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IN THE SUPREME COURT OF IOWA

No. 24-1053
Dist. Ct. Case No. ESPR020120

IN THE MATTER OF THE ESTATE OF REX. L. FELTEN, Deceased

KATHY FELTEN,
Plaintiff/Appellant,

v.

KAREN HOFFMAN, Individually and
as Executor of the Estate of Rex Felten,

Defendant/Apellee.

APPEAL FROM THE DISTRICT COURT FOR CLINTON COUNTY
HON. STUART P. WERLING

**APPELLANT KATHY FELTEN'S BRIEF AND REQUEST FOR ORAL ARGUMENT**

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**ISSUE I: THE DISTRICT COURT ERRED IN ENFORCING THE NO CONTEST PROVISION IN REX FELTEN'S WILL BECAUSE KATHY FELTEN CONTESTED IT IN GOOD FAITH AND FOR PROBABLE CAUSE.**

## ROUTING STATEMENT

The Iowa Supreme Court should retain this case because it has not evaluated the meaning of "good faith" and "probable cause" in the context of unenforceability of no contest will provisions since the middle of the twentieth century. *See Geisinger v. Geisinger*, 41 N.W.2d 86, 93 (Iowa 1950). The only recent pronouncement from an Iowa appellate court in this area is an unpublished 2017 Iowa Court of Appeals case, which appears to require a will challenger to satisfy factors that by definition cannot be present in every case and to waive attorney-client privilege; this should not be the law. *See Matter of Est. of Workman,* 898 N.W.2d 204, 2017 WL 706342 at *3 (Iowa Ct. App. Feb. 22, 2017) (Table); *see also* Iowa R. App. P. 6.904(2)(a)(2) (unpublished decisions are not controlling legal authority). The determination of whether and what considerations should be controlling in Iowa is a substantial issue of first impression and/or should be revisited due to the evolution of legal principles in this area nationwide. As a matter of broad public importance, Iowans need prompt and ultimate guidance from the Iowa Supreme Court. *See* Iowa. R. App. P. 6.1101(2)(c),(d), and (f) (criteria for retention).

## NATURE OF THE CASE

This case arises out of the Estate of Rex L. Felten, who died on July 21, 2021, at the age of 89 ("Estate," and "Rex," respectively). Rex executed his Last Will and Testament ("Will") on July 2, 2021, a mere nineteen days before his death. *See* D0005, 8.4.21, Will. Kathy Felten ("Kathy"), Kenneth Felten ("Kenneth"), and Karen Hoffman ("Karen") are adult children of Rex; Kathy and Karen are named beneficiaries under his Will. *See* D0005, 8.4.21, Will, pgs. 1-3. The district court admitted Rex's Will to probate and appointed Karen as executor ("Executor"). *See* D0006, 8.4.21, Order.

Plaintiffs Kathy and Kenneth thereafter filed a petition to intervene, set aside the will, and remove the Executor, which included a jury demand. *See* D0012, 10.5.21, Petition. Kathy and Kenneth amended their petition shortly thereafter. *See* D0015, 10.8.21, Amended Petition ("Petition"). The Petition asserted that Rex lacked capacity to execute his Will, that Karen unduly influenced Rex in its execution, and that Karen tortiously interfered with Kathy and Kenneth's inheritance. *See id.* at pgs. 3-5, ¶¶ 32-48.

Karen filed an abuse of process counterclaim against Kathy and Kenneth, which the district court dismissed on summary judgment. *See* D0053, 6.21.22, Ruling on Pls. MSJ. Following a trial from July 31 to August

3, 2023, the jury returned a verdict in favor of the defense on all of Kathy and Kenneth's claims ("Verdict"). *See* D0160, 8.3.23, Civil Verdict; D0162, 8.4.23, Order.

Karen as executor thereafter filed her final report. *See* D0177, 4.9.24, Final Report ("Final Report"). Therein, Karen stated that Kathy and Kenneth would not receive any portion of the Estate due to the no contest provision in Article 11 of Rex's Will. *See id.* at pgs. 1-2, ¶ 3. Kathy objected to the Final Report[1]. *See* D0180, 4.19.24, Final Report Obj. Karen responded in defense of the same. *See* D0181, 4.30.24, Response to Fnl Report Obj. Following a hearing, the district court overruled Kathy's objection, approved the Final Report and enforced the no contest provision of the Will. *See* D0188, 6.7.24, Order Closing Probate. Kathy appeals from the same. *See* D0189, 6.26.24, Notice of Appeal.

**STATEMENT OF FACTS**

Facts and shorthand designations previously set forth in the Nature of the Case are incorporated here.

[1] Kenny did not object because Rex's Will expressly excluded him, and thus an objection to the enforcement of the "no contest" clause would be futile. *See* D0005, 8.4.21, Will.

The new Will that Rex executed only days before his death "differed significantly from a previous will in its disbursement of Mr. Felten's property." *See* D0053, 6.21.22, MSJ Ruling, at pg. 1. "The parties agree that the new will, rather than disbursing all of the property evenly between Mr. Felten's three children as in the old, left nearly the whole estate to Karen." *See id*.

Kathy Living with Rex

Kathy lived with her father from approximately 2005 or 2006 until 2018 or 2019. D0192, 8.13.24, Tr. 115:14-25 (Kathy). She moved in after Rex had knee surgery. *Id.* at Tr. 109:25-110:5. Kathy was "cooking, taking care of him, taking him to doctor's appointments, getting his pills ready." *Id.* at Tr. 110:6-8. She would also run errands like getting groceries or going to the bank for Rex. *Id.* at Tr. 111:2-6. During the time Kathy lived with him, Rex began slowing down and using a walker or cane when needed. D0192, 8.13.24, Tr. 116:1-6 (Kathy). As he aged, he started to forget things and repeat things; he also grew paranoid when he couldn't find something and thought someone was stealing from him, with increasing frequency. *Id.* at Tr. 116:22-117:17. Rex's mother and sister had dementia; Kathy had observed similar

behaviors in them (as she now observed with her father) during the time period when his mother and sister were diagnosed. *Id.* at Tr. 117:24-118:6.

Karen was always able to influence their father's actions more than Kathy could. D0192, 8.13.24, Tr. 121:14-119 (Kathy). Kathy testified, "if I ever had trouble getting him to go to the doctor, all I had to do was call her and he would jump up and go." *Id.* at Tr. 121:20-23. On one memorable occasion when Kathy recognized Rex needed the medical care he was resisting, Kathy enlisted Karen and then Rex agreed to go; when they got Rex to the hospital, he ended up needing a pacemaker. *Id.* at Tr. 122:1-18.

<u>Karen Moves In and Shuts Out Kathy</u>

Karen moved into Rex's house in December of 2019. D0192, 8.13.24, Tr. 201:17-19 (Karen). Kathy moved out because Karen "made it miserable" for Kathy to be there; Karen would tell Kathy that their father didn't want Kathy there and that Kathy needed to get out. D0192, 8.13.24, Tr. 119:22-120:3 (Kathy). When Kathy left, Karen accused her of stealing antique furniture from their father, which Kathy believed to be hers based on an understanding with their father. *Id.* at Tr. 120:14-121:3. Karen told Kathy that Rex demanded Kathy bring it back, but when Kathy asked Rex, he told Kathy he hadn't said that. *Id.* at Tr. 121:9-13. Kathy told Karen to install

security cameras so that Karen could see Kathy was not stealing from their father. *Id.* at Tr. 123:12-19.

**At trial, Karen admitted she had no evidence Kathy was stealing things or cash from their father.** *Id.* at Tr. 225-20:226:3 (Karen). Nothing in Report and Inventory filed for the Estate, which Karen executed under oath as Executor, states that Kathy had stolen anything from Rex. *Id.* at Tr. 309:3-15 (Billy Coakley, counsel for Rex and his Estate).

After Kathy moved out, she could tell when Karen was listening to her father's phone calls with Kathy because Rex would talk less than usual. D0192, 8.13.24, Tr. 123:3-11 (Kathy). Once the security cameras were installed, Kathy knew she had about an hour to visit with Rex if she arrived unannounced because otherwise Karen or Karen's kids would show up. *Id.* at Tr. 124:1-9. Kathy did not know that Karen had also set up cameras inside the house and that Karen was recording and watching Kathy's private conversations with their father. *Id.* at 127:2-7; *see also id.* at Tr. 202:9-17 (Karen admitting to installing the cameras inside without telling Kathy or Kenny) and Tr. 209:25-210:1 (Karen admitting to watching the private conversations she recorded). However, when *Karen* was home alone with Rex, she turned off the video cameras. *Id.* at Tr. 244:7-14 (Karen). Towards

the end of Rex's life, it became harder for Kathy to connect with Rex because she couldn't speak freely with him when Karen was around. *Id.* at Tr. 127:8-22 (Kathy). Karen admitted she did not want Kathy to move back into the house unless Karen was there. *Id.* at Tr. 232:25-233:4 (Karen).

<u>Karen's Letter to Rex</u>

Karen wrote their father a letter in April of 2021; this was prior to Rex executing his Will and less than three months before Rex's death. D0152, 8.1.23, Ex. 12 (Letter from Karen); D0192, 8.13.24, Tr. 226:11-16 (Karen). Karen repeatedly showed Rex this letter, both when he asked for it *and* when Karen had decided she wanted Rex to reread it. *Id.* at Tr. 227:4-6; 229:10-13. Karen's letter made several baseless allegations against Kathy, including but not limited to the following:

> "I'm afraid that Kathy will meet another man & move out again when she decides she has done more than her share like she did when she moved in with Dick."
>
> "…she wants to come back here because you would be paying the bills for her- electricity and groceries."
>
> "When I started staying with you in Dec 2019, you had less than $100 in the Baldwin checking account and still owed on the loan for the side by side."
>
> "…you worried how you were going to pay taxes and insurance."
>
> "Today you have over $12,000 in those two accounts. You would take out your cash each month and by the end of the month your

> cash was gone too. Today you have over $14,000 in your safe. You never knew she took it but where else could it have gone."
>
> "She [Kathy] also used to tell me that she wished you had died instead of mom cause mom would have traveled with her."
>
> "You always said there are 2 kinds of people you can't trust, a liar and a thief. She is both."
>
> "She has taken things from both of us that didn't belong to her."
>
> "I am a mandated reporter of abuse because of my job as a therapy assistant. What she did with your finances is called Financial Elder Abuse. If anyone in authority finds this out, I could lose my job, pay big fines and serve jail time for not reporting it."
>
> "Moms last words to me were that she was sorry the 2 of you didn't help me as much as you did Kathy & Kenny."
>
> "I hate to think of what might happen if she forgot to put some of your medication in your pill boxes or put in to many in them."
>
> "… would she send you to a nursing home."

D0152, 8.1.23, Ex. 12 (Letter from Karen).

In making these statements, Karen knew Rex would literally rather be executed than be put in a nursing home. D0192, 8.13.24, Tr. 242:5-9; *see also id.* at Tr. 241:9-16 (Karen testifying as to Rex's wishes: "Take me out behind the barn and shoot me first."). By her own admissions, the evidence is clear Karen continued to poison Rex's view of Kathy in oral conversations. For example, Karen told Rex that Kathy was untrustworthy, *despite Karen having no evidence of Kathy lying or cheating*; that Kathy wished Rex had

died instead of their mother; and that Kathy might mess up Rex's medications, which Rex knew could result in his death. *Id.* at Tr. 237:8-18; Tr. 236:8-15; Tr. 243:4-11; Tr. 242:23-243:3. Karen admitted she did not offer evidence to back up her accusation regarding the "Baldwin checking account." *Id.* at Tr. 230:22-25. Rex never paid late on taxes or insurance. *Id.* at Tr. 231:1-6. Karen also admitted she did not report Kathy for financial elder abuse *because Karen had no evidence*. *Id.* at Tr. 238:7-15; 239:2-5. Instead, Karen admitted she was the one who originated the baseless theory that Kathy was stealing from Rex and planted the idea in his head. *Id.* at Tr. 233:15-234:9.

Rex's Mental Capacity

Rex's medical records indicated he had been diagnosed with "mild dementia" in 2019. D0153, 8.2.23, Ex. A pg. 30 (Medical Associates Record); D0192, 8.13.24, Tr. 378:7-19. (Dr. Thompson). One of his doctors started him on a medication for that called Donepezil. *Id.* at Tr. 378:19-379:5. Dr. Thompson, who treated Rex intermittently during approximately the last five years of Rex's life, wrote a note on June 23, 2021, stating that Rex was mentally competent to make his own decisions. *Id.* at Tr. 336:23-337:4; D0153, 8.2.23, Ex. A pg. 38 (Medical Associates Record).

Dr. Thompson also testified that a high level of trust is needed between seniors and their caretakers. D0192, 8.13.24, Tr. 375:12-16. To her knowledge, Rex was not taken off the medication for mild dementia. *Id.* at Tr. 379:6-8. Although Karen never used it, Rex had signed a Power of Attorney that authorized Karen to handle any financial transactions on his behalf. *Id.* at Tr. 250:5-16 (Karen). She was in the room when he signed it. *Id.* at Tr. 224:24-225:12. Karen also had access to Rex's finances and safe, and she would make out checks for Rex to sign. D0192, 8.13.24, Tr. 204:24-205:4, 231:23-232:4. Karen was also in the room when Rex discussed estate planning changes with his attorney. *Id.* at Tr. 301:23-302:9 (Coakley).

Karen would not allow Kathy to go with their father to doctor's appointments because Karen said she had more medical experience with "dementia patients." D0161, 08.03.23, Order for Maintenance of Exhibit, Ex. 21 (video of their conversation in front of Rex where Karen says this); *see also* D0192, 8.13.24, Tr. 126:14-20 (Kathy's testimony about not being able to attend her father's doctor's appointments). Counsel for Kathy cross-examined Karen about this at trial:

> Q. Ma'am, we just had a video of you saying you get to go to the doctor appointments, not because it was dad's request, but because you have more experience with dementia patients. That's what you said.

> A. That's what I said.
>
> Q. And you said that in front of your father?
>
> A. Yes.
>
> Q. That impact of saying that in front of your father -- I'm going to keep playing. And we don't hear him say "I'm not a dementia patient," okay?
>
> A. Okay.

D0192, 8.13.24, Tr. 209:1-11 (Karen). As Rex continued to grow paranoid when objects were missing, Kathy observed that Karen would play into this by telling Rex that somebody had stolen it, and Rex would believe her. D0192, 8.13.24, at Tr. 125:22-126:13 (Kathy).

Additional facts are set forth in the Argument.

## **ARGUMENT**

Although her will contest was ultimately unsuccessful, Kathy should not be punished for shining light on true facts that demonstrate she brought it in good faith and for probable cause. Namely, that her elderly father, who had a mild dementia diagnosis, *dramatically* changed his estate plan mere days before dying to give the lion's share to Karen—his self-appointed caretaker and financial confidant who readily admitted she told Rex egregious lies about Kathy—instead of evenly distributing it among his three

children as he had always planned before. Karen further admitted, "There exist material questions of fact regarding the Testamentary Capacity of Rex Felten." D0047, 5.23.22, Def. Statement of Disputed Facts. Karen also admitted under oath at trial that she repeatedly told Rex Kathy was untrustworthy, lying, cheating, and committing financial elder abuse, *despite having no evidence*.

Kathy was reasonably concerned Rex lacked capacity to execute his Will and susceptible to undue influence from Karen, who had effectively shut out Kathy from meaningful relationship with their father in the final year of his life. In bringing this will contest, Kathy was not acting in bad faith or without a colorable basis. When the district court dismissed Karen's abuse of process counterclaim against Kathy, it found: "the existence of a genuine dispute over the facts surrounding Mr. Felten's will would seem to show that Plaintiffs have indeed filed their Petition to Intervene and Set Aside Last Will and Testament because they really do intend to reach that objective." *See* D0053, 6.21.22, MSJ Ruling, at pgs. 6-7.[2] Despite this acknowledgement, the

[2] This was borne out. Kathy provided evidence at trial that substantiated the key factual allegations in her Petition. *See* D0015, 10.8.21, Am. Petition at ¶¶ 8-31, the proof of which is set forth in the Statement of Facts above and discussed in the Argument below.

district court ultimately enforced the no contest provision in Rex's Will. In so doing, the district court simply wrote: "the evidence was overwhelming that Rex wished to enforce harmony among his heirs and to punish any heir who disobeyed his wishes through disinheritance." D0188, 6.7.24, Order Closing Probate. Although the testator's intent is relevant to that determination, it is not the sole determinant. The district court's order was reversible error because Kathy's will contest was in good faith and for probable cause under a totality of the circumstances approach, as detailed below.

## **PRESERVATION OF ERROR**

Kathy preserved error on the arguments herein because she raised the good faith and probable cause exception to enforcement of no contest will provisions in her Objection to Final Report, which the district court ruled on. DO81, 4.30.24, Fnl Report Obj; D0188, 6.7.24, Order Closing Probate.

## **STANDARD OF REVIEW**

The standard of review for probate matters tried in equity is *de novo*. *See In re Est. of Roethler*, 801 N.W.2d 833, 837 (Iowa 2011); *see also Workman,* 2017 WL 706342 at *3 (applying *de novo* review to enforceability of no contest provision in will). "Under a *de novo* standard of review, we are

not bound by the trial court's conclusions of law or findings of facts, although we do give weight to factual findings, particularly when they involve the credibility of witnesses." *Roethler,* 801 N.W.2d at 837.

## ISSUE I: THE DISTRICT COURT ERRED IN ENFORCING THE NO CONTEST PROVISION IN REX FELTEN'S WILL BECAUSE KATHY FELTEN CONTESTED IT IN GOOD FAITH AND FOR PROBABLE CAUSE.

Iowa and other jurisdictions readily acknowledge robust public policy considerations for overriding "no contest"[3] will provisions when the beneficiary challenged the will in good faith and for probable cause—just like Kathy did. This is detailed below in subpart A. Next, subpart B explains why the 2017 unpublished *Workman* case is not controlling law as to specific criteria required to prove good faith and probable cause. Finally, subpart C expounds on why Kathy filed her will contest in good faith and for probable cause. The district court erred in barring Kathy from taking under her father's Will, and its ruling should be reversed.

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[3] A "no contest" or forfeiture clause in a will "declares that one who attacks a will forfeits any interest in the decedent's estate or at least will suffer a limitation of his or her interest." *Workman,* 2017 WL 706342 at *1 (quoting George Blum et al., 80 Am. Jur. 2d Wills § 1323 (2d ed. 2016)). "Its purpose is to deter challenges to a will, that is, to dissuade the devisees of wills from challenging bequests made therein." *Id.* (quoting 80 Am. Jur. 2d Wills § 1323 (2d ed. 2016)).

### A. Iowa's Good Faith and Probable Cause Exception Has Strong Roots in Public Policy.

The public policy considerations behind this exception inform its application and demonstrate how Kathy's situation is squarely at the heart of why it exists in the first place. First, encouraging will challengers who act in good faith and for probable cause is critical for supporting the court's role as truth seeker. The court is duty-bound to investigate a will and must learn "true facts" regarding the circumstances of its execution and validity, which necessarily must come "from those who are or were in a position to know them." *In re Estate of Cocklin*, 17 N.W.2d 129, 132-33 (quoting with approval *Moran v. Moran,* 123 N.W. 202, 208 (Iowa 1909) (Evans, C.J., dissenting). For the court to ascertain what happened,

> **it is manifestly important that the highway of information to the court be kept open, and that there shall be no lion in the way.** But here is a forfeiture provision in the purported will itself which may be a roaring lion intended to terrorize every beneficiary of the will. Its demand is that no adverse evidence be volunteered. Its tendency is necessarily to suppress material facts, and thus to impede the administration of the law according to its true spirit.

*Cocklin*, 17 N.W.2d at 133, 135 (emphasis added) (in which the court ultimately adopted the good faith and probable cause exception on public

policy grounds) (quoting with approval *Moran,* 123 N.W. at 208 (Evans, C.J., dissenting), and further quoting *Rouse v. Branch,* 74 S.E. 133, (S.C. 1912) (exception founded "upon justice and morality")).

Given the support that will challengers provide the court in its role as truth-seeker, "**those who are attempting, in good faith, to determine the true intent of the testator should not be punished**." *See Gunter v. Pogue,* 672 S.W.2d 840, 842–44 (Tex. App. 1984)[4], *writ refused NRE* (Oct. 17, 1984) (emphasis added) (explaining why Texas "would and probably should" adopt this approach, though deciding the appeal on other grounds; citing *Cocklin*, 17 N.W.2d 129, among cases from Connecticut, New Jersey, and Pennsylvania, as examples of jurisdictions who have adopted this exception). **To hold otherwise "may be tantamount to a denial of access to the courts."** *Id.* (emphasis added).

Moreover, this exception balances competing interests. "If the will should be held valid, no harm has been done through the contest, except the delay and the attendant expense." *Salce v. Cardello*, 301 A.3d 1031, 1041

[4] In matters such as the present one, Iowa courts routinely consider case law outside Iowa in their analysis. *See, e.g., Workman*, 2017 WL 706342 at *2 (citing *Parker v. Benoist*, 160 So. 3d 198, 208 (Miss. 2015)); *Cocklin*, 17 N.W.2d at 134-35 (comparing authorities from well over a dozen foreign jurisdictions).

(2023) (internal quotations omitted) (emphasis added) (citing *South Norwalk Trust Co. v. St. John*, 92 Conn. 168, 175-77 (1917) (which reiterated that a "good faith challenger" aids the court but does not defeat a valid will). **"Courts cannot know whether a will, good on its face, was made in conformity to statutory requirements, whether the testator was of sound mind, and whether the will was the product of undue influence, unless these matters are presented in court."** *Winningham v. Winningham*, 966 S.W.2d 48, 52 (Tenn. 1998) (emphasis added) (reversing enforcement of forfeiture provision).

In short, public policy demands that someone in a situation such as Kathy's is entitled to the benefit of this exception. To hold otherwise would have a chilling effect and impede Iowa courts' ability to ascertain the truth.

### B. Guidance from the Iowa Supreme Court Is Needed Because the *Workman* Criteria for Good Faith and Probable Cause Are Neither Controlling Nor Sufficient.

Although the good faith and probable cause exception is settled law, the Iowa Supreme Court has not analyzed the contours of these standards in the context of will contests for nearly three-quarters of a century. *See Geisinger v. Geisinger*, 41 N.W.2d 86, 93 (Iowa 1950); *In re Cocklin's Estate*, 236 Iowa 98, 111–12, 17 N.W.2d 129, 135–36 (1945). More recently, the Court

cited these opinions with approval but did not discuss the exception in any detail. *See Youngblut v. Youngblut*, 945 N.W.2d 25, 30 fn. 1 (Iowa 2020); *In re Estate of Spencer*, 232 N.W.2d 491, 499 (Iowa 1975)).

The *Geisinger* case involved brothers who unsuccessfully challenged codicils to their father's will that disproportionately benefited their sister, who was also the executor of the will. 41. N.W.2d at 88-90. The brothers argued this was in good faith and for probable cause; the district court denied the sister's request to enforce the will's forfeiture provision. *Id.* at 89-90, 92. On appeal, the Iowa Supreme Court affirmed both rulings. *Id.* at 94.

The *Geisinger* court catalogued facts demonstrating the brothers acted in good faith and for probable cause. *Id.* at 92. Among them were the father's elderly age when he executed the codicils, his various physical and mental impairments, and his paranoia. *Id.* The father had a confidential and fiduciary relationship with the sister, who lived with him, wrote checks for him, had access to his safety deposit box, and helped manage his affairs. *Id.* The court noted a feeling of "open hostility" between the sister and brothers. *Id.* It found the brothers relied on the advice of their attorneys to whom they had disclosed these circumstances and who determined the brothers had just

cause to object. *Id.* The foregoing facts laid out by Kathy echo these considerations.[5]

Almost 70 years after *Geisinger*, the Iowa Court of Appeals addressed the good faith and probable cause exception in an unpublished 2017 decision on very different facts. *See Workman,* 2017 WL 706342. There, Dennis Workman challenged his mother Margaret's will because he argued she lacked testamentary capacity and that his brother, Gary, had exercised undue influence over her. *Id.* at *1. Unlike the *Geisinger* case or Kathy's, the record in *Workman* was clear Margaret had worried for decades about Dennis's debt issues, doubted his financial dealings, and wanted to make sure the family farmland did not fall into the hands of creditors. *Id.* at *4-5. Multiple previous iterations of her will consistently included no contest provisions "specifically to stave off a will contest by Dennis." *Id.* at *4. Margaret in earlier wills also withdrew any specific benefits for Dennis and placed them in a trust administered by his siblings. *Id.* In her final will, Margaret stated Gary would receive a "disproportionately large share" on purpose to recognize his "many years of contribution and effort." *Id.* at *5. Ultimately, Dennis failed to present any evidence beyond his subjective belief of

[5] The advice of counsel factor is addressed in more detail below.

Margaret's wishes, which he could not show was reasonable; he also did not call Margaret's mental capacity into question. *Id.* at *4-5.

In affirming the enforceability against Dennis of the no contest provision in Margaret's will, the court of appeals in *Workman* analyzed the overlapping standards of good faith and probable cause within six factors: advice of counsel, testator's intent, testator's conduct, testator's mental capacity, jury question, and jury deliberation. *Id.* at *3-6. The court implies these are *always* required for a will challenger to demonstrate good faith and probable cause. Although Kathy is nonetheless able to satisfy these criteria, this is not controlling law and should not be made so. Below Kathy addresses advice of counsel and jury issues in subparts B(1) and B(2), respectively. Kathy's argument as to why the factors of the testator's intent, conduct, and mental capacity also cut in favor of finding she acted with good faith and for probable cause are part of subpart C.

1. <u>Advice of counsel should be one factor within an elastic standard, rather than a strict requirement, which Kathy nonetheless satisfies.</u>

In *Geisinger,* the sister executor argued that the court gave too much weight to the evidence her brothers offered to show they relied on their attorneys in objecting. *Geisinger*41 N.W.2d. at 295-96. The court noted that advice of counsel is a defense to an action for malicious prosecution and

found no error with the trial court giving that evidence "substantial weight." *Id.* That said, advice of counsel is not *required* to show probable cause in the malicious prosecution context. *See Jensen v. Barlas,* 438 F. Supp. 2d 988, 997–98 (N.D. Iowa 2006) ("probable cause," the absence of which proves an element of malicious prosecution claim, is "knowledge of a state of facts which would lead a person of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, to believe that the suit is justified." (quoting *Brown v. Monticello State Bank,* 360 N.W.2d 81, 87 (Iowa 1984) and citing *Elliott v. Clark,* 475 N.W.2d 663, 666 (Iowa Ct.App.1991)).

Nonetheless, the *Workman* court framed "advice of counsel" as *requiring* a challenger to specifically prove that they informed counsel of the no contest provision and were advised to proceed anyway. *Id.* at *3. Iowa law recognizes express or implied waiver of attorney client privilege, the latter of which occurs where the client litigant "has placed in issue a communication which goes to the heart of the claim in controversy." *See Union Cnty., IA v. Piper Jaffray & Co.,* 248 F.R.D. 217, 220 (S.D. Iowa 2008) (internal citations omitted). As a matter of first impression in Iowa, Kathy argues that although advice of counsel may be relevant as one of many factors under a totality of

circumstances approach, the scope and content of this disclosure should not be a specific litmus test because it would unfairly require challengers to waive attorney-client privilege. This is consistent with Iowa precedent. For example, in *Squealer Fields v. Pickering,* this Court found an insurer waived attorney-client privilege when it designated its former attorney as an expert witness as part of its advice-of-counsel defense to a bad faith claim. *Squealer Fields v. Pickering*, 530 N.W.2d 678, 684–85 (Iowa 1995) (en banc), abrogated on other grounds by *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 44 (Iowa 2004).

In a variety of contexts, other jurisdictions also hold that a litigant waives attorney-client privilege in asserting advice of counsel as a defense. *See, e.g., Carlino E. Brandywine, L.P. v. Brandywine Vill. Assocs.,* 301 A.3d 470, 479 (2023), reargument denied (Oct. 2, 2023), appeal denied, 316 A.3d 4 (Pa. 2024) ("Asserting reliance on the advice of counsel as a defense waives the attorney-client privilege with respect to communications with counsel that are placed in issue by that defense."); *Empire W. Title Agency, L.L.C. v. Talamante ex rel. Cnty. of Maricopa,* 323 P.3d 1148, 1150 (Ariz. 2014) ("when a litigant advances a subjective and allegedly reasonable evaluation of the law . . . that necessarily incorporates [the advice of counsel],

confidential attorney-client communications relevant to that evaluation are discoverable") (internal citations and quotations omitted); JJK Min. Co., LLC v. Swiger, 292 F.R.D. 323, 329 (N.D.W. Va. 2013) ("review of a sampling of cases from across the country reveals that, although there is no uniform bright line rule," this is the better position).

The logic behind determining a waiver has occurred is equally applicable in the context of requiring will challengers to disclose advice of counsel. Will challengers should not be forced to waive this privilege where other factors readily demonstrate they acted in good faith and for probable cause.

Moreover, requiring advice of counsel would effectively bar *pro se* litigants because they could never satisfy this criteria, which would be manifestly unjust and contrary to well-settled law. *See Metz v. Amoco Oil Co.,* 581 N.W.2d 597, 599 (Iowa 1998) ("A litigant has a right to appear in court pro se." (citing *Arthaud v. Griffin*, 202 Iowa 462, 464, 210 N.W. 540, 541 (1926))).

Treating advice of counsel as one factor among many is consistent with the Restatement (Third) of Property (Wills and Donative Transfers) § 8.5, cmt. c, which states:

> Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful. **A factor** that bears on the existence of probable cause is whether the beneficiary relied upon the advice of independent legal counsel sought in good faith after a full disclosure of the facts. The mere fact that the person mounting the challenge was represented by counsel is not controlling, however, since the institution of a legal proceeding challenging a donative transfer normally involves representation by legal counsel.

Restatement (Third) of Property (Wills and Donative Transfers) § 8.5, cmt. c (emphasis added) (quoted in *Workman*, 2017 WL 706342 at *2-3). The plain language of the last sentence implies that finding counsel to take the case may be enough to satisfy this singular factor (i.e., that the challenger relied upon advice of counsel in good faith and necessarily fully disclosed the facts) but states that this is insufficient on its own.

Although representation by counsel is not controlling under the Restatement, Iowa law specifically enumerates the meaning of counsel's signature to a pleading:

> Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; **that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;**

> **and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation.**

Iowa R. Civ. P. 1.413(1); *see also* Iowa Code § 619.19(2) (similar language).

Here, Kathy's counsel signed the Petition, and Kathy verified it as required under Iowa Code § 633.35 and Rule 1.413(3). *See* D0015, 10.8.21, Am. Petition and Attachment. In a case like this, where courts already recognize that beneficiaries are likely the only ones with fact knowledge to aid the courts, it is axiomatic—absent evidence otherwise—that Kathy (along with Kenny) disclosed such facts to counsel, who would not otherwise know them. At trial, these key factual allegations were proven to be *true* and formed the heart of Kathy's case. This readily shows "full disclosure" to counsel for the basis of the will contest. As noted earlier, the district court in dismissing Karen's abuse of process claim acknowledged genuine disputes over the facts behind Rex's will and noted the sincerity of Kathy's Petition; this further infers that Kathy acted in good faith on the reliance of counsel in filing her Petition. *See* D0053, 6.21.22, MSJ Ruling, at pgs. 6-7.

In short, to the extent advice of counsel has any bearing on the analysis, the Court should find it satisfied here when coupled with the legal import of Kathy's and her counsel's signatures on the Petition and the truth of its

factual allegations shown at trial. To hold otherwise would undermine Iowa Code § 633.35 and Rule 1.413(3) in a situation such as this where there is zero evidence that Kathy or her counsel acted in bad faith or for any improper purpose in filing the will contest.

2. Jury issues should also be treated within an elastic standard, rather than a strict requirement, which Kathy nonetheless satisfies.

The *Workman* court's focus on "jury question" and "jury deliberation" is also problematic as a litmus test because probate courts sit in equity and are not always tried to a jury. It would therefore be impossible for some litigants to satisfy the exception and unfairly penalize those who lawfully opt to try their case to the judge instead. Moreover, requiring assessment of jury issues as part of the analysis completely defies the standard of measuring probable cause *at the time the will challenge is filed*:

> "Probable cause exists when, **at the time of instituting the proceeding,** there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful. A factor that bears on the existence of probable cause is whether the beneficiary relied upon the advice of independent legal counsel sought in good faith after a full disclosure of the facts."

Restatement (Third) of Property: Wills and Other Donative Transfers § 8.5 cmt. c (2003) (emphasis added) (as quoted in *Workman,* 2017 WL 706342

at *2). Even the *Workman* court acknowledges that these factors—"whether there is a jury question and the length of deliberation"— appear problematic because they "could be read as requiring proof of the underlying claim" and "seem at odds" with the Restatement. *Workman,* 2017 WL 706342 at *3.

The *Workman* court purports to resolve this tension. However, its resolution is unsatisfying and creates additional problems:

> On closer examination, we believe these factors bear on whether a challenger's subjective belief that he or she is filing a will contest in good faith is objectively reasonable. For example, if a challenger introduces no evidence of undue influence, the challenger's belief in the viability of the action at the time it was filed could be deemed unreasonable. Conversely, if the challenger introduces overwhelming evidence of undue influence, the challenger's belief could be deemed reasonable. These factors comport with an objective good-faith standard. *See* [*Wilson v. Dallas*, 743 S.E.2d 746, 760 (S.C. 2013)] ("The question is not whether there was in fact undue influence, but whether the parties could in good faith reasonably believe so.... [S]omething more than a subjective belief or a mere allegation is necessary....").

*Id.* If probable cause is measured at the time of filing—as it should be—any determination of whether a will challenger possesses it must necessarily evaluate the reasonableness of his or her belief *at that time*. While the evidence presented at trial is relevant to this determination, it cannot be the sole determinant. It stands to reason that secrecy may be at issue where defendants exercise undue influence; will challengers are entitled to the

benefit of discovery in order to ferret out what happened, just like any other litigant. *See Comes v. Microsoft Corp.*, 775 N.W.2d 302, 311 (Iowa 2009) ("The goal of modern discovery rules is to 'make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'") (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682–83 (1958)). Discovery may turn up a smoking gun—or it may not. Evaluating whether "a challenger's subjective belief that he or she is filing a will contest in good faith is objectively reasonable" at the time of filing is possible without requiring a will challenger to produce "*overwhelming* evidence of undue influence" (emphasis added) at trial to satisfy probable cause in hindsight.

Furthermore, while discovery should always be available for those who need it, here the record shows that Kathy was already aware, and specifically pled, the facts necessary to render a jury question on her claims. Specifically, she pled that Karen was telling Rex that Kathy was stealing from him. D0015, 10.8.21, Am. Pet., ¶ 18. She pled that Rex was susceptible to paranoia and suspicions. *Id.* at ¶ 19. She pled that Karen was isolating Rex from his family. *Id.* at ¶20, 21. Kathy knew these facts, and pled them, before receiving

Karen's damning letter in discovery. Karen admitted at trial these facts alleged by Kathy were true.

Nonetheless, to the extent the existence of a jury question and jury deliberation are relevant to showing the objective reasonableness of Kathy's subjective belief in her will contest, these considerations do not cut against her. Karen has no grounds to claim a jury question did not exist given that she never filed a motion to dismiss or a motion for summary judgment, her abuse of process claim was denied, and so was her motion for directed verdict. D0192, 8.13.24, Tr. 270-271 ("The Court finds that the motion should be denied. There is sufficient evidence on each of the three counts for those counts to reach a jury question for the jury to determine."). As for the length of jury deliberation, it took the jury a few hours to render a verdict in Karen's favor. It stands to reason that if Kathy's claims lacked any objective reasonableness, the jury would have decided against her more quickly, like the jury in *Workman* who deliberated for sixty-three minutes. 2017 WL 706342 at *6.

In sum, *Workman*'s criteria is problematic if applied strictly across the board instead of viewing good faith and probable cause within an elastic container. As *Workman* acknowledges, these standards "overlap and have

been applied interchangeably." *See* 2017 WL 706342 at *2 (citing *Parker*, 160 So. 3d at 208 ("[M]any of the factors which support a finding of good faith support a finding of probable cause, and vice versa."). With this in mind, and incorporating by reference the authorities already set forth, Kathy further addresses her satisfaction of the good faith and probable cause standards together below.

### C. Kathy Contested the Will in Good Faith and for Probable Cause.

Ultimately, courts considering good faith and probable cause review the "totality of the circumstances" and analyze whether the will challenger "had a reasonable expectation that her will contest would be successful" and "provided significant evidence that she instituted the contest in good faith." *Parker,* 160 S.3d at 208; *see also* 160 S.3d at 200 (adopting exception and reversing enforcement of no contest provision where sister unsuccessfully challenged the will her father executed shortly before dying, which significantly altered her inheritance in favor of a sibling).

The Court has defined "probable cause" thus:

> One has probable cause for initiating civil proceedings against another if he reasonably believes in the existence of facts upon which his claim is based and reasonably believes that under such facts the claim may be valid at common law or under an existing

> statute, or so believes in reliance upon the advice of counsel received and acted upon as stated in the foregoing authorities.

*Geisinger*, 241 Iowa 283, 295 (citing Restatement of the Law, Torts, section 675) (no real distinguishment made as to "good faith" as a separate concept). The disjunctive "or" as used therein indicates more than one way to show probable cause: the reasonable belief of a challenger based on facts and law or the challenger's reliance upon advice of counsel. This is consistent with Kathy's arguments in subpart B above for treating advice of counsel as one factor rather than a litmus test. Probable cause does not require certainty in outcome but rather whether there are "reasonable grounds for believing the suit is justified." *Id.* (discussing probable cause in malicious prosecution cases) quoting *Wilson v. Hayes*, 464 N.W.2d 250 (Iowa 1990)). As noted earlier, the *Geisinger* court also considered the testator's ailing health, susceptibility, and confidential fiduciary relationship with the executor in finding that the objectors acted in good faith and for probable cause.

Since *Geisinger,* courts across the U.S. have considered a wide variety of inquiries in their analysis of what constitutes good faith and probable cause. *See* Gus G. Tamborello, *In Terrorem Clauses Are They Still*

*Terrifying?*, 10 EST. PLAN. & COMMUNITY PROP. L.J. 63, 88–89 (2017)[6] (cataloguing existing law and listing 20 non-exhaustive inquiries that should "greatly enhance the likelihood the contestant will be able to establish that he brought the contest in good faith and with just cause, even if the will is not ultimately set aside").

Highly relevant inquiries on Tamborello's list include, without limitation: whether there was a substantial likelihood the contest would be successful, whether the contestant's subjective belief in will defects was objectively reasonable, whether the contestant relied on advice of counsel in good faith and with full disclosure of the facts, whether contestant's claims were supported by evidence and went beyond not being treated equally in the will or the presence of family discord, whether there was evidence the testator's physical or mental health was compromised at or near the time of execution of the will, whether the will being contested was procured by a care-giver or fiduciary of the testator, whether the will primarily benefitted persons who were living with the testator and upon whom the testator was dependent for care and maintenance, whether the will was executed in close

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[6] Notably, jury issues do not appear in Tamborello's list of inquiries relevant to the good faith and probable cause analysis. *See id.*

proximity to the testator's death, whether it differed markedly from previous wills, and whether any facts and circumstances indicated the testator was not exercising his "freedom of disposition" voluntarily and carefully. *See id.* at 88-89 (questions 1-3, 6-9, 12, 14-15, 17, 19) (internal citations omitted).

All of the foregoing factors cut in Kathy's favor, as demonstrated in the Statement of Facts and the arguments previously set forth. At the time she filed her Will contest, Kathy objectively, reasonably believed that she would be successful based on the facts known to her, which included her father's ailing health, susceptibility/paranoia, and the way Karen made baseless accusations against Kathy and interfered in Kathy's relationship with their father. Kathy knew that her father's longtime intent was to divide his estate equally among his three kids, which he changed 19 days before he died to disproportionately benefit Karen, upon whom he relied almost exclusively for caretaking and who controlled his finances and medical care because Karen had shut the others out. All of this goes beyond the obvious hostility that resulted between Kathy and Karen.

Karen later admitted there were genuine disputes about Rex's testamentary capacity, and the district court recognized the legitimacy of Kathy's pursuit in granting summary judgment to Kathy on Karen's abuse of

process claim. Kathy ultimately offered evidence to substantiate her will contest at trial, which proved the factual allegations at the heart of her Petition. The evidence went further to show, as the most egregious example, that in the months preceding Rex's new Will, Karen deliberately took advantage of her proximity to Rex by repeatedly feeding him baseless lies about Kathy in a handwritten letter that Karen admitted she had no evidence for.

Although the jury sided with Karen, it was not unreasonable for Kathy to expect her contest would be successful. Thanks to Kathy, the fact finder had a more full picture of the facts to aid its decision. There is no evidence Kathy acted with any improper motive or bad faith. It would be a miscarriage of justice if the no contest provision is enforced, and Kathy were unable to take under her father's will. It would also have a chilling effect on future will contests given the significant evidence on which Kathy based her challenge.

## **CONCLUSION**

The Court's ruling in this matter erred when it simply held that "the evidence was overwhelming that Rex wished to enforce harmony among his heirs and to punish any heir who disobeyed his wishes through disinheritance." D0188, 6.7.24, Order Closing Probate. Rex's wishes

regarding harmony, while relevant to his intent, are not controlling on the questions presented to the jury – that is, was he unduly influenced by Karen to change his will. Rex's wishes are likewise not controlling on the question presented to the Court – did Kathy bring her will contest claims in good faith, supported by probable cause.

As set forth above, although Kathy is able to satisfy the rigid *Workman* requirements, guidance from the Court is needed. The Court should adopt a more clear and comprehensive "totality of the circumstances" approach as urged by Tamborello. This is not inconsistent with the Court's ruling in *Geisinger*. It also honors the public policy rationale behind this exception to enforcement of no contest will provisions. *Workman's* current approach, which appears to require a litigant to waive attorney-client privilege as a requirement to bring her case, and further requires the district court to speculate as to the cause of the length of jury deliberations, is simply not a good approach to resolving the question of good faith and probable cause.

The judgment below that overruled Kathy Felten's objection to the Final Report and enforced the "no contest" provision of the Last Will and Testament of Rex L. Felton, deceased, should be reversed and remanded for entry of an order allowing Kathy to take under Rex Felten's Last Will and

Testament and granting any other such relief that the Court finds just and equitable. Costs of appeal should be taxed to the Estate of Rex Felten.

## REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellant Kathy Felten respectfully requests to be heard orally upon the submission of this appeal.


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## CERTIFICATE OF FILING

The undersigned hereby certifies that I, or someone acting on my behalf, filed the foregoing Plaintiff/Appellant's Brief via the Iowa Judicial Branch EDMS system on October 11, 2024.

*/s/ Benjamin Arato*
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of October, 2024, a copy of the foregoing Plaintiff/Appellant's Brief was served via the Iowa Judicial Branch EDMS system to the attorneys listed below:


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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 8,240 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.9903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally space typeface using Georgia 14-point.

Dated: October 11, 2024

*/s/ Benjamin Arato*
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