IN THE COURT OF APPEALS OF IOWA

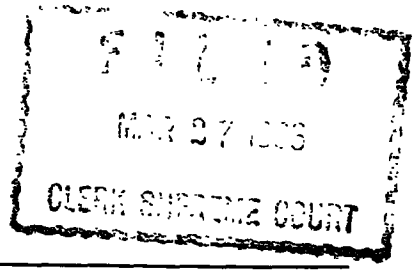
No. 5-466 / 94-1019

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IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF MARIE DeTAR

KATHLEEN JORDAN,

Appellant,



Appeal from the Iowa District Court for Monroe County, James P. Rielly, Judge.

Kathleen Jordan appeals from the entry of the order accepting the final report for the guardianship and conservatorship of her mother, Marie DeTar. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Kathleen Jordan, Longmont, Colorado, pro se, appellant.

John A. Pabst of Pabst & Maughan, Albia, and Paul Goldsmith of Goldsmith Law Office, Chariton, for appellees guardians and conservators.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

CADY, J.

This case involves Kathleen Jordan's objections to the final report filed by the guardians and conservators of her mother, Marie DeTar. The district court approved the final report. Kathleen appeals. We affirm in part, reverse in part, and remand the district court's decision for further proceedings.

Marie DeTar was the mother of eight children: Barbara Spaur, Evelyn Orwig, Linda Rodman, Bertha Orwig, Carolyn Brewer, C.E. Brown, Kathleen Jordan, and Margaret Carruthers. Marie lived with her husband, Eli DeTar, in rural Monroe County.

On February 20, 1991, Barbara and Carolyn filed a petition for the appointment of a guardian and conservator for Marie. At the time Marie was exhibiting dementia and loss of memory. Eli had deteriorating health and could not consistently care for Marie. Barbara and Carolyn were appointed to serve as guardians and conservators. The conservators chose John Pabst to act as their attorney. Marvin Colton was appointed as guardian ad litem for Marie.

Barbara and Carolyn did not inform Kathleen, Margaret, or Evelyn prior to initiating the conservatorship proceedings, although they did inform the other siblings. On July 12, 1991, Kathleen, Margaret, and Evelyn filed a request to have Barbara and Carolyn removed as conservators. They asked to have a non-family member appointed guardian and conservator.

On November 28, 1991, Kathleen picked up Marie and took her to visit Margaret and Evelyn. Marie returned to her home the next day. In response to the incident, Barbara and Carolyn filed a motion seeking to restrict the times Kathleen, Margaret, and Evelyn could visit with Marie. The conservators also filed an annual report on February 3, 1992, while the motion was pending.

On March 11, 1992, the parties entered into a stipulation regarding pending matters, which was approved by the district court. The annual report was approved and the guardianship and conservatorship was continued. The court ordered all of Marie's children would have access to her medical records. The court also ordered that the children were required to contact the conservators before visiting Marie, and her physicians could provide limitations for visitation.

On July 15, 1992, Colton filed a letter with the court recommending a hearing on the issue of visitation with Marie. This letter followed the conservators demand that the other children give notice at least ten days in advance before they could have visitation. Colton stated he felt this demand was excessive, and not in the ward's best interests. On September 28, 1992, the district court ordered Kathleen, Evelyn and Margaret to give notice two days before visiting Marie.

On September 13, 1992, Marie was placed in Oakwood Estates, a residential care facility. The conservator's annual report, which covered the time period from January 7, 1992, until February 12, 1993, was approved by the district court. No

objections to this report were filed. On November 1, 1993, the district court awarded Barbara $1176 and Carolyn $1398 for reimbursement of out-of-pocket expenses.

Eli died in September 1993. Pabst, the conservator's attorney, became the attorney for Eli's estate. The conservators decided to take against the will. Paul Goldsmith became the conservator's attorney for purposes of the suit and Sidney Drake was hired to represent the estate in the suit. On December 6, 1993, Colton withdrew as guardian ad litem. Robert F. Bozwell, Jr., was subsequently appointed as guardian ad litem.

Marie died on February 13, 1994. The conservators filed a final report on March 23, 1994, which covered the period from February 12, 1993, to February 13, 1994. At the time of the final report the ward had total assets worth $3169.

Barbara asked to be reimbursed for out-of-pocket expenses of $136 for the time period of October 1, 1993, until February 13, 1994. Carolyn asked to be reimbursed for out-of-pocket expenses of $160 for the time period of November 1, 1993, through February 13, 1994. Each conservator also asked for conservator's fees. Each claimed to have spent 800 hours in conservatorship business for the time period of April 1991 until February 13, 1994, and asked to be paid $7 per hour, for a total of $5600 for each conservator. The conservators had not previously requested an hourly fee for the care of their mother. Goldsmith filed a request for attorney fees of $1605. Pabst also filed a request for attorney fees, seeking $1153.

Kathleen filed objections to the conservators claims for $5600 each, and Pabst's claim for attorney fees. At an oral hearing held on May 23, 1994, the court granted Goldsmith's request for attorney fees. On May 31, 1994, the district court entered an order approving the final report. The court awarded Pabst attorney fees of $1153. The court also awarded Barbara and Carolyn their out-of-pocket expenses and $5600 each as conservator's fees. Kathleen appealed the court's decision.

I. Under Iowa Code section 633.33 (1993), an action for the payment of conservator and attorney fees is in equity, and our review is de novo. We give weight to the trial court's fact findings, especially on credibility, although we are not bound by them. *In re Conservatorship of Holmberg,* 483 N.W.2d 9, 11 (Iowa App. 1992).

II. Kathleen asserts the conservators' claims should be eliminated or reduced because the conservators did not submit an itemized claim or report of the services they performed for the ward. The conservators' application for fees states only that they be reimbursed for 800 hours at $7 per hour, for a total of $5600 each.

Compensation for fiduciaries and their attorneys is permitted by section 633.200, which provides:

> The court shall allow and fix from time to time the compensation for fiduciaries, other than personal representatives, and their attorneys for such services as they shall render as shown by *an itemized claim or report* made and filed setting forth what such services consist of during the period of time they continue to act in such capacities.

(Emphasis added).

This provision is applicable to conservators and their attorneys. *In re Guardianship of Hunter*, 442 N.W.2d 94, 98 (Iowa 1989).

Generally, a conservator or guardian must file an itemized statement of activities or services rendered for the ward. *See In re Guardianship of Laufert*, 247 Iowa 1352, 1363, 79 N.W.2d 187, 194 (1956); *In re Guardianship of Liggett*, 327 N.W.2d 779, 781 (Iowa App. 1982). In *Hunter*, the supreme court required an itemization of litigation expenses incurred by a conservator before it would approve reimbursement for the expenses. *Hunter*, 442 N.W.2d at 98. Because the conservator had not filed such an itemization, the court remanded the case to allow the conservator to file an application for payment of specific expenses and for a hearing on the application. *Id.*

We determine this procedure should be followed here. Under section 633.200, we believe the conservators have the burden to show what services they performed for the ward. We remand to allow the conservators to file an application for conservators' fees, with an itemization of activities or services performed for the ward. Although at this late date it may be difficult for the conservators to detail the time and date of their services, we believe they should at a minimum set forth the type of services they performed. This application should be set for a hearing with notice to other interested parties. The district court should approve conservators' fees for activities and services it finds proper and reasonable.

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III. Kathleen contends Barbara and Carolyn are not entitled to conservators' fees. She first claims the conservators acted in bad faith, and should not be rewarded for their actions. She points to the conservators' efforts to restrict the other children from visiting their mother, and claims this was not in Marie's best interests.

A conservator or guardian who has faithfully and honestly discharged the duties of his or her trust is usually entitled to compensation from the ward's estate for his or her services. *In re Guardianship of Liggett,* 327 N.W.2d 779, 781 (Iowa App. 1982) (quoting 39 Am.Jur.2d *Guardian and Ward* §184 (1968)). Willful misconduct of a fiduciary, however, may be grounds to disallow compensation. *Holmberg,* 483 N.W.2d at 12. If the conservator commits a breach of trust, the court in its discretion, may deny all compensation, allow a reduced compensation, or allow full compensation. *Liggett,* 327 N.W.2d at 782.

In the present case, we determine the conservators' fees should be reduced. The guardian ad litem stated the ward wanted to visit all of her children and wanted them to be able to visit her in her home. The conservators tried to restrict Marie's visitation with Kathleen, Margaret, and Evelyn. No evidence has been produced to show a good reason for these restrictions and we find these efforts to restrict visitation were not in the ward's best interests. We conclude the conservators should not be entitled to fees for the time and effort they expended attempting to keep the ward's other children from visiting the ward. On remand, the court should not award the conservators any fees for time spent attempting to restrict visitation with the ward.

IV. Additionally, Kathleen believes the conservators should have been more diligent in obtaining medical care for Marie. Kathleen recommended Marie be taken to specialists, and the conservators did not follow through on her advice. Kathleen admits she did not raise this issue before the district court.

We determine error has not been preserved on this issue. Even if error had been preserved, however, we do not find the conservators acted in bad faith by keeping Marie under the medical supervision of the doctor they had chosen. We find no reason to reduce or eliminate the conservators' fees based on their choice of physicians for Marie.

V. Kathleen objected to certain expenses claimed by the conservators. During the conservatorship the conservators periodically sought reimbursement for mileage and telephone calls. Some of the telephone calls and requests for mileage which Kathleen objects to were approved by the district court on November 1, 1993. Under Iowa Code section 633.36, all orders and decrees of the probate court are final decrees as to all parties having notice. Because there was no timely appeal of the November 1, 1993, order, we will not now consider objections to the order. In this appeal, we consider only matters raised in the final report.

VI. Kathleen also objects to the conservators' requests for reimbursement for telephone calls and mileage made at the time they submitted the final report. Although the conservators filed an itemized report of expenses for the November 1,

1993 order, no itemized report of expenses was filed at the time of the final report. The conservators merely claimed an amount they spent for telephone calls and mileage on behalf of the ward.

As previously discussed concerning the conservators' fees, we believe there should be an itemized report before expenses may be approved. On remand of the case, the conservators should file an itemized report of all expenses.

VII. Kathleen claims the district court should not have approved the request for attorney fees by the guardian ad litem, Marvin Colton. She believes the guardian ad litem did not act in the ward's best interests and should not be entitled to receive attorney fees from the conservatorship.

The order approving Colton's attorney fees was entered March 30, 1992. The final report only affirmed the order previously made. We determine the March 30, 1992 order was final and may not now be reviewed in this appeal.

VIII. Kathleen asserts the district court should not have awarded the conservators' attorney, John Pabst, attorney fees. As noted above, fees approved in orders previous to the final report will not now be considered. In the final report the court did award Pabst attorney fees of $1153.

A conservator's attorney is entitled to reasonable fees. *Holmberg,* 483 N.W.2d at 12. We find Pabst's request for fees was supported by an itemized statement and were reasonable. We affirm the award of attorney fees to Pabst.

IX. Kathleen claims the conservators caused her to place unnecessary matters in the appendix, and asks us to assess these costs against the conservators. We find all parts of the appendix were necessary, and costs of the appendix are included in court costs for this appeal.

X. Finally, we consider the conservator's motion to dismiss the appeal and to require Kathleen to furnish an undertaking secured by cash or approved securities, as found in Iowa Rule of Civil Procedure 80(b). We deny this motion.

In conclusion we reverse that portion of the district court decision which awarded conservators' fees and expenses, and remand for further proceedings on these issues. We affirm the award of attorney fees to the guardian ad litem and the conservators' attorney. Costs of this appeal are assessed one-half to each party.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.