT

“The law does not require that [a testator] recognize his relatives equally or at all. It does not place obstacles in the way of the aged or infirm in the disposition of their property, provided their mentality meets accepted tests at the time of execution of the testamentary instrument and the same was not procured by the exercise of undue influence.” In re Blake’s Estate, 81 S.D. 391, 136 N.W.2d 242, (1965).

Dora Lee was of sound mind when she executed her will. Two years later, she was of sound mind when she executed her codicil. Appellee’s brief throughout and specifically at pages 28-29, repeatedly insinuates that Dora Lee was not of sound mind to know what she was doing. Vicki did not challenge the trial court’s conclusion that Dora Lee had testamentary capacity and intent at the relevant times. SR 4770. That Dora Lee was competent to make her will and codicil reflected a consistency of purpose and dispositional intent for her estate plan. During this period of family strife, it was no secret that Dora Lee’s capacity and freedom from undue influence would be challenged by Vicki after her death. Vicki’s family gave Dora Lee ample reasons to leave Vicki out of her will and codicil. Dora Lee’s lawyers confirmed and documented that her decision to disinherit Vicki was a choice she freely made and assisted her in carrying out her estate

plan. The trial court clearly erred in determining that Dora Lee was the client only “in a nominal sense” when three separate lawyers representing Dora Lee testified under oath that they were well aware of who their client was and that Audrey had no influence in their representation of Dora Lee.

1. Dora Lee’s Codicil and the Missing Three Elements of Undue Influence

The conservatorship litigation ended, but Dora Lee’s frustration with the Penfields was not resolved as evidenced by her rejection of Bill’s attempts at apologies. The final solution to protect Dora Lee’s estate plan from challenge was the codicil. The codicil’s recommendation came completely independent of any influence or suggestion by Audrey. It defies logic that Audrey would be aware of the Elliott case, mastermind the plot, and manipulate three lawyers who have an ethical duty to their client, Dora Lee.

Three of the four essential elements of undue influence are the “opportunity to exert such influence and effect the wrongful purpose,” “a disposition to do so for an improper purpose,” and “a result clearly showing the effects of undue influence.” Estate of Dokken, 2000 S.D. 9, 604 N.W.2d 487 at 495-96. The codicil was the idea of attorney Nooney who, along with Schippers and Elsing recommended it to Dora Lee. Based on the holding in Estate of Elliott, 537 N.W.2d 660 (SD 1995), the advice of counsel was designed to remove the suggestion of taint in the earlier will which Nooney, accurately in hindsight, had warned Dora Lee would be claimed by the Penfields.

Before deciding to move ahead with the codicil, Elsing wanted to talk to Jeff Denison, the trust officer at US Bank. (TT 794). Elsing vetted US Bank who was suggested as the proposed personal representative of Dora Lee’s estate to replace Audrey. Elsing was concerned with a number of matters including a possible conflict of interest if

the bank represented other members of the family. Elsing knew Shane Penfield had worked in Rapid City for a number of years and may have a relationship with the bank. (TT 795). Likewise, Elsing quizzed Denison about the cost. (TT 795).

Elsing discussed the Codicil with Dora Lee. She agreed and thought using the bank was a good idea. (TT 800). After discussing the codicil with Dora Lee on October 16, 2014, Elsing wrote Denison advising that Dora Lee had agreed to naming US Bank as personal representative. (Exh. 1, p. 48, SR 1844).

The codicil removed Audrey's power as personal representative of the estate. Power over the Estate was placed with US Bank's trust department. Elsing did more than just draft the Codicil. Elsing agreed the codicil was a good idea. (TT 799). Elsing traveled to Dora Lee's home and visited with her about the Codicil on October 16, 2014. Elsing's notes and testimony reflect that Dora Lee was adamant about who she wanted to have her property. (TT 700). On the day she made her Codicil, she reread the will, read the codicil, and confirmed that she was making the Codicil of her own free will. (Exh. 1, pp. 57-61, SR 1853-1857). Dora Lee understood that her will would be challenged. Elsing testified: "Yes, she got that. That was the whole purpose of all these meetings with her and these questionnaires that I developed and she answered." (TT 801).

"For influence to be undue it must be of such a character as to destroy the free agency of the testator and substitute the will of another for that of the testator." Estate of Holan, 2001 S.D. 6, P16, 621 N.W.2d 588, 591-92 *quoting* Matter of Estate of Elliott, 537 N.W.2d at 662. Elsing's five page questionnaire recorded that Audrey had not told Dora Lee what she should have in her will and that giving all of her estate to Audrey was what she genuinely wanted to do. (Exh. 1, p. 61, SR 1857).

The day she made her Codicil, Dora Lee understood that the only change she was making was to name US Bank as personal representative and the other parts of her will would remain the same. (Exh. 1, p. 60-61, SR 1856-1857). Dora Lee affirmed that Audrey had not told her what she should do with her property after she died. (Exh. 1, p. 60, SR 1856). The facts surrounding the recommendation and preparation of the Codicil show that Elsing acted unilaterally for his client and not at the direction of Audrey.

Having had no connection with the recommendation for the codicil, Audrey could not have been improperly disposed to have her mother execute it. Audrey did nothing to influence the making of the codicil. Audrey had no opportunity to exert and effect a wrongful purpose because the codicil was not her idea. The legal holding of Elliott and the rationale for its recommendation was not communicated to Audrey so she had no opportunity to exert influence by way of the codicil.

The codicil was not made to effect an improper or wrongful purpose at Audrey's direction or behest; rather, it was made for the purpose of confirming Dora Lee's estate plan and removing what her lawyers knew would be a suggestion of taint. As explained at trial, Dora Lee's counsel took steps to insulate Audrey from knowing that a codicil was being recommended to Dora Lee. None of the three elements were established by the contestant as respects the codicil. Because Audrey did not actively participate in the preparation and execution of the codicil, the trial court erred in finding Dora Lee's free will was supplanted by Audrey. Estate of Melcher, 89 S.D. 253, 261, 232 N.W.2d 442 (1975).

With regard to the codicil, Vicki limits her argument to less than two pages and deflects attention to Audrey versus what Dora Lee wanted after advice of counsel. The

argument of Vicki's counsel is void of any facts in the record showing Audrey's involvement or participation in the codicil. At trial, Vicki conceded in her testimony that Audrey did not come up with the idea of the codicil. (TT 641). Vicki further conceded that the codicil was something Dora Lee's lawyers generated to make it "foolproof." (TT 641-43). Vicki cannot rise above her testimony and now claim a better version of the facts. Parkhurst v. Burkel, 1996 S.D. 19, 544 N.W.2d 210.

The concept of the Codicil was not Audrey's. The testimony of Nooney establishes that he was acting as a counselor evaluating his client's legal affairs and reporting his advice to solve a client problem. These facts were much different than those in Davies v. Toms, 75 S.D. 273 (S.D. 1954) where the grantor directed her lawyer to prepare a deed. In Davies, the grantor told the draftsman she knew what she wanted to do and had the right to do it—actions entirely consistent with a finding that her attitude of mind was due to the coercion of others. Davies, 75 S.D. at 280, 63 N.W.2d at 410. Not so in this case.

Eighteen months prior to any discussions about a Codicil, Nooney counseled Dora Lee that "it would be in everyone's best interest to have...the issue of undue influence addressed while you are alive and able to testify." (Exh. 55, SR 2477-2478). Nooney told Dora Lee that it was wise to resolve the questions of "your desires and the reasons behind those desires" while she was living. (Exh. 55, SR 2477-2478). Later, when Nooney read this Court's decision in Estate of Elliot, it became apparent that a solution existed to the problem which had vexed¹ Nooney.

¹ Dora Lee did not make a good witness due to her expressive aphasia. Likewise she would not do well with a video recording.

“Advice implies at least apparent open-mindedness on the part of the recipient.” Davies v. Toms, 75 S.D. 273, 280, 63 N.W.2d 406, 409 (1954). Dora Lee’s open-mindedness to the advice is revealed in her willingness to also discuss the matter with Schippers and Elsing. Her open-mindedness is further exemplified by her final decision to replace Audrey with US Bank as the personal representative of her estate. One would not expect a lay person to be well-versed in the legal effect and implications of a Codicil. That said, given the history and circumstances, good legal representation included providing a solution to memorialize Dora Lee’s dispositional intentions.

Nooney’s advice was actual advice that was neither incompetent nor perfunctory; quite the opposite. With her counsels’ help, protection and independent advice, Dora Lee understood exactly what was being done and why. (TT 801). The holding in Estate of Elliott, provided the legal rationale for their advice and a solution to a problem perceived to potentially exist. The codicil was the mechanism to effectuate Dora Lee’s intent. The record is void of any evidence that Nooney was influenced or acting for Audrey in serving his client Dora Lee’s needs.

2. Independent Counsel, Advice and Protection

For more than two years during the conservatorship proceedings and after, Dora Lee had independent legal counsel. All three lawyers were well aware that Dora Lee wanted to disinherit Vicki. Each attorney was devoted entirely to the interests of Dora Lee in whom she placed her entire confidence. Any cloud of undue influence was removed given the substantial evidence showing Dora Lee had independent advice which was neither incompetent nor perfunctory. Walsh v. Shoulders, 87 S.D. 270, 279, 206 N.W.2d 60, 65 (1973). Early on, Nooney counseled Dora Lee that her will likely would

be challenged. (Exh. 55, SR 2477-2478). The “red flag” issues of testamentary capacity and undue influence were also obvious to Elsing. Vicki made persistent efforts to obtain production of Dora Lee’s will even after the conservatorship case was finally decided. Dora Lee told her lawyers she wanted her decision to disinherit Vicki kept in confidence.

Dora Lee’s counsel zealously advocated in her best interest. At one point, Vicki perpetrated what Nooney correctly characterized as legal extortion proposing to drop an objection to Nooney’s fees if, in turn, Dora Lee’s will would be turned over. Dora Lee told Nooney she was not happy about the conservatorship and the reasons she chose to disinherit Vicki. (TT 1020-21). Dora Lee’s displeasure with the manner in which the Penfields had proceeded was likewise shared with Attorneys Schippers and Elsing. The consequence of the Penfield’s actions caused Dora Lee to disinherit Vicki.

With Dora Lee having been betrayed by Vicki, Audrey also voiced her displeasure with the Penfields. Audrey made her opinions known to the lawyers; but Dora Lee’s counsel repeatedly confirmed that Dora Lee’s decision to disinherit Vicki was her own choice.

To suggest that Elsing was a mere draftsman misrepresents the record. Elsing’s work with Dora Lee was well-documented in his file which reveals the thoroughness of his advice and counsel. (Exh. 1, SR 1797-1893). Elsing’s questionnaires serve as a tutorial on memorializing client communication, dispositional intent, and freedom from undue influence. A mere draftsman would not review the myriad of estate planning options as Elsing did with Dora Lee on their first meeting. (TT 698). A mere draftsman would not make a return visit to Dora Lee to confirm her will was consistent with her intent. A mere draftsman would not consider case annotations on sound mind and undue

influence. A mere draftsman would not vet a personal representative as Elsing did US Bank as he prepared the Codicil.

Elsing testified that in his first meeting with Dora Lee he discussed putting property in joint tenancy with right of survivorship or alternatively, deeding the property and reserving a life estate. (TT 698). Elsing testified he explained how these options worked. (TT 698-99). He also discussed making outright gifts and reviewed the tax consequences of not getting a stepped-up basis for gifts, but getting a stepped-up basis if it's included in your probate estate. (TT 699). Elsing also reviewed that it was possible to form a corporation and make gifts of stock versus an outright gift of property. (TT 700).

According to Elsing, there was not a problem with Dora Lee understanding the general information he was supplying. (TT 699). She in fact made several reflective choices. Dora Lee was not interested in making any gifts. (TT 702). Elsing reviewed personal representatives and waiver of bond, if there were no issues of trusting the person nominated. (TT 704).

With regard to what Dora Lee wanted to do with her property, Elsing testified she told him: "I want it to go to Audrey." (TT 705). Elsing made sure that Audrey was not exerting influence upon her to make this disposition. (TT 705). On inquiry of the trial court, Elsing was asked if he wondered if, when she made her Codicil if Dora Lee could still remember the same reasons for disinheriting Vicki she gave in 2012. Elsing replied: "I don't have any reason to believe she did not remember." (TT 900).

Nooney began working for Dora Lee in the Fall of 2012. Nooney was well aware of Audrey's vitriolic e-mails. Nooney characterized Audrey's communications as "chatter," and commented on the weight he gave Audrey's input. (TT 1019). Nooney

testified: “that’s fine, and Audrey’s a nice enough person, but she wasn’t my client. I had to see what Dora Lee wanted done.” (TT 1020). Nooney wrote multiple letters to get the conservator to provide Dora Lee with sufficient funds to allow her to pay bills and buy groceries. While much is made by Vicki that Dora Lee did not discuss changing her will in her first meeting with Nooney, the consequences of the conservatorship made Dora Lee’s basic needs the priority.

Schippers, the associate of Nooney, spent time with Dora Lee and provided advice with respect to her estate plan. (TT 1149). Dora Lee told Schippers she was unhappy about the conservatorship and how it was put in place. (TT 1152). It was Schippers who, like Nooney, researched the issue of a codicil and then drove to Dora Lee’s home near Meadow and recommended the codicil. (TT 1154).

The trial court erred in finding that Dora Lee was only nominally represented. Each attorney—all officers of the court—testified it was Dora Lee who was their client, not Audrey. Our Rules of Professional Conduct juxtaposed against the facts of this case bear out that the lawyers acted independently for Dora Lee.

“As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client or to others.”

(Appendix to Chapter 16-18 South Dakota Rules of Professional Conduct, Preamble, Item 2). Nooney, Schippers and Elsing were advisors, advocates, negotiators and evaluators in the best sense of the profession representing Dora Lee, not Audrey. It was their duty to ascertain Dora Lee’s intent and then protect those intentions.

Nooney and Schippers met privately with Dora Lee, not Audrey. Nooney and Schippers wrote numerous letters to Dora Lee, not Audrey. Nooney zealously protected Dora Lee and advocated in and out of court for her. When necessary, Nooney refused to negotiate when the proposal of counsel would violate a client confidence and trust. Dora Lee's attorney's fees were not paid by Audrey, but by Dora Lee (after recommendation by the conservator and court approval).

Elsing likewise met privately with Dora Lee on numerous occasions. Elsing did not draft the questionnaires at Audrey's direction. Elsing evaluated his client's needs and developed the questions in a format he thoughtfully created for Dora Lee who suffered from a condition very similar to that of his own mother. Elsing was not merely a draftsman. Rather, he assessed his client's needs in the context of the applicable law and provided competent legal counsel and took great care to understand an elderly woman with whom he developed the ability to communicate effectively. Elsing's work for his client was patient, thorough and well-reasoned². Elsing was paid by Dora Lee, only after Dora Lee's fiduciary recommended payment.

² Counsel for Vicki attempts to minimize Elsing's work because "he did not even know the elements of undue influence." In actuality, after hours on the stand on the second day of his testimony, Mr. Elsing was unable to recite the elements of undue influence for Vicki's counsel. (TT 840) A lawyer's inability to recite the four legal elements of undue influence does not equate to his inability to determine if his client has had her free will destroyed and supplanted. Yet, counsel for Vicki would have this court infer that a lawyer with 45 years of experience in wills and a masters in mechanical engineering somehow was not up to the task of sizing up his client's freedom from undue influence. Elsing wisely kept checklists to remind himself of important will elements that included a review for undue influence. (Exh. 1, p. 97, SR 1983). A review of Elsing's will execution practices as recalled by the will and codicil witnesses and his thorough questionnaires reveals that Elsing unquestionably understood the elements of undue influence and canvassed the issue with his client, who like his own mother had suffered from a serious communication impediment. (See, SR 1820-1827, 1842-1843, 1853-1857). Elsing's working file includes his research of Estate of Dokken and copies of annotations to Estate

Like Nooney and Schippers, Elsing was an advocate for Dora Lee. It was Elsing who, on July 11, 2013, refused to turn over Dora Lee's will to the conservator on grounds of confidentiality. (Exh. 1, p. 43, SR 1839). Elsing found the conservator's insistence "unsettling" and reminded the conservator that under SDCL 29A-5-405, it was obligated to consider the protected person's desires and personal values. Recall that Penfields originally contacted Dakota Bank. Elsing visited with Dakota Bank's trust officer and made clear that Dora Lee "does not wish to have the content of her Will disclosed to anyone." (Exh. 1, p. 44, SR 1840). Elsing made every effort to independently confirm that Dora Lee's dispositional intent was reflected in his work product and that it would be recorded for posterity. Elsing was much more than a scrivener and certainly not Audrey's puppet, but rather Dora Lee's protector.

3. Fiduciary Recommends Payment of Dora Lee's Attorneys' Fees and Court Approves

From September of 2012 and until her death, the conservator managed Dora Lee's financial affairs and in time, immersed itself in learning Dora Lee's estate plan. During much of this time, litigation over the conservatorship was contentious. So much so that the conservator engaged its own legal counsel (Greg Peterson).

Mr. Peterson appeared in the conservatorship and monitored matters, including the conservator's annual accountings to the court. A number of letters were exchanged between Dora Lee's counsel and Mr. Peterson. (Exh. 127-128, SR2677-2680; Exh. 142, SR 2742-2743; Exh. 144, SR 2758-2760). Nooney advocated for Dora Lee, not Audrey.

of Pringle, 2008 S.D. 38, 751 N.W.2d 277 which provide the elements of undue influence. (Exh. 1, p. 56, SR 1852; TT 899).

It was Dora Lee who needed her allowance increased so she could afford diapers and get her bills paid and it was Nooney who went to bat for her.

Elsing, who typically charged \$200 for a will, had fees of \$3,195.25 which were approved on recommendation by the conservator. (Order Approving Conservator's Second Report, Exh. 31, SR 2253-2254). The attorney fees of Nooney and Schippers of over \$82,000 were likewise court approved. (Exh. 31, SR 2254). In fact, the conservator sought and received permission to pay from Dora Lee's holdings Mr. Peterson's fees of \$23,507.72 in addition to the conservator's fees. (Exh. 27, SR 2206; Exh. 31, SR 2254).

The conservator, represented by its own counsel, never suggested that the attorney's fees claimed by Nooney, Schippers or Elsing should be denied because their legal work was done for Audrey and not Dora Lee. Never was it suggested that Dora Lee was not receiving competent legal counsel. Had Peterson or his client believed that Nooney, Schippers or Elsing were working for Audrey rather than Dora Lee, the fiduciary would have been duty bound to oppose the fee requests. The fiduciary specifically recommended that Elsing's fees for Dora Lee's estate planning be approved. (Exh. 27, ¶ 19, SR 2210).

Days before she made her codicil republishing her will, the conservator reported to the court that Dora Lee's estate plan was consistent with her testamentary intent (to disinherit Vicki). (Exh. 27, SR 2210). In fact, the conservator advised the court that it recommended Dora Lee consider creating a Revocable Living Trust, rather than a will. (Exh. 27, ¶ 20, SR 2210). Given the recommendation, it is clear that the conservator believed Dora Lee could comprehend making a trust and nominating beneficiaries.

This Court is no doubt mindful that had the conservator believed Dora Lee's intent was to equally distribute her estate between her daughters, the conservator, acting in Dora Lee's best interests, could have revoked the previously made will of December 18, 2012. See, e.g. Matter of Guardianship of Nelson, 903 N.W.2d 753, 2017 S.D. 68; SDCL 29A-5-420.³ The conservator did not take, nor recommend, this action.

4. The Trial Court's Failure to Consider Dora Lee's Controlling Motives

In cases claiming undue influence, this court has said: "...after all such evidence has been received it must be carefully screened in the light of established rules and standards to determine whether there is substantial evidence to support a finding of undue influence. The evidence, both direct and circumstantial, taken as a whole, must be such as to clearly and unmistakably point to a final document which is the product of the mind of another and not the will of the signator. Mere suspicion, speculation or conjecture that it is does not suffice." In re Blake's Estate, 81 S.D 391, 399, 136 N.W.2d 242, 247 (1965). The trial court's fundamental error was in disregarding evidence of Dora Lee's controlling motives which influenced her actions. In re Whitman's Estate, 45 S.D. 14, 184 N.W. 975 (1921). The trial court's finding Audrey to be not credible should not have supplanted Dora Lee's clear intent as verified by her lawyers.

Because she was of sound mind, Dora Lee had an intelligent perception and understanding of the disposition she wished to make of her estate. Dora Lee made her motives and intentions known to her caregivers, housekeeper, her lawyers and to Audrey.

³ "A will made by the conservator on the protected person's behalf, or an amendment or revocation of a will previously made by a the protected person or conservator shall be in writing and signed by the conservator in the presence of at least two witnesses, who shall each affix his or her signature. The conservator may, but need not, attach a self-proving affidavit as provided in 29A-2-504."

Dora Lee loved living at her home on the ranch. She did not want to be put in a nursing home, a fear shared by many elderly. The conservatorship froze her assets and an evaluator was sent to her home to visit about her continued care which included discussion of the option of a nursing home—an option that Dora Lee feared.

According to her caregivers and housekeepers, Dora Lee was “with it” and she “knew what was going on.” (Exh. 165, pp. 26, 36, SR 2861, 2877; Exh. 167, p. 28, SR 2972; Exh. 169, p. 15, SR 3020). Vicki’s access to her mother was not prevented, but accommodated. Caregiver Fink testified that she told Vicki she could call anytime and that Fink would accommodate her visits. (Exh. 167, p. 15, SR 2959). Caregiver Weishaar recounted that Dora Lee was sad that she could not have a better relationship with Vicki, “but it wasn’t because she was isolated, it was because Vicki—Vicki didn’t act the way her mom wanted her to act....” Dora Lee had had enough. (Exh. 169, pp. 29-30, SR 3033-3034). Also omitted from the trial court’s findings was any acknowledgement of the evidence provided by Dora Lee’s housekeepers and caregivers who knew Dora Lee and served as witnesses to the testamentary documents in issue. Dora Lee shared her reasons for disinheriting Vicki with those close to her as well as her attorneys.

When they first began the temporary conservatorship proceedings without notice, Penfields intended on removing Dora Lee to a facility and getting Audrey removed from the ranch. (Exh. 109, SR 2636). An aggressive and disturbing move by any standard. Audrey, who had taken care of her father and mother in their declining years, was understandably upset with the manner in which Penfields had proceeded. According to Nooney, Dora Lee felt betrayed by the Penfields’ decision to bring the conservatorship without notice. Not only were her assets frozen, she was handcuffed from being able to

even hire counsel to defend herself.⁴ Schippers confirmed how upset Dora Lee was with the impact of the conservatorship and the actions of the Penfields. Penfields supplied plenty of reasons for Dora Lee to disinherit Vicki.

Penfields soon realized that Dora Lee was upset. Bill made repeated attempts at apology, yet the Penfields could not bring themselves to apologize for the manner in which they proceeded. In spite of Bill's repeated attempts at apology, Dora Lee remained steadfast. Days before she made her will, Dora Lee privately told McClean Thompson-Kerver that she wanted to disinherit her daughter, Vicki, because of Vicki's husband's actions. (TT 1123, SR 864). Dora Lee's decision to disinherit Vicki never changed.

The litigation proceeded. The parties became more entrenched in their positions. Even after the conservatorship proceedings ended, Dora Lee still rejected and refused Bill's efforts to "apologize." Examination of his "apology" demonstrates why Dora Lee remained upset with the Penfields.

Bill had his son deliver and read Dora Lee a letter which said, in part: "I do not apologize for the actions taken to bring correction to the care and management of you and your property." (Exh. 139, SR 2719). Understandably, Dora Lee remained upset with Bill who also told her in the letter she was not able to think and speak for herself. (Exh. 139, SR 2719). Bill went on to blame Dora Lee for his wife's stress telling Dora Lee that Vicki "is hurt because she has been cheated your love and affection." (Exh. 139, SR 2719). Bill claimed that the Penfields had never taken anything from Dora Lee "without

⁴ At footnote 5 of Appellee's Brief, Vicki places blame on Audrey attempting to cash a CD of Dora Lee's to pay for a lawyer. In reality, Dora Lee penned a letter in her own writing asking that her CD be placed in her checking account when it matured a couple of weeks after she was served with the conservatorship. Exh. 114, SR 2651. This was summarily declined by Dakotah Bank based on the freezing of her assets leaving Dora Lee no money to defend herself. Exh. 119, SR 2657.

a mutual agreement”, which certainly concedes her soundness of mind when it worked to the Penfields’ advantage. (Exh. 139, SR 2719). Apparently Bill failed to consider the *ex parte* proceedings by the Penfields freezing Dora Lee’s assets without advance notice— action taken in the absence of mutual agreement.

Dora Lee’s will and later codicil were not the product of undue influence, but rather the consequence of the actions of the Penfields. In the end, Dora Lee demonstrated she could “think and speak for herself.” It is no wonder that Dora Lee followed the legal advice of her lawyers and made her codicil republishing her will disinheriting Vicki. The trial court’s findings were contrary to a clear preponderance of the evidence and its judgment should be reversed. In re Estate of Olson, 757 N.W.2d 219, 2008 S.D. 97.

Dated: June 14, 2019.

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CERTIFICATE OF COMPLIANCE

It is hereby certified, consistent with SDCL 15-26A-66(b)(4) that this brief was drafted using Microsoft Word in proportionally spaced typeface of 12 point, which includes serifs. The page count is 16 pages. The word count, according to the word processing program is 4,989 and the character count without spaces is 24,948.

Dated this 14th day of June, 2019.

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The undersigned hereby certifies that on the date written below, true and correct copies of APPELLANT'S REPLY BRIEF were served by electronic service and first-class U.S. mail to the individuals identified below at their last known addresses:

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