

**IN THE COURT OF APPEALS OF IOWA**

No. 0-889 / 10-0778  
Filed January 20, 2011

**IN THE MATTER OF THE ESTATE OF  
OWEETIS FRYE, Deceased**

**ROBERT D. FRYE, BENJAMIN D.  
FRYE, and HANNA M. FRYE,**  
Beneficiaries-Appellants.

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Appeal from the Iowa District Court for Buchanan County, George L. Stigler, Judge.

Beneficiaries appeal from an order denying their motion for summary judgment to remove the executor and granting the executor's motion for summary judgment. **AFFIRMED.**

Mark J. Willging and Danita L. Grant of Fuerste, Carew, Juergens & Sudmeier, P.C., Dubuque, for beneficiaries-appellants.

Thomas P. Peffer of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for executor-appellee.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ.

**DOYLE, J.**

The crux of the current dispute originates from a petition to remove Banklowa as executor of the Oweetis Frye estate. The petitioners, three beneficiaries of the estate, claim Banklowa mismanaged the estate.<sup>1</sup> After extensive discovery was conducted, the petitioners filed a motion for summary judgment seeking Banklowa's removal. Banklowa resisted and requested leave to file a cross-motion for summary judgment.

The district court granted Banklowa's motion for summary judgment and denied the petitioners' motion, effectively dismissing the petition. Under the circumstances presented to us, we agree no purpose would be served by the appointment of a successor executor at this late stage in the probate proceedings. The district court's ruling does not preclude petitioners from litigating in the probate court their pending objections to the final report, nor does the ruling preclude the adjudication in another forum of any claims petitioners may have against Banklowa. Therefore, we affirm.

***I. Background Facts and Proceedings.***

Oweetis and Wilbert Frye had two children, sons Robert and Richard. Wilbert Frye died in 1989. His will created a residuary trust. The trust was funded by the residue of Wilbert's estate, which included several real estate tracts and all stock in Pilot Grove Farm, Inc. Banklowa was appointed trustee of the trust. The net income of the trust was to be paid to Oweetis during her lifetime. Upon her death certain real estate was to go to son Robert; certain real

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<sup>1</sup> Petitioners are Robert Frye, son of Oweetis, and his children, Benjamin and Hanna Frye. For clarity, we refer to them as "the petitioners" in this opinion.

estate was to go to son Richard; the Pilot Grove Farm stock was to go to Richard; and the remainder of the trust assets were to be paid one-half to Robert and one-half to Richard.

Oweetis Frye died on February 19, 2007. Banklowa filed its final trust report in October 2007. Robert and his two children, Benjamin and Hanna Frye, filed objections to the trust report and requested Banklowa be removed as trustee. Contending the objectors lacked standing, Banklowa filed a motion to dismiss. The district court granted the motion, and the objectors appealed. This court affirmed the dismissal.<sup>2</sup>

Oweetis's will named her sons and her five grandchildren as beneficiaries.<sup>3</sup> Banklowa was appointed as executor on February 23, 2007. Robert, Benjamin, and Hanna filed a petition to remove Banklowa as executor on May 29, 2008, alleging Banklowa breached its fiduciary duties and mismanaged the estate. Banklowa filed a response on June 24, 2008, and it filed its "Executor's Final Report and Application for Discharge" the next day. The other grandchildren beneficiaries joined in Banklowa's response to the petition for removal. The petitioners also filed an objection to the final report, to which Banklowa responded. The objection remains pending in the estate.

On July 28, 2008, the petitioners filed a motion to dismiss the final report. In the meantime, Banklowa filed a supplemental response to the petition for

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<sup>2</sup> In so affirming, this court held Benjamin and Hanna had no standing to allege Banklowa breached its fiduciary duty to the trust, and, although Robert was an interested party as a remainder beneficiary of the trust, he had no standing to invoke judicial intervention in the trust case. See *In re Will of Frye*, No. 08-0775 (Iowa Ct. App. Feb. 4, 2009).

<sup>3</sup> Oweetis's son Richard preceded her in death.

removal. In an August 5, 2008 order, the district court determined the application for approval of the final report was premature because of the pendency of the application to remove the executor.

On January 5, 2009, Banklowa filed a motion for summary judgment claiming it was entitled to summary judgment with regard to the petitioners' request for an order:

- (1) Ordering Banklowa to appear and show cause why it should not be removed as Executor of the Oweetis Frye Estate;
- (2) Ordering Banklowa to deliver to a successor executor a copy of any and all records, accounts and property of the estate.

Banklowa argued "[t]here are no facts in dispute and there are no claims on the face of this case that a new Executor could pursue against Banklowa." The petitioners filed a resistance to the motion and Banklowa responded.

By an order filed April 11, 2009, the district court denied Banklowa's motion for summary judgment. In its analysis, the court stated:

Although the aforementioned facts may be clear as to the trust and the actions taken by the trustee, the overlapping role that Banklowa has played in these proceedings definitely presents a factual question for determination to be made concerning the steps necessary to protect all interests it was attempting to cover. Since [Oweetis] had suffered a stroke and was not capable of bringing about objections on her own, or changing her mind pertaining to decisions that had previously been made while her husband was alive, as it may have been prudent to appoint a guardian ad litem or attorney to represent her interest in these proceedings, thereby instructing Banklowa as her agent and the trustee of her husband's trust to make the best decisions for her as income beneficiary. To continue on with the course of conduct that had previously suited [Oweetis] may not have been financially appropriate for her given her circumstances and her medical needs. There is an issue raised in these proceedings that will need to be decided based on full evidentiary presentations. As a result, the court cannot grant summary judgment in these proceedings.

In November 2009, petitioners filed a motion for summary judgment, later amended, requesting removal of Banklowa as executor and appointment of a successor executor. Banklowa filed its resistance with a motion to allow a cross-motion for summary judgment.<sup>4</sup> Although no proposed cross-motion was attached to its filings, Banklowa's filings clearly include the substance of its cross-motion for summary judgment, the basis therefore, and the relief requested. The bank requested the court dismiss the petition and provide that any objections to the handling of the estate be heard as part of the closing of the estate or in a direct action by the petitioners against Banklowa.<sup>5</sup>

Hearing on petitioners' motion for summary judgment and Banklowa's motion to allow a cross-motion for summary judgment was held on December 22, 2009. After the petitioners' motion was fully argued, Banklowa argued for leave to file its cross-motion for summary judgment.

Thereafter, the district court entered its order granting Banklowa's "motion for summary judgment" and denying petitioners' motion for summary judgment, stating:

This estate has been pending for a substantial period of time. The issues that the [petitioners] raise are matters that could

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<sup>4</sup> Since it was less than sixty days prior to trial, Banklowa requested permission, pursuant to Iowa Rule of Civil Procedure 1.981(3), to file its motion for summary judgment.

<sup>5</sup> The petitioners assert the grounds for Banklowa's first and second motions for summary judgment are the same and the district court's denial of the first operates as issue preclusion as to the second. We disagree. Banklowa's position in its cross-motion for summary judgment is significantly different than the position it took in its first failed motion for summary judgment. In the first, Banklowa argued the petitioners had no claim because it was not guilty of mismanagement. The court found there were genuine issues of material fact on that claim such that summary judgment was not proper. In the cross-motion, Banklowa asserts the petition should be dismissed "as any claims the Petitioners believe they have can be addressed in the normal course of the Estate or in a direct action against Banklowa."

directly be litigated in an action by them against Banklowa. The estate possesses marginal assets and no purpose would be served by appointing a replacement executor in lieu of Banklowa and a new attorney for the new executor. Any matters or claims that the [petitioners] have or believe they may have against Banklowa could be litigated in a different forum with no expenses to the estate.

The petitioners now appeal.

## ***II. Scope and Standards of Review.***

Claims for removal of an executor are tried in equity. Iowa Code § 633.33 (2007); *In re Estate of Atwood*, 577 N.W.2d 60, 63 (Iowa Ct. App. 1998). But, because the ruling being appealed was made by sustaining a motion for summary judgment, our review is for errors at law. *Sieh v. Sieh*, 713 N.W.2d 194, 196 (Iowa 2006). “We examine the record to determine whether any genuine issue of material fact exists and whether the court correctly applied the law.” *Id.* The court has broad discretion in deciding whether to remove an executor. *Atwood*, 577 N.W.2d at 63. We examine the record to determine whether an abuse of discretion can be found. *Id.* at 64.

## ***III. Discussion.***

Founded upon complaints that Banklowa mismanaged the Wilbert Frye Trust and the Oweetis Frey estate, the petitioners’ petition for removal sought removal of Banklowa as executor and appointment of a successor executor. The grounds for removal of an executor are spelled out by statute, Iowa Code section 633.65, and include mismanagement of the estate and failure to perform any duty imposed by law. *Id.* at 63-64. The district court’s ruling effectively dismissed the petition for removal, but did not decide the merits of whether or not

Banklowa was guilty of mismanagement as alleged by petitioners. The court specifically left that matter open for later adjudication.

It was petitioners' motion for summary judgment and Banklowa's motion to allow cross-motion for summary judgment that came on for hearing. On appeal the petitioners first contend it was improper for the district court to have granted Banklowa's cross-motion without allowing the parties an opportunity to argue the merits of that motion. The bank acknowledges the procedural error but argues the petitioners failed to preserve error for review. We agree. The petitioners did not raise the issue before the trial court. We will not consider issues raised for the first time on appeal. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal").

The petitioners also argue the court's grant of Banklowa's motion is deficient as the court made no fact findings. The beneficiaries made no motion for enlargement of the court's findings. Iowa R. Civ. P. 1.904(2). Error was not preserved for our review. *Meier*, 641 N.W.2d at 537. Additionally, because no motion for enlargement of finding was made under rule 1.904(2), we assume as fact any unstated finding that is necessary to support the court's ruling. See *Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1983).

The final report was filed June 25, 2008, almost two and a half years ago. Since that time, the parties have engaged in extensive and sometimes contentious discovery. Banklowa asserts the estate does not have the assets to pay the cost of a new executor and new attorney because, at the beneficiaries'

request, all assets of the estate have been distributed, except for a small amount of cash which is not enough to pay ordinary fees, let alone additional fees. Petitioners have not denied these assertions. The administration of the estate is virtually complete. Disposition of the final report has been on hold for two and a half years. At this late stage in the proceedings it makes little sense or benefit, economic or otherwise, to remove Banklowa as executor and appoint another, particularly when avenues for relief remain open to the petitioners concerning their claims of mismanagement on the part of Banklowa. The petitioners present no compelling argument to the contrary.

Presented with unusual circumstances, the district court made a pragmatic decision in granting Banklowa's motion for summary judgment dismissing the petition to remove. Not having reached the merits of the controversy, the petitioners are still free to litigate their claims. We find no abuse of discretion on the part of the district court in granting Banklowa's cross-motion for summary judgment and denying the petitioners' motion for summary judgment as being moot.

**AFFIRMED.**