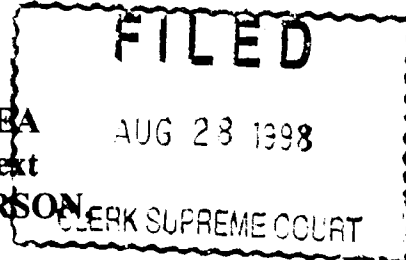


IN THE COURT OF APPEALS OF IOWA

No. 8-281 / 97-1152

WILLIAM ANTHONY PLEMONS-PEARSON,
Individually; **LINDSEY N. PEARSON, a Minor,**
STEPHANIE L. PEARSON, a Minor, and ANDREA
B. PEARSON, a Minor, by Their Guardian and Next
Friend, WILLIAM ANTHONY PLEMONS-PEARSON,



Plaintiffs-Appellants,

vs.

DIANA L. DE MOSS,

Defendant-Appellee.

Appeal from the Iowa District Court for Monroe County, Richard J. Vogel,
Judge.

Plaintiffs appeal the district court's denial of their petition to remove the
conservator and claim for reimbursement. **AFFIRMED.**

Steven H. Shindler and Stacey N. Warren of Smith, Schneider, Stiles, Hudson,
Serangeli, Mallaney & Shindler, P.C., Des Moines, for appellants.

Garold F. Heslinga of Heslinga, Heslinga, Dixon & Smith, Oskaloosa, for
appellee.

Considered by Cady, C.J., and Streit and Mahan, JJ.

MAHAN, J.

William Plemons-Pearson ("Tony"), individually and as guardian of his three children, Lindsey, Stephanie, and Andrea ("the children"), appeals the decision of the district court denying a petition for removal of Diana DeMoss as conservator and also denying a claim for reimbursement of certain expenses. Tony claims the district court erred when it: (1) failed to remove DeMoss because, according to Tony, DeMoss is incapable of acting in the best interests of the children; and (2) refused to order DeMoss to reimburse Tony for certain expenses incurred for the benefit of the children. We affirm.

Tony and his first wife, Kendra, divorced in September 1990. The district court awarded Kendra primary physical care of the children. After the divorce, Tony and Kendra did not get along well. Tony alleges Kendra's family, including DeMoss, was bitter and angry with him.

In February 1995, Kendra died from liver cancer. In her will, Kendra named her sister, DeMoss, as guardian and conservator for the children. However, Tony was awarded primary physical care of the children.

Tony and his current wife, Deb, lived in a 1250-square-foot two-bedroom home with their son, Ryan. Tony increased the living area of the home by remodeling the basement, adding two bedrooms and a bathroom. Tony claimed he did this immediately after the children moved into his home. DeMoss alleges Tony started on the project long before the children moved into the home.

Tony submitted a request for payment to DeMoss, asking her for conservatorship funds to help pay for the improvements in the home. The bills submitted to DeMoss totaled \$3000. Tony also testified he would have to spend approximately \$2500 to \$3000 to finish the project.

In March 1995, after the children moved into Tony's home, he quit his job at Primerica Financial Services to spend time with the children. According to Tony, he felt they needed to bond as a family and get a sense of stability. Tony did not return to work outside the home until November 1995. During the time Tony was not working, his family acquired substantial debt.

At the time of trial, Tony was working for Van Rheen Plumbing as a plumber, working fifty hours per week at \$8.50 per hour. Tony also receives \$2028 per month in social security benefits for the children. Deb works for the City of Pella as a police dispatcher, earning \$15,000 per year.

In making its decision the district court stated:

[Tony and Deb's] combined income should gross \$716 per week or something over \$3000 per month. He presently receives close to \$2100 per month social security for the three girls. He claims he does not have nor does his wife have any medical or health insurance, and there is no coverage for the girls.

[Tony] presented Exhibit P-6 purporting to show his monthly living expenses. He shows over \$1500 per month mortgage payments. One of these mortgages will be paid off in three years. He shows a term life insurance payment of \$70 per month but does not show the amount of the policy nor the beneficiaries. He shows \$12,800 on credit cards with monthly payments of \$472. It is presumed that most of this debt was acquired during the nine months he decided not to work. The \$82 per month satellite bill is now reduced to \$24 per month. He is not

making payments of \$75 to the girls' college fund. School lunches and school supplies should only be for the school year. He does not have health insurance so the \$215 per month he claims for health insurance is false. The babysitting-child care figure of \$480 per month is false. He now claims that figure should be \$200 per month. Deducting only the excess child care, the health insurance, the college fund, excess satellite, and term life insurance leaves a monthly expense of \$4486 per month. In addition, this court sees no reason to reward him for his choice not to work for nine months. The mortgage payments belong to him. If funds were provided from the Guardianship to help pay his mortgage, then the Guardianship should have a mortgage against the house for the amount of those payments.

The Court realizes that [Tony] and his wife's income figures are gross income figures and income taxes have to be paid on those figures. However, their combined incomes along with the social security payments should provide more than an adequate income for the family. It should be noted that [Tony] is the natural father of the girls with a legal obligation to support them. It is not like he is a distant relative or stranger.

There is no court order existing for the payments of funds from the Conservatorship ordering [DeMoss] to make payments to or for the benefit of the wards at this time nor should there be. The social security payments and [Tony's] support should provide an adequate living for the children.

I. REMOVAL OF CONSERVATOR. The trial court has broad discretion in deciding whether to remove a fiduciary under Iowa Code section 633.65. *In re Estate of Randeris v. Randeris*, 523 N.W.2d 600, 605-06 (Iowa App. 1994). We examine the record de novo to determine whether an abuse of discretion can be found. *Id.* We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Selestian*, 515 N.W.2d 356, 358 (Iowa App. 1994).

Iowa Code section 633.65 provides:

When any fiduciary is, or becomes, disqualified under sections 633.63 and 633.64, has mismanaged the estate, failed to perform any duty imposed by law, or by any lawful order of court, or ceases to be a resident of the state, then the court may remove the fiduciary.

Iowa Code § 633.65 (1995). Reasons for disqualification under section 633.63 include:

1. Any natural person of full age, who is a resident of this state, is qualified to serve as a fiduciary, except the following:

.....

b. any other person whom the court determines to be unsuitable.

§ 633.63(1)(b).

A conflict of interest may support removal as well as unwarranted hostility between the fiduciary and the beneficiaries. *Randeris*, 523 N.W.2d at 606.

Although the conservator must show cause why she should not be removed, the burden of proving the allegations of the petition are upon the petitioner. *In re Estate of Jones*, 492, N.W.2d 723, 725 (Iowa App. 1992).

Tony contends the record supports DeMoss's intense hatred for him has prevented her from making objective decisions about the best interests of the wards. DeMoss testified she was looking out for the children's best interests.

DeMoss filed tax returns at her own expense, she claims no fees for her services, and as noted by the district court, she has wisely invested the conservatorship funds. Further:

No claim shall be allowed against the estate of a ward upon application of the claimant unless it shall be in writing, filed in duplicate with the clerk, stating the claimants name and address, and describing the nature and the amount thereof, if ascertainable. It shall be accompanied by the affidavit of the claimant, or of someone for the claimant, that the amount is justly due, or if not due, when it will become due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant, except as therein stated.

§ 633.654. The Iowa Code also states:

Conservators shall have the following powers *subject to the approval of the court after hearing on such notice*, if any, as the court may prescribe:

3. To make payments to, or for the benefit of, the ward in any of the following ways:
- a. Directly to the ward;
 - b. Directly for the maintenance, welfare and education of the ward;
 - c. To the legal guardian of the person of the ward;

§ 633.647 (emphasis added).

We see nothing in the record showing a claim was filed by Tony pursuant to section 633.654 prior to his filing of the petition for removal of DeMoss. No prior court order had been entered requiring DeMoss to pay Tony for living expenses, or for the remodeling of his home. Thus, DeMoss could not pay Tony upon his request to her, and she did not violate section 633.654. Also, we find nothing in the record to show DeMoss has mismanaged the funds of the conservatorship or there is unwarranted hostility or a conflict of interest. Tony did not prove the allegations contained in his petition.

We agree with the findings of the district court and find the district court did not abuse its discretion when it refused to remove DeMoss from her position as conservator.

II. CLAIM FOR PAYMENT. A claim for payment is tried by the court as an equitable proceeding. *See* Iowa Code § 633.33. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

In making its ruling on Tony's claim for reimbursement for improvements on his home, the district court stated:

Again, these are **improvements** and at least, in theory, should add to the overall value of his house. . . . The claim is in very general form and does not itemize the things for which the claim is made. For instance, there are ten items listed as "Wal-Mart." The Court was not informed as to what those items are nor how they are incorporated. The only information provided in the itemization is the list of places materials were supposedly purchased. The claim is totally inadequate in that regard notwithstanding the fact it should be denied otherwise.

It appears exhibit four entered by Tony at the hearing included actual receipts helping to show what was purchased and being requested in the claim for payment. While these may show what was claimed, we agree with the remaining statements by the district court. These are Tony's children and the house is Tony's house. As

stated by the district court, these improvements should make a somewhat corresponding addition to the value of the home. We affirm the district court's decision to deny the claim for payment.

For these reasons, we affirm the decisions of the district court.

AFFIRMED.