IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19-2088
WASHINGTON COUNTY 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
IN AND FOR WASHINGTON COUNTY
THE HONORABLE CRYSTAL S. CRONK

FINAL BRIEF OF APPELLEE WASHINGTON STATE BANK, AS CONSERVATOR FOR VERNON D. RADDA, AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

Washington State Bank, as Conservator for Vernon D. Radda, respectfully requests that the Supreme Court retain this appeal because it presents an issue of first impression. Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

The Petition for Declaratory Judgment in this matter was filed on May 13, 2019. (Petition, App. 5). In their Petition, Petitioners sought a determination by the Court whether Radda had the testamentary capacity to execute either the 1992 or 2015 wills, citing Iowa Code § 633.637. (Petition, App. 5). On August 1, 2019, the Conservator moved to dismiss the Petition pursuant to Iowa Code § 633.290 and Iowa Code § 633.310, due to the fact that Vernon is still alive and, therefore, any action to declare a will "null and void" is not ripe for adjudication because a will cannot be probated until the death of the testator. (Motion to Dismiss, App. 9). On September 6, 2019, following a hearing, Judge Cronk entered her Ruling on Conservator's Motion to Dismiss. (Ruling, App. 32). In the Ruling, Judge Cronk found "the testamentary capacity of a testator is subject to challenge only after the testator has died and the will is filed for probate." (Ruling, App. 32). She additionally found, however, that "this action concerns the right of a person under a guardianship and conservatorship to execute a will." (Ruling, App. 32).

On September 11, 2019, the Conservator filed a Motion to Enlarge, requesting clarification of the District Court's Ruling. (Motion to Enlarge, App. 37). Specifically, the Conservator requested clarification: (1) if the Ruling only allowed for a determination whether Radda presently has the

capacity to execute a will, and not whether Radda had capacity to execute either the 1992 or 2015 wills; (2) the parties on whom such determination is binding; and (3) the party responsible for the costs of the action. (Motion to Enlarge, App. 37). The Petitioners filed a Resistance to the Motion on September 17, 2019. (Resistance, App. 40).

Two months later, on November 14, 2019, the Court had not yet entered an order on the Motion to Enlarge, and no hearing had been scheduled. The undersigned contacted Court Administration to check on the status of a ruling, and was advised to file a Proposed Order.[1] The undersigned immediately advised opposing counsel of the suggestion by Court Administration, and provided a copy of the Proposed Order. (Letter from Pogge to Briley, App. 43). On November 19, 2019, the Court entered its Order Enlarging Ruling on Conservator's Motion to Dismiss, holding: (1) the action may proceed only for a determination whether Radda currently has the capacity to execute a will; (2) a determination of whether Radda had capacity to execute prior wills can only be made after his death; and (3) Petitioners will be responsible for the costs of the action, as it is not in Radda's best interest to use his funds to defend his

[1] Petitioners repeatedly refer to this contact as "ex parte" communication, implying that the undersigned contacted the Judge without including counsel for Petitioner. The undersigned simply contacted Court Administration to check the status of the Motion – a contact that is not prohibited in any way and should not be classified as "ex parte."

competency, when those funds will likely be needed for his care. (Order, App. 45).

Petitioners filed an Application for Interlocutory Appeal, which was granted.

STATEMENT OF THE FACTS

A Guardianship and Conservatorship was established for Vernon Radda on September 16, 1991, with Radda's consent. (Petition, App. 5). Radda's sister, Julie Zieser, was appointed Guardian, while Washington State Bank was appointed Conservator. (Petition, App. 5). In 1992, Radda executed a will, with the assistance of counsel. (Petition, App. 5). In 2015, with the assistance of counsel, Radda executed another will. (Petition, App. 5). Zieser passed away in 2016, and her husband, Wayne Zieser, and her son, David Zieser, were appointed Radda's Guardians. (Petition, App. 5). Washington State Bank remained Conservator. (Petition, App. 5).

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN FINDING THAT IT ONLY HAS AUTHORITY TO DETERMINE RADDA'S PRESENT TESTAMENTARY CAPACITY AND, THEREFORE, IT CANNOT MAKE A DETERMINATION REGARDING THE VALIDITY OF THE 1992 OR 2015 WILLS.

a. Preservation of Error.

Washington State Bank, as Conservator for Vernon D. Radda, agrees with Petitioners' statements on error preservation.

b. Standard of Review.

This appeal stems from a ruling on a Motion to Enlarge a ruling on a Motion to Dismiss. Accordingly, the appropriate standard of review is that used for a motion to dismiss. On appeal of a motion to dismiss, the Court "employ[s] a limited review; it is not de novo." *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001). Rather, the Court "review[s] a district court's ruling on a motion to dismiss for the correction of errors at law." *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014) (quoting *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012)). The petition's well-pleaded factual allegations are to be accepted as true, but not its legal conclusions. *Id.* Additionally applicable in this matter, the Court will "review rulings on statutory construction for correction of errors at law." *Schaefer v. Putnam*, 841 N.W.2d 68, 74 (Iowa 2013).

c. The District Court Did Not Commit Error in Deciding it Only Has Jurisdiction to Determine Radda's Present Testamentary Capacity.

"A ward for whom a conservator has been appointed shall not have the power to convey, encumber, or dispose of property in any manner, other than by will if the ward possesses the requisite testamentary capacity, unless the court determines that the ward has a limited ability to handle the ward's own funds. If the court makes such a finding, the court shall specify to what extent the ward may possess and use the ward's own funds." Iowa Code § 633.637(a). Petitioners argue that this statute allows them to petition the Court for a determination of Radda's testamentary capacity in 1992 and 2015. However, the District Court was correct in finding it only has authority to determine Radda's present testamentary capacity.

Iowa Code § 633.637 does not impose any requirement on the ward to request a determination of his competency. It simply states that a ward can dispose of property by will if he has the required testamentary capacity. The statute does allow for the ward to petition the court for a determination of capacity.

What Iowa Code § 633.637 specifically does not do is allow a third party to request a determination of a ward's testamentary capacity for a previously created will while the testator is still living. Upon the death of a

person, a petition can be filed for probate of the decedent's will. Iowa Code § 633.290. As Radda is still alive, no petition for probate of his will can be filed. After Radda's death, an interested person is entitled to file an objection to probate of the will. Iowa Code § 633.310. Petitioners have not cited to any statutory provision that allows an objection to a will at any time besides after the death of the testator. No such statutory provision exists.

At this time, any action to determine the validity of Radda's 1992 or 2015 wills is not ripe for adjudication. "If a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it." *Iowa Coal Mining Co., Inc. v. Monroe Cnty.*, 555 N.W.2d 418, 432 (Iowa 1996). "A case is ripe for adjudication when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative." *State v. Wade*, 757 N.W.2d 618, 627 (Iowa 2008). A determination of Radda's testamentary capacity at the time of preparation of his 1992 and 2015 wills is purely speculative at this time, as a will does not become valid until the death of the testator. As the District Court properly held, it only has jurisdiction now to determine Radda's present testamentary capacity, though the standing of Petitioners to make even that request remains in dispute.

Petitioners rely on and liken this matter to *In re Guardianship & Conservatorship of Hanken*, 928 N.W.2d 125 (Table), 2019 Iowa App. LEXIS

160, 2019 WL 719048 (Iowa Ct. App.). However, that reliance is misplaced. As an initial matter, *Hanken* is an unpublished Court of Appeals opinion and is, therefore, not controlling authority. Iowa R. App. P. 6.904(2)(c). Further, *Hanken* involved a ward who petitioned the District Court for termination of the guardianship and conservatorship, and for the right to draft a new will if she so chose. Neither of those things happened here. Radda has not petitioned the District Court for termination of the guardianship and conservatorship, and he is not requesting the right to draft a new will. Petitioners are unilaterally requesting determinations that are not theirs to request.

Petitioners have not pointed to any Iowa case or statute that authorizes the action they asked the District Court to take. Petitioners have referred to four cases from other jurisdictions which, they claim, support their contentions. Clearly, those cases are not binding on this Court. Even so, all four can be distinguished from the matter at hand.

The first, *Sable v. Sable (In re Sable),* 2009 N.J. Super. Unpub. LEXIS 334, 2009 WL 321558 (N.J. Super Ct. App. Div. Feb. 11, 2009), is an unpublished decision which, under state rules, shall not "constitute precedent or be binding upon any court." New Jersey Rule 1:36-3. Further, Petitioners themselves point out that the appellate court did not address the issue of whether a trial court has power to invalidate estate planning documents while

the testator is still living, as the issue had not been raised to the trial court. Petitioners, therefore, are wrong to argue that *Sable* allows a testator's capacity at the time a will was made to be challenged prior to the testator's death.

The second case, *In re Niles*, 623 A.2d 1 (N.J. 2003), also did not address the issue claimed by Petitioners: "The issue in this appeal is whether to create an exception, if one does not already exist, to the American Rule, which generally does not permit a prevailing party to recover counsel fees from a losing party." There was no request to address, on appeal, whether the validity of a will could be determined while the testator was still living. Additionally, the underlying case in *Nile* dealt with undue influence, which has not been asserted in the present matter.

The third case, *In the Matter of Guardianship and Conservatorship of Estate of Tennant*, 714 P.2d 122 (Mont. 1986), involved a woman who was unduly influenced by her landscapers to give them money, deed her home to them, and change her will to benefit them. Her conservator filed an action to have the funds returned from the landscapers and to set aside the deed and will. However, the testator died soon thereafter, and the civil action was consolidated with the probate of her estate. Accordingly, the district court did not have the occasion to make a determination whether the will was valid

during the testator's lifetime, since she passed away prior to the court taking any action.

The fourth case, *In re Armster*, 2001 Tenn. App. LEXIS 797, 2001 WL 1285904 (Tenn. Ct. App.), is also unpublished and, therefore, not even binding authority in Tennessee, let alone Iowa. In addition, *Armster* predominately dealt with a request for appointment of conservator and the issue of undue influence, though the appellate court did discuss testamentary capacity. The case is not similar to the case at hand, given the issues addressed.

Petitioners also claim *Driesen v. Little Big Horn Invs., L.L.C. (In re Driesen)*, 2009 Iowa App. LEXIS 458, 2009 WL 1491871 (Iowa Ct. App.), is analogous to the present matter. As an initial issue, this case, like most others cited by Petitioners, is unpublished and does not constitute controlling legal authority. Further, the case involved a daughter who sought an involuntary guardianship for her mother, sought to have her mother removed as the trustee of her trust, and sought to quiet title to a farm which a son had transferred from the trust. The issues in *Driesen* are entirely different from the case at hand, as there was no issue of testamentary capacity to execute a will. The issues in *Driesen* were appropriately raised during the mother's lifetime, unlike the issues in the present case.

There are no cases or statutes, in Iowa or elsewhere, that authorize the District Court to do as requested by Petitioners. Even if this Court determines the cases cited by Petitioners are similar to this one, the fact that there are so few of them and they are mostly unpublished indicates they are the exception rather than the rule. Accordingly, the District Court was correct in finding that it currently only has authority to determine Radda's present testamentary capacity to execute a will, as opposed to his capacity in 1992 or 2015.

d. Even if the District Court Has Jurisdiction to Determine the Validity of Radda's 1992 and 2015 Wills, They are Not Invalid as a Matter of Law.

Even if this Court finds that the District Court now has jurisdiction to determine Radda's testamentary capacity at the time his 1992 and 2015 wills were executed, Petitioners' assertion that the wills are invalid as a matter of law is incorrect.

First, Petitioners assert that *Hanken* is the controlling case on this matter and overrules *In re Springer's Estate*, 110 N.W.2d 380 (Iowa 1961). That is incorrect. An unpublished Court of Appeals opinion does not overrule a Supreme Court decision. In *Springer*, the Court found "[t]he fact decedent was under guardianship does not in this case raise a presumption of incompetency and make a case for the jury on that ground alone as contended by contestants. This was a voluntary guardianship under section 670.5, Code

of Iowa, 1954, and no presumption is raised." *Springer*, 110 N.W.2d at 388. The same is true in the present matter.

However, even if Petitoners' reliance on *Hanken* is correct, it is not determinative of the validity of the 1992 and 2015 wills. "[A]bsence of 'decision-making capacity' does not necessarily equate with absence of 'testamentary capacity.' In other words, a person who is under a guardianship and conservatorship may nonetheless possess testamentary capacity to transfer property." *Hanken*, 2019 WL 719048 at *2. Petitioners incorrectly argue that *Hanken* stands for the proposition that a will is invalid as a matter of law if made by a person under a guardianship or conservatorship. (Brief of Appellants, p. 17). *Hanken* states "the fact of guardianship is presumptive proof of incompetency to make a will, and the burden is upon the proponent to overcome such presumption." *Id.* at *3. This language, specifically quoted by Petitioners, indicates that the 1992 and 2015 wills cannot be invalid ***as a matter of law***, as it permits a rebuttal of that presumption.

If it is determined that the District Court has the authority to determine the validity of the 1992 and 2015 wills pursuant to *Hanken*, it should be permitted to do just that – determine the validity. Even under *Hanken*, the fact that Radda is under a guardianship does not automatically invalidate those wills as a matter of law.

This matter is before the Court following only a pre-answer Motion to Dismiss and Order Enlarging Ruling on such Motion to Dismiss. The District Court has heard no evidence, and must assume the facts in the Petition are true. For Petitioners to ask this Court to find the 1992 and 2015 wills invalid as a matter of law at this stage of litigation is premature, at best.

II. THE DISTRICT COURT PROPERLY DETERMINED THE KIENES DO NOT HAVE STANDING TO CHALLENGE RADDA'S WILL, AND THAT, IF THIS ACTION PROCEEDS, THEY SHOULD BE RESPONSIBLE FOR FURTHER CONSERVATOR'S FEES IN DEFENDING THIS ACTION.

a. Preservation of Error.

Washington State Bank, as Conservator for Vernon D. Radda, agrees with Petitioners' statements on error preservation, with the clarification that the Order Enlarging Ruling did not specifically address whether the Kienes are "interested persons," although it is agreed that all parties argued the issue.

b. Standard of Review.

This appeal stems from a ruling on a Motion to Enlarge a ruling on a Motion to Dismiss. Accordingly, the appropriate standard of review is that used for a motion to dismiss. On appeal of a motion to dismiss, the Court "employ[s] a limited review; it is not de novo." *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001). Rather, the Court "review[s] a district court's ruling on a motion to dismiss for the correction of errors at law." *Shumate v. Drake*

Univ., 846 N.W.2d 503, 507 (Iowa 2014) (quoting *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012)). The petition's well-pleaded factual allegations are to be accepted as true, but not its legal conclusions. *Id.* Additionally applicable in this matter, the Court will "review rulings on statutory construction for correction of errors at law." *Schaefer v. Putnam*, 841 N.W.2d 68, 74 (Iowa 2013).

c. The Kienes are Not Interested Persons Who Have Standing to Challenge Radda's Wills.

An action to set aside a will requires an interested party. Iowa Code § 633.308. An "interested party must have an immediate interest rather than a contingent interest, which may never vest." *Matter of Pearson's Estate*, 319 N.W.2d 248, 249–50 (Iowa 1982). As discussed above, Iowa does allow a challenge to a will before it is admitted to probate, but only after the testator has died. Iowa Code § 633.310. It is undisputed that Petitioners are entitled to challenge Radda's will at the time of his death. However, at the present time, Petitioners lack a vested interest and therefore lack standing until Vernon's death.[2]

[2] Though this matter was appealed before the issue could be raised at the District Court level, one of the Petitioners, Kevin Kiene, has no blood relation to Radda and does not have standing for that reason, in addition to the others argued herein.

Petitioners rightfully point out that "interested person" is used repeatedly throughout the Iowa probate statutes. Notably, however, the term is not used in Iowa Code § 633.637, which is the statute Petitioners claim authorizes this action. "[L]egislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned." *Marcus v. Young*, 538 N.W.2d 285 (Iowa 1995). If the Legislature intended interested parties to have standing to request a determination of testamentary capacity of a ward, it would have included "interested person" in the wording of the statute. The omission of the phrase, coupled with its wide use throughout the rest of Chapter 633, makes it clear the Legislature did not intend for anyone besides the ward to request a finding as to his testamentary capacity. Petitioners do not have standing to pursue the pending action.

d. The District Court Properly Held the Kienes Should Be Responsible for the Costs of this Action.

The District Court was correct in holding that Petitioners should be responsible for the costs of this action, including all attorneys' fees.

Petitioners argue that all parties should be responsible for their own costs. Following Petitioners' assertion to its logical conclusion, any third party could file a declaratory judgment action against a person who is still living,

thereby costing the person significant sums of money that he may or may not have. As specified in the District Court's Order Enlarging Ruling, Radda's funds are needed for his care while he is still alive. It is not in his best interest to use those funds now to defend his competency. This is the precise reason that Iowa Code § 633.310 allows a will to be questioned and competency to be determined after the death of the testator, once the funds are no longer needed.

Fee shifting has been allowed for public policy reasons in matters related to child custody and support. *See In re Marriage of Erpelding*, 917 N.W.2d 235 (Iowa 2018). *Erpelding* held that a ban on fee shifting violated public policy, as the child's right to support would be adversely affected. The same is true here. Radda is a protected person under a guardianship and conservatorship. His rights will be adversely impacted if he is forced to use his own funds to defend this action. Rather, for public policy reasons, Radda is entitled to have his costs, including the Conservator's attorneys' fees, paid by Petitioners. To hold otherwise puts Radda in a vulnerable position, one that Petitioners have created.

CONCLUSION

For the foregoing reasons, Washington State Bank, as Conservator for Vernon D. Radda, respectfully requests that this Court uphold the District

Court's Order Enlarging Ruling on Motion to Dismiss, specifically that the District Court only has jurisdiction to determine Radda's present testamentary capacity, that Petitioners do not have standing to request a determination of Radda's competency as it relates to his 1992 and 2015 wills, and that Petitioners are responsible for the costs and fees associated with this action.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

The Appellee Washington State Bank, as Conservator for Vernon D. Radda, requests oral argument on all issues presented herein.

Respectfully submitted,

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CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing this document was $0.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 4,934 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point.

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PROOF OF SERVICE

The undersigned hereby certifies that the foregoing Appellee's Final Brief was served upon the attorney of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on the 26th day of May, 2020.

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CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Appellee's Final Brief was filed with the Iowa Supreme Court by electronically filing the same on the 26th day of May, 2020.

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