FILED
OCT 25 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-254 / 93-1261

IN THE MATTER OF THE CONSERVATORSHIP OF LEOLA C. SCHULTZ,

LORETTA DENNIS,

Appellant.

Appeal from the Iowa District Court for Sac County, Gary L. McMinimee, Judge.

Loretta Dennis appeals the denial of her request for substitution of her sister's guardian and conservator. **AFFIRMED IN PART AND REVERSED IN PART.**

Lee H. Gaudineer of Austin, Gaudineer, Austin, Salmons & Swanson, Des Moines, for appellant.

Russell S. Wunschel and Dee Ann Wunschel Crouse of Wunschel Law Firm, P.C., Carroll, for appellee, guardian and conservator.

Heard by Donielson, C.J., Huitink, J. and Schlegel, S.J.* Cady, J., takes no part.

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

HUITINK, J.

Loretta Dennis appeals the denial of her request for substitution of John Rohlf as guardian and conservator for her sister, Leola Schultz. We affirm in part and reverse in part.

Leola is eighty-four years old. She was diagnosed with Alzheimer's in May 1988. In February 1989 Leola voluntarily petitioned the district court for the appointment of John Rohlf, a local banker, as her guardian and conservator. In March 1989 Loretta, Leola's only surviving sibling, filed a request for notice pursuant to Iowa Code section 633.42 (1993).

In August 1989 Leola filed a request for substitution of the guardian and conservator, proposing Loretta replace Rohlf. The court overruled this request, stating no statutory grounds justified the removal.

Between 1990 and 1992, Loretta and her family observed a deterioration in Leola's mental state. Leola's personal hygiene and the cleanliness of her house suffered, she did not eat properly, and she had difficulty dressing herself. She wandered at night and suffered from incontinence. In the summer of 1992, Rohlf hired someone to help Leola with her meals, medications, cleaning and laundry during the day and early evening hours.

In September 1992, Loretta took Leola to live in her home in Ames. In December 1992, Leola's doctor opined her condition had reached an advanced stage and she needed twenty-four hour care.

In January 1993, Loretta filed a motion for substitution. She claimed Rohlf had failed to: (1) provide care for Leola; (2) assist Leola in developing maximum self-reliance; (3) ensure Leola received emergency medical services; and (4) ensure Leola received counseling, treatment, and other needed services. The district court overruled Loretta's request stating she had not shown Rohlf had failed to perform his duties or that he performed them incompetently.

Our review in equity actions is de novo. Iowa App. P. 4. We give weight to the fact findings of the trial court, especially when considering credibility of the witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

Leola contends Rohlf is no longer suitable to serve as Leola's guardian. Loretta argues she is better able to attend to Leola's needs and should be substituted for Rohlf as guardian. We agree.

Iowa Code section 633.65 (1993) states, in part, a fiduciary may be removed if the fiduciary "is, or becomes, disqualified under sections 633.63 and 633.34, has mismanaged the estate, [or] failed to perform any duty imposed by law." Section 633.63(1)(b) provides any person of full age who is a resident of the state is qualified to serve as a fiduciary except a person "whom the court determines to be unsuitable."

When the two statutes are read together it is clear suitability is always a consideration in an action for

removal of a fiduciary. The question of suitability is not restricted to whether an executor is competent, nor must criminal or civil liability be proved. In re Estate of Cutler, 368 N.W.2d 724, 727-28 (Iowa App. 1985). One fiduciary may be unsuitable if there is another who may better provide for the needs of the ward. From reviewing the unique circumstances of this case we find Rohlf is no longer suitable to serve as Leola's guardian.

Leola requires round-the-clock care and supervision due to her advanced Alzheimer's. Loretta has provided this care for Leola since September 1992. She is a former public health nurse with considerable experience and knowledge in caring for persons with debilitating diseases. Loretta's nursing skills, insights and sensitivity will ensure Leola will receive quality care in the future.

From our de novo review of the record, we conclude the trial court erred in failing to substitute Loretta Dennis as guardian for her sister Leola. It is appropriate to transfer both physical and legal custody of Leola to Loretta as guardian. The district court is reversed on this issue.

We reject Loretta's claim she should also replace Rohlf as conservator. There is no requirement the same person serve as both guardian and custodian. See Iowa Code § 633.628. A conservator serves a different purpose than a guardian: to manage a ward's property rather than the

ward's person. Although Rohlf is no longer suitable to serve as guardian for Leola, it does not follow he is no longer suitable to serve as conservator.

There is no evidence indicating Rohlf has mishandled Leola's assets. He has invested her assets prudently and filed annual reports as required by statute. Iowa Code § 633.641 (1993). The record indicates Rohlf has been a suitable conservator of Leola's estate. The district court's denial of Loretta's request to remove Rohlf as conservator is affirmed.

Loretta also filed an objection to certain requests for guardian and conservators fees as well as attorney fees. Rohlf filed his request for fees in the district court and the court has yet to rule on this matter. We determine the issue of fees is not properly before this court since the district court retains jurisdiction to act on matters between the parties collateral to the subject matter of the appeal. In re Estate of Tollefsrud, 275 N.W.2d 412, 417 (Iowa 1979).

The decision of the district court is affirmed in part and reversed in part. We determine any other issues the parties may have raised are either covered by this opinion or are without merit. Each party shall pay their respective costs.

AFFIRMED IN PART AND REVERSED IN PART.