**IN THE COURT OF APPEALS OF IOWA**

FILED
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CLERK SUPREME COURT

No. 8-075 / 97-0176
Filed April 24, 1998

**IN THE MATTER OF THE CONSERVATORSHIP AND GUARDIANSHIP OF AGNES IRENE ARTMAN, Ward,**

**COFER W. ARTMAN,**
Appellant,

**AGNES IRENE ARTMAN,**
Appellant,
vs.

**FIRSTAR BANK, CONSERVATOR FOR AGNES IRENE ARTMAN,**
and

**MARY K. BEGGS, GUARDIAN AND FORMER CONSERVATOR OF AGNES IRENE ARTMAN,**
Appellee.

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Appeal from the Iowa District Court for Wapello County, Dan F. Morrison, Judge.

Cofer and Irene Artman appeal from a ruling of the district court granting Cofer's application to have their daughter, Mary Kae, removed as Irene's conservator, but declining to have her removed as guardian. **AFFIRMED.**

Michael C. Vinyard of Vinyard & Curran, Ottumwa, for appellant-applicant.

John R. Silko, Bloomfield, for appellant-ward.

Robert M. Box of Box & Box, Ottumwa, for appellee-guardian.

Heard by Cady, C.J., and Huitink and Streit, JJ.

**STREIT, J.**

A husband appeals from the district court's denial of his application to remove his daughter as guardian of his wife. Because the wife is incompetent necessitating she have a guardian and there is no other choice to serve as guardian of the wife, we affirm. The guardianship is limited to decisions of a personal, rather than financial, nature or decisions regarding property interests.

***I. Background Facts & Proceedings.***

Cofer and Irene Artman are a married couple. At the time of trial Cofer was eighty years old and Irene was seventy-seven. The couple have two children, Mary Kae Beggs and Jane Petty.

Irene suffered a series of strokes beginning in July 1994. She was hospitalized for a time, and then returned home where Cofer cared for her with assistance from health care workers. After returning home, she fell several times. She suffered injuries from her falls, including a broken wrist, a broken pelvis, a chipped hip, and a head injury. Some of the falls occurred while she was in Cofer's care.

In February 1995, Mary Kae Beggs and Jane Petty accompanied Irene to see attorney Robert Box. Irene wanted to discuss her options regarding her future care, and Cofer's intent to purchase another home. During the meeting with Mr. Box, Irene executed a voluntary petition to appoint Beggs as her guardian and conservator. The next day, Beggs closed all of Irene's bank accounts and transferred them into conservatorship accounts. She later transferred the conservatorship funds into a joint

account with both her name and Irene's name as joint tenants. She also replaced Cofer's name with her own as beneficiary on life insurance policies in Irene's name.

Shortly after the meeting with attorney Box, Beggs and Petty sought to have Cofer committed to the Southern Iowa Mental Health Unit and Irene was placed at Vista Woods Care Center, a nursing home. The court ordered Cofer receive outpatient treatment. The same week, Beggs and Petty went to Cofer and Irene's house and began sorting through their parents' personal property. Some of the property was boxed up, some left at the house, and some taken to Beggs's and Petty's residences.

When Cofer found out Beggs had been appointed as conservator, he transferred approximately $97,000 from his and Irene's joint account into an account with his name only. Beggs, in May 1995, petitioned for a temporary restraining order preventing Cofer from selling or diverting any of Irene's assets. A temporary injunction was granted. A permanent injunction followed in July 1995.

On August 4, 1995, Cofer filed an application seeking to have Beggs removed as Irene's guardian and conservator. Following a August 5, 1996, hearing, the district court removed Beggs as conservator because of the impropriety of her actions, but retained her as Irene's guardian. Cofer filed a 179(b) motion to enlarge the trial court's findings. The motion was denied.

Cofer appeals. He seeks to have Beggs removed as guardian of Irene, sanctioned for her actions as a fiduciary, and enjoined from paying attorney fees with

Irene's assets. Cofer also seeks to keep the motor home the trial court found the conservator was entitled to sell. Beggs denies any wrong doing as conservator for Irene. She does not wish to be reappointed as conservator, but only to remain Irene's guardian.

### *II. Standard of Review.*

An action to remove a fiduciary is not included among actions cited as triable at law. *In re Guardianship of Hedin*, 528 N.W.2d 567, 568 (Iowa 1995); Iowa Code § 633.33 (1997). The matter was properly tried in probate as a proceeding in equity. *In re Guardianship of Stewart*, 369 N.W.2d 820, 822 (Iowa 1985). Our review is de novo. *In re Guardianship of Sams*, 256 N.W.2d 570, 572 (Iowa 1977). 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) (1997).

### *III. Guardianship of Irene.*

Cofer petitioned to terminate Irene's guardianship or to modify the guardianship by removing Beggs as guardian and appointing either him or a neutral third party as guardian.

Irene voluntarily signed a petition for appointment of guardian, designating Beggs as her guardian.[1] A person is incompetent if the ward's or proposed ward's decision-making capacity is so impaired the ward is unable to care for her personal safety or provide for such necessities as food, shelter, clothing, and medical care,

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[1] Cofer insinuates Irene was coerced into signing the petition.

without which physical injury or illness may occur. *In re Guardianship of Hedin*, 528 N.W.2d 567, 583 (Iowa 1995); *See* Iowa Code § 633.552(2)(a). There is clear and convincing evidence in this case that Irene is incompetent and needs a guardian.

The question is who should be Irene's guardian. Cofer vehemently argues Beggs should not. He first seeks to terminate the guardianship. Among the grounds for termination of a guardianship are:

> 3. A determination by the court that the ward is competent and capable of managing the ward's property and affairs, and that the continuance of the guardianship . . . would not be in the ward's best interests.
> 4. Upon a determination by the court that the . . . guardianship is no longer necessary for any other reason.

Iowa Code §§ 633.675(3), (4).

As discussed above, there is clear and convincing evidence of Irene's incompetence and need for guardianship. Cofer can not establish grounds for termination of Irene's guardianship. Irene has had a series of stokes and now has severe speech difficulty and significant intellectual impairment. Her attention and judgment are impaired to a degree she cannot make a proper judgment as to her own welfare. She is unable to perform self care, with the exception of feeding herself which requires supervision. For these reasons, she is not capable of managing her property or affairs and the continuance of the guardianship is necessary.

Cofer argues if Irene needs to have a guardian, it should be himself or a neutral third party rather than their daughter. Cofer seeks Beggs's removal as Irene's guardian. A guardian can be removed for mismanaging the estate, failing to perform

any duty imposed by law, or by any lawful order of the court. Iowa Code § 633.65 (1997). In making a determination as to whether a guardian should be removed and replaced the court must consider the availability of third-party assistance to meet a ward's or proposed ward's need for such necessities, if credible evidence of such assistance is adduced from any source. *See In re Guardianship of Hedin*, 528 N.W.2d at 579. Neither party shall have the burden to produce such evidence. *Id.* In determining whether a guardian should be removed, the district court also considers whether a limited guardianship is appropriate. *Id.*

Early legislation divided guardianships into actions affecting property interests (guardianships of the estate) and actions affecting personal interests (guardianships of the person). *Id.* A plenary guardianship controls both types of interests. *Id.* Today, a plenary guardianship is a "disposition of last resort." *Id.* A limited guardianship is a guardianship fashioned by the court to meet the particular needs of the incapacitated person.

The district court was limited in its options for the position of guardian. Cofer is eighty years old and suffers from arthritis, poor hearing, and stomach problems. He uses a cane for balance. He is not capable of providing Irene's minimal care. After observation of Cofer and testimony by him, the district court found he would not be an adequate guardian for Irene's personal or estate matters. We defer to the district court's judgment on this matter. *See* Iowa R. App. P. 14(f)(7). It is not usual for a bank, which in this instance serves as Irene's conservator, to serve as a guardian

of a ward. It would be more appropriate for a family member to make decisions regarding Irene's personal matters, including living arrangements and medical care.

Although the district court did not specifically state Beggs was a limited guardian of Irene, its order reflects this arrangement. The bank has taken control of all Irene's assets and will manage all Irene's financial matters in the future. Beggs only has guardianship over Irene's person. The district court's continuance of Beggs as guardian over Irene's personal matters is affirmed.

### *IV. Sanctions for Mary Kae Beggs's Conduct as Irene's Conservator.*

Cofer seeks sanctions against Beggs for her conduct while acting as Irene's conservator. He argues Iowa Code section 633.160 gives him a cause of action against Beggs for sanctions. That section states:

> Every fiduciary shall be liable . . . for neglect or unreasonable delay in collecting the . . . assets of the estate or in selling, mortgaging or leasing the property of the estate; for neglect in paying over money or delivering property of the estate the fiduciary [has] in the fiduciary's hands; for failure to account for or to close the estate within the time provided by this Code; for any loss to the estate arising from the fiduciary's embezzlement or commingling of the assets of the estate with other property; for loss to the estate through self-dealing; for any loss to the estate arising from wrongful acts or omissions of any cofiduciaries which the fiduciary could have prevented by the exercise of ordinary care; and for any other negligent or willful act or nonfeasance in the fiduciary's administration of the estate by which loss to the estate arises.

Iowa Code § 633.160 (1997).

The statute does not give Cofer a cause of action for sanctions based upon improper conduct. Rather, the statute imposes liability upon a fiduciary for losses to the estate which occur due to negligent or willful conduct by the fiduciary which results in a loss to the estate. Cofer has not proved Beggs has caused the estate to have any loss. His claim for sanctions is denied.

*V. Miscellaneous.*

Cofer requests the appellate court reverse the district court's order requiring the conservator to sell the motor home and give Cofer his share of the proceeds. The conservator had the authority to collect and sell the automobile under sections 633.646(1)-(2)[2] of the Iowa Code. Cofer's request regarding the motor home is denied. The district court ordered it would approve reasonable attorney fees for Beggs's defense of her guardianship of Irene. That order is affirmed. The trial court ordered the conservator pay Beggs' attorney $2190 in fees and $47.50 for costs after the trial of this matter. The conservator is ordered to pay $750 for appellate attorney fees incurred by Beggs to defend her guardianship status on appeal. In light of the

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[2] The statute states, in part:

The conservator shall have the full power, without prior order of court, with relation to the estate of the ward:

1. To collect, receive, receipt for any principal or income, and to enforce, defend against or prosecute any claim by or against the ward or the conservator; to sue on and defend claims in favor of, or against, the ward or the conservator.

2. To sell and transfer personal property of a perishable nature and personal property for which there is a regularly established market.

Iowa Code § 633.646 (1997).

fact Beggs' status as limited guardian over Irene is affirmed, Cofer's request for a permanent injunction against Beggs enjoining her from making personal decisions regarding Irene is denied.

**AFFIRMED.**