IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-0288

IN THE MATTER OF THE ESTATE OF RUTH C. BISIGNANO,
Deceased.

EXILE BREWING COMPANY, LLC,
Appellant/Cross-Appellee,

vs.

ESTATE OF RUTH C. BISIGNANO,
Appellee-Cross-Appellant.

IN THE MATTER OF THE ESTATE OF FRANK J. BISIGNANO,
Deceased.

EXILE BREWING COMPANY, LLC,
Appellant/Cross-Appellee,

vs.

ESTATE OF FRANK J. BISIGNANO,
Appellee-Cross-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE CRAIG E. BLOCK

APPELLEES'/CROSS-APPELLANTS' BRIEF AND REQUEST FOR ORAL ARGUMENT

SCOTT M. WADDING
MATTHEW G. SEASE
DELANEY J. KOZLOWSKI
SEASE & WADDING
The Rumely Building
104 Southwest Fourth Street, Suite A
Des Moines, Iowa 50309
Phone: (515) 883-2222
Fax: (515) 883-2233
swadding@seasewadding.com
msease@seasewadding.com
dkozlowski@seasewadding.com
ATTORNEYS FOR APPELLEES/CROSS-APPELLANTS

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ROUNTING STATEMENT

Even though this case involves the application of existing legal principles and may be transferred to the court of appeals, the Estates believe retention by the Iowa Supreme Court would be appropriate in this case.

STATEMENT OF THE CASE

Nature of the Case. This case is an appeal from the district court's order reopening the Estate of Ruth C. Bisignano ("Ruthie's Estate") and the Estate of Frank J. Bisignano ("Frank's Estate") (collectively, the "Estates").

In addition to the probate proceedings from which this appeal arises, this appeal implicates two additional legal proceedings. First, there is a civil action pending in the United States District Court for the Southern District of Iowa in which the Estates assert causes of action arising from Exile's unauthorized use of Ruth C. Bisignano's ("Ruthie") name, image, and likeness to sell its lager-style beer. The case is *Estate of Ruth C. Bisignano et al. v. Exile Brewing Company, LLC*, No. 4:22-cv-00121 (S.D. Iowa). This action was removed from the Iowa State District Court for Polk County,

Case No. CVCV060249, after the Estates' petition was amended to include a federal Lanham Act claim. At the hearing on Exile's motion in the probate proceedings, the probate court took judicial notice of the record in the lawsuit.

Second, on March 3, 2022, Ruthie's Estate filed a Petition for Cancellation in the United States Patent Trademark Office before the Trademark Trial and Appeal Board requesting the cancellation of Registration No. 6,292,054 for the name RUTHIE registered by Exile after the Estates filed their lawsuit against Exile. The cancellation case is styled *Estate of Ruth C. Bisignano v. Exile Brewing Company, LLC*, No. 92079178.[1]

Course of Proceedings. On March 10, 2020, the Iowa District Court for Polk County granted a request to reopen Frank's Estate. On June 1, 2020, Frank's Estate filed a lawsuit against Exile alleging various state law claims arising from Exile's unauthorized use of Ruthie's name, image, and likeness to sell beer. Exile filed a Motion to Dismiss the lawsuit, alleging, *inter alia*, the case should be

[1] The Estates respectfully request this Court to take judicial notice of the cancellation pleadings referenced in their brief.

dismissed because Ruthie's Estate, not Frank's Estate, is the real party in interest. Based on Exile's arguments, the administrator for Frank's Estate filed a petition to reopen Ruthie's Estate, which was granted on September 22, 2020. Ruthie's Estate was added as a plaintiff in the lawsuit shortly thereafter.

Almost a year later, Exile filed a document styled, "Motion to Vacate, Dismiss, and Close These Proceedings," (hereafter "Motion to Vacate") asking the probate court to vacate its prior order reopening the Estates and to close the Estates. After a hearing, the probate court denied Exile's Motion to Vacate, finding Exile's arguments "meritless." The probate court also denied the Estates' request for attorneys' fees requested pursuant to Iowa Rule of Civil Procedure 1.413. Exile filed a motion to reconsider pursuant to Iowa Rule of Civil Procedure 1.904, which the probate court also denied. Exile filed a notice of appeal within thirty days of the probate court's ruling denying Exile's 1.904 motion.

Disposition of the Case in District Court. The probate court denied Exile's Motion to Vacate, reaffirmed its order reopening the Estates, and denied the Estates' request for attorneys' fees.

STATEMENT OF THE FACTS

Ruthie Bisignano ("Ruthie') was a well-known bartender from Des Moines, Iowa who became famous in the 1950s due to her unique serving style of filling two pint glasses while balancing them on her breasts and serving them. [App. 666, Second Amended Petition (CVCV060249) at 4]. Ruthie closed her bar in 1971 and thereafter lived a relatively quiet life with her husband, Frank Bisignano ("Frank"). [App. 667, Second Amended Petition (CVCV060249) at 5].

Ruthie passed away in 1993. [App. 169, Exile Probate Motion to Vacate Exhibit 6 (Ruth Probate) at 1]. Ruthie died intestate, and Frank opened an estate primarily to facilitate a real estate inheritance from Ruthie's late mother, Bessie McDuffy, whose estate was pending when Ruthie died. [App. 175–92, Exile Probate Motion to Vacate Exhibit 6 (Ruth Probate) at 7–24]. The probate court determined that Frank was Ruthie's sole heir, Ruthie's assets were distributed to Frank, and Ruthie's Estate was closed in 1993. [App. 202–03, Exile Probate Motion to Vacate Ex. 6, Order Approving Final Report (Ruth Probate) at 34–35].

Frank died intestate in 1996, and Frank's estate was opened shortly thereafter. [App. 220, Exile Probate Motion to Vacate Ex. 7 (Frank Estate) at 14]. Frank and Ruthie had no children, so Frank's heirs were his brother (Alfonso Bisignano) and two sisters (Barbara Hamand and Rose Medici). [App. 233, 248–51, Exile Probate Motion to Vacate Ex. 7, (Frank Estate) at 27, 42–45].

In 2012, Exile believed "Ruthie had this mass appeal,"[2] so it took Ruthie's identity to market and advertise a lager-style beer called, "Ruthie."[3] Exile's labels and advertisements for the "Ruthie" beer feature images of Ruthie's identity, including an image of her engaging in her famous beer-pouring style, in conjunction with her professional name, Ruthie.[4]

In March 2020, a petition to reopen Frank's Estate was filed to investigate and pursue claims against Exile and others exploiting Ruthie's identity for their own financial gain. [App. 10–11, Petition to Reopen Frank's Estate at 1–2]. The petition identifies Fred

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2 *See* App. 519, Estate Motion for Summary Judgment Ex. 5 (CVCV060249) at 2.

3 *Id.*

4 *See* App. 524, Estate Motion for Summary Judgment Ex. 11 (CVCV060249).

Huntsman as one of the surviving heirs to Frank's Estate, explains that the estate is being reopened to "investigate and pursue potential claims against a corporation," and that Frank's Estate "would be the beneficiary of any proceeds." [App. 10, Petition to Reopen Frank's Estate at 1]. The probate court granted the petition to reopen and appointed an administrator, Frank's nephew Fred Huntsman. [App. 12, Order Granting Administration and Appointing Administrator Without Bond of Frank's Estate (3/10/20) at 1].

Frank's Estate filed a lawsuit on June 1, 2020 (hereafter, the "Litigation").[5] Frank's Estate asserted six causes of action, namely, Invasion of Privacy; Infringement of the Right of Publicity; Misappropriation of Trade Values; Consumer Fraud; Deceptive Marketing; and Trade- and Service-Mark Infringement.[6] After the filing of the lawsuit, Exile expanded its beer sales into other states, so the Petition was amended to add a federal Lanham Act for deceptive

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[5] The lawsuit was originally filed in the Iowa District Court for Polk County. The case number was CVCV060249. The case was later removed to the United States District Court for the Southern District of Iowa after the petition was amended to add a federal question. The current case number is 4:22-cv-121.

[6] Amended Petition at ¶¶ 41–102 (CVCV060249).

marking and false designation of origin pursuant to 15 U.S.C. section 1125 (section 43 of the Lanham Act). [App. 680–90, Second Amended Petition (CVCV060249) at 18–19].

Shortly after Frank's Estate filed the Litigation, Exile filed a Motion to Dismiss asserting, *inter alia*, Iowa law does not recognize the right of publicity and Frank's Estate was not a proper party because Ruthie's Estate was the only real party in interest in the Litigation and, therefore, could only be asserted by Ruthie's Estate. [App. 308–09, Exile Br. in Support of Motion to Dismiss (CVCV060249) at 1–2].

Based on Exile's position that Ruthie's Estate was the only real party in interest in the Litigation, the administrator of Frank's Estate requested to reopen Ruthie's Estate.[7] The probate court granted the Petition to Reopen Ruthie's Estate, and shortly thereafter Ruthie's Estate filed a Motion to Amend the Petition to add

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[7] At the time of briefing on Exile's Motion to Dismiss, it was believed that no estate had been opened for Ruthie following her death, so the lawsuit was filed on behalf of Frank's Estate. [App. 318, Estate's Br. in Support of Resistance to Exile's Motion to Dismiss (CVCV060249) at 4 n.2]. As it turned out, however, an estate for Ruthie had in fact been opened to facilitate a real estate inheritance from Ruthie's late mother.

Ruthie's Estate as a plaintiff. [App. 389–90, Motion for Leave to Amend Petition (CVCV060249) at 1–2]. Exile did not object to the reopening of Ruthie's Estate, Exile did not resist Ruthie's Estate's Motion for Leave to Amend, and the district court allowed Ruthie's Estate to be added as a party. [App. 393, Order Granting Motion for Leave to Amend (CVCV060249)].

Meanwhile, the district court denied Exile's Motion to Dismiss in its entirety. In its Order, the district court made two important legal rulings that cleared away the legal and procedural underbrush establishing the Estates' ownership to protect and defend Ruthie's identity. First, the Court held that the right of publicity exists under Iowa law, reasoning:

> The Iowa Supreme Court listed the four forms of invasion of privacy recognized in the Restatement (Second) of Torts, including "appropriation of the other's name, or likeness" and stated: **"We approve these principles and apply them here."** Winegard v. Larsen, 260 N.W.2d 816, 822 (Iowa 1977) (emphasis added). Count II is based on the "right of publicity" and is very similar to the explicitly recognized claim of invasion of privacy – misappropriation. The United States District Court for the Northern District of Iowa acknowledged the similarities and predicted that the Iowa Supreme Court would recognize a right of publicity claim.

> Iowa courts have not specifically recognized a "right to publicity." However, the Eighth Circuit recently predicted that the Minnesota Supreme Court would recognize a "right of publicity" even though Minnesota courts do not recognize a common law cause of action for invasion of privacy. *Ventura*, 65 F.3d at 730. In contrast to Minnesota, Iowa has long recognized a common law cause of action for invasion of privacy. *See, e.g.*, *Anderson v. Low Rent Housing Comm'n*, 304 N.W.2d 239, 249 (Iowa 1981). **Accordingly, this Court believes that the Iowa Supreme Court, if faced directly with a "right of publicity["] claim, would allow such a claim to proceed.**
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> Sharp-Richardson v. Boyds Collection, Ltd., No. C 96-0344 MJM, 1999 WL 33656875, at *15 (N.D. Iowa Sept. 30, 1999) (emphasis added). The Court agrees with this analysis.

[App. 376–77, Order Denying Motion to Dismiss (CVCV060249) at 5–6 (emphasis in original)].

Second, the Court held Frank's Estate is a proper plaintiff to bring claims for the invasion of Ruthie's right of publicity. The district court agreed with the majority of jurisdictions addressing the issue and held "The Estate of Frank is a proper Plaintiff . . . ." because the right of publicity is, like any other property, descendible. [App. 374–75, Order Denying Motion to Dismiss (CVCV060249) at

3–4]. Exile did not seek interlocutory appeal of the district court's denial of its Motion to Dismiss, and the district court's legal holdings are not before this Court on appeal as they were decided in the Litigation.

After the district court denied Exile's Motion to Dismiss, the case proceeded to the discovery phase of the Litigation. After a year of litigation and discovery, the Estates moved for partial summary judgment on its right-of-publicity claim. In response, Exile filed a cross-motion for summary judgment in the Litigation and contemporaneously filed its Motion to Vacate in Ruthie's Estate and Frank's Estate. Exile did not file a motion to intervene pursuant to Iowa Rule of Civil Procedure 1.407 before filing its Motion to Vacate in the probate proceedings.

The probate court, Judge Craig E. Block presiding, found the arguments Exile advanced in its effort to close the Estates "meritless." [App. 88, Probate Order Denying Motion to Vacate at 6]. Judge Block held Exile was an interloper in the probate proceedings, the Estates were properly reopened under established law and, denied Exile's Motion to Vacate in its entirety. *Id.* Exile filed a

motion to reconsider pursuant to Iowa Rule of Civil Procedure 1.904, which was also denied. Judge Block determined Exile was an interloper in the probate proceedings and, in any event, found Exile's request to intervene was untimely due to Exile's delay in seeking to close the Estates after they were reopened. [App. 159, Probate Order Denying Exile's Motion for Reconsideration at 6].

Also, while the Litigation was pending Exile registered a trademark on the name "RUTHIE," Registration No. 6,282,054. So, on March 3, 2022, Ruthie's Estate filed Petition for Cancellation in the United States Patent and Trademark Office. The Estate's Petition alleges Exile's RUTHIE mark must be cancelled because it falsely suggests a connection with Ruthie Bisignano in violation of 15 U.S.C. sections 1052(a) and 1064, and because the RUTHIE mark is void for fraud on the USPTO due to Exile's deliberate concealment that the RUTHIE mark pointed uniquely and unmistakably to Ruthie Bisignano. [*Estate of Ruth C. Bisignano v. Exile Brewing Co., LLC*, Petition for Cancellation, Proceeding No. 92079178, *https://ttabvue.uspto.gov/ttabvue/v?pno=92079178&pty*

=CAN&eno=1 (last visited Nov. 17, 2022)]. The trademark cancellation proceedings are pending.

ARGUMENT

In this case, the Estates are plaintiffs in an ongoing lawsuit against Exile. Generally, the Estates' claims arise out of Exile's unauthorized use of Ruthie Bisignano's name, image, and likeness, and the Estates seek to stop Exile's continued exploitation of Ruthie's stolen identity. Ruthie's Estate is also the petitioner in a pending trademark cancellation proceeding against Exile that seeks cancellation of the trademark for the name RUTHIE because the mark falsely suggests a connection with Ruth C. Bisignano.

In the Estates' lawsuit against Exile and the trademark cancellation proceeding, the Estates are real parties in interest to the legal claims asserted therein, and the Estates were reopened pursuant to established law requiring claims to be brought by the real parties in interest. The plain language of the relevant statutory provisions and a century of Iowa Supreme Court jurisprudence not only allow estates to be reopened under the circumstances presented in this case, but in fact require them to be reopened when

an application to reopen is made under these circumstances. The Estates' claims are by definition "other property" that was discovered after original administration and the administration of the Estates' legal claims involves countless "necessary acts" that must be performed and constitutes "other proper cause" under any meaningful interpretation of the phrase. As discussed more fully below, the probate court correctly held Exile's attempt to close the Estates under these circumstances is "meritless."

I. Judge Block Did Not Err in Denying Exile's Motion To Intervene Because Exile Failed to Comply With Procedural Prerequisites for Intervention, Exile's Motion was Untimely, and Exile is an Interloper.

A. Standard of Review.

While Iowa courts have held that review of rulings deciding motions for intervention *of right* are for correction of errors at law, *see, e.g.*, *In re H.N.B.*, 619 N.W.2d 340, 343 (Iowa 2000), Exile does not assert intervention *of right* on appeal pursuant to Iowa Rule of Civil Procedure 1.407(1). Rather, Exile claims Judge Block erred in denying *permissive* intervention under Rule 1.407(2), *see* Exile Opening Br. at 76–78, which should be reviewed for abuse of

discretion.[8] *See Allen Calculators v. National Cash Register Co.*, 322 U.S. 137, 142, 64 S. Ct. 905, 88 L. Ed. 1188 (1944); *Restor-A-Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 877 (2d Cir. 1984) ("The district court's discretion under Rule 24(b)(2) is very broad."); 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1923 (3d ed. 2002) ("The traditional view has been that the appellate court can reverse if the trial court has erroneously denied intervention of right or if it has abused its discretion in denying permissive intervention . . . .").

In any event, even if review were for correction of errors at law (it is not), it is well established that the district court is accorded discretion in ruling on a motion to intervene, and "[t]he district court exercises this discretion when determining whether an applicant intervenor is 'interested' in the litigation before the court." *In re H.N.B.,* 619 N.W.2d at 342–43.

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[8] Exile could not rely on intervention of right because any "interest" Exile could have is contingent on a successful outcome in the trademark cancellation proceedings and in the Litigation. *See Matter of Estate of DeVoss*, 474 N.W.2d 539, 542 (Iowa 1991) (holding contingent interests are insufficient to allow intervention of right).

B. Preservation of Error.

Exile requested to intervene for the first time in its motion to reconsider filed pursuant to Iowa Rule of Civil Procedure 1.904, so Exile failed to preserve error.[9] *See Winger Contracting Co. v. Cargill, Inc.*, 926 N.W.2d 526, 543 (Iowa 2019) (holding an issue raised for first time in 1.904 motion is not preserved for appellate review).

C. Discussion.

> *"[A] denial of permissive intervention has virtually never been reversed."*[10]

In this case, Judge Block's denial of permissive intervention should not be reversed because Exile failed to comply with applicable rules of procedure prior to filing its motion in the probate proceedings, Exile's attempt to intervene was untimely, and Exile was an interloper. Notably, in the trademark cancellation proceedings, Exile abandoned the sole basis it offered to justify permissive

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[9] Exile also asserts on appeal that the district court erred in denying its motion to amend the pleadings. This motion was also requested for the first time in Exile's 1.904 motion and is not preserved for review.

[10] *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 990 n.19 (2d Cir. 1984).

intervention, yet Exile does not disclose this change of position in its brief.

First, Judge Block was right to deny Exile's motion to intervene because Exile failed to comply with the requirements of Rule 1.407.[11] Interventions in probate proceedings are governed by Iowa

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[11] Exile asserts its failure to comply with Rule 1.407 is excused because the probate court lacked subject matter jurisdiction. Exile's argument, however, confuses subject matter jurisdiction and the court's authority to hear a particular case. Subject matter jurisdiction "means the jurisdiction over the *general class of cases* to which the proceedings belong." *In re Marriage of Bolson*, 394 N.W.2d 361, 363 (Iowa 1986) (emphasis added). The Iowa Code expressly states the "class of cases" to which the probate court has jurisdiction includes estate administration. Iowa Code § 633.10 (2019).

Exile's reliance on *Youngblut v. Youngblut*, 945 N.W.2d 25 (Iowa 2020) and *Morris Plan Co. of Iowa v. Bruner*, 458 N.W.2d 853 (Iowa Ct. App. 1999) is misplaced. In *Youngblut*, the Iowa Supreme Court held "a claim alleging that a decedent's will resulted from tortious interference by a beneficiary must be joined with a timely will context." 945 N.W.2d at 26. *Youngblut* has nothing to do with a probate court's subject matter jurisdiction over probate proceedings. Similarly, *Bruner* was a foreclosure action, did not involve subject matter jurisdiction of the probate court, and does not even cite the probate code. 458 N.W.2d at 854–58.

While there may have been some confusion between subject matter jurisdiction and authority twenty-five years ago, *see Schrier v. State*, 573 N.W.2d 242, 244 (Iowa 1997), there is no such confusion today. Because Exile's challenge is one of the probate court's authority to hear a particular case, Exile is not excused from compliance with the rules of procedure based on subject matter jurisdiction. *See State v. Mandicino*, 509 N.W.2d 481, 483 (Iowa 1993); *McKim v. Petty*, 242 Iowa 599, 604, 45 N.W.2d 157, 159–60 (1950).

Rule of Civil Procedure 1.407. *See* Iowa Code § 633.34 ("All actions triable in probate shall be governed by the rules of civil procedure, except as provided otherwise in this probate code."). The Iowa Court of Appeals recently recognized that "intervention is governed by statute, and if a person attempts to take advantage of this remedy without bringing himself within the provisions of the statute, he is considered a mere 'interloper' who acquires no rights by his unauthorized interferences, unless there was a waiver of objections." *Matter of Conservatorship of Haravon*, 2021 WL 1400773, at *4 (Iowa Ct. App. Apr. 14, 2021). In this case, Exile did not file a motion to intervene before filing its Motion to Vacate, did not "serve a motion to intervene upon the parties," did not "state the grounds therefor," and was not "accompanied by a pleading setting forth the claim or defense for which intervention is sought," as required by Iowa Rule of Civil Procedure 1.407. *See* Iowa R. Civ. P. 1.407(2)–(3). For this reason alone, Judge Block's denial of intervention should not be reversed. *See Matter of Guardianship of Z.D.*, 952 N.W.2d 183, 2020 WL 4814143, at *1 (Iowa Ct. App. Aug. 19, 2020) ("In any event, their motion [to intervene] was not 'accompanied by

a pleading setting forth the claim or defense for which intervention is sought' as required by rule 1.407(3). So the district court was right to refuse intervention.").

Second, Judge Block did not err in concluding Exile's attempt to intervene was untimely. Exile waited nearly a year after the Estates were reopened to file its Motion to Vacate. As Judge Block observed:

> Whether Exile has an intervention of right or a permissive intervention is not critical to this analysis because of the untimeliness of its Motion. Both of these subsections require the application to be timely. Iowa case law consistently states: "it is the general rule intervention will not be allowed after final judgment or decree has been entered." A ruling will not be a final judgment when it "specifically provides for subsequent entry of a final order" on the issue resolved in the initial ruling.
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> Here, a Petition to Reopen the Estate and Appoint Administrator was filed September 18, 2020. The Court filed an Order Granting Administration and Appointing Administrator on September 22, 2020. Exile did not file its Appearance and Motion to Dismiss until August 19, 2021. It took almost a year from when the Court ordered the Estates to be reopened for Exile to attempt to intervene or file in these proceedings. Exile has been aware of the pending civil lawsuit since it was served on June 4, 2020. Exile was given notice of the Estates being reopened on October 2, 2020, by a Motion for Leave to Amend Petition to Add the Estate of Ruth C. Bisignano filed on the civil case (CVCV060249). The Court finds filing an appearance and attempting to intervene ten

> months later to be an untimely application under Iowa R. Civ. P. 1.407.
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> Therefore, the Court will not allow Exile to amend its Motion because a Motion to Intervene would be ineffectual under the circumstances.

[App. 158–59, Probate Order Denying Exile's Motion for Reconsideration at 5–6]. Judge Block did not abuse his discretion holding Exile's attempt to intervene was untimely.

Third, Exile was not a party to the probate proceedings, is not a beneficiary, and is not an heir at law to the Estates. "It is generally recognized by the courts and other authorities that no one has any standing to object to the probate of a will, or to bring any action to set aside its probate, unless he has an interest in property which the testator owned at his death and attempted to dispose of by will." *In re Kenny's Estate*, 233 Iowa 600, 602, 10 N.W.2d 73, 75 (1943) (citation and internal quotation marks omitted). The only property interests that can be claimed in the probate proceedings are the legal claims of the Estates and the property rights related to Ruthie's identity that Exile tortiously misappropriated. This is not a basis in which to intervene into the probate matters.

A similar situation arose in *In re Estate of Miroballi*, 2014 WL 978461 (Ill. Ct. App. Mar. 11, 2014). In that case, a tortfeasor's insurer sought to intervene in a probate action asserting it had a "financial interest" in the probate proceedings that was not adequately represented by the estates. The Illinois Court of Appeals rejected the argument, holding the insurer "had no interest in the decedents' estates; rather, its sole interest was in the wrongful death action, *which was collateral to and unrelated to the probate proceeding*." *In re Estate of Miroballi*, **2014 WL 978461**, at *4 (emphasis added). The court reasoned:

> Imperium hoped to use to its advantage the fact that the estates had been closed by filing a motion to dismiss the wrongful death action in the law division court. After the estates reopened, Imperium did not prevail on its motion to dismiss. Rather than challenge that ruling in the law division court, Imperium sought to undo the reopening of the estates by intervening in the probate proceeding. But Imperium's challenge to the reopening of the estates in probate court was nothing more than an attempt to block the wrongful death action in the law division court. Indeed, Imperium identified no independent interest in the probate proceeding; any interest was attendant to and dependent on the wrongful death action. Not surprisingly, Imperium cites no case law for its position that its interest in the wrongful death action should allow it to intervene in the probate proceeding. Therefore, Imperium possessed no

> interest or enforceable right with respect to the estates in the probate proceeding.

Id. As in *In re Estate of Miroballi*, in this case Exile's sole interest is in the Litigation and trademark cancellation proceedings, which are collateral to and unrelated to the probate proceedings. Exile has "no interest or enforceable right with respect to the estates in the probate proceeding" and, therefore, the probate court correctly denied Exile's motion to intervene for this reason alone. *See id.*

Importantly, permissive intervention requires the party seeking intervention to allege a "question of law or fact in common" between the proceedings. Iowa R. Civ. P. 1.407(2)(b). Exile's alleged "common question of law or fact" was that "Specifically, Exile, in good faith, purchased for value the rights to use Ruth's name and likeness by registering a trademark for the name 'RUTHIE' and using said mark in conjunction with its goods and services." RUTHIE." [App. 100, Exile Petition to Intervene in Probate Proceedings at 1].

However, before Exile filed its opening brief in this appeal, Exile reversed course, arguing in the pending trademark cancellation proceedings that Exile does *not* claim its trademark confers

ownership of Ruthie's name and likeness and admits any such assertion "stems from a misunderstanding of trademark law," stating:

> 20. Registrant [Exile] has not claimed that Registrant owns rights in [Ruthie] Bisignano's name, image, or likeness, only that Registrant owns rights in the "RUTHIE" mark. *Owning a trademark which may be the name of another person does not grant any publicity rights or rights in such other person's name, image, or likeness. The fact that Registrant owns the registration for the "RUTHIE" mark has no bearing on whether the Estate owns rights in Bisignano's name, image, or likeness.* Petitioner will not be prejudiced in the Civil Action by the fact that this proceeding is suspended, *and any such assertion stems from a misunderstanding of trademark law*. Petitioner will not experience prejudice if this proceeding is suspended.

[Registrant's Reply in Support of Motion to Suspend Trademark Cancellation Proceedings at 8–9 (emphasis added), *available at https://ttabvue.uspto.gov/ttabvue/v?pno=92079178&pty=CAN&eno=8* (last visited Nov. 17, 2022)]. Despite reversing its position in trademark cancellation proceedings, Exile nevertheless continues to pursue this appeal without so much as mentioning its changed position to this Court.

Under these circumstances, Judge Block's denial of permissive intervention should be affirmed and Exile's appeal dismissed.

II. Judge Block Correctly Determined Exile's Attempt to Close the Estates was "Meritless"

A. Standard of Review.

The district court's decision to reopen an estate under section 633.489 is reviewed for abuse of discretion. *In re Estate of Roethler,* 801 N.W.2d 833, 837 (Iowa 2011) (citations omitted). The district court only abuses its discretion when it exercises its discretion "on grounds clearly untenable, or to an extent, clearly unreasonable." *Id.*

B. Preservation of Error.

As noted above, issues raised by Exile for the first time in its 1.904 motion are not preserved for appellate review. *Winger*, 926 N.W.2d at 543. In addition, for the first time on appeal, Exile requests another hearing before the probate court to allow Exile a second chance to establish its arguments. Exile Opening Br. at 79–80. Exile, however, did not call any witnesses or offer any exhibits into evidence at the probate hearing, and Exile did not request an opportunity to do so. Exile's request for a "trial" raised for the first time on appeal is not preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

C. Discussion.

1. Overview of Reopening Administration of Estates.

Iowa Code sections 633.487, .488, and .489 govern the reopening of estates. These code sections were part of the original adoption of the Iowa Probate Code in 1963. *In re Estate of Sampson*, 838 N.W.2d 663, 667 (Iowa 2013). In this case, the Estates were reopened pursuant to Iowa Code section 633.489 (not sections 633.487[12] or 633.488[13]), which states in relevant part:

> Upon the petition of any interested person, the court may, with such notice as it may prescribe, order an estate reopened if other property be discovered, if any necessary act remains unperformed, or for any other proper cause appearing to the court.[14]

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[12] Section 633.487 "essentially cuts off the rights of persons who received notice of the final report to contest distribution or prior acts of administration." *In re Estate of Sampson*, 838 N.W.2d at 667; *see* Iowa Code § 633.487 (2019).

[13] Section 633.488 governs reopening a final settlement and "contemplates a reopening of matters which have already been considered in the final accounting, distribution, and settlement order." *Ritz v. Selma United Methodist Church*, 467 N.W.2d 266, 270 (Iowa 1991); *see* Iowa Code § 633.488.

[14] Before adoption of section 633.489, an estate could be reopened only to correct mistakes in settlements. *See* 1963 Iowa Probate Code Special Pamphlet, § 489, at 140–141 (stating section 633.489 was adopted in lieu of Iowa Code section 389.9 (1962), which only allowed estates to be reopened to correct mistakes in settlements).

Iowa Code § 633.489. The Bar Committee Comment explains section 633.489 is based on the Model Probate Code section 194, stating:

> Adapted from section 194 of the Model Probate Code in lieu of 638.9 (1962 Code) to permit reopening for administration of newly discovered property or performance of required but omitted acts of personal representatives.

Special Pamphlet, 1963 Iowa Probate Code, Acts 1963 (60 G.A. S.F. No. 165 (eff. Jan. 1, 1964), § 489, at 140–141 (West 1963) (hereafter 1963 Probate Code Special Pamphlet).

Section 633.489 permits "any interested party to reopen the estate if the party can show (1) new property, (2) a 'necessary act' remains, or (3) 'any other proper cause' exists." *In re Estate of Roethler*, 801 N.W.2d at 838 (quoting Iowa Code § 633.489). In *In re Estate of Witzke*, 359 N.W.2d 183, 185 (Iowa 1984), the Court held the phrase "for any other proper cause appearing before the court," "should be read as permitting the district court to exercise discretion in considering a petition that alleges a cause for reopening *other than the two causes specifically enumerated in section 633.489*." (Emphasis added).

In *In re Estate of Sampson*, , the Iowa Supreme Court further observed "other proper cause" "should be interpreted with reference to the other items in the list—i.e., other property being discovered or any necessary act being unperformed—*which concern unperformed acts of administration*." 838 N.W.2d at 670 (emphasis added). Thus, "[s]ection 633.489 applies where future events require administration of matters not considered in the final report . . . ." *In re Estate of Roethler*, 801 N.W.2d at 838; *see also*, *In re Estate of Warrington*, 686 N.W.2d 198, 204 (Iowa 2004) ("Therefore, the bar of section 633.487 does not prevent a person otherwise meeting the requirements of section 633.489 from reopening an estate.").

2. Judge Block Correctly Held Exile's Attempt to Close the Estates was Meritless Because Legal Claims Have Been Considered "Property" for a Century, Iowa Law Unambiguously Defines "Personal Property" to Include Legal Claims, and it was *Exile* that Insisted Ruthie's Estate be Reopened When it Contended Ruthie's Estate is the *Only* Real Party in Interest in the Litigation.

> "*[N]o one would have the temerity at this late day to insist that a chose in action is not property of some*

character. It is personal property under all of the authorities."[15]

In this case, Judge Block did not abuse his discretion in holding that the Estates should be reopened due to the existence of the Estates' legal claims that needed to be administered and prosecuted. The Estates' legal claims fall under all three prongs of section 633.489. The Estates' claims were discovered after the original estates were closed because Exile started using Ruthie's name, image, and likeness after both Estates were closed. There are numerous "necessary acts" and "other proper causes" that remain for the administrator to perform, including hiring counsel, approving payment of litigation expenses, approving claims to be prosecuted filed, and more generally approving day-to-day decisions throughout the prosecution of the lawsuits and trademark cancellation proceedings. In short, Exile's unauthorized exploitation of Ruthie's name, image, and likeness giving rise to legal claims of the Estates are "future events requir[ing] administration of matters not considered in the final report," and involve numerous unperformed acts of

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[15] *Brenton Bros. v. Dorr*, 213 Iowa 725, 239 N.W. 808, 812 (1931) (citation and internal quotation marks omitted).

administration that require the Estates to be reopened under section 633.489. *See In re Estate of Roethler*, 801 N.W.2d at 838.

While Exile makes a litany of assertions on appeal, Exile's central argument seems to be that the Estates' legal claims and proceeds to be derived therefrom are not "property" under the Iowa Probate Code and, as such, there is no "property" to be administered under section 633.489. This argument, however, is without merit. Long before the Iowa Probate Code was adopted, the Iowa Supreme Court held "the term 'property' includes everything of value, tangible or intangible, capable of being the subject of individual right or ownership." *Clark v. Lucas Board of Review*, 242 Iowa 80, 98 N.W.2d 748 (1950); *Personal Property*, Black's Law Dictionary 1337 (9th ed. 2009) (defining "personal property" as "Any movable *or* intangible thing that is subject to ownership and not classified as real property."). When adopting the Iowa Probate Code, the legislature used the term "property" without qualification, stating: "**Property**—includes both real and personal property." Iowa Code § 633.3(35). The legislature did so "notwithstanding its assumed knowledge that the term has been broadly construed to include both tangible

and intangible property."[16] *Johnson v. Nelson*, 275 N.W.2d 427, 430 (Iowa 1979); *Jahnke v. City of Des Moines*, 191 N.W.2d 780, 787 (Iowa 1971) ("We assume the legislature knew the existing state of the law and prior judicial interpretations of similar statutory provisions. We assume, too, its use of terms was in the accepted judicially established context unless there is clear evidence to the contrary.").

More importantly, Chapter 4 of the Iowa Code governs the construction of statutes and expressly defines "personal property" for purposes of the Iowa Probate Code. *See* Iowa Code § 4.1 *et seq.* In relevant part, Iowa Code section 4.1 states:

> In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute:

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[16] The Iowa Probate Code differentiates between tangible personal property and intangible personal property, which illustrates legislative intent to include both tangible and intangible within the meaning of "personal property." *See, e.g.*, Iowa Code § 633.276 (employing the term "tangible personal property" to allow such property to be disposed of by document extrinsic to a will); Iowa Code § 633.356(1)(a), (3)(a) (providing process for small estates and allowing a successor "To collect money, receive personal property, or have evidences of intangible personal property transferred under this section . . .").

. . . .

> (21) *Personal property.* The words "*personal property*" include money, goods, chattels, evidences of debt, and *things in action*.

Iowa Code § 4.1(21) (emphasis added). The Iowa Code's definition of "personal property" was in effect at the time the Iowa Probate Code was adopted in 1963, has not changed since, and is near verbatim the Model Probate Code's definition of "personal property." *See* Model Probate Code § 3(t) ("When used in this Code, unless otherwise apparent from the context . . . 'Personal property' includes interests in goods, money, choses in action, evidences of deb and chattels real."). Thus, without question the examples of "personal property" set forth in section 4.1(21) apply to the Iowa Probate Code, which expressly includes "things in action." *See* Iowa Code § 4.1(21).

A "thing in action" means the same thing as "chose in action." *Arbie Min. Co. v. Farm Bureau Mut. Ins. Co.*, 462 N.W.2d 677, 680 (Iowa 1990) ("A 'chose in action' is the same thing as a 'thing in action.' "). Personal property (the "thing" or "chose") is either *in possession* or *in action*. *See* W. S. Holdsworth, *The History of the*

Treatment of Choses in Action by the Common Law, 33 Harv. L. Rev. 997, 997–98 (1920) (hereafter "Holdsworth, *The History of the Treatment of Choses in Action*") ("ALL personal things are either in possession or in action. The law knows *tertium quid* between the two." (citation and internal quotation marks omitted)); *Chose*, Black's Law Dictionary 305 (4th ed. 1951)[17] (defining "chose" as "A thing, an article of personal property. A chose is a chattel personal . . . and is either in action or in possession."). As its name suggests, a chose in possession is a thing that can be possessed. *Chose in Possession*, Black's Law Dictionary 275 (4th ed. 1951) (defining "chose in possession" as "a personal thing of which one has possession. A thing in possession, as distinguished from a thing in action."). Choses in possession are things that today are more commonly called "tangible" property. *See id.*; Kevin D. DeBre, *Patents on People and the U.S. Constitution: Creating Slaves or Enslaving Science*, 16 Hastings Const. L.Q. 221, 231 (1989).

[17] Citations are made to the Fourth Edition of Black's Law Dictionary because it is the version in effect at the time the legislature adopted the Iowa Probate Code in 1962.

A chose *in action*, on the other hand, is everything else; specifically, "[a] personal right *not reduced into possession, but recoverable by a suit at law*." *Chose in Action*, Black's Law Dictionary 305 (4th ed. 1951) (emphasis added); *see also* Brown on Personal Property § 7, at p. 13 (1955) (stating a "chose in action" is a "right of property which . . . is essentially intangible in that it can ultimately only be claimed or enforced by action, not by taking physical possession."); Pascale Chapdelaine, *The Undue Reliance on Physical Objects in the Regulation of Information Products*, 20 J. Tech. L. & Pol'y 65, (2015) (" 'choses in action' are generally associated with 'intangible property' and are often negatively defined as 'embracing all forms of property not involving actual possession or right of possession as a necessary incident' " (quoting W.H. Hastings Kelke, *An Epitome of Personal Property Law* 2 (3d ed. 1910), and noting choses in action evolved to "encompass 'intangible rights existing only in contemplation of the mind, . . . all invisible and incorporeal rights,' " (quoting Frank Hall Childs, *Principles of the Law of Personal Property* 54 (1914)).

A chose in action includes both an intangible right itself and the cause of action arising from an invasion of that right. *See* 73 C.J.S. Property § 12 ("The term has been applied both to the right to bring an action and the thing itself, which is the subject matter of the right."); Brown on Personal Property § 7, at 13 (1955); Pascale Chapdelaine, *The Undue Reliance on Physical Objects in the Regulation of Information Products*, 20 J. Tech. L. & Pol'y 65 (2015); W.H. Hastings Kelke, *An Epitome of Personal Property Law* 2 (3d ed. 1910); Frank Hall Childs, *Principles of the Law of Personal Property* 54 (1914). So, for example, a "chose in action" includes intellectual property (e.g., patents and copyrights) *and* a cause of action for infringement. *See, e.g.*, *Keller v. Bass Pro Shops, Inc.*, 15 F.3d 122, 125 (8th Cir. 1994) ("Patents are choses in action."); Restatement (Second) of Contracts § 316 ("On the other hand, 'chose in action' is a much broader term. In its primary sense it includes . . . tort claims, and rights to recover ownership or possession of real or personal property; it has been extended to instruments and documents embodying intangible property rights, to such intangible property as patents and copyrights, and even to equitable

rights in tangible property."); João Marinotti, *Tangibility As Technology*, 37 Ga. St. U. L. Rev. 671, 738 (2021) (similar); Holdsworth, *The History of the Treatment of Choses in Action*, 33 Harv. L. at 997–98 (observing "it was not difficult to include in this category of things [choses in action] which were even more obviously property of an incorporeal type, such as patent rights and copyrights.").

In view of the foregoing, the Iowa Supreme Court has repeatedly held a "cause of action," such as a legal claim, is a "chose (or thing) in action" that is personal property. *See, e.g.*, *Gray v. Oliver*, 943 N.W.2d 617, 622–23 (Iowa 2020); *Chrysler Credit Corp. v. Rosenberger*, 512 N.W.2d 303, 304 (Iowa 1994) ("causes of action" are "things in action"); *Arbie Min. Feed*, 462 N.W.2d at 680 (similar); *Citizens State Bank v. Hansen*, 449 N.W.2d 388, 389 (Iowa 1989) (similar). As the Iowa Supreme Court observed over ninety years ago, "While courts, text-writers, and legislators have not always sharply distinguished between the right to recover and the thing to be recovered, *there cannot be any question that the right to recover*

is comprehended in the term 'chose in action." *Brenton Bros. v. Dorr*, 213 Iowa 725, 239 N.W. 808, 812 (1931) (emphasis added).

One case directly on point is *Johnson*, 275 N.W.2d at 430. In *Johnson*, the Iowa Supreme Court held the term "property" includes legal claims and directly rejected the argument that the term "property" should be narrowly construed to only include "tangible" property. 275 N.W.2d at 430. In so holding, the Iowa Supreme Court noted it has historically interpreted the term "property" to include all tangible and intangible things of value.[18] *Id.* at 430. Turning to the definition of "property" and "personal property" found in Iowa Code section 4.1—which define personal property to include "things in action"—the Court held a cause of action was "property" and

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[18] Exile's assertion that the term "property" under the Probate Code should controlled by the Uniform Declaimer Act's definition that property must be "fixed and certain" is belied by a century of case law, the definition of "property" and "personal property" applicable to the Iowa Probate Code, and legislative history. In fact, the Uniform Disclaimer Act was not enacted until 1967—four years *after* the Iowa Probate Code was adopted. *See* Acts 1967 (62 G.A.) ch. 391, § 1, eff. July 1, 1967. Moreover, the definition of "property" in chapter 556 of "a fixed and certain interest in or right in an intangible" was added to chapter *nearly thirty years later* in 1996. *See* Acts 1996 (76 G.A.) ch. 1173, §§ 1, 2 (amending section 556.1 to include definition of "property" to mean "a fixed and certain interest in or right in an intangible").

observed "the unqualified use of the term property would bring the longstanding definitions of property in sections 4.1(1) and (9) back into play." *See id.*[19] Tellingly, on appeal Exile makes no attempt to address the express definitions of "property" and "personal property" applicable to the Iowa Probate Code.

In this case, the Estates were reopened due to the causes of action against Exile and others who profit from the exploitation of Ruthie's stolen identity.[20] Under the plain language of the Iowa

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[19] The recognition of "personal property" to include general intangibles such as intellectual property and causes of action is also consistent with the Iowa Code's treatment of "personal property" in related contexts. *See, e.g.*, Iowa Code § 554.9102, Uniform Commercial Code Comment ¶ 5(d) (explaining "[g]eneral intangible" and "[p]ayment intangible" is a "residual category of personal property, including things in action, that is not included in the other defined types of collateral" that includes "various categories of intellectual property. . . .").

[20] Further, despite Exile's arguments to the contrary, the right to potential proceeds, standing alone, have been held to be "property." *In re Marriage of Bevers*, 326 N.W.2d 896, 900 (Iowa 1982) ("Pension benefits are deferred compensation; rights to the pension benefits are derived from the employment contract and a contractual right is a chose in action—a form of property."); *In re Marriage of Schroeder*, 697 N.W.2d 128, 2005 WL 729029, at * (Iowa Ct. App. Mar. 31, 2005) ("Pension benefits represent a contractual right to future payment, and are a chose in action and are, by the above definition, personal property."); *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa Ct. App. 1997) ("IPERS benefits, like other pension

Code and longstanding Iowa Supreme Court precedent, these causes of action are by definition property requiring administration by the Estates and are "future events" that "require administration of matters not considered in the final report . . . ." *See Roethler*, 801 N.W.2d at 840;[21] *see also* Iowa Code § 4.1(21) ("personal property" includes "things in action"); Iowa Code § 633.3(35) ("property" includes "personal property").

If there was any doubt about whether the Estates should be reopened to administer the Estates' legal claims, any such doubt is foreclosed by the procedural posture of this case. Ruthie's Estate and Frank's Estate are real parties in interest to the legal claims asserted in the Litigation and in the trademark cancellation proceedings. In fact, in its Motion to Dismiss pleadings Exile argued the claims could *only* be prosecuted by *Ruthie's Estate* because her estate is the only real party in interest. [App. 309, Exile Br. in

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benefits, represent a contractual right to future payment, and are a chose in action.").

[21] The Estate's claims for trademark cancellation in the action pending in the USPTO are also things in action and personal property.

Support of Motion to Dismiss (CVCV060249) at 2 ("The claims asserted in the Petition concern Exile's allegedly wrongful use of Ruthie Bisignano's, not Frank Bisignano's name, identity, and persona, and therefore, *since Plaintiff is not the legal representative of Ruthie Bisignano's Estate*, Plaintiff lacks the capacity and standing to assert the present claims.")]. Exile asserted:

> Under Iowa law, when an individual dies intestate, the legal representative of an estate is the administrator. In that instance, only the administrator has the right to bring suit. "It is 'an elementary rule of law' that a plaintiff must have the capacity to sue in order to commence and maintain an action in district court." The administrator of an estate is the real party in interest.
>
> *Therefore, as a matter of law, the Petition must be dismissed for lack of subject matter jurisdiction because Plaintiff is not the administrator of the Estate of Ruthie Bisignano* and, therefore, does not have the capacity or standing to bring the present suit. *See Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 473 (Iowa 2004) (issue of standing appropriately challenged in a motion to dismiss for lack of subject matter jurisdiction).

[App. 310, Exile Br. in Support of Motion to Dismiss (CVCV060249) at 3].

Moreover, the first heading in Exile's reply brief read: "**THE REAL PARTY IN INTEREST IS THE LEGAL REPRESENTATIVE**

OF THE ESTATE OF RUTHIE BISIGNANO." [App. 341, Exile Motion to Dismiss Reply Br. (CVCV060249) at 1]. And at the motion to dismiss hearing, Exile's counsel emphasized that the claims had to be brought by Ruthie's Estate because her estate had previously been opened, arguing:

> The only other thing I would mention is that, again, a lot of the arguments, like the probate, it's come to our attention that, in fact, Ruthie Bisignano, according to the public record in the probate court action, did have an estate open for her.
>
> That's why we think it's important that it be brought in her name so maybe potential defenses related to pass these rights.
>
> . . . .
>
> So the real party of interest, that would be the primary reason why we want -- well, first of all, the law requires that this right is personal to Ruthie and it should be brought in her estate and by the administrator of her estate.

[App. 368–69, Motion to Dismiss Hearing Tr. (CVCV060249), at 24:15–22, 25:2–6; *see also* App. 48, Motion to Dismiss Hearing Tr. (CVCV060249) 4:22–25 ("So the administrator of the estate is the real party in interest, but it's the administrator of Ruthie's estate, not the administrator.")]. Based on Exile's arguments that Ruthie's Estate was the *only* real party in interest, Ruthie's Estate

was reopened.[22] Ruthie's Estate promptly filed a motion to be added as a plaintiff in the Litigation to eliminate any disagreement about whether the case was brought by a real party in interest. [App. 389–90, Motion for Leave to Amend Petition (CVCV060249) at 1–2; Iowa R. Civ. P. 1.201 ("Every action must be prosecuted in the name of the real party in interest." Iowa R. Civ. P. 1.201 (emphasis added)]; *see also* Fed. R. Civ. P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest."); Iowa R. Civ. P. 1.201 (precluding dismissal unless the party is given an opportunity to substitute the petition to add the real party interest). Exile did not object to the reopening of Ruthie's Estate and did not oppose Ruthie's Estate's request to be included as a plaintiff in the lawsuit, so the

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[22] Exile is right that Ruthie's Estate is a real party in interest, but Frank's Estate is also a real party in interest. *See Tate v. Whitehead*, No. 4:09-CV-524, 2010 WL 11613989, at *3 (S.D. Iowa May 28, 2010) (relying on *Ritz* and holding the decedent's estates—not the decedent's heirs in their individual capacity—were the real parties in interest under the federal rules of civil procedure and noting "the Court finds that the most appropriate way to address defendants' concern regarding the possibility of multiple suits is to require that Nell's and Gary's estates be joined or substituted in this action as the real parties in interest. Any rights to the Memorabilia proceeds amongst Nell's heirs, assuming the Court rules in favor of plaintiffs, may then be determined in a proper probate proceeding.").

district court allowed Ruthie's Estate to join the action and the Litigation proceeded for nearly a year before Exile raised any complaint about the reopening of Ruthie's Estate in the probate proceedings for the first time.

Relatedly, with respect to Frank's Estate the district court in the Litigation rejected Exile's argument that Frank's Estate is not a real party in interest. The district court held Frank's Estate is a proper party because the rights misappropriated by Exile are descendible. [App. 374–75, Order Denying Motion to Dismiss, at p. 3–4 (citing Restatement (Second) of Torts § 652I & cmt. a (Am. L. Inst. 1977), Westlaw (updated June 2020) ("The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded. The cause of action is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his. **The only exception to this rule involves the appropriation to the defendant's own use of another's name or likeness**.") (emphasis added)]; Restatement (Third) of Unfair Competition § 46 cmts. b, g (Am. L. Inst. 1995), Westlaw (updated June 2020) ("[t]he

interest in the commercial value of a person's identity [i.e., the right of publicity] is in the nature of a property right and is freely assignable to others"). Because the district court in the Litigation held Frank's Estate is a proper plaintiff in this action and that holding is an issue before this Court on appeal, it was appropriate for the probate court to allow Frank's Estate to be reopened pursuant to Iowa Code section 633.489.

For the first time on appeal, Exile alternatively requests another hearing to "decide the substantive issue of whether and to what extent Ruth's intellectual property could and actually did descended [sic] to her heirs." Exile Opening Br. at 80. But the question was decided nearly thirty years ago when Ruthie's Estate was originally probated and the district court determined that Frank was Ruthie's sole heir. [App. 203, Probate Order Approving Final Report in Ruthie's Estate at 2]. The district court Order states:

> Frank Bisignano, *as sole heir of the Estate of Ruth C. Bisignano*, shall receive sole and absolute title to the following described real estate . . .

[App. 203, Probate Order Approving Final Report in Ruthie's Estate at 2 (emphasis added)]. This determination is final, cannot now be

revisited,[23] and Exile's challenge to Frank's inheritance is squarely prohibited by Iowa Code section 633.488. *See* Iowa Code § 633.488 (imposing five-year deadline to reopen settlement and seek redistribution of property); *In re Estate of Sampson*, 838 N.W.2d at 667. Accordingly, Exile has no ability to argue that Ruthie's property did not descend to Frank and his heirs. *See* Iowa Code § 633.488; *In re Estate of Sampson*, 838 N.W.2d at 667.

The Iowa Supreme Court has held estates were properly reopened on facts much closer than these. One example is *Ritz v. Selma United Methodist Church*, 467 N.W.2d 266 (Iowa 1991). The dispute in *Ritz* occurred over buried property (coins and money) found six years after the decedent's estate was closed and after the real estate in which property was found had been sold. *Ritz*, 467 N.W.2d at 268. A legal dispute ensued as to the ownership of the money and Iowa Supreme Court held that the buried coins were "other property" and Iowa Code section 633.489 allowed for the estate to be

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[23] Ruthie died in 1993 and her estate was closed in 1993. The five-year time limit to contest redistribution of property expired in 1998. *See* Iowa Code § 633.488.

reopened. *Id.* at 270. In its holding, the Iowa Supreme Court recognized:

> Based on the district court's finding as to Charles Nelson's ownership and Opal's succession thereto, the bills and coins were property of Opal which were not administered in her estate. This is a circumstance which allows reopening of that estate for purposes of administering these assets and making distribution to her legatees in their proportionate share. These legatees are the rightful owners of the money rather than the finder. This is true even though Opal was not aware of the buried money at the time of her death.

Id.

The property at issue in this case are the claims against Exile (and others) for misappropriating Ruthie's name, image, and likeness and for trademark cancellation in the USPTO proceedings. Like the coins and legal tender in *Ritz*, the Estates' claims are unadministered "other property" that must be administered and distributed through the Estates. Estates routinely pursue actions on behalf of deceased individuals. Indeed, it is a necessary function of a fiduciary in serving as an administrator or executor of an estate. Iowa Code § 633.81 (allowing fiduciaries to bring suits in their fiduciary capacity). By any definition, "other property," "necessary act," and "proper cause" include the protection against the unauthorized

use of a deceased individual's name, image, likeness and right to publicity through legal action.

Further, *In re Estate of Warrington* 686 N.W.2d 198 (Iowa 2004) is directly on point and forecloses Exile's arguments on appeal. *Warrington* involved the distribution of property from a husband to a wife. When the husband died, he left his wife's a life estate in his "real property together with the power to use the principal 'as shall be necessary to maintain [his wife's] usual station of life, and to bury her,' subject to court approval 'of the necessity and wisdom of such [expenditure]." *Warrington*, 686 N.W.2d at 200. The decedent's wife was appointed as the executor, and prior to the closing of the estate, she directed the title of the husband's one-half interest in the real property be changed to the names of the decedent's sisters "subject to the life use" of the wife. *Id.* The final report was approved without the wife's life estate interests ever being listed on the inventory. *Id.*

In 1992, twenty years after the death of the husband, a portion of the land was sold to the county. *Id.* at 201. These proceeds were used to purchase a certificate of deposit with the interest going

to the wife and the principle going to the sisters at death of the wife. *Id.* In 1994, the wife also sold her individual one-half interest in the property to a third party. *Id.* In 1999, she moved into a nursing home and by 2002, she was running out of funds to stay in the nursing home. *Id.* As such, the wife's conservator petitioned to reopen her husband's estate so that the husband's interest may be sold pursuant to the clause allowing her to "maintain" her standard of life. *Id.* After a hearing, the district court entered an order finding that the wife "had waived her right to use the principal because she did not reserve this power in her final report requesting a change of title in the real estate. The court therefore denied her conservator's petition to reopen the estate and sell the remainder interest." *Id.*

The Iowa Supreme Court reversed and held that the wife (who also served as executor of her husband's estate) did not waive any interest in the property by excluding her interest in the final report and inventory. *Id.* at 202–03. The Court determined that the wife's interest in the property likely should have been included on the inventory, however, this had no impact on waiver. *Id.* The Court stated as follows:

> Even if we assume that [the wife] was obligated as executor to include her right to invade the principal as a limitation on title, her failure to do so could just as well have been due to inadvertence or mistake rather than to a conscious decision to give up this right. Importantly, the remainderpersons have suggested no reason that [the wife] would choose to abandon her power to invade the principal . . . .
>
> The remainderpersons also rely on the fact that [the wife] did not assert her right of invasion in subsequent transactions relating to the real estate, particularly in 1992 when the proceeds of the sale made to the county were deposited in a bank account that did not contain a reference to [the wife's] right to the corpus. The most that can be said with respect to [her] handling of the funds from the 1992 sale is that she waived her right to assert her power of invasion as to those funds. That conduct does not necessarily indicate an intention to waive her rights with respect to the remaining real estate at issue here.
>
> Based on the contrary, yet equally plausible, inferences that can legitimately be drawn from [the wife's] actions, we conclude the remainderpersons have not carried their burden to prove waiver.

Id. at 203. In this ruling, the Court reversed the district court's finding of waiver. *Id.* The Iowa Supreme Court then went on to find that the estate must be reopened pursuant to Iowa Code section 633.489. *Id.* at 204–05.

The arguments posed by Exile are nearly identical to the arguments rejected in *Warrington*. The crux of Exile's argument is

that the Ruthie's property, i.e., the intellectual property rights in Ruthie's name, image, likeness (e.g., the right of publicity) were waived, disclaimed, abandoned, and passed to the public domain because it was not listed on Ruthie's inventory, Frank's inventory, or any other subsequent inventory. These arguments do not survive the well-reasoned analysis of *Warrington*. Like the Estates' causes of action in this case, the wife's right to invade the property in *Warrington* was a chose in action and when the need to invade the property arose (i.e., the "action"), the Iowa Supreme Court had no trouble deciding that the estate could be reopened for purposes of administering the chose in action, including invading the property to enforce the wife's rights in the property.

Further, like the spouse's executor in *Warrington*, there are many plausible and good reasons the intellectual property rights in Ruthie's name, image, and likeness may not have been included on the inventories of Ruthie and Frank estates.[24] The most obvious is

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[24] Contrary to Exile's arguments, section 633.488 does not bar the Estates from being reopened. As Judge Block observed,

> [S]ection 633.489 applies when a reopened estate 'does not affect the previously approved plan of distribution.' In this case, any of the potential proceeds from the

that is that it was simply not known or understood at that time that rights in a decedent's name, image, and likeness needed to be included in the inventory in the first place because the law on such rights in Iowa was unsettled and commentators have observed that it was the traditional practice at that time that rights in one's name, image, and likeness would not be included on a probate inventory. *See* Note, *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 Harv. L. Rev. 683, 683 (1995). Moreover, omission may have been like *Warrington*, where it may "have been due to inadvertence or mistake rather than a conscious decision to give up this right." 686 N.W.2d at 203.

> civil case with Exile do not affect the previously approved plan of distribution. If the civil case fails, then there will be no proceeds or property to distribute. This is why this case is more like *In re Estate of Ritz* and *In re Estate of Warrington* as new property will not affect any previously approved plan of distribution of property. This case is distinguishable from *In re Estate of Sampson* where reopening an estate would impact a beneficiary's property distribution because the real property interest was previously considered and the estate was already closed.

[App. 92–93, Probate Order Denying Motion to Vacate at 10–11].

Further, Exile has not put forth any evidence or substantiated reasons why Ruthie, or any descendent of Ruthie, would waive Ruthie's interest in her name, image, likeness, and her right to publicity. Accordingly, this Court should follow the logic of *Warrington*, and deny Exile's claims in their entirety.

Exile complains that there are "practical difficulties" that prevent reopening of the estates. Not so. Exile bases its "practical difficulties" argument on the notion that intellectual property that was "abandoned" will have to be "clawed back" and because some of Frank's heirs have passed away. The Estates, however, are not seeking to "claw back" property; the Estates are asserting their rights to stop Exile's theft of Ruthie's identity. And the Iowa Supreme Court directly rejected argument that the death of heirs creates practical difficulties in *Ritz*, holding:

> It appears in the record that certain of Opal's legatees may be deceased. If such legatees died before ethe testator, their interest shall be distributed in accordance with § 633.273. If these legatees died after the testator, their interest to Opal's personal property vested upon her death. Iowa Code § 633.350. Consequently, this property shall be distributed as any other personal property in their estates.

Ritz, 467 N.W.2d at 270 n.3. Similarly, Judge Block observed:

> Additionally, the Court does not find that all of the estates at the time of Frank's death need to be reopened. The Court finds that this is not a procedural requirement in order to reopen Frank's Estate. If, and when, it is time to distribute any proceeds, the Court will inquire into who and how the proper beneficiaries are to receive any proceeds.

[App. 94, Probate Order Denying Motion to Vacate at 12]. Judge Block did not abuse his discretion in so holding.

Finally, Judge Block did not abuse his discretion in finding the individual who petitioned to open the Estates, Fred Huntsman, is an "interested party" within the meaning of Iowa Code section 633.489. Ruthie and Frank both died intestate.[25] Accordingly, when Ruthie passed away, her estate passed to Frank. When Frank died intestate, his interest passed to his two sisters and his brother. *See* Iowa Code § 633.219. Mr. Huntsman is the nephew of Ruthie and Frank; his mother was one of Frank's sisters and is now deceased. Mr. Huntsman is an heir, as defined in Iowa Code section 633.3(24), to his mother's interest in Frank's Estate.[26] He also testified he

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[25] Exile lacks standing to challenge the Estates' selection of administrator.

[26] Exile argues at length that Mr. Huntsman has somehow "waived" his right to any interest in these proceedings by waiving an accounting in his deceased sister's *guardianship and*

inherited Ruthie's property, including scrapbooks. [Confidential App. 87–88, Huntsman Depo. Tr. at 69:21–70:10 (stating he has inherited some of Ruthie's property, including Ruthie's scrapbooks)]. Accordingly, he is an "interested party" under Iowa Code § 633.489. The estates have been reopened for two years and none of the other heirs have objected to or raised any concerns to the probate court about Mr. Huntsman serving as administrator of either Ruthie's Estate or Frank's Estate. Under these circumstances, Judge Block did not abuse his discretion in holding the administrator is an interested party to the Estates.

For the reasons stated above, Exile's challenge to the probate court's decision to reopen the Estates is meritless. [App. 88, Probate Order Denying Motion to Vacate at 6 ("Although the Court found Exile to be a nonparty interloper, the Court still finds their Motion meritless.")].

3. Far from Depriving the Probate Court of Jurisdiction, the Omission of Intellectual Property Rights in Ruthie's Name,

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conservatorship proceedings. Even if this were true (it's not), at best, Mr. Huntsman would have only "waived" receiving his sister's status as an heir, not his own.

Image, and Likeness in the Final Inventories Actually Provides an Independent Basis to Reopen the Estates.

Exile repeatedly asserts that the Estates cannot be reopened because Ruthie's intellectual property rights in her name, image, and likeness were not included in the inventories of Frank's Estate and Ruthie's Estate. Having no relevant case law or evidence in the record to support its position,[27] Exile suggests the omission of the rights on the inventory as a matter of law operates as some kind of abandonment, disclaimer, or waiver. But Exile has it exactly backwards: The fact that Ruthie's intellectual property rights were not

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[27] Exile, for example, cites the Uniform Disclaimer Act codified in Iowa Code section 633E.1, which, to the extent it has any relevance to this case, actually supports the Estates' position that the rights in Ruthie's name, image, and likeness were not disclaimed because the Act expressly states, "To be effective, a disclaimer must be in writing or other record," and no such written disclaimer in Ruthie's name, image, and likeness was ever made. *See* Iowa Code § 633E.5. Exile also cites Iowa Code section 556.9 for the proposition that "intangible property is presumed abandoned if not claimed by the owner for more than 'three years after it became payable or distributable,' " Exile Opening Br. at 62, but Exile omits its cited language appears in the Iowa Code chapter addressing Disposition of Unclaimed Property that requires a person in possession of the abandoned property to deliver the property to the state treasurer and, if they claim the abandoned property, to file a claim with the state treasurer. Chapter 556 has nothing to do with the administration of estates under the Iowa Probate Code.

included on the inventories provides independent grounds requiring the Estates to be reopened under to section 633.489.

Section 633.489 is primarily a tool for the probate court to administer assets that were unadministered during previous probate proceedings. *Ritz*, 467 N.W.2d at 270 (observing section 633.489 "is aimed at reopening a closed estate for the purpose of administering *property omitted from the inventory* or performing other necessary acts which were not performed during the original administration." (emphasis added)). An administrator does not have authority to pick and choose between what property is to be administered: Under Iowa law, the inventory is to include *all* property, *see* Iowa Code § 633.477 (requiring the inventory to include "an accounting of all property coming into the hands of the personal representatives"), and an administrator " 'has no right to give away any assets of the estate even though of trifling value, nor will the law give effect to such transfer,' " *Varvaris v. Varvaris*, 255 Iowa 800, 805, 124 N.W.2d 163, 165–66 (1963) (quoting 33 C.J.S. Executors and Administrators § 188)). Property (whether tangible or intangible) that is not included on the inventory are deemed unadministered (not

abandoned or waived), and the probate court abuses its discretion when it denies a petition to reopen an estate to administer the overlooked or unadministered assets, including intangible property. *See Warrington*, 686 N.W.2d at 205.

This conclusion is confirmed by the plain language of section 633.489 and its legislative history. The term "discovered" as used in the context of estate reopening statutes like section 633.489 means "to make *known* (something secret, hidden, unknown, or *previously unnoticed*)." *State ex rel. Armstrong, Teasdale, Schafly, & Davis v. Kohn*, 850 S.W.2d 86, 88 (Mo. 1993) (quoting Webster's Third New International Dictionary 647 (1976) (emphasis added)); *see also Jack v. P & A Farms, Ltd.*, 822 N.W.2d 511, 516 (Iowa 2012) ("If the legislature has not defined words of a statute, we may refer to prior decisions of this court and others, similar statutes, dictionary definitions, and common usage." (citation and internal quotation marks omitted)). The term "discovered" encompasses to the term "known," which means "to apprehend *immediately* with the mind or with the senses : perceive *directly* : have direct *unambiguous* cognition of" and "to apprehend with *certitude* as true, *factual*,

sure, or *valid* : perceive or have with the mind's grasp *with clarity* and the *conviction of certainty* : have *certitude* about and *clear comprehension* of." *Known*, Webster's Third World Dictionary (3d ed. 1966) (emphasis added). Property is "discovered" if it was previously not "known" or "unnoticed." *Kohn*, 850 N.W.2d at 88. The statutory notes to the Model Probate Code confirm that section 633.489 applies to overlooked or unnoticed property like the intellectual property rights in Ruthie's name, image, and likeness in this case. *See* Model Probate Code, Statutory Notes to Section 195 at pp. 366–67 (1946) (explaining section 194 of the Model Probate Code applies "where, by mistake or otherwise, a portion of the estate of the decedent has not been included in the decree of distribution and the administration of the estate is closed" and section 194 provides "for the reopening of the original administration for the purpose of distributing the estate overlooked.").

In keeping with the purpose of the reopening statutes to administer property that was "not included in the decree of distribution" and the definition of the term "discovered" and "known," courts in other Model Probate Code jurisdictions have held that

property is "discovered" even where the administrator was aware of the property at the time of the original administration but there is no evidence establishing the administrator was aware of a claim *of ownership* over the property. In *Butler University v. Estate of Verdak*, 815 N.E.2d 185, 189 (Ind. Ct. App. 2004), for example, the estate's personal representative was aware the decedent's collection of ballet costumes, musical scores, and painted canvas that Butler University had in its possession but did not list them on the inventory before the estate was closed. Butler argued that the estate could not be reopened because the original personal representative knew about the property so it was not "discovered" after the estate was closed.

The Indiana Court of Appeals disagreed and held the estate could be reopened. The Court observed the purpose of the reopening statute was to "to change the former rule so that an estate might have the benefit of assets omitted in the former administration although there had been a previous final settlement," that "the former settlement stands and, without setting it aside, the estate may be opened for the purpose of administering omitted assets," and "[t]he

former settlement continues to be a final adjudication as to all matters except these omitted and unadministered assets." *Estate of Verdak*, 815 N.E.2d at 195 (citations and internal quotation marks omitted). In view of the purpose of the statute allowing reopening estates, the court had no trouble holding the estate could be reopened even though the original administrator was aware that the property omitted was in Butler's possession when the estate was originally administered, noting "there is no evidence that [the original personal representative] was aware that the estate might have a claim to ownership of the property. Moreover, it is likely impossible to prove [the original personal representative's] knowledge as to ownership of the property because he is deceased." *Id.* at 196 n.10 (internal quotation marks omitted).[28]

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[28] The Indiana Court of Appeals has emphasized the importance of requiring an estate to be reopened to administer assets that were omitted during original probate proceedings, explaining:

> To put in the hands of heirs or legatees the discretion as to whether an estate should be reopened and administrator de bonis non appointed or the assets distributed without the estate being reopened would be in violation of every principle embodied in the Probate Code affording protection to decedents and other heirs.

McGahan v. Nat'l Bank of Logansport, 281 N.E.2d 522, 529–30 (Ind. Ct. App. 1972).

Like the property in *Estate of Verdak*, there is no evidence in this case that the administrator of Ruthie's Estate knew of a claim ownership over the intellectual property rights associated with Ruthie's name, image, and likeness could be made in the inventory. No Iowa decision had recognized the right of publicity at that time and, notably, until 1994—a year *after* Ruthie's estate closed—it was the traditional practice to not report a decedent's right of publicity would in an estate. *See* Note, *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 Harv. L. Rev. at 683.

Far from being evidence of "waiver," "abandonment," or "disclaimer," the legislative intent of section 633.489, the Iowa Supreme Court's decision in *Warrington* and other cases interpreting section 633.489, and decisions in other jurisdictions[29] firmly

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[29] The Iowa Supreme Court's decision in *Warrington* holding that omitted property—like Ruthie's intellectual property rights in her name, image, and likeness in this case—is not "waived" or "abandoned" is in line with decisions in other jurisdictions in related contexts. *See, e.g.*, *Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991) ("Because the trustee did not pursue the claim, Vreugdenhill contends, the claim was unadministered at the close of the case and passed to the debtor by operation of law. This court finds, however, that in order for property

establish that the omission of the intellectual property rights in Ruthie's name, image, and likeness on the final inventory of Ruthie's Estate—standing alone and in the absence of evidence of an intentional waiver of the right—not only permits the Estates to

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to be abandoned by operation of law pursuant to section 554(c), the debtor must formally schedule the property before the close of the case."); *Gibson v. Belcher*, 338 S.E.2d 330, 332–33 (S.C. 1985) ("The failure to list an item in the inventory of an estate is not determinative of title."); *Griffith's Adm'x v. Miller*, 149 S.W.2d 11, 14 (Ky. 1941) ("[T]he mere failure to inventory or list the note, as alleged by defendants, does not now render it a nullity, or bar plaintiff from maintaining her action to enforce payment."); *Hobart v. Hale*, 477 N.E.2d 740, 744–45 (Ill. Ct. App. 1985) ("We find no merit in plaintiff's third contention that the estate's failure to inventory the assignment among the estate's assets constitutes an abandonment of its interest."); *Eger v. Eger*, 314 N.E.2d 394, 400 (Ohio Ct. App. 1974) ("Issues such as the failure of an executor or administrator to include an asset of which he had knowledge in the inventory or failure of a beneficiary or other interested person to file timely exceptions to an inventory are not valid defenses in a declaratory judgment action seeking to include assets in an estate."); *In re Randall's Estate*, 40 N.W.2d 446, 449 (N.D. 1949) ("The listing of property, or failure to list it, does not affect the true title. That is the construction that must be given to those sections of the probate code referring to the property of the decedent's or of the estate. That also is the sense in which the probate and district court used the word 'assets of the estate' in their findings and conclusions."); *In re Linford's Estate*, 239 P.2d 200, 203 (Utah 1951) (similar); *Lenge v. Goldfarb*, 363 A.2d 110, 114 (Conn. 1975) ("The mere listing of a questionable asset upon an inventory is not binding upon adverse claimants, nor is the failure to list an asset an obstacle to bringing an action to claim that asset.").

be reopened, but requires the Estate to be reopened upon an application to reopen under section 633.489. *See Warrington*, 686 N.W.2d at 204–05 (holding a chose in action omitted from final inventory is not deemed waived absent evidence of intent to disclaim the property, and the district court abused its discretion when it refused to reopen the estate so the omitted chose in action could be administered); *see In re Estate of Sampson*, 838 N.W.2d at 670 (noting "other proper cause" concerns "unperformed acts of administration"); *In re Estate of Roethler*, 801 N.W.2d at 838 ("Section 633.489 applies where future events require administration of matters not considered in the final report . . . ."); *Ritz*, 467 N.W.2d at 270 ("Section 533.489 . . . is aimed at reopening a closed estate for the purpose of administering property *omitted from the inventory* or performing other necessary acts which were not performed during the original administration." (emphasis added)); 34 C.J.S. Executors and Administrators § 201 ("Moreover, an estate's failure to inventory an assignment does not constitute an abandonment of its interest. Thus, the failure of an executor to include an asset of which the executor had knowledge in the inventory of the estate or failure

of a beneficiary or other interested person to file timely exceptions to an inventory are not valid defenses in a subsequent action seeking to include assets in an estate.").

In this case, there is no evidence suggesting that the original administrators intentionally relinquished, disclaimed, abandoned, waived, or otherwise gave up the rights in Ruthie's intellectual property rights. The intellectual property rights at issue were not included in the inventories during the original probate proceedings, were not mentioned in any of the probate pleadings, and the law regarding right of publicity was unsettled during the probate of Ruthie's Estate and Frank's Estate. Thus, the intellectual property rights at issue in this case were "overlooked," "unnoticed," "omitted," and, "unadministered" in the original probate proceedings. Section 633.489 was enacted to allow an estate to be reopened specifically in cases like this. As in *Ritz* and *Warrington*, estate administration is needed to administer and distribute rights pertaining to Ruthie's identity and the estates were properly reopened pursuant to section 633.489 because there was "other property" that was "discovered"; there are "necessary acts" requiring administration,

namely, administering previously overlooked and unadministered property; and "other proper cause" for reopening is present because there are unperformed acts of administration.

Therefore, the fact that the intellectual property rights associated with Ruthie's identity were omitted from the inventory actually supports (and indeed requires) the Estates to be reopened for purposes of administering the unadministered intellectual property rights. Exile's arguments that omission of Ruthie's intellectual property rights in the inventory constitute some kind of waiver or abandonment have, in the words of the *Warrington* Court, "no merit." *See Warrington*, 686 N.W.2d at 204.

III. Attorneys' Fees Should be Assessed (Cross Appeal)

A. Preservation of Error.

The Estates preserved error on its request for attorneys' fees by requesting attorney fees in the probate proceedings and by filing a timely cross-appeal from the denial of the Estates' request for fees. In addition, this Court has inherent authority to assess attorneys' fees for frivolous appellate filings. *See In re Estate of DeTar*, 572 N.W.2d 178, 182 (Iowa Ct. App. 1997).

B. Standard of Review.

Review from a denial of sanctions under the rules of procedure is for abuse of discretion. *Rowedder v. Anderson*, 814 N.W.2d 585, 589 (Iowa 2012). This Court may impose sanctions for frivolous filings in the first instance and on its own motion. *In re Estate of DeTar*, 572 N.W.2d at 182.

C. Discussion.

Ruthie's Estate was reopened after Exile's demanded that Ruthie's Estate be included as a plaintiff in the Litigation because, according to Exile, Ruthie's Estate was the only the real party in interest to the legal claims asserted. This appeal also follows the ruling by the district court in the Litigation that Frank's Estate is a real party in interest, that the Estates' legal claims are descendible, and the Estates' legal claims, including infringement of Ruthie's right of publicity, state valid causes of action under Iowa law.

In the probate proceedings and now on appeal, Exile frivolously seeks an end-run around the district court's rulings in the Litigation by repackaging its previously rejected arguments and

reraising them in the probate proceedings and now on appeal, asserting meritless and unsupported arguments that have been squarely rejected by the Iowa Supreme Court, omitting any discussion of the controlling definitions that actually apply to the Iowa Probate Code, and persisting in its request for permissive intervention even though in pending trademark cancellation proceedings it abandoned the sole basis asserted for permissive intervention.

The probate court found Exile's arguments "meritless," but it did not impose any sanctions against Exile pursuant to Iowa Rule of Civil Procedure 1.413. Exile's meritless Motion to Vacate and this appeal have resulted in a substantial waste of time and resources. Therefore, the Estates respectfully request this Court on appeal to assess reasonable attorneys for this frivolous appeal to deter parties like Exile from filing frivolous appeals, asserting meritless arguments, and attempting to resurrect, rehash, and reargue issues that the district court rejected long ago in the underlying Litigation. *See* Iowa R. Civ. P. 1.413; *In re Estate of DeTar*, 572 N.W.2d at 182 (observing the appellate court may impose sanctions for a frivolous appeal). If reasonable attorneys' fees are not assessed, there is

nothing to deter parties like Exile from pursuing meritless and baseless arguments, wasting judicial time and resources, and needlessly driving up the cost of litigation.

CONCLUSION

The district court properly denied Exile's belated attempt to intervene in the probate proceedings, and the Estates were properly reopened. Therefore, the district court's judgment and order reopening the Estates should be affirmed, and this Court should assess attorneys' fees and costs against Exile.

REQUEST FOR ORAL ARGUMENT

The Estates respectfully request oral argument in this matter.

Respectfully submitted,

/s/ *Scott M. Wadding*
Scott M. Wadding, AT0010447
Matthew G. Sease, AT0010484
Delaney J. Kozlowski, AT0015277
SEASE & WADDING
104 Southwest Fourth Street, Suite A
Des Moines, Iowa 50309
Phone: (515) 883-2222
Fax: (515) 883-2233
swadding@seasewadding.com
msease@seasewadding.com
dkozlowski@seasewdding.com

ATTORNEYS FOR APPELLEES/
CROSS-APPELLANTS

CERTIFICATE OF COST

I, Scott M. Wadding, certify that there was no cost to reproduce copies of the preceding brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,946 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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I, Scott M. Wadding, certify that on December 1, 2022, I served this document by filing an electronic copy of this document with Electronic Document Management System to all registered filers for this case. A review of the filers in this matter indicates that all necessary parties have been and will be served in full compliance with the provisions of the Rules of Appellate Procedure.

/s/ *Scott M. Wadding*

Scott M. Wadding, AT0010447
Matthew G. Sease, AT0010484
Delaney J. Kozlowski, AT0015277
SEASE & WADDING
104 Southwest Fourth Street, Suite A
Des Moines, Iowa 50309
Phone: (515) 883-2222
Fax: (515) 883-2233
swadding@seasewadding.com
msease@seasewadding.com
dkozlowski@seasewdding.com
ATTORNEYS FOR APPELLEES/
CROSS-APPELLANTS