IN THE IOWA SUPREME COURT

Supreme Court No. 19-2088

District Court No. GCPR001740

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF VERNON D. RADDA,

KEVIN KIENE AND BARBARA KIENE,

Petitioners-Appellants.

Appeal from the Iowa District Court for Washington County

The Honorable Crystal S. Cronk, District Judge

FINAL BRIEF OF APPELLANTS AND REQUEST FOR ORAL ARGUMENT

Siobhan Briley (AT0012848)
sbriley@pughhagan.com
PUGH HAGAN PRAHM PLC
425 E. Oakdale Blvd., Suite 201
Coralville, IA 52241
Phone: (319) 351-2028
Fax: (319) 351-1102
Attorney for Petitioners-Appellants Kevin and Barbara Kiene

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ROUTING STATEMENT

The supreme court should retain this appeal because it presents a substantial issue of first impression. Iowa R. App. P. 6.903(2)(d), 6.1101(2)(c).

STATEMENT OF THE CASE

This case presents a question of first impression in Iowa: whether a determination about the testamentary capacity of a person subject to a conservatorship may be made after the person has executed wills and while the person is still alive. On May 19, 2019, after learning that the protected person, Vernon D. Radda ("Vernon"), had executed a will in 1992 ("1992 Will") and a subsequent will in 2015 ("2015 Will"), Petitioners sought a declaratory judgment about Vernon's testamentary capacity in 1992 and 2015. The Conservator moved to dismiss, which motion was denied after hearing. The Conservator then moved to enlarge the ruling on the motion to dismiss. Petitioners resisted. After several months without an order, the Conservator contacted the court *ex parte* and, apparently, was directed to submit a proposed order. The Conservator drafted and submitted the proposed order without informing or conferring with Petitioners. The proposed order included relief that would reverse the district court's ruling on the motion to dismiss and, effectively, dismiss the petition. Nonetheless,

the district court adopted the Conservator's proposed order in its entirety.

Petitioners timely filed an application for interlocutory review, which the supreme court granted.

STATEMENT OF THE FACTS

Petitioners Kevin Kiene ("Kevin") and Barbara Kiene ("Barbara") are a married couple. Vernon is Barbara's brother. App. at 5, ¶2. He been under the captioned guardianship and conservatorship since 1991.

Vernon suffers from Schizoaffective Disorder and severe autism spectrum disorder. App. at 5, ¶3. He resides in a care facility, Pearl Valley, in Washington, Iowa. *Id.* Because of his condition, Vernon has always needed help caring for himself and maintaining his finances. Until the present guardianship and conservatorship was established, Vernon was cared for by his mother, Betty Jean Radda ("Betty Jean"). App. at 5, ¶4. Betty Jean became unable to care for Vernon in 1991, when she became subject to a guardianship and conservatorship. *See* Washington County Case No. GCPR001669. Betty Jean passed away in 2001.

The present guardianship and conservatorship were established with Vernon's consent. Petition for Guardianship and Conservatorship (Standby), filed Sept. 16, 1991. Vernon's other sister, Julie Zieser ("Julie"), was appointed Guardian. *Id.* Washington State Bank was appointed Conservator.

Id. Julie died in 2016, at which time her husband, Wayne Zieser, and her son, David Zieser, were appointed as Vernon's Co-Guardians. *See* Application for Appointment of Successor Co-Guardians, filed Oct. 20, 2016, and Order Appointing Successor Co-Guardians, filed Oct. 21, 2016.

In or around spring 2017, Vernon mentioned to Barbara that he had recently signed some documents. App. at 5-6, ¶7. Barbara asked Vernon what documents he had signed, but Vernon could not identify them. *Id.* Barbara asked Vernon, "Was it a will?" *Id.* Vernon replied, "I don't know." *Id.* Upon investigation, Barbara learned that Vernon had executed the 1992 Will and the 2015 Will. App. at 5, ¶8.

Vernon owns substantial assets, including cash, investments, and real property. *See* 2018 Annual Report of Conservator, filed Apr. 4, 2019. The total value of Vernon's estate is currently over $1.9 million. *Id.* at 6.

Concerned that Vernon had executed wills without understanding the nature of the documents or the nature and extent of his property, Barbara and Kevin filed the Petition in this matter on May 13, 2019. App. at 5-7. The Petition asks the court to determine whether Vernon had testamentary capacity in 2015 and, if not, whether he had such capacity in 1992. App. at 6-7 (citing Iowa Code § 633.637(1)).

On August 1, 2019, the Conservator moved to dismiss the Petition on two grounds: 1) that the Kienes' claim was not ripe for adjudication; and 2) the Kienes lacked standing to seek court intervention. App. at 9-10. In support of the first ground, the Conservator argued that Vernon is still alive and no petition for probate has been filed. App. at 9, ¶4. In support of the second ground, the Conservator argued that the Kienes lacked an immediate interest in the will and, therefore, are not interested parties. App. at 10, ¶7.

The Conservator also sought sanctions against the Kienes and their counsel for filing the Petition. App. at 10, ¶10.

The Kienes resisted the motion to dismiss and, after hearing, the district court denied the motion. App. at 12-36. The court held that whether Vernon possessed the requisite testamentary capacity when he executed the 1992 Will and/or the 2015 Will is a proper subject "for declaratory judgment as shown in" *In the Matter of Guardianship of Hanken* (unpublished opinion), No. 18-1368, 928 N.W.2d 125 (Table), 2019 WL 719048 (Iowa Ct. App. Feb. 20, 2019). App. at 35 ("As a general rule, the testamentary capacity of a testator is subject to challenge only after the testator has died and the will is filed for probate. *However, this action concerns the right of a person under a guardianship and conservatorship to execute a will, which is uncertain and appropriate for declaratory judgment*[.]") (emphasis added).

Thus, the court held that, under Iowa law, the Kienes may be entitled to the relief requested in the Petition. App. at 35.

On September 11, 2019, the Conservator asked the court to enlarge the Ruling in two ways. App. at 37-38. First, the Conservator asked the court to change the questions for resolution to 1) whether Vernon *presently* possesses the testamentary capacity to execute a will and 2) which beneficiaries will be bound by the outcome of this litigation. App. at 37. Second, the Conservator asked the Court to shift the entire burden of paying for this case to the Kienes. App. at 38.

The Kienes timely resisted the Conservator's motion. App. at 40-42. The Kienes pointed out that "neither Petitioners nor any other party has asked" the court whether Vernon presently has the capacity to execute a will.[1] App. at 40, ¶5. The Kienes further pointed out that the Conservator's request for a decision as to which beneficiaries will be bound by resolution of the questions in the Petition is "premature[,]" as a determination of which persons may be bound by the court's decision depends on what the court's decision is. App. at 41, ¶6. Finally, the Kienes disputed the Conservator's entitlement to attorney's fees, noting the Conservator's failure to provide

[1] While the Conservator raised this question in its motion to dismiss, it has not filed any counterclaims.

any authority to support its request, which contravenes the general rule that "each party pays his, her, or its own attorney's fees." App. at 41 ¶9 (citing *Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 445, 474 (Iowa 2017)).

On November 14, 2019, the Conservator's attorney emailed correspondence to the Kienes' attorney, reporting that he had called the court regarding the delay in entering an order on the motion to enlarge. App. at 43. The Kienes' attorney was not included in the call. Apparently, during the call, court administration directed the Conservator to submit a proposed order. *Id.* The Conservator's attorney did not attempt to confer with the Kienes' attorney before drafting or submitting its proposed order. *See id.*

The Conservator's proposed order included only the relief the Conservator had requested in the motion to enlarge—relief that would vitiate the Kienes' request for declaratory judgment. App. at 44. On November 19, 2019, the district court adopted the Conservator's proposed order in full, inappropriately substituting the alternative relief proposed by the Conservator for the relief requested by the Kienes. App. at 45-46.

On December 17, 2019, the Kienes timely sought interlocutory review of the Order Enlarging Ruling on Conservator's Motion to Dismiss. App. at 47. The application was granted. App. at 68.

ARGUMENT

I. Preservation of Error.

The Kienes preserved the arguments raised in this appeal throughout the proceedings before the district court. *See* App. at 6-7, 12-14, 17-31.

II. Standard of Review.

This court's "review of a declaratory judgment action depends upon how the action was tried to the district court." *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 178 (Iowa 2010). In determining how the district court tried the action, this court considers "the pleadings, relief sought, and nature of the case[.]" *Id.* (quoting *Nelson v. Agro Globe Eng'g, Inc.*, 578 N.W.2d 659, 661 (Iowa 1998) (internal quotation marks omitted)).

The Kienes seek a declaratory judgment that Vernon lacked testamentary capacity when he executed the 2015 Will and the 1992 Will. Under the Probate Code, "[a]ctions to set aside or contest wills, for the involuntary appointment of guardians and conservators, and for the establishment of contested claims shall be triable in probate as law actions, and all other matters triable in probate shall be tried by the probate court as a proceeding in equity." Iowa Code § 633.33 (2020). This is not a will contest. *See In re Miguet's Estate*, 185 N.W.2d 508, 513 (Iowa 1971) (action challenging interpretation of will and seeking determination of distributive

rights not a will contest). Nor is it an action to "set aside" a will. The Kienes contend that, because no determination that Vernon had testamentary capacity was made before he executed the 1992 Will and the 2015 Will, the Wills are not valid. They are not arguing that either will should be set aside if Vernon had the requisite testamentary capacity.

In any event, for purposes of this appeal, it is not necessary to decide whether this is an action at law or in equity because the appeal challenges only the district court's application of legal principles and legal conclusions, which are not binding on the appellate court. *NevadaCare, Inc. v. Dep't of Human Services*, 783 N.W.2d 459, 465 (Iowa 2010). This Court "will reverse a district court's judgment if [it finds] that court has applied erroneous rules of law, which materially affect its decision." *Id.*

III. Because the presumption raised in § 633.637 of the Probate Code—that a person subject to a conservatorship lacks testamentary capacity—was not rebutted before Vernon executed the 1992 Will or the 2015 Will, both Wills are invalid as a matter of law.

It is black-letter law that testamentary capacity is required for a will to be valid. *See* Black's Law Dictionary (11th ed. 2019) ("testamentary capacity" is "[t]he mental ability that a person must have to prepare a valid will"). Thus, a will executed without testamentary capacity is by definition not a valid will. *See Matter of Estate of Henrich*, 389 N.W.2d 78, 81 (Iowa Ct. App. 1986) ("will is invalidated if" testator lacked testamentary capacity); *Pearson v. Ossian*, 420 N.W.2d 493, 495 (Iowa Ct. App. 1988) (setting aside will where testator lacked testamentary capacity).

The Iowa Probate Code raises a presumption that a person under a conservatorship lacks testamentary capacity. Iowa Code § 633.637(1) (a "person for whom a conservator has been appointed" has no power "to convey, encumber, or dispose of property in any manner, other than by will *if the protected person possesses the requisite testamentary capacity*" (emphasis added)); *Guardianship of Hanken*, 2019 WL 719048, at *1 ("the fact of guardianship is presumptive proof of incompetency to make a will, and the burden is upon the proponent to overcome such presumption") (citing *Ward v. Sears*, 78 N.W.2d 545, 550-51 (Iowa 1956)); *Reeves v.*

Hunter, 171 N.W. 567, 569 (Iowa 1919) (same).

To overcome the presumption, a protected person must show that he or she knows and understands "(1) the nature of the instrument then being executed; (2) the nature and extent of their property; (3) the natural objects of their bounty; and (4) the property distribution the [protected] person desires to make." *Estate of Henrich*, 389 N.W.2d at 81 (citing *Matter of Adams' Estate*, 234 N.W.2d 125, 127 (Iowa 1975)). "All four of these elements 'must exist coextensively at the time the will is executed.'" *Id.*

The requirement that a protected person overcome the presumption of lack of testamentary capacity applies whether a conservatorship is voluntary or involuntary. *See* Iowa Code Chapter 633, Subchapter XIII, Part 2 (2020) (§ 633.572, Appointment of conservator on voluntary petition, repealed by 2019 Acts). The Conservator nonetheless argues that, because the conservatorship here is voluntary, there is no presumption of lack of testamentary capacity. App. at 15, ¶4 (citing *In re Springer's Estate*, 110 N.W.2d, 380, 388 (Iowa 1961)). This argument fails because it ignores the plain language of § 633.637(1). *See Guardianship of Hanken*. *See* No. 18-1368, 2019 WL 719048, at *1 (Iowa Ct. App. Feb. 20, 2019) (holding that protected person must "overcome the presumption of impaired testamentary capacity" in order to make a will).

In *Guardianship of Hanken*, the protected person, Diana Hanken, petitioned the court to terminate the guardianship and conservatorship and for permission to make a will. *Id.* Before trial, Hanken agreed to a continuation of the conservatorship, leaving for trial only the issue of whether she had testamentary capacity. *Id.* The district court held that, by assenting to continuation of the conservatorship, Hanken conceded that the conservatorship was necessary. *Id.* ("It is undisputed that Hanken lacked 'decision-making capacity.'"). Accordingly, the presumption in § 633.637(1) applied. *Id.* ("The question, then, is whether Hanken overcame the presumption of impaired testamentary capacity."). The district court found that Hanken failed to overcome this presumption. *Id.*

On appeal, the court of appeals affirmed. *Id.* at *2. The court reiterated that the fact of a conservatorship constitutes "presumptive proof" that the protected person lacks testamentary capacity. *Id.* at *1 (citing Iowa Code § 633.637). If the protected person fails to overcome this presumption, he or she lacks power to make a valid will. *Id.* at *2.

The result in *Guardianship of Hanken* renders *Springer's Estate* inapposite and defeats the Conservator's argument. In *Springer's Estate*, the court addressed whether, under the 1954 Code, submission to a voluntary guardianship raised a presumption that the protected person was mentally

incompetent. 110 N.W.2d at 388. The court concluded it did not: "The fact decedent was under a guardianship does not in this case raise a presumption of incompetency …. This was a voluntary guardianship under section 670.5, Code of Iowa, 1954, and no presumption is raised." *Id.* (citing *Olsson v. Pierson*, 25 N.W.2d 357, 360 (Iowa 1946)).

In 1954, the Iowa Code provided for the establishment of a guardianship over the person and property of "[a]n idiot, lunatic, or person of unsound mind[,] or [] [a]n habitual drunkard, incapable of managing his own affairs[,] or [] [a] spendthrift who is squandering his property[.]" Iowa Code § 670.2(1) (1954). It also allowed "[a]ny person, other than an idiot or lunatic" to apply to "have a guardian appointed for his person or property, or both[.]" *Id.* § 670.5. Thus, in 1954 (and earlier), a "person of unsound mind[,]" a "habitual drunkard, incapable of managing his affairs[,]" or a "spendthrift" could initiate voluntary guardianship proceedings. *Id.* However, such persons were not presumptively mentally incompetent—unlike, apparently, "idiots" and "lunatics." *See In re Springer's Estate*, 110 N.W.2d at 388 (citing Iowa Code § 670.5 (1954)).

The legislature altered this legal framework in 1966 when it rejected the antiquated terminology of the Code and adopted more accurate and less judgmental language to articulate the tests for a guardianship and a

conservatorship. *See generally* Iowa Code Chapter 633 (1966); Iowa Code § 633.552(a)(1) (2020); *id.* § 633.553(a)(1) (2020). Today, the Code affords the same rights and protections to all persons subject to conservatorships, whether the conservatorship is voluntary or involuntary. These rights and protections include the mechanism in § 633.637(1) that gives persons subject to conservatorships the power to make presumptively valid wills. *See* Iowa Code § 633.637(1) (2020). When complied with, this legal mechanism expands protected persons' decision-making capacity regarding disposition of their property and avoids unnecessary will contests after the protected person dies. It also establishes more enforceable protection against undue influence and outright manipulation, including by the very fiduciaries who are charged with protecting the person subject to the conservatorship and ensures that a protected person's testamentary intent is known and respected.

The Code required a determination that Vernon possessed the requisite testamentary capacity before he executed the 1992 Will and the 2015 Will. Because no such determination was made, both Wills are invalid as a matter of law. Absent a determination that Vernon had the requisite testamentary capacity in 1992 and 2015, neither Will may be admitted to probate.

IV. The Kienes have standing to challenge Vernon's testamentary capacity now: Iowa law allows challenges to testamentary instruments while the testator is still living, and the Kienes are "interested persons."

A. A challenge to the testamentary capacity of a live person subject to a conservatorship is not a will contest.

Under Iowa law, a determination that a protected person has testamentary capacity *must* be made before the protected person makes a will—*i.e.*, while the protected person is still alive. Iowa Code § 633.637(1); *Guardianship of Hanken*, 2019 WL 719048, at *1-*2. Such a determination, when requested by the protected person, is clearly not a will contest. *See Guardianship of Hanken*, 2019 WL 719048, at *1-*2. Nonetheless, the Conservator argues that, by seeking the same determination as to Vernon regarding the 2015 Will and the 1992 Will, the Kienes are launching an improper will contest. App. at 9-10, ¶¶4, 7. The Conservator is wrong.

First, because no determination that Vernon had the requisite testamentary capacity was made before either Will was executed, both Wills are invalid as a matter of law. It is axiomatic that there is no need to contest an invalid testamentary instrument.

Second, if it is shown that Vernon had the requisite testamentary capacity before executing either Will, such Will is presumptively valid and, even after it is admitted to probate, no challenge founded on § 633.637(1).

will lie

Third, § 633.637(1) must read to allow challenges to wills executed without testamentary capacity before the protected person dies. Otherwise, it is rendered superfluous—a result the legislature could not have intended. *See* Iowa Code § 4.4 ("it is presumed that[] … [t]he entire statute is intended to be effective"); *Miller v. Marshall Cnty.*, 641 N.W.2d 742, 749 (Iowa 2002) (courts "must read provision of a statute together" and give effect to each "so that no single part is rendered insignificant or superfluous").

Section 633.308 of the Code allows will contests after probate is opened: "[a]ny interested person may petition to set aside the probate of a will…." Iowa Code § 633.308 (2020). To be admitted to probate, a will is presumed to be valid and the maker presumed to have testamentary capacity. *See* Iowa Code § 633.264 (2020) ("any person of full age and sound mind may dispose by will of all the person's property"). If § 633.637(1) has been complied with, a will made by a protected person would be presumptively valid and should be admitted to probate. Section 633.637(1) therefore preempts § 633.264 as the yardstick for determining whether a will executed by a protected person may be admitted to probate. Once such will is admitted to probate, § 633.308, not § 633.637(1), becomes the mechanism for challenging the will. If a protected person's will presumptively satisfied

the requirements of § 633.264 and could be challenged only after being admitted to probate, pursuant to § 633.308, the separate requirements imposed by § 633.637(1) would be redundant.

Furthermore, a challenge to a will made by a person presumed to have testamentary capacity requires "substantial evidence that at the time of execution of the will the testator lacked mental capacity[.]" *Matter of Adams' Estate*, 234 N.W.2d at 127; *In re Springer's Estate*, 110 N.W.d at 383 ("the burden is upon contestants to show lack of mental capacity of the testatrix" by "substantial evidence"). It is presumed that the legislature knew this law when it enacted § 633.637. *See Iowa Farm Bureau Fed'n v. Envntl. Prot. Comm'n*, 850 N.W.2d 403, 433-34 (Iowa 2014) ("The legislature is presumed to know the state of the law, including case law, at the time it enacts a statute.") (quoting *Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 600 (Iowa 2011) (internal quotation marks omitted)). Knowing this law, the legislature determined that additional requirements were necessary for a protected person to make a will, including requiring proof of testamentary capacity before death and shifting the burden of providing such proof to the protected person. Iowa Code § 633.637(1). The legislature plainly intended that the determination whether protected person's will is valid be made well before the will is probated. Iowa Code § 633.637(1); *Guardianship of*

Hanken, 2019 WL 719048, at *1 (protected person must overcome presumption of lack of testamentary capacity to make a will).

Only three states have had occasion to address the question whether a testator's capacity may be challenged after a will is made and before the testator's death.[2] All three agree with the Kienes' argument. *See In the Matter of Harry Sable*, 2009 WL 321558 (N.J. Super. Ct. App. Div. Feb. 11, 2009); *In re Niles*, 623 A.2d 1 (N.J. 2003); *In the Matter of Guardianship and Conservatorship of Estate of Tennant*, 714 P.2d 122 (Mont. 1986); *In re Armster*, No. M2000-00776-COA-R3-CV, 2001 WL 1285904 (Tenn. Ct. App. Oct. 25, 2001).

In *Matter of Sable*, the testator, Harry Sable, suffered from dementia. His son Barry nonetheless facilitated Harry's execution of estate planning documents, which changed the provisions of previously executed documents. 2009 WL 321558, at *3. Barry's brother, Michael, complained to the court, seeking appointment of a guardian and asking the court to "void" the powers of attorney and "any will" executed by Harry "due to Harry's incapacity" as well as Barry's undue influence. *Id.* After trial, the New Jersey Superior Court concluded that "Michael Sable has proven by

[2] Petitioners conducted extensive research to identify cases on point. They found only the cases discussed herein.

clear and convincing evidence that Harry Sable lacked the mental capacity to execute a will or any other legal documents on or after October 1, 2003" and, accordingly, held that "all documents executed by Harry Sable on or after October 1, 2003, are null and void of no legal force or effect whatsoever as a result of Harry Sable's mental incapacity at that time." *Id.* at *6.

On appeal, Barry argued that "the trial court improperly determined the validity of a will while the testator was still living." *Id.* at *8 (trial court has no power to invalidate estate planning documents while testator is still living). Because Barry had not raised that issue to the trial court, the appellate court did not decide it. However, the appellate court noted its approval of the trial court's determination. *Id.* at *8 (citing *In re Niles*, 823 A.2d 1 ("by implication *Niles* stands as authority for the proposition that when a live testator is adjudicated incompetent as of a particular date, any documents executed subject to that date may be invalidated"))[3]; *see also In re Armster*, 2001 WL 1285904, at *7 (court had power to determine living testatrix's testamentary capacity).

In *In re Niles*, the New Jersey Chancery Court, Probate Part, declared

[3] Although the basis for invalidation of the documents relied on in *Niles*—adjudication of incompetence—does not apply in Iowa, the legal principle is the same.

amendments to a will and modifications to trust documents "null and void" as a result of undue influence and reinstated the prior estate planning documents. 623 A.2d at 6. Similarly, in *In re Cohen*, 760 A.2d 1128 (N.J. Super. App. Div. 2000), an action brought to challenge a will, the court agreed it was empowered to decide "whether a testamentary plan could be changed for tax purposes if it was in conformity with the wishes of the mentally incompetent testator who was still living." *In re Sable*, 2009 WL 321558, at *9.

The Supreme Court of Montana reached the same conclusion. *See Guardianship and Conservatorship of Estate of Tennant*, 714 P.2d at 124. In *Estate of Tennant*, a conservator was appointed after it became clear that a testator who lacked capacity had been influenced to change her will. *Id.* at 127. The newly appointed conservator challenged the will on the ground that the testator lacked capacity when she executed it. *Id.* Finding that the testator "lacked the necessary testamentary to execute the subject will," the court declared the will "void." *Id.*

Clearly—and contrary to the Conservator's views—courts have power to declare a will "null and void" outside of a will contest and while the testator is still alive.

Analogous law in Iowa compels the same conclusion here. *See Guardianship of Driesen*, 2009 WL 1491871. In *Guardianship of Driesen*, a putative heir challenged a living testator's testamentary capacity. *Id.* at *3. The testator had created a trust and made three amendments to the trust. *Id.* at *1. Before the third amendment, a guardianship was established, and the guardian assisted in preparing the third amendment. *Id.* The putative heir challenged the final amendment, arguing that because the testator was under a guardianship, she lacked capacity to amend the trust. *Id.* The court disagreed, noting that the "test for a guardianship is not the same as a test for capacity to amend a trust"—*i.e.*, the test used to determine testamentary capacity. *Id.* at *3 (citing *Ward*, 78 N.W.2d at 550). Because the testator's capacity had been established at trial, the court of appeals rejected the putative heir's challenge.

Notably, in *Guardianship of Driesen*, there was no presumption of lack of testamentary capacity. Yet, neither the district court nor the court of appeals questioned the propriety of challenging and establishing the testator's testamentary capacity while she was still alive. The result in *Guardianship of Driesen*—that a challenge to testamentary capacity may be raised before the testator's death—should apply with even greater force here, where there is a presumption of lack of testamentary capacity.

B. The Kienes are "interested persons" who have standing to challenge Vernon's executions of the Wills.

Section 633.637 delineates a protected person's powers with respect to his or her property, including limitations on those powers. Iowa Code § 633.637(1). It is silent, however, regarding who has standing to seek enforcement of those limitations. *Id.* The Conservator interprets this silence to mean that only the protected person has standing. App. at 10, ¶7. Once again, the Conservator is wrong.

"'Standing to sue' has been defined to mean that a party must have 'sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" *Birkhofer ex rel. Johannsen v. Birkhofer*, 610 N.W.2d 844, 847 (Iowa 2000) (citing Black's Law Dictionary 1405 (6th ed. 1990)). The Iowa Supreme Court's test for standing "is that the complaining party must (1) have a specific, personal, and legal interest in the litigation and (2) be injuriously affected." *Id.* (internal citations omitted). In an action arising under Chapter 633 of the Code, this test is satisfied where a litigant is an "interested person."[4] Iowa Code § 633.42 (2020) ("any interested person in the proceeding may file with the clerk a request for

[4] The Code also contains several references to an "interested party." *See, e.g.* Iowa Code § 633.40 (2020). Any distinction between an "interested person" and an "interested party" is well beyond the scope of the questions presented to the court in this matter.

notice of" hearings); § 633.118 (2020) (interested persons have right to attorney); § 633.122 (2020) (allowing "any interested person" to contest the acts of a fiduciary); § 633.290 (2020) ("any interested person" may petition to open probate); § 633.308 (2020) ("any interested person may petition to set aside the probate of a will").

The Code, however, does not define "interested person." *Classon v. Classon*, No. 08-184 / 09-1339, 2010 WL 2383432, at *4 (Iowa Ct. App. June 16, 2010). Iowa courts therefore have crafted definitions of "interested person" as appropriate for the circumstances. *See, e.g.*, *In re Estate of Boyd*, 634 N.W.2d 630, 638-39 (Iowa 2001) (defining "interested person" for purposes of § 633.122 as one whose "interests are directly affected by a diminution of the [estate] assets"); *Classon*, 2010 WL 2383432, at *4 ("interested person" under § 633.122 is "any person whose interest in the assets of an estate may be diminished by acts of a fiduciary")[5]; *Matter of Pearson's Estate*, 319 N.W.2d 248, 249 (Iowa 1982) ("interested person" for purposes of § 633.308 "must have an immediate interest rather than a contingent interest" to contest a will). While the Kienes are "interested

[5] The court in *Classon* also stated: "We believe that for purposes of section 633.308, an 'interested person' similarly includes any person whose interest in assets may be diminished, but also includes any person whose interest in assets may be increased." 2010 WL 2383432, at *4 n.3.

persons" under any definition, the most appropriate definition in this case is that applied to § 633.122.

Section 633.122 provides: "The acts of the fiduciary without prior approval of the court after notice, may be contested by any interested person at or before the entry of the order discharging the fiduciary." Iowa Code § 633.122. The Conservator and Guardians are fiduciaries (*see* Iowa Code § 633.633 (2020); § 633.641(1) (2020)), and their actions, in permitting Vernon to execute two wills without seeking a determination that he had the requisite testamentary capacity, bear directly on Barbara's interests as a putative heir. *See* Iowa Code § 633.219(3) (2020) (providing for distribution of intestate estate to siblings where decedent had no spouse, issue, or parents). Accordingly, the Kienes may contest these actions as interested persons.

Finally, restricting standing to challenge or seek a determination of testamentary capacity under § 633.637(1) to only the protected person (or his or her fiduciary) would undermine the public policy supporting conservatorships. *See, e.g., Matter of Guardianship of Hedin*, 528 N.W.2d 567, 571 (Iowa 1995) (doctrine of *parens patriae* "obligates the state to care for the vulnerable and less fortunate"). A person subject to a conservatorship by definition has impaired decision-making capacity with regard to his or

her property and requires assistance to "carry out important decisions concerning" his or her financial affairs. Iowa Code § 633.553(1)(a). Were the power to challenge violations of the Code limited to the protected person and his or her fiduciary, it would be all but impossible to protect such person from a fiduciary's manipulation with regard to the protected person's property.

The plain language of § 633.637(1), the plain language of § 633.122, and the public policy underlying conservatorships require that a person other than the protected person (and his or her fiduciaries) be empowered to seek court intervention to effectuate the intent of § 633.637(1).

V. No basis exists to require the Kienes to pay the Conservator's attorney's fees for this proceeding.

The Conservator asks that the Kienes pay its attorney's fees. This request should be denied.

Under the "American rule," parties are responsible for their own fees and costs. *Baldwin v. City of Estherville*, 929 N.W.2d 691, 699 (Iowa 2019); *Thornton*, 897 N.W.2d at 474. The exceptions to this rule are few and far between. "One of these exceptions shifts the attorney fees of the victor to the losing party if there is an express statutory authorization to do so." *Id.* The Conservator has not identified any fee-shifting statute that is applicable to this case.

Another exception arises under Iowa's common law and applies where a party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines*, 510 N.W.2d 153, 158 (Iowa 1993). Such conduct "must rise to the level of oppression or connivance to harass or injure another." *Id.* at 159-60. The Conservator does not in this matter allege any such conduct and none has occurred.

CONCLUSION

For the foregoing reasons, Petitioners Kevin and Barbara Kiene respectfully request that this Court hold that they have standing to seek a declaratory judgment to determine whether Vernon lacked the requisite testamentary capacity in 1992 and 2015, that such action may be brought while Vernon is still alive, that each party bear their own attorney's fees, and that the Court order such further relief as the Court deems appropriate.

REQUEST FOR ORAL ARGUMENT

Petitioners respectfully request that this case be submitted with oral argument.

CERTIFICATE OF COST

The cost of printing or otherwise producing copies of this brief is $0.

Respectfully submitted,

PUGH HAGAN PRAHM PLC

By: */s/Siobhan Briley*
Siobhan Briley (AT0012848)
sbriley@pughhagan.com
425 E. Oakdale Blvd., Ste. 201
Coralville, IA 52241
Phone: (319) 351-2028
Fax: (319) 351-1102
Attorney for Petitioners Kevin and Barbara Kiene

COPY TO:
R. Ronald Pogge
rpogge@hhlawpc.com
Chandler M. Surrency
csurrency@hhlawpc.com
HOPKINS & HUEBNER, P.C.
Attorneys for Conservator-Appellee Washington State Bank

Eric J. Schmitt
LLOYD, McCONNELL, DAVIS & LUJAN, L.L.P.
Attorney for Conservator and Guardians

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on **May 28, 2020** by:

X EDMS	__ CM/ECF
__Email	__ U.S. Mail
__Hand Delivery	__Certified Mail

By: */s/ Elisa C. Ryan*

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because it contains 5,529 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

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Dated: May 28, 2020

/s/ Siobhan Briley

Siobhan Briley (AT0012848)
PUGH HAGAN PRAHM PLC
425 E. Oakdale Blvd., Ste. 201
Coralville, IA 52241
Tel: (319) 351-2028
Fax: (319) 351-1102
Attorneys for Petitioners-Appellants
Kevin and Barbara Kiene