

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 23 1988

CLERK SUPREME COURT

IN THE MATTER OF THE
CONSERVATORSHIP OF
ESTHER S. NEBERGALL,

and

IN THE MATTER OF THE ESTATE OF
OSCAR E. NEBERGALL, DECEASED.

ESTHER NEBERGALL, GARY
ANDERSON, Individually and as Next
Friend of MELISSA SUE ANDERSON and
FRED ANDERSON, individually and as
Next Friend of JEREMY ERIC
ANDERSON,

Appellants,

vs.

HILLS BANK AND TRUST COMPANY,

Appellee.

Filed March 23, 1988

276

7-383
86-1295

Appeal from the Iowa District Court for Cedar County (14123 & 14041),
Linda K. Neuman, Judge.

Objectors appeal a trial court ruling, claiming the court erred in failing
to remove a bank as executor of an estate and in discharging the executor from
liability for its actions. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, Cedar Rapids, for appellants.

Thomas D. Hobart of Meardon, Sheppel, Downer & Hayes, Iowa City; and
Stuart Werling of Werling & Cochran, Tipton; for appellee.

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

SCHLEGEL, J.

237

Objectors appeal a trial court ruling, claiming the court erred in failing to remove a bank as executor of an estate and in discharging the executor from liability for its actions. Specifically, the objectors accuse the bank of self-dealing in authorizing a loan from itself to the estate and for mismanagement in its handling of the sale of the estate's property. Thus, the objectors contend that the executor should have been removed and replaced for mismanagement of the estate, including failing to prosecute a potential claim against itself. We consider this as an action in equity and therefore review is de novo. See In re Cutler, 368 N.W.2d 724, 726 (Iowa App. 1985). We affirm.

In February 1984, Oscar and Esther Nebergall consented to the Hills Bank and Trust (Hills Bank) acting as conservator of their affairs. Due to financial considerations, the bank filed an application for permission to borrow money on the best terms available from any source, including Hills Bank. That application was approved. After checking a couple of banks in the area, Hills Bank loaned the conservatorship \$300,000, placing a second mortgage on the Nebergall's farm property. This was done due to Hills Bank having the best interest rate in the area. In June 1984, Oscar Nebergall died. Hills Bank became executor of Oscar's estate. At the same time, discussions with interested parties were occurring concerning the necessity of selling all or part of the farm property to prevent cash flow problems in paying off the Nebergall's loan. After efforts to refinance the loan were unsuccessful, Hills Bank gave notice that the farm would be advertised for sale. Several bids on the property were rejected by Hills Bank as being too low. Eventually, a previous bidder, Donald Lamp, agreed to buy the property at the conservator's bottom line price of \$425,000. Considerable dispute exists between the parties as to the conservator's diligence in securing a good bid on the property. On February 21, 1985, Gary Anderson filed

an objection to the sale. On February 27, 1985, a hearing on the joint application to sell was held. Gary Anderson claims he did not withdraw his objection. The other four people present, including Anderson's own attorney, testified that Anderson withdrew the objection. On February 27, 1985, a judge signed an order approving the sale and application of the proceeds from the sale to the indebtedness. On January 23, 1986, the executor, Hills Bank, filed its final report and after the ward and other parties objected and requested removal of the executor, the lower court ruled in favor of the Hills Bank.

The objectors contend that the trial court erred in failing to remove the executor and in discharging the executor from liability. The trial court determined that Hills Bank did not breach its fiduciary duty as conservator of the estates of Oscar and Esther Nebergall and thus, the acts of Hills Bank as conservator were ratified and the discharge as conservator approved. Since the objectors have not raised on appeal objection to the trial court's decision regarding the conservator, we deem such an objection to be waived. See Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983).

We therefore turn to the issue of whether the trial court erred in rejecting the claim that Hills Bank, as executor, breached its fiduciary duty by failing to bring a lawsuit against itself for its actions as conservator of the estates of Oscar and Esther Nebergall. The Iowa statutory provision for removal of a fiduciary states:

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. The court may upon its own motion, and shall upon the filing of a verified petition by any person interested in the estate, including a surety on the fiduciary's bond, order the fiduciary to appear and show cause why the fiduciary should not be removed. Any such petition shall specify the grounds of complaint. The removal of a fiduciary after letters are duly issued to the fiduciary shall not invalidate the fiduciary's official acts performed prior to removal.

Iowa Code § 633.65 (1985). The Iowa Code also prohibits self-dealing by a fiduciary, except where notice is given to interested parties, court approval is obtained, and the fiduciary derives no profit other than its distributive share in the estate. Iowa Code § 633.155 (1985). The trial court has wide discretion in whether to remove a fiduciary or not. In re Estate of Lovell, 344 N.W.2d 576, 579 (Iowa App. 1983).

We find no grounds for removal of the executor stemming from the loan transaction between Hills Bank and the conservatorship. Due to severe cash flow problems, it appears that the loan was in the conservatorship's best interests. The wards had consented to taking out a loan. Hills Bank obtained court authorization for obtaining a loan for the conservatorship. The record indicates that the terms of the loan were the most favorable available to the conservatorship. Hills Bank did not derive any profit from the loan transaction other than the interest, which was approved by the court. We therefore find nothing about the loan transaction which would warrant a conclusion that the executor should be removed.

Furthermore, there is also no merit to the claim that the executor should be removed due to the sale of the farm land. Due to the mounting debt, it appears that sale of the property had become a necessity. All interested parties had sufficient notice of the proposed sale. Although Gary Anderson initially objected to the sale, the evidence indicates that Anderson withdrew the objection. Hearing was held on the application to sell the property and the court approved the sale upon the terms and conditions proposed. Thus, we find nothing improper about Hills Bank's actions regarding the sale of the property.

In conclusion, we find no impropriety in Hills Bank's actions as executors and we accordingly hold that the trial court's orders and rulings be affirmed.

AFFIRMED.