IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

No. 9-307 / 97-2277
Filed October 15, 1999

IN THE MATTER OF THE CONSERVATORSHIP OF DEBRA MOELLER MANUS, Ward,

FIRSTAR BANK OF IOWA, N.A.,
Plaintiff-Appellant,

vs.

DEBRA L. MOELLER MANUS, CYNTHIA R. TEBBEN and WILLIAM TEBBEN,
Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, Mark Smith, Judge.

Firstar Bank appeals from a district court order changing venue in its declaratory judgment action and denying its application for attorney fees. **REVERSED.**

Jeffrey S. Bittner of Carlin, Hellstrom & Bittner, Davenport, and Edward N. Wehr and John R. Newman of Wehr, Berger, Lane & Stevens, Davenport, for appellant.

Thomas W. Lipps of Peterson & Lipps, Algona, and E. J. Gallagher, III of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellees Cynthia and William Tebben.

Robert A. Dotson of the Dotson Law Firm, Algona, for the conservator, Stan Manus.

Heard by Streit, P.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Firstar Bank appeals from a district court order changing venue in its declaratory judgment action and denying its application for attorney fees. We reverse.

Background facts. In 1973, nine-year-old Debra Moeller, now known as Debra Manus, suffered an accidental gunshot wound to her head. In 1975, a conservatorship was established for her benefit in Scott County, Iowa, funded with monies received as a settlement from the accident. Debra's father, Howard Moeller, was initially appointed as conservator; Firstar Bank was appointed conservator in 1989. The conservatorship continued into Debra's adulthood by her own consent. In 1990, Debra married Phillip Manus and moved to Kossuth County. However, the conservatorship continued to be administered by Firstar in Scott County. In 1993, Debra's brother-in-law Stan Manus purchased a jeep for Debra and her husband. Debra asked the conservator, Firstar Bank, to distribute $12,500 from her funds so she could reimburse Stan for the jeep. Firstar applied to and received authorization from the probate court to do so.

On March 6, 1996, Debra, while driving the jeep, collided with a vehicle carrying Cynthia and Anthony Tebben. Soon after the Tebbens filed an action against Debra in Kossuth County to recover for their injuries and damages. The Tebbens' petition was later amended to include Firstar as a defendant pursuant to Iowa Code section 633.665 (1995). Although section 633.665 allows a conservator to be named as a nominal defendant in an action against a ward, the Tebbens' discovery requests

indicated that they sought to impose personal liability for the accident on Firstar under theories of breach of fiduciary duty and negligent entrustment of a motor vehicle. Firstar subsequently filed a petition for declaratory judgment in the Scott County probate court to seek a ruling on the propriety of the Tebbens' claims. Shortly thereafter, Debra settled with the Tebbens and assigned to them any claims she had against Firstar. The Tebbens then moved to dismiss Firstar's declaratory judgment action.

A hearing was set for September 24, 1997, on Firstar's declaratory judgment petition, their application for fees, and on a motion filed by Debra's court-appointed counsel to remove Firstar as conservator. On the day of the hearing, the court declined to hear the declaratory judgment action because the Tebbens' motion to dismiss had not been ruled upon and they had not yet filed an answer to Firstar's petition.[1] Therefore, the only issues properly before the court were Firstar's application for fees and Debra's pending motion to remove Firstar as conservator. The court clarified during the hearing that the issue of attorneys fees in regard to the declaratory judgment action would be held in reserve until such action was tried. However, the court issued a ruling which: (1) granted Debra's request to remove Firstar as conservator; (2) continued the declaratory judgment action; (3) transferred the conservatorship, including the declaratory judgment action, to Kossuth County; (4) approved conservators fees of $900 for routine administrative services; and (5)

[1] The court did, however, advise counsel at the hearing that it would be denying the Tebbens' motion to dismiss.

denied Firstar any attorney fees incurred in connection with defending the declaratory judgment action. Firstar's 179(b) motion was denied and it now appeals.

Scope of review. Proceedings in probate are of an equitable nature. Iowa Code §633.33 (1997). Our review is therefore de novo. Iowa R. App. P. 4; *see also In re Guardianship and Conservatorship of Liggett*, 327 N.W.2d 779, 780 (Iowa App. 1982) (citations omitted).

I. Attorney fees. Firstar claims that the court erred in ruling that it would not be entitled to compensation for its reasonable attorneys fees incurred in defending itself against the Tebbens' lawsuit. We note that the merits of this issue were not argued at the September 24th hearing. In fact, the only discussion of these particular fees was initiated by the Tebbens' counsel, who requested that the court reserve judgment on the issue until there had been a final decision on the declaratory judgment action and the Tebbens' breach of fiduciary duty and negligent entrustment claims against Firstar. The court responded:

> What I was intending to do is if the court appoints a temporary conservator and appoints on temporary basis, fees accumulated for the defense of Firstar in regard to these two issues of breach of fiduciary duty and negligent entrustment would be held in reserve for the purposes of determining whether that's a conservatorship responsibility or ultimately FirstarBank's responsibility. So I intend to award attorney fees for the administration of the estate. That does not include the issue of those two claims at this time. I will approve attorney fees that have been incurred in the usual administration of this matter, but not on the issue of negligent -- or excuse me -- negligent entrustment and breach of fiduciary duty. * * * I'm going to hold that in abeyance is what I'm going to do.

Despite this stated intention, the court ruled in its October 16th ruling as follows:

> The attorneys for the conservator, Firstar, have submitted request for attorney fees which appear to be not only for matters involving this conservatorship, but also matters involving the defense of Firstar Bank against the allegations of breach of fiduciary duty and negligent entrustment. At this time, the Court authorizes the payment of $1,100.00 as reasonable attorney fees and $900.00 for conservator fees for duties involved with this conservatorship. All other fee charges appear to be for the purpose of defending Firstar against the allegations aforementioned. The Court finds that the matters involving the defense of the aforementioned allegations by the assignee of the ward no longer serve any substantial conservatorship interest and, therefore, the attorney fees incurred as a result of the bank defending itself in those allegations should not be taxed to the conservatorship.

In its conclusions of law, the court further stated:

> It is clear that a fiduciary and its attorney is entitled to compensation for services performed on behalf of the conservatorship, but not fees in which the conservator or attorneys are requesting payment which are incurred to defend the conservator's interest. These services are limited to those which protect or benefit the estate. The breach of fiduciary duty and negligent [entrustment] allegations against Firstar in its individual capacity and its defense of these allegations was for its personal protection and not for the protection of the estate, therefore the Court may refuse to order compensation for those services. *Id.* [citing *In re Matter of Conservatorship and Guardianship of Hunter*, 442 N.W. 98 (Iowa 1939)]

We find the court was premature in ruling on the declaratory judgment attorneys fee issue. Section 633.646 of the Iowa Code vests the conservator with the power to defend against any claim against itself or the ward.[2] A conservator is

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[2] Iowa Code §633.646 (1997) provides that:

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

therefore authorized to make a claim against the conservatorship assets for reasonable attorney fees incurred in successfully defending itself against a claim in its capacity as conservator. The allowance or disallowance of fees should be determined after the actions of the conservator have been reviewed for their propriety. It appears from the record that the Scott County trial judge agreed with these general principles as arguments were not heard on the issue at the September 24th hearing. The court specifically stated that the issue of such fees would be reserved until the merits of the declaratory judgment action had been litigated. This precluded arguments from counsel either in support of or in resistance to such fees. Furthermore, it is apparent from the record both counsel agreed to delay the fee issue.

We therefore reverse the decision of the Scott County district court denying Firstar attorney fees in the declaratory judgment action and find that until the merits of the declaratory judgment action have been resolved, the issue of Firstar's claim for attorney fees is not ripe for decision.

II. Venue. Firstar next argues that the court erred in ordering that venue on matters relating to its conduct as conservator be transferred to Kossuth County. Although Firstar does not specifically appeal the transferring of venue to Kossuth County of the entire conservatorship, we find that the declaratory judgment action is

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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.

not a separate action from the conservatorship and thus review venue of the conservatorship file as a whole.

All actions triable in probate are to be governed by the rules of civil procedure, except as otherwise provided in the code. *See* Iowa Code § 633.34 (1997). Iowa Code section 633.49 governs the transfer of probate proceedings:

> In any proceeding in probate, the court may, upon written showing, supported by affidavit, and on such notice to interested parties as the court may prescribe, transfer such proceeding to any other county, when it is made to appear that such transfer will be in furtherance of justice. Thereupon, the matter shall be pending in such other county.

As discussed above, the issues pending before the court on September 24, 1997 were limited. In her application for removal of conservator, Manus noted the situation of the parties and stated:

> It would be anticipated that after appointment of a successor conservator, jurisdiction of the conservatorship would be transferred to Kossuth County.
>
> WHEREFORE, the attorney for the Ward moves that this matter be set down for hearing, that after hearing, Firstar Bank Iowa, N.A. be removed as conservator and a successor be appointed as conservator for Debra Moeller Manus.

Although an eventual transfer of venue was mentioned in this motion, we find it was insufficient to properly raise the issue and put Firstar on notice that the issue would be heard at the September 24th hearing. Debra clearly did not comply with the procedure outlined in section 633.49; no affidavit accompanied the motion.

Debra argues that Firstar agreed that it would have no objection to a transfer of the conservatorship when "everything [wa]s completed." Again, however, this was informal discussion on an issue not properly before the court. The court should not have transferred venue of the conservatorship. We hereby reverse that part of the court's ruling which denied Firstar's claim for fees and transferred the conservatorship file to Kossuth County.[3] Costs on appeal are assessed to the Tebbens.

REVERSED.

[3] We note that a Kossuth County judge has since transferred the Tebbens' personal injury action against Firstar to Scott County. It is not clear from the record before us whether the Tebbens have appealed that ruling.