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IN THE SUPREME COURT OF IOWA

No. 23-0093

GARY DEAN JANSSEN and LARRY DALE JANSSEN,
Plaintiffs-Appellants,
v.
THE SECURITY NATIONAL BANK OF SIOUX CITY, as Executor of the Estate of Richard D. Janssen, and **SHERYL ANN COLLINS,** Individually,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF WOODBURY COUNTY
NO. ESPR055208
HON. ZACHARY S. HINDMAN

APPELLANT'S BRIEF

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Max 100 L.C., 621 N.W.2d at 181; *Ney v. Ney*, 891 N.W.2d 446, 453 (Iowa 2017)

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ROUTING STATEMENT

This case presents the following questions:

> Can a party who was joined in a will contest pursuant to Iowa Code 633.312 consent to her dismissal before trial?
>
> And, can the losing party at trial (who also consented to both the dismissal and the trial without the dismissed party) later demand a new trial by arguing the joinder statute was not met based on the consented-to-dismissal?

This appeal should be transferred to the Court of Appeals of Iowa under Iowa Rule of Appellate Procedure 6.1101(3) as the issues presented can be resolved via application of existing legal principles.

STATEMENT OF THE CASE

Nature of the Case: This is a will contest and tortious interference action brought by Larry and Gary Janssen against their sister Sheryl Collins concerning the estate of their father, Richard Janssen. Richard's other three children–Dean, Jeff, and Debra–were joined as parties to the action for the first two-and-a-half years of litigation, including a first trial ending in a hung jury.

Before the second trial, Dean and Jeff voluntarily dismissed their claims. (App.p. 543) Additionally, Larry and Gary moved for the dismissal of their claims against Debra Shultz, stating:

> COME NOW the Plaintiffs and hereby DISMISS all claims made against Defendant Debra Lynn Shultz. This applies only to those limited claims and does not in any way impact the Plaintiffs' remaining claims.

(App. pp. 790, 792, 1070-1071).

All parties consented to the dismissal and trial of the remaining claims without Dean, Jeff, and Shultz serving as anything other than testifying witnesses. (App. p. 1071)

> THE COURT: Thank you very much. Anything on those dismissals, Mr. Deinert?
>
> MR. DEINERT: Yeah. First, Your Honor, <u>we don't object</u>, although the first notice we received of these dismissals was when we received the e-mail after lunch yesterday, about 18 hours before trial. There are other issues that will be addressed later on in this pretrial hearing that are affected by the untimely dismissal of a claim as well as a party. <u>But, of course, Deb Shultz does not object to being dismissed, as well as the capacity claim</u>.
>
> THE COURT: All right. Thank you, Mr. Deinert. Anything on the dismissals on behalf of Security National Bank, Mr. Lessmann?
>
> MR. LESSMANN: No, Your Honor. We agree with the Court to the extent that the Rule 1.943 be -- that it's within ten days does require consent of the Court. <u>We do not object to the dismissal of Deb Shultz as a party. Nor do we object to the dismissal of the Count 1, testamentary capacity claim</u>.

(App. p. 1071) (emphasis added).

The accepted compromise, and valuable dismissal, was granted with the sisters' (Collins and Shultz) consent and the case proceeded to a second trial. (App p. 1072) The court stated:

> THE COURT: All right. Very well. So the request for dismissal of Count 1 and the request for dismissal of Debra Shultz as a party will be granted then. So that, I think, takes care of that.

(App. p. 1072)

After evidentiary presentation, the Woodbury County jury unanimously found Collins committed fraud and undue influence against her father, and tortious interference

with inheritance against her brothers. (App. pp. 800-801) The jury also found Collins' conduct was willful and wanton, warranting punitive damages. (App. pp. 802-803)

Weeks after the jury's verdict, however, Collins reversed her position in ostensibly withdrawing her prior express consent, objected to Shultz's dismissal, and argued for the first time that the Court lacked jurisdiction to conduct the very trial she consented to. (Motion to Dismiss the Petition and Matter for Failure to Include Indispensable Party) The district court accepted Collins' argument, reversed its pretrial order granting Shultz's dismissal, and ordered Larry and Gary to retry the case a third time after rejoining Shultz as a defendant. (App. p. 937; Order dated Dec. 21, 2022)

Larry and Gary have appealed that order and now ask this Court to reverse and direct the district court to enter judgment on the jury's verdict in their favor.

Course of Proceedings: This action began on September 17, 2018, as a proceeding to probate a will. (App p. 7) The Plaintiffs filed a petition to contest the will and for damages for tortious interference with inheritance. (App p. 12) The named plaintiffs were Larry, Gary, Dean, and Jeff Janssen. (App p. 12) The named defendants were the Estate of Richard Janssen, Sheryl Collins, and Debra Shultz. (App p. 12) The claims asked that the 2018 will be set aside, sought a public finding against Defendants individually, as well as monetary personal judgment. (App p. 12)

The case was first tried to a jury in October 2019. (Court Reporter Memo and Certificate) Because the jury was unable to reach a verdict, District Judge Hindman declared a mistrial on November 6, 2019. (Order dated Nov. 6, 2019)

Defendants Sheryl Collins and Debra Shultz were at all times represented by the same legal counsel. (Dkct. ESPR055208) After the first trial, the District Court warned their counsel about the potential divergence of their interests in this action–including the very interests involved in Shultz's consented-to dismissal raised by Collins' post-trial motions that led to this appeal.

> Although, as set forth above, the Court concludes that a reasonable jury could find that Debra tortiously interfered with Larry's and Gary's inheritance by way of undue influence, it is more difficult for the Court to conclude that a reasonable jury could find that Debra tortiously interfered with Larry's Gary's inheritance by way of fraud. That does not change the Court's analysis with respect to the Defendants' motion for directed verdict on the tortious interference claim against Debra, in light of the Court's conclusion with respect to tortious interference by undue influence. **But it does raise, in the Court's mind, the question whether a conflict exists here between Sheryl and Debra.** If the jury had found in favor of the Defendants on the lack-of-testamentary-capacity claim, and on the undue influence claim, such that the April 2018 will were not set aside; and if the jury had found that Sheryl tortiously interfered with Larry's and Gary's inheritance by way of fraud, but did not so find with respect to Debra, then Sheryl could potentially have been on the hook for damages in an amount equivalent to the combined inheritance received by Sheryl and Debra. Such a result could have left Sheryl owing Larry and Gary damages in an amount roughly double that of which she received under the will.
>
> **Accordingly, it is arguably in Sheryl's interest, if a jury does not find in favor of the Defendants on all issues, and if the jury finds against her on the tortious interference claim, for the jury also to find against Debra on the tortious interference claim.** The Court does not, by raising this issue, mean to suggest that there necessarily exists here a conflict of interest

> for the attorneys representing the individual Defendants, either waivable or otherwise. But since this issue occurred to the Court in analyzing the Defendants' motion for directed verdict, and since there exists a possibility that **this matter will be tried again, the Court concludes that it is appropriate to raise the issue now, in order to ensure that the issue is discussed by the appropriate parties and counsel, so as to avoid problems arising in the future**.

(Order date Nov. 6, 2019 re: Directed Verdict Motions)(emphasis added)

The case was set for a retrial on June 22, 2021. (Order dated Feb. 11, 2021) Prior to the second trial, two plaintiffs withdrew as named parties in the case. (App. pp. 543) On June 21, 2022, with the consent of the district court and counsel for all Defendants, who stated that they had no objection, the remaining Plaintiffs dismissed their claims against Defendant Debra Shultz. (App. pp. 790, 792, 1070-1071).

After the Plaintiffs' obtained a unanimous verdict on all of their claims against Collins, she moved to dismiss for failure to include Shultz as an indispensable party. (App p. 821).

The district court treated Collins's motion as a motion "for new trial for failure to join an indispensable party," and granted that motion on May 19, 2022. (App. p. 847)

On June 3, 2022, Plaintiffs filed a motion asking the district court to enlarge, amend, and reconsider its ruling on Defendant Collins's motion. (App. p. 888) On December 21, 2022, the district court denied Plaintiffs' motion. (App. p. 937)

On January 13, 2023, Plaintiffs filed a notice of appeal. (App. 972).

STATEMENT OF FACTS

This proceeding concerns a contest over the last will and testament of the decedent Richard Janssen, who died on September 2, 2018, leaving two wills—one executed May 13, 2014, and one purportedly executed a few months before his death, on April 20, 2018.

While this appeal concerns a procedural question of the will contest–not a weight of the evidence one–some mention of the unsavory nature of Sheryl Collins' actions bears mentioning.

The elements of the undue influence case, and their satisfaction, were admitted on the stand by Collins' handpicked attorney for the invalid will–Joel Vos. Vos testified undue influence "would be… if the person who makes the call initially says, 'This is what my mom or dad wants to do and has it all laid out…" (Trial Tr. Vol. III, 6/24/21–82:15-20); "an influencer attending a meeting" (Trial Tr. Vol. III, 6/24/21–83:3-7); "a hasty or quickly prepared estate plan (Trial Tr. Vol. III, 6/24/21–p.83: 13-15); "a beneficiary or person who stands to benefit actively participating [in the will preparation]" (Trial Tr. Vol. III, 6/24/21–83:14-20); "a dramatic or significant change in a will" (Trial Tr. Vol. III, 6/24/21–83:21-23); "a person being mentally or physically weak" (Trial Tr. Vol. III, 6/24/21–83:24-25; 84:1-5); and ultimately "person improperly inserts their opinions into the process of an estate to the point where it no longer represents the -- the intent of the person who makes the will, but now it reflects the intent of the person who is exerting the undue influence." (Trial Tr. Vol. III, 6/24/21–82:2-7).

Vos then admitted to the jury that each of these was present in the instant case: that Sheryl Collins made the initial call to Vos's firm to set the appointment for Richard (Trial Tr. Vol. III, 6/24/21–85:10-16); that Collins slipped instructions to Vos's firm–in her own handwriting–as to what her dad allegedly wanted to do, even to the extent of saying why Larry and Gary Janssen were allegedly being disinherited, and had it all laid out before Vos had ever even spoken with (let alone met) Richard Janssen (Trial Tr. Vol. III, 6/24/21–87: 20-25; 88: 1-25; 89: 1-14); that Vos drafted Richard Janssen's alleged will in accordance with Sheryl Collins' directions before ever meeting with Richard Janssen (Trial Tr. Vol. III, 6/24/21–89:8-14); and that Sheryl Collins actively participated in the will preparation by bringing Richard to the appointment and substantively engaging in the planning discussions with Mr. Vos by providing her answers to "fifteen to twenty questions" about how to prepare the alleged will (Trial Tr. Vol. III, 6/24/21–91:14-19; 92:1-25; 93:1-25; 94:1-25; 95:1-25). On its face, the alleged new will radically changed Richard's most recent will by disinheriting Larry and Gary Janssen (compare Exhibits 372 and 375 with Exhibits 307-310), and Collins admitted that the challenged will benefited her (Trial Tr. Vo. II, 6/23/21–205:4-8). Collins fed all of the information to Vos before the meeting to effect the disinheritance. (Exhibits 365, 365A, 366, 370).

In fact, Collins secretly recorded herself confusing and unduly influencing her father into the change just shortly before she took her father to Vos to enact her desired changes. (Exhibits 365, 365A). As the jury found, the recording reflects a troubling

conversation between a greedy and unremitting daughter and her confused and vulnerable father. *Id*. The jury was instructed to consider the following as fraudulent statements by Collins:

a. That Larry Dale Janssen and/or Gary Dean Janssen convinced Melva Janssen, Richard's wife, to bequeath to them in her 2014 will her undivided one-half interest in the farmland that Richard and Melva jointly owned;

b. That Richard Janssen had been tricked into signing his 2014 will;

c. That Barry Thompson was taking advantage of Richard;

d. That the document which constitutes Plaintiffs' Exhibit 311 was Melva's will;

e. That powers of attorney can do whatever they want;

f. That Richard having received a life estate in Melva's former interest in their previously jointly-owned farmland meant that Richard did not own her former interest in the land; or

g. That people were trying to take Richard's land.

(Jury Instr. No. 24).

The jury found Collins' fraudulent actions so abhorrent as to render a unanimous verdict in Plaintiffs' favor, overturning the 2018 will, assessing nearly a half-million dollars in personal damages against her, and finding that her conduct rose to the level of willful and wanton disregard of others' rights supporting punitive damages. (App. pp. 800, 802)

Weeks after the unanimous verdicts were entered against her, Collins, for the first time, withdrew her consent to Shultz's dismissal and related agreement to go to trial on those terms. (App. p. 821)

The Court treated Collins's motion as a request for a new trial for failure to join an indispensable party, and granted Collins's request for a new trial, finding that Debra Shultz was an indispensable party whose dismissal by consent of the parties and with the permission of the Court had been improper. The Court also held that the dismissal of an indispensable party at any time prior to the conclusion of the trial was an error that "cannot be waived" or excused.

ARGUMENT

This appeal poses two questions:

1. Was Iowa Code § 633.312 complied with?
2. If not, did the district court still have authority to hear the case?

The answer is 'yes' to both these questions.

As explained below, Iowa Code § 633.312 requires only service of notice and joinder of all interested parties to the suit. Once joined, a party may move for, or consent to, its dismissal from the case. That's what happened here, satisfying the first inquiry. The district court's first error was in finding otherwise.

But even a failure to satisfy the statutory requirements of Iowa Code § 633.312 does not deprive the court of authority to hear the case. This is because a statute (or a failure to comply with one) cannot deprive a court of its constitutionally granted subject matter jurisdiction. Rather, statutes may only limit a court's authority to hear a case. In the event of statutory noncompliance, the Court's authority to hear a case can still be

conferred by the parties' consent, waiver, or estoppel–each of which occurred here. The district court's second error was in finding it lacked authority to hear this case.

. PLAINTIFFS COMPLIED WITH IOWA CODE §633.312 BY SERVING SHULTZ WITH NOTICE AND JOINING HER AS A DEFENDANT.

There are only two requirements of Iowa Code 633.312: (1) that "all known interested parties… shall be joined" in a will contest action, and (2) that "[a]ll such defendants shall be brought in by serving them with notice pursuant to the rules of civil procedure." Both requirements were undeniably met here.

Debra Shultz was joined as a defendant to this will contest action on October 3, 2018 and served on October 11, 2018. (See Plaintiffs' Petition filed October 3, 2018; Return of Service on Debra Shultz filed October 15, 2018). Dean and Jeff Janssen were likewise joined, but as plaintiffs. *Id*. There are no other requirements under 633.312. Thus, there was actual compliance with the statute. *See In re Ditz' Est.*, 255 Iowa 1272, 1278, 125 N.W.2d 814, 818 (1964) (finding compliance with what is now Iowa Code 633.312 where "the court did order the seven parties brought in, and they were brought in by amending the petition to include them as parties defendant and by serving them with an original notice.") (emphasis added).

Nothing else is mandated by statute. "When the meaning of a statute is clear we will not amend it by judicial edict, nor add words creating a new meaning." *Mallory v. Jurgena*, 250 Iowa 16, 21, 92 N.W.2d 387, 390 (1958). Iowa Code 633.312 does not require a party to remain a defendant through trial, prevent a party from moving for

summary judgment or for a directed verdict for her own dismissal as a defendant, or prevent a party from otherwise requesting or consenting to the dismissal of such claims against her. Nor does it limit the Court's authority to grant a defendant's dismissal at any of these stages. The District Court erred when it ruled otherwise.

Once joined, Shultz could move for, and consent to, her dismissal. Indeed, Shultz exercised all her rights as a party after being joined–including filing an answer to the petition, written discovery, depositions, a motion for summary judgment seeking her dismissal, pretrial filings, a first trial, a motion for directed verdict seeking her dismissal, post trial motions, more depositions, a second motion for summary judgment, and pretrial filings for a second trial. *See generally* Court Docket Woodbury Co. No. ESPR055208. After two years and eight months of actively participating in the litigation seeking her dismissal, she exercised her ultimate right to consent to her own dismissal before trial and thereby limit her exposure to liability. (App. p. 1071) (Shultz's counsel, Ryland Deinert, stating "of course, Deb Shultz does not object to being dismissed."). In short, Shultz was afforded all the rights and protections of a litigant contemplated by Iowa Code 633.312 and the related Iowa R. Civ. P. 1.234.

Shultz's right as a properly joined litigant to consent to her own dismissal is consistent with the general autonomy the Iowa Rules of Civil Procedure afford parties in litigating their positions, including:

- the right to choose which defenses to raise (Iowa R. Civ. P. 1.405 and 1.421),

- the right to choose which counter or cross claims, if any, she might bring (Iowa R. Civ. P. 1.241-1.246),
- the right to choose whether to interplead (Iowa R. Civ. P. 1.251) or intervene (Iowa R. Civ. P. 1.407),
- the right to default by never appearing before the court (Iowa R. Civ. P. 1.972),
- the right to dismiss claims against parties and the implied reciprocal right of defendants to consent thereto when necessary (Iowa R. Civ. P. 1.943),
- parties' right to settle and resolve claims between them (Iowa R. Civ. P. 1.281(5) and 1.908),
- the related interests of judicial economy (Iowa R. Civ. P. 1.602(1), and
- and the Court's general authority over case management vis-a-vis the parties' litigation positions (Iowa R. Civ. P. 1.602, 1.914, 1.943, 1.953, *e.g.*).

This constellation of rules points to the general principle that parties–including necessary ones–may be dismissed from a lawsuit by stipulation or agreement. Here, all parties and the District Court agreed to Shultz's dismissal, consistent with the general rights of litigants to do so. The District Court erred in finding it lacked authority to grant the dismissal.

I. THE DISTRICT COURT RETAINED AUTHORITY TO HEAR THE CASE EVEN IN THE ABSENCE OF STRICT COMPLIANCE WITH IOWA CODE SEC. 633.312.

The District Court lost its way in concluding it lacked authority to hear this case. Notably, the District Court believed it could not adjudicate the merits of the case, for unexplained reasons, because the party voluntarily agreed to be dismissed (and received the benefit of that bargain).

To be clear, the district court at all times retained *subject matter jurisdiction* over this action. Iowa Const. art. V, § 6; Iowa Code § 601A.16(1). Statutes (including Iowa Code § 633.312) cannot deprive a court of this constitutionally granted subject matter jurisdiction. *Max 100 L.C.*, 621 N.W.2d at 181. Likewise, the failure to comply with a statute does not deprive a court of subject matter jurisdiction. Thus, a failure to comply with Iowa Code 633.312 does not deprive the district court of subject matter jurisdiction to hear the will contest.

Rather, a statute may only deprive the court of "authority to hear a case," or otherwise prescribe procedural parameters of the court's authority to rule on particular types of matters. *See Max 100 L.C.*, 621 N.W.2d at 181; *Ney v. Ney*, 891 N.W.2d 446, 453 (Iowa 2017). But in that case, parties may consent to a court's authority to hear a case, and waive objections to noncompliance with requirements. "While parties cannot waive the absence of subject matter jurisdiction, a defect in the court's jurisdiction of the case can be obviated by consent, waiver, or estoppel." *Ney v. Ney*, 891 N.W.2d 446, 453–54 (Iowa 2017)

In reneging on her consent to Shultz's dismissal, Collins confuses subject matter jurisdiction with the Court's authority to hear and decide a specific case; the District Court followed this false premise to its error. As a result, the District Court's Order was built on a faulty foundation, with the muddling of subject matter jurisdiction at the core.

In Iowa, Courts distinguish between subject matter jurisdiction and jurisdiction of the case. *Ney v. Ney*, 891 N.W.2d 446, 453 (Iowa 2017)(citing, *Schaefer*, 841 N.W.2d at 80 n.13). The Court failed to adhere to that distinction, and that confusion led directly to the Court's unsound conclusion that it lacked jurisdiction.

Subject matter jurisdiction refers to the power of a court "to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the court's attention." *Christie v. Rolscreen Co.,* 448 N.W.2d 447, 450 (Iowa 1989); *City of Des Moines v. Des Moines Police,* 360 N.W.2d 729, 730–31 (Iowa 1985). Iowa Code chapter 907 clearly confers jurisdiction on the district court to hear cases concerning probation issues generally.

Subject matter jurisdiction should **not** be confused with authority to hear a specific case or the parties before the court. "A court may have subject matter jurisdiction but for one reason or another may not be able to entertain a particular case." *Christie,* 448 N.W.2d at 450. "In such a situation we say the court lacks authority to hear that particular case." *Id.* **The importance of this distinction becomes evident when issues of waiver arise**. *Id.* (emphasis added).

This distinction is important because although **a statute cannot deprive a court of its constitutionally granted subject matter jurisdiction**, it can affect the jurisdiction of the case by prescribing specific parameters of the court's authority to rule on particular types of matters. *Ney v. Ney*, 891 N.W.2d 446, 453 (Iowa 2017)(emphasis added). However, the Supreme Court of Iowa recently confirmed that non-subject matter jurisdictional defects can be averted via consent, waiver, or estoppel.

> **[W]hile parties cannot waive the absence of subject matter jurisdiction, a defect in the court's jurisdiction of the case can be obviated by consent, waiver, or estoppel.**

Id. (citing, *In re Marriage of Seyler*, 559 N.W.2d 7, 10 n.3 (Iowa 1997) (citing *State v. Mandicino*, 509 N.W.2d 481, 482–83 (Iowa 1993), which overruled cases to the contrary))(emphasis added).

One who invokes or consents to jurisdiction of a court is barred from questioning it on any ground other than lack of jurisdiction of the subject matter. *McKim v. Petty*, 242 Iowa 599, 45 N.W.2d 157, 159-60 (1950)(Court established that a challenge to personal jurisdiction could be (and was) waived).

This straightforward consent-and-waiver concept has been broadly applied. *Danforth v. Thompson*, 34 Iowa 243, 245; *In re appeal of McLain*, 189 Iowa 264, 269, 270, 176 N.W. 817; 21 C.J.S., Courts, § 109, pages 163 to 167; 14 Am.Jur. 385–387, Courts, sections 191 and 192. ("Where a court has general jurisdiction of the subject matter a lack of jurisdiction of the particular case may be waived, as may other

objections to jurisdiction, such as lack of jurisdiction of the person.”). *See also*, *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 876 (Iowa 2007)(failure to timely raise objection to Court’s authority results in waiver of the same); *State v. Emery*, 636 N.W.2d 116, 122 (Iowa 2001)(Failure to comply with procedural statues in transfer of criminal/juvenile claims could be waived and did not deprive the Court of jurisdiction); *Keokuk Cnty. v. H.B.*, 593 N.W.2d 118, 122 (Iowa 1999)(Court recognized litigants can waive statutory mandate of exhausting administrative remedies); *State v. Yodprasit*, 564 N.W.2d 383, 387 (Iowa 1997)(Irregularities in a rule-based waiver proceeding can be waived); *O'Kelley v. Lochner*, 259 Iowa 710, 716, 145 N.W.2d 626, 630 (1966) (“(O)ne who invokes or consents to a court's jurisdiction is estopped to question it on any ground Other than lack of jurisdiction of the subject matter.”); *Oakes v. Oakes*, 255 Iowa 1315, 1318, 125 N.W.2d 835, 837 (1964)(“The question of lack of jurisdiction was not raised until third parties were the highest bidders on the sale of the farm. Having consented to the jurisdiction, they are estopped to deny the authority of the court to proceed except where the court lacks jurisdiction of the subject matter.”).

Clearly, here, the district court had subject matter jurisdiction because Iowa Code §§633.10 confers the same. (The district court retains jurisdiction to construe the will (including its alleged validity) and the distributions to be made thereunder.).

Thereafter, in explicitly consenting to the dismissal of Shultz, and trying the jury case to full verdict, Collins and Shultz (and all others) waived their right to later object

to jurisdiction. She effectively consented to be bound by the jury's verdict and waived her later complaint about her sister's dismissal. *See also*, *In re Damon's Guardianship*, 238 Iowa 570, 575–76, 28 N.W.2d 48, 51 (1947):

> Appellant invited the district court to hear and determine this controversy in the manner in which it was heard, *i. e.*, upon his final report and any objections that might be filed thereto. He thereby waived any right he may have had to question its jurisdiction and is in no position to contend in effect that the hearing instigated by him was a nullity.
>
> 'If a guardian submits to a settlement in a court which has no jurisdiction over him, he may waive his right afterward to question the jurisdiction, * * *.' 39 C.J.S. Guardian and Ward § 153a(2), p. 255. See also as having some bearing *Staples v. Staples*, Iowa, 26 N.W.2d 334, 336, and cases cited; *576 *In re Estate of Ferris*, 234 Iowa 960, 971, 972, 14 N.W.2d 889, 896; *March v. Huffman*, 199 Iowa 788, 792, 793, 202 N.W. 581, 583, where we say, 'having participated in the proceedings of the court he thereby submitted himself to its jurisdiction, * * *.' In the *Ferris* case, supra, [234 Iowa 972, 14 N.W.2d 896], we quote with approval from an earlier case, 'A defendant cannot be heard to attack the jurisdiction of a court in which he is sued and at the same time invoke such jurisdiction affirmatively in his own behalf.'

In re Damon's Guardianship, 238 Iowa 570, 575–76, 28 N.W.2d 48, 51 (1947).

A party may waive its objection to jurisdiction by the failure to object, the failure to timely object, or the failure to raise the defense. 21 C.J.S. Courts § 97. A litigant who has stipulated to a procedure in excess of the court's jurisdiction may be estopped to question it when to hold otherwise would permit the parties to trifle with the courts. 21 C.J.S. Courts § 99.

Additionally, waiver of non-subject matter jurisdiction complaints occurs whenever a party affirmatively seeks relief, acts inconsistently with a claim of no

jurisdiction, or otherwise obtains something of benefit by participating in the proceeding. See, 21 *C.J.S. Courts* § 97 (obtaining something of benefit by participating in the proceeding, or otherwise acting in a manner inconsistent with a claim that personal jurisdiction is lacking); *Schaeffer v. Schaeffer*, 471 S.W.3d 367, 372 (Mo. Ct. App. 2015)("waiver happens in that context when "a party affirmatively seeks relief," acts inconsistently with a claim of no personal jurisdiction, or otherwise obtains something of benefit to herself by participating in the proceeding.").

Other equitable factors favor this same outcome and are routinely considered by courts in deciding the course of action: (a) whether the absent person is adequately represented by a party already before the court; (b) whether "there is real prejudice to the absentee"; and (c) the promotion of judicial economy by "avoid[ing] multiplicity of actions."

Debra Shultz had a full and fair opportunity to participate in the will contest. She was served with copies of the petitions and participated as a party in all discovery and in the first trial. Represented by counsel, she consented to the dismissal of claims against her with prejudice. (App. p. 1071)

The fact that her attorney also represented Sheryl Collins is not, as suggested by the district court, a mitigating factor that should diminish her responsibility for accepting her own dismissal from the action. To the extent that Shultz and Collins's attorney may have had a conflict of interest, this did not arise from the dismissal of claims against

Shultz. In fact, in ruling on motions for directed verdict following the first trial, the district court advised Shultz and Collins to consider whether it was advisable to allow themselves to be represented jointly by the same attorney. (Order date Nov. 6, 2019 re: Directed Verdict Motions). This advisory warning from the Court was made nearly two years prior to the dismissal they now complain of. Specifically, the Court's warning to Shultz advised of her potentially divergent interests from her sister. If they disregarded this advice, that was their prerogative, but they cannot now be heard to complain.

It also bears mentioning that Shultz's interests were fully and adequately represented during the trial. Because Shultz's interests were implicated only in the will contest portion of the litigation (in distinction from the tortious interference claim against Sheryl Collins), Shultz's only defense strategy was to support the purported validity of the Decedent's 2018 will. Shultz added her weight to this argument by testifying as a witness at the trial (Vol. 3 Trial Tr. 251-65; Vol. 4 Trial Tr. 4-60), where she repeatedly denied the exercise of undue influence over the decedent by Collins. (Vol. 4 Trial Tr. 49:19-25; 50:1-8, 21-23; 58:10-12; 59:1-18). Although the jury obviously did not accept this testimony, the important point is that Shultz's posture in the litigation was identical to that of the executor. Further representing Shultz's interests in defending the will was the executor of the Decedent's estate, who participated fully in both trials to defend the contested will.

Indeed, the executor's attorney himself correctly characterized the executor as having "a statutory duty to defend a will on behalf of the beneficiaries that are listed in the will." (Tr. of Hearing, Sept. 16, 2021, at 89:22-24.) *See, e.g., Leach v. Farmers Sav. Bank*, 205 Iowa 114, 116, 213 N.W. 414 (Iowa 1928) ("an executor or administrator is not only the personal representative of the decedent, but is also, to a very great extent, the representative of the creditors and of the legatees and distributees"); *Geremia v. Geremia*, 159 Conn. App. 751, 783, 125 A.3d 549 (Conn. App. Ct. 2015) ("the administrator or executor, as the designated fiduciary of the estate, is the representative of all beneficiaries under [a] decedent's will"); *In re Estate of Venturelli*, 54 Ill. App. 3d 997, 1002, 370 N.E.2d 290 (Ill. App. Ct. 1977) ("It is well established that an executor is the representative of the decedent and all those interested in the estate, such as creditors, heirs, legatees, and devisees"). Moreover, in representing the Janssen estate and seeking to uphold the 2018 will, the executor's attorney was fulfilling a duty to the distributees under that will, including Debra Shultz. *See Sabin v. Ackerman*, 828 N.W.2d 325 (Iowa Ct. App. 2013) ("[a]lthough the estate attorney is hired by an executor or administrator, his obligations, like those of the fiduciary, extend to the estate and all other distributees") (quoting *Ruden v. Jenk*, 543 N.W.2d 605, 610 (Iowa 1996)).

The executor's attorney fulfilled his responsibilities to the distributees under the 2018 will, including Shultz. He made a lengthy opening statement and a closing argument to the jury in which he explained the distributions that would be made under both of the

wills in question and cast the facts in a light favorable to upholding the 2018 will. (Vol. 2 Trial Tr. 40:7 through 70:17; Vol. 6 Trial Tr. 153:7 through 187:6). Of critical importance, he reviewed in detail **seven individual elements** relevant to whether a will has been procured by undue influence, and he argued that the evidence did not support **any** of those elements with regard to the 2018 will. (Vol. 6 Trial Tr. 174:9 through 187:6). Although the jury found otherwise by clear and convincing evidence, there is no reason to believe that the result would have been different had Shultz remained a nominal defendant through the end of the trial.

The District Court "concede[d] that the Plaintiffs' adequate representation argument presents a difficult question," and suggested that the Iowa appellate courts might apply the adequate representation principle in future cases as courts in other jurisdictions have done. (App. p. 873) To do so would require no change in the law but merely an acknowledgment that existing equitable principles, together with Rule 1.234(2), direct trial courts to apply a less rigid and mechanical approach to the indispensable party issue.

Finally, nowhere does the district court identify any actual prejudice to Shultz having not nominally remained in the caption. Nor is there any argued prejudice to Collins. Instead, the district court noted merely that Shultz was not physically present for the entirety of the trial. (Dec. 21, 2021, Order on Mtn to Enlarge at 29). There has been no suggestion that changing this fact would have altered the jury's

verdict. Moreover, "[i]n a civil suit, the parties do not have a constitutional right to be personally present during trial." *Kulas v. Flores*, 255 F.3d 780, 786 (9th Cir. 2001). Even in criminal cases, "a defendant's right to be present at trial can be waived." *State v. Bostic*, No. 21-1675, 2023 WL 155033 at *11 (Iowa Ct. App. Jan. 11, 2023) (unreported). Accordingly, the mere physical absence of a person from parts of the trial is not the kind of prejudice with which a court is concerned in determining whether the effect on the interest of an absent party is inequitable.

The Court will not create prejudice if none exists. *See Higley v. Cessna Aircraft Co.*, No. CV103345GHKFMOX, 2012 WL 12878652, at *3 (C.D. Cal. Sept. 18, 2012) (denying equitable defense of laches) ("To establish prejudice, Defendant must show what it would have done differently had Plaintiff timely effected service"); *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., Ltd.*, No. 95 C 0673, 1996 WL 680243, at *3 (N.D. Ill. Nov. 21, 1996) (party was unable to establish prejudice where it failed to describe "what it would have done differently had it been made aware of this defense earlier"); *People v. Walker*, 2019 Ill. App. 2d 170262, 7 (Ill. App. Ct. 2019) (where "we have not been apprised what would have been done differently … [, w]e are not allowed to speculate on behalf of a party as to how prejudice occurs"); *People v. Moreno*, H037566, 2013 WL 135758, at *6 (Cal. Ct. App. Jan. 11, 2013) ("the showing of prejudice that Defendant must make is that he would have done something differently").

This case does not present a situation of "nonjoinder" or "failure to join" an indispensable party. Instead, we have the situation where a party was joined to the lawsuit, participated actively for several years, and ultimately consented to her dismissal. All parties, including Collins and Shultz, have waived any claim to challenge the Court's authority thereafter.

CONCLUSION.

For the reasons stated above, this Court should reverse the decision of the district court and direct it to enter a judgment in accordance with the jury's verdicts on both the invalidity of the Decedent's 2018 will and the award of tortious interference damages against Sheryl Collins, and to proceed accordingly.

REQUEST FOR ORAL ARGUMENT

Pursuant to Iowa Rule of Appellate Procedure 6.903(2)(i), Plaintiffs request the opportunity to present oral argument.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE <u>REQUIREMENTS AND TYPE-VOLUME LIMITATION</u>

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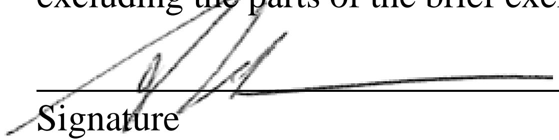

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