TRUE INTENT

— FIRST EDITION —

SOUTH DAKOTA WILL CONTESTS

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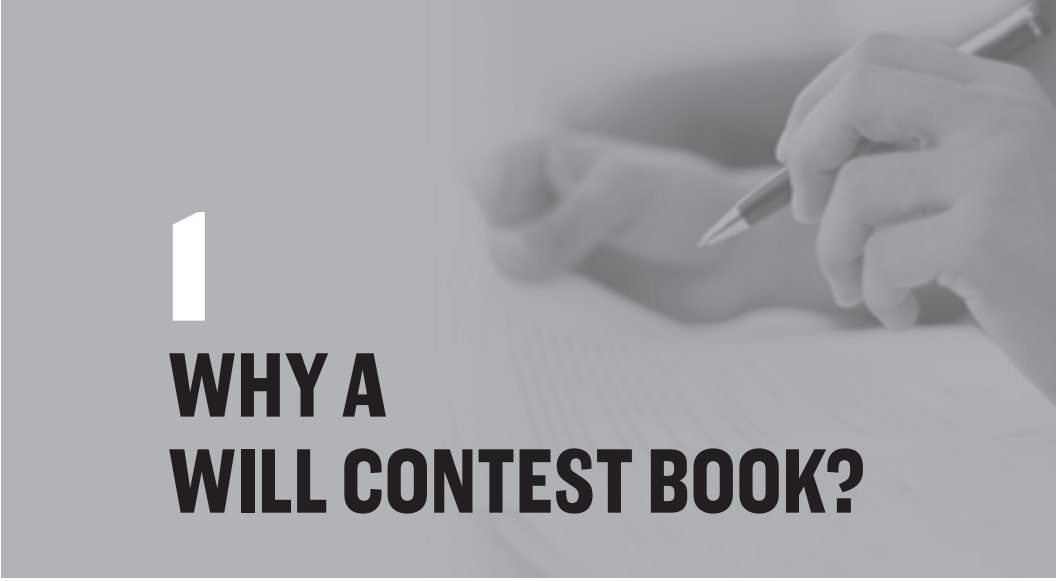
PREFACE

This book is not legal advice. I am not allowed to give specific legal advice here. I can only offer general suggestions and identify red flags for you to watch out for. If I accept your case, then we will be in this together. Until then, however, please do not construe anything in this book to be legal advice about your case. I will begin giving specific legal advice for your case only after you have agreed to hire my firm, and after I have agreed, in writing, to accept your case.



1
WHY A WILL CONTEST BOOK?

I think this book can be very helpful to you.

The information I give here will help if you or a loved one has been the victim of wrongdoing. I have done the best to explain things simply.

I wrote this book so that you and your family could have good, solid information about Will Contests, breaches of fiduciary duty, suspicious land transfers, and abuses of Durable Powers of Attorney. I have also written about how you should go about hiring an attorney to assist you in a Will Contest or breach of fiduciary case.

Will Contests and contested estates are very complicated and difficult cases. Many victims never even know they are victims. And most victims have no idea where to begin to right the wrong.

This book will help you understand these cases. It will describe legitimate cases. And it will give suggestions about how you can improve your odds of winning if you have a legitimate case.

This book is not for everybody. I can't help you if you have given Mom or Dad good reasons for leaving you out of the Will. Believe me, I get plenty of those calls.

I also can't help you if you are already represented and are trying to change attorneys. I get plenty of those calls as well. I have my own way of doing things. I've learned that I can help people best when I handle cases from the very beginning. If you already have a lawyer, and they haven't already told you something you find in this book, that's an issue between you and your lawyer.

I handle large and significant civil litigation cases, personal injury cases, including the types of cases I describe here. Many of the examples I give come straight from my own cases. For more information, visit our website at *www.northernplainsjustice.com*.

Many victims never even know they are victims. And most victims have no idea where to begin to right the wrong.

2
WHY IS A WILL CONTEST NECESSARY?

Simple. People are being taken advantage of.

The tired, the weak, the elderly, and the sick are being taken advantage of by unscrupulous "friends" or relatives. I believe that today's probate and trust system is ripe for abuse. "Informal" probates are rarely monitored, allowing swindlers to take property that isn't theirs. In the past few years, I've seen an explosion of documents called "Durable Powers of Attorney." They are unregulated, and they have led to out-and-out fraud and misconduct in the drafting and signing of Wills and transfers of property, trusts, investments, and money. The elderly in particular are being abused and taken advantage of.

The Honorable David Gilbertson, the Chief Justice of the South Dakota Supreme Court, stated in his 2011 State of the Judiciary message to the South Dakota Legislature, that "while our state is aging we have few laws and programs on the books to specifically protect our elderly from abuse and crime." Chief Justice Gilbertson noted a number of scams against the elderly. He stated that, "this issue is quickly be-

coming a national priority and South Dakota should definitely become more aggressive in its protection of senior citizens. This is a problem that the judiciary, as well as others, needs to address." The need to protect senior citizens is real.

I wrote this book so that you could have good, honest, and useful information to review and study in the comfort of your own home.

This book also saves time. I get lots and lots of calls from people asking me to represent them in a Will Contest case. I have packed a lot of information into this book, and it saves time for you and me. I can't accept every case. Writing this book gives me a chance to reach more people, including you. After reading it, you will understand the basics about Will Contests, breaches of fiduciary duty, and other estate cases. With that information, you can make an informed decision about what to do next. Even if I cannot accept your case, I would like you to be educated about the process so that you don't fall victim to these types of frauds.

"Informal" probates are rarely monitored, allowing swindlers to take property that isn't theirs.

3
JUST WHAT IS A WILL?

Put simply, a Will is a person's written intention of what should be done with their property after they die. There's no such thing as an "oral" Will. Most Wills today are written by attorneys after talking to their clients. Some are written by people themselves. Some are handwritten, but most are typed. The signing of a Will must be witnessed by other people. There are dozens of rules about how to properly draft a Will. Those rules are not the subject of this book. If you have questions about your Will, you need to ask an estate planning lawyer. If you don't know any, contact my firm and we can refer you to someone.

Wills can come in many forms. Some are very complex, while others are quite simple. Each Will should be tailored to your individual needs, and form Wills should be avoided.

If you die without a Will, state law provides a "default Will" of sorts. These are called "intestacy" laws. Generally, when you die without a Will, your property will pass to your spouse and children. If you do not have a spouse or children, then the property generally goes to your parents, and then to extended family as necessary.

Since almost everyone dies possessing property, almost everyone needs a Will. You most certainly need a Will if you are leaving behind a boyfriend, girlfriend, fiancé(e), or a lifetime friend or caretaker. They would never receive your property unless you have a Will that expressly states that intention. You also need a Will if you want a particular person to receive a specific item you own—like a car or a family heirloom (such as a ring or watch). In other words, if you want a particular person to receive a particular piece of your property after your death, it is extremely important that you say so in a valid Will. Otherwise, your true intentions might not be followed. Finally, you usually need a Will if you want to divide up your estate among children, grandchildren, nieces, or nephews; especially if you are not dividing it equally.

If you already have a Will, you should review your estate plan occasionally, and especially after important events in your life such as marriage, divorce, having children, or an increase in your net worth. These types of events typically might change how you want your estate or property to be disposed of when you are gone. An attorney can help you draft a new Will and cancel or "revoke" your old Will. (Always revoke you old Will. One common situation I encounter in my office is when a person leaves two Wills. This often creates a legal fight about which one is valid.)

In short, it is very important to give some careful thought to planning your Will. It is even more important to review your Will regularly to ensure that it still says what it should. And you must clearly express any change of your intention. The best way to do this is with an experienced attorney. Watch out for form Wills you find on the Internet. And also be cautious about having a lawyer in

your own family draft a Will, especially if their area of expertise is not estate planning.

Wills are serious business, and they deserve serious attention.

They would never receive your property unless you have a Will that expressly states that intention.

4
WHAT IS A WILL CONTEST?

A Will Contest is simply a lawsuit filed in court that challenges the validity of a Will signed by a person who has died. There are several reasons that a Will might not be valid. Was the deceased of sound mind and body at the time he signed it? Did she know about all of her property and understand what she was doing? Did someone try to pressure the deceased when she drafted the Will? Did they threaten the deceased? Physically intimidate him? Trick him?

In a Will Contest the whole point of the case is to have the court or the jury decide if the Will was the valid and legitimate desire of the deceased—or if instead the actions of another person had the effect of overcoming their intent, or "will." Is the Will the product of the deceased's true intent, or does it instead represent the intent or desire of a wrongdoer?

Before I talk about the "red flags," first I need to define a few terms:

- **Contestant** - the person who contests the Will and claims it is invalid;

- **Decedent** - the person who made a Will and is now dead;
- **Proponent** - the person that submits the Will to the court for probate and claims the Will is valid;
- **Testator** – a male decedent; and
- **Testatrix** – a female decedent.

What "red flags" could indicate the Will is invalid?

Every case is unique. However, there are a number of "red flags" that may show a Will was improper. Here are a few:

- The person who signed the Will (the "testator" or "testatrix") was very ill or had a serious medical condition right before the Will was signed.
- The testator was very elderly or very ill and not able to handle his own affairs any longer.
- The testator was mentally incompetent, suffering from senility or Alzheimer's Disease, or was just mentally "out of it" before the Will was signed.
- The testatrix suddenly changed her Will to favor one person over other family members.
- The testatrix suddenly goes from the family lawyer she's used for years to some new lawyer she doesn't know or whom she's never used before.
- The new lawyer happens to be the lawyer of the person who suddenly becomes the chief beneficiary.

- The testatrix goes to several lawyers looking to do a new Will, and the lawyers refuse to do a Will for her. (This a huge red flag because those lawyers may think that she's not competent or under undue influence, and want no part of this kind of fraud.)
- The Will is actually typed up by a family member—who just happens to be the one that gets all the property.
- Everything was done "in secret"—and the secret is that the person who took them to the lawyer or wrote up the Will is the one that gets all the property.
- The person who suddenly becomes the chief beneficiary of the new Will was present when the Will was signed or took the testator to their lawyer.
- The Will has a lot of factual mistakes in it—wrong family members named, misspelled names, or things the testator would just "know" if it were on the level.
- The testator suddenly becomes angry at some family members and no one can understand why.

This list could go on and on. It gives you an idea of what types of things to look for, but you can certainly think of others. The general rule is that if something doesn't smell right, or gives you an uneasy feeling, then it's time to pursue your hunch.

CHALLENGING A WILL

There are four basic situations where a Will can be challenged:

- First, when the person making the Will was not mentally competent and, therefore, "lacked testamentary capacity" to make a Will.
- Second, another person placed "undue influence" on the person making the Will.
- Third, the person making the Will wrote it under "duress." (Duress is a fancy legal word meaning "under a threat or severe pressure.")
- Fourth, someone tricked the person making the Will—by fraud, false pretenses, etc.

The next four chapters will discuss each of these situations.

The important thing to remember is that there are *several* ways to challenge the validity of a Will. Each one of these four methods, or theories, can, by itself, be enough to invalidate a Will.

5
MENTAL COMPETENCY—*BEING OF SOUND MIND*

South Dakota law states that "an individual eighteen or more years of age who is of sound mind may make a will." This phrase "sound mind" is also referred to as "testamentary capacity." So what does "sound mind" actually mean?

The South Dakota Supreme Court has said that the soundness of mind required by a person to execute a Will does not require perfect health or the same level of awareness required to "make contracts and do business generally or engage in complex and intricate business matters."[1]

More specifically, the Court says that sound mind means someone who, "*without prompting* is able to comprehend:

1. the nature and extent of his property,
2. the persons who are the natural objects of his bounty, and

1 *Estate of Burg*, 2010 S.D. 48 ¶ 44, 783 N.W.2d 831, 843 (S.D. 2010).

3. the disposition he desires to make of such property."[2]

There's plenty of legal jargon in there, so let's make this simpler and take apart each of those elements.

Understanding the Nature and Extent of One's Property

Under the law, the person making the Will must be able to comprehend—that is, he must understand and appreciate—just exactly what property he owns. For example, if the person knows he owns land, bank accounts, jewelry, and other property, and where that property is, then he is more likely to be of sound mind.

The person must be able to understand and appreciate what property he owns *without prompting* from someone else. What is "prompting"? It's where someone has to remind "Grandpa" about that land he owns in Lincoln County and Clark County. If Grandpa didn't remember that he owns three sections of land next to the homestead, and five sections of hunting land and cropland in another county, he may not be of sound mind. His memory had to be "prompted," and this is not a person who should be making a Will.

The question that comes up in these cases is how long someone needs to be of "sound mind" when they execute a Will. We all know about people who are very clear-headed and lucid for a while and then may have periods of time when they are not. Or they may begin a long, slow decline.

2 *Estate of Burg*, 2010 S.D. 48 ¶ 44, 783 N.W.2d, 831, 842-43; numbering added for clarity.

The Court has said that sound mind is "not determined by any single moment in time, but must be considered as to the condition of the testator's mind a reasonable length of time before and after the will is executed."[3] What is reasonable? That is hard to say, but a few weeks before and after is probably reasonable.

Under the law, the person making the Will must be able to comprehend just exactly what property he owns.

When I talk of something that is "reasonable" in the law, there is always plenty of room for interpretation and arguments. It usually means that Courts decide the answer based on all the facts of the situation. The best I can do here is give some examples of what "reasonable" probably is. Here are three examples:

- If the person has been sick and confused for five years and then supposedly signed a Will after all that time, it's pretty clear that he was not of "sound mind" for a reasonable time before the Will was signed.
- A tougher call is the case where a person was really sick and had some trouble understanding his affairs enough to take care of them for a month or two, then got better and executed a Will, but several months later got sick and confused again. Under those circumstances, it is more likely that the Will was signed at a time the person was of sound mind.

3 *Estate of Burg*, 2010 S.D. 48 ¶ 44, 783 N.W.2d. 831.

- On the other hand, if the person was ill and very confused to the point where he couldn't understand his business affairs and had no idea of what his property was, then very briefly got a little clearer of mind and executed a Will, and then went back to being very confused, that probably is not someone who was of sound mind.

These kinds of situations can be very hard to get a handle on, and the testator's medical records and doctor's testimony about their condition become very important.

The Natural Objects of a Testator's Bounty

This is definitely a phrase you and I don't use in everyday conversation. So what does the Court mean when it says, "the natural objects of his bounty"? Our Supreme Court has never defined exactly who the natural objects of a testator's bounty are. This, of course, would be unique to every case. But the Court has given us some ideas.

In a 2010 opinion, the Court noted that the law in other states seems to suggest that husbands, wives, children, and grandchildren are probably the natural object of the testator's bounty. The Court also noted cases from other states where nephews, nieces, brothers, sisters, and other "collateral heirs" were not considered natural or normal objects of a testator's bounty simply because of the family relationship. So, while our Supreme Court hasn't really said for sure who are the natural objects of a testator's bounty, I can reasonably say that a

husband or wife, and children or grandchildren, are probably the natural objects of a testator's bounty.

I can also say that other people *might* be the natural objects of a testator's bounty depending on how close the relationship is between the testator and the other person. An example would be the nephew who is treated like a son when a testator has no children. You can probably think of other, similar examples.

The Disposition of Their Property

The final part of the Court's definition is that the testator must, without prompting, be able to explain how he wants his property to be given under his Will. It's not really any more complicated than that. If someone needs prompting to decide where each item of property will go, or who to name in his Will, he probably does not have the capacity to make a Will.

Next I look at the situation where someone attempts to influence the contents of a testator's Will. This is called "undue influence."

6
UNDUE INFLUENCE

"Undue influence" is basically what it sounds like it is. It is one person using improper influence (control, pressure, leverage) to get another person to sign a Will—a Will that clearly benefits the person using the improper influence.

The South Dakota Supreme Court has said that to prove that a Will was the result of undue influence, the contestant must prove four things:

1. that the decedent was susceptible to undue influence;
2. that the person who was responsible for the undue influence had the opportunity to exert such undue influence and did so for a wrongful purpose;
3. the person who was responsible for the undue influence had the disposition to do so for an improper purpose; and
4. the Will itself actually shows it was the result of undue influence.[4]

4 *In Re Estate of Duebendorfer*, 721 N.W.2d 438, 446 (S.D. 2006); *In Re Unke*, 1998 SD 94, ¶ 12, 583 N.W.2d at 148.

That may sound complicated and confusing, but it's really not. Let's look at this closer.

First, is the person susceptible to undue influence? If someone is elderly, or in poor health, or mentally confused, or weak, that person is susceptible to undue influence. Our Supreme Court has stated that, "[W]hile mere physical weakness is not necessarily evidence of undue influence, 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 undue influence than a mentally alert younger person in good health."[5]

So it's really pretty clear—if someone is weak, for any reason, they are more susceptible to undue influence. On the other hand, if someone is healthy, strong-willed, and clear-headed, he is probably not susceptible to undue influence.

Second, did the proponent of the Will have an "opportunity" to exercise undue influence? This element requires proof that the proponent exercising undue influence had to have access to the testator before the testator executed the Will. In other words, they spent time with the testator. It just makes sense. In order to do something wrong, the person has to have had the chance to talk to or meet with the testator.

Third, did the person who was responsible for the undue influence have the "disposition to do so for an improper purpose"? The South Dakota Supreme Court has said that "a disposition to unduly influence . . . for an improper purpose is . . . evident from . . . persistent efforts to gain control and possession of testator's property."[6] This boils down to the person

5 *Matter of Estate of Borsch*, 353 N.W.2d 346 (S.D. 1984), at 350.
6 *Matter of Estate of Borsch*, 353 N.W.2d 346, 350 (S.D. 1984).

using his position or making efforts to influence the testator in order to get the testator's property. For example, trying to get someone to sign accounts over to you, or to get your name on the deed of their house or farm property—done again and again—is obviously a persistent effort to gain control of the testator's property.

Fourth, does the Will show it was the result of undue influence? This is really pretty simple. If the Will gives most or all of the property to the person using undue influence, that is evidence that the Will was the result of the undue influence that person used.

The Presumption of Undue Influence

Undue influence is a bad thing in the eyes of the law. In fact, it's so bad that the law presumes that there *was* undue influence if someone named in the Will had a "confidential" relationship with the person making the Will and participated in drafting it.

So what is a "confidential" relationship? Well, it's a relationship of "trust and confidence." More to the point, it's when one person has placed "trust and confidence in the integrity and fidelity of another."[7] Our Supreme Court has also said that, "a confidential relationship is not restricted to any particular association of persons."[8] This means that anytime there is evidence that one person has placed trust and confidence in another, it may well be a confidential relationship.

7 *In Re Estate of Duebendorfer*, 721 N.W.2d 438, 458.
8 *In Re Estate of Duebendorfer*, 721 N.W.2d 438, 458.

The Supreme Court has also said that a fiduciary relationship is a confidential relationship. A fiduciary relationship is where one party has the legal duty to act in the best interests of another party. This includes an attorney, financial advisor, or legal guardian. In South Dakota, it also includes someone who is named in a Power of Attorney document. This person is required by law to act in the best interests of the other person *at all times, without exception.*

To summarize, the Court will presume that undue influence has taken place if a person had a close relationship with the testator, the opportunity and disposition to exert undue influence, and if he has somehow benefitted under a Will that he helped draft.

With the presumption in place, the burden is now on the person suspected of undue influence. This beneficiary must now present evidence that he did *not* take unfair advantage of the person who made the Will. If they don't, the presumption stands. And that beneficiary will lose the case. The law will presume that the Will was the result of undue influence.

A fiduciary relationship is where one party has the legal duty to act in the best interests of another party.

Many times, the beneficiary will present evidence that he did not take advantage of the testator. This type of evidence "rebuts" or answers the presumption of undue influence. But that does not mean the beneficiary "wins" the case. It simply means that he doesn't "lose" the case. The other side then proceeds to prove the four elements I discussed above.

So, when there is a confidential or fiduciary relationship between

the testator and the beneficiary, a contestant has *two* ways to win the case—first, through the presumption of undue influence, and second, through proving the four elements of undue influence I discussed above.

Next I turn to the situation where someone is *forced* into executing a Will. This is called "duress," and it is a supercharged version of undue influence. It's when influence turns to force.

7
DURESS

Duress is somewhat similar to undue influence.

In both cases, the main concern is that someone's free choice, or free will, is being overborne. For the purposes of duress, the main concerns are threats of force or uses of actual force. These threats or actual force alter the behavior of the person making the Will. A Will written or executed under duress is invalid because the Will needs to reflect the intent of the testator. Instead, a Will written under duress reflects the intent of the wrongdoer and not that of the testator.

What are some examples of duress? The most egregious example is someone who drafts a Will with a gun pointed at them. This rarely happens, but you get the idea. In most cases, the duress is often more subtle, and it occurs behind closed doors.

For examples, I can look at our state law concerning duress in contracts as a guide in telling us what constitutes duress in the making of a Will. Here are some examples of how someone might place duress on someone in the drafting of their Will:

1. locking the testator in a room (or threatening to do so);

2. taking and holding the testator's property (or threatening to do so);
3. physically assaulting the testator (or threatening to do so);
4. injuring the character of the testator with rumors or lies (or threatening to do so)[9]; or
5. threatening to put the testator in a nursing home unless the testator signs a Will that benefits the person making the threat.

I can think of countless examples of these types of situations. Perhaps the Son tells Dad he is going to withhold Dad's Social Security checks unless Son gets a bigger piece of the pie in the Will. Or the Son hides the car keys and refuses to let Dad drive until the Will is drafted. Or the Son physically assaults Dad in order to get the Will changed.

These Wills would be invalid on account of duress. Again, the main point is simply that the testator's intent is overborne, which results in an invalid Will. At the end of the day, the concept is pretty simple: If a person is threatened with force to change his Will, and then does change it, the Will is invalid.

If a person is threatened with force to change his Will, and then does change it, the Will is invalid.

The fourth reason to invalidate a Will is when someone is tricked into changing their Will. This trickery or deceit is called "fraud."

9 See South Dakota Codified Laws 53-4-3.

8
FRAUD

Put simply, fraud is lying. The key concepts behind fraud are deception and misrepresentation. While undue influence and duress overpower a testator's personal choice, fraud deceives or tricks the testator. The testator is freely executing his Will, but he is doing so based on false promises or lies. So the basic question to ask when looking at whether a Will was procured by fraud is: Was the testator lied to?

The South Dakota Supreme Court has stated that the burden rests on the person contesting the Will to show fraud.[10] To prove fraud, the contestant must establish four things:

1. that the beneficiary of the Will intentionally made a false statement of fact to the testator;
2. that the false statement was made in bad faith or with the intent of deceiving the testator;
3. that the testator was deceived by this false statement; and

10 *Estate of Weickum*, 317 N.W.2d 142, 146 (S.D. 1982).

4. that, as a result, the testator made a Will he would not have otherwise made.[11]

Again, the best way to make this clearer is to simply break it down into its parts.

Did the beneficiary make a false statement?

A false statement of fact is simply a lie. A false statement of fact can be an oral or written statement, or any claim of something as a fact that is misleading. It can also be a promise made without any intention of keeping that promise. A simple example is where Son tells Dad that his other son hated him. Or Daughter tells Mom that her other daughter is stealing from her. Then Dad or Mom get mad based on this false information and change their Will.

Was the false statement made in bad faith or with the intent of deceiving the testator?

A lie alone is not enough. The lie had to have been made in bad faith or to deceive the testator. What is "bad faith"? It means that the statement was made with bad intentions or in an insincere fashion.

Did the false statement deceive the testator?

If the testator doesn't believe the lie, there is no fraud. The first factual question then is whether or not the testator believed the lie. The second question is how long the testator believed

11 *Estate of Weickum*, 317 N.W.2d 142, 146 (S.D. 1982).

the lie. If he is told something false, and then investigates the issue, he may learn the truth. At this point, he no longer believes the lie.

Did the false statement induce the testator to make a Will he would not have otherwise made?

This is the big one. It must be shown that the testator was lied to, relied on the lie, and then came up with a Will that is different than what he would have otherwise made. So if Son lies to Dad, and Dad leaves all his property to Son, but Dad would have done so regardless of Son's lies, then Daughter cannot show fraud. However, if Son lies to Dad, saying that Dad shouldn't give any land to Daughter because she will lose it all to the IRS, and Dad changes his mind from splitting the land to giving it all to Son, then there is a good chance that Daughter can show fraud.

At the end of the day, to show fraud you have to show that the testator was lied to by someone who benefits under the Will, and that the lie caused the Will to be different than it would have been without the lie. The court is mainly concerned with important misrepresentations of fact that somehow manipulate the testator's free will or agency.

9

HOW TO TELL IF A WILL SHOULD BE CONTESTED

Here's the sad truth: You probably don't know if you have a valid Will Contest case. The problem is that the wrongdoer usually doesn't do his wrongdoing out in the light of day. As our Supreme Court has said: "Undue influence is not usually exercised in the open. It is therefore usually solely through inferences drawn from surrounding facts and circumstances that a court arrives at the conclusion that a will is the product of undue influence working on the mind of the testator . . . There is no direct proof of undue influence in this case. There seldom is."[12] The same is true about fraud. The reason that fraud works is that someone is tricked by a lie. If they knew about the lie, they wouldn't be tricked.

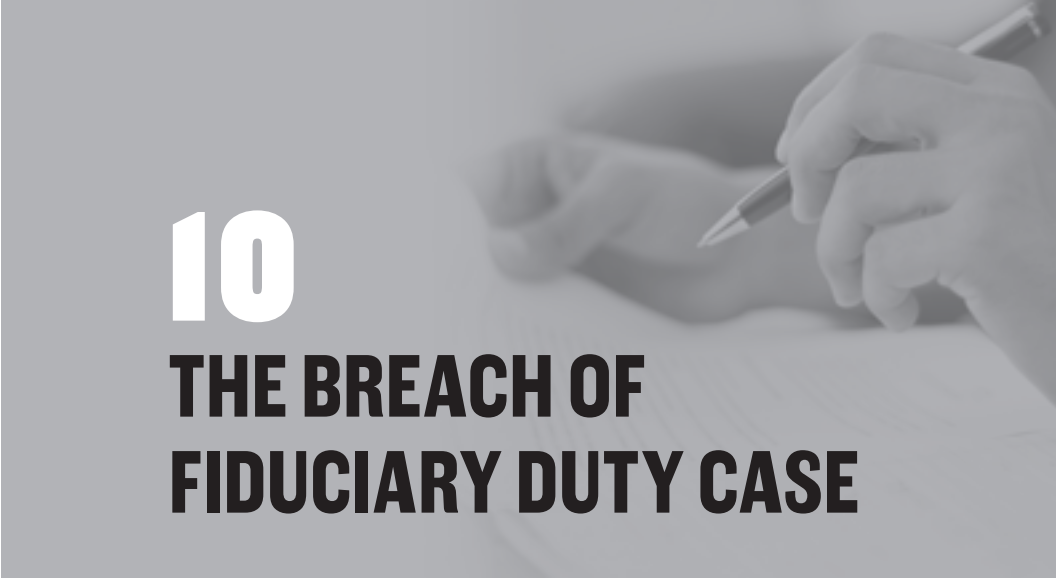
These wrongdoers are usually desperate and greedy, and they will do anything to conceal their work. And after the person dies, it is a lot harder to prove any wrongdoing. That doesn't mean you can't prove wrongdoing, it just means it's a lot harder to do so. It also means that you are probably not

12 *In Re Metz Estate*, 100 N.W.2d 393, 397 (S.D. 1960).

going to be able to figure it out on your own. You need an attorney experienced in Will Contest and estate cases to help get to the bottom of the wrongdoing. And in most cases, your attorney will need subpoenas and the power of the law to go in and find the documents and witnesses to prove the case. The information is usually out there somewhere. But it's very difficult to find it. It's also important to have a strategy to investigate the facts.

If you suspect that there is wrongdoing going on while your loved one is alive, contact a lawyer and get to the bottom of it. There are usually tip-offs and red flags of these kinds of shenanigans and wrongdoing. If you see them or suspect them, it's time to talk to a lawyer.

Your attorney will need subpoenas and the power of the law to go in and find the documents and witnesses to prove the case.



10
THE BREACH OF FIDUCIARY DUTY CASE

In many cases, the wrongdoing didn't affect a testator's Will. Instead, the wrongdoer finds ways to transfer money, accounts, or property into their greedy hands *before* the testator dies. A common way for this to happen is through the use of a Power of Attorney. And the wrongful use of a Power of Attorney is considered a "breach of fiduciary duty."

A fiduciary duty is the highest duty known under the law. It is where one person has a legal duty to act in the best interest of another person and is strictly bound to take no advantage of the other person. In simplest terms, a fiduciary is required to treat and protect the property of someone else with as much care and caution as if it was their own.

A fiduciary can be an agent, such as a power of attorney or a trustee of a trust. Those people are bound by the law to act in the highest good faith for the benefit of the person that gave them the authority to act on their behalf. If anyone breaches a fiduciary duty, they are subject to suit for any damages they cause.

A fiduciary duty is where one person has a legal duty to act in the best interest of another person and is strictly bound to take no advantage of the other person.

Here's a real-life example from one of my cases.

An 88-year-old man, Kenneth, suddenly starts getting visits from two shirttail relatives. (They were related by marriage to his late sister.)[13] They give Kenneth some shocking news: that the lady who has helped him with his affairs for several years is stealing from him! This is particularly shocking to Kenneth, because the woman has been a friend for over 30 years. But it's all a lie.[14]

Kenneth is a proud man. He is beside himself with rage about being "taken"—but he doesn't realize he is really being taken by the shirttail relatives.[15] He can't check up on these things himself because he doesn't have the strength. He can't even walk anymore.

His newfound "friends" take him to a lawyer, and the lawyer drafts a Power of Attorney and, of course, a new Will. His new "friends" then take that Power of Attorney to Kenneth's bank. They change his bank accounts to make them payable on death to them. His new "friends" claim that Kenneth approved of this, but they are the only ones who can "verify" that this is what he wants. When Kenneth dies, the bank pays

13 *In Re Estate of Duebendorfer*, 721 N.W.2d 438, 440.
14 *In Re Estate of Duebendorfer*, 721 N.W.2d 438, 440.
15 *In Re Estate of Duebendorfer*, 721 N.W.2d 438, 440.

out the money to them. As a result, Kenneth's estate is missing a lot of money. Because of these account transfers, the beneficiaries to the Will get next to nothing, because there is nothing of real value left in the estate.[16]

Kenneth's lifelong friends and relatives are heartbroken and confused. What's worst of all is that Kenneth spent his last year on Earth thinking his lifelong friends had betrayed him. The reality was that his new "friends" set him up and took advantage of him.

But here's the problem for these new "friends." Under South Dakota law, someone who has a Power of Attorney can't use that document and its power to benefit themselves, in any way, unless the document specifically says "they can give themselves any gift they like of my property" or words to that effect. If that type of phrase is not in the Power of Attorney document, then each and every act of self-dealing is a breach of fiduciary duty.

Our Supreme Court has stated that "[i]n general, a power of attorney 'must be strictly construed and strictly pursued' . . . only those powers specified in the document are granted to the attorney-in-fact."[17] In other words, if the power to undertake a specific action is not granted in the Power of Attorney, the power simply does not exist. If the Power of Attorney permits someone to enter into a land transaction on their behalf, and the person then uses the Power of Attorney to change ownership of bank accounts, these acts go outside of the narrow scope of the document. These acts are impermissible.

16 *In Re Estate of Duebendorfer*, 721 N.W.2d 438, 440-41.

17 *In Re Guardianship of Blare*, 1999 SD 18, ¶ 6, 589 N.W.2d 211 (S.D. 1999), citing 3 Am. Jur.2d Agency § 31 (1986); *Scott v. Goldman*, 917 P.2d 131, 133 (Wash. App. Div 2 1996), stating powers of attorney are strictly construed.

Our Supreme Court has noted that this general rule is even more important when a fiduciary uses, or attempts to use, fiduciary powers to benefit the fiduciary. That is called "self-dealing" and it's just as bad as it sounds. In many cases, "self-dealing" is plain old "dirty dealing."

To protect against this, our Supreme Court has said that fiduciaries can't "self-deal" unless a Power of Attorney, which is created without *any* undue influence or wrongdoing, specifically and expressly gives the person the authority to do so in "clear and unmistakable language."[18]

So here's the lesson: If someone uses a Power of Attorney to give themselves gifts from the person that gave them the Power of Attorney, it's almost always wrongdoing. The South Dakota Supreme Court quoted a statement from a Nebraska court that sums it up well: "[A] fiduciary will not be allowed to feather his or her own nest unless the power of attorney specifically allows such conduct."[19]

If the Power of Attorney document says that the attorney-in-fact—the person with the power—can give themselves gifts, such a gift transfer *may* be valid. However, it still might be invalid. It all depends. To answer that question, I would turn next to the four questions I asked in Chapters 5-8. Is the person competent? Was the Power of Attorney signed as a result of undue influence? Duress? Fraud? If not, the gift or self-dealing *may* be acceptable.

There isn't a one-size-fits-all answer to these cases. You need to look long and hard at any Power of Attorney that

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18 *Bienash v. Moller*, 721 N.W.2d 431, 435 (S.D. 2006); *In Re Estate of Stevenson*, 2000 SD 24, ¶ 15, 605 N.W.2d 818 (S.D. 2000).

19 *Bienash v. Moller*, 721 N.W.2d 431, 436 (S.D. 2006).

gives the power of self-dealing. It's a radical power to give. Those kinds of Powers of Attorney often don't pass the "smell test." They are often fraudulent.

In Kenneth's case, the story has a happy ending. Kenneth's real friends and family members came to us for help. I went to court for them and filed a suit against the shirttail relatives. It was a long fight. In fact, the case resulted in two separate Supreme Court opinions. I prevailed at the jury trial and at the Supreme Court, and I was able to get Kenneth's property and money back.

If you want to read about what happened, I'd be happy to send you those two Supreme Court opinions. Just call, write, send us an e-mail, or send us a message through our website at *www.northernplainsjustice.com*.

11 HOW DO I FIND A QUALIFIED ATTORNEY?

Finding a well-qualified lawyer can be tough for any case. This is especially true in light of all the advertising that is done by lawyers. Never make the decision based on advertising alone. Anyone can buy pay-per-click ads. Anyone can buy television or radio ads or put up a website. That is not to say that anyone who advertises on television or radio is not a good lawyer. It is to say that you need to look at things besides an advertisement.

The job of finding an attorney is even harder in the specialized area of Will Contests, breaches of fiduciary duty, and self-dealing Powers of Attorney. South Dakota does not have "board-certified" attorneys who have earned the seal of approval from the state bar in certain areas. Their specialties are largely unregulated, which means you need to do a lot of investigating before hiring a lawyer.

So what should you do?

First, ask questions. The first question you should ask is if the attorney regularly handles these kinds of cases. Ask the lawyer to let you know what Will Contest or estate cases they

have handled in the past. Have they handled any cases that have gone to the state Supreme Court? Have they tried any of these cases to a jury? Have they tried any of these cases to the court? How many cases do they have right now? Do they actually try cases to juries?

Second, get a referral from a lawyer you know. Not all lawyers can handle all kinds of cases, and the best lawyers I know will quickly admit when a case is not within their specialty. Your local lawyer will be able to refer you to someone that they respect and who has experience in handling Will Contest and estate cases. When you ask for a referral from your local lawyer, you can ask them the same questions about the lawyer they suggest.

Third, ask for a sample of verdicts, settlements, and testimonials from former clients. In other words, ask for some examples that show that the lawyer knows how to handle these kinds of cases and has successfully done so in the past. While past performance is no guarantee of future success, it's certainly better than zero information.

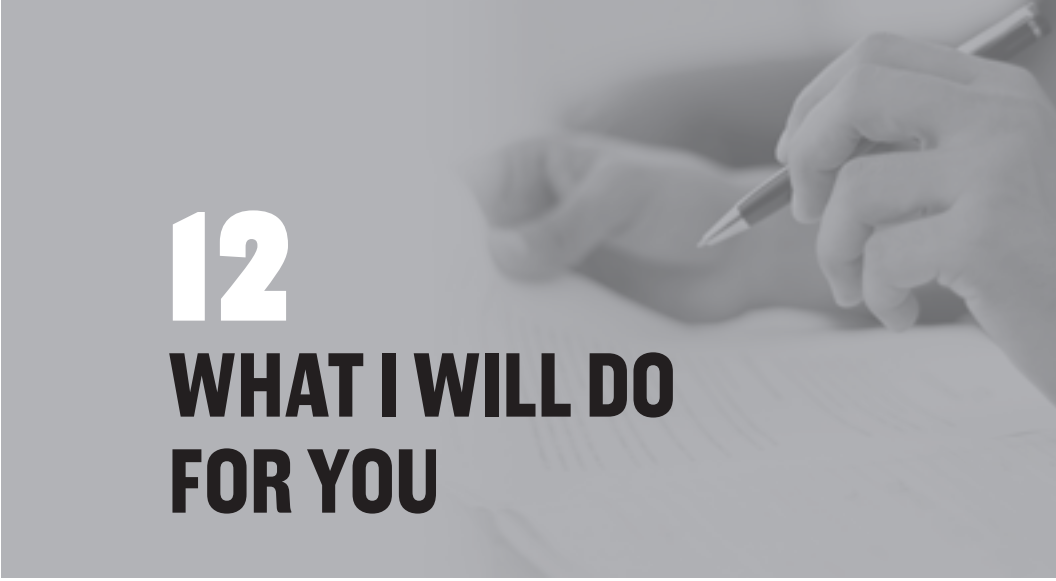
Fourth, ask for an explanation of the steps involved in a Will Contest or estate lawsuit. There are certain things that have to be "proven" and certain steps that have to be completed to get a case to trial, settled, or resolved. Have the lawyer explain those things to you. Make it your job to know. You should also ask how long one of these cases will take to resolve. Don't be surprised if the estimate is given in years, rather than weeks or months. In fact, if a lawyer tells you this is an easy case that he can wrap up in a few weeks, you should proceed with caution.

Fifth, ask for an explanation of the fees that the lawyer will charge for handling the case. Are the fees contingent, or

is the fee hourly? What costs are going to be necessary for the case to be completed?

Sixth, and most importantly, develop a list of your own questions. Get a notebook, and keep a running list of issues you want explained to you. Don't settle for short answers. Insist on getting the whole picture. And only make a decision when you've got good answers to all of your questions.

Get a notebook, and keep a running list of issues you want explained to you. Don't settle for short answers.



12
WHAT I WILL DO FOR YOU

If you are thinking about hiring my firm, you'll want to know what you can expect from me. In this chapter, you'll find a summary of the things that I will do for you if you agree to retain my services. Please note that this list is not all-inclusive, and every case is different. Not everything will be necessary in every case, and there may be other things I need to do. But, on the whole, these are the things I will do for you:

- Interview the client.
- Educate the client on Will Contest and estate claims (and other relevant claims).
- Interview witnesses relevant to the case.
- Retain a private investigator to interview witnesses (in some circumstances).
- Collect prior Wills.
- Collect relevant documents.
- Review financial records.

- Subpoena banking records.
- Obtain medical records.
- Obtain nursing home records.
- Interview law enforcement (in some circumstances).
- Analyze all records.
- Prepare legal documents to challenge the Will or start a lawsuit.
- Prepare discovery documents to force the other side to disclose all relevant information.
- Prepare the client, witnesses, and doctors for depositions.
- Prepare written questions for the depositions of the other parties and witnesses.
- Draft motions and briefs to narrow the issues.
- Draft briefs in response to motions filed by the other side.
- Set a trial date.
- Prepare for trial.
- Prepare the client and witnesses for trial.
- Organize the presentation of evidence for trial—documents, media, and exhibits.
- File appropriate motions and briefs in support of our position.
- Prepare appropriate jury instructions.

- Try the case to the jury or court, as appropriate in each case.
- Review the trial result for any appeal issues to the Supreme Court.

I will use all of my experience to get you the best result, either through trial or through settlement. I can tell you that many cases are going to end up going to court and being tried, and that's how I handle the cases from the start. I anticipate that the case will end up in court and plan accordingly. The truth is that the only way to handle these cases effectively is to prepare to actually go to trial. A case that is ready for trial is a case that is ready for settlement.

13
THE LEGAL PROCESS

The legal process is similar in most types of cases discussed in this book. If I agree to represent you and we both sign a written employment agreement, I will do our initial investigation. If the investigation gives us enough facts and evidence to contest a Will, I file a legal document called a "petition" with the court, asking for the Will to be declared invalid. The petition has to be "served" or delivered to the proponent of the Will.

The person who is the "proponent" of the Will—the one who wants the Will to be approved by the court—has 30 days to answer our petition.

The next step is "discovery," where both sides get to ask questions of the other side—both in writing, using "interrogatories" and "requests for production of documents," and through oral depositions. Oral depositions are simply the attorney for each side asking the other side's witnesses some questions about the case. I would get to ask questions of the "proponent" of the Will, and the other side's lawyer gets to ask questions of you. I will make sure that you understand the entire process and are prepared for the questions that you will be asked.

The next step is for the court to hear any pretrial motions regarding the case. These could include motions to exclude evidence or to rule that one side or the other is entitled to win even without going to trial.

The next step is the trial. The trial can be either to a judge or a jury. If it's to a judge, that one judge will make the decision. If it's a jury, 12 people are selected to be jurors, and they hear the testimony in the case and make a decision on whether a Will is valid or invalid.

How do you decide if a judge or jury will try the case? Well, in South Dakota there is a state statute that gives a contestant the right to have a jury trial in a Will Contest. The contestant can always "waive" or give up that right and have a judge decide the case.

My preference is usually to try the case to a jury. Every case is different. I need to know all the facts of a particular case before I decide what direction to go. If I take your case, we will discuss that in detail.

In many cases, the next step after a trial is an appeal to the state Supreme Court. The Court will review the trial transcript and decide whether any mistakes were made about the law or the facts. The Court will also review the written arguments of both sides. These are called "briefs." Often, they are not brief at all, and may run as long as 30 pages (or more). It takes a lot of hard work and skill to write good briefs, and you want a law firm that prides itself on writing briefs and that has argued these types of cases on appeal. Because even if you win at trial, it's all for nothing if you don't also win on appeal.

14
WHAT CASES WILL I NOT ACCEPT?

Over the years, I have developed a system for selecting cases. My law firm is highly selective about which cases I take. This is as much for the benefit of the client as it is for us. This chapter talks about the general rules I have for accepting a case.

No "Small" Estate Cases

I don't take "small" estate or Will Contest cases, because the costs of going after a small case are often more than you will recover in the Will Contest or lawsuit even if you win. What's a small case? It's a case where the potential recovery is below $300,000. The way the laws are written, and the way the system works, the costs of some Will Contest or estate cases will be prohibitive in light of what you might actually recover if you win the Will Contest. However, if the Will was improperly drafted or signed and you have a serious and significant financial claim because of it, I can help.

No Frivolous Cases

The other kinds of cases I don't take are frivolous cases. I don't take frivolous Will Contests or any other kinds of frivolous cases. Period. Yes, you may have the right to bring a lawsuit if you have a flimsy case and a sprinkling of facts in your favor. But I don't want any part of it.

What is a frivolous Will Contest or estate case? A frivolous Will Contest or estate case is one that's not based on any truthful, factual information. The testator may have really good reasons for doing what he did and may have told his lawyer why he was leaving you out of his Will, when there was no question he was mentally competent, and there is no way he was subject to undue influence.

Frivolous cases are also those that just can't be proven—for good reason. For example, if you had nothing to do with "Uncle Joe," looked down on him, and told him he was not worth the time of day or made him feel that way, don't be surprised when Uncle Joe gives his money to your cousin Sally who was always good to him and took care of him. And don't be surprised when I don't take your case.

A frivolous Will Contest or estate case is one that's not based on any truthful, factual information.

A Will Contest can't be based on you feeling that you weren't treated fairly. It must be based on evidence. Was Uncle Joe manipulated, incompetent, or tricked? If not, I don't have the facts necessary to proceed. The bottom line is that if there are good reasons that you got nothing from the Will, then you need to take your medi-

cine. There are dozens of good reasons for leaving someone out of a Will: a bad relationship, failing to visit, or acting just plain mean and nasty. Or perhaps you're bad with money or have a gambling problem. Uncle Joe certainly wouldn't want to waste his hard-earned estate on you. If any of these apply to you, you're probably out of luck.

Frivolous cases are frankly hurting the credibility of the legal system and the credibility of lawyers. We value our credibility, and we value our profession. We respect our jury and legal system as the best in the world. While not perfect, the jury and legal system is, in our judgment, and the judgment of our founding fathers, the cornerstone of our great democratic republic. We don't mean to sound like preachers on this, but I can assure you that I am not going to take any case that is frivolous.

15
WHAT CASES DO I ACCEPT?

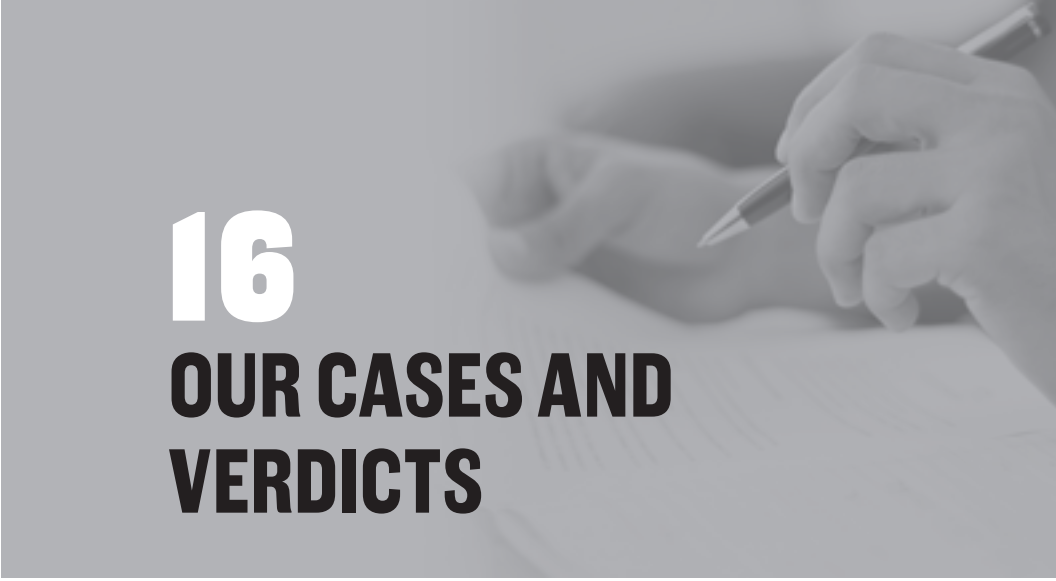
Take a look at our past record and my history in these kinds of cases. I take cases with merit and cases that I believe can make a difference in people's lives. I take cases where I can right a wrong. That's why I went into the legal profession.

The cases need to be large enough to make them financially worth it to pursue for the client. Since I have done as many cases as I have in the past, I have a good idea how much time and effort it will take to bring the case to trial and give our clients the best chance for success. It doesn't make any sense to take a case where the ultimate recovery for the client will be totally eaten up by attorney's fees. So the case needs to be large enough for the client to be able to pay the attorney's fees and costs and still recover a substantial sum from the estate. If it's not, I recommend that the client not proceed with the case.

I also defend Will Contest cases if the case meets our criteria. In other words, I sometimes represent the "other" side—the side who is accused of wrongdoing. Why do I de-

fend Will Contest cases when I also help people to contest Wills? Because of what I have talked about in Chapter 14. There are frivolous or bogus Will Contest cases filed all the time. If a person wants to talk to me about representing them under those circumstances, I will certainly talk to them about it. If I am convinced that the facts of the case show the Will was valid, and the case meets my criteria, I may help defend someone falsely accused of wrongdoing.

I take cases with merit and cases that I believe can make a difference in people's lives.



16
OUR CASES AND VERDICTS

Experience matters. Results matter. I have both.

I have successfully represented both petitioners and respondents in these cases—plaintiffs and defendants. I have the settlements and the verdicts to back that up.

I have tried several Will Contest cases in the past several years that went to a jury. I have also had several cases that were handled in court trials (without a jury), or with motions and hearings. And I have many others that were resolved out of court.

One case was *Estate of Duebendorfer*, in Turner County, South Dakota.[20] That case went to trial and resulted in a jury verdict for our clients, who were contesting a Will on the basis of undue influence. This jury verdict led to a recovery by our clients of over $350,000. Its companion case, *Bienash v. Moller*, also went before the South Dakota Supreme Court and was affirmed.[21]

20 *In Re Estate of Duebendorfer*, 721 N.W.2d 438.
21 *Bienash v. Moller*, 721 N.W.2d 431, (S.D. 2006).

I also tried the case of *Ward v. Lange*, a case that involved nephews who improperly took property from their uncle. That resulted in a damage award for the personal representative of the estate of Walter O'Keefe, in the amount of $100,000. This case also went to the South Dakota Supreme Court and was affirmed by the Court.[22] Its companion case, *Estate of Walter O'Keefe,* also went to the Supreme Court and was affirmed in most respects.[23]

I'll send you a copy of the case for your review if you would like a copy.

I also recently dealt with, and prevailed, in a case that involved the use of a Power of Attorney and attempts by a legal guardian to actually change the terms of the person's Will. That case was *Billars v. Lehr*.[24] It was decided by the circuit court in my client's favor. I did file an appeal in order to get more money for the estate, and within just a month or two after I wrote and filed the appeal brief, I successfully settled the case through mediation. The circuit court's decision is not published, but you can obtain a copy of the decision from us.

22 *Ward v. Lange*, 553 N.W.2d 246 (S.D. 1996).
23 *Estate of Walter O'Keefe,* 583 N.W.2d 138 (S.D. 1998).

24 A 2009 Bon Homme County civil case.

ABOUT THE AUTHOR

JEFF COLE

Jeff Cole has been practicing law since 1992. He grew up on a family farm a few miles north of Madison, South Dakota. Jeff and his wife Kim now live in Sioux Falls. He still longs to live on the farm. His wife Kim is not so sure about that, but may be persuaded someday. Jeff does own his own tractor that he keeps on the farm, which allows him to drive around and at least feel like he is a farmer for short periods of time.

Jeff graduated from Madison High School in 1979, South Dakota State University in 1988, and the University of South Dakota School of Law in 1992.

Jeff's legal career has been diverse, but is now primarily focused on trials and litigation. He has been lead counsel or co-counsel on numerous major litigation matters in the past several years. He was also a criminal prosecutor for nine years.

Jeff has tried over 35 jury trials and hundreds of court trials. He has also briefed and argued eight reported cases to the South Dakota Supreme Court, and one reported case to the United States Court of Appeals for the Eighth Circuit, including *Ward v. Lange*, 553 N.W.2d 246 (S.D. 1996); *Engelhart v. Kramer*, 570 N.W.2d 550 (S.D. 1997); *Estate of Walter O'Keefe*, 583 N.W.2d 138 (S.D. 1998); *Even v. City of Parker*, 597 N.W.2d 670 (S.D. 1999); *City of Marion v. Schoenwald*, 631 N.W.2d 213 (S.D. 2001); *Fink v. Dakotacare*, 324 F.3d 685 (8th Cir. 2003); *Bienash v. Moller*, 721 N.W.2d 431 (S.D. 2006); *Estate of Duebendorfer*, 721 N.W.2d 438 (S.D. 2006*); and Cassandra Skjonsberg v. Menard, Inc. and Praetorian Insurance Company, (2019 SD 6)*.

Jeff was also trial counsel for clients who intervened in another noteworthy reported case, *Livestock Marketing v. U.S. Dept. of Agriculture*, 207 F.Supp.2d 992 (D.S.D. 2002), a case that ended up in the United States Supreme Court. Mr. Cole's clients ultimately prevailed.

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Maybe the person who signed the will was seriously ill or mentally incompetent at the time of the signing or the person who passed away had recently changed their will in favor of one person over another.

There are many red flags and many different situations that can raise serious questions about the validity of a will.

ATTORNEY JEFF COLE

If you suspect that a Will was the result of fraud, undue influence, duress or lack of mental capacity, this book will help you understand what legal help is available to you.

The author, Jeff Cole is an attorney with extensive experience in contested Will cases and his book will help you understand what is available to you and how you should proceed.

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