Supreme Court No. 18-1235
Audubon County District Court No. GCPR008999

IOWA SUPREME COURT

In the Matter of the Guardianship and Conservatorship of Marvin M. Jorgensen, Ward

Roxann Wheatley, Rick Wheatley, and Dallas Wheatley
Appellants

Date of District Court Decisions: April 27, 2018, and June 21, 2018

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR AUDUBON COUNTY
HONORABLE KATHLEEN A. KILNOSKI, DISTRICT COURT JUDGE

FINAL BRIEF OF APPELLEE, LEO P. MARTIN, GUARDIAN AD LITEM FOR MARVIN M. JORGENSEN

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COMES NOW Leo P. Martin, Guardian Ad Litem for Marvin M. Jorgensen (Marvin), and for his Guardian ad Litem's Brief in Response to Appellant's Brief states:

STATEMENT OF THE CASE

This case involves the Conservatorship of Marvin M. Jorgensen ("the Ward" or "Marvin"). Appellants are Roxann Wheatley, Rick Wheatley and Dallas Wheatley (collectively, the "Wheatleys"). This appeal arises from the District Court's rulings following the Conservator's (Security National Bank or SNB) Application for Review of Family Leases which resulted in the reformation of several farm leases between the Conservator and family members of Marvin.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in reforming or rescinding the leases.

Albert v. Conger, 886 N.W.2d 877 (Iowa Ct App 2016)
Folkers v. Southwest Leasing, 431 N.W.2d 177 (Iowa Ct. App. 1988)
In Estate of Leonard v. Swift, 656 N.W.2d 132(Iowa 2003)
In re Conservatorship of Snider, 2001 WL 710101 at *1 (Iowa Ct. App. June 13, 2001
In re the Estate of Sorenson-Peters, 2-389/11-1547 Lexus 893 (Iowa Ct. App. 2012)

In the Matter of the Conservatorship of Darrell Rininger, 500 N.W. 2d 47, 51 (Iowa, 1993)
Johnson v. Kaster, 637 N.W.2d 174, 177 (Iowa 2001)
Koehn v. Koehn Bros. Farms, LLC, 13-1036 Lexus 867 (Ia Ct. App. 2014)
Runesman v. Bailey, 250 N.W.2d 630 (Iowa 1934)
Iowa Code § 633.647 (2018)
Iowa Code § 633.668 (2018)
Iowa Code § 633.41 (2017)

2. Whether the District Court erred in removing the Chappell Farm from Dallas Wheatley's Written Lease.

In re the Estate of Sorenson-Peters, 2-389/11-1547 Lexus 893 (Iowa Ct. App. 2012)

3. Whether the District Court erred by including the Corning Farm in Michael Jorgensen's Lease.

In re the Estate of Sorenson-Peters, 2-389/11-1547 Lexus 893 (Iowa Ct. App. 2012)

STATEMENT OF FACTS

1. Marvin is the owner of approximately 18,000 acres of agricultural land in Iowa. (Order 4/27/18, P. 1, App 617). Marvin suffered a stroke in October, 2016, and became incapacitated and unable to protect his interests. (Order 4/27/18, P. 1, App. 617). A sizeable portion of this land had historically been leased to his children Mark Jorgensen ("Mark"), Michael Jorgensen ("Michael"), and Roxann Wheatley ("Roxann"), along

with their spouses and to some extent their children (the Ward's grandchildren). (*Id*., App 617).

2. The filing of a "voluntary" application for the appointment of a guardian and conservator dated December 21, 2016, asked for the appointment of Roxann as guardian and Roxann and Security National Bank ("SNB") as co-conservators. (Application 12/21/2016, App 9).

3. Following this Application a "Family Settlement Agreement" dated January 27, 2017, was entered into by Roxann, represented by attorney Martin L. Fisher ("Fisher"); Mark, represented by Alexander Wonio; Michael, pro se; grandson Shane Jorgensen, pro se; and SNB, represented by attorney Nick Critelli. These parties agreed to the appointment of Roxann as Guardian and SNB as Conservator. (Family Settlement Agreement 1/31/17, App 64).

4. The Family Settlement Agreement also provided for the creation of a Family Council consisting of Michael, Mark and Roxann to give guidance and assistance to SNB in discharging its obligations as conservator. SNB agreed to give due deference, which would not be unreasonably withheld, as to matters and issues on which the family council unanimously consents, in writing signed by all parties, provided they did not

contravene a) Marvin's intent, or b) SNB's fiduciary duties or federal and state rules and regulation governing its operation as a trustee. SNB further agreed to take into consideration Mr. Jorgensen's past course of dealing with his children and their family members. (Family Settlement Agreement 1/31/17, App 64).

5. For years prior to his stroke, Marvin had managed his own personal and financial affairs, including leasing and managing his extensive agricultural land holdings. (Application for Review of Family Farm Leases 2/9/18, ¶5, App 309).

6. Marvin's dealings with farm tenants were entirely oral or "handshake" basis. (Order 4/27/18, App 617, Tr. 3/14/18, PP. 9:23-10:9, App 397).

7. Marvin helped some of his children and certain grandchildren by paying certain expenses (Order 4/27/18, App 617) but the children also stated that Marvin did not make gifts to his children. (Tr. 3-15-18 PP. 151:10-152:24, App 397; Tr. 3-14-18 P. 213:14-19, App 397; *Id*. PP. 90:17-91:7, App 397).

8. Marvin's children and grandchildren leasing his land had various operations. Roxann and her husband Rick Wheatley (Rick) were

row crop farmers. (Application for Review of Family Farm Leases, 2/9/18, ¶3, App 309). Michael raised cattle. (Order 6/21/18 ¶17 App 775). Mark and Dallas (Roxann's son) had mixed operations, farming both row crops and raising cattle. (Tr. 3/14/18 P. 23, App 397; Tr. 3/15/18 P. 42, App 397). None of Marvin's children or grandchildren knew exactly what Marvin's arrangements were with others. (Order, 4/27/18 P. 3, App 617).

9. Attached to the Family Settlement Agreement was a document which was labeled "Family Recommendation to Conservator", which recommended that:

> "1. All current farm leases will remain in effect. 2. All farm leases shall be extended to the year 2030; 3. Rents will be calculated at the Iowa State University cash rent for medium quality ground, effective March 1, 2018 less $40 per acre as per past course of dealing." (Family Recommendation to Conservator dated 1/27/17 and filed 1/31/17 with the Family Settlement Agreement on 1/31/17, App 74).

10. Although attorney James Mailander ("Mailander") had been appointed as Guardian ad Litem for Marvin ("GAL"), (Order 1/6/17, App 60), Mailander was also identified as the attorney for Marvin in a table in the first paragraph 1 of the recitals in the Family Settlement Agreement. (Family Settlement Agreement 1/31/17, App 64).

11. Mailander, as GAL, signed a Family Settlement Agreement signature page under the heading "APPROVED AS TO FORM ONLY". (*Id*. P. 10, 1/31/17, App 64).

12. An Application to Approve Family Settlement Agreement and to Appoint Guardian and Conservator was filed on January 31, 2017, by Mailander, as GAL. (Application to Approve 1/31/17, App 62).

13. An Order Approving Family Settlement Agreement and Appointing Guardian and Conservator was filed on February 1, 2017. (Order 2/1/17, App 75). This order was approved without a hearing.

14. On February 6, 2017, Mailander was discharged as GAL.

15. On April 5, 2017, Attorney Fisher filed an Application to Withdraw as Guardian's Counsel for Roxann as Guardian and to continue as attorney for the conservatorship. (Application to Withdraw as Guardian's Counsel 4/5/17, App 79). Nick Critelli withdrew as Counsel for the conservator on May 16, 2017. (Application to Withdraw Appearance (Nick Critelli) 5/16/17, App 85).

16. On April 25, 2017, an Application for Appointment of Guardian ad Litem was filed by Attorney Fisher. (Application 4/25/17, App 81). An Order was filed on that same date to appoint Clint Hight, an

attorney from Greenfield, as GAL. (Order Appointing Guardian ad Litem 4/25/2017, App 83).

17. On May 24, 2017, SNB as Conservator filed an Application for Order Authorizing Management of Farm Land in which it requested that the court "enter an order authorizing and directing the conservator to execute and enter into any and all agreements, leases and instruments, and to perform all other acts necessary or appropriate to manage the Ward's farm land." (Emphasis supplied). (Application 5/24/17, App 86).

18. On May 26, 2017, Clint Hight, as GAL, filed an Answer of Guardian ad Litem in response to the Application for Order Authorizing Management of Farm Land (and an Application for Order Authorizing Payment for Care of Ward) that stated in part:

> "In the opinion of the undersigned, it would be in the best interests of the proposed ward to authorize the Conservator to perform the acts requested in said applications as long as the Conservator gives appropriate consideration to the family settlement agreement filed herein on January 31, 2017, and exercises such authority in accordance with their fiduciary duty to the ward." (Emphasis supplied). (Answer 5/26/2017 ¶4, App 88).

19. An Order Authorizing Management of Farm Land was filed on June 2, 2017, which states in part, "The Conservator is authorized and directed to execute and enter into any and all agreements, leases and

instruments, and to perform all other acts necessary or appropriate to manage the Ward's farm land." (Emphasis supplied). (Order 6/2/17, App 90).

20. The Application and the June 2, 2017 order do not distinguish between family and non-family leases or specify the properties in question (Application 5/24/17 and Order 6/2/17, App 86 & 90).

21. Thereafter, the Conservator, SNB, entered into leases with the Jorgensen family members (the three children and two grandchildren) at rates of $40.00 per acre below average ISU rates for medium quality land for a period of time extending to March 1, 2030. (Application dated 2/9/18 ¶15, Lease Attachments 1 through 6 filed 2/9/18, App 309 & 316, 327, 338, 348, 357 & 367). The Lease with Mark Jorgensen was unsigned. (Family Farm Lease Attachment #3, 2/9/18, App 338). These rental rates were far below market value as evidenced by leases with non-family members. (Application for Order Approving 2017 Crop Year Non-Family Farm Leases filed 12/1/17, App 109; Cash Rental Rates for Iowa 2017 Survey filed 12/1/17 as Attachment 2, App 118; and Leases filed 12/1/17 as Attachments 3 to 10, App 127, 134, 141, 149, 160, 167, 174 & 181).

22. The Conservator, SNB, relied on the representations of the children as to their past course of conduct with their father when it prepared the family leases. (Tr. 3/14/18, P. 10:10-25; *Id*. PP. 23:18 to 24:4; *Id*. PP. 30:17 to 31:1; *Id*. P. 60:6 to 63:22, App 397).

23. On December 1, 2017 the Conservator, SNB, filed an application to approve "non-family" farm leases for the 2017 crop year. (Application 12/1/17 and Attachments 1 to 10, 12/1/17, App 109 & 114, 115, 127,134,141,149, 160, 167, 174 & 181.)

24. On December 27, 2018 the Conservator, SNB, filed an application to approve "non-family" farm leases for the 2018 crop year. (Application 12/27/17 and Attachments 1 to 10, 12/27/17, App 192 & 197, 198, 210, 217, 224, 232, 243, 250, 257 & 264.)

25. The GAL filed two Waiver of Notice documents in which he consented to the entry of orders approving the 2017 and 2018 Non-Family Farm Leases. (Waivers filed 12/1/17 and 12/27/17, App 188 & 271).

26. Orders were entered to approve the 2017 and 2018 Non-Family Farm Leases. (Orders 12/4/17 and 12/28/17, App 189 & 272).

27. On February 9, 2018, an Application for Review of Family Leases and copies of the "family leases" were filed with the Court by the

Conservator, SNB. (Application 2/9/18 and Attachments 2 to 6, App 309 & 327, 338, 348, 357, 367).

28. A hearing (originally scheduled for February 22, 2018, which was continued due to inclement weather) was conducted on March 14 and March 15, 2018 regarding several issues including the Application for Review of Family Leases. (Court Order 2/22/18 and Transcripts for 3/14/18 and 3/15/18, App 392 & 397).

29. On March 15, 2018 the Court entered an Order directing the parties to submit their specific requests for court action by April 5, 2018, via EDMS and by email in Word format. (Court Order 3/15/18, App 569).

30. The parties submitted their specific requests. (Conservator's Position Statement Re: March 14, 2018 Hearing, 3/26/18, App 571; Statement of Guardian ad Litem, 3/30/18, App 580; Specific Requests for Court Action of Roxann Wheatley, Rick Wheatley and Dallas Wheatley, 4/5/18, App 585; Statement to the Court by Michael Jorgensen (not including Exhibit stricken by Court Order dated April 10, 2018), 4/5/18, App 599; Court Order dated April 10, 2018, App 615; Mark Jorgensen Post-Hearing Brief & Request for Relief (not including Exhibit stricken by

Court Order dated April 10, 2018), 4/6/18, App 606; Court Order 4/10/18, App 615).

31. The GAL, in his Statement of Guardian ad Litem submitted on March 30, 2018 recommended that the Family Council be dissolved and that the family leases be terminated. The GAL noted that a majority of the members of the Family Council admitted that they provided inaccurate information to the Conservator. (Statement of GAL 3/30/18, App 580).

32. At the March 15, 2018 hearing, Mark Jorgensen (Mark) testified that Marvin was not in favor of gifting. He admitted the $40.00 discount per acre discount was not part of his Dad's plan or intention, in fact "what's going on here the last year would make Dad puke. It would make him very disgusted". (Tr. 3-15-18 P. 98:17-99:18, App 397.) He wanted the Judge to "rectify something us kids were taking, stealing from Dad". (Tr. 3-15-18, P. 109:20 – 24, App 397.) See also *Id.* P. 117:12-18, App 397.)

33. Michael acknowledged that prior to Marvin's stroke Marvin wasn't giving his children anywhere near the discount that they were each receiving pursuant to the Family Settlement Agreement. (Tr. 3-14-18, PP. 174:24-175:3, App 397). Michael stated that his father's "favorite expression was money is the root of all evil." *Id.* P. 175:7-8. Michael stated

that at one of the Family Council meetings his sister, Roxy (Appellant Roxann), wanted to lease approximately 2,200 acres formerly farmed by non family members at the discounted "family" rate. (*Id.* PP. 175:19-176:5, App 397). The discussion was characterized as "More or less you scratch my back and I will scratch your back." which would have been at the expense of Marvin. (*Id.*, PP. 176:6-15, App 397).

34. The Court Order dated April 27, 2018, adopted many of the GAL's recommendations including dissolution of the Family Council and termination of the family leases. This Order was later modified on June 21, 2018. These Orders are the Orders from which the Appellants filed their appeal. (Orders 4/27/18 & 6/21/18, App 617 & 775).

35. Clint Hight served as GAL until June 25, 2018 when he withdrew for medical reasons. (Application to Withdraw as GAL 6/25/18, Order 6/25/18, App 784 & 785).

36. After a hearing, Leo P. Martin (the undersigned attorney and GAL) was appointed Guardian ad Litem on July 18, 2018. (Order 7/18/18, App 787).

PRESERVATION OF ERROR

The GAL admits that the alleged errors asserted by the Appellants have been preserved for review.

STANDARD OF REVIEW AND SCOPE OF REVIEW

The appropriate standard of review in this case is *de novo*. Iowa R. App. P. 6.907. "Generally, the Supreme Court will hear a case on appeal in the same manner in which it was tried in the district court, at law or in equity." *Johnson v. Kaster*, 637 N.W.2d 174, 177 (Iowa 2001). A case tried in equity, as this case was at the district court level, is reviewed *de novo*. *Id.* at 177. "In reviewing a decision in equity, the Supreme Court has the responsibility to examine the facts as well as the law and decide anew the issues *properly preserved*." *Id*. at 177. While the district court's factual findings are not binding, they are accorded weight. *Id*. The Court is also "especially deferential to the district court's assessment of witness credibility." *Id*. at 178.

"A *de novo* review does not mean the appellate courts decide the case in a vacuum, or approach it as though the trial court had never been involved; rather, even in a *de novo* appellate review, great weight is

accorded the findings of the trial court where the testimony is conflicting." *Albert v. Conger*, 886 N.W.2d 877 (Iowa Ct. App. 2016).

Therefore, the GAL admits that the properly preserved alleged errors are within the scope of the review provided that the appropriate standard for review is *de novo.*

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN REFORMING/RESCINDING THE LEASES

For the GAL's discussion regarding error preservation, scope of review and standard of review see pages 17 and 18 herein.

A. The issue for the trial court was not termination but reformation or rescission.

Appellant correctly states the law as it relates to the reformation of written documents. *Runesman v. Bailey*, 250 N.W.2d 630 (Iowa 1934). *See Koehn v. Koehn Bros. Farms, LLC,* 13-1036 Lexus 867 (Ia Ct. App. 2014) at page 32:

> But a contract will be reformed "only if the party seeking reformation clearly and convincingly establishes" that the contract does not express the true intend of the parties because of "fraud or duress, mutual mistake of fact, mistake of law, or mistake of one party and fraud or inequitable conduct on the part of another" citations omitted. To reform the contract, "A definite intention or agreement on which the minds of the parties have met must have preexisted the instrument in question. There can be no reformation unless there is a preliminary

> or prior agreement, either written or verbal, between the parties furnishing the basis for the rectification as to which the instrument can be conformed." citations omitted.

The law relating to rescission is very similar, as noted in *Folkers v Southwest Leasing*, 431 N.W.2d 177,181 (Iowa App. 1988):

> There is no hard and fast rule on the subject of rescission, for the right depends on the circumstances of the particular case. It is permitted for failure of consideration, fraud in making the contract, for inability to perform it after it is made, for repudiation of the contract or an essential part thereof, and for such a breach as substantially defeats its purpose.

The trial court was presented with a scenario wherein the conservator for the ward sought review and direction concerning its actions relating to the leases in question.

As noted in the Statement of Facts, the filing of a "voluntary" petition for the appointment of conservator eventually resulted in a family settlement agreement, which was approved by the court. (Application 12/21/2016, App 9, Family Settlement Agreement 1/31/17, App 64). A blanket request by the Conservator for authority to execute leases was approved subject to the caveat "necessary and appropriate therefor". (Application 5/24/17, Order 6/2/17, App 86 & 90). The Conservator, SNB, relied on the representatives of the children as to their past course of conduct with their

father when it prepared the family leases. (Tr. 3/14/18, P. 10:10-25; Id. PP. 23:18 to 24:4; Id. PP. 30:17 to 31:1; Id. P. 60:6 to 63:22, App 397).

In this case, the actual "agreement" was the Family Settlement Agreement. The leases were to be created based on the terms of that agreement, i.e. "past practices" of Marvin and an adherence to the fiduciary duties of the conservator. Therefore, the question is whether the leases originally executed, complied with the intentions contemplated by the Family Settlement Agreement. For reasons set forth later in this brief the GAL submits they did not and that the conservator had a mistaken belief they did based upon the fraudulent and inequitable conduct of the appellants re the "past practices of the Ward".

While it is true that a Notice of Termination was sent to the Wheatleys by the Conservator, to limit the review of this matter solely to an examination of the law relating to the termination of leases fails to adequately capture the entire situation facing the trial court.

The agreement between the Conservator and the family members was with the understanding the leases were to reflect the Ward's past practice of granting favorable terms to family members on certain parcels of ground. It was also to be consistent with the Conservator's fiduciary duty to the Ward.

The interpretation of "past course of conduct" was complicated by the fact all the previous leases were oral. None of Marvin's children or grandchildren knew exactly what Marvin's arrangements were with others. (Order, 4/27/18 P. 3, App 617). The Trial Court found that "While he undoubtedly was able to keep a tally of his adjustments for his family members while he was functioning at full capacity, that history is opaque at this time." (*Id.*, App 617). Thus, the Ward, Marvin, was of absolutely no assistance due to his medical condition and could shed no light on the situation nor voice his opinion. One can only wonder how Marvin could have been competent to execute an application for a "voluntary" Conservatorship.

Be that as it may, the Conservator initially relied on the assertions of the lessees as to past practices and prepared various leases including those with Appellants. (Tr. 3/14/18, P. 10:10-25; Id. PP. 23:18 to 24:4; Id. PP. 30:17 to 31:1; Id. P. 60:6 to 63:22, App 397; Leases 2/9/18 Attachments 3-6, App 338, 348, 357 and 367). However, as time went by and it became apparent to the Conservator that the Appellants and other family members had not accurately portrayed the "past practices", the Conservator brought the matter to the attention of the Court. (Application for Review of Family

Farm Leases 2/9/18, App 309). The Court, upon hearing, discovered the Conservator was correct, i.e., the lease terms represented by the tenants were not representative of "past practices" but rather agreements between the children and grandchildren as to what benefits each would receive. (Order 4/27/18, App 617). Further, there was testimony adduced that the Conservator actually found it had violated its fiduciary duty to the Ward by entering into the leases in question.

Whether the decision of the trial court is considered to be a reformation of the leases to match the actual agreement of the Conservator and lessees or a rescission of the Family Settlement agreement and the leases as an extension thereof, is more a matter of semantics than substance. The facts as adduced at the March 14 and 15, 2018 hearings make it clear that in order to protect the interests of the Ward the leases had to be changed.

Appellant argues the "leases" could not be "terminated". However, this ignores that the leases were executed as an extension of the agreement between the Conservator and the tenants. The agreement which is the subject of the Court orders of April 27, 2018 (App 617) and June 21, 2018 (App 775) is that leases would be created which a) fairly represented the past course of conduct of the Ward and b) would not cause SNB to violate its

fiduciary duty to the Ward. (Family Settlement Agreement 1/31/17, App 64). The testimony shows that certainly was not the case. Further, Appellant cites no authority to support the proposition that "leases" of agricultural ground cannot be the subject of reformation/rescission.

B. Effect of *de novo* Review

Appellant's next argument is that the trial court did not use the "magic words" of mistake, fraud, ambiguity, unconscionability or bad faith in its decision, however the Appellant asserts the proper standard of review in this matter is "*de novo*" to which the GAL agrees.

> "Because this case was tried to the district court as a proceeding in equity, our review is *de novo*.
>
> . . . "in an equity case we are not bound by the district court's decision, but we do give weight to the trial court's factual findings, especially its determination of creditability. (C*itations omitted*.) We examined the whole record and adjudicate the rights anew so long as the issues have been properly presented" *In re the Estate of Sorenson-Peters*, 2-389/11-1547 Lexus 893 (Iowa Ct. App. 2012)

Therefore, the lack of certain findings by the trial court is not dispositive if the appellate court finds, in its *de novo* review, the requisite basis for reformation.

The "Jorgensen Family Settlement Agreement" (Settlement Agreement) provides at paragraph 3 as follows:

"3. Jorgensen Family Council. Michael, Mark and Roxann agree to form a family council to give guidance and assistance to SNB in discharging its obligations as conservator, executor and trustee.

(a) Due Deference:

SNB agrees it will give due deference, which will not be unreasonably withheld, as to the matters and issues on which the family council unanimously consents, in writing and signed by all parties, provided they do not contravene Marvin's intent, or SNB's fiduciary duties or federal and state rules and regulation governing its operation as trustee.

(b) Prior Course of Dealing:

In determining Marvin Jorgensen's intent, SNB agrees to take into consideration Mr. Jorgensen's past course of dealing with his children and their family members."

Attached to the "Settlement Agreement" was the "Family Recommendation to Conservator" purporting to give guidance and assistance to SNB in discharging its obligations as conservator. (Family Recommendation 1/31/17, App 74).

As noted, the "agreement" between the parties which formed the basis of the trial court's decision to reform the various leases was not the leases themselves but rather the terms of the "Family Settlement Agreement". The issue presented to the Trial Court and now to the Appellate Court is:

Were the actions of the family members and the Conservator's reliance thereon sufficient to justify reformation or recission of the leases?

Key to deciding this issue is the "Statement of the Guardian ad Litem" presented to the court by Clint Hight, the GAL, who attended the hearings in question prior to submitting his report to the Court. (Statement of GAL 3/30/18, App 580).

As noted in *Estate of Leonard v. Swift, 656 N.W.2d 132, at page 140*

> "Overall, we think the role of a guardian ad litem is two-fold. The guardian ad litem, by filing an answer on behalf of the ward denying all material allegations in the petition prejudicial to the ward, insures that default judgment is not rendered against a person who is unable to defend for reasons of incompetency, incarceration, or minority. In addition, as an officer of the court, the guardian ad litem advocates for the best interest of the ward. (*Citations omitted*.)

The GAL, advocating for the best interests of the Ward, was clear that the lessees engaged in conduct that is equivalent to the "fraud or inequitable conduct" which when coupled with the mistaken belief on the part of the Conservator resulted in the leases that can be reformed or rescinded. (Statement of GAL 3/30/18, App 580).

The testimony was clear that the Family Council presented their unanimous recommendation to the conservator that family farm lease "rents

be calculated at the Iowa State University Cash Rent for Medium Quality Ground, effective March 1, 2018, less $40.00 per acre as per past course of dealing." (Family Recommendation 1/31/17, App 74). The Conservator testified that Family Council meetings were unproductive and became heated often enough that the Conservator stopped having Family Council meetings and asked for requests to be in writing. (Tr. 3-14-18, PP. 65:12-66:12, *Id.*, PP. 30:17-31:4, *Id*., PP. 62:10-63:22, App 397). Testimony from at least two of the Ward's children indicated that the Family Council was not working and may, in fact, be causing more discord among the members. (Tr. 3-15-18, PP. 114:22-115:19; *Id*. PP. 116:25-117:21; *Id*. P. 161:15-18, App 397.) Further, Mark Jorgensen and Mike Jorgensen both testified that even though they had signed the Family Recommendation to Conservator (1/31/17, App 74) which recommended significant rent discounts ". . . as per past course of dealing" those proposed reductions did not actually reflect Marvin's intent or his past course of dealing. (Tr. 3/15/18 P. 104:12-24; *Id*. PP. 108:7-110-3; *Id*. PP.161:19-162:1, App 397).

Michael paid $60.00 to $70.00 per acre for pasture prior to his father's stroke. (Tr. 3/14/18, P. 169:9-21, App 397). Michael paid considerably less (approximately $35.00 per acre) than prior course of dealing pursuant to

the lease prepared pursuant to the Family Settlement Agreement. (*Id.* PP. 169:9-170:11, App 397, Farm Lease Attachment #4 2/9/18, App 348).

Michael's discount of $40.00 per acre is the same amount per acre as his siblings received. (*Id*. P. 170:1-11, App 397). He argued that he was also entitled to free corn stalks based upon prior course of dealing (*Id*. P. 170:12-24, App 397), and use of Marvin's equipment without charge. (*Id*. PP. 170:25-171:18, App 397). Michael asserts that he is entitled to the same discount per acre as his siblings and his nephew and entitled to all items that he has received without additional charge in the past course of dealing. (*Id*. PP. 171:24-172:15, App 397).

Michael testified that he was not aware that his father Marvin had suggested a $25.00 an acre break for family members when his father met with Farmers National. (*Id*. P. 174:19-23, App 397).

Michael acknowledged that prior to Marvin's stroke Marvin wasn't giving his children anywhere near the discount that they were each receiving pursuant to the recommendation attached to the Family Settlement Agreement. (*Id*. PP. 174:24-175:3, App 397). Michael stated that his father's "favorite expression was money is the root of all evil." (*Id*. P. 175:7-8, App 397). Michael stated that at one of the Family Council

meetings his sister, Roxy (Appellant Roxann), wanted to lease approximately 2,200 acres at the discounted rate. (*Id*. PP. 175:19-176:5, App 397). The discussion was characterized as "More or less you scratch my back and I will scratch your back." (*Id*. P. 176:10, App 397). Applying the discounted rate to additional acres would have been at Marvin's expense. (*Id*. P. 176:6-15, App 397).

On March 15, 2018 Mark Jorgensen (Mark) testified that Marvin wasn't in favor of gifting. (Tr. 3-15-18, P. 98:17-20, App 397). Mark recanted the recommendation of a $40.00 per acre discount for family members. (*Id*., P. 98:17-25, App 397). Mark admitted that he had taken part in the benefit of the discount and stated that it made him sick. (*Id*. P. 99:1-18, App 397). Mark stated that this did not match his father's intentions and "would make Dad puke." (*Id*. P. 99:7-15, App 397). He further stated that the actions of the family members were stealing for Dad. (*Id*. P. 109:20-24; *Id*. P. 117:12-18, App 397).

Appellants acknowledged that the rental rate of the ISU cash rent rate for medium quality land minus $40.00 per acre was not the Ward's prior course of dealing (Specific Requests for Court Action 4/5/18 PP. 4-5, App 585) and that prior to the Ward's stroke there were simultaneous uses of

different parcels for different purposes (*Id*. P. 9, App 585), and that prior to the Ward's stroke Michael was permitted to use stalks and hay ground (*Id*. P. 11, App 585).

The data from the 2017 and 2018 Crop Year Non-Family Farm Leases is summarized in the following table which shows actual rent paid by non-family members was far above the ISU average rent rate. The acres and rates for both the 2017 and 2018 leases were the same. (Application 12/1/17 and ten attachments and Application 12/27/17 and ten attachments, App 109 & 114, 115, 127, 134, 141, 149, 160, 167, 174 & 181).

Attach-ment No.	**Tenant**	**ISU Average Rent Rate**	**Crop Acres**	**Rent Paid By Non-Family Tenant**
3	Lovett – Wayne Co.	$167.00/acre	184.21	$190.00/acre
4	Lonnie Burgmaier Union County	 $201.00/acre	 758.47	 $250.00/acre
5	Burgmaier Farms Adams Co. Ringgold Co. Union Co.	 $195.00/acre $164.00/acre $201.00/acre	 265.12 192.16 1,031.78	 $250.00/acre $250.00/acre $250.00/acre
6	Fishback Louisa Co. Muscatine Co.	 $179.00/acre $211.00/acre	 2,658.00 56.50	 $260.00/acre $260.00/acre
7	McLaughlin Ag LLC Louisa Co. Louisa Co. - pasture	 $179.00/acre $ 44.00/acre	 122.00 60.00	 $295.00/acre $ 66.83/acre

8	Chambers Adair Co. Audubon Co. Guthrie Co.	 $187.00/acre $230.00/acre $210.00/acre	 193.20 886.46 277.04	 $250.00/acre $250.00/acre $250.00/acre
9	Lauritsen Audubon Co.	 $230.00/acre	 407.11	 $250.00/acre
10	Jespersen – Cass Co.	$212.00/acre	250.22	$250.00/acre

The GAL approved the non-farming leases for the 2017 and 2018 crop years. (Waivers filed 12/1/17 and 12/27/17, App 188 & 271). The GAL did not consent or approve of the family member leases. (Statement of GAL 3/30/18, App 580).

If the Burgmaier properties totaling 2,247.53 acres were leased to the Appellants at the ISU rate minus $40.00 per acre family discount instead of to Lonnie Burgmaier and Burgmaier Farms (Lease Attachments 4 and 5 12/1/17, App 134 & 141), the Conservatorship's income would have decreased from the $561,882.50 rent paid by the non-family tenants to $353,151.69 (calculated based on ISU rates shown in ¶ 10 and 11 of the Application for Order Approving 2017 Crop Year Non-Family Farm Leases minus $40.00 per acre) for a loss of $208,730.81. (*Id*.; Application 12/1/17, App 109; Attachment #2 to Application 12/1/17, App 115).

C. **Prior Court Approval of Leases and Specific Approval of Gifts**

Iowa law requires prior court approval for a conservator to enter into a

lease (Iowa Code Section 633.647) and specific authorization for a conservator to make gifts (Iowa Code Section 633.668).

Iowa Code Section 633.647 states that "Conservators shall have the following powers subject to approval of the court after hearing on such notice, if any, as the court may prescribe: . . . 2. To execute leases." (Emphasis supplied).

Iowa Code Section 633.668 states that:

> For good cause shown and under order of court a conservator may make gifts on behalf of the ward out of the assets under a conservatorship to persons. . . to whom or to which such gifts were regularly made prior to commencement of the conservatorship. . . (Emphasis supplied).

The Conservator did not have sufficient prior court approval to enter into the leases with the Appellants.

An Application that was not accompanied by any proposed leases resulted in the entry of a June 2, 2017 Order that stated: "The Conservator is authorized and directed to execute and enter into any and all agreements, leases and instruments, and to perform all other acts necessary or appropriate to manage the Ward's farm land." (Application for Order Authorizing Management of Farm Land 5/24/17, App 86; Order 6/2/2017, App 90).

Despite the entry of the June 2, 2017 Order, SNB correctly believed that court approval of the leases was required as evidenced by its attorney

and court filings. (Tr. 5-18-18, P. 43:15 – 24, App 397; Applications filed 12/1/17 and 12/27/17, App 109 & 192). Despite the June 2, 2017 Order, SNB sought and received court approval of the non-family member leases for the 2017 and 2018 crop years. (Id., App 109 & 192, and Orders 12/4/17 and 12/28/17, App 189 & 272). The GAL consented to entry of the Orders that approved the non-family member leases. (Waivers 12/1/17 and 12/27/17, App 188 & 271.) No similar waivers were filed by the GAL regarding the family member leases. Instead, the GAL disapproved of the family member leases. (Statement of GAL 3/30/18, App 580).

The testimony elicited at the hearing disclosed that the proposed family member leases a) were not consistent with Marvin's intent; b) were contrary to Marvin's prior course of dealing; c) caused SNB to breach its fiduciary duty to Marvin; d) provided substantial discounts below market rate and were, in effect, gifts to the family members; e) were characterized by one of Marvin's sons as "stealing from Dad" (Tr. 3/15/18, P. 109:22-24; *Id*. P. 117:12-18, App 397) and f) not in Marvin's best interest.

When the Conservator sought court approval of the family member leases, the Court correctly rejected the leases and directed that the leases be terminated and new leases be prepared based upon market rate rents minus

$25.00 per acres as stated in the orders that are the subject of this appeal. (Application 2/09/18, and six (6) attachments thereto, App 309, 316, 327, 338, 348, 357 & 367); and Orders 4/27/18 and 6/21/18, App 617 & 775).

The Conservator did not have authority to make gifts of the Ward's assets without specific prior approval of the Court.

The conservator may not make a gift of Conservatorship funds except as authorized in Iowa Code Section 633.668. *In the Matter of the Conservatorship of Darrell Rininger*, 500 N.W. 2d 47, 51 (Iowa, 1993). The statute expressly requires court approval of such gifts. The June 2, 2017 Order did not make the necessary specific findings or contain an authorization to make gifts which is required by Iowa Code Section 633.668.

Despite the entry of the June 2, 2017 Order, the Conservator did not have the necessary authority to enter into the family member leases at discounted rates under either Iowa Code Section 633.647(2) or Iowa Code Section 633.668. The Appellants' leases had to be reformed or rescinded. New leases at the rental rate of market value minus $25.00 per acre may only be made if the Court finds that there is sufficient evidence to show that the ward regularly made such gifts prior to the commencement of the conservatorship.

Michael acknowledged that prior to Marvin's stroke Marvin wasn't giving his children anywhere near the discount that they were each receiving pursuant to the Family Recommendation attached to the Family Settlement Agreement. (*Id*. PP. 174:24-175:3, App 397).

On March 15, 2018 Mark Jorgensen (Mark) testified that Marvin wasn't in favor of gifting. (Tr. 3-15-18, P. 98:17-20, App 397). Mark recanted the recommendation of a $40.00 per acre discount for family members. (*Id*., P. 98:17-25, App 397). Mark admitted that he had taken part in the benefit of the discount and stated that it made him sick. (Id. P. 99:1-18, App 397). Mark stated that this did not match his father's intentions and "would make Dad puke." (*Id*. P. 99:7-15, App 397).

The table (based upon Application 12/1/17 and its ten attachments, App 109, 114, 115, 127, 134, 141, 149, 160, 167, 174 & 181 and Application 12/27/17 and its ten attachments, App 192, 197, 198, 210, 217, 224, 232, 243, 250, 257 & 264) disclosed on Pages 29 and 30 of this Brief that summarizes the rates paid by non-family member tenants also discloses the ISU rate for medium quality land. The family member leases are at rates $40.00 per acre less than the ISU rates which are far less than the fair market rates.

In addition to the family discount of $25.00 per acre less than the fair market rate authorized by the trial court (Orders 4/27/18 and 6/21/18, App 617 & 775), the Appellants seek the reduced rate of $40.00 per acre less than the ISU rate for medium quality land instead of market rate minus $25.00 per acre. Further, the 2018 non-family leases show that farm ground in close proximity to land that Appellants leased was actually leased to the non-family member tenants at rates greater than those shown in the ISU rental survey rate for medium quality land in the same counties. (Application Non-Family Leases 12/27/17 and Attachments 1, 2, 4 and 5, App 192, 197, 198, 217 and 224 and Application Family Leases 2/9/18 and Attachments 2 and 5, App 309, 327 and 357).

Therefore, if the Appellants prevail on this appeal, the Appellants will pay rent based upon the ISU survey rate for medium quality land minus $40.00/acre instead of the market rate minus $25.00 per acre set by the court. In each year from 2020 through 2029 the Ward will lose amounts greater than just the difference between a $25.00 per acre discount versus a $40.00 per acre discount from the ISU survey rate for medium quality land because the going fair market rate is higher than the ISU survey rate for medium quality land.

The District Court obviously and appropriately found the leases with a) Roxann Wheatley and Rick Wheatley, and b) Dallas Wheatley, had to be vacated to prevent the continued gifting of assets of the Conservatorship to those tenants each year from 2019 through 2029 in amounts that were in excess of the amounts regularly made prior to commencement of the Conservatorship.

The appropriate amount of gifts to be made to the Ward's children in the form of rent rate discounts should be made by the Appellate Court under *de novo* review or by the District Court on remand.

The Ward's long time bookkeeper testified that he wanted to have all leases be on a cash rent basis with a discounted rental rate for his children. (Tr. 3-14-18, P. 93:12-94:12, App 397). She testified that after death Marvin wanted to give property to his children but not his grandchildren although he helped grandchildren in individual ways. (*Id*. P. 93:16-19, App 397). She also testified that Marvin:

> "wanted to give a discount to his children but an equal portion, because he knew there was a problem there, that he was giving Rick and Roxy way more of a break than he was giving Michael and Mark, and he didn't think that was right." (*Id*. PP. 93:24-94:4, App 397).

The trial court's direction that family members are to receive a $25.00 per acre discount from fair market rates for tillable, hay and pasture acres means that family members do not receive equal family discounts (gifts)

because the family members do not lease the same number of acres. See the 2018 leases submitted for court review which show that Michael leased 1,732 acres (Attachment #4 2/9/18, App 348); Mark leased 1,880.61 acres (Attachment #3 2/9/18, App 338); Roxann and her spouse Rick leased 3,185.73 acres (Attachment #2 2/9/18, App 327); and grandson Dallas leased 1,478.92 acres (Attachment #5 2/9/18, App 357).

The Court in its April 27, 2018 Order does not specifically refer to the gifting statute (Iowa Code Section 633.668) but appears to conclude that a discount of $25.00 below market rental rates is appropriate based upon the ward's prior course of dealing. (Order 4/27/18, App 617). The Court in its April 27, 2018 Order specifically rejected the family member leases that used the rental rate of the ISU survey rate for medium quality land minus $40.00 per acre. (*Id.*)

The Appellate Court in its *de novo* review can determine if gifts in equal amounts are to be made to each child in the form of discounted rents or it may remand to the Trial Court for a determination of the appropriate amount of gifting, if any, that should be made to the children in the form of rental rate discounts. The Appellate Court, or the District Court on remand,

can also determine the amount of rental rate discounts, if any, that should be made to grandchildren.

Effect of gifts upon the Ward's estate value

The Appellants argue in their brief that "the value of Marvin's farmland was not "diminished" at all. The land would have continued to retain the exact same value for sale in 2030." This argument does not consider the full effect of the gifts upon the Ward's estate. The Ward has considerable debt obligations that are secured by mortgages on his real estate. The gifts reduce the income that is available to pay that debt. The gifts also reduce the size of the bequest that the Ward plans to make from his estate to Mayo Clinic (Will and First Codicil filed as Attachments A and B 1/4/17, App 22 & 32).

The Appellants' leases provide for payment of rental rates that are significantly below the market rate and are to be in effect until March 1, 2013. In the unlikely event that farms need to be sold to service the debt or to meet other needs for the Ward, the price that can be obtained upon sale will be significantly reduced due to these lease terms. Potential buyers will pay less for land that is subject to a multiple year lease at below market rates. The Trial Court made the correct decision for the benefit of the Ward

when it reformed or rescinded the family member leases.

Conservator's duty as a fiduciary is to manage the Ward's assets prudently.

Appellant Roxann, in her motion dated November 9, 2017, argued:

> The Family Settlement Agreement signed by the Ward's children and SNB as Conservator contemplated that "in determining Marvin Jorgensen's intent, SNB (would) take into consideration Mr. Jorgensen's past course of dealing with his children and their family members." (Family Settlement Agreement filed January 31, 2017) However, SNB, as Marvin's Conservator is Marvin's fiduciary, and must manage his assets, which consist primarily of farmland prudently. Iowa Code Section 633.41 (2017); In re Conservatorship of Snider, 2001 WL 710101 at *1 (Iowa Ct. App. June 13, 2001) (discussing conservator's duty to manage farmland with personal care)
> (Motion 11/9/17 ¶ 14, App 101).

SNB as Conservator requested that the Court review the family member leases to determine whether the Conservator will be deemed to be in compliance with its fiduciary duties. (Application 2/9/18 ¶16-19, App 309; Tr. 3/14/18 PP. 19:21-20:14, App 397). When the Conservator sought Court review of the family member leases it referred to the assertion by Appellant Roxann on November 9, 2017 that the Conservator could not abrogate its statutory duty to the Ward. (Application 2/9/18 ¶18, App 309; Motion 11/9/17 ¶ 14, App 101). The Conservator admitted that its actions related to the leases were contrary to the Conservator's fiduciary duties (Tr.

3/14/18, P. 17-20, App 397). The leases were different from the Conservator's normal practice. (*Id*. P. 20:11-14, App 397). The Conservator's testimony describes the process of creating the leases and concludes that the leases do not reflect the Ward's prior course of dealing. (*Id*. PP. 17:16-24:4, App 397).

The GAL agrees with the argument that Appellant Roxann made on November 9, 2017 for the benefit of her father, the Ward herein, and believes that the argument should be applied to the issues in this current appeal. This argument can be used to support the Trial Court's decisions in the April 27, 2018 and June 21, 2018 Orders from which the Appellants have appealed. This argument can also be used to argue that the Trial Court was too generous to the family members by granting a discount of $25.00 per acre from the market rate rental rates for family member leases.

II. The District Court did not Err in Removing the Chappell Farm From Dallas Wheatley's Written Lease.

For the GAL's discussion regarding error preservation, scope of review and standard of review see pages 17 and 18 herein.

The tillable acres on the Chappell Farm were enrolled in the Conservation Reserve Program (CRP) when Marvin had his stroke. (Application 2/9/18 ¶31-32, App 309). There was no prior course of dealing

regarding raising crops on the tillable acres on the Chappell Farm because it was enrolled in the CRP program. (Tr. 3-15-18 P. 53:2-19, App 397). The Trial Court and the Appellate Court, under *de novo* review, may reform the leases to protect the Ward's interest. *In re the Estate of Sorenson-Peters*, 2-389/11-1547 Lexus 893 (Iowa Ct. App. 2012). The Guardian ad Litem requests that the Ward's interest be protected by requiring that the tenant on these tillable acres pay market rate rent for these tillable acres.

III. The District Court did not Err by Including the Corning Farm in Michael Jorgensen's Lease.

For the GAL's discussion regarding error preservation, scope of review and standard of review see pages 17 and 18 herein.

The 480 acres of the Corning Farm pasture was used by Marvin prior to his stroke for his own cattle. The Court found that Michael had used this land when he returned to Iowa before Marvin used it for his own cattle. The Court elected to use that prior course of dealing (even though it was not immediately prior to Marvin's stroke) to approve the inclusion of the Corning Farm in Michael's lease. (Order 4/27/18 PP. 3-4 as modified by Order 6/21/18 P. 3 ¶7, App 617 and 775; Lease Attachment #4 2/9/18, App 348). The Trial Court and the Appellate Court under *de novo* review, may reform the leases to protect the Ward's interest. *In re the Estate of*

Sorenson-Peters, 2-389/11-1547 Lexus 893 (Iowa Ct. App. 2012) The Guardian ad Litem requests that the Ward's interest be protected by requiring the tenant on the Corning Farm to be required to pay market rate rent for the 480 acres of the Corning Farm.

CONCLUSION

Wherefore, the Guardian ad Litem prays that the court either a) affirm the Trial Court in all respects except that with respect to the Chappell Farm ground taken out of CRP and the Corning Farm the tenants for those properties should be required to pay market rate rent; or b) remand the case to the Trial Court with directions that the Trial Court should make a determination regarding the amount of gifts (in the form of discounts to rent), if any, should be made to family members and to modify its Order based upon the Trial Court's determination on that issue, and to otherwise affirm the Trial Court in all other respects except that with respect to the Chappell Farm ground taken out of CRP and the Corning Farm the tenants for those properties should be required to pay market rate rent.

APPLICATION FOR APPELLATE ATTORNEY FEES

The Appellee Guardian ad Litem on behalf of the Ward applies for attorney fees in this appeal. A detailed application with an itemized

statement for attorney fees of the Appellee Guardian ad Litem on behalf of the Ward in this appeal will be filed when all of the briefs are completed.

REQUEST FOR ORAL ARGUMENT

The Guardian ad Litem requests to be heard in oral argument before the court in this matter.

CERTIFICATE OF COSTS

The undersigned hereby certifies that the cost of printing the Final Brief of the Guardian ad Litem was $0.00.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

1. This brief complies with the type volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because it contains 8,009 words.

2. This brief complies with the type face requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) because it has been prepared in proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2019, a copy of the foregoing pleading was electronically filed with the Clerk of The Supreme Court, the counsel for the Appellants and upon other parties by EDMS to their respective counsel:

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CERTIFICATE OF FILING

The undersigned hereby certifies that on the 16th day of October, 2019 he filed Appellee Guardian ad Litem's Final Brief with the Clerk of the Supreme Court of Iowa via EDMS.

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