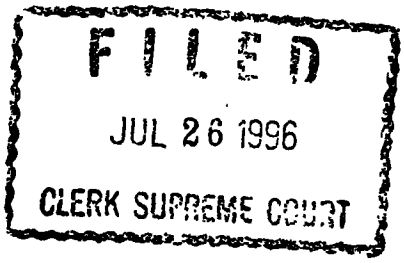
IN THE COURT OF APPEALS OF IOWA

No. 6-376 / 95-807



IN THE MATTER OF THE ESTATE OF RAYMOND E. HERRON, Deceased,

DONNA THOMPSON, Applicant to Reopen Estate,

Appellant.

Appeal from the Iowa District Court for Dallas County, Michael J. Streit, Judge.

Donna Thompson appeals a district court ruling denying her application to reopen the estate of Raymond E. Herron. **AFFIRMED.**

Robert W. Green, Sioux City, for appellant.

Randy V. Hefner of Van Werden, Hulse & Hefner, Adel, for appellee Larry Herron.

Considered by Cady, P.J., Huitink, and Vogel, JJ. Streit, J. takes no part.

PER CURIAM

This is an appeal by an applicant who sought to reopen an estate to pursue a personal injury action. The district court denied the request to reopen the estate. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On May 10, 1991, Donna Thompson was a passenger in a vehicle which was in an automobile accident with a vehicle driven by decedent Raymond Herron. Herron died the same day. His will was subsequently admitted to probate and his estate was closed on December 17, 1991.

On April 26, 1993, Thompson filed an application pursuant to Iowa Code section 633.489 to reopen the estate. She claimed she had suffered injuries in the collision and sought to pursue her claim against Herron's estate. The executor resisted the application. On June 4, 1993, the district court continued a hearing on the matter to allow Thompson to serve notice on Nancy Metz, who was believed to be a co-owner of Herron's vehicle. Nothing further appears in the record until March 31, 1995, when the district court denied the application to reopen the estate.

Thompson filed a motion pursuant to Iowa Rule of Civil Procedure 179 on April 10, 1995. Before the district court ruled on the motion, she filed notice of appeal on May 1, 1995. Thereafter, on May 24, 1995, the district court entered an order which canceled its previous order and set the application to reopen the estate for hearing.

We first note that the district court was without jurisdiction to enter the order of May 24, 1995, because the case was then pending on appeal. *See In re Marriage of Courtney,* 483 N.W.2d 346, 348 (Iowa App. 1992). Therefore, we give this order no consideration.

Actions to reopen an estate are tried as equitable actions under section 633.33. *In re Estate of Lynch,* 491 N.W.2d 157, 160 (Iowa 1992). Our scope of review is de novo. *Id.*

Thompson contends the district court should have reopened the estate under section 633.489. This section provides, in pertinent part:

> Upon the petition of any interested person, the court may, with such notice as it may prescribe, order an estate reopened if other property be discovered, if any necessary act remains unperformed, or for any other proper cause appearing to the court.

I.C. §633.489 (1991). Thompson claims a necessary act remained unperformed and proper cause was shown to the court.

We turn to the issue of whether a necessary act remained unperformed. The phrase "necessary act" in section 633.489 refers to an action that is required by law of the administrator in order to properly close the estate. *In re Estate of Witzke,* 359 N.W.2d 183, 184 (Iowa 1984). Thompson claims the executor failed to perform the necessary act of giving her notice that the will had been admitted to probate. Under section 633.410, an executor is required to give notice by ordinary mail to each claimant whose identity is reasonably ascertainable.

To be a "claimant," a person must have a "claim," which generally refers to debts or demands against the decedent which might have been enforced against him during his lifetime by personal actions for the recovery of a sum of money. *In re Estate of Weidman*, 476 N.W.2d 357, 365 (Iowa 1991). Although Thompson has now asserted a claim against the estate, no such claim was made at the time of the probate proceedings.

We conclude Thompson was not a claimant whose identity was reasonably ascertainable at the time the probate estate was open due to the fact she had not yet raised any claims. We determine she has failed to show the executor failed to perform a necessary act.

We next turn to Thompson's assertion that she presented proper cause for the court to reopen the estate. Section 633.489 permits reopening of an estate for any proper cause appearing to the court. *Witzke*, 359 N.W.2d at 185. This language permits the district court to exercise discretion in considering a petition that alleges a cause for reopening other than the two causes specifically enumerated in section 633.489 (discovery of property and performance of a necessary act). *Id.* We will not reverse the district court's decision unless the court has abused its discretion. *Lynch*, 491 N.W.2d at 161. We will not find an abuse of discretion by the court unless it is shown that the discretion was exercised on grounds clearly untenable or to an extent clearly unreasonable. *Id.*

Thompson contends her personal injury action against the estate is a proper cause to reopen the estate. We find no abuse of discretion in the district court's decision not to reopen the estate. We do not believe the district court's decision was clearly unreasonable.

Thompson also asks us to remand the case for further findings of fact and conclusions of law by the district court. Because Thompson filed her notice of appeal before the district court responded to her rule 179 motion, we conclude she has failed to preserve error on this issue.

We affirm the district court on all issues raised in this appeal. Costs of this appeal are assessed to Thompson.

AFFIRMED.