

**IN THE COURT OF APPEALS OF IOWA**

No. 9-052 / 08-0938  
Filed May 6, 2009

**IN THE MATTER OF THE ESTATE OF  
BRUCE ZENISEK,**  
Deceased,

**BRAEDEN LEE KOSS ZENISEK, by his  
Mother and natural guardian and by his  
Conservator TIFFANY KOSS,**  
Beneficiary-Appellant.

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Appeal from the Iowa District Court for Johnson County, Marsha A. Bergan, Judge.

The conservator for the minor child of the decedent appeals from a district court ruling denying her petition to remove the administrators of the decedent's estate. **AFFIRMED.**

Joseph Johnston of Johnston & Nathanson, Iowa City, for appellant.

Dennis J. Mitchell and V. Jean Bartley of Meardon, Sueppel & Downer P.L.C., Iowa City, for appellee.

Considered by Mahan, P.J., and Miller and Doyle, JJ.

**MILLER, J.**

Tiffany Koss, the conservator for her minor child with the decedent, Bruce Zenisek, appeals from a district court ruling denying her petition to remove Andrew Zenisek and James Zenisek as administrators of the decedent's estate. She claims the court erred in not removing the administrators due to a conflict of interest and in not removing the guardian ad litem for the child. We affirm the judgment of the district court.

Bruce Zenisek was killed in a forklift accident on June 9, 2007. He died intestate and was survived by his ten-year-old son, Braeden. Zenisek's brothers, Andrew and James, were appointed as administrators of his estate. They filed a report and inventory in November 2007, which listed seventy acres of farmland owned by Bruce as the primary asset of the estate. That land, on which a partially constructed three-bedroom house is located, was appraised at \$252,000 as of the date of Bruce's death.

Two claims totaling \$49,440 were filed against the estate by Hills Bank and Trust Company for loans made to Bruce. A mechanic's lien for approximately \$81,000 was also filed against the farmland by the construction company that had been building Bruce's house.

In January 2008, Andrew and James offered to purchase the farmland for its appraised value in order to satisfy the claims against the estate. They filed an application for the appointment of a special administrator "to investigate and make recommendations to the Court in relation to [their] Offer, or to a public offering" and sought appointment of an attorney for the minor child to represent

his interests in the proceeding. Notice of the hearing on the administrators' application was sent to the child's mother, Tiffany Koss, but neither she nor her attorney appeared at the hearing.

Following the hearing, the district court entered an order appointing Iowa State Bank and Trust Company as a special administrator "to serve without bond for the purpose of evaluating the offer to buy real estate and to make a written recommendation to the Court prior to any hearing on any purchase." The court also appointed an attorney to represent the minor child. Koss filed a motion requesting the district court to reconsider its appointment of the special administrator and guardian ad litem for the child. The court denied her motion after a hearing, finding both appointments were appropriate.

Koss then filed a petition requesting that Andrew and James be removed as the administrators of Bruce's estate and that she be appointed in their place. As grounds for their removal, Koss alleged in relevant part that she did not believe it was in her son's best interest to sell the farmland and that the administrators ignored requests to investigate a wrongful death action on behalf of the estate. The district court denied the petition, finding the grounds for removal under Iowa Code section 633.65 (2007) had not been proved at the hearing. Koss appeals.

Claims for the removal of an administrator are tried in equity. *In re Estate of Atwood*, 577 N.W.2d 60, 63 (Iowa Ct. App. 1998); see also Iowa Code § 633.33. We review equitable proceedings de novo. Iowa R. App. P. 6.4. The

district court has broad discretion in deciding whether to remove a fiduciary<sup>1</sup> pursuant to section 633.65. *In re Estate of Cutler*, 368 N.W.2d 724, 728 (Iowa Ct. App. 1985). We therefore “examine the record de novo to determine whether an abuse of discretion can be found.” *Estate of Randeris v. Randeris*, 523 N.W.2d 600, 606 (Iowa Ct. App. 1994).

The grounds for removal of a fiduciary are statutory and include mismanagement of the estate and failure to perform any duty imposed by law. Iowa Code § 633.65; *Atwood*, 577 N.W.2d at 63-64. A conflict of interest or evidence that the fiduciary is using his or her position for personal advantage may also serve as grounds for removal. *Atwood*, 577 N.W.2d at 64. The burden to show wrongful conduct that suffices to remove a fiduciary is upon those so asserting. *In re Estate of Phoenix*, 493 N.W.2d 79, 81 (Iowa Ct. App. 1992).

Koss claims the district court erred in denying her petition to remove the administrators due to the conflict of interest and self-dealing created by their offer to purchase the farmland from the estate. She argues that “[i]f trying to buy the main asset of the estate at a questionable value is not a conflict of interest, then no conflict of interest can exist which would disqualify an administrator.” We conclude otherwise.

The administrators sought the appointment of a special administrator after offering to purchase the farmland for its appraised value. The district court granted their application and appointed a special administrator “for the purpose of evaluating the offer to buy real estate and to make a written recommendation

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<sup>1</sup> Iowa Code section 633.3(17) defines a fiduciary to include an administrator of an intestate estate.

to the Court prior to any hearing on any purchase.” Following the hearing on Koss’s petition to remove the administrators, the court additionally authorized the special administrator “to obtain an updated appraisal and to investigate methods of marketing the real estate so as to maximize its value to the heir.”

We believe the appointment of the special administrator alleviated any potential conflict of interest created by the administrators’ offer to purchase the farmland. See *In re Estate of Jarvis*, 185 N.W.2d 753, 755 (Iowa 1971) (approving appointment of temporary administrator due to possible conflict of interest between the interests of the executor and the estate). We find no evidence to support Koss’s claim of self-dealing on the part of the administrators as they have simply offered to purchase the farmland if approved to do so by the court. See Iowa Code § 633.155 (“No fiduciary shall in any manner engage in self-dealing, except on order of court after notice to all interested persons . . .”).

Our conclusion is supported by the court’s decision in *Phoenix* in which a co-executor purchased property from the estate without prior court approval. 493 N.W.2d at 81 (affirming denial of petition to remove executors). In concluding there was no self-dealing on the part of the executors, the court noted the price paid for the property was fair, most of the beneficiaries were aware of the sale before it occurred, and the executors sought legal advice before proceeding. *Id.* The same factors are present here to an even greater extent.<sup>2</sup>

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<sup>2</sup> Koss argues at length that the appraisal commissioned by the administrators undervalued the farmland. However, at the hearing on her petition to remove the administrators she submitted no alternative appraisals and offered no expert testimony in support of that assertion. Furthermore, in response to the concerns expressed by Koss at the hearing on her petition, the district court authorized the special administrator to “obtain an updated appraisal . . . to maximize [the property’s] value to the heir.”

We also deny Koss's related claim that the administrators mismanaged the estate by failing to investigate a wrongful death claim. Andrew Zenisek testified that he did not feel there was a sufficient basis to proceed with such an action because he believed Bruce's death was the result of his own negligence in deciding to operate a forklift left on his property by the construction company building his house. Andrew explained

it's pretty clear cut that [Bruce] went over and took the palate forks off, put the manlift on, went to work . . . he did it on his own, well aware of the whole situation about loaders tipover situations when they get too high in the air. He knew exactly . . . what could happen. He just made a mistake, it was an accident.

In addition, in its order denying Koss's petition, the court "empowered [the administrators] to spend up to \$1,000.00 . . . to investigate a wrongful death claim." We therefore find no merit to Koss's claim that the administrators mismanaged the estate. *Cf. In re Estate of Rutter*, 633 N.W.2d 740, 750-51 (Iowa 2001) (finding court abused its discretion in not removing executor where he handled the estate in a manner that favored some beneficiaries over others and rendered an incomplete accounting with unauthorized disbursements).

Finally, we need not and do not address Koss's final claim that the district court erred in not removing the guardian ad litem for the minor child as that claim was not preserved for our review. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). The court did not rule on this issue in its order denying Koss's petition to remove the administrators, and no post-trial motion was filed

requesting the court to do so. *See id.* (“When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.”).

Based upon our de novo review of the record, we find the district court did not abuse its discretion in denying Koss’s petition to remove Andrew and James as administrators of Bruce’s estate. The judgment of the district court is therefore affirmed.

**AFFIRMED.**