IN THE IOWA SUPREME COURT

Supreme Court No. 19-2088

District Court No. GCPR001740

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF VERNON D. RADDA,

KEVIN KIENE AND BARBARA KIENE,

Petitioners-Appellants.

Appeal from the Iowa District Court for Washington County

The Honorable Crystal S. Cronk, District Judge

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether, because the presumption raised in § 633.637 of the Probate Code—that a person subject to a conservatorship lacks testamentary capacity—was not rebutted before the protected person executed wills, the wills are invalid as a matter of law.

Cases

In re Armster, 2001 WL 1285904 (Tenn. Ct. App. Oct. 25, 2001)
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Iowa Code § 4.8 (2020)
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Iowa Code § 633.308 (2020)
Iowa Code § 633.310 (2020)
Iowa Code § 633.553(1)(a) (2020)
Iowa Code § 633.637 (2020)
Iowa Code § 670.5 (1954)

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II. Whether, because Iowa law permits challenges to testamentary instruments while the testator is living, and because Petitioners are "interested persons," Petitioners have standing to challenge the protected person's execution of wills before probate.

Cases

In re Conservatorship of Smith, 655 N.W.2d 814 (Minn. 2003)
In re Prokosch's Guardianship, 151 N.W. 130 (Minn. 1915)
Marcus v. Young, 538 N.W.2d 285 (Iowa 1995)

Statutes and Rules

Iowa Code § 633.637 (2020)

III. Whether the court should deny the Conservator's request for fees because no statutory or other basis exists for departing from the "American rule."

Cases

Baldwin v. City of Estherville, 929 N.W.2d 691 (Iowa 2019)
Thornton v. Am. Interstate Ins. Co., 897 N.W.2d 445 (Iowa 2017)

INTRODUCTION

Petitioners, Kevin and Barbara Kiene ("Kienes"), established in their opening brief that Iowa courts have the power to determine retrospectively the testamentary capacity of a person subject to a conservatorship. Appellants' Brief at 17-21. They also showed that they have standing to challenge whether the protected person here, Vernon D. Radda ("Vernon"), had testamentary capacity when he executed wills in 1992 and 2015. *See* Appellants' Brief at 22-32. Respondent, Conservator Washington State Bank ("Respondent"), does not address the Kienes' analysis of Iowa's Probate Code or the Kienes' discussion of the policy implications of Respondent's position. Respondent merely repeats the arguments raised in its previously filed papers. Appellee's Brief at 13-15, 18-20, 22-24. As purported support for those arguments, Respondent misconstrues the district court's ruling on its motion to enlarge, asserting incorrectly that the court "decided" that it lacked jurisdiction to determine Vernon's testamentary capacity in 1992 and 2015. Appellee's Brief at 13-15. Respondent also attempts but fails to distinguish and undermine the authorities cited by the Kienes. Appellee's Brief at 15-17. Respondent's arguments fail to refute the Kienes' showing that they are entitled to the relief

requested in their petition and, therefore, the district court's ruling on Respondent's motion to enlarge should be reversed.

ARGUMENT

I. Standard of review.

The Kienes disagree that the appropriate standard of review is for corrections of errors at law. *See* Appellee's Brief at 12. Where the district court exercises its discretion to dismiss a claim for declaratory relief on motion to dismiss before holding hearing on the merits, this Court reviews the district court's determination for an abuse of discretion. *Wright v. Thompson*, 117 N.W.2d 520, 525 (1962). When, as here, the district court makes no specific findings of fact and provides no reasoning to support its conclusions, the court has abused its discretion. *Poole v. Hawkeye Area Cmty. Action Program, Inc.*, 666 N.W.2d 560, 565 (Iowa 2003) ("An abuse may be found if there is no record to support the court's factual determination or when the rule is based on clearly untenable reasons.").

The Kienes agree that this Court is not bound to accept the district court's legal conclusions. *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014). This Court "will reverse a district court's judgment if [it finds] that the court has applied erroneous rules of law, which materially affect its

decision." *NevadaCare, Inc. v. Dep't of Human Services*, 783 N.W.2d 459, 465 (Iowa 2010).

II. Respondent fails to refute the Kienes' showing that § 633.637 required a determination of Vernon's testamentary capacity before the 1992 and 2015 wills were executed, rendering the executed wills invalid as matter of law.

Respondent agrees with the Kienes that § 633.637 raises a presumption that a person subject to a conservatorship lacks testamentary capacity. Appellee's Brief at 19. Respondent does not dispute that there was no determination regarding Vernon's testamentary capacity before he executed wills in 1992 and 2015. Thus, at least implicitly, Respondent concedes that the presumption of lack of testamentary capacity was not rebutted before either will was signed—also conceding that the wills were executed without the requisite testamentary capacity. Nonetheless, Respondent argues that this Court should not permit any challenge to Vernon's legal capacity to execute a will while Vernon is still alive. Appellee's Brief at 14. Respondent's position is not supportable.

First, Respondent misunderstands the Kienes' argument. The Kienes do not challenge the validity of the 1992 and 2015 wills. Rather, they question whether Vernon had the capacity to execute a legally valid will in 1992 and 2015. Because a determination of Vernon's testamentary capacity was

required and no such determination was made, Vernon is presumed to lack such capacity. Accordingly, the wills cannot as a matter of law be valid.

Second, Respondent's reliance on *In re Springer's Estate*, 110 N.W.2d 380 (Iowa 1961), is misplaced because the Code no longer contains the provision on which *Springer's Estate* relied to conclude that the fact of a conservatorship does not raise a "presumption of incompetency." 110 N.W.2d at 388. Indeed, the Code contains no provision exempting voluntary conservatorships from the requirements of § 633.637.

Third, the district court did not "decide" that it lacked jurisdiction to make a retrospective determination of Vernon's testamentary capacity. Instead, the district court adopted the order drafted by Respondent's counsel. The court offered no reasoning to support, and provided no insight into, its decision to overrule its own four-page opinion denying Respondent's motion to dismiss by adopting a three-paragraph order proposed by Respondent's attorney.

A. The Kienes challenge the failure to determine Vernon's testamentary capacity to execute a valid will in 1992 and 2015, and Vernon's capacity, not the validity of the wills themselves.

This Kienes are not asking the court to invalidate either the 1992 or the 2015 will. The Kienes are asking the court to determine whether Vernon had

testamentary capacity in 1992 and 2015. *Id.* at 22. As the Kienes have made clear, if it is shown that Vernon had testamentary capacity in 1992 and 2015, the wills he executed would be legally valid by definition and no claim pursuant to § 633.637 would lie. Appellants' Brief at 23 (compliance with § 633.637(1) renders protected person's will presumptively valid). Without such a showing, the wills are not valid.

Respondent, however, seems to believe that a challenge to testamentary capacity cannot be raised separately from a will contest or an objection to a will. *See* App. at 10, ¶7 (framing the Kienes' request for declaratory judgment as "an action to set aside a will"); Appellee's Brief at 14 (framing request as "an objection to a will"). This is plainly wrong as a general matter. *See, e.g.*, *In re Guardianship of Driesen*, 771 N.W.2d 652 (Table), 2009 WL 149187, at *3 (Iowa Ct. App. May 29, 2009) (challenge to trust amendment while testator was still living). It is also wrong as applied to courts' authority to determine the validity of a will while the testator is still living. *See In the Matter of Harry Sable*, 2009 WL 321558 (N.J. Super. Ct. App. Div. Feb. 11, 2009); *In re Niles*, 623 A.2d.1 (N.J. 2003); *In the Matter of Guardianship and Conservatorship of Estate of Tennant*, 714 P. 2d 122 (Mont. 1986); *In re*

Armster, 2001 WL 1285904 (Tenn. Ct. App. Oct. 25, 2001); *Guardianship of Driesen*, 2009 WL 149187, at *3 (Iowa Ct. App. May 29, 2009).[1]

In *Matter of Harry Sable*, the trial court decided a challenge to a testator's competence to execute a will and other estate planning documents while the testator was still living. 2009 WL 321558 at *5-*6. The court agreed with the plaintiff and invalidated the documents. *Id.* at *6. On appeal, the defendant argued that the trial court lacked authority to invalidate a will and other estate planning documents while the testator is still living. *Id.* at *8. The appellate court declined to rule on that argument because the defendant had not challenged the trial court's authority before appealing. *Id.* However, citing *In re Niles*, 823 A.2d 1 (N.J. 2003), the appellate court said the trial court had authority to invalidate the documents while the testator was alive: "*Niles* stands as authority for the proposition that when a live testator is adjudicated incompetent as of a particular date, any documents executed subsequent to that date may be invalidated." *Id.*

Courts in other jurisdictions have also exercised their power to determine the validity of a will while a testator is still living. *See Estate of*

[1] Respondent attempts to undermine the usefulness of authorities cited the Kienes by claiming that they are not binding on this Court. As Respondent concedes, however, this is a case of first impression. Appellee's Brief at 7. It is thus hardly surprising that there is no binding authority on point.

Tennant, 714 P.2d at 124 (addressing request to set aside will before testator's death); *In re Armster*, 2001 WL 1285904, at *1 ("This appeal involves a conservatorship action and an effort to set aside a will and related documents."). The same must be true here because § 633.637 not only permits but requires a determination of testamentary capacity before a protected person may execute a valid will. Iowa Code § 633.637(1). This requirement furthers the public policy supporting conservatorships by protecting the property of the person subject to conservatorship as well as preserving his or her testamentary intent regarding that property. *See* Iowa Code § 633.553(1)(a) (conservatorship protects person whose "decision-making capacity … is so impaired that [he or she] is unable to make, communicate, or carry out important decisions concerning [his or her] financial affairs"); *In re Conservatorship of Smith*, 655 N.W.2d 814, 820 (Minn. 2003) ("primary purpose of conservatorship proceedings is … to protect that class of citizens who are incapable of fully protecting themselves") (quoting *In re Prokosch's Guardianship*, 151 N.W. 130, 132 (Minn. 1915) (internal quotation marks omitted)).

The protection in § 633.637(1) is effectuated by raising the presumption that a protected person lacks testamentary capacity. *See In the Matter of*

Guardianship of Hanken, 928 N.W.2d 125 (Table), 2019 WL 719048, at *1 (Iowa Ct. App. Feb. 20, 2019) ("guardianship is presumptive proof of incompetency to make a will"); *Matter of Guardianship of Hedin*, 528 N.W.2d 567, 571 (Iowa 1995) (noting that purpose of guardianship is to protect "the vulnerable and less fortunate"). The presumption in § 633.637 differs from the presumption that applies in will contests, where testamentary capacity—not lack thereof—is presumed and the burden is on the contestant to prove otherwise. *See Matter of Estate of Henrich*, 389 N.W.2d 78, 81 (Iowa Ct. App. 1986) ("will is invalidated if" contestant shows that testator lacked capacity); *Pearson v. Ossian*, 420 N.W.2d 493, 495 (Iowa Ct. App. 1988) (setting aside will where contestant showed testator's lack of capacity). Because the purpose of a presumption is to establish a fact as a matter of law unless the fact is disproved, a presumption is by definition rebuttable. *See* Black's Law Dictionary (11th ed. 2019) ("Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence."). If a presumption is not rebutted, the presumed fact is established as a matter of law. *Id.* Thus, Respondent's argument that the wills cannot be invalid as a matter law fails. *See* Appellee's Brief at 20.

The protection inherent in § 633.637 also affords protected persons self-determination by providing a mechanism by which such persons may dispose of their property by will, but only where it is has been established that they have the capacity to do so. By requiring a determination of testamentary capacity made before a protected person makes a will, the legislature plainly decided that it is not appropriate to wait until after the person's death to determine whether he or she had the requisite capacity to make a valid will.[2] The legislature's decision ensures to the extent possible that a protected person's will is valid *before* it is presented to the court for probate, thus avoiding unnecessary and often costly will contests and objections.

Because the presumption applies, and because it was not rebutted *before* Vernon executed the wills, neither will is, at present, legally valid. Any other result would render § 633.637 superfluous because any challenge to Vernon's testamentary capacity would have to be raised at the same time as a challenge to his will was raised—after he has died. *See* Appellants' Brief at 23; Iowa Code § 633.308 (providing for will contest after will is admitted to probate); *id.* § 633.310 (providing for objection to will before it is admitted to probate). Because it is presumed that "[t]he entire statute is intended to be

[2] The Kienes searched for legislative history and commentary that would shed light on the legislative intent behind § 633.637 but were not able to locate any.

effective[,]" it must be the case that § 633.637 does something other than what § 633.308 and § 633.310 do. Iowa Code § 4.4.

Respondent's position—that a protected person's capacity to execute a will is subject to challenge only after the protected person dies—renders the protections inherent in § 633.637(1) without force or effect. Respondent offers no legal or policy reason why a determination of Vernon's testamentary capacity in 1992 and 2015 cannot be made now. Such a determination is in the best interests of Vernon, his putative heirs, and justice.

B. Section 633.637 does not distinguish between voluntary and involuntary conservatorships. Thus, Respondent's reliance on *Springer's Estate* is misplaced.

Despite the Kienes' showing that *Springer's Estate* is no longer apposite, Respondent repeats its contention that § 633.637's presumption of lack of testamentary capacity does not apply in a voluntary conservatorship.[3]

[3] Respondent misunderstands the Kienes' argument. The Kienes do not argue that *Hanken* has overruled *Springer's Estate*. Appellee's Brief at 18. Rather, they argue that § 633.637 renders § 670.5, and thus *Springer's Estate*, irrelevant here. *Hanken* is significant because it is the only Iowa case that addresses § 633.637's requirement of a showing of testamentary capacity before a protected person may dispose of his or her property by will. 2019 WL 719048, at *1.

Appellee's Brief at 19 (citing *In re Springer's Estate*, 110 N.W.2d 380, 388 (Iowa 1961)). Respondent's contention fails.

Springer's Estate was decided pursuant to an earlier version of the Code that did not include § 633.637 and that included a subsection that has been removed from the Probate Code. *See* 110 N.W.2d at 388 (citing Iowa Code § 670.5 (1954)). The Probate Code no longer makes any meaningful distinction between voluntary and involuntary conservatorships. *See* Appellant's Brief at 19-20 (noting that the current Probate Code affords the same rights and protections to all persons subject to conservatorships, whether voluntary or involuntary). In addition, unlike § 670.5, § 633.637 does not state or even suggest that its application is limited to involuntary conservatorships, and no other provision of the current Probate Code suggests that it should be. Finally, § 633.637 was enacted after § 670.5 and, along with the other provisions in the current Probate Code, replaced the former Chapter 670. To the extent § 633.637 is incompatible with § 670.5, § 633.637 controls. *See* Iowa Code § 4.8 (statute latest in date controls).

C. The district court did not "decide" that it lacked jurisdiction to determine Vernon's testamentary capacity in 1992 and 2015.

In support of its arguments, Respondent incorrectly states that the district court "decided" that it only had jurisdiction to determine Vernon's

present testamentary capacity. Appellee's Brief at 13-18. Nothing in the order makes any such statement. Nor is there any indication that the district court engaged in any reasoning before overruling its own reasoned four-page opinion denying Respondent's motion to dismiss with a three-paragraph order drafted by Respondent's attorney. The district court specifically stated that the Kienes' request for a determination of the validity of Vernon's 1992 and 2015 wills is ripe for adjudication. *See* App. at 35 ("this action concerns the right of a person under a guardianship and conservatorship to execute a will, which is uncertain and appropriate for declaratory judgment"). Once again, Respondent's argument fails.

III. The Kienes have standing to ask the court to determine whether Vernon had testamentary capacity in 1992 and 2015.

Respondent also fails to defeat the Kienes' argument that they are appropriate persons to petition the court for a determination of Vernon's testamentary capacity. Respondent's contention that only the protected person may petition for such a determination during his or her lifetime ignores the plain language of § 633.637. *See* Appellee's Brief at 23.

Respondent's conclusion that § 633.637 reveals an intent to allow only the protected person to request a determination of testamentary capacity is infirm. *See* Appellee's Brief at 22-23 (citing *Marcus v. Young*, 538 N.W.2d

285, 289 (Iowa 1995)). Section 633.637 does no such thing, explicitly or implicitly. As Respondent concedes, § 633.637 does not say that the request for a determination of testamentary capacity must be made by the protected person Appellee's Brief at 13 ("§ 633.637 does not impose any requirement on the [protected person] to request a determination of his competency"). Respondent can point to no language in the provision, or elsewhere in the Code, that suggests it should be so limited. Thus, the doctrine of "*expression unis est exclusion alterius*" does not apply. Were it applicable, though, it would lend more support to the Kienes' position than to Respondent's. The legislature's decision not to delineate in § 633.637 the persons who may request the required determination should be taken to suggest that standing is not limited to anyone in particular.

Significantly, Respondent fails to address the policy concerns implicated by its proposed interpretation of § 633.637. *See* Appellants' Brief at 31-32. Reading § 633.637 to allow only the protected person (including his or her fiduciary) to seek a determination as to testamentary capacity would expose the protected person to improper influence and abuse, in direct conflict with the purpose of a conservatorship. *Id.*; *id.* at 21; *see In re Conservatorship of Smith*, 655 N.W.2d 814, 820 (Minn. 2003) ("primary purpose of

conservatorship proceedings is … to protect that class of citizens who are incapable of fully protecting themselves") (quoting *In re Prokosch's Guardianship*, 151 N.W. 130, 132 (Minn. 1915) (internal quotation marks omitted)).

The Probate Code plainly allows someone other than the protected party and his or her fiduciary to petition the court for a determination where the protected person or his fiduciary, for whatever reason, fails to do so.[4]

IV. Respondent's request for fees is unsupported and therefore must be denied.

Respondent offers no support for its contention that the Kienes should pay its fees for having to defend this case. Absent a contractual fee agreement or a basis in statutory or common law, the protected person's assets must be used to pay Respondent's fees. *Baldwin v. City of Estherville*, 929 N.W.2d 691, 699 (Iowa 2019); *Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 445, 474 (Iowa 2017). This is especially true here because the problem at the heart of this case is a problem of Respondent's (along with Vernon's Guardians') own making. Had one of Vernon's fiduciaries complied with its obligations

[4] It is not clear in this case whether the failure to request a determination of Vernon's testamentary capacity in 1992 and 2015 was the product of ignorance or malfeasance. It is clear, however, that the determination was required and was not made. Therefore, it must be requested.

to ensure that Vernon had the "requisite testamentary capacity" before executing the wills (Iowa Code § 633.637(1)), the expenses for the determination clearly would be paid from Vernon's assets and the Kienes would not be required to bring an action requesting the mandatory determination now.

Respondent's argument that "any third party could file a declaratory judgment action against a person who is still living, thereby costing the person significant sums of money" is overblown. Appellee's Brief at 23. In most instances, there will be no basis for a declaratory judgment. Such cases would be easily disposed of. In the few instances where a declaratory judgment might be appropriate, only those cases where the law is uncertain or has not been complied with would have any hope of withstanding a motion to dismiss. It is highly unlikely that there will be many such cases, especially given that this appears to be the first such case filed since § 633.637 was enacted in 1966.

Respondent should have ensured that Vernon complied with the requirements of § 633.637 before he executed the wills. The Kienes should not be penalized for Respondent's (or Vernon's Guardians') failures in 1992 and 2015.

CONCLUSION

WHEREFORE, petitioners-appellants, Kevin and Barbara Kiene, respectfully request that this Court reverse the district court's ruling on the motion to enlarge of respondent-appellee, Conservator Washington State Bank, deny respondent-appellee's request for fees, and award such further relief as this Court deems appropriate.

CERTIFICATE OF COST

The cost of printing or otherwise producing copies of this brief is $0.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on **May 28, 2020** by:

X EDMS	___ CM/ECF
___ Email	___ U.S. Mail
___ Hand Delivery	___ Certified Mail

By: */s/ Siobhan Briley*

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because it contains 3,358 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(f) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: May 28, 2020

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