

IN THE COURT OF APPEALS OF IOWA

No. 0-894 / 10-0959
Filed February 23, 2011

**IN THE MATTER OF THE ESTATE
OF FERN MORIS, Deceased,**

**SHARON HAGEN, HELEN SMITH,
KENNETH WILHITE, and LORNA WILHITE,**
Plaintiffs-Appellants,

vs.

**JOSEPH P. MORIS INTER-VIVOS
REVOCABLE TRUST and All Other
Known and Unknown Beneficiaries,**
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla,
Judge.

The plaintiffs appeal from the district court's dismissal of their claims.
REVERSED AND REMANDED.

Pressley Henningsen of Riccolo & Semelroth, P.C., Cedar Rapids, for
appellants.

Ann M. Klostermann McCrea of Elderkin & Pirnie, P.L.C., Cedar Rapids,
Jessica A. Doro of Bradley & Riley, P.C., Cedar Rapids, and Gary J. Streit of
Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellees.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

The beneficiaries under the last will and testament of Fern Edna Moris appeal the district court's dismissal of their claim against the Joseph P. Moris Inter-Vivos Revocable Trust and their claim seeking to set aside Fern's will. Acknowledging procedural errors, they assert the proper remedy was for the district court to grant their motion to amend and transfer their consolidated petition to the probate docket. We agree, and reverse and remand.

Background Facts and Proceedings. From the limited record before us, we set forth the basic facts pertinent to this appeal. Joseph and Fern Moris were married in 1962. No children were born of the marriage, but each had nieces and nephews who are the ultimate and competing beneficiaries of the current action. Fern's three nieces and one nephew ("the Beneficiaries") have alleged that Fern was incompetent to execute her last will and testament as well as an intervivos trust agreement, both bearing the date of April 22, 2003. They claim she was unduly influenced by Joseph, and as a result he fraudulently induced her to transfer assets belonging to her to his own intervivos trust. Joseph served as trustee of Fern's trust.

Joseph died on October 31, 2006, survived by Fern who died on January 8, 2009. One of Fern's nieces, Sharon Hagen, was nominated in Fern's will to be the executor of her estate. However, anticipating a challenge to Fern's will and possibly Fern's trust, the district court on June 23, 2009, appointed U.S. Bank N.A. to serve as the executor of Fern's estate, and admitted Fern's will to probate. The successor trustee after Joseph's death, Wells Fargo Bank, was

“appointed and ordered to defend the will herein and also defend the trust from any challenges to its validity or powers.”

Notice of the admission of the will to probate was published on August 7 and August 14, 2009. The second notice regarding the trust was published on July 9, 2009. On August 12, 2009, the Beneficiaries filed an action in district court challenging the validity of Fern’s will and trust documents. The action was captioned:

In the Matter of the Estate of Fern Moris, Deceased.
To Set Aside Decedent’s Will
Will Admitted to Probate:

Sharon Hagen
Helen Smith
Kenneth Wilhite
Lorna Wilhite, Plaintiffs

vs.

Joseph P Moris Inter-Vivos Revocable Trust;
and all other known and unknown beneficiaries, Defendants

Probate No. _____
Petition at Law to Set Aside and Contest Probate of Will
and to Challenge Creation of Trust

The “Probate No.” was stricken by the clerk of court and a civil case number was assigned as CVCV66478. The petition alleged in “Division One: Will Contest,” Fern’s lack of testamentary capacity, undue influence, and fraud in the inducement by Joseph. In “Division Two: Trust Contest” the same general allegations were made.

Timely service was made on Wells Fargo, which was also the trustee of Joseph’s trust. Wells Fargo then filed a pre-answer motion to dismiss asserting the action should have been filed in the probate proceedings; the trust contest

was not properly filed; the will contest and trust contest should have been filed separately; Joseph's trust was not a proper defendant to either the will or trust action. On September 30, 2009, the Beneficiaries resisted the motion to dismiss. They also sought leave to amend their petition by adding additional defendants—the trustee of Fern's trust, Wells Fargo, as well as what appears to be the individual beneficiaries of Joseph's trust. In addition, they sought, "to the extent the Court believes it's necessary, separate the will and trust contests into separate actions," while anticipating a later motion to consolidate the actions in the interest of judicial economy. The defendants replied in support of their motion to dismiss and resisted the Beneficiaries' motion for leave to amend their petition. On October 12, 2009, the Beneficiaries replied to defendant's resistance to motion for leave to amend the petition, and attached a proposed case caption sheet, with the appropriately named defendants and the segregated will and trust contests. The defendants subsequently resisted the motion to consolidate.

A hearing was held on December 18, 2009, with a ruling filed on May 20, 2010, dismissing the Beneficiaries will contest because it was not filed in the probate proceedings. As that petition was dismissed, the motion to consolidate was denied. The trust contest was also dismissed for failure to comply with the requirements of the trust code, namely Iowa Code sections 633A.3108 and 633A.3109 (2009). After having dismissed both the will contest and the trust contest, the district court then denied the Beneficiaries' motion to amend as moot. The Beneficiaries appeal.

Standard of Review. We review a motion to dismiss for errors at law. *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009) (citing *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724, 728 (Iowa 2008)).

The Will Contest. The Beneficiaries argue the district court erred by dismissing the lawsuit rather than simply acknowledging the procedural missteps, granting the motion to amend pleadings and allowing the case to be transferred to the probate docket. They further argue the trust action should not have been dismissed as they properly filed the trust contest and complied with the statutory requirements. We agree with the Beneficiaries.

Several code sections come into play in review of the procedures involved in our review. Iowa Code section 633.308 provides: “Any interested person may petition to set aside the probate of a will by filing a written petition in the probate proceedings.” This allowed the Beneficiaries the right to contest the admission of Fern’s will to probate.

Next, Iowa Code section 633.309 directs how and when such a petition should be filed by providing in pertinent part:

An action to contest or set aside the probate of a will must be commenced in the court in which the will was admitted to probate within . . . four months from the date of second publication of notice of admission of the will to probate.

The statutory time to file this will contest ran on December 14, 2009, four months after the second notice of publication which occurred on August 14. The Beneficiaries filed their action on August 12, actually in advance of the second publication notice.

Although the original petition indicates it was intended to be filed in the probate action, it was altered by the clerk of court and a civil docket number was assigned. When the defendants' motion to dismiss noted the error, the Beneficiaries sought to amend their pleading by having the district court transfer the case to the probate docket. This amendment was filed on September 30, still well within the four-month time frame. See Iowa Code § 633.309. As the Beneficiaries argued in their September 30, 2009 resistance to the motion to dismiss and their motion to amend, "This was merely a function of the clerk's administration and not substantive. If necessary, the case should merely be renumbered, not dismissed."

An improper filing does not strip the court of jurisdiction, as jurisdiction is in the district court, but the court maintains *separate dockets* for civil and probate cases. *Woodbury Cnty. Attorney v. Iowa Dist. Ct.* 448 N.W.2d 20, 21 (Iowa 1989). As noted in *Estate of Young*, 273 N.W. 2d 388, 392 (Iowa 1978), "a mere procedural irregularity . . . does not go to the court's jurisdiction." Moreover, Iowa Code section 611.7 provides the remedy for an improperly filed action: "An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer to the proper docket." In addition, section 611.8 provides, "Such error may be corrected by the plaintiff without motion at any time before the defendant has answered, or afterwards on motion in court."

We agree with the Beneficiaries that the district court should have granted the motion to amend to allow the case to be properly docketed in the probate

court. The district court should have also allowed the amendment as to adding additional defendants. Iowa Code section 633.312 provides:

In all actions to contest or set aside a will, all known interested parties who have not joined with the contestants as plaintiffs in the action, shall be joined with proponents as defendants. When additional interested parties become known, the court shall order them brought in as party defendants.

The Beneficiaries set forth the proper defendants in their timely motion to amend as well as attaching a document indicating the proper captioning of the will and trust contests. We therefore reverse the district court's dismissal of the Beneficiaries' motion to amend and dismissal of the will contest.

The Trust Contest. Next the Beneficiaries appeal the district court's dismissal of the trust contest. In its ruling, the district court set forth the full text of Iowa Code sections 633A.3108 and 633A.3109 but then simply concluded, "Nowhere in CVCV066478 have the beneficiaries shown that they have complied with the requirements of §§ 633A.3108 and 633A.3109."

As with the will contest, the defendants assert the trust contest was not filed in the proper court, that is under the probate docket. They further assert that notice of the trust contest was not provided to all necessary parties and was improperly combined with the will contest. What is missing from defendants' argument is that the Beneficiaries attempted to correct the initial procedural missteps with their filing of the motion to amend. Attached to the motion to amend was a proposed caption sheet, which included additional defendants to the trust contest. However, as the motion to amend was not granted, all of the corrective measures proposed by the Beneficiaries were essentially foreclosed.

As we have previously determined the motion to amend should have been granted, we therefore grant the Beneficiaries the remedy they seek. We reverse and remand with instructions to transfer the will contest and trust contest to the probate docket, allow the additional defendants to be named and allow the cases to go forward on the merits.

REVERSED AND REMANDED.