

**IN THE COURT OF APPEALS OF IOWA**

No. 2-1050 / 09-1418  
Filed February 13, 2013

**IN THE MATTER OF THE  
ESTATE OF SHIRLEY J.  
ANDREWS, Deceased.**

**DENNIS ANDREWS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Ruth B. Klotz, Judge.

An executor appeals from probate court money judgments against him.

**REVERSED AND REMANDED.**

Thomas G. Fisher, Jr., of Parrish, Kruidenier, Dunn, Boles, Gribble,  
Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Kenneth W. Rittgers, Des Moines, for appellee Estate of Shirley J.  
Andrews.

Felicia B. Rocha, Urbandale, for appellee Lynn Andrews.

Considered by Eisenhauer, C.J., Vogel, J., and Miller, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**MILLER, S.J.**

Dennis Andrews, removed as executor of the estate of his mother, appeals from probate court money judgments against him. We reverse and remand.

**I. BACKGROUND FACTS AND PROCEEDINGS**

Shirley Andrews died in September 2007. She had given her son, Dennis Andrews, a power of attorney in May 2007. Her will nominated Dennis to serve as executor, without bond. Dennis was appointed, qualified, and was issued letters of appointment as executor. He filed a designation of attorney Kenneth Rittgers as his attorney to assist in the administration of the estate. See Iowa Code §§ 633.3(17) (2009) (defining a “fiduciary” as including an executor), .82 (providing that the designation of the attorney employed by the fiduciary is to be filed in the estate proceeding).

Lynn Andrews, Dennis’s brother and a beneficiary under Shirley’s will, apparently believed that Dennis had misused his power of attorney and had not properly accounted for the proceeds of a loan, secured by a mortgage on real estate owned by Shirley, that Dennis had secured shortly before Shirley’s death. In April 2008 Lynn filed a motion requesting that Dennis be required to provide an accounting of the proceeds of the loan and to disclose all actions taken by him under the power of attorney. In July 2008 Lynn filed a motion asserting a belief that Dennis had breached his fiduciary duty to preserve assets of the estate, and requesting that Dennis be removed as executor.

The probate court held a hearing on two days in September 2008. Although Dennis had not revoked Rittgers's designation as his attorney, and Rittgers had not withdrawn as attorney for Dennis, Dennis was represented at the hearing by attorney James Sayre. As noted in the court's resulting order filed October 23, 2008, the hearing was only "on the Motion of Lynn Andrews for the Removal of Dennis Andrews as Executor of the Estate of Shirley Andrews." In its order the court made findings of fact as to certain financial transactions in which Dennis had engaged; concluded that Dennis had "mismanaged this estate in the manner in which he has handled the funds of the estate"; and further concluded there were "unresolved issues" concerning whether Shirley had authorized Dennis to engage in several of the financial transactions that had benefitted him.

The court ordered that Dennis was removed as executor but not discharged from responsibility until the successor executor had been able to review records and provide an accounting and a final report with recommendations as to matters in controversy. The court appointed Craig Rogers as successor executor. It directed him to "determine the disposition of" certain bank accounts. It further directed him to verify whether Dennis was the named beneficiary of a certain life insurance policy, was a joint owner of a certain certificate of deposit and the circumstances surrounding the name or names in which it had been placed, who became the owner of a policy on the life of Lynn at Shirley's death, and to "investigate the matter of the gifts reportedly authorized by Shirley to Dennis as offsets to earlier gifts to Lynn."

Rogers qualified as executor and was issued letters of appointment. On February 13, 2009, Rogers filed a "Financial Report of Executor." The report stated that Dennis had removed a total of \$35,181.49 from the estate. In further relevant part the report stated: "This court should treat this Report as a Petition for a Hearing, set this matter for hearing and prescribe notice." The prayer for relief stated: "WHEREFORE, THIS EXECUTOR PRAYS, that this Court enter an Order Setting the Time and Place of Hearing on this Report and enter other such direction as the cause of justice requires."

On March 27, 2009, Rittgers, identifying himself as "attorney for the within Estate," filed an application identifying requested fees and expenses for Rogers and for himself and providing an accounting of funds received by Rogers. The application requested a hearing on fees and expenses, on claims that had been filed, and on Rogers's financial report. On the same day the probate court entered an order setting hearing on "the Application of the Executor's Attorney" for May 5, 2009.

Lynn filed a motion on April 20, 2009, seeking continuance of the May 5 hearing. On that same date the probate court entered an order continuing the hearing to June 3, 2009. An "Affidavit of Mailing" filed April 27, 2009, shows that a copy of the motion to continue and the order to continue were served on Dennis. Nothing, however, indicates that a copy was served on either attorney Sayre, who had represented Dennis at the hearing in December 2008, or attorney Rittgers, who continued to be the attorney of record for Dennis in

Dennis's capacity as an undischarged executor with limited but continuing responsibilities.

The probate court held a hearing on June 3, 2009. Neither Dennis nor attorney Sayre attended. The court reporter's list of "Appearances" indicates the hearing was attended by attorney Rittgers, whom the reporter refers to as the "attorney for probate"; executor Rogers; Lynn's attorney, Felicia Rocha; and attorney Thomas Fisher.<sup>1</sup>

The June 3 hearing was not an evidentiary hearing. The court and the persons attending discussed the evidence that had been received at the hearing on the motion to remove Dennis, the financial report that Rogers had filed, and the application for fees and expenses filed by Rittgers. Rittgers stated that it had been "almost impossible" for Rogers to reconcile the accounts that had been used by Dennis. The court and the parties who were present discussed the fact that Dennis had filed for bankruptcy and that the bankruptcy court was awaiting the possibility of a judgment against Dennis. The court noted that unresolved issues remained, including ownership and entitlement to the proceeds, following Shirley's death, of the life insurance policy she had owned covering Lynn as the insured.

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<sup>1</sup> Although the court reporter lists Fisher as "counsel for Dennis," on Fisher's later motion the probate court entered an order to correct the record. The order provides that Fisher did not appear at the hearing, and did not represent Dennis in this case until the notice of appeal. The record seems to indicate that the person identified as Fisher was someone representing the State of Iowa as to a claim filed on behalf of the Iowa Department of Human Services.

On July 28, 2009, the probate court entered an order indicating it would enter a judgment against Dennis within the next thirty days. The record on appeal does not show to whom, if anyone, a copy of this order went.

On August 14, 2009, the probate court entered three money judgments, each including interest, against Dennis. The first is for “\$48,478.39 for the Estate of Shirley Andrews.” The second is for “\$438.96 to Lynn Andrews for hauling/dumping fees incurred.” The third is for “\$8,245.64 to Lynn Andrews for the Life Insurance Policy of Lynn Andrews.”

Dennis appeals. He contends the judgments were entered in violation of his right to due process of law. He asserts the judgments were entered without appropriate notice or hearing.

## **II. SCOPE OF REVIEW**

Subject to limited exceptions, matters in probate are decided in equity. Iowa Code § 633.33. In such cases our review is de novo. Iowa R. App. P. 6.907. Further, the issue before us involves a fundamental constitutional right, the right to procedural due process of law, which we review de novo. *In re Estate of Adams*, 599 N.W.2d 707, 709 (Iowa 1999). Our review is thus de novo.

## **III. PROCEDURAL DUE PROCESS**

A threshold question in due process challenges under both the Iowa Constitution and the federal Constitution is whether “state action” is involved. *See generally Putensen v. Hawkeye Bank of Clay Cnty.*, 564 N.W.2d 404, 408 (Iowa 1997) (noting that such a state action requirement originated in federal cases interpreting the due process clause in the Fifth and Fourteenth

Amendments to the federal Constitution, and the due process clause of article I, section 9 of the Iowa Constitution is implicated where the power of the State is called upon by a private party in such a way as to deprive another of life, liberty, or property). State action is found “when private parties make use of state procedures with the overt, significant assistance of state officials.” *Id.* at 410 (citing and quoting *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988)). In *Pope*, the court found significant state action through the “intimate[ ] involve[ment]” of the probate court in a decedent’s estate proceeding. *Pope*, 485 U.S. at 487. We conclude that the involvement of the probate court in considering a judgment against Dennis and subsequently entering multiple judgments against him satisfies the “state action” requirement necessary to support a due process challenge.

“When a state action threatens to deprive a person of a protected liberty or property interest, a person is entitled to procedural due process.” *Meyer v. Jones*, 696 N.W.2d 611, 614 (Iowa 2005). “A guiding principle of procedural due process mandates notice and the opportunity for hearing appropriate to the nature of the case. Notice must be reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *In re Estate of Borrego*, 490 N.W.2d 833, 837 (Iowa 1992) (citations omitted).

Two hearings were held in the case before us. The first was an evidentiary hearing, limited to the issue of whether Dennis should be removed as executor. In its resulting order removing him the probate court noted that

“unresolved issues” remained. Rogers’s February 13, 2009 “Financial Report of Executor” did not seek any judgment from Dennis, nor did attorney Rittgers’s March 27, 2009 application for fees and expenses. The June 3, 2009 non-evidentiary hearing was limited to the matters raised by Rogers’s report and Rittgers’s application. During that hearing Rittgers acknowledged that the information available as of then left it “almost impossible” to reconcile Dennis’s accounts, and the court noted that unresolved issues remained. When the court entered its July 28, 2009 order indicating an intent to enter judgment against Dennis, no one had made a formal request for a judgment against him and thus he of course had not been served with anything apprising him of the nature of any judgment that might result. Although the order stated an intention to enter some judgment against him, it gave no indication of the nature of the judgment being considered, whether a declaratory judgment, an injunction, or a money judgment, and if the latter in favor of whom or in what amount. Finally, despite the numerous record indications and acknowledgements that several substantial issues remained unresolved, the order did not provide for any hearing to address and resolve those issues.

We conclude that any notice to Dennis provided by the probate court’s July 28 order, lacking any specificity as to the nature or extent of the contemplated judgment, was not adequate to afford Dennis an opportunity to articulate and present any objections he might have. More importantly, before any money judgment could be entered against Dennis an evidentiary hearing was needed to deal with the acknowledged, unresolved financial issues that



continued to exist. The court's order made no provision for such a hearing and none was held.

We thus conclude that the judgments against Dennis were entered without the notice and opportunity for hearing required by the nature of the case and the judgments that were in fact entered. The judgments must be reversed and the case remanded for any such further proceedings, including any request for a judgment or judgments, notice, and opportunity for hearing, as are appropriate.

#### **IV. CONFLICT OF INTEREST**

On appeal Dennis contends that the judgment of the probate court must be reversed because the court failed to appoint an attorney to represent the successor executor, Rogers. He argues that attorney Rittgers, who had a continuing attorney-client relationship with Dennis, had a conflict of interest by representing Rogers, who was seeking a judgment against Dennis. Dennis requests that we remand with directions that the probate court remove Rittgers as attorney for Rogers. Although for the reasons stated hereafter we decline to do so, first several points deserve brief mention.

First, an executor, as a fiduciary, and not the court, designates the attorney whom the executor employs to assist the executor in the administration of a decedent's estate. Iowa Code § 633.82. Second, attorney Rittgers was not the "Attorney for the above-entitled Estate," as represented in his March 27, 2009 application, nor was he the "attorney for probate," as designated by the court reporter at the June 3, 2009 hearing. Dennis had designated attorney Rittgers to assist him as executor, that designation had not been revoked, and attorney

Rittgers had not withdrawn as attorney for Dennis. At all relevant times attorney Rittgers thus remained Dennis's attorney in Dennis's limited remaining capacity as executor. Third, nothing in the record before us indicates that Rogers ever designated attorney Rittgers as Rogers's attorney in Rogers's capacity as successor executor.<sup>2</sup>

The question of Rittgers's role or roles and the question of whether he had a conflict of interest were never, however, presented to or passed upon by the probate court. "Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal." *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). Dennis did not file a motion to enlarge or modify the probate court's August 14, 2009 judgment and order. See *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984) ("It is well settled that a [rule 1.904(2)] motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication."). We conclude error has not been preserved on this issue, decline to further address it, and leave it to the parties and court to address it on remand, if necessary.

## **V. DISPOSITION**

We reverse the probate court's August 14, 2009 judgments and remand to the court for further appropriate proceedings.

### **REVERSED AND REMANDED.**

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<sup>2</sup> We acknowledge that despite the lack of any such designation the transcript of the June 3, 2009 non-evidentiary hearing may reasonably be read as indicating Rittgers believed himself to be representing Rogers, and not representing Dennis, at that hearing.