FILED
OCT 28 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF AURA C. STARNER.** | ) | Filed October 28, 1987 |
| **RUTH SOLL,** | ) | 246 |
| Conservator-Appellee, | ) | |
| vs. | ) | 7-350<br>86-1856 |
| **HELEN SCHILLING,** | ) | |
| Objector-Appellant. | ) | |

Appeal from the Iowa District Court for Shelby County (10337), Keith E. Burgett, Judge.

Objector appeals from the district court order approving the final report and accounting of the conservator claiming that gifts were made subsequent to the opening of the conservatorship. **REVERSED AND REMANDED.**

Thomas W. Jacobson of Bunz & Jacobson, Manilla, for objector-appellant.

Milton L. Hanson, Avoca, for conservator-appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ. Snell, J. takes no part.

**PER CURIAM** 247

This is an appeal by the objector to the final report of the conservator.

Aura C. Starner voluntarily petitioned the court for appointment of a conservator on May 31, 1984. Ruth Soll was appointed conservator. Aura Starner died June 2, 1986. Ruth and the objector Helen Schilling were both daughters of Aura Starner. They have one other sister and two brothers. Gifts of personal property were made before and after the opening of the conservatorship to the children of Aura Starner, including the conservator.

The objector, Helen, claims the trial court erred in finding the disposition of the ward's personal property did not violate the Iowa Probate Code. We agree.

This is a proceeding in equity. Iowa Code § 633.33 (1985). Our scope of review is de novo. Iowa R. App. P. 4. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7).

A review of the facts show Aura Starner had decided to dispose of her household and personal items. She had made various grouping of the items and designated the persons to receive the property. It is not clear from the record whether this was done before or after the opening of the conservatorship. It is clear, however, there were certain items of personal property that were not delivered to or picked up by the donees until after the conservatorship was opened and Ruth Soll had qualified as Aura's conservator. Several of these items went to Ruth which she accepted and retained.

The trial court made the following finding of facts:

1. There is insufficient evidence on the part of the objector to show any inconsistencies which would require that the court reverse the gifts as made by Mrs. Starner.

2. The evidence was clear and convincing there was no fraud as to the ward Aura C. Starner, and from the evidence presented the court would be unable to determine whether or not the gifts were made prior to the conservatorship and fully intended to be delivered at that time, and were not actually received by the parties until they decided to actually pick up the property.

3. There is insufficient evidence to show there were any inconsistencies or wrongdoing on the part of Ruth Soll as conservator in this conservatorship.

The trial court approved the final report and confirmed the acts of the conservator. The trial court also overruled the objections to the final report and ordered that the distribution of Aura C. Starner should stand.

The objector claims Aura Starner did not have the power to dispose of her property except by will or with court approval. The property was distributed after the opening of the conservatorship. A conservator must have court approval to continue a regular program of gifts. Also, many items were given to the conservator, Ruth Soll.

To address the objector's allegations we must look to the appropriate sections of the 1985 Iowa Probate Code.

Section 633.637 regulates the powers of the ward as follows:

> A ward for whom a conservator has been appointed shall not have the power to convey, encumber or dispose of property in any manner, other than by will if the ward possesses the requisite testamentary capacity, unless the court determines that the ward has a limited ability to handle the ward's own funds. If the court makes such a finding, it shall specify to what extent the ward may possess and use the ward's own funds.

Section 633.638 presumes all transfers and gifts made by the ward to be a fraud against the interests of the ward. We recite it here as follows:

> If a conservator be appointed, all contracts, transfers and gifts made by the ward after the filing of the petition shall be presumed to be a fraud against the rights and interest of the ward except as otherwise directed by the court pursuant to section 633.637.

We also set out section 633.639 which pertains to title to the ward's property:

> **633.639 Title to ward's property.**
> The title to all property of the ward is in the ward and not the conservator subject, however, to the possession of the conservator and to the control of the court for the purposes of administration, sale or other disposition, under the provisions of the law.

Section 633.668 sets forth the procedure and manner a conservator may make gifts on behalf of the ward as follows:

> For good cause shown and under order of court, a conservator may make gifts on behalf of the ward out of the assets under a conservatorship to persons or religious, educational, scientific, charitable, or other nonprofit organizations to whom or to which such gifts were regularly made prior to the commencement of the conservatorship, or on a showing to the court that such gifts would benefit the ward or the ward's estate from the standpoint of income, gift, estate or inheritance taxes. The making of gifts out of the assets must not foreseeably impair the ability to provide adequately for the best interests of the ward.

The property which was delivered to or picked up by the donees after the conservatorship was opened was not transferred by authority of an order of court. No court order, finding the ward possessed the limited ability to make these gifts or transfers, was obtained.

We determine the items of property in question were gifts made by the ward. These gifts were not consummated or completed until after the conservatorship was opened and Ruth Soll had qualified as conservator of the property of Aura C. Starner. No court approval was obtained for making these gifts.

The conservator suggests to us, if it is illegal for the conservator and the ward to make gifts of personal assets in the period of the conservatorship, then it is for this court to determine when the property was turned over to Ruth Soll <u>as agent</u> for Aura C. Starner. (Emphasis ours.) We find nothing in the Iowa Probate Code authorizing an agent of a ward to do what a ward [illegible]

a ward's conservator is prohibited from doing. Further, we fail to find Ruth Soll was designated an agent by Aura C. Starner before or after the opening of the conservatorship.

We remand to the trial court to make a determination of the items of personal property that were transferred after the opening of the conservatorship and for the conservator to account for those items.

We call the conservator's attention to Iowa Code section 633.155. This section governs any transactions between herself as an individual and as a fiduciary. It recites as follows:

> No fiduciary shall in any manner engage in self-dealing, except on order of court after notice to all interested persons, and shall derive no profit other than the fiduciary's distributive share in the estate from the sale or liquidation of any property belonging to the estate. Every application of a fiduciary seeking an order under the provisions of this section shall specify in detail the reasons for such application and the facts justifying the requested order. The notice shall have a copy of the application attached, or, if published, it shall contain a detailed statement of the reasons and facts justifying the requested order.

**REVERSED AND REMANDED.**