IN THE COURT OF APPEALS OF IOWA

No. 0-577 / 10-0096
Filed November 24, 2010

IN THE MATTER OF THE CONSERVATORSHIP OF ROSE V. ALESSIO,
Plaintiff-Appellant,

vs.

FIRST COMMUNITY TRUST, N.A.,
Defendant-Appellee.

Appeal from the Iowa District Court for Fayette County, Richard D. Stochl, Judge.

The executor of a decedent's estate appeals from a district court order discharging the conservator and transferring the conservatorship's assets without directing the conservator to make a reimbursement for investments made without court approval. **AFFIRMED.**

Hugh M. Field of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellant.

Gary F. McClintock of McClintock Law Office, Independence, for appellee.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

MANSFIELD, P.J.

Michael Leo, in his capacity as the executor of the Estate of Rose Alessio, appeals the district court order discharging the conservator, First Community Trust, N.A. (FCT), and transferring the conservatorship assets without ordering a reimbursement for equity investments that decreased in value by $34,272.39. Michael contends the conservator made the investments without court approval, and therefore should be held liable for the loss that resulted. Michael also alleges the investments were imprudent. FCT responds that the investments were prudent under the circumstances, and that it should be shielded from legal liability despite the failure to obtain prior court approval. *See* Iowa Code § 633.633A (2009).

The district court made a factual finding that the conservator's investment strategy was a prudent one, but it nonetheless concluded the conservator was strictly liable for damages due to its failure to obtain prior court approval as required by Iowa Code section 633.647(1). Still, it held the estate of the ward had not sustained any damages, because the investment losses were due to Michael's decision to liquidate the investments "at an imprudent time."

Upon our review, we uphold the district court's factual finding that the conservator acted prudently. In our view, this is sufficient to sustain the judgment below, because we do not share the district court's view that failure to obtain court approval results in strict liability for ensuing losses under Iowa law. Therefore, we affirm, although we do so on grounds different from those relied upon by the district court.

I. Background Facts and Proceedings.

Michael Leo was the guardian for his great-aunt, Rose Alessio. After the death of Rose's brother, a dispute arose between Michael and another family member regarding assets inherited by Rose from her brother's estate. To settle the dispute, Michael and the other family member entered into a family settlement agreement. Under the agreement, Rose's assets along with the assets from her brother's estate would be managed by a conservator.

Accordingly, on August 20, 2007, Michael filed a petition for the involuntary appointment of conservatorship for Rose Alessio. According to the attorney appointed to represent Rose, *see* Iowa Code § 633.575, Rose was in "very good" health, but suffered from "progressive dementia and Alzheimer disease which rendered her incapable of understanding the nature of the proceeding or its purpose." Following a hearing, the district court granted the petition and appointed Veridian Credit Union as conservator. On October 19, 2007, the district court amended its previous order and appointed FCT as conservator. Letters of appointment were issued on October 31, 2007.

Following the issuance of the appointment letters, Michael began transferring Rose's assets to FCT. In December 2007, Michael met with FCT trust officer Julie Ames. What was said during this meeting is highly disputed. Michael claims he told Ames that Rose's health "was in very bad shape," and "it could be a month to six months and that's about all we're looking at." Michael alleges that at the time, Rose suffered from renal failure, congestive heart disease, and dementia. Ames claims Michael told her only that Rose was living in a nursing home and never mentioned any terminal illnesses or serious health

problems. Ames also maintains Michael told her that she should not visit Rose because "it was unnecessary, it would confuse [Rose], and so to go through him." Ames took notes during this meeting. They do not reference any health problems.

By April 2008, FCT had received Rose's assets in the form of cash from several matured and called CDs as well as money market accounts. On May 8, 2008, FCT filed an initial report with the district court. The report stated Rose had assets totaling $327,219.26. FCT also took over Rose's stream of monthly income. This amounted to approximately $3321 per month from social security payments, IPERS payments, an annuity, and interest from the assets. During this same time, Rose's monthly expenses for her nursing home and other needs were approximately $4300.

On May 21, 2008, the trust investment committee at FCT held a meeting and determined Rose's assets should be invested approximately twenty percent in equities and eighty percent in fixed income securities. After the meeting, FCT carried out this decision and invested the conservatorship assets in this manner without obtaining court approval. Thus, twenty percent of Rose's assets were placed in equity mutual funds.

Rose passed away at the age of eighty-nine on September 23, 2008. Michael was appointed as executor of her estate. A month after Rose's death, Michael requested FCT to liquidate the investments. At this time, due to the volatile market conditions in the fall of 2008, the equity mutual funds had declined in value by $34,272.92.

On March 25, 2009, FCT filed an application with the district court seeking retroactive approval of the prior investments. Michael resisted the application and requested the court to order FCT to reimburse the estate for the losses on the equity securities.

The application came on for a hearing on August 19, 2009. At the hearing, Michael argued that the investments were imprudent because the conservatorship was only for a limited duration. *See* Iowa Code § 633.123(2). Michael also argued FCT had failed to seek court approval of the investments and thus should be held strictly liable for the ensuing losses. FCT maintained that the investments were proper and the circumstances and needs of the ward had been considered. FCT also asked the court to approve the investments retroactively.

Following the hearing, the district court determined "the overall investment strategy . . . is not viewed as imprudent under the circumstances." Yet the district court also recognized that FCT had failed to obtain the statutory approval required by statute. It added, "Where the actions of the conservator are unauthorized, the conservator may be liable to the estate for any damages incurred." Still, the court found that "the estate suffered no particular damage as a result of the investment made by [FCT]." Rather, the district court found that had Michael not compelled the liquidation of the assets "at an imprudent time," the investment would have "recovered its original value thereby causing no damage to the ward or to the estate."

Michael appeals.

II. Standard of Review.

Both parties maintain our standard of review for this action is at law. We do not necessarily agree, *see* Iowa Code § 633.33 (stating matters in probate are tried in equity subject to certain exceptions), but our resolution of this appeal does not turn on the standard of review.

III. Analysis.

A. Liability of a Conservator.

A conservator's powers are generally those common to all fiduciaries. Iowa Code § 633.649. However, the statute goes on to explain that some powers may be exercised "without prior order of court," *id*. § 633.646, whereas others are "subject to the approval of the court." *Id.* § 633.647. As a contemporary observer put it shortly after these provisions had been enacted, "Certain of those powers are expressly made subject to prior approval by the court after hearing on prescribed notice, [*see id*. § 633.647] and certain are expressly conferred without the necessity of court approval [*see id*. § 633.646]." Jack W. Peters, *Conservatorships and Guardianships under the Iowa Probate Code*, 49 Iowa L. Rev 678, 685 (1964). Although "continu[ing] to hold any investment" does not require prior court approval, Iowa Code § 633.646(5), any other "invest[ment of] funds belonging to the ward" is specifically made subject to prior court approval. *Id*. § 633.647(1). It is not disputed that FCT did not seek or obtain court approval before investing assets of the conservatorship in equity mutual funds.

Historically, in Iowa, an investment made without the required prior approval was deemed wrongful and could be avoided. *In re Guardianship of*

Nolan, 216 Iowa 905, 907-08, 249 N.W. 648, 650 (1933) (applying predecessor statute that also required prior court approval). "[T]he wards have a right to accept or reject [the investment], and in case of rejection the guardian is liable to the wards with interest." *In re Estate of Jefferson*, 219 Iowa 429, 433, 257 N.W. 783, 784 (1934). Here, the ward's heir, Michael, chose to reject the investment. Thus, he argues he was entitled to a judgment against FCT.

According to decisions like *Estate of Jefferson*, when the conservator failed to seek court approval, it made no difference that the investments may have been prudent under the circumstances. *Id*. at 433-34, 257 N.W. at 784-85. A conservator who made unauthorized investments bore the risk of loss from market conditions. *Id*. As the supreme court stated:

> The only defense which the guardian raises here is that the investments were sound investments at the time they were made, not only considered so by him but by bankers of large experience, upon whose judgment he relied; and that his error and the errors of the men upon whose judgment he relied were no greater than the error or judgment of thousands of others who invested in property prior to and at the beginning of the general depression. The guardian in this case is held liable not alone on account of the fact that his judgment in regard to investments was not the best. He is not held liable alone because of the fact that investments have greatly depreciated, through no fault of his, but due to the great economic depression which has befallen the country and the world. But he is held liable in this case because he has failed to comply with the statutes of the state of Iowa that required him to secure orders of court before he invested the money of his ward. Had he secured the orders of court which the statutes required, then he would not have been liable, but, having failed to comply with the statutes in securing the orders of court, authorizing him to make these investments, the lower court was right in entering judgment against the guardian for the amount of the investments which he wrongly made.

Id.

FCT argues, however, that the general assembly changed the law in 1989. At that time, it adopted an act "relating to guardians and conservators" that, among other things, provided for "immunity from liability." 1989 Iowa Acts ch. 178, § 1. Section 16 of that legislation, which became section 633.633A of the Iowa Code, provides:

> Guardians and conservators shall not be held personally liable for actions or omissions taken or made in the official discharge of the guardian's or conservator's duties, except for any of the following:
>
> 1. A breach of fiduciary duty imposed by this probate code.[1]
> 2. Willful or wanton misconduct in the official discharge of the guardian's or conservator's duties.

Iowa Code § 633.633A. FCT maintains that even though it may have breached a *statutory* duty, i.e., section 633.647's mandate to obtain prior court approval, it did not breach a *fiduciary* duty. FCT argues that the relevant fiduciary duties imposed by chapter 633 were to "protect and preserve" the assets of the estate and to invest them "prudently," *see id*. § 633.641, and that it fulfilled those duties.

Although the matter is not free from doubt, we conclude FCT is correct. A statutory duty and a fiduciary duty are two different things. The legislature enacted section 633.633A to grant "immunity." Had the legislature wished to preserve strict liability for statutory violations, it could have reworded subsection (1) more simply to read, "A violation of this probate code."

The only supreme court decision arguably on point is *In re Conservatorship of Rininger*, 500 N.W.2d 47 (Iowa 1993). On a careful reading, we think that decision supports the position we have taken. *Rininger* arose after

[1] As originally enacted in 1989, section 633.633A(1) read, "A breach of fiduciary duty imposed by this Code." That was subsequently changed to, "A breach of fiduciary duty imposed by this probate code."

section 633.633A became law but does not refer to it. There, the conservator either purchased or helped the ward purchase six separate certificates of deposit using conservatorship funds, with the certificates being placed in joint tenancy with the ward's sister. *Reninger*, 500 N.W.2d at 49-50. After the ward died, the funds went to the ward's sister. *Id*. at 50. Other relatives then challenged the conservator's handling of these funds, urging that the conservator had breached his fiduciary responsibilities. *Id*. The district court surcharged the conservator, and the supreme court affirmed. *Id.* Although the supreme court emphasized that Iowa law required prior court approval of these "gifts" to the sister, *see* Iowa Code § 633.668, and that the conservator had failed to obtain such approval, it does not appear these considerations alone were sufficient to establish personal liability. *Reninger*, 500 N.W.2d at 51. Rather, at the end of its opinion, the supreme court noted:

> In the present case, the probate court determined that it would not have approved the transactions in question had it been requested to do so. Thus, while we do not doubt the conservator's sincerity and good intentions, a breach of fiduciary responsibility on his part was clearly established.

Id.

In short, we reconcile sections 633.647 and 633.633A as follows: When a conservator fails to obtain prior court approval, the conservator has violated section 633.647, and will be held liable for subsequent losses if the violation is subsequently determined to have been a breach of fiduciary duty, e.g., a transaction as in *Reninger* that the probate court would not have approved even if it had been presented to the court in a timely manner. *See* Iowa Code § 633.633A(1). We do not think this reading eliminates the incentive to obtain prior

court approval, because such approval will protect the conservator from a possible challenge to the transaction at a later date as having been imprudent or otherwise a breach of fiduciary duty.

B. Did the Conservator Act Prudently?

Although FCT is not strictly liable for having failed to get prior court approval of its investments, we must now consider whether FCT breached a fiduciary duty imposed by law. Iowa Code section 633.641 imposes such a duty. It requires a conservator to invest the estate "prudently." What amounts to a prudent investment strategy is further explained in section 633.123. The district court, after hearing the testimony, found FCT had acted prudently. We agree.

Michael's position rests largely on his claim that FCT was on notice that Rose had very little time to live: "I told Ms. Ames, I said it could be a month to six months and that's about all we're looking at." But Ames flatly denied this conversation occurred, and her detailed, contemporaneous notes support her testimony.[2] Michael also admitted he never inquired about how FCT was investing Rose's assets. This strikes us as odd if Michael had been aware Rose had only a short time to live, since he knew he would be Rose's sole heir. It is also undisputed that Michael told Ames not to bother Rose at the nursing home.

The trial testimony reveals that FCT's trust investment committee met, and after considering Rose's age (eighty-nine), her assets, and her expenses, decided on a "conservative" strategy that involved eighty percent in fixed income investments and twenty percent in equity mutual funds. Historically, over any

[2] It is noteworthy that Rose actually died nine months after Michael allegedly told Ames that Rose had at most six months to live.

recent twelve-month period, this mix had not produced a loss. Some of Rose's CD's were "callable" and had been redeemed due to declining interest rates, so a review of the investment strategy was needed in any event.

Regardless of whether we apply a "substantial evidence" or a de novo standard of review (giving deference in the latter case to the district court's ability to weigh credibility), we believe the district court's finding that FCT acted prudently should be sustained. FCT was a bank, not an oracle, and did not have reason to anticipate the global stock market downturn in the second half of 2008. We find, therefore, that FCT did not breach a "fiduciary duty imposed by [the] probate code," and the district court properly entered judgment for FCT. This is not a case, like *Rininger*, where the district court would not have approved the investments had they been presented to it beforehand.

Because we reach this conclusion, we need not address the district court's finding that the estate "suffered no particular damage" because any losses were due to Michael's decision to liquidate the investments in October 2008. A conservatorship terminates upon the death of the ward. Iowa Code § 633.675(2). Upon termination, "all assets of the conservatorship shall be delivered, under direction of the court, to the person or persons entitled to them." *Id*. § 633.678. It is the conservator's duty to deliver the assets to the person or persons so entitled. *Id*. § 633.641.

Upon Rose's death, the conservatorship terminated, and Michael, as the heir to Rose's estate, was entitled to the conservatorship's assets. Michael had a right to those assets in October 2008. It is difficult, in our view, to blame Michael for liquidating the assets "at an imprudent time." This presumes an

ability to out-guess the market—exactly what FCT is being forgiven for not having.

IV. Conclusion.

FCT's failure to seek court approval before making the investments does not render it strictly liable for losses that occurred when there was a subsequent downturn in market conditions. Because the record shows FCT followed a prudent investment approach under the circumstances known to it, we uphold the district court's ruling in its favor.

AFFIRMED.