

IN THE COURT OF APPEALS OF IOWA

No. 4-419 / 93-1401

FILED

DEC 14 1994

CLERK SUPREME COURT

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**IN THE MATTER OF THE CONSERVATORSHIP
OF VERNON SCHAPER,**

**SECURITY BANK, Conservator
of Vernon Schaper,**

Appellant,

vs.

**BYRON M. SCHAPER, Executor
of the Estate of
Vernon Schaper, Deceased,**

Appellee.

Appeal from the Iowa District Court for Marshall
County, Kurt L. Wilke, Judge.

Security Bank appeals from a judgment of the district
court approving the final report involving a
conservatorship. **AFFIRMED AS MODIFIED.**

Max H. Buck of Grimes, Buck, Schoell & Beach,
Marshalltown, for appellant.

Harry L. Haywood, III, of the Haywood Law Office,
Eldora, for appellee.

Heard by Sackett, P.J., Habhab, J., and Schlegel, S.J.*

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

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HABHAB, J.

On August 28, 1984, Vernon Schaper, then eighty years of age, signed a voluntary petition for appointment of a conservator. Security Bank of Marshalltown was appointed as conservator of Vernon's property and letters of appointment were issued on August 29, 1984. On October 31, 1984, Security filed an inventory showing Vernon had cash of \$3000, a savings account of \$3822, real estate of 63.44 acres, social security income of \$329 per month.

For the next several years, Security collected Vernon's various incomes and paid his bills. For each of those years Security received conservator fees.¹ In 1988, Security noted the cash on hand was insufficient to meet Vernon's expenses at the nursing home, and requested permission from the court to borrow \$3000 from itself. Security informed the court that an anticipated sale of a part of Vernon's farmland would occur before the end of the year and provide the funds for repayment of the loan. No notice of this planned action was given to Vernon. In December 1988, Security obtained permission to sell slightly over nineteen acres of the land for \$30,000.

In 1989, Security again noted cash on hand was insufficient to pay Vernon's nursing home bills. Security again requested permission from the district court to

1. The bank filed annual reports and furnished Vernon's children with copies. In addition, there is an itemized list of time and charges by the bank's farm manager and a letter stating that if any of the children had any concerns they were to contact the bank.

borrow \$2000 from itself. In 1991, Security borrowed another \$10,000 to pay Vernon's bills, and requested permission to sell the remainder of Vernon's land so it could meet his nursing home expenses. On October 22, 1991, Vernon's three sons resisted the proposed sale, noting there were other social services available to help Vernon meet his nursing obligations. Security ultimately withdrew its request.

Security administered the conservatorship until Vernon's death on March 22, 1992. Security filed a final report on June 9, 1992. Byron Schaper, the executor of Vernon's estate, filed his objections to the final report. Byron alleged Security had claimed excessive fees to administer the conservatorship. He also claimed Security's actions as conservator were grossly abusive, wasteful, and in violation of the Model Prudent Person Investment Act. Byron requested an in-depth accounting and production of documents. On May 11, 1993, Byron filed a civil suit against Security.

On June 17, 1993, Byron filed a request to amend the objections, asking the district court to keep the conservatorship open until conclusion of the civil suit. Security resisted, arguing the motion was made for the sole purpose of delaying the proceedings. Byron filed an extensive request for production of documents. After

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Security filed a resistance, Byron filed a motion to compel production of the documents and the answers to the interrogatories. At the hearing, the district court overruled Security's resistance to the request for discovery, holding that the basic rules regarding discovery were applicable in the present case.

Security ultimately responded to the request for production by making the entire conservatorship file available for inspection. Security requested that Byron admit he had received various yearly reports regarding the status of Vernon's accounts but failed to register any objections to those reports.

The final hearing on all objections was held on July 21, 1993. At the hearing, the district court acknowledged a civil suit had been filed. Byron eventually agreed to limit the proceedings to the single issue of excessive conservator fees. Upon submission of all the evidence, the district court awarded Security \$652.50 for time expended to defend the final report and \$652.50 in attorney fees. Security filed a motion to amend the findings which was denied. Security appeals.

Security first contends the district court erred in applying discovery rules to a hearing on the final report. A decision on this issue will not have an effect on the existing controversy since the district court decided the fees were not excessive and the executor has not appealed this issue in a cross-appeal. See City of Dubuque v.

Public Employment Relations Bd., 339 N.W.2d 827, 831 (Iowa 1983). The question is now moot. We need not address it.

Security also contends the district court abused its discretion in setting the conservator fees and attorney fees in connection with the defense of the final report. The setting of fees for the conservator and the conservator's attorney is governed by Iowa Code section 633.200 (1993). In re Guardianship & Conservatorship of Hunter, 442 N.W.2d 94, 98 (Iowa 1989). The setting of the fees for fiduciaries and their attorneys is largely discretionary on the part of the district court. Committee on Professional Ethics & Conduct v. Zimmerman, 465 N.W.2d 288, 291 (Iowa 1991); In re Larkins' Will, 243 Iowa 322, 326, 51 N.W.2d 396, 398 (1952).

The conservator requested a fee of \$4,915 for 65.75 hours. The attorney requested a fee of \$5,898. The district court awarded the conservator \$245 and its attorney \$188.50 for services performed prior to the death of Vernon. In addition, the court awarded the conservator and attorney a fee of \$652.50 each for services rendered in defending the final report. The court limited the award to \$652.50 to reflect fees incurred in defending the claim of excessive fees. The court stated that since the issue of mismanagement is the subject of a different action between the parties, those additional expenses would not be considered.

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We determine the district court acted well within its discretion in awarding the fees of both the conservator and the attorney. We affirm the district court's limited award of fees since no abuse of discretion has been shown.

We need not consider Security's final issue of whether the district court should have held open the issue of attorney fees until the resolution of the civil action. We decline to do so for Security failed to preserve this issue in the district court. See Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985) (issues not presented in the trial court generally may not be raised for the first time on appeal). In addition, it cannot go unnoticed that Security resisted the executor's application to keep the conservatorship open.

We affirm the ruling of the district court. We also decline the executor's invitation that we order Security to repay the conservator's fees previously paid. The issue before the trial court was whether those fees were reasonable. The trial court held they were. The executor did not cross-appeal.

We note, however, that the trial court in limiting the allowance of fees to those services performed prior to the death of Vernon left unresolved that portion of their claim for fees that corresponds to services performed after Vernon's death. The trial court took the position that a majority of those services (after Vernon's death) relate to

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objector's claim of mismanagement. The court stated that mismanagement was the subject of another lawsuit, and since that question was not addressed in these proceedings, it would not consider those fees and expenses charged for preparation of a defense to that suit.

We pass the question of whether the trial court could or could not entertain a part or all of the request for fees. To avoid a duplication of hearings, we believe the question of the merits of the remaining portion of the claim for fees is best reserved in the decedent's estate in the form of a claim after the merits of the other lawsuit is resolved. With the thought that the trial court's ruling may not be explicit in this respect, we modify accordingly.

We affirm the ruling of the district court as modified.

AFFIRMED AS MODIFIED.

Schlegel, S.J., concurs; Sackett, P.J., specially concurs without opinion.