IN THE COURT OF APPEALS OF IOWA

No. 1-856 / 11-0094 Filed January 19, 2012

IN THE MATTER OF THE ESTATE OF KENNETH PULLEN, Deceased

FRANKLIN PULLEN, JODIE PULLEN SMITH BENNETT, ALLAN SEARL, and SHEILA RUNYON WILCOXSON,

Intervenors-Appellants.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Following settlement of a wrongful death action in Nebraska, surviving adult children appeal the lowa district court's distribution of wrongful death proceeds to decedent father's surviving spouse and minor children. **AFFIRMED** IN PART, REVERSED IN PART, AND REMANDED.

Alan O. Olson of Olson Law Offices, Des Moines, and George Stevens, Shenandoah, for appellants.

John M. French of Law Offices of John M. French, Council Bluffs, and John C. Rasmussen of Peters Law Firm, P.C., Council Bluffs, for appellees.

Heard by Danilson, P.J., and Tabor and Mullins, JJ.

DANILSON, P.J.

Following settlement of a wrongful death action in Nebraska, four of the decedent's surviving adult children appeal the Iowa district court's distribution of wrongful death proceeds to his surviving spouse and other children. The district court held Iowa had the most significant relationship with the dispute and therefore Iowa law should control the distribution. The objecting children contend the district court erred in applying Iowa law, rather than Nebraska law, to distribute the decedent's wrongful death proceeds. The objecting children also argue that even if Iowa law applies, the district court erred in its allocation of the wrongful death proceeds. Upon our review, we conclude the district court erroneously took judicial notice of Nebraska law, but properly applied Iowa law. We also modify the district court's distribution of benefits to the surviving spouse as the award was not supported by the evidence. We therefore reverse the district court's order in part and remand for further proceedings consistent with this opinion.

I. Background Facts and Proceedings.

In September 2004, Kenneth Pullen suffered a heart attack while at his home in Villisca. He was first taken to Montgomery County Hospital in Red Oak and then transferred to Methodist Hospital in Omaha, Nebraska. Kenneth died several days later while undergoing a "fairly routine" surgery at Methodist Hospital, when air entered his coronary artery system. He was fifty-three years old. He was survived by his spouse, Vicki Pullen; their minor children, Brittney and Courtney; their adult child, Ryan; and four adult children from a prior

marriage, Frank, Jodie, Allan, and Sheila. The adult children, except Ryan, are the appellants in this case.

Kenneth died without a will. Vicki opened a probate estate in Pottawattamie County and was appointed administrator. In her representative capacity as administrator, Vicki filed a wrongful death and medical malpractice action in Nebraska district court under the Nebraska Medical-Hospital Liability Act¹ against Kenneth's treating physician and various Nebraska medical facilities.² The wrongful death claim was settled in February 2010 for a confidential amount. Vicki filed an application for authority to settle the claim with the lowa district court. The district court approved the terms of the settlement. Because of the confidentiality of the settlement, it is unclear whether deductions were made for court costs and attorney fees. Regardless, the remaining amount of the settlement is currently the only asset in dispute.

Vicki did not file a petition for distribution in Nebraska.³ Instead, she filed an application to distribute the settlement via Iowa probate administration proceedings, pursuant to Iowa Code section 633.336 (2009). Vicki proposed a distribution in which Frank, Jodie, Ryan, Brittney, and Courtney would each

¹ The provisions of the Nebraska Medical-Hospital Liability Act are set forth in Nebraska Revised Statutes sections 44-2801 through 44-2855.

² An lowa lawsuit was filed the following day, but was subsequently dismissed without prejudice.

³ Under Nebraska law, the class of persons entitled to recover damages in a wrongful death action includes the widow and next of kin. Neb. Rev. Stat. §§ 30-810; 44-2819. Unlike lowa law, the recovery does not become property of the decedent's estate. *Compare id.* at § 30-810, *with* lowa Code § 633.336. Further, unlike lowa law, Nebraska permits potential heirs to recover only for pecuniary losses. *Compare* Neb. Rev. Stat. §§ 30-810 (permitting recovery for amount of damages actually sustained); 44-2819 (same), *with* lowa Code § 633.336 (permitting recovery for "loss of services and support"). Under Nebraska law, the court is directed to distribute the proceeds, following a hearing, "in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons." Neb. Rev. Stat. § 30-810.

receive \$10,000; Allan and Sheila would receive nothing; and the remainder would be distributed to her as the surviving spouse. Frank, Jodie, Allan, and Sheila (the objecting children) answered the application and objected to the proposed distribution. In June 2010, the district court granted the objecting children's motion to continue hearing to conduct discovery.

In September 2010, a trial was held to determine the apportionment of the settlement monies. At the close of the evidence, the district court ordered the parties to file post-trial briefs "in lieu of closing arguments." The court further instructed that only once it had received the post-trial briefs, would it then file a written ruling. In their closing brief, the objecting children took the position that distribution of the wrongful death proceeds should be determined under Nebraska law.

In November 2010, the district court issued an order approving Vicki's proposed distribution. The court's order took judicial notice of Nebraska law, but found lowa had the most significant relationship with the dispute because the parties were domiciled in lowa. Accordingly, the court ordered lowa law should control the distribution of the wrongful death proceeds. The objecting children subsequently filed a motion to amend or enlarge findings and conclusions, which the court overruled. The objecting children now appeal.⁴

II. Standard of Review.

This matter was tried before the district court in probate as a proceeding in equity. Therefore, our review is de novo. Iowa Code § 633.33; see *In re Estate* of *Roethler*, 801 N.W.2d 833, 837 (Iowa 2011). We will give weight to the trial

⁴ Vicki filed a cross-appeal, which was subsequently dismissed.

court's findings of fact, especially those involving the credibility of witnesses, but we are not bound by them. See Iowa R. App. P. 6.904(3)(*g*). In addition, we are not bound by the district court's conclusions of law. *Estate of Roethler*, 801 N.W.2d at 837.

III. Judicial Notice of the Choice of Law Issue.

The objecting children argue the district court erred in ordering the distribution of wrongful death settlement proceeds pursuant to lowa law "when the wrongful death action was based on Nebraska law." In essence, they argue the proceeds should have been distributed not to the administrator but directly to persons entitled to the damages according to Nebraska law. The objecting children further contend the district court's distribution scheme for the wrongful death proceeds conflicts with applicable Nebraska law.

We do not reach this issue, because we first must consider Vicki's contention that the objecting children failed to plead and prove Nebraska law necessary for the district court to take judicial notice of Nebraska law. Our supreme court has instructed that it is not sufficient to merely plead the applicability of foreign law; it must also be proven. *Pennsylvania Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 810 (Iowa 2002); *In re Estate of Allen*, 239 N.W.2d 163, 169 (Iowa 1976). "A party relying on foreign law may ask the court to take judicial notice of foreign statutory law and may introduce into evidence statutes or

⁵ Vicki also argues that the objecting children first advanced an argument asserting application of Nebraska law in a post-trial brief, yet continued to advance application of Iowa law in a post-trial motion to enlarge or amend findings of fact and conclusions of law. However, we conclude the objecting children are not bound by a single argument, but may profess alternative arguments.

cases to prove the foreign law." *Simoni*, 641 N.W.2d at 810; *see also* Iowa R. Civ. P. 1.415 (setting out procedure for judicial notice of foreign statutes).

Vicki is correct that the objecting children first advanced their argument asserting Nebraska law in their post-trial brief, where they took the position that distribution of the wrongful death proceeds should be determined under Nebraska law. The objecting children point out the district court specifically ordered the parties to file post-trial briefs "in lieu of closing arguments." And the district court subsequently ruled the objecting children, through their post-trial brief, "had sufficiently cited Nebraska law and asserted that Nebraska law should apply."

We disagree. "Citation to foreign opinions in a party's brief is not adequate because it is not the introduction of evidence." *Simoni*, 641 N.W.2d at 811. Here, the choice-of-law question with which we are confronted arose in the context of a post-trial brief. Therefore, the parties introduced no evidence, and the issue was not tried by consent of the parties. *See* lowa Rs. Civ. P. 1.402 (outlining general rules of pleadings); 1.457 (establishing that a party can consent, expressly or impliedly, to a trial on issues not directly raised in the pleadings). Perhaps more importantly, we observe a post-trial brief is not a pleading, the objecting children's answer did not reference Nebraska law, and therefore Nebraska law was never properly pled. Iowa R. Civ. P. 1.401;⁷ see

⁶ We observe, however, that Iowa Rule of Civil Procedure 1.415 permits judicial notice to be taken of another state's statute if the statute is properly designated in the pleadings.

lowa Rule of Civil Procedure 1.401 provides:

There shall be a petition and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a cross-petition, if a person who was not an original party is

also 11 Barry A. Lindahl, *Iowa Practice Series*, *Civil & Appellate Procedure*, § 10:3, at 10-11 (2011 ed.) ("[T]he primary purpose of pleadings under the rules is to give the adverse party fair notice of the claim asserted."). Thus, until the objecting children's post-trial brief was filed, neither Vicki nor the court was aware of the claim asserting Nebraska law should be applied to distribute the proceeds.

The objecting children further argue Vicki's contention the district court should not have taken judicial notice of Nebraska law was not properly preserved for our consideration because Vicki dismissed her cross-appeal raising that issue. We disagree, however, because the district court nevertheless applied lowa law and the objecting children now challenge that determination by claiming Nebraska law applies. Vicki is entitled to support the application of lowa law for any reason previously argued, including the court's impermissible judicial notice of Nebraska law. See Duck Creek Tire Serv., Inc. v. Goodyear Corners, L.C., 796 N.W.2d 886, 893 (lowa 2011) ("It is well-settled law that a prevailing party can raise an alternative ground for affirmance on appeal without filing a notice of cross-appeal, as long as the prevailing party raised the alternative ground in the district court."). As Vicki's post-trial brief alleges, "[o]bjectors have not pled application of Nebraska law."

We agree. Nebraska law was not properly pled, and judicial notice should not have been taken by the district court. Under these circumstances, the issue

summoned under the provisions of rule 1.246; and an answer to crosspetition, if a cross-petition is served.

⁸ Vicki argues that the objecting children have not preserved error on any issue claiming that Nebraska law is controlling, due to their failure to plead Nebraska law. However, we observe the district court did rule upon the issue, and we therefore conclude the issue was properly preserved for our review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (lowa 2002).

of Nebraska law is not rightly before us, and we must apply lowa law to resolve this dispute. See Simoni, 641 N.W.2d at 811. Moreover, even if Nebraska law should have been applied to these facts, because the foreign law was not pled or proved, "our conflict-of-law rules require us to assume the foreign law is the same as lowa law." Talen v. Employers Mut. Cas. Co., 703 N.W.2d 395, 409 (lowa 2005).

IV. Application of Iowa Law.

The objecting children contend the court's distribution is incorrect because, in this case, "no award of damages was made for loss of services and support," but rather, the administrator "simply settled for a lump sum." The objecting children allege that, pursuant to lowa Code section 633.336, when a settlement is made without a specific award of damages for loss of services or support, the settlement proceeds should be distributed as personal property of the estate. That section provides:

When a wrongful act produces death, damages recovered as a result of the wrongful act shall be disposed of as personal property belonging to the estate of the deceased; however, if the damages include damages for loss of services and support of a deceased spouse, parent, or child, the damages shall be apportioned by the court among the surviving spouse, children, and parents of the decedent in a manner as the court may deem equitable consistent with the loss of services and support sustained by the surviving spouse, children, and parents respectively. Any recovery by a parent for the death of a child shall be subordinate to the recovery. if any, of the spouse or a child of the decedent. If the decedent leaves a spouse, child, or parent, damages for wrongful death shall not be subject to debts and charges of the decedent's estate, except for amounts to be paid to the department of human services for payments made for medical assistance pursuant to chapter 249A, paid on behalf of the decedent from the time of the injury which gives rise to the decedent's death up until the date of the decedent's death.

Iowa Code § 633.336.

The wrongful death claim was filed by the legal representative of Kenneth's estate, Vicki, in her capacity as administrator. Prior to an amendment to section 633.336 in 1976, our supreme court observed in *Egan v. Naylor*, 208 N.W.2d 915, 918 (Iowa 1973), that the surviving spouse and children have no cause of action for loss of services and support in a wrongful death action; the claim belongs to the estate. The court also acknowledged, "[i]t is anomalous that our statutes confer the right to recover for loss of services and support of a deceased spouse and parent on the decedent's estate rather than on those who incurred the loss." *Egan*, 208 N.W.2d at 918.

Our supreme court again discussed the inequity that could occur in the law as it existed before the 1976 amendment in *In re Estate of Johnston*, 213 N.W.2d 536, 539 (lowa 1973) by stating, "[u]nquestionably by statutory amendment the court or jury could be empowered to determine a proper allocation of damages between the estate and those suffering a loss of decedent's services and support." Subsequently, the legislature amended section 633.336 by inserting language consistent with that set forth by the court in *Estate of Johnston*, 213 N.W.2d at 539. *See* 1976 Session, 66th G.A., ch. 1227, § 4. As the court observed after the amendment, damages for wrongful death, "recovered by an administrator, are to be distributed by the trial court under section 633.336." *Audubon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R. Co.*, 335 N.W.2d 148, 151-52 (lowa 1983).

We acknowledge that section 633.336 provides that the wrongful death damages are to be apportioned "if the damages include damages for loss of

services and support of a deceased spouse, parent or child." Where a lump sum settlement is received, as here, the question becomes whether we are able to conclude the lump sum settlement includes damages for loss of services and support. To resolve this issue, we observe the court is empowered pursuant to section 633.336 to equitably apportion the proceeds, whereas such apportionment would be unnecessary if the settlement delineated the specific amounts paid for such a loss. Thus, we conclude the legislature must have intended to distribute proceeds in a manner equivalent to each person's loss even if the settlement did not specifically define the amount paid for each loss. See Egan, 208 N.W.2d at 918 (observing inequities in the law prior to the amendment of section 633.336); Estate of Johnston, 213 N.W.2d at 539 (also noting inequities in prior law).

Moreover, the Nebraska wrongful death action was initiated by

Vicki Pullen, individually, as parent and natural guardian of Brittney Cole Pullen, a minor, and Courtney Anne Pullen, a minor, and as administrator of the Estate of Kenneth Pullen, deceased; Jodie Pullen Smith; Franklin Carl Pullen; and Ryan Joseph Pullen.

Absent evidence to the contrary, we can only conclude the settlement sum was paid for the elements of damage each sought in the petition. Accordingly, we conclude that although the administrator simply received a lump sum that did not include a specific amount set aside for loss of services or support, the court was authorized to enter an equitable award to Kenneth's surviving spouse and children consistent with their respective loss of service and support. Iowa Code § 633.336.

The objecting children also make an alternative argument asserting application of Nebraska law to the distribution of the proceeds grounded upon our supreme court's holding in In re Estate of Coe, 130 Iowa 307, 308-09, 106 N.W. 743, 743-44 (1906). In Estate of Coe, the court ruled the Illinois wrongful death statute determined the distribution of settlement proceeds procured from an Illinois wrongful death action for an Iowa resident killed in a railroad accident that occurred in Illinois. 130 lowa at 307-08, 106 N.W. at 743-44. The court first recognized the lex loci delicti rule, in which "[t]he right to recover in [wrongful death cases] depends solely on the statute of the state where the wrongful act is committed." 130 lowa at 308-09, 106 N.W. at 743. The court further observed, however, that "a recovery in a jurisdiction, other than where the liability arises, will not justify a distribution of the fund not in accordance with the statute creating the right." 130 Iowa at 309, 106 N.W. at 744 (emphasis added); see also In re Estate of Williams, 130 Iowa 558, 561, 107 N.W. 608, 612 (1906) ("[W]here a statute provides for the recovery of damages for death wrongfully occasioned, the moneys collected are payable to the persons, and in the proportions provided by such statute, without regard to the law of domicile of the beneficiaries." (emphasis added.)).

Vicki argues *Estate of Coe* was since overruled by lowa's adoption of the "most significant relationship" methodology for choice of law issues, as set forth in the Restatement (Second) Conflict of Laws. *See Veasley v. CRST Int'l, Inc.*, 553 N.W.2d 896, 897 (Iowa 1996); see also Berghammer v. Smith, 185 N.W.2d 226, 231 (Iowa 1971); *Fabricius v. Horgen*, 132 N.W.2d 410, 414-16 (1965). However, we find it unnecessary to resolve the issue of whether *Estate of Coe* or

some of its principles remain valid law today. Even if the principles in *Estate of Coe* apply, and Iowa law requires the distribution of proceeds pursuant to Nebraska law, because Nebraska law was not properly pled, we are unable to take judicial notice of that state's law, and we must presume Nebraska law is the same as Iowa law. *See Talen*, 703 N.W.2d at 409. Thus, we apply Iowa Code section 633.336 to determine the recipient of the proceeds.

V. Distribution under lowa Law.

The objecting children argue that even if lowa law applies, the district court erred by allocating the wrongful death settlement proceeds first to the loss of services and support the administrator (Vicki) and minor children Courtney and Brittney suffered by Kenneth's death, and next for spousal consortium, followed by parental consortium, and finally as personal property of the estate. We acknowledge in determining its distribution, the district court stated, "The first apportionment should be for the present value of the amount of financial support that [Kenneth] would have contributed to Vicki and his dependent children but for his death." However, we decline to take issue with the district court's analysis or methodology in reaching its ultimate conclusions, because unless the overall distribution is inequitable, no party is aggrieved by the ruling.

The objecting children further argue the district court's distribution was inequitable. Specifically, they contend the district court erred in awarding \$169,332 to Vicki for loss of spousal consortium because such award was not supported by the evidence presented to the court. This award was broken down into two parts: \$119,332 for loss of household services and \$50,000 for the intangible component of the consortium claim. The objecting children take issue

with both of these allocations. Allan and Sheila also argue it was inequitable to deny them any award, and Frank and Jodie contend they were entitled to a greater proportional share of the proceeds.

To determine whether the distribution is equitable, we first observe section 633.336 references the "loss of services and support," and identical language is used in lowa Code section 613.15 to limit and define the measure of recovery for the death of a spouse or parent. We also note our supreme court has interpreted the term "services" for purposes of section 613.15 to include "intangible consortium damages." *Kulish v. W. Side Unlimited Corp.*, 545 N.W.2d 860, 862 (lowa 1996). And a person's spouse, as well as adult and minor children, may recover consortium damages upon the wrongful death of the spouse or parent. *Id.* We apply the supreme court's definition of "services," as used in section 613.15, to our analysis of the district court's allocations pursuant to section 633.336.

We also observe in this case the district court made separate allocations for the loss of services and the loss of support. Other than the methodology used by the district court, the objecting children have limited their specific complaint to the court's allocation for the loss of services, or intangible consortium damages.

In determining the allocations for loss of services, the district court made extensive findings and conclusions that we find unnecessary to repeat here. However,

[i]n equity it is our duty in a de novo review to examine the whole record and adjudicate rights anew on those propositions properly

presented, provided issue has been raised and error, if any preserved in the course of the trial proceedings.

In re Estate of Cory, 184 N.W.2d 693, 695-696 (lowa 1971).

Indeed, there is evidence in the record Kenneth was giving serious consideration to leaving Vicki after eighteen years of marriage, although they had not previously separated. There was evidence Kenneth and Vicki did not have a loving relationship; there were arguments between them and name-calling by both. In addition, the evidence did not support that Kenneth performed household chores and services as suggested by the expert's report the district court relied on in reaching its determination as to the amount of loss Vicki suffered for Kenneth's household services.

We observe that Kenneth was 53 years of age and at the time of his demise and had a life expectancy of 26.52 years. Vicki's life expectancy was 35.43 years at the time of Kenneth's death. Considering the evidence presented to the district court, we find a more equitable distribution to Vicki for loss of services to be \$100,000, rather than \$169,332. We further find Frank, age thirty-two; Jodie, age thirty-one; and Ryan, age twenty-six; should each receive \$20,000, rather than \$10,000. Because Brittney, age twenty-two; and Courtney, age twenty-one; are younger than the other siblings and were minors when they suffered the loss of their father, we direct they receive \$30,000. We acknowledge Kenneth's personal contact and communication with his children differed, but sometimes a father's advice, support, or companionship may be more meaningful to a child who only infrequently receives it. Thus, we have not

fixed the children's losses solely upon their respective amount of contact or communication with Kenneth.

We affirm the conclusion of the district court that Allan and Sheila should be omitted from the distribution. We appreciate the fact that Sheila and Allan acknowledged Kenneth as their father, attended his funeral, expressed their affection for Kenneth, and experienced the loss of a parent. However, the evidence in the record does not support that Allan and Sheila financially relied on Kenneth or benefited from his society and companionship. See, e.g., Audubon-Exira Ready Mix, Inc, 335 N.W.2d at 152. Moreover, they were not parties to the Nebraska lawsuit. Accordingly, the district court's decision not to distribute proceeds to Allan and Sheila for loss of support or services is proper under these facts.

VI. Conclusion.

Upon our review of the issues raised, we affirm in part and reverse in part the district court's distribution of Kenneth Pullen's estate. We remand for proceedings consistent with this opinion.⁹

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

⁹ As ordered by the district court, any remaining balance of the net wrongful death settlement proceeds after payment of the distributions for loss of support and services shall be distributed as personal property in accord with sections 633.212 and

633.219.