BEFORE THE IOWA SUPREME COURT

NO. 21-0227

TODD RAND,

Plaintiff-Appellant,

v.

SECURITY NATIONAL CORPORATION D/B/A SECURITY NATIONAL BANK,

Defendant-Appellee.

On Appeal from the District Court for Woodbury County
The Honorable Steve J. Andreasen

Brief of Amicus Curiae Iowa Academy of Trust and Estate Counsel

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes and Other Authorities

Identity and Interest of Amicus Curiae

The Iowa Academy of Trust and Estate Counsel ("Iowa Academy") is an Iowa non-profit corporation focused on Iowa trust and estate matters. It seeks to foster cooperation and collective discussions among trust and estate attorneys, trust officers, law professors, and other interested professionals in Iowa concerning estate and business succession. The Iowa Academy further seeks to educate and support legislative efforts and initiatives for facilitating effective transmission of wealth and values by Iowa families.

Iowa Academy membership is limited to 250 Iowa attorneys and is available only by invitation from its board of directors. Trust and estate matters are a primary component of the professional life of Iowa Academy members, who give vital advice to fiduciaries regarding the responsible management of trusts and estates.

The Iowa Academy and its members have a significant interest in this case, as Plaintiff Todd Rand's tort claims implicate, and could substantially affect, the operation of the Iowa probate code, the fiduciary duties owed by Iowa Academy members and their clients, and the venue in which probate disputes are litigated.

No party's counsel authored this brief in whole or part, nor did any party, party's counsel, or person other than the Iowa Academy contribute money to fund the preparation and submission of this brief.

Argument

As presented by Plaintiff Todd Rand, this is simply a tort case. Rand alleges that Defendant Security National Bank, in its capacity as the duly nominated and appointed executor[1] of his father's estate, committed negligent or intentional misrepresentation, and that a jury (under several common-law theories) should award him compensatory and punitive damages. But this is not simply a tort case; there is much more to it, which is why the Iowa Academy is compelled to weigh in.

Rand's complaints are several, but the crux of his lawsuit is that on September 20, 2016, Security National Bank sent a letter to the estate's five beneficiaries, Rand included, which (according to Rand) suggests that Iowa law sets personal representative and attorney fees at 2% of the value of the estate assets, when in fact the 2% rate is a statutory maximum for ordinary services to the estate. Under Rand's theory of the case, if Security National Bank had been clear that 2% was the maximum—rather than what the bank was *entitled* to under the law—then Rand would have looked "elsewhere for a different, more [cost] competitive personal representative to administer his father's large estate." (Rand Br. 21). Rand further claims, as he must, that he likely would have found that

[1] The Iowa probate code uses the terms "executor" and "personal representative" somewhat interchangeably.

cheaper alternative, who would have then taken over the administration of his father's estate. Had that occurred, Rand would have been spared the expense of opposing Security National Bank's fee application and the alleged emotional distress that came with it.

As stated in Security National's brief, there are numerous reasons why Rand's claims are legally deficient, but the most fundamental problem—which is of most concern to the Iowa Academy—is that these claims ignore the requirements and underlying policy considerations of how executors are appointed, compensated, and (if necessary) removed under the Iowa probate code. As this Court made clear in *Youngblut v. Youngblut*, 945 N.W.2d 25, 25 (Iowa 2020), when tort claims intersect with probate matters, those "underlying policy considerations" matter.

I. The probate code provides that the probate court, not the beneficiaries or anyone else, selects the executor and sets reasonable fees.

In arguing that the district court was wrong to grant summary judgment on his unique claims, Rand paints himself as the decision maker—as the person who was entitled to search for and ultimately choose the executor. Rand claims he lost that opportunity because Security National Bank led him to believe there was no reason to shop around, because every would-be executor and every would-be attorney would be entitled to compensation of the same 2% fee.

Rand's "lost opportunity" is significantly overstated by him—to the point this Court should refuse to recognize it. Under Iowa probate law, the selection of the executor is not the choice of a single beneficiary—nor any beneficiary, for that matter. In fact, the executor "is not an agent of the heirs or beneficiaries," "does not derive his or her powers from them, and is not subject to their control." *Matter of Herm's Est.*, 284 N.W.2d 191, 196 (Iowa 1979). Instead, the executor is an "officer of the court" who is chosen by the court. *Id;* Iowa Code §§ 633.294 and 299.

That dynamic makes sense, given the purpose of a probate proceeding. Unlike litigation, where opposing parties meet in dispute, a probate proceeding implicates multiple parties with overlapping interests. In furtherance of the administration of the estate, the court and the executor must consider the wishes of the testator (who may have nominated a party as executor), the interests of the estate's creditors (as a group and vis-à-vis each other) and the interests of the beneficiaries (again, as a group and vis-à-vis each other).

By Iowa cases and statute, the testator is given great deference in choosing an executor, and with good reason: the testator is in the best position to know the difficulties that may come with administering his or her estate, and is thus in the best position to know who has the necessary skills or background to perform the task. The testator also knows whether the beneficiaries will get along or whether, as here, a neutral third-party is needed to keep the peace. Thus, "[t]he

testator has the right to appointment of the executor of his or her preference if the nominated executor is qualified to serve." *Matter of Est. of Petersen*, 570 N.W.2d 463, 467 (Iowa Ct. App. 1997).[2]

The probate code is in accord, providing that the "person designated in the will" is given first "order of preference for appointment of executor." Iowa Code § 633.294. The second preference is "any beneficiary named in the will, or a person nominated by the beneficiaries," which is followed by "any creditor of the deceased, or a person nominated by such creditor," which is then followed by any "other person as the court may find qualified." *Id*

Even if Rand found someone who would agree to submit a fee application that was less than the 2% cap, that nominee would fall in the fourth preference category ("such other person as the court may find qualified"). Iowa Code § 633.294. Rand was a beneficiary under the will (thus potentially falling into the second preference category) but he admitted he would not be a suitable executor. (MSJ Order 30). And Rand provided no evidence that his fellow beneficiaries would have agreed to nominate an alternative, cheaper executor. Indeed, none of them joined his objection to Security National's fee application, and Rand

[2] *See also In re Schneider's Est.*, 277 N.W. 567, 570 (1938) ("Where a person is named as executor in a will, it is to be presumed that in the judgment of the testator he possesses a special fitness for the discharge of the trust. Indeed, the very reason that he is named at all must be because the testator desired that he should administer rather than any one else.")

"conceded in his deposition" that he and the other beneficiaries "were not on good terms." (MSJ Order 30).

So the "opportunity" that Rand claims he lost—to find a cheaper executor—would be worthless unless he could convince the probate court to appoint that theoretical executor (who would fall in the fourth preference order) instead of Security National Bank (who was nominated in the will and thus the statutorily preferred executor), solely because the other option is cheaper.

There is no legal or factual basis to make such a claim. "[T]he nominee in a will admitted to probate should be appointed executor unless for the most persuasive reasons and the mere wishes of the heirs are insufficient." *In re Swanson's Est.*, 31 N.W.2d 385, 389 (1948). That includes a wish for a cheaper executor.

Making matters worse for Rand's "lost opportunity" theory, Security National Bank did not send the allegedly misleading letter until three weeks after the probate court appointed the bank as the executor. (*See* Order Admitting Will and Appointment of Personal Rep.) Rand's real hurdle, then, isn't to establish that he lost an opportunity to have someone else appointed as executor from the start; it's to establish that he lost the opportunity to have Security National *removed* as the executor in place of someone who would request less than 2%. That is an even higher burden than having someone else appointed at the outset.

To remove Security National as executor, Rand would have been required to show that the bank "mismanaged the estate" or "failed to perform any duty imposed by law." Iowa Code § 633.65; *see also Matter of Est. of Atwood*, 577 N.W.2d 60, 63 (Iowa Ct. App. 1998) (burden is on the party seeking removal). There is no such evidence. In fact, after a three-day hearing in which Rand raised the same factual allegations he is raising here, the probate court found that "the results of [Security National's] efforts as they relate to the decedent's business affairs are of particular note and have resulted in a very substantial monetary benefit to the estate." (Order on Fees at 17-18). In other words, Security National competently administered the estate as Roger Rand asked it to do when he nominated the bank in his will.

Rand does not argue otherwise. His only complaint is about fees and Security National Bank's disclosure of them. Thus, if the Court were to do anything but affirm summary judgment in this case, it would be suggesting, at the very least, that a probate court could have replaced Security National Bank (who was nominated in the will) with an executor of *one* beneficiary's choosing *purely* because this other executor would agree to submit an application of some unknown, but lesser, dollar figure.

There is no basis in the probate code or case law to make such a ruling. The executor's fee, like the selection of the executor, is squarely within the province of the probate court. Iowa Code § 633.197. "[T]he law imposes a

standard of reasonableness in the determination of fees for ordinary services and burdens the court with the responsibility to resolve the question." *Est. of Randeris v. Randeris*, 523 N.W.2d 600, 606 (Iowa Ct. App. 1994) (Cady, J.). And it is "common for the maximum ordinary fee allowed by statute to be requested and approved by the court." *Id.*

Again, the executor is an agent of the court, not of the beneficiaries. *Matter of Herm's Est.*, 284 N.W.2d at 196. While the beneficiaries may attempt to secure a fee agreement, it is not a right. Instead, when it comes to fees, the only recognized *right* of a beneficiary in the probate code is the right that Rand exercised: to object to the fee application.

Rand succeeded in that effort, meaning that the court established a reasonable fee and thus the probate code worked as it was designed. If Rand was dissatisfied with that order, he should have appealed it. But otherwise that should have been the end of the matter. Instead, Rand filed this lawsuit, requesting more than a million dollars in damages based on an alleged "opportunity" or "right" that the probate code does not afford him in any meaningful respect—which is to choose someone else to administer his father's estate who will do it for less.

If the Court allows that claim to be presented to a jury, it will result in lasting damage to a probate system that works well. The Iowa Academy respectfully requests that the Court reject the invitation.

II. Disappointed beneficiaries should not be allowed to present tort claims to a jury that were, or could have been, raised with the probate court.

Because Rand's tort claims are based on a theory that does not "fit[] into Iowa's legislative scheme," *Youngblut*, 945 N.W.2d at 37, summary judgment was appropriate. But Rand's claims are troubling to the Iowa Academy for an additional, though related, reason: His complaints should have been, and to some extent were, raised in the probate proceedings.

This is not a case where Rand discovered the truth well after the fee application was approved or the estate closed. Security National Bank sent the allegedly misleading letter to Rand on September 20, 2016. By February 2017, Rand had hired his own attorney, who is counsel of record in this case, who made further inquiry about the executor and attorney fees. (Rand Br. 24).

At that point—a full eight months from when Security National submitted its fee application—Rand knew or should have known that a fee award of 2% of the gross assets of the estate is the maximum fee for ordinary services, not an entitlement. Accordingly, if he wanted Security National Bank removed as executor for misleading him and intending to request the 2% fee, he should have made that motion then. But Rand did not do that; instead, he waited until Security National conducted the work and submitted its application. Only then did Rand complain about the allegedly misleading letter.

That delay should foreclose Rand's tort claims. A petition for removal is an equitable action, which is decided by the probate judge and reviewed de novo on appeal. *Matter of Est. of Atwood*, 577 N.W.2d 60, 63 (Iowa Ct. App. 1998). By opting not to request Security National's removal in the probate proceedings, Rand has done more than change the timing of his charge; he has dramatically changed the procedure.

The probate court is in the best position to know whether an executor, who is the court's agent, should be removed. A jury, on the other hand, knows little to nothing about the topic. It does not understand the legal construct that the executor is working under; nor does it have the wisdom of the probate court, which has heard about every conceivable dispute that can occur between family members, creditors, and everyone else who is interested in an estate.

Thus, when it comes to disputes over the selection of the executor and its fees, "'the plaintiff should be limited to the probate action because that is the preferred method for resolving issues related to wills.'" *Youngblut*, 945 N.W.2d at 34 (quoting Nita Ledford, Note, *Intentional Interference with Inheritance*, 30 Real Prop., Prob. & Tr. J. 325, 340 (1995)). Rand had his chance to address these issues in the probate court, and he did so by objecting to the fee application instead of asking that Security National be removed as executor months earlier. This choice of action was understandable since a removal request based solely

on price would have failed under the probate code. But either way, Rand made his choice, the probate court listened, and the issue should now be laid to rest.

Conclusion

"[I]nheritance law has developed a host of specialized doctrines and procedures to deal with the[] difficulties" of administering an estate, including who will be selected as the executor and how they will be compensated. *Youngblut*, 945 N.W.2d at 33. As it was in *Youngblut*, "[t]here is thus little reason to suppose that tort concepts and procedures, which have developed primarily to deal with less subtle forms of injurious misconduct," can efficiently or adequately deal with specific and subtle probate matters that take up their own chapter in the Iowa Code and contain their own rules of procedure. This is not a tort case; it is a probate matter that belongs exclusively in probate court.

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PROOF OF SERVICE

I hereby certify that on the 25th day of June, 2021, I electronically filed the foregoing Brief of Amicus Curiae Iowa Academy of Trust and Estate Counsel with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2,612 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 Word 2007 in Garamond 14 pt.

Dated: June 25, 2021

/s/ Lori McKimpson

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