IN THE IOWA SUPREME COURT

NO. 22-0288

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

EXILE BREWING COMPANY, LLC
Appellant/Cross-Appellee

vs.

ESTATE OF RUTH C. BISIGNANO
Appellee/Cross-Appellant

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

EXILE BREWING COMPANY, LLC
Appellant/Cross-Appellee

vs.

ESTATE OF FRANK J. BISIGNANO
Appellee/Cross-Appellant

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE CRAIG E. BLOCK, ASSOCIATE PROBATE JUDGE
FIFTH JUDICIAL DISTRICT
POLK COUNTY NOS. ESPR033730 | ESPR040450

# FINAL BRIEF FOR APPELLANT/CROSS-APPELLANT/INTERESTED PARTY, EXILE BREWING COMPANY LLC

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*Rife v. D.T. Corner, Inc.,* 641 N.W.2d 761 (2002)

## ROUTING STATEMENT

This case involves questions of first impression concerning a probate court's jurisdiction to reopen estates that had been closed for more than two decades upon the alleged "discovery" of "intellectual" or other "intangible" property, including a trademark. Iowa Code § 633.487 bars heirs of an estate from contesting the correctness or legality of the inventory, accounting, or distribution of a decedent's property. Iowa Code §§ 633.488 and 633.489 allow for reopening an estate in limited circumstances. Those circumstances do not allow a probate court to claw intangible property back from the public domain, particularly when the property has been abandoned or disclaimed under other Iowa laws, such as Iowa Code, Chapter 556 Disposition of Unclaimed Property, Iowa Code, Chapter 633E – Uniform Disclaimer of Property Interest Act, and Iowa Code, Chapter 547, Registration and Protection of Marks.

One type of "intellectual property" Fred Huntsman seeks to claim through these reopened Estates is a "right of publicity" concerning the name, likeness, and story of Ruth Bisignano, who was famous in the 1950's and died in 1993. This type of intellectual property has never been statutorily adopted or judicially recognized in Iowa, demonstrating the changing legal

principles involved in this appeal. Due to the historical nature of the information that Huntsman seeks the exclusive right to use, this case involves important First Amendment issues. Such issues include whether a person or entity may talk about a historical figure without paying a fee to said figure's heirs.

The case also raises questions of first impression regarding the standing of remote heirs to reopen estates and the application of judicial estoppel to prevent remote heirs from making inconsistent statements in separate, more recent probate proceedings. Because this case revolves around abandoned intellectual property, the case also presents issues of first impression concerning the procedure for protecting properly reappropriated intellectual property.

All of these issues present "substantial questions of enunciating or changing legal principles" and "issues of broad public importance requiring prompt or ultimate disposition by the supreme court," which justify this Court retaining the case. Iowa. R. App. Proc. 6.1101(2)(d) & (f).

## STATEMENT OF THE CASE

Ruth Bisignano ("Ruth") and Frank Bisignano ("Frank") died in 1993 and 1996, respectively; their Estates were closed in 1993 and 1999, respectively. APP. 10, 20, FPR, Mar. 9, 2020; RPR, Sept. 18, 2020[1]. On March 9, 2020, Fred Huntsman ("Huntsman") (a nephew to Frank) filed a Petition to Reopen Frank's Estate. *Id.* The Petition asserts the vague reason of "investigating" and pursuing "potential claims" against a corporation as the basis for reopening the Estates. APP. 10, 20, FPR ¶ 7, Mar. 9, 2020; RPR ¶ 7, Sept. 18, 2020. The Petition asserted that Huntsman is a "qualified person" because he is the son of Barbara Hamand, a named (but also deceased) beneficiary to Frank's Estate, and requested that Huntsman be appointed Administrator. APP. 10-11, FPR ¶ 8, Mar. 9, 2020.

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[1] Per Iowa R. App. P. § 6.904, intelligible abbreviations for the record are as follows: the first letter in each citation is either "F", referencing Frank's Estate, Case No. ESPR040450 or "R" referencing Ruth's Estate, Case No. ESPR0033730. The next letters represent the title of the pleading, such as "PR" for "Petition to Reopen", "O" for "Order", "MTD" for "Motion to Dismiss", "MTD Ex #" for "Motion to Dismiss Exhibit", "RB" for "Reply Brief", MTR" for Motion to Reconsider", "BMTR" for "Brief in support of Motion to Reconsider", and "ATE" for "Application to Employ". The date represents the date the document was filed in each respective case.

Within one day, the Probate Court entered an order reopening Frank's Estate. APP. 12, FO, Mar. 10, 2020. It did so without a hearing, witness testimony, or exhibits to support its findings: (1) Huntsman "is a proper person to present such Petition" or (2) "good cause has been shown [] to reopen the administration". APP. 12, FO, Mar. 10, 2020. It also did so without making any findings or conclusions of law bearing on its own jurisdiction to reopen the Estate under Iowa Code § 633.487-9. APP. 12, FO, Mar. 10, 2020.

On April 15, 2020, as the newly appointed Administrator for Frank's Estate, Huntsman filed an Application to Employ Litigation Counsel. APP. 14, FATE, Apr. 15, 2020. Huntsman explained: "a dispute exists pertaining to potential causes of action arising from Exile Brewing Company, LLC's unjustified and unpermitted knowing, willful, and intentional misappropriation of the interests and rights in the name, identity, persona, likeness, and symbol of the famous Des Moines bartender and tavern operator Ruthie Bisignano." APP. 14, FATE ¶ 3, Apr. 15, 2020. Huntsman further asserted Exile "has committed misappropriation under Iowa common and statutory law on the basis of invasion of privacy, unfair competition, deceptive marketing, common law trade- and service mark infringement, and

misappropriation under Iowa Code chapter 714H." APP. 14, FATE ¶ 4, Apr. 15, 2020.

Within one day, the Probate Court again granted Huntsman's request. APP. 18, FO, Apr. 16, 2020. It again did so without a hearing, witness testimony, or exhibits. APP. 18, FO, Apr. 16, 2020. The Order, again, did not find any facts or conclusions of law to support a determination that the Probate Court had jurisdiction to reopen the Estate under Iowa Code § 633.487-9 or that Huntsman was entitled to the relief he sought – authority to employ litigation counsel to pursue the specific claims identified against Exile. APP. 18, FO, Apr. 16, 2020.

On behalf of Frank's Estate, Huntsman filed suit against Exile on June 1, 2020. APP. 285, RMTD Ex. 15, Petition, Aug. 13, 2021. Thereafter, Huntsman filed a Petition to Reopen Ruth's Estate, as well as a Motion to Employ Litigation Counsel for Ruth's Estate. APP. 20, 24, RPR, Sept. 18, 2020; RATE, September 25, 2020. As it did for Frank's Estate, the Probate Court granted the Petition and Motion without a hearing, witness testimony or exhibits to support its findings. APP. 22, 29, RO, Sept. 22, 2020; RO, Sept. 28, 2020. It also did so without making any determination as to its own jurisdiction to reopen the Estate under Iowa Code § 633.487-9.

Having been sued by Huntsman as Administrator for these Estates in a collateral litigation and as a result of these Orders, Exile filed a Motion to Dismiss, Vacate, and Close these Estates because, under Iowa Code § 633.487, Huntsman is barred from contesting the correctness or the legality of the inventory, the accounting, distribution, or other acts of the personal representative. APP. 31, RMTD, Aug. 19, 2021. This jurisdictional bar applies unless an exception to this bar set forth in Iowa Code § 633.489 applies. Said statute allows for reopening an estate only "if other property be discovered, if any necessary act remains unperformed, or for any other proper cause."

The name, identity, persona, likeness, and symbol of Ruth first achieved public recognition in the 1950's. Ruth's level of recognition dwindled after the 1970's when Ruth ceased balancing beer on her bosom, having run-ins with the law, closed her business, and settled down to live a quiet life with the last of her 9 husbands (16 marriages), Frank. APP. 288, FMTD Ex. 15, Petition ¶ 25, Aug. 13, 2021. In any event, Ruth's persona was not hidden and waiting for "discovery." But, it did materially change when she left the public spotlight and no longer used her name and likeness for commercial purposes.

Intellectual and intangible property is unique in that it is limited in scope and duration. Accordingly, it changes over time and can pass into the public domain, becoming available for reappropriation if it is not claimed or maintained by its creators, authors, or assignees. Overlooking these unique aspects of intangible and intellectual property, the Probate Court erroneously classified "claims against Exile for, in part, misappropriating Ruthie's name, image, and likeness and her right to publicity" and the "potential proceeds from the civil case" as "potential new property" or "other proper cause" for reopening these Estates. APP. 92, RO, Nov. 16, 2021, p. 10.[2] In doing so, the Probate Court exceeded the jurisdictional authority granted to it under Iowa Code § 633.489 and abused its discretion to hold that Huntsman was entitled to property that (1) did not exist at the time of Ruth or Frank's deaths, (2) was not distributed to Huntsman, (3) was abandoned and/or disclaimed, and (4) passed into the public domain. The Probate Court further erroneously denied Exile's Motion to Intervene in these probate proceedings, which Exile sought

[2] Although this Order includes the caption and references the Estate of Frank Bisignano, Case No. ESPR040450, per the Docket Report for this case the Order was not filed in or entered in the matter titled Estate of Frank Bisignano, Case No. ESPR040450.

to do for purposes of ensuring any intangible or intellectual property rights awarded to Huntsman through these proceedings do not encroach upon Exile's established and registered trademark for the name "RUTHIE," which it uses in conjunction with the sale of craft beer.

Exile filed a Motion to Reconsider identifying the defects in the findings of fact and conclusions of law reached by the Probate Court in these Orders. APP. 97, RMTR, Nov. 24, 2021. Said Motion was denied by the Probate Court on January 31, 2022. APP. 154, RO, Jan. 31, 2022.[3] In said Order, the Probate Court specifically refused to "make a ruling" as to whether Ruth's intellectual property legally could, and actually did, descend to the heirs of Ruth Bisignano instead of passing into the public domain. APP. 160, RO, p. 7, Jan. 31, 2022. And, it erroneously interpreted a ruling on a Motion to Dismiss filed in the collateral case as "deciding" the issue. APP. 160-161, RO, p. 8, fn. 22, Jan. 31, 2022. The Probate Court further refused to grant Exile leave to intervene in the probate proceedings. APP. 157-159, RO, p. 4-

[3] *Id.*

7, Jan. 31, 2022. As to Exile, this was a Final Order pursuant to Iowa Code § 633.36. Therefore, Exile appeals.

## STATEMENT OF THE FACTS

Ruth died intestate on February 4, 1993 and Frank died intestate on November 17, 1996. APP. 10, 20, FPR ¶ 3, Mar. 9, 2020; RPR ¶ 3, Sept. 18, 2020. Huntsman is the nephew of Frank, has lived in Seattle Washington since 1984, and did not attend the funerals of Ruth or Frank. *Id.*; CONF. APP. 23, 50-1, FMTD Ex 1, Huntsman Dep. 5:16-7, 32:25 – 33:11, Aug. 19, 2021.

Frank served as the administrator for Ruth's Estate following her death. APP. 172, FMTD, Ex 6, p. 4, Aug. 13, 2021. In doing so, Frank prepared a Final Report and Inventory for Ruth's Estate on or about July 29, 1993. APP. 183-97, FMTD, Ex. 6, p. 15-29, Aug. 19, 2021. Frank did not include the name "RUTHIE" or Ruth's name and likeness as property within his Final Report and Inventory for Ruth's Estate. APP. 183-97, FMTD, Ex. 6, p. 15-29, Aug. 19, 2021. Frank also filed a Receipt and Waiver attesting as follows:

> [n]o other money or property is payable or deliverable to the undersigned from the fiduciary as share, legacy, claim, allowance, fees, rentals, proceeds of life insurance, joint tenancy property, survivorship property, documents of ownership, title or transfer, abstracts, fire insurance policies or other right or interest in or to said estate, due or to become due or deliverable from the above-entitled estate or from the fiduciary or otherwise.

APP. 200, FMTD Ex. 6, p. 32, Aug. 13, 2019. An Order Approving the Final Report of the Administrator and approving the distribution of Ruth's property was entered on or about August 5, 1993. APP. 202-4, FMTD Ex. 6, p. 34-36, Aug. 13, 2019. At that time, Frank was discharged of his obligation to further administer Ruth's Estate and Ruth's Estate was closed. APP. 204, FMTD Ex. 6, p. 36, Aug. 13, 2019.

Frank died intestate on November 17, 1996. APP. 249, FMTD Ex. 7, Aug. 13, 2021). Huntsman's sister, Andrea Huntsman ("Andrea") was appointed to serve as the administrator for Frank's Estate. APP. 249, FMTD Ex. 7, ¶ 2, Aug. 13, 2021. Andrea filed a Final Report on April 20, 1999. APP. 249-51, FMTD Ex. 7, p. 43-45, Aug. 13, 2021. Nothing in the Final Report itemized the name "RUTHIE" or Ruth's name, likeness, and story as property owned by Frank's Estate. APP. 233-42, 249-51, FMTD Ex. 7, p. 43-45, Aug. 13, 2021. Had there been value associated with Ruth's name and likeness at the time it could have been listed on Schedule F – Miscellaneous Property Not Reportable Under Any Other Schedule. APP. 239, FMTD, Ex. 7, p. 33, Aug. 19, 2021.

Per the Final Report, Frank's heirs at law were his then living siblings: Barbara Hamand, Alfonso Bisignano, and Rose Medici. APP. 249, FMTD Ex.

7, p. 43, Aug. 13, 2021. All such beneficiaries filed Waivers of Accounting, stating they "received from [Andrea] all money and property to which [they were] entitled under the Decedent's Estate and release the Estate and Personal Representative from any further claims of any kind." APP. 252-4, FMTD Ex. 7, p. 46-48, Aug. 13, 2021. They further waived notice of the hearing and consented to "entry of an Order approving the Final Report in all respects, closing the Estates, and discharging the Personal Representative. APP. 252-4, FMTD Ex. 7, p. 46-48, Aug. 13, 2021. The Order Approving the Final Report was entered on August 21, 1999. APP. 257, FMTD Ex. 7, p. 51, Aug. 13, 2021. At that time, Frank's Estate was settled and closed with Andrea being released and discharged of further obligations. APP. 258, FMTD Ex. 7, p. 51, Aug. 13, 2021.

In 2012, Exile Brewing Company, LLC ("Exile") wanted generations of Iowans to know the history of Ruth and her contributions to the beer and restaurant industry, as well as to stimulate discussions about women's rights. APP. 273, FMTD Ex. 11, Exile Ans. No. 4, Aug. 13, 2021. Prior to commencing the use of the name "RUTHIE" on one of its craft beers, Exile:

a. searched for trademarks and products being sold under the name "Ruthie"

b. searched for pictures of Ruth

c. searched for children, an estate, or a trust for Ruth

APP. 273, FMTD Ex. 11, Exile Ans. No. 4, Aug. 13, 2021. Having located no one claiming a right to use the name "RUTHIE", Exile commenced using the name in conjunction with the sale of beer on or about August 1, 2012. APP. 276, FMTD Ex. 14, Trademark Registration, Aug. 13, 2021. On December 5, 2019, Exile filed an Application to trademark the name "RUTHIE" for use in association with beer with the U.S. PTO. APP. 278, FMTD Ex. 12 Trademark App., Aug. 13, 2021. Exile incurred both the cost of this application, $275, and the fees of its attorney to file this application. APP. 277, FMTD Ex. 12, Trademark App., Aug. 13, 2021. Registration for the mark "RUTHIE" was issued to Exile by the US PTO on March 16, 2021. APP. 281, FMTD Ex. 14, Trademark Reg, Aug. 13, 2021.

Huntsman is the son of Barbara Hammand, who was Frank's sister and passed away sometime after Frank's death. APP. 10, 249, FPR ¶ 5, Aug. 13, 2021; FMTD Ex. 7, Aug. 13, 2021; CONF. APP. 29, FMTD Ex. 1, Huntsman, 11:1-11, Aug. 13, 2021. Huntsman heard Ruth's story during conversations in his family since the 1960's and he has long considered his Aunt Ruthie "a

family treasure." CONF. APP. 90-1, FMTD Ex. 1, Huntsman Dep. 72:21-73:19, Aug. 13, 2021.

Huntsman knew of Exile's use of the name "RUTHIE," as well as its use of a caricature of Ruth and reference to Ruth's story on its products as of 2014. CONF. APP. 77, 172, FMTD Ex. 1, Huntsman Dep. 59:5-12, 154:8-12, Aug. 13, 2021. From 2014 to 2020, no person within the alleged line of succession for Ruth or Frank's Estate sent Exile a cease and desist letter or otherwise contacted Exile to object to their use of Ruth's name and likeness. CONF. APP. 77-8, 172, FMTD Ex. 1, Huntsman Dep. 59:8-60:11, 154:13-16, Aug. 13, 2021. Huntsman admitted during his deposition:

> Q. So from 1970 to 2012, is there any product or service upon which Ruthie's name and likeness was used with the consent of Ruthie's family?
> A. No.
> Q. [I]n that time frame after Frank passed away [1996] until 2011, is there anything that the heirs to Frank Bisignano did to publish Ruthie's name and image or use it in conjunction with a product or service.
> A. No.

CONF. APP. 171-2, FMTD Ex. 1, Huntsman Dep. 153:19-154:7, Aug. 13, 2021. Huntsman does not have a plan for commercial use of Ruthie's name and likeness in the future. CONF. APP. 158-9, FMTD Ex. 1, Huntsman Dep.

140:14 – 141:15, Aug. 13, 2021 ("I don't know if we've completely formulated those").

Huntsman's sister, Andrea, passed away on April 14, 2019 with her funeral services taking place on April 18, 2019. APP. 283, FMTD Ex 19, Obituary, Sept. 13, 2021. Huntsman attended Andrea's funeral and, during a dinner following the same, asked his cousins "did anybody give Exile permission or did Exile ask anybody for permission." CONF. APP. 181-2, FMTD Ex. 1, Huntsman Dep. 63:7-64:1, Aug. 13, 2021. Huntsman alleges no cousins gave Exile permission. CONF. APP. 181-2, FMTD Ex. 1, Huntsman Dep. 63:7-64:1, Aug. 13, 2021.

As of the date of Andrea's death, Huntsman was serving as Andrea's Conservator, which he had been doing since 2017. APP. 259, FMTD Ex. 8, Final Report of Conservator ¶ 1, Aug. 13, 2021. On August 1, 2019, Huntsman filed a Final Report, itemized Andrea's property, and requested to be discharged of his duties as the Conservator for Andrea's Estate. APP. 259-67, FMTD Ex. 8, Final Report of Conservator ¶ 1, Aug. 13, 2021. On the same day, Huntsman filed a Receipt, Consent, and Waiver as Trustee of Andrea's Estate. APP. 268, FMTD Ex. 9, RCW, Aug. 13, 2021. In doing so, Huntsman "waived further accounting" and consented to the Court "approving said Final

Report, closing said estate, and discharging [Huntsman from his fiduciary duties]." APP. 268, FMTD Ex. 9, RCW, Aug. 13, 2021. On August 9, 2019, the Court entered an Order approving the final conservatorship report and closing the same. APP. 269, FMTD Ex. 10, Order, Aug. 13, 2021.

On March 9, 2020, Huntsman filed a Petition to Reopen Frank's Estate. APP. 10, FPR ¶ 7, Mar. 9, 2020. The Petition vaguely asserted "investigating" and pursuing "potential claims" against a corporation as the basis for reopening the Estates. APP. 10, FPR ¶ 7, Mar. 9, 2020. The Petition asserts Huntsman is a "qualified person" because he is the son of Barbara Hamand, a named but also deceased beneficiary to Frank's Estate, and requested that he be appointed Administrator. APP. 10, FPR ¶ 8, Mar. 9, 2020. One day later, the Court entered an Order reopening Frank's Estate and appointing Huntsman as the administrator for said Estate. APP. 12, FO, Mar. 10, 2020.

On September 18, 2020, Huntsman filed a Petition to Reopen the Estate of Ruth's Estate. APP. 20, RPR Sept. 18, 2020. Two days later, the Court entered an Order reopening Ruth's Estate and appointing Huntsman as the administrator for said Estate. APP. 22, RO, Sept. 20, 2020.

In both Petitions, Huntsman vaguely represented that he sought to reopen Ruth and Frank's Estates to "investigate and pursue potential claims

against a [unidentified] corporation". APP. 10, 20, FPR ¶ 7, Mar. 9, 2020; RPR ¶ 7, Sept. 18, 2020. The two Orders issued to reopen these Estates were issued without identifying the "unnamed corporation" or requiring that notice be sent to potentially interested parties, such as the "unnamed corporation." APP. 12, 22, FO, Mar. 10, 2020; RO, Sept. 20, 2020. Said Orders were also issued without any hearing, witnesses, or evidence. *Id.* And, they make no statement concerning the Probate Court's jurisdictional basis for reopening Frank or Ruth's Estates; they do not even mention Iowa Code § 633.487-9. APP. 12, 22, FO, Mar. 10, 2020; RO, Sept. 20, 2020.

On April 15, 2020 and September 25, 2020, Huntsman filed an Application to Employ Litigation Counsel in each of the Estates. APP. 14, 24, FMTE, April 15, 2020; RMTE, September 25, 2020. Through said Applications, Huntsman disclosed that he intended to pursue claims for "misappropriation under Iowa common and statutory law on the basis of invasion of privacy, unfair competition, deceptive marketing, common law trade and service mark infringement, and misappropriation under Iowa Code chapter 714H. APP. 14, 24, FMTE, April 15, 2020; RMTE, September 25, 2020. Despite having no evidence and making no finding that either Estate ever owned a trade or service mark or any other property forming the basis

for these "misappropriation" claims, the Probate Court granted said Applications. APP. 18, 29, FO, April 16, 2020; RO, September 25, 2020.

On June 1, 2020, as Administrator for Frank's Estate, Huntsman filed a Petition against Exile asserting claims for:

1. Appropriation of Ruth's name and likeness
2. Unfair Competition – Appropriation of the commercial value of Ruthie's identity and infringement of the right of publicity
3. Unfair Competition - Misappropriation of trade values
4. Consumer Fraud under Iowa Code Chapter 714H
5. Deceptive Marketing – Misrepresentations regarding endorsement and/or approval
6. Trade and Service Mark Infringement (common law)

APP. 285, FMTD Ex. 15, Petition, Aug. 13, 2021. Through this litigation, Huntsman seeks to enjoin Exile's use of what he claims is an infringement on Ruth's name and likeness, as well as "disgorge" Exile of any pecuniary gain (i.e. obtain a royalty and/or profits) earned by Exile through its sale of the beer named RUTHIE. APP. 303, FMTD Ex. 15, Petition, Prayer for Relief, Aug. 13, 2021.

## ARGUMENTS

### I. THE PROBATE COURT ERRED IN HOLDING THAT A "POTENTIAL SHOWING OF NEW PROPERTY" OR "POTENTIAL PROCEEDS" PROVIDE A JURISDICTIONAL BASIS FOR REOPENING THESE ESTATES UNDER IOWA CODE § 633.489

#### a. Preservation of Error

All arguments raised herein have been preserved via Exile's Motion to Dismiss, oral arguments, and Motion to Reconsider. See APP. 31, 36-44, 67-9, 71-81, 97-101, and 104-9, RMTD, Aug. 13, 2021; Tr. 4:7-12:20; Tr. 35:14-37:12 (the image went into the public domain); Tr. 39:4-41:2; Tr. 41:9- 11 (tort and property concepts should not be conflated for purposes of determining Probate Court jurisdiction); Tr. 42:18-49:2 (probate and tort case law should not be conflated to allow resurrection of tort claims; the probate rules are a built-in statute of repose for intellectual property claims); RMTR, Nov. 24, 2021; RBMTR 3-8, Nov. 24, 2021 (citing other portions of the Probate Code that define substantive property rights and noting Iowa Chapters 555-559 on "Property" should be used to define property as a "fixed and certain interest", abandoned if not claimed).

### b. Standard of Review

A district court's decision to reopen an estate under section 633.489 is reviewed for an abuse of discretion. *In re Estate of Roethler*, 801 N.W.2d 833, 837 (Iowa 2011). An abuse of discretion exists where the district court has exercised its discretion on grounds clearly untenable or to an extent clearly unreasonable. *Id.*

### c. Argument

#### i. Statutory construction of Iowa Code § 633.487-9 requires analyzing "if other property be discovered, if any necessary act remains unperformed, or other proper cause" in light of provisions of the Iowa Probate Code that governed the original proceedings

Whether an estate can be reopened under Iowa Code 633.487-9 is a subject matter jurisdictional issue that cannot be conferred upon the Probate Court by consent. *Youngblut v. Youngblut*, 945 N.W.25 (Iowa 2020); *Moris Plan Co. Of Iowa v. Brauner,* 458 N.W.2d 763, 765 (Iowa 1990). The issue is so significant that the Court has both the power and duty to determine its jurisdiction. *State v. Lasley*, 705 N.W.2d 481, 486 (Iowa 2005) ("courts should be less concerned about the form in which the question of subject matter jurisdiction reaches it and more concerned about establishing an

efficient, prompt, trustworthy solution, even if innovative and unusual approaches are required to reach the issue").

Under the rules of statutory construction, the polestar is legislative intent. *Carlon Cov. v. Board of Review of City of Clinton*, 572 N.W.146, 154 (Iowa 1997). Only when a statute is ambiguous may a court resort to the rules of statutory construction. *Id.* A statute is ambiguous if reasonable minds may differ or be uncertain as to the meaning of the statute. *Id.*

The jurisdictional statutes at issue in this appeal state:

> ***Limitation on rights.***
>
> No person, having been served with notice of the hearing upon the final report and accounting of a personal representative or having waived such notice, shall, after the entry of the final order approving the same and discharging the said personal representative, have any right to contest, in any proceeding, other than by appeal, the correctness or the legality of the inventory, the accounting, distribution, or other acts of the personal representative,….

Iowa Code § 633.487. Next, section 633.488 provides a limited exception:

> ***Reopening settlement.***
>
> Whenever a final report has been approved and a final accounting has been settled in the absence of any person adversely affected and without notice to the person, the hearing on such report and accounting may be reopened at any time within five years from the entry of the order approving the same, upon the application of such person, and, upon a hearing,

> after such notice as the court may prescribe to be served upon the personal representative and the distributees, the court may require a new accounting, or a redistribution from the distributees….

*Id.* § 633.488. Lastly, section 633.489 provides another limited exception:

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

There is no ambiguity in these statutes. But there was an abuse of discretion when the November 16, 2021 Order interpreted "other proper cause" as including "potential proceeds" from a collateral litigation that it authorized.

Under Iowa law, the right to take property by devise or descent is a statutory privilege, not a natural right. *In re Emerson's* Estate, 191 Iowa 900 (1921). Such matters are strictly within legislative control. *Id.* It is an error to grant any administrator of an estate greater relief than the probate statutes provide. *Mater of Estate of Glaser*, 959 N.W.2d 379, 386-7 (Iowa 2021); see also *Haulman v. Haulman*, 164 Iowa 471 (1914) (having parted with the property right prior to his death, nothing remained in the decedent at the time of his death that could possibly pass to his executors). When a person

dies "title to the person's property, real and personal, passes to whom it is devised by the person's last will, or, in the absence of such disposition, to the persons who succeed the estate as provided in the probate code." Iowa Code § 633.350. All of the property shall be subject to the possession of the personal representative as provided in section 633.351 and to the control of the court for purposes of administration, sale, or other disposition. *Id.* During the period of administration the personal representative "shall take possession of all the personal property of the decedent." Iowa Code § 633.351. And, the personal representative may maintain an action to determine the title to any property of the decedent. *Id.*

The November 16, 2021 Order, cited *In re Estate of Sampson*, 838 N.W.2d, 663, 667 (Iowa 2011) for the proposition that this case can be analogized to prior cases evaluating Iowa Code § 633.487-9 and holding that there is distinction between section 633.488 and 633.489. APP. 91, FO, p. 9, Nov. 16, 2021. The case describes the difference between the two statutes as redistribution of property from one party to another versus the administration of newly discovered property. But, the distinction has no application to the facts of this case because, even today, Huntsman has not established title to

any intellectual or intangible property, real or personal, existing at the time of Ruth's death.

The property involved in *Sampson* was real property, title ownership for which clearly rested with the decedent, who utilized a will to create a life estate in the real property for his widow and a remainder interest in the same real property for his siblings. *Sampson*, 838 N.W.2d. at 665. When the will was processed by the probate court, the final report and inventory identified the widow as the sole beneficiary and did not mention the residual interest granted to the siblings. *Id.* The widow subsequently changed her own will, bequeathing the real estate to charity, instead of the decedent's siblings. *Id.* The Iowa Supreme Court held the probate court did not have jurisdiction to reopen the decedent's estate under Iowa Code 633.487-9, at the siblings' request. *Id.* Although the siblings did not know about their residual interest in the real property until the widow passed away, substantively they were requesting a distribution different from what they originally received from the

decedent, which was nothing.[4] Thus, the request to reopen was governed by section 633.488, not 633.489.

The factor motivating the siblings' request to reopen the estate in *Sampson* was the "potential proceeds" to be gained from ownership and control of the residual interest in real property that they did not obtain from the original distribution of the estate. Huntsman has the same motivation – to gain ownership over Ruth's intellectual property that he did not received as result of the original distribution of the estate and, correspondingly, gain proceeds from that property. The Probate Court acknowledge the same when it found that the "other proper cause" is "the potential for proceeds." APP. 91-2, FO, p. 9-10, Nov. 16, 2021. The only difference is that the property Huntsman seeks to control is intangible property, not real property. Like in *Sampson*, Huntsman's Petition to Reopen should, be governed and barred by section 633.487 and 633.488, not authorized by 633.489.

In *Sampson* the limited scope of section 633.489 was extensively analyzed in light of the underlying policies of probate – at some point, it is

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[4] The heirs received nothing from the decedent's estate because the widow was the sole beneficiary.

desirable for the distribution of an estate to be recognized as final, even if there was some flaw in the proceeding because assets need to be marketable and recipients of estate property need to be able to move on with their affairs. Thus, it was reiterated that section 633.489 allows for reopening of a closed estate only "if other property be discovered, if any necessary act remains unperformed, or *for any other proper cause appearing to the court.*" *Sampson*, 838 N.W.2d. at 670. The doctrine of *ejusdem generis* provides that general words that follow specific words are tied to the meaning and purpose of the specific words. *Id.* To the extent there is conflict or ambiguity between specific and general statutes, the provision of the specific statute controls. *Id.* Thus, the phrase "other proper cause" should be narrowly interpreted with reference to the other items in the list – other property discovered or necessary acts of administration remaining unperformed.

The November 16, 2016 Order broadly interprets "other property discovered" as "new property." It admits "[a]t this moment, there is no new property for this Court to distribute." It then expansively interprets "other proper cause" holding the phrase includes the "potential showing of new property" and "distribution of any potential proceeds." APP. 92, FO, p. 10, Nov. 16, 2021. This interpretation of "other proper cause" is too broad. It

clearly exceeds the purpose of having a jurisdictional bar to the Probate Court's ability to reopen a closed estate, making the Order clearly untenable. If "potential proceeds" is the only showing necessary to reopen an estate, any heir having any claim to proceeds from an estate could reopen it at any time under section 633.489. For example, in *Sampson*, the siblings could have alleged a right to proceeds from the sale or rent of the real property to reopen the deceased's estate under section 633.489. As it was in *Sampson*, using section 633.489 for this purpose is an abuse of discretion.

Any analysis under section 633.489 should start with a determination of whether there is "other property discovered" and determine whether title for the property existed at the time of the decedent's death, but for some reason was not discovered until after the estate was closed. If the petitioner cannot establish title to the property rested with the decedent at the time of the death it could not pass to heirs under Iowa Code § 633.50 and, thus, there is no "other property discovered" for purposes of section 633.489. As will be discussed below, to hold otherwise, would allow for heirs to vest within themselves property rights the decedent did not own at the time of their death.

The second step of the analysis under Iowa Code 633.489 should determine whether some "necessary act" was not performed. This phrase

should be interpreted in light the legislatively prescribed process originally used to administrate the estates and distribute the property. For example, under Iowa Code 633.350 the title to the property passes to the person to whom it is devised under the deceased's will or through intestate succession under the probate code. Under Iowa Code 633.351, the personal representative may, but is not required to, determine title to any property of a decedent. This statute grants the original personal representative discretion as to whether title to property should be quieted or clouds removed. Because the legislature gives the personal presentative discretion on the issue of whether title should be quieted, the original personal representative's decision not to quiet title in property should be given difference and undisturbed. To hold otherwise, would allow remote heirs to question the decisions made by the original administrators and render title based upon those decision unmarketable.

The "other proper cause" step should be limited in light of and tied to these two specific exceptions. If the petition substantively requests a redistribution of property to the petitioner and does not identify an unperformed necessary act of administration, an estate should only be reopened if doing so would serve the goals of probate – finality and marketable title. If there appear to be any "practical difficulties" associated

with granting the requested relief, the petition to reopen should be denied. This interpretation is consistent with other cases that interpret and apply Iowa Code § 633.487-9.

For example, *In re Estate of Ritz*, 467 N.W.2d 266 (Iowa 1991), an estate was reopened after $24,457 was found buried in the ground of the real property owned by the decedent. The $24,457 existed at the time of the decedent's death and was discovered after the estate was closed. Those facts provide for the application of section 633.489 due to the discovery of "other property."

Comparably, in *Roethler*, an estate closed in 1999 was reopened in 2008 for purposes of allowing a beneficiary to exercise an option to purchase land granted onto him under the decedent's will. *Roethler,* 801 N.W.2d at 842. The estate could be reopened because the will granted the beneficiary an unqualified right to purchase eighty acres of land from the decedent's estate. *Id*. A necessary act remained unperformed in the original probate because the original executor failed to give notice of the probate to the beneficiary/owner of the option to purchase, as required under Iowa Code § 633.304. *Id.* The option to purchase was not considered "other property discovered" because there was no dispute that title to the real estate was owned by the decedent at

the time he died, and the decedent granted the beneficiary the option to purchase the land. Rather, the defect was in a necessary act of administration, the executor's failure to carry out the decedent's unequivocal intent under the will. Notably, the request to reopen in *Roethler* was not motivated by "potential proceeds." The beneficiary sought to purchase property from the estate, i.e. he sought to pay money into the estate in exchange for title to the real estate. Here, Huntsman does not ask the Probate Court for permission to pay anything into the Estate; his only motivation is to obtain a distribution from these Estates.

*In re: Estate of Warrington*, 686 N.W.2d 198, 205 (Iowa 2004) involved reopening an estate where the decedent's will bequeathed a life estate for real property to the decedent's wife, Leona. Leona requested that her spouse's estate be reopened so the real estate could be sold to pay for Leona's nursing home care. The Court found this was a necessary act - it was necessary to carry out the decedent's intent as prescribed by his will and it did not deprive the remainder persons of a "testamentary devise to which they were unconditionally entitled under the provisions of the will." *Id.* at 205. The estate was reopened to ensure titled of the real estate was cleared of the remainder person's interest and, thus, marketable title was available for

Leona's support. Practical difficulties did not make reopening the estate untenable because the farm could be sold and the proceeds applied to Leona's expenses without depriving any other beneficiary of a right to which they were clearly and unconditionally entitled.

In *Estate of Witzke*, 359 N.W.2d 183 (Iowa 1984), the petitioners purchased real estate in 1980 from the estate, which was closed in November 1980. They identified the mistake in January 1981. On October 12, 1982, the petitioners filed a petition to reopen the estate, seeking to rescind the sale based upon an allegation of fraud against the administrator and requesting damages from the estate. The petition was denied because the phrase "necessary act" refers to "an act that is required by law of the administrator in order to properly close the estate." The petition was also denied due to practical difficulties associated with reopening the estate. Those difficulties included repossessing funds that had already been paid to the distributes and creditors prior to the closing so the estate could honor the petitioner's claim. *Id.* at 185.

Interpretating section 633.489 as a three-prong test with "other proper cause" being limited by the first two prongs and "other practical difficulties," harmonizes Iowa's statutes, giving effect to each subpart of the entire probate

code and disregarding no subpart therein. While the probate court has discretion under the last "other proper cause" provision of 633.489, a finding of no practical difficulties associated with granting the request prevents remote heirs from usurping the finality and marketable title intended to be achieved in the original proceedings. In each of the aforementioned cases the Iowa Supreme Court cautioned against interpreting the term in a manner that exceeds the limitations of the first two prongs of the test or usurp the purpose of Iowa Code 633.487: cutting off the rights of persons who received notice of the final report to contest distribution or prior acts of administration. See also *Youngblut*, 945 N.W.2d at 37 (the distribution coming out of probate should be final and conclusive). Any other interpretation would not give effect to the Legislature's intent when it enacted the entirety of the probate code, which was "to provide a prompt, efficient, centralized way of resolving issues relating to a decedent's estate and getting the estate distributed." *Id.* at 35. That is one reason for tight deadlines in probate. *Id.* It is also the reason Iowa Code § 633.487 was adopted – to give preclusive effect on everyone who has been given notice. *Id.* at 37.

Applying the first, "other property" prong, the Petition to Reopen states Huntsman's reason for his request to reopen these Estates is to "investigate

and pursue potential claims against a [unidentified] corporation." APP. 3, 13, FPR ¶ 7, Mar. 9, 2020; RPR ¶ 7, Sept. 18, 2020. By its plain and ordinary terms, this stated purpose does not satisfy the first prong of 633.489 because it does not identify any property, let alone the "discovery of other property" that existed at the time the decedent's deaths. An intent to investigate is not an unequivocal or unconditional right to anything, it is not even an identifiable remainder interest in property. At best, it asserts a suspicion of a right to own something if some unidentified conditions are met.

To the extent they involve quasi-intangible property rights, *Roethler*, *Sampson, and Warrington* are all instructive. *Roethler* involved an option to purchase real estate that was unequivocally granted to the petitioner. Comparably, *Sampson* and *Warrington* involve a remainder interest in real property that a remote heir only inherited if certain conditions were met. The owners of those quasi-intangible rights sought different relief in *Sampson* and *Warrington*. In *Sampson*, the remote heirs sought to reopen the estate to claim their residual interest and prevent the sale of the real estate; in *Warrington*, the remote heirs sought to prevent the reopening of the estate to preserve their residual interest and evade the sale of the real estate. In both cases, the Iowa Supreme Court treated the remainder interest claimed by these disappointed

heirs with disfavor and denied their requests for relief, largely because the heirs were not "unconditionally entitled" to an inheritance from the decedent. The same result should follow for Huntsman, who presented the probate court solely with a claim that he is entitled to proceeds only if multiple conditions are met. Such conditions include a favorable outcome from his proposed "investigation" and Huntsman's mother not bequeathing her interest in Frank's Estate to someone other than Huntsman, such as a charity. APP. 10, FPTR ¶ 6-9, Mar. 9, 2020. To that end, there is no evidence in this record whatsoever to suggest Hamand bequeathed or left anything to Huntsman.

Applying the second "necessary act" prong, the Petition also does not allege that the original administrators failed to do some act that they were required to perform. To wit, there is no allegation or explanation for why the requested "investigation" was not performed when the original Estates were closed.

Under the third "other proper cause" prong, the Petition failed to provide the Probate Court with the factual information needed to do a basic analysis under the first two prongs of Iowa Code § 633.489. This alone renders the original Orders reopening these Estates untenable. Further, a request to "investigate and pursue potential claims" has practical difficulties because it

is too vague to even enable to probate court to determine whether the purpose for reopening the Estates serves the goals of probate: prompt, efficient, centralized resolution of issues, marketable title, and finality of a deceased person's affairs.

As set forth in the next sections of this Brief, Huntsman's Application to Employ Litigation Counsel did not and could not cure these defects with the Petitions to Reopen nor does it overcome the jurisdictional limitations placed upon the Probate Court under Iowa Code § 633.487-9. Rather, the Applications to Employ Litigation Counsel highlight the defects and jurisdictional limitations. In short, the Applications identify multiple other conditions that must be met for Huntsman to be entitled anything from these Estates. For example, he must have success in a collateral litigation. APP. 14, 24, FATE, April 15, 2020; RATE, Sept. 25, 2020. The Application also identifies specific intellectual property, a trademark, without requiring that Huntsman present evidence:

(1) that Ruth or Frank owned a trademark (or any other intellectual property) at the time of their deaths;

(2) that a necessary act of administration remained unperformed as to the trademark (or any other intellectual property); or

(3) that the goal of finality and marketable title for the trademark (or any other intellectual property) would be served by reopening these Estates.

APP.14, 24, FATE, April 15, 2020; RATE, Sept. 25, 2020. Below, the three-prong test for section 633.489 is applied to the intangible and intellectual property identified in Huntsman's Application, further demonstrating the defects and confirming the Application does not provide a jurisdictional basis for reopening these Estates.

**ii. For intangible property to qualify as "other property discovered" there must be some identifiable fixed or certain interest existing at the time of the decedent's death**

As discussed above, "title" passes when a person dies. Iowa Code § 633.350. Therefore, Iowa Code § 633.489's "other property" prong must be interpreted in light of this requirement for property to descend under the probate code. "Title" is "the union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property." Black's Law Dictionary 2d Pocket Ed. Definition of "title" (2001).

Iowa's Probate Code defines "property" as "both real and personal property." Iowa Code § 633.3. Similarly, "estate" is defined as "the real and

personal property of either a decedent or a ward and may also refer to the real and personal property of a trust described in section 633.10." *Id.* "Estates of decedents" is again described as consisting of "real or personal property or both" under Iowa Code section 633.10. Because Iowa's Probate Code does not explicitly bring "intellectual property" within the bundle of rights that comprises an "estate" such rights cannot be devised or descend through intestate succession to heirs. Under the plain and unambiguous language of Iowa's Probate Code, there is no statutory privilege to transfer or inherit broadly defined "intellectual property", via intestate succession in Iowa. More than the buzz words "intellectual property", "unfair competition", "trademark", or "potential proceeds" is necessary to establish title in names, ideas, stories, abstract ideas, or "claims" that can be devised or descend.

For example, Iowa's Probate Code provides wrongful death claims "shall be disposed of as personal property belonging to the estate of the deceased…" Iowa Code § 633.336. In a similar respect, Iowa's Probate Code provides "[t]he avails of any life or accident insurance…shall be disposed of like other property left by the decedent." Iowa Code § 633.333. These statutes are what convert wrongful death claims or insurance claims into "property"

that can be owned by a decedent, collected within that decedent's estate, and distributed.

There is no similar statute converting "all claims" or "potential proceeds" of a decedent into personal property that can be owned by an estate. The fact that no portion of the Probate Code identifies "all claims" or "potential proceeds" as "personal property" belonging to an estate confirms the legislature did not intend for "any and all claims" or "potential proceeds" to be considered property of estates capable of being transferred through intestate succession. Had the legislature intended for "all claims" or "potential proceeds" to be considered personal property of a deceased person's estate, it would have used broad language to do so in the Probate Code, instead of specifically identifying only "wrongful death claims" and "insurance proceeds" as property of the estates.

Unlike wrongful death and insurance claims (the scope of which is fixed as of the date of the decedent's death), intellectual property is a category of intangible property that protects the commercially valuable products of the human intellect, the scope of which is not clearly defined in law or the facts

of this case.[5] *Phyllis Schlafly Revocable Trust v. Cori*, 2022 WL 898760 fn. 4 (E.D. Mo. 2022); see also *Hepp v. Facebook*, 14 F.4th 204, 215-217 (3rd Cir. 2021) (identifying multiple dictionary definitions of intellectual property, none of which purport to classify it as a type of real or personal property).

Nonetheless, Huntsman will likely point to Iowa Code § 611.20 to argue all "potential proceeds" are property of an estate because said statute states: "all causes of action shall survive and may be brought notwithstanding the death of person entitled or liable to the same." The argument is quickly disposed of because "context is king": meanings of particular words may be indicated or controlled by associated words within the statute. *Des Moines Flying Service, Inc. v. Aerial Services, Inc.*, 880 N.W.2d 212 (Iowa 2016); *State v. Tague,* 676 N.W.2d 197, 201 (Iowa 2004) ("[a]lthough the title of a statute cannot limit the plain meaning of the text, it can be considered in determining legislative intent" (citation and internal quotation marks omitted)). Iowa Code § 611.20 is a procedural rule set forth Title XV – Judicial Branch and Judicial Procedures, Chapter 611 Actions. Chapter 633,

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[5] One of the inherent issues with Huntsman's "claims" is that they are not fixed as of the date of Ruth's death; they are continually changing.

the Probate Code, is within the same Title, but provides separate procedures for collecting, administering, and disposing of a decedent's property. With the exception of Iowa Code § 633.336 and 633.333, neither of these Chapters purports to identify or define substantive property rights. Stated another way, section 611.20 is procedural; it "preserve[s] any claim a decedent has prior to death." *Anderson v. Bristol, Inc.*, 847 F.Supp.2d 1128 (S.D. Iowa 2012). But, it does not convert all "causes of action" into substantive property rights based upon activities occurring after a person's death. Those property rights either exist at death or not. Substantive property rights are created in other parts of the Iowa Code, such as Title XIV, "Property;" Title XIII, "Commerce," including Chapter 547, "Trade Names;" Chapter 548 "Registration and Protection of Marks," and Chapter 553, "Iowa Competition Law." These are the statutory provisions that should be used to define and identify "property" as used in the Probate Code.

For example, Iowa Code, Title XIV - Property includes Chapters 555 through 569, which identifies various types of real and personal property rights. See *Tague,* 676 N.W.2d at 201 (a section heading is an aid to interpretation). Nothing in any of these statutes identifies "claims" or "potential proceeds" as property. But Chapter 556 does identify and govern

the "Disposition of Unclaimed Property." Said statute broadly defines "property" as "a fixed and certain interest in or right in an intangible that is held, issued, or owed in the course of a holder's business or by a government or governmental entity, and all income or increment therefrom, including that which is referred to as or evidence by the following:…(6) An amount due and payable under the terms of an insurance policy…(9) Any other fixed and certain interest or right in an intangible that is held, issued, or owing in the course of a holder's business or by a government or governmental entity." Iowa Code § 556.1. The Act then further broadly provides: "[a]ll intangible personal property, not otherwise covered by this chapter, including any income or increment earned on the property [that] has remained unclaimed by the owner for more than three years after it became payable or distributable is presumed abandoned." Iowa Code § 556.7-9. The purpose of this Act is to allow for the escheat of unclaimed real and personal property following a dormancy period after which property is deemed abandoned. 30A C.J.S. Escheat § 12 (personal property that will escheat must have "some substance or value to it").

Notably, this statute indicates that the "proceeds" or income from "intangible personal property" are not a separate or distinct type of property;

they are tied to one another, further demonstrating the error by the Probate Court when interpreting "other property" as "potential proceeds." To even be considered "property" under the broadest definition of the term identified by the Iowa Legislature, Huntsman had to identify some "fixed or certain interest" in the "intangible" thing for which he seeks protection. Here, the interest Huntsman sets forth in both the Petition and Application to Employ is so vague and indefinite that it was not even capable of disposition of under the Uniform Disposition of Property Act. The purpose of said act is to clear title to intangible property by establishing it was abandoned[6] for lack of claim after two years. Iowa Code § 556.7-9.

Iowa's commercial or "unfair competition" laws contemplate a similar "fixed and certain interest" requirement in the context of intellectual property. Said laws start with an overriding policy: "[a] person shall not attempt to establish or establish, maintain, or use a monopoly of trade or commerce in a

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[6] "Abandonment" in property law means the voluntary relinquishment or renunciation of a property right. *Cerajeski v. Zoeler*, 735 F.3d 577, 581 (7th Cir. 2013). It means that the owner gives up all claims to the property, thus pitching it back into the public domain, where it is available for reappropriation. *Id.*

relevant market for purposes of excluding competition or controlling, fixing, or maintain prices." Iowa Code § 553.5. "Trade or commerce" is broadly defined as "any economic activity involving or relating to any commodity, service, or business activity." This is what intellectual property does – it grants a limited monopoly over a commercially valuable idea. See *Arthur Miller*, Common Law Protection for Products of the Mind: An Idea Whose Time has Come, 119 HVLR 703, 723, 733 (2006) (traditionally courts require that an idea be fixed or recorded or elaborated and developed sufficiently to be identified as the plaintiff's work as distinguished from the efforts of others; but proposing an alternative test for ownership of ideas that evaluates whether granting the plaintiff monopoly power would create an anticompetitive effect that proscribes an area of human activity and creativity); see also *International News Service v. Associated Press*, 248 U.S. 215, 246-7 (1918) (property is a creation of the law that depends upon exclusion from interference; words and ideas are not, in and of themselves, actionable property rights; they are free as the air to common use and, thus, a person is not excluded from using any combination of words merely because someone has used those words before). Consistent with these principles, through Iowa Code § 553.5, Iowa's

Legislature has spoken on the topic, erring on the side of not granting monopolies or broad intellectual property rights.

One limited exemption from this "monopoly prohibition" is for "activities or arrangements expressly approved or regulated by any regulatory body or officer acting under authority of this state or the United States." Iowa Code § 553.4. This limited exemption allows for a monopoly over intellectual property to be granted, via registration of a trade name under Iowa Code, Chapter 547 or a trademark under Iowa Code, Chapter 548. Trademarks, patents, and copyrights can also be registered with the U.S. PTO or Copyright Office to avoid violation of Iowa's anti-monopoly statute. 15 U.S.C. § 1051, *et. seq.*; 35 U.S.C § 1, *et. seq.*; 17 U.S.C. § 1.

Per the Application for Employment, Huntsman seeks to use these Estates to create a broad monopoly over words or ideas related to Ruth's "name, identity, persona, likeness, or symbol." APP.14, FATE ¶ 2, Apr. 15, 2020; CONF. APP. 158-9, FMTD Ex. 1, Huntsman Dep. 140:14-141:15, Aug. 13, 2021. He does so in violation of Iowa Code § 553.5's broad prohibition on monopolies. For example, Huntsman seeks to fix the price for the name "RUTHIE", by enjoining Exile from using said name on its products, as well as demanding royalty and lost profit damages resulting from Exile's use of

the name RUTHIE on the beer that it sells. APP. 14, FATE, ¶ 3 filed Apr. 15, 2020; APP. 303, FMTD Ex. 15, Aug. 13, 2021, Prayer for Relief). Accordingly, Huntsman asks the Probate Court to grant him monopoly rights that Ruth and Frank did not own at the time of their deaths and that meet no exception to Iowa's anti-monopoly law because he has not presented the Probate Court with any registration for any such right.

Huntsman further seeks to exclude Exile from utilizing a caricature of a woman balancing beer on her bosom or making reference to Ruth's story. APP. 289-292, FMTD Ex. 15, ¶ 36-39, Aug. 13, 2019. These ideas or concepts are as free as the air to common use. Huntsman must present more to establish the Estate's title to such property under Iowa's statutory laws. Because they have not been reduced to a trade name, trademark, patent, or copyright that is approved or regulated by any governing body, he is unable to demonstrate that Ruth or Frank had "title" to such property at the time of their deaths or pursuant to Iowa's commerce laws.

Demonstratively, Huntsman could present evidence that as of the date of her death Ruth owned copyright photos, which are alleged to be infringed upon by Exile's caricature of Ruth. He has not done so. Huntsman could present evidence that, prior to her death, Ruth had written a story about her

life such that Exile's reference to that story allegedly infringes upon the commercial value of the manuscript created and owned by Ruth. Huntsman has not done so. Both could have evidenced a "fixed and certain" interest at the time of Ruth or Frank's deaths under Iowa's broader "intangible property" laws. Huntsman has not alleged facts or produced evidence that would support a conclusion that Ruth or Frank claimed, let alone perfected marketable title to intangible or intellectual property as of the dates of their deaths under any statutory law in Iowa.

Iowa's common law for "unfair competition," likewise, does not support a conclusion that Huntsman has identified title to "property" owned by Ruth and Frank at the time of their deaths in his Application to Employ Litigation Counsel. As noted above, intellectual property protects "commercially valuable products of the human intellect." *Phyllis Schlafly Revocable Trust,* 2022 WL 898760 at fn. 4. It follows that Ruth and Frank had to have something of commercial value at the time their deaths in order for Huntsman to identify a "property right" capable of descent. *Adventure Comm. Technology, LLC v. Sprint Communications Company L.P.*, 224 F.Supp. 706, 773-774 (S.D. Iowa 2015) (the complaint failed to state a claim for unfair competition because it failed to allege facts that suggest that the defendant

was a direct competitor of the plaintiff); *Qwest Communication Corporation v. Free Conferencing Corporation*, 837 F.3d 889, 898 (8th Cir. 2016) (direct competition is a necessary element to an "unfair competition" claim). The Inventory and Reports filed by the original administrators to close these Estates did not identify any words or ideas related to Ruth's "name, identity, persona, likeness, or symbol" as having value. APP. 183-96, 233-51, FMTD, Ex. 6, p. 15-29, Aug. 13, 2021; FMTD Ex. 7, p. 43-45, Aug. 13, 2021. Had there been value associated with Ruth's name and likeness it could have been listed on Schedule F – Miscellaneous Property Not Reportable Under Any Other Schedule. APP. 189, 239, FMTD, Ex. 6, Aug. 13, 2021; FMTD, Ex. 7, p. 33, Aug. 19, 2021. Accordingly, Huntsman has not presented the Court with evidence of something with commercial value at the time of Ruth or Frank's deaths. Nor has he identified a "direct competition" between the two Parties' commercial activities. Accordingly, he has not identified any right entitled to protection under the common law for "unfair competition."

Iowa's common law on trademarks is also demonstrative. A trademark is a common law property right. *Commercial Sav. Bank v. Hawkeye Fed. Sav. Bank*, 592 N.W.2d 321, 327 (Iowa 1999) (discussing how a trademark is acquired); *Reiff Funeral Homes, Inc. v. Reiff,* 928 N.W.2d 157 at *5 (Iowa Ct.

App. 2019). Trademarks are words, names, or symbols used to identify a person's goods or services and distinguished them from those of another. *Id.*; see also *PSK, LLC v. Hicklin*, 757 F.Supp. 2d 836 (2010) (federal and Iowa courts classify marks from weakest to strongest into four categories: (1) generic; (2) descriptive; (3) suggestive; or (4) arbitrary or fanciful).

Here, Huntsman did not present the Probate Court with allegations or evidence of a word, name, or symbol Ruth or Frank were using at the time of their deaths. APP. 14, FATE ¶ 2, Apr. 15, 2020. And, Huntsman did not identify any goods or services sold by Ruth or Frank at the time of their deaths. APP. 14, FATE ¶ 2, Apr. 15, 2020. By Huntsman's own admission there had not been a product or service upon which Ruth's name or likeness had been used by the alleged heirs from 1970 to the present date. CONF. APP. 171-3, FMTD Ex. 1, Huntsman Dep. 153:19-155:7, Aug. 19, 2021. Huntsman still does not have a plan for commercial use of Ruthie's name and likeness in the future. CONF. APP. 158-9, FMTD Ex. 1, Huntsman Dep. 140:14 – 141:15 ("I don't know if we've completely formulated those"). As such, Huntsman has not presented evidence that Ruth or Frank owned a trademark under the common law.

In sum, Huntsman has not alleged or presented the probate court with any evidence that at the time of their deaths, Ruth or Frank (1) owned a trade or service mark; (2) had a "fixed and certain interest" in something; or (3) that Ruth's name had "commercial value." As such, Huntsman has not identified intangible or intellectual property existing at the time of Ruth or Frank's death that could descend. As such, it was a clearly untenable for the Probate Court to grant Huntsman such property, enabling him to file an infringement action against Exile. In doing so, the Probate court exceeded its jurisdiction.

#### iii. Replacing the discretion exercised by the original administrators of these Estates with Huntsman's current opinions is not a "necessary" unperformed act

As noted above, Iowa Code 633.351 granted the original administrators/personal representatives of these Estates discretion to maintain an action to "determine the title to any property of the decedent." To ensure the goal of marketable title is achieved, this provision works in tandem with other Iowa statutes and common laws governing disclaimer, abandonment, and transfer of property.

Primarily, Iowa's Probate Code includes the Uniform Disclaimer of Property Interest Act ("UDPIA"). Iowa Code § 633E.1. Said act applies to

disclaimers of any interest in or power over property, whenever and however created. Iowa Code § 633E.5. Any person, including a fiduciary (a personal representative or administrator), may disclaim the interest or power over property. *Id.* In the case of a decedent who died intestate, the disclaimer becomes effective at the time of the decedent's death. Iowa Code § 633E.6. If a fiduciary disclaims a power held in a fiduciary capacity which has been exercised, the disclaimer takes effect immediately after the last exercise of the power. Iowa Code § 633E.11(2). A disclaimer by a fiduciary is effective as to another fiduciary if the disclaimer so provides and the fiduciary has the authority to bind the estate, trust, or other person for whom the fiduciary is acting. Iowa Code § 633E.11(3).

Further, Iowa Code § 556.9, provides that intangible property is presumed abandoned if not claimed by the owner for more than "three years after it became payable or distributable." Under both Iowa's common law and statutory law, a trade or service mark is abandoned if there is a discontinuation of use and no intent to resume the use; non-use for "two years shall constitute prima facie evidence of abandonment." See Iowa Code 548.101(1)(a); *Iowa Entrepreneur, L.L.C.*, 801 N.W.2d at  2011 WL 1584418 (Iowa Ct. App. 2011). Federally registered trademarks can, likewise, be abandoned upon a

showing of discontinued use and no intent to resume. *Equitable Ntnl, Life Ins. Co. Inc. v. AXA Equitable Life Ins. Co.*, 434 F.Supp.3d 1227, 1241-4 (D. Utah 2020). This is because a trademark protects the goodwill that is built up within a mark through the mark's use in commerce. *Id.* After a mark is abandoned, it enters the public domain and another party can appropriate it. *Id.* at 1245.

As a result, maintenance of a trademark or any other intangible personal property had to be performed by the prior administrators to prevent abandonment and retain title to the property. The administrators could have fixed their interest or cleared their title in a trademark by using it, registering it, or licensing it. The decision to not do these things was an act of administration, but it was not a required act. Unlike in *Roether* there was no will requiring Frank and Andrea to build or maintain commercial value in Ruth's name and likeness when they closed Ruth and Frank's Estates. Frank and Andrea had discretion under Iowa Code § 633.351 regarding whether they would quiet title in a mark or make any other claim to intangible property. Frank and Andrea did not create, use, quiet, or perfect title in anything that could be considered intellectual or intangible property owned by Ruth at the time of her death. Likely this is because it takes use, time, effort, and money to create and maintain intellectual property rights. See APP. 277-80, FMTD

Ex. 12 Trademark Registration, Aug. 13, 2021 (noting the date Exile commenced use of the mark and paid $275 to register the mark "RUTHIE"). Because Frank and Andrea did nothing to use or maintain Ruth's name and likeness, they made a decision to abandon any rights they may have had to such property by operation of law.

Further, Frank exercised his discretion when he attested:

> [N]o other money or property is payable or deliverable to the undersigned from the fiduciary as share, legacy, claim, allowance, fees, rentals, proceeds of life insurance, joint tenancy property, survivorship property, documents of ownership, title or transfer, abstracts, fire insurance policies or other right or interest in or to said estate, due or to become due or deliverable from the above-entitled estate or from the fiduciary or otherwise.

APP. 200, FMTD Ex. 6, p. 32, Aug. 13, 2019. Through this act, Frank disclaimed the "claim" that is the subject of these Estate proceedings and is binding on subsequent administrators, such as Huntsman, under the UDPIA.

Overall, Huntsman has not and cannot identify a single act that that the original administrators were required to but failed to perform. Rather, Huntsman seeks to supplant the discretion exercised by the original administrators with his own present-day opinions on such matters. Iowa Code § 633.489's "necessary act" prong does not provide a basis for doing so.

### iv. "Other proper cause" for reopening these Estates does not exist because doing so frustrates the goals of probate: finality of a deceased person's affairs and marketable title

The substance of Huntsman's Petition and Application is to reverse the discretion exercised by the original administrators and redistribute any intangible property associated with Ruth's name and likeness. The interests of prompt, efficient, centralized disposition of property are not served by allowing remote heirs to question the discretionary acts of their predecessors in interest regarding intellectual or intangible property. Moreover, there are practical difficulties associated with Huntsman's request. To award him the relief requested, the Probate Court has to claw back previously abandoned property that passed into the public domain. This is particularly problematic regarding intellectual property and trademarks that, when abandoned, transfer into the public domain and can be reappropriated.

By disclaiming and abandoning any other interests in these Estates, the original administrators placed Ruth's name and likeness in the public domain such that Huntsman could have used it however he saw fit as of 2011. Huntsman has not presented the Probate Court with any reasonable explanation for why he did not take action in 2011 to generate his own

commercially valuable trademark, image, or manuscript concerning Ruth at that time. Even to this day, nothing is stopping Huntsman from investing in and creating his own marks, photographs, manuscripts, or other creative works incorporating references to Ruth. The only restriction existing is that if Huntsman attempted to use the name "RUTHIE" to sell beer in Iowa, Exile would have a cause of action against him. This demonstrates that Huntsman does not seek to protect the product of his own human intellect, i.e. the purpose of intellectual property and unfair competition laws. Rather, he seeks to trade on the goodwill created by Exile in Exile's intellectual property.

Huntsman knew Exile was using the name "RUTHIE" as an tribute to Ruth as early as 2014. CONF. APP. 77, 172, FMTD, Ex. 1, Huntsman Dep. 59:5-12, 154:8-12, Aug. 13, 2021. He did not promptly seek to reopen these Estates at that time, waiting another six years before "investigating" the claims he now seeks to enforce. Huntsman's investigation would have been much more accurate had he completed it before his sister, an original administrator, was dead and no longer available to answer for her administrative decisions.

Other practical difficulties revolve around having to "undo" dispositions of at least four other deceased person's estates within the line of

succession that have been closed (Barbara Hamand, Alfonso Bisignano, Rose Medici, and Andrea Huntsman) to distribute "potential proceeds." For example, the record is void of any evidence concerning the settlement of Barbara Hamand's estate and it is not known whether she had creditors entitled to payment from her estate. See Iowa Code § 633.350 (noting property of an estate is chargeable with payment of debts of the estate). At this time, there is absolutely no basis to suggest that the Probate Court can dispose of "proceeds" (if they are recovered from collateral litigation) without expending considerable judicial resources to do so properly.

Huntsman may argue "other proper cause" includes using these Estates to judicially adopt a "right of publicity." Frank and Andrea were just as capable of seeking the judicial adoption of a right of publicity and could have done so as part of the original probate proceedings. Iowa Code § 633.351. This further demonstrates Huntsman's desire to replace the prior discretionary acts of administration with his own.

Should the Iowa Supreme Court consider the issue *Milton H. Greene Archives, Inc. v. Marilyn Monroe, LLC,* 692 F.3d 983 (9th Cir. 2012) and *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, 589 F.Supp.2d 331 (S.D.N.Y. Dec. 4, 2008) are instructive. There, Monroe, LLC (much like Huntsman),

claimed to acquire Marilyn Monroe's posthumous right of publicity as a residuary beneficiary under Marilyn Monroe's will. These Courts evaluated whether Monroe's right to publicity descended under her will to the residual beneficiaries. Like Iowa, none of the states in which Marilyn Monroe could have been domiciled had a statutorily recognized "descendible, posthumous right of publicity" at the time of her death. Accordingly, each of these Courts agreed the right did not descend to Monroe, LLC, even though Marilyn Monroe had a will and bequeathed the residual of her estate to specified beneficiaries. Because the right did not exist at the time of her death, Marilyn Monroe had no testamentary capacity to devise "rights of publicity."

In *Greene*, the Court noted that Monroe, LLC may have obtained a posthumous right by lobbying the California legislature to adopt a statutory right of publicity. *Greene*, 692 F.3d 983 at 992 (9th Cir. 2012). But, the right did not apply to Marilyn Monroe because she was domiciled in New York at the time of her death. As such, Monroe, LLC did not acquire, through an inheritance, any such right. Instead, Marilyn Monroe's persona belong to the public because it "never belonged to anything or anyone else." *Greene*, 692 F.3d at 1000.

As the Courts in *Greene* and *Shaw* did, this Court should evaluate Iowa's laws in existence at the time of Ruthie's death, in 1993, to determine whether she had a descendible right of publicity at the time of her death. Like New York, Iowa had no statutorily recognized descendible posthumous right of publicity at the time Ruth passed away in 1993 or when Frank passed away in 1996. Iowa still has no statutorily recognized descendible posthumous right of publicity as of today's date. And, unlike Marilyn Monroe, Ruth died intestate. As such, she had no testamentary intent and expressed no desire to leave her alleged heirs, such as Huntsman, with the right to oversee and exploit any of her persona after her death. Even if she had testamentary intent, Ruth lacked testamentary capacity to bequeath a right of publicity to any of her heirs because the right did not exist under Iowa law at the time of her death. Just as Marilyn Monroe's right of publicity could not descend for lack of existence at the time of her death, Ruth's right of publicity could not descend through Iowa's laws of intestate succession. Ruth's persona, like Marilyn Monroe's, belong to the public because it "never belonged to anything or anyone else."

Notably, Huntsman has not approached the Iowa Legislature seeking a statutorily recognized right to publicity. Tony Bisignano is another alleged

heir to Frank's Estate and is a Representative in the Iowa Legislature. APP. 10, FPR ¶ 6, Mar. 9, 2020. Thus, Ruth's alleged heirs have more resources than most to approach and obtain such rights from the Iowa Legislature. Further, Huntsman is a citizen of Washington State so he would not be required to comply with right of publicity laws if they were judicially adopted in Iowa. As such, it is difficult to see how Huntsman could be viewed as a person with the best interest of Iowa citizens in mind when advocating for the judicial adoption of a right of publicity.

To that end, virtually every other court that has adopted a right of publicity has also adopted limitations for it. Because it is so far-reaching, courts have uniformly held that the First Amendment bars appropriation liability for the use of a name or likeness that concerns matters that are newsworthy or of legitimate public concern. *Batterglieri v. Mackinac Center for Public Policy*, 680 N.W.2d 915, 301 (Mich. App. 2004) (this privilege exists because dissemination of information regarding matters of public concern is necessary for the maintenance of an informed public). Even if the use of a name is for trade, when there is a redeeming public interest, news, or historical value the use is privileged. *Id.* (citation omitted, emphasis added).

Legislatures have also limited the right. Arkansas and Pennsylvania's statutes only authorize an action for misappropriation of a deceased person's name and likeness upon a showing that the plaintiff has a 50% or more interest in the person's estate. See 42 PA Conn. St. § 8316 (2003); Ark. Code Ann. § 4-75-1105 (2016). Florida authorizes only a deceased person's surviving spouse or surviving children to bring a right of publicity action. Fla. Stat. § 540.08(1) and (2) (2007). California's right to publicity statute only authorizes a spouse, child, grandchild, or parent to inherit the right of publicity. Cal. Civ. Code § 3344.1(e) (2012). Tennessee's right of publicity expires 10 years after the death of the personality. Tenn. Code Ann. § 47-25-1104(a) (1984). A right of publicity cause of action based upon Virginia's statute expires after 20 years. Va. Code Ann. § 8.01-40 (2015).

Under any of these common law or statutory schemes individuals such as Huntsman would not succeed in a right of publicity case based upon the record before this Court. First, Exile's purpose for adopting the "RUTHIE" mark and telling Ruth's story was based upon its historical significance and for the purpose of stimulating discussions concerning women's rights. APP. 273, FMTD Ex. 11, Exile Ans. to Rog No. 4, Aug. 13, 2021. Thus, Huntsman's right of publicity action against Exile most likely fails at some

point in time. Moreover, under any of the right of publicity statutes adopted by other states, Huntsman would not be afforded the relief he seeks. Either he would not have the necessary interest (as a child or 50% heir) to pursue the claim or the claim would be barred by a statute of limitations. Said limitations should be judicially recognized if the Court adopts a right of publicity.

Overall, there is no "other proper cause" for reopening these Estates, given the facts of this case, existing Iowa law, and any law that could reasonably be adopted.

## II. THE PROBATE COURT ERRED IN HOLDING HUNTSMAN HAS STANDING TO FILE A PETITION TO REOPEN

### a. Preservation of Error

All arguments raised herein have been preserved via Exile's Motion to Vacate, Dismiss, and Close and oral arguments, as well as its Motion to Reconsider. APP. 31, 39-41, 104-108, RMTD, Aug. 19, 2021; Tr. 7:25-9:25 (Huntsman settled Andrea's Estate without making these claims in that proceeding); FBMTR, Nov. 24, 2021.

### b. Standard of Review

Once reopened, the district court must determine on the merits whether the petitioner is entitled to the relief they seek. *Roethler*, 801

N.W.2d at 837. Probate matters are tried in equity, and the district court's ruling on the merits is reviewed de novo. "Under a de novo standard of review, we are not bound by the trial court conclusions of law or findings of facts." *Id.*

**c. Argument**

Standing requires that the petitioner show (1) a specific personal or legal interest in the proceeding and (2) an injury in fact. *Midstates Bank, N.A. v. LBR Enterprises LLC,* No. 20-0336, 2021 WL 1897968 at *4 (Iowa Ct. App. 2021). Standing is a jurisdictional issue. *Dumbough v. Cascade Manufacturing Co.*, 264 N.W.2d 763, 765 (Iowa 1985). Judicial estoppel protects the integrity of the fact-finding process by courts. *Tyson Foods, Inc. v. Hedlund,* 740 N.W.2d 192 (2007). It prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding. *Id.* Because it is designed to protect the integrity of the judicial process it is a doctrine that may be raised at any time, even at the appellate stage. *Id.* The doctrine applies when a fact is "judicially accepted." *Id.*

For all of the reasons discussed above, Huntsman has not demonstrated that he is entitled to inherit anything from these Estates. Moreover, Huntsman

knew of Exile's use of the name "RUTHIE" as of 2014. CONF. APP. 77, 172, FMTD, Ex. 1, Huntsman Dep. 59:5-12, 154:8-12, Aug. 13, 2021. Andrea, passed away on April 14, 2019. APP. 283, FMTD Ex. 19, Obituary, Aug. 13, 2021. Huntsman learned of these "misappropriation claims" during a family dinner that he attended following Andrea's funeral in April 2019. CONF. APP. 81, FMTD Ex. 1 Huntsman Dep. 63:15-25, Aug. 13, 2021. At the same time, Huntsman was acting as Andrea's Conservator; he filed a Final Inventory and Report to close Andrea's Conservatorship on August 1, 2019. APP. 259, FMTD Ex. 8, Report, Aug. 13, 2021. In doing so, Huntsman "waived further accounting" and consented to the Court "approving said Final Report, closing said estate, and discharging [Huntsman from his fiduciary duties]." APP. 268, FMTD Ex. 9, RCW, Aug. 13, 2021. On August 9, 2019, the Court entered an Order approving the Report and closing the same. APP. 269, FMTD Ex. 10, Order, Aug. 13, 2021.

Because they were siblings Andrea had the same right to inherit from Ruth and Frank that Huntsman asserts in these Probate Proceedings. Thus, Huntsman knowingly, voluntarily, and intentionally misrepresented to this Probate Court that Ruth's name and likeness was not property when he closed Andrea's Estate. Huntsman now asks the same Court and the same

Judge to adopt a contrary fact - that these "misappropriation claims" should be considered "valuable property." Huntsman should be judicially estopped from making these factual assertions. To hold otherwise, creates the perception that the Probate Court was misled regarding the property held by Andrea when it entered an order closing Andrea's Conservatorship.

Moreover, since he knew about the "misappropriation claims" Huntsman had the opportunity to claim the property and/or perform acts of administration to clear title to the property on behalf of Andrea's Estate. Instead of claiming that interest on behalf of Andrea, Huntsman filed a Receipt, Consent, and Waiver as Trustee of Andrea's Estate. APP. 268, FMTD Ex. 9, RCW, Aug. 13, 2021. In doing so, Huntsman disclaimed his interest in these claims; he should be bound to that disclaimer under Iowa's UDPIA and barred from reopening Andrea's Estate under Iowa Code § 633.489. This prevents him from being able to distribute any "potential proceeds" to Andrea's Estate, in the event "proceeds" are recovered and demonstrates further "practical difficulties" warranting denial of Huntsman's request to reopen these more remote-in-time Estates.

## III. THE PROBATE COURT ERRED IN DENYING EXILE'S MOTION TO INTERVENE

**a. Preservation of Error**

Huntsman filed a Motion to Strike Exile's Motion to Dismiss, arguing that Exile did not have standing to intervene. In response to the Motion, Exile requested leave to file a Motion to Intervene. APP. 140, RMTD Reply Brief, p. 23, Sept. 13, 2021. Exile reiterated its Motion to Intervene and requested permission to amend the pleadings, attaching a Petition to Intervene, within its Motion to Reconsider. APP. 97-100, RMTR Ex. A, Nov. 24, 2021.

**b. Standard of Review**

A district court's ruling on motions for leave to amend the pleadings is reviewed for an abuse of discretion. *Rife v. D.T. Corner, Inc.,* 641 N.W.2d 761 (2002). Denial of a motion to intervene is reviewed for correction of errors of law. *In re H.N.B.* 619 N.W.2d 340, 343 (Iowa 2000).

**c. Argument**

The Probate Court has the power to grant leave to amend pleadings to conform to the proof. Iowa R. Civ. P. 1.402(4). Such leave "shall be freely given." *Id.* Allowance of amendment is the rule and denial the exception. *Neylan v. Moser*, 400 N.W. 538 (1987). For example, when there is nothing on the record indicating that the case be ready for trial or that trial was even

scheduled, it is an abuse of discretion to deny amendment based upon timeliness.

Iowa R. Civ. P. 1.407(2)(b) allows for permissive intervention when an applicant's claim or defense and the main action have a question of law or fact in common. A party is allowed to intervene in a probate proceeding if they have any an immediate interest in the property at issue so long as the motion is timely. *Matter of Pearson's Estate*, 319 N.W.2d 248 (1982).

The November 17, 2021 Order provides that, under Iowa Code § 633.488, Exile has standing to intervene in these Estate proceedings, but forfeited that standing because it did not file a Petition to Intervene with the Court and only made that motion orally. APP. 87-8, RO, p. 5-6, Nov. 16, 2021. Given that Exile made its Motion for Leave, via its Reply to the Estate's Motion to Strike, this conclusion is clearly erroneous. APP. 140, RMTD Reply Brief, p. 23, Sept. 13, 2021.

Through its Motion to Reconsider, Exile requested permission to amend or recast the pleadings to correct any defect with its Motion to Intervene. Denying said Motion, the Court held that Exile's Motion was "untimely" and tantamount to a motion filed after a final order. APP. 158, RO, p. 5, Jan. 31, 2022. The holding ignores the Probate Court's ongoing oversight

of the administration of these Estates. Less than 30 days ago a Notice of Delinquency was issued to Huntsman advising that his administration of Frank's Estate was Delinquent for failure to file a Final Inventory and Report as required by Iowa Code § 633.32. Not. of Delinq., June 1, 2022. There certainly is no indication in the record that the matter has been prepared for trial, let alone scheduled for trial. Thus, it was an abuse of discretion for the Court to conclude that Exile's Motion to Intervene was untimely. Huntsman has yet to even make a proper claim of ownership over property by filing an Inventory.

In the event this Court finds the Probate Court has jurisdiction to reopen these Estates (which it should not), it will cause no delay whatsoever, to grant Exile leave to file a Petition to Intervene, the purpose of which is to challenge the Inventory and any finding as to whether the Estate has "property." This will ensure that Huntsman does not seek and the Probate Court does not grant Huntsman rights that improperly encroach upon Exile's right to use the mark "RUTHIE".

To that end, in its Order, the Court conceded that it "did not make a ruling" as to whether Ruth's intellectual property legally could and actually did, descend to the heirs of Ruth Bisignano instead of passing into the public

domain. APP. 160-1, RO, p. 7, fn. 22, Jan. 31, 2022. It erroneously found the August 18, 2020 Order from the collateral civil case decided the issue. APP. 160-1, RO, p. 7, fn. 22, Jan. 31, 2022. The District Court made no such decision in the collateral case. APP. 372, CVCV60249, Order on Motion to Dismiss, Aug. 18, 2020; APP. 625, CVCV60249, Ruling on Estate's Motion for Summary Judgment, Jan. 18, 2022. As with all Orders on Motions to Dismiss, the District Court presumed the allegation that Ruthie Bisignano "died intestate, with her interest in claims passing to her husband, Frank Bisignano." APP. 373, CVCV60249, Order on Motion to Dismiss, p. 2, Aug. 18, 2020. Thus, nowhere in said Order did the District Court overseeing the collateral case decide whether property was capable of and did descend to the heirs of Ruth and Frank Bisignano, via intestate succession, under Iowa's Probate Code. That issue rests squarely within the Probate Court's jurisdiction under the Probate Code. It was an abuse of discretion for this Court to defer to a collateral court for a decision on the substantive issues pending before it. Because the substantive issues remain undecided there can be no prejudice to Huntsman if Exile's Motion to Intervene were granted on remand.

## CONCLUSION

This case presents unique and complicated issues concerning what court is responsible for deciding substantive issues of property law. The root of the analysis must begin with whether Huntsman, either individually or as the administrator for these Estates, has a right to title for intangible property and the scope of any such title. Because Huntsman's claim arises from alleged right to inherit from these Estates, the first issue that must be resolved is whether the Probate Court has jurisdiction to reopen these Estates under Iowa Code 633.487-9 to grant Huntsman the rights he seeks to enforce against Exile. Because the Probate Court has no such jurisdiction, Exile requests that the Orders Reopening these Estates be reversed and the Probate Court instructed to close these Estates. Alternatively, Exile requests that the Orders to Reopen, Orders granting Leave to Employ Litigation Counsel, and the Orders on Exile's Motion to Vacate, Dismiss, and Close be reversed and remanded to the Probate Court with instructions to:

1. Hold a trial to decide the substantive issue of whether and to what extent Ruth's intellectual property could and actually did descended to her heirs,

2. Hold trial to decide whether Huntsman has standing to reopen these Estates, and
3. Grant Exile's Motion to Intervene for purposes of participating in the aforementioned trial.

Exile further requests any other relief the Court deems just.

## REQUEST FOR ORAL ARGUMENT

Defendants believe that this is a matter that requires oral arguments and as such request oral arguments.

## CERTIFICATE OF COST

Counsel for the Defendants-Appellees certifies that the actual cost of printing Defendants-Appellees' Proof Brief is $0.00.

## CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using **Times New Roman** in **14-point font** and contains 13,966 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

By: /s/ Kristina J. Kamler
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November 2, 2022
Date

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 2, 2022, the Appendix was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, service being made by EDMS upon the following:

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