

IN THE IOWA SUPREME COURT

Supreme Court Number 18-0927

Johnson County Number: TRPR030161

**MAXWELL R. ALBERHASKY,
Petitioner-Appellant,**

And concerning

**GEORGE RODNEY ALBERHASKY,
Respondent-Appellee,**

and

**GRAYSON H. ALBERHASKY,
Intervenor-Appellee.**

**APPEAL FROM THE IOWA DISTRICT COURT FOR JOHNSON
COUNTY**

The Honorable Mary E. Howes, Judge

**FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT OF
GEORGE RODNEY ALBERHASKY AND GRAYSON H. ALBERHASKY**

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

ROUTING STATEMENT

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STATEMENT OF THE CASE

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STATEMENT OF FACTS AND PROCEEDINGS

Iowa R. App. P. 6.903(2)(f)

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Iowa Code § 633A.4202(1) and (2)

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Iowa Code § 633A.4202(1)

Iowa Code § 633A.6202(1)

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED MAX'S PETITION FOR FAILURE TO STATE A CLAIM

I. Error Preservation

Iowa Trust § 633A.1106(1) and (3)

Iowa Code § 633A.4202(1)

Iowa Code §633A.6202(1)

Markey v. Carney, 705 N.W.2d 13 (Iowa 2005)

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Iowa Code Chapter 565B

Iowa R. Civ. P. 1.402(4)

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

Iowa Code Chapter 633A

II. Scope and Standards of Review

Iowa R. App. P. 6.907

In re Trust No. T-1 of Trimble, 825 N.W.2d 474 (Iowa 2013)

Iowa Code §§ 633.33, 633A.6101

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III. Regardless of Standards of Review Applied, Rod
And Grayson Were Entitled to Dismissal as a Matter of Law

A. The District Court Did Not Err, and Max Was
Not Prejudiced, By Receiving Exhibits and
Hearing Expert Testimony

Crookham v. Riley, 584 N.W.2d 258 (Iowa 1998)

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B. The District Court Applied The Appropriate
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Iowa R. Evid. 5.201

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Tate v. Derifield, 510 N.W.2d 885 (Iowa 1994)

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C. Max's Claims Fail Under Well-Settled
Iowa and Federal Law

"Petition for Accounting"

Iowa R. App. P, 6.903(2)(g)(3)

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"Petition to Void Transaction"

Iowa Code § 633A.4202(2)

IRC § 529

Iowa Code Chapter 12D

Iowa Code Chapter 633A

IAdvisor529 Program Description and Participation Agreement

Iowa Code § 12D.3

Iowa Code § 633A.1101(1)(b)

Iowa Code § 633A.1102(18)(l)

IRS Prop. Reg. §1.529-1 (c)

Iowa Code §12D.1

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D. Max's Petition Did Not Provide Rod or Grayson
With Sufficient Notice of Any Claims Other Than
The Accounting and Trust Code Claims

Davis v. Ottumwa Young Men's Christian Association,
438 N.W.2d 10 (Iowa 1989)

Shill v. Careage Corp., 353 N.W.2d 416 (Iowa 1984)

Gosha v. Woller, 288 N.W.2d 329 (Iowa 1980)

Peterson v. Bottomley, 582 N.W.2d 187 (Iowa 1998)

Engstrom v. State of Iowa, 461 N.W.2d 309 (Iowa 1990)

ROUTING STATEMENT

The Iowa District Court for Johnson County (District Court) applied well-established Iowa law to dismiss a petition that on its face failed to state a cause of action upon which relief could be granted. Transfer of this matter to the Iowa Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(1) and (3).

STATEMENT OF THE CASE

Maxwell R. Alberhasky (Max) appeals the District Court's dismissal of two claims against his father George Rodney Alberhasky (Rod) on the grounds that:

- As the owner-participant of a college savings account set up pursuant to Iowa Code Chapter 529 (529 account), Rod maintained the discretion and authority to change the beneficiary designation, and Max lacked standing to assert a claim based on such a change
- As one of the former custodians of an account established for Max pursuant to Iowa Code Chapter 565B (UTMA account), Rod's duties were not governed by the Iowa Trust Code. An UTMA account is not a trust as defined by Iowa law, and is not governed by the Iowa Trust Code set forth in Iowa Code Chapter 633A. *See* Iowa Code § 633A.1102(18)(b).

App. 375 (Ruling 5).

This appeal is the most recent battle in a seemingly endless – and costly – legal campaign waged by Angela Boeke Gerard (Angela) against Rod, who is Angela's former husband, and Rod's family.

Rod petitioned for dissolution on December 27, 1999. *See* 12/27/99 Petition, Case No. 06521 CDDM012155 (Johnson). The parties were divorced on

February 1, 2001. App. 29-30 (DQ Reply 2-3). Since 2010, the District Court has been presiding over modification proceedings, and has issued several orders relating to the very same assets and accounts that are now before this Court. *See* 3/23/10 Modification Petition (CDDM012155). Dissatisfied with the rulings in the modification proceedings, Angela and her current husband, Stephen C. Gerard, II (Stephen), commenced and prosecuted this action in Max's name. App. 8, 31 (Trust Petition 4¹; DQ Reply 4). *See also* 10/10/16 Appearance. The judge presiding over the modification, the Honorable Mary E. Howes, has been assigned to this action to provide continuity and to prevent inconsistent rulings. The District Court stayed the contempt proceedings brought by Angela against Rod in the modification pending the resolution of this case. App. 19 (DQ Motion 2). *See also* 4/9/14 Order; 4/28/14 Order (CDDM012155); 5/27/10 Order (CDDM012155).

For all the reasons set forth in the District Court's ruling of April 18, 2018, no viable cause of action has been articulated in the present action, and Rod and Grayson Alberhasky (Grayson) are entitled to dismissal as a matter of law.

¹ The Trust Petition was misnumbered insofar as there is no page numbered "2". Jump citations are to the original page numbers with page 2 being omitted.

STATEMENT OF FACTS AND PROCEEDINGS²

The Alberhasky Family and Assets

Rod married Angela on May 26, 1989. App. 29 (DQ Reply 2). They have two sons, Max (11/11/92), and Grayson (8/31/95). *Id.* Angela is a lawyer, and former Assistant Johnson County Attorney. *Id.* Rod is an optometrist. *Id.*

Throughout the years, Rod and his family have invested in several businesses and properties in the Iowa City area. *Id.* As part of the family's wealth management plan, assets and funds have been deposited and invested in various places, including the following three accounts involving Max, Grayson, and their cousins:

Allie's Trust. On May 3, 2000, Rod's mother, Alois Mary Alberhasky (Allie), established a revocable trust (Allie's trust). App. 110-25 (MTD Ex. I). Rod and his sister, JoEllen M. Alberhasky Olson (JoEllen), became successor co-trustees upon Allie's incapacitation in 2009, and served in that capacity until the final

² Max's initial failure to provide citations for any of the factual assertions he made in his page proof brief violated the Iowa Rules of Appellate Procedure, generated significantly more work for Rod's and Grayson's counsels, and forced Rod and Grayson to incur unnecessary attorney fees. *Compare* Max's Proof Brief 5-8 with Iowa R. App. P. 6.903(2)(f) ("All portions of the statement shall be supported by appropriate reference to the record or the appendix in accordance with rule 6.904(4)."); Iowa R. App. P. 6.904(4)(a) ("Proof briefs must contain references to the parts of the record").

distribution of Allie's trust assets in or around October 2015. App. 67, 114 (MTD Exs. A ¶2; I Art. II). Pursuant to the trust provisions, each of Allie's four grandchildren, including Max, were to receive \$25,000 upon reaching the age of twenty-five. App. 119-120 (MTD Ex. I §5.2 ¶¶C, E). Max received everything to which he was entitled pursuant to Allie's trust when he turned 25 on November 11, 2017. App. 127-29 (MTD Ex. J).

529 Account. On or about March 4, 2010, Rod and JoEllen, as co-trustees of Allie's trust, used Allie's trust assets to fund Iowa Code Chapter 529 accounts as an estate planning tool and to help cover college expenses and tuition for Allie's four grandchildren. App. 70 (MTD Ex. A ¶20). Each of the four accounts received an initial transfer of \$65,000. *Id.* Allie's trust was designated as the owner-participant of the accounts. App. 70, 100-105 (MTD Exs. A ¶21; F). Max and Grayson were each designated as a beneficiary of one of the accounts. App. 70, 98-109 (MTD Exs. A ¶20; E; G; H) Rod and JoEllen later exercised their discretion to designate Grayson as the beneficiary of both accounts.³ App. 107-109 (MTD Exs. G; H). In

³ The funds remaining in the 529 account were used to pay for Grayson's college education at Southern Methodist University.

accordance with District Court orders entered in the modification, Max used other funds given to him by Rod and Rod's family to pay for his college education. App. 85 (MTD Ex. B 5). Angela was not required to contribute anything to Max's or Grayson's post-secondary educations. App. 31 (DQ Reply 4). *See also* 8/9/11 Modification Order (CDDM012155).

UTMA Account. Funds from Allie's trust were also used to establish UTMA accounts for the benefit of Allie's four grandchildren, including the UTMA account for Max. Approximately \$90,000 was initially deposited in each account. App. 30 (DQ Reply 4). Allie served as the initial custodian, and she later designated Rod as her successor custodian. *Id.* The District Court appointed U.S. Bank as custodian on September 7, 2012. App. 91-92 (MTD Ex. C). When Max turned twenty-one, on November 11, 2013, he received approximately \$265,961.26 from his UTMA account.⁴ App. 31 (DQ Reply).

⁴ On November 20, 2013, Angela, who held Max's power of attorney, picked up a check made out to Max in the amount of \$265,961.26, from a U.S Bank branch in Iowa City. There has been no accounting or information provided as to what happened to those funds following their withdrawal.

Dissolution and Modification

On December 27, 1999, Rod petitioned for divorce upon learning Angela had developed an intimate relationship Stephen. App. 29, 41-49 (DQ Reply 2, Ex. B (*In re Gerard*, 631 N.W.2d 271 (Iowa 2001))). See also 12/27/99 Dissolution Petition (CDDM012155).

On February 1, 2001, Rod and Angela were divorced pursuant to a stipulation and decree that allowed each boy at the age of fourteen to decide which parent he wanted to live with. App. 30 (DQ Reply 3). At sixteen, Max made the decision to reside primarily with Angela, and gradually became estranged from Rod, Allie and the Alberhasky family in general. App. 22-26, 30 (DQ Motion Ex. A (Ziegler Tr.); DQ Reply 3).

In 2009, Grayson informed Angela that he wanted to live with Rod. App. 30 (DQ Reply 3). On March 14, 2010, Rod applied for an order modifying the original dissolution decree, requesting an order giving him primary physical care of Grayson and requiring both parents to provide post-secondary education subsidies to assist with their sons' college educations. *Id.* Angela resisted the requested modifications, and called Stephen to testify as an "expert" witness regarding financial issues tried at the modification trial. *Id.*

On August 9, 2011, the District Court entered an order modifying the original dissolution decree, and, among other things:

- Awarded Rod primary care of Grayson
- Reserved the issue of post-secondary school subsidies for Max until the funds he had been given by the Alberhasky family were gone
- Ordered that Rod would continue to act as custodian of the funds and to pay Max's college expenses upon proof that Max maintained a C average or better⁵

App. 31 (DQ Reply 4). *See also* 8/9/11 Modification Order (CDDM012155).

Following the District Court's order granting some of Rod's requested modifications, Angela continued to urge the District Court to remove Rod as custodian of the boys' accounts, and brought contempt proceedings against him.

App. 31 (DQ Reply 4). *See also* 8/18/11 Application (CDDM012155); 8/19/11 Motion (CDDM012155); 6/28/13 Application (CDDM012155). Angela requested, and temporarily obtained in a ruling from the bench, control of Max's 529 and UTMA accounts. *See* 8/19/11 Motion to Stay and Reconsider (CDDM012155).

On August 8, 2012, the District Court amended and clarified its previous rulings to state:

- U.S. Bank would become the custodian of Max's UTMA account
- Both Max and Grayson had sufficient funds to pay for their own post-secondary educations and neither parent would need to provide a post-secondary subsidy [beyond what Rod and his family had already provided]

⁵ Although Max blocked Rod's access to his grades upon turning eighteen while he was attending the University of Arizona, Rod did not seek Court intervention.

- Max should first use his UTMA account and if necessary his 529 account to pay for his post-secondary education.

App. 81-96 (MTD Exs. B; C).

Grayson eventually requested independent counsel, and moved to intervene in the contempt proceedings brought by his mother against his father on the grounds that Angela's prosecution of his father directly affected his access to his 529 funds. App. 31 (DQ Reply 4). *See also* 10/7/13 Motion to Intervene (CDDM012155). The District Court granted Grayson's motion over Angela's resistance. *See also* 10/11/13 Resistance (CDDM012155); 10/15/13 Order (CDDM012155).

On November 11, 2013, Max turned twenty-one years old. App. 31 (DQ Reply 4). A few days after his birthday, the custodial UTMA account at U.S. bank was closed, and a check was issued in Max's name for \$265,961.26. *Id.*

Because the funds in Max's UTMA account far exceeded any amounts Max would pay in connection with his post-secondary education, Rod and JoEllen as co-trustees of Allie's trust, the account's owner, changed the designated beneficiary of the 529 account to Grayson. App. 109 (MTD Ex. H).

Action Brought Pursuant to the Iowa Trust Code

On December 30, 2013, Angela, as attorney for Max, commenced this action in probate pursuant to the Iowa Trust Code, against Rod and JoEllen seeking:

- An accounting of the UTMA account
- An order issued pursuant to section Iowa Trust Code § 633A.4202(2) voiding the discretionary change made to designate Grayson as the beneficiary the 529 account, and monetary damages
- A judgment pursuant to Iowa Trust Code §633A.4202(1) for monetary damages based on an alleged breach of fiduciary duties by Rod in connection with the UTMA account

App. 6-8 (Trust Petition).

On February 26, 2014, Rod moved to dismiss Max’s petition. App. 8-11 (MTD). JoEllen and Grayson joined in the motion. App. 14-17 (Joinders). Rod, JoEllen and Grayson urged dismissal of Max’s petition for several, independent reasons, including:

- Max had failed to sue the proper parties, and had improperly sued and served Rod and JoEllen in their individual capacities
- Max lacked standing to bring the 529 claim
- Max sought relief under the Iowa Trust Code, but the Iowa Trust Code does not govern the 529 and UTMA accounts

App. 8-11, 14-17, 350-358 (MTD; JoEllen Joinder; MTD Brief).

Max resisted dismissal, again relying on the Iowa Trust Code – sections 633A.1106(1) and (3), 633A.4202(1), 633A.6202(1) - as authority for his claims. App. 12-13 (MTD Resistance). In the over four years between the filing of the motion to dismiss and the District Court’s ruling, Max never sought to amend his petition or to assert a different type of claim.

On June 23, 2014, Rod provided Max with a complete accounting of his UTMA account. App. 97 (MTD Ex. D). Max never identified any deficiencies with respect to this accounting, nor did he amend his petition to assert a need for additional information or materials. *See* Docket.

On May 15, 2015, Maxwell graduated from college.⁶ App. 39 (DQ Reply Ex. A 1).

On October 10, 2016, Stephen appeared as counsel for Max. *See* 10/10/16 Appearance.

On October 20, 2016, Rod asked the Court to disqualify Angela and Stephen as Max's attorneys. App. 18-49 (DQ Motion; DQ Reply). Rod withdrew the motion when Angela and Stephen agreed to refrain from testifying as witnesses, in addition to acting as Max's counsel. *See* 3/29/17 Motion to Withdraw.

On July 31, 2017, Max voluntarily dismissed his claims against JoEllen. *See* 7/31/17 Dismissal.

On August 8, 2017, the District Court heard arguments relating to the motion to dismiss. Tr. 1. Exhibits were offered in support of the motion, some of which had been previously submitted through motion practice, and some of which were legal and financial articles and authorities. *See* Tr. 6:21-22; Hrg. Exs. A-T.

⁶ Max received a Bachelor of Science in psychology from the University of Arizona.

Stephen, acting as Max's counsel, did not object to the exhibits themselves and acknowledged that they provided "background", but argued that they should not be used to support a motion to dismiss. *See* Tr. 3:10-4:3. The District Court also heard expert testimony from Robert Milbrath and Robert Downer. Mr. Milbrath discussed why the owner-participant retains discretion to change the beneficiary of a 529 account. Tr. 8:12-10:20. Mr. Downer discussed why UTMA accounts are not governed by the Iowa Trust Code, and reiterated that the owner-participant of a 529 account is free to change the beneficiary. T. 13:24-17:7; 18:21-20:20. Stephen did not object to any of the testimony presented by Mr. Milbrath or Mr. Downer, and asked them clarifying questions on cross-examination. *See* Tr. 11:1-11; 17:13-18:17; 21:3-11.

On November 11, 2017, Max turned twenty-five years old, and received everything to which he was entitled pursuant to Allie's trust, which totalled just under \$25,000 after the payment of professional fees. App. 127-129 (Ex. J). Thus, despite Max's nearly complete estrangement, Rod and his family provided him with sufficient funds to allow him to graduate debt-free from the out-of-state college of his choice, and having been given \$290,245 in cash by his 25th birthday.

On April 18, 2018, the District Court dismissed the remaining claims asserted against Rod in Max's petition on the grounds that Max had failed to state a claim upon which relief could be granted because:

- Max lacked standing to challenge how the 529 account was managed by its owner-participant, and there was no authority to support a proposition that a 529 account is subject to the provisions of the Iowa Trust Code
- The Iowa Trust Code does not apply to the UTMA account, and the UTMA account had already been closed with its funds distributed to Max

App. 363 (Ruling 5).

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED MAX'S PETITION FOR FAILURE TO STATE A CLAIM

On appeal, Max argues that in dismissing his claims, the District Court erred in:

- applying an incorrect legal standard
- considering matters beyond his petition, including exhibits and expert testimony presented at the August 8, 2017, hearing
- finding that his petition failed to state a cause of action under the notice pleading standard

Max's Brief 9-14. None of these arguments supports the reversal of the District Court's dismissal of Max's claims.

I. Error Preservation

Max resisted dismissal. He argued that the District Court could not consider any matters beyond the allegations of his petition, and that he had stated claims pursuant to Iowa Trust Code §§ 633A.1106(1) and (3), 633A.4202(1)

633A.6202(1). App. 12-13, 369-370 (MTD Resistance; Notice); Tr. 3:12-4:3. *See also* 6/23/17 Brief 5-8.

However, Max failed to preserve error with respect to his request for an accounting described in the first count of his petition. Although Rod was sued (improperly) in his individual capacity, any actions taken in connection with the UTMA account were taken in Rod's capacity as a custodian of that account. Max turned fourteen years old on November 11, 2006. Beginning on that date, Max had the right to inspect the records and to petition for an accounting. *See* Iowa Code §§ 565B.12(5), 565B.19(1). Max never requested that Rod provide records of the UTMA account. Moreover, Max waited seven years to petition for an accounting, after Rod had stopped acting as the custodian, after the UTMA account terminated, and after the assets had been cleared out. App. 375 (Ruling 5). Nonetheless, after the filing of Max's petition, Rod provided Max with a full accounting on June 23, 2014. Over four years have passed and neither Max nor his legal counsel has requested any clarification or additional information relating to the UTMA account. App. 97 (MTD Ex. D). As the District Court correctly found, the doctrine of laches applies, and Max should be deemed to have waived any claim he might now seek to prosecute in this regard. App. 375 (Ruling 5 (citing *Markey v. Carney*, 705 N.W.2d 13, 22 (Iowa 2005))).

Finally, for the first time on appeal, Max cites Iowa Code § 565B.12(2), with no analysis, for the proposition that “[t]he custodian of UTMA assets is required to observe the standard of care that would be observed by a prudent person dealing with the property of another.” Max’s Brief 14. This is a new assertion. In his petition and in resisting the motion to dismiss, Max relied exclusively on provisions of the Iowa Trust Code; he never indicated that he was bringing a claim based on an allegation that Rod had breached a fiduciary duty articulated in the Uniform Transfers to Minors Act set forth in Iowa Code Chapter 565B. App. 12-13, 369-370 (MTD Resistance; Notice); Tr. 3:12-43; 11:1-11; 17:12-18:17; 21:3-11; 27:19-30:18. *See also* 6/23/17 Brief 5-9. Rod, JoEllen and Grayson were the parties who argued that UTMA custodians were governed by the standards set forth in Iowa Code Chapter 565B. *See, e.g.*, App. 15, 57-58 (JoEllen’s Joinder 2; 6/23/17 Brief pp. 8-9); Tr. 14:-16:10; 25:22-27:16.

Even if Max had referenced a duty described in Iowa Code Chapter 565B at some point in the proceedings, it still would have been incumbent upon him to amend at his petition if he intended to assert a claim that Rod, or JoEllen, had breached such a duty. Amendments to pleadings are liberally granted. *See* Iowa R. Civ. P. 1.402(4); *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 767 (Iowa 2002). Max has had nearly five years to assert a claim under Iowa Code Chapter 565B in this action. It would be extremely prejudicial and unfair to allow him to prosecute

such a claim now - especially given that a motion to dismiss challenging the sufficiency of Max's claims asserted under the Iowa Trust Code Chapter 633A has been pending for nearly four and a half years. Max complains that this matter has been pending for nearly five years. Max's Brief 14-15. Rod has been justifying his actions and those of his family in gifting Max hundreds of thousands of dollars in court actions that have spanned nearly two decades. It is particularly galling that Rod continues to be prosecuted on two separate fronts by a parent who successfully resisted being ordered to contribute anything to her sons' post-secondary educations.

II. Scope and Standards of Review

Claims asserted pursuant to the Iowa Trust Code are tried by the District Court in equity, and are reviewed *de novo*. See Iowa R. App. P. 6.907; *In re Trust No. T-1 of Trimble*, 825 N.W.2d 474, 482 (Iowa 2013)(citing Iowa Code §§ 633.33, 633A.6101)).

Where the appeal turns on whether the District Court properly interpreted and applied governing statutes and law, the review is for errors at law. See *Trimble*, 825 N.W.2d at 482 (citing *In re Estate of Myers*, 825 N.W.2d 1, 4 (Iowa 2012)). Similarly, review of rulings granting motions to dismiss, as well as rulings granting motions for summary judgment, is for correction of errors at law. See

Iowa R. App. P. 6.907; *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009); *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 27 (Iowa 2005).

Where error is alleged in connection with evidentiary matters, review is for abuse of discretion, even in probate actions. *See, e.g., In re Estate of Rutter*, 633 N.W.2d 740, 745-46 (Iowa 2001)(citations omitted).

III. Regardless of Standards of Review Applied, Rod And Grayson Were Entitled to Dismissal as a Matter of Law

A. The District Court Did Not Err, and Max Was Not Prejudiced, By Receiving Exhibits and Hearing Expert Testimony

Max’s counsel acknowledged that this case “is part and parcel” of the dissolution-modification action. Tr. 27:19-28:1. Both below and on appeal, Max’s counsel regularly refers to matters relating to that action, as well as to matters that are well outside the record. *See, e.g.,* Max’s Brief 6-9, 14. Tr. 28:12-25.

As Max acknowledges, issues such as whether 529 or UTMA accounts are trusts are for the District Court to determine. Max’s Brief 13. Experts may offer opinions about domestic law as to issues that become operative factual elements necessary to sustain an asserted claim, such as the correctness of a lawyer’s position in the legal malpractice context (*i.e.*, the case-within-a case causal element). *See Crookham v. Riley*, 584 N.W.2d 258, 27-68 (Iowa 1998)(citing *United Cent. Bank v. Kruse*, 439 N.W.2d 849, 852 (Iowa 1989)). Here, whether

the provisions of the Iowa Trust Code Chapter 633A apply to 529 and UTMA accounts is essentially a factual element necessary to sustain the claims asserted in Max's petition. The testimony offered by Mr. Milbrath and Mr. Downer was limited to the analysis of whether 529 and UTMA accounts are treated as trusts by financial and legal professionals in Iowa. There is no question that such testimony was useful to the District Court. Moreover, the scope of the testimony that may be heard by a District Court sitting in equity is more relaxed. *See Rutter*, 633 N.W.2d at 745-46. Indeed, Stephen himself testified as a "financial" expert in front of the District Court in the modification proceedings while he was a sitting judge. App. 30 (DQ Reply 3).

Assuming, *arguendo*, that the District Court erred in receiving exhibits and hearing expert testimony, Max cannot demonstrate the District Court's actions resulted in any prejudice or harm. *See, e.g., Baysinger v. Haney*, 155 N.W.2d 496, 499 (Iowa 1968)(a judgment should not be reversed and litigation prolonged unless the error affected the result to the prejudice of the appealing party); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 183 (Iowa 2004)(error cannot be predicated upon an evidentiary ruling unless a substantial right of the party is affected).

The District Court has presided over both the dissolution-modification action, and this action brought under the Iowa Trust Code. It is therefore familiar with the exhibits that were submitted by Rod, JoEllen and Grayson. Further, there

has been no allegation or assertion that the exhibits were inaccurate, unfair, or misleading. Max's counsel did not object to any of the exhibits in particular, and recognized that they provided useful "background." Tr. 3:17-19. And, the District Court's ruling dismissing Max's claims made no specific reference to the exhibits submitted. App. 371-75 (Ruling).

Similarly, Max did not object to any of the expert testimony provided by Mr. Milbrath or Mr. Downer. Tr. 7-21. Although Max's counsel asked the witnesses some clarifying questions, Max never challenged the substance of Mr. Milbrath's or Mr. Downer's opinions that the Trust Code is inapplicable to 529 and UTMA accounts. The District Court correctly found "that there is no Iowa case law or statutory law that supports the proposition that a 529 account is subject to Iowa Code Chapter 633A: Iowa Trust Code." App. 375 (Ruling 5). The fact that the District Court ultimately reached a conclusion consistent with professional witnesses with expertise relating to 529 and UTMA accounts does not render the District Court's ruling invalid.

B. The District Court Applied The Appropriate Legal Standards When Considering The Motion to Dismiss

A district court may grant a motion to dismiss for failure to state a claim, such as when a plaintiff cannot show the existence of a legal duty or right by which he can recover. *See Geisler v. City Council of City of Cedar Falls*, 769 N.W.2d

162, 165 (Iowa 2009)(citing Iowa R. Civ. P. 1.421(1)(f)); *Unertl v. Bezanson*, 414 N.W.2d 321, 324 (Iowa 1987). Such dismissal will be reviewed for corrections of errors at law. *Geisler*, 769 N.W.2d at 165 (citing Iowa R. App. P. 6.907).

Max's primary complaint on appeal is that the District Court considered matters that were not specifically set forth within the four corners of his petition. It is true that facts beyond the allegations set forth in the petition generally will not be considered. However, a court may take judicial notice of certain, undisputed facts and relevant authorities. *Geisler*, 769 N.W.2d at 165 (citing *Winneshiek Mut. Ins. Ass'n v. Roach*, 132 N.W.2d 436, 443 (Iowa 1965)). "The Court can take judicial notice of Code sections within the context of a motion to dismiss." App. 57 (MTD Brief 8, fn 3)(citing *Turner v. Iowa State Bank and Trust Co. of Fairfield*, 743 N.W.2d 1 (Iowa 2007); Iowa R. Evid. 5.201). And, "[w]hile a motion to dismiss admits the truth of all well-pleaded, issuable and relevant facts, it does not admit mere conclusions of fact or law not supported by allegations of ultimate facts." *Krise v. Cota*, 2000 WL 1825447, *1 (Iowa Ct. App., Dec. 13, 2000)(citing *Tate v. Derifield*, 510 N.W.2d 885, 887 (Iowa 1994)). "General allegations as to the status and condition of persons or corporations, without stating the facts to support such allegations, are usually mere conclusions of law . . . not well pleaded and must be ignored in considering defendant's motion to dismiss." *Bailey v. Iowa Beef Processors, Inc.*, 213 N.W.2d 642, 648 (Iowa 1973)(affirming

dismissal). The District Court did not misapply these standards. It simply found that on its face, Max's petition failed to state any viable causes of action under Iowa or federal law, as discussed more fully below.

Even if the District Court did go beyond the strict constraints of a pre-answer motion to dismiss, that does not mean that Max is entitled to a remand or reinstatement of his claims. Rod, JoEllen, and Grayson were quite explicit in their reason for seeking dismissal - Max's claims failed as a matter of law because the Iowa Trust Code did not apply. App. 8-11, 14-17, 50-63 (MTD; Joinder; MTD Brief). Their motion seeking dismissal of this action was pending for nearly four years. If Max had any factual basis or a legal authority to refute that position or to support a different type of claim, he had more than a fair opportunity to do so.

In urging dismissal, Rod, Grayson, and JoEllen expressly advised the District Court and Max that their motion could be treated as either a motion to dismiss or a motion for summary judgment under Iowa law.

To the extent that the [District] Court finds the extrinsic evidence presented with this motion helpful, then Rod and JoEllen request that the [District] Court treat this Motion as a Motion for Summary Judgment. *See Troester v. Sisters of Mercy*, 328 N.W.2d 308 (Iowa 1982); Iowa Practice Series, Civil and Appellate Procedure, § 13:19.

App. 63 (MTD Brief 14, fn 5)(citations in original).

When a district court considers additional matters outside the pleadings, the reviewing court may treat a motion to dismiss as a motion for summary judgment.

See, e.g., Mormann v. Iowa Workforce Development, 913 N.W.2d 554 (Iowa 2018)(identifying three alternative approaches to review: treating the hearing as a motion to dismiss on the pleadings; reviewing the motion using summary judgment standards; or, treating the hearing as a trial on the merits on a preliminary issue)(citing *Tigges v. City of Ames*, 356 N.W.2d 503 510 (Iowa 1984)(“form must give way to substance”)).

Because Rod and Grayson can bear their burden on appeal of demonstrating that no genuine issues of material fact exist, they are entitled to an immediate dismissal of this action, regardless of the standards employed.

C. Max’s Claims Fail Under Well-Settled Iowa and Federal Law

Max asserts three counts in his petition. App. 6-8 (Trust Petition). None of them states a cause of action upon which relief can be granted.

“Petition for Accounting”

Even if error had been preserved and this claim had been timely asserted, Max has waived this argument on appeal. His brief makes no overt reference to this count. *See* Max’s Brief 5. Moreover, Max cites to no authority to support this claim, or to refute the District Court’s conclusion that it is barred by the doctrine of laches. *See* Iowa. R. App. P, 6.903(2)(g)(3)(“Failure to cite authority in support of

an issue may be deemed waiver of that issue”). *See also State v. Ryun*, 860 N.W.2d 343 (Iowa Ct. App. 2014).

More importantly, this count has no merit. Max received an accounting long after Rod stopped acting as the UTMA account custodian, and long after the account had been cleared out. App. 375 (Ruling 5). In addition to being time-barred pursuant to the doctrine of laches, the District Court correctly found that “there are no new grounds that make an accounting, at this point in time, of the UTMA account necessary.” *Id.*

“Petition to Void Transaction”

The second count seeks relief pursuant to Iowa Code § 633A.4202(2) based on Rod’s decision to change the beneficiary of the 529 account from Max to Grayson. App. 7 (Trust Petition 3). Specifically, Max requested that the District Court order the “transaction void”, and award him monetary damages. *Id.*

As the District Court correctly found:

- The 529 account is governed by section 529 of the federal Internal Revenue Code (IRC) and Iowa Code Chapter 12D (Iowa Educational Savings Plan Trust). It is not governed by Iowa Trust Code Chapter 633A
- Max lacked standing under IRC § 529 and Iowa Code Chapter 12D to challenge the management and control of the 529 account by its owner-participant
- No Iowa statutory or common law supports the proposition that a 529 account is subject to the provisions of Iowa Trust Code Chapter 633A

App. 375 (Ruling 5).

The administration of 529 plans is governed by IRC § 529 and related regulations, which are further clarified by Iowa Code Chapter 12D and related regulations described in 781 Iowa Administrative Code Chapter 16, all of which were provided to the District Court for its review. App. 188-237 (MTD Exs. N; O).

529 accounts are implemented through a participation agreement signed by the participant-owner, which are further governed by the IAdvisor529 Program Description and Participation Agreement. *See* Iowa Code §12D.3. *See also* App. 238-297 (MTD Ex. P). These participation agreements are not trust agreements, and they do not form trusts. *See* Iowa Code § 633A.1102(18)(b).⁷ Therefore, actions taken by an account owner-participant are not subject to the Iowa Trust Code.

Iowa 529 Accounts are controlled by the account owner-participant. *See* IRS Prop. Reg. §1.529-1 (c); Iowa Code §12D.1(2)(i). An “owner” is defined as “the person who ... is entitled to select or change the designated beneficiary to whom funds may be paid from the account, or to receive distributions from the

⁷ There can be no argument that a constructive trust was created, as a constructive trust is explicitly exempted from the definition of “trust” pursuant to Iowa Code § 633A.1102(18)(1).

account if no such other person is designated.” *Id.* A “participant” is defined “the person or entity that establishes an Account with the Iowa Advisor 529 Plan or his or her successor” or as an “individual, individual’s legal representative, trust ... that has entered into a participation agreement under this chapter for the advance payment of high education costs on behalf of a beneficiary.” IAdvisor 529 Participation Agreement; Iowa Code §12D.1(2)(i).

Iowa 529 accounts are administered for the benefit of a designated beneficiary. *See* IRS Prop. Reg. §1.529-1 (c); Iowa Code §12D.1(2)(c). A “beneficiary” is variously defined as the individual: (1) designated as the beneficiary when the account was created; (2) designated as the new beneficiary when beneficiaries are changed; (3) designated by the participation agreement to benefit from advance payments of higher education costs on behalf of the beneficiary; (4) receiving the benefits accumulated in the account as a scholarship and (5) for whom the account is established. *Id.*; IAdvisor 529 Participation Agreement.

The owner-participant of a 529 account retains absolute authority to change the designated beneficiary. *See* IAdvisor 529 Participation Agreement. There is no obligation under federal law, Iowa law, or the participation agreement to notify the prior beneficiary, or to obtain the prior beneficiary’s consent before making a change. *Id.*

. . . [T]he account owner of a section 529 savings account has no fiduciary duties to the beneficiary of the account. Thus the account owner could change the beneficiary or withdraw the funds himself or herself and the beneficiary would have no grounds for complaint, even if the account owner's actions clearly violated the donor's intent.

App. 298 (MTD Ex. Q.)(Susan T. Bart, *The Best of Both Worlds: Using a Trust to Make Your 529 Savings Accounts Rock*, 106 ACTEC Journal 34, 34 (Winter 2008)).

When a trust establishes a trust-owned §529 savings account for a beneficiary, the beneficiary does not receive any property or any property interest in the account. The trustee can revest the contribution (as well as its earnings), will control the timing and amount of all distributions to the designated beneficiary, and can change the beneficiary.

Id. at 310.

When a Trustee establishes a §529 savings account, generally the trustee must designate one of the trust beneficiaries as the designated beneficiary. . . . Further, the trustee, as account owner, would retain the right to change the designated beneficiary to a different beneficiary of the trust or to have the account paid to the trust as account owner.

App. 333 (MTD Ex. R.)(Susan T. Bart, *Saving for Education: Creating Educational Dynasty Trusts Using 529 Plans*. 40 ACTEC Journal 197, 212 (Winter 2014)).

Rod and JoEllen as trustees for the owner-participant of the 529 account had an unrestricted right to change the beneficiary designation. Max, as the former

beneficiary of a 529 account, has no legal right to the funds in the account, nor could he direct their use.

“Petition for Damages and Breach of Fiduciary Duties”

Max’s last claim states that he “believes Rodney has breached his fiduciary duties as trustee of Maxwell’s UTMA funds as assets as required by Iowa Code Section 633A.4202(1).” App. 7 (Trust Petition 3).

Again, this count is legally deficient on its face because the Iowa Trust Code does not govern UTMA accounts. This, too, is made explicit by the Iowa Trust Code’s definition of “trust” which provides in relevant part:

“Trust” means an express trust, charitable or noncharitable, with additions thereto, wherever and however created, including a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust. “Trust” does not include any of the following:

.....

A custodial arrangement pursuant to the uniform transfers to minors Act of any state.”

Iowa Code § 633A.1102(18)(b). It is manifestly impossible for Rod to violate a statute that does not apply pursuant to its express terms.

Administration of the UTMA account is governed by Iowa Code Chapter 565B, the Iowa version of the Uniform Transfers to Minors Account promulgated by the Uniform Law Commission in 1986. App. 140-187 (MTD Exs. L; M).

Iowa UTMA accounts are controlled by a custodian. *See* Iowa Code

§565B.1. A custodian’s duties include the following:

- observe the standard of care that would be observed by a prudent person dealing with property of another, ***and is not limited by any other statute restricting investments by fiduciaries***. *See* Iowa Code § 565B.12(2) (emphasis added)
- collect, hold, manage, invest, and reinvest property on behalf of a minor and turn the property over when the minor turns twenty-one. Iowa Code §§ 565B.12, 565B.20
- keep UTMA property separate and distinct from all other property. *See* Iowa Code §565B.12(4)
- keep records of all transactions relating to UTMA property and make such records available at reasonable intervals to the parent or the minor when the minor turns fourteen. *See* Iowa Code §565B.12(5)
- provide an accounting if requested by an interested party and ordered by the Court. *See* Iowa Code §565B.19

Iowa Code Chapter 633 and any other state laws that conflict with Iowa Code Chapter §565B do not apply to UTMA accounts. *See* Iowa Code §565B.24.

The creation of an UTMA account does not transform a UTMA account into a “trust”. *See In re Marriage of Rosenfeld*, 668 N.W.2d 840, 844 (Iowa 2003).

Because the UTMA account is not a trust, Iowa Trust Code Chapter 633A does not apply. Rod was not a “trustee” of the UTMA account, and is not subject to the fiduciary standards outlined in the Iowa Trust Code.

D. Max's Petition Did Not Provide Rod or Grayson With Sufficient Notice of Any Claims Other Than Accounting and Trust Code Claims

“Despite the liberality of our pleading rules . . . we still require that a petition give ‘fair notice’ of the claim.” *Davis v. Ottumwa Young Men’s Christian Association*, 438 N.W.2d 10, 13 (Iowa 1989)(citing *Shill v. Careage Corp.*, 353 N.W.2d 416, 420 (Iowa 1984); *Gosha v. Woller*, 288 N.W.2d 329, 331 (Iowa 1980)).

In addition to being untimely, unpreserved, and waived, Max’s claim for an accounting fails because there is no way to determine what might be involved in an accounting following the one provided in June of 2014. App. 375 (Ruling 5). By that time, Rod had already stepped down as custodian, and had provided all of the information he had. Max and Angela had cleaned out the account in November 2013.

Max’s other two claims are expressly asserted pursuant to the provisions Iowa Trust Code Chapter 633A. App. (Trust Petition 3-4). He gives no indication that he ever intended to pursue any other type of claim.

In *Peterson v. Bottomley*, 582 N.W.2d 187 (Iowa 1998), the plaintiff alleged multiple common law theories of recovery relating to the damage of a residential property. Following a bench trial, the district court found the defendant liable

under Iowa Code Chapter 558A, a theory which had not been pled by the plaintiff.

The Supreme Court of Iowa reversed, holding:

Although Iowa Rule of Civil Procedure 69(a)[now 1.402] does not require the identification of a specific theory of recovery, we have held that, **if specific theories of recovery are identified in the pleadings, it may be inferred that these are the only theories on which the plaintiff relies.**”

Id. at 188-189 (emphasis added). *See also Davis*, 438 N.W.2d at 13 (“It is clear that an ERISA claim was not in the contemplation of any of the parties at the outset.”); *Engstrom v. State of Iowa*, 461 N.W.2d 309, 313 (Iowa 1990)(“In examining plaintiffs’ pleading, we find no indication that plaintiffs provided notice that they were relying on a breach of contract claim.’”).

As in *Peterson*, Max has identified specific theories of recovery, none of which can support the imposition liability upon Rod. The District Court correctly identified the insufficiency of Max’s pleadings, and appropriately dismissed the case.

CONCLUSION

The District Court properly dismissed the claims asserted in Max’s petition and its ruling of April 18, 2018, should be affirmed in its entirety.

REQUEST FOR ORAL ARGUMENT

Rod and Grayson desire to be heard orally on all issues raised in this appeal.

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CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

1. This brief complies with the limitation on the volume of type set forth in Iowa R. App. P. 6.903(1)(g)(1). It contains 6617 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the type-face requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f). It has been prepared in a proportionally spaced typeface, using Microsoft Word 2008 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE AND FILING

I certify that on September 12, 2018, I filed this Final Brief and Request for Oral Argument with the Iowa Supreme Court through the EDMS, and served counsel for the other parties appearing in this appeal through the EDMS and email:

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