

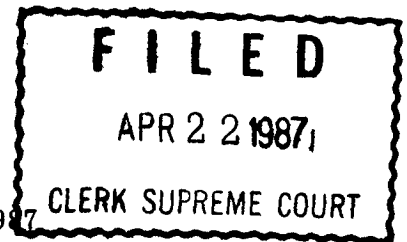
IN THE COURT OF APPEALS OF IOWA

In the Matter of the Estate of)
FLORENCE E. WALKER, Deceased;)
BENFORD M. WALKER and **GLEN**)
WALKER,)

Appellants.

Filed April 22, 1987

6-352
84-1686 & 84-1808



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Appeal from the Iowa District Court for Polk County (Probate No. 25-8339)

- Joel D. Novak, Judge.

The appellants argue that the administrator of the estate of Florence Walker must be removed because of a conflict interest and challenge the district court's order authorizing the specific sale of a parcel of real estate owned by the estate. **AFFIRMED.**

Benford M. Walker and Glen Walker, pro se, of Ankeny for appellants.

David L. Phipps of Whitfield, Musgrave, Selvy, Kelly & Eddy of Des Moines for appellees.

Considered by Oxberger, C.J., Snell and Schlegel, JJ.

This appeal represents yet another altercation in the extensive series of arguments between two sets of beneficiaries of the estate of Florence Walker. This is the fourth time that we have entertained an appeal brought by one or both of the appellants. In 1981, we affirmed a district court order dismissing appellant Benford Walker's petition in which he sought to vacate all orders relating to the conservatorship of Florence Walker. In 1982, we affirmed a jury verdict sustaining the appellees' petition to set aside the will executed by Florence Walker. In 1985, the appellants challenged several findings and conclusions entered by the probate referee and adopted by the district court. In ruling upon their appeal, we affirmed the following provisions of the district court's order: that authorizing the settlement of a personal injury suit brought by the estate; that refusing to remove Mr. Bernard O'Malley as an attorney for the estate; that refusing to remove the Valley National Bank as administrator of the estate; and that authorizing the administrator to sell certain real estate in order to pay the debts of the estate.¹

Essentially, the present appeal challenges the proceedings which have occurred since our decision in 1985. In addition, the appellants attempt to relitigate a number of issues conclusively determined in prior proceedings; we hold that the well-established doctrine of *res judicata* precludes them from

¹These issues were decided in appeal no. 83-179 (May 28, 1985). The appellants' petitions for further review in each of the above-mentioned proceedings were denied. The appellants subsequently filed a complaint in the United States District Court for the Southern District of Iowa challenging the judicial proceedings in this state. The complaint was dismissed by the district court and on appeal to the Eighth Circuit.

reasserting these claims.² See In re Marriage of Kurtz, 199 N.W.2d 312, 315 (Iowa 1972) ("[A] matter once decided is finally decided and may not be again litigated"); In re Estate of Jarvis, 185 N.W.2d 753, 756 (Iowa 1971). Consequently, only two issues remain for our consideration: First, the appellants contend that an alleged conflict of interest exists between the administrator of the estate and the law firm representing the appellees; in addition, the appellants maintain that the district court and probate referee erred in authorizing the specific sale of the real estate. We find no merit in either contention, and affirm.

Initially, the appellants argue that the Valley National Bank must be removed as administrator of the estate because a member of the Whitfield Law Firm, the firm representing the appellees, once served on the board of directors of the bank. In addition, the appellants contend that the bank is a client of the Whitfield Law Firm and that as a result, a conflict of interest necessarily exists between the firm and the bank. This allegation was not raised in any prior proceeding and therefore is not barred by res judicata. We note, however, that the appellants assert this claim for the first time in this appeal; it was never presented to a lower court and consequently is not properly before us. See State Farm Mutual Auto Insurance Co. v. Pflibsen, 350 N.W.2d 202, 207 (Iowa 1984) ("Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and decided on ap-

²Hence, the following arguments raised in the appellants' brief are barred: those concerning the conservatorship proceedings; the action setting aside the will; the propriety of Bernard O'Malley serving as attorney for the estate; the previously raised arguments concerning the propriety of Valley National Bank acting as administrator of the estate; and the propriety of the general order to sell the real estate.

peal.").³ Nevertheless, because of the desirability of settling this estate, we have considered the merits of the appellants' argument and conclude that it is not substantiated by the record.

In asserting their claim, the appellants have relied upon the supreme court's decision in Rowen v. Lemars Mutual Insurance Co., 230 N.W.2d 905 (Iowa 1975). We find Rowen inapposite. At issue in Rowen was an attorney's ability to represent his clients when he was affected by an obvious conflict of interest. Rowen, 230 N.W.2d at 914-15. By contrast, the issue in the present case concerns the ability of a fiduciary of an estate to properly perform his functions. The appellants have attempted to bring this case within the ambit of Rowen by arguing that the Valley National Bank is in fact the Whitfield Law Firm, and hence, that the attorney-client issue is implicated; nothing in the record supports this assertion. Accordingly, we have analyzed the appellants' claim in light of the principles governing a general request for the removal of a fiduciary in probate proceedings. See Matter of Estate of Lovell, 344 N.W.2d 576, 577-78 (Iowa App. 1983); Iowa Code § 633.65 (1985).

It is well-settled that an important aspect of an administrator or executor's fiduciary responsibility is the duty to maintain an undivided loyalty to the estate. See Iowa Code § 633.65 (1985); see also Mitchell v. Union Trust Co., 202 Conn. 57, 65, 519 A.2d 1185, 1189 (1986); Corey v. Corey, 120 Minn. 304, 310, 139 N.W.509, 513 (1913). In reviewing an allegation that an officer of an estate is incapable of properly functioning, we examine the record de novo. Lovell, 344 N.W.2d at 577. We have done so in the present case, and conclude that the appellants have failed to satisfy their burden of proving the allegations

³The appellants argue that they are entitled to raise this claim for the first time on appeal because it is in essence a motion to disqualify counsel. See Rowen v. LeMars Mut. Ins. Co., 230 N.W.2d 905, 914 (Iowa 1975) (supreme court has original jurisdiction to entertain a motion to disqualify in a pending appeal). We think that the appellants' claim is more aptly characterized as an attempt to remove an officer of the estate, and thus find Rowen factually distinct.

contained in their brief. See In re Estate of Smith, 223 Iowa 172, 176-78, 271 N.W.888, 890-91 (1937). To argue that even a potential conflict of interest exists in this case is at best speculative and imposes a strain upon credulity. Furthermore, as we have continually noted throughout the proceedings accompanying the settlement of this estate, the record contains no evidence indicating that the assets of the estate have ever been mismanaged or improperly depleted. In these circumstances, we conclude that no basis exists requiring the removal of the Valley National Bank as administrator. See Mitchell v. Union Trust Co., 202 Conn. at 66-67, 519 A.2d at 1190.

Similarly, we conclude that the appellants' various arguments attacking the specific sale of the real estate are without merit. We are extremely limited in reviewing their arguments, and would be authorized to completely decline from doing so, because they have failed to provide a record of the proceedings below. See Powell v. Khodani-Intergreen, 334 N.W.2d 127, 129-30 (Iowa 1983); Iowa R. App. P. 10(b). We have, however, examined their contentions in light of the probate referee's findings of fact and conclusions, and determine that the sale was proper in all respects. Because we would gain little from filling additional pages with the recitation of the appellants' specific arguments challenging the sale, we refrain from doing so. Suffice it to say that the sale fully comported with the guidelines set forth in Iowa Code section 633.386.⁴ Accordingly, we conclude that the decision of the district court authorizing the specific sale is affirmed. In addition, we reiterate our conclusion that no basis exists requiring the removal of the named administrator of the estate.

AFFIRMED.

⁴Furthermore, we note that had any error been found surrounding the sale of the real estate, we would have been precluded from taking any action because we fully concur with the appellees' assertion that the propriety of the sale is a moot issue; the record discloses that the appellants failed to stay the sale as required by Iowa Code section 633.394 and Iowa Rule of Appellate Procedure 7(a). See In re Fairchild's Estate, 231 Iowa 1070, 3 N.W.2d 157 (1942). We nevertheless examined the merits of the appellants' contentions because of our strong desire that this estate be settled expeditiously.