IN THE COURT OF APPEALS OF IOWA

No. 6-827 / 05-1943
Filed December 28, 2006

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF HOWARD REYNOLDS, a/k/a HOWARD A. REYNOLDS,

DANIEL CLARK, Individually and as Executor of the Estate of Howard Reynolds, and MAXINE CLARK, Individually,
Appellants.

Appeal from the Iowa District Court for Harrison County, James Richardson, Judge.

Beneficiaries of a decedent's estate appeal, following remand, from a district court order that awarded attorney fees to a law firm that had represented the decedent in certain matters. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Warren L. Bush, Wall Lake, for appellant.

Robert Kohorst of Kohorst, Early & Louis, Harlan, for appellee firm.

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

PER CURIAM.

In 2003 Daniel and Maxine Clark, beneficiaries of the estate of Howard Reynolds, filed an appeal from an October 2003 order that approved payment of attorney fees to the law firm of Kohorst, Early & Louis (Kohorst). Upon our review for the correction of errors at law, we held the Clarks were bound by a June 2003 order that had approved a contingent fee agreement with Kohorst, as well as $85,000 in attorney fees already paid to the firm. *In re Guardianship & Conservatorship of Reynolds*, No. 03-1924 (Iowa Ct. App. Jan. 13, 2005) (*Reynolds I*). However, we reversed the October 2003 order to the extent it awarded an additional $61,883.90 in attorney fees, and remanded the matter to the district court with directions. *Id*. The district court again approved the fees, and the Clarks again appeal.[1]

As we stated in *Reynolds I*, our review is for the correction of errors at law. Iowa Code § 633.33 (2003); Iowa R. App. P. 6.4. Upon such review we affirm the district court's conclusion that Kohorst was entitled to an award of additional attorney fees. However, we reverse the portion of the fee award that was based upon Kohorst's alleged "recovery" of a single premium deferred annuity policy issued by Allied Life Insurance Company (Allied annuity) in 1996. This matter is remanded for entry of an amended order consistent with our decision.

Although we find it unnecessary to fully set forth the background of this case, we will note a few salient facts. The contingent fee agreement stated that Kohorst's representation was "in regard to the Howard Reynolds Trust and [successor trustee] Henry Bollinger, Jr.'s alleged misappropriation of funds," and

[1] Although Kohorst filed a notice of cross-appeal, it does not raise any claims of error.

provided that "[i]n the event of recovery" between filing a claim or petition and appeal, Kohorst was entitled to receive an amount equal to thirty-three and one-third percent of the " 'net recovery.' " Kohorst, on behalf of Reynolds, filed an application to dissolve the trust or in the alternative to remove Bollinger as trustee and for an accounting. After Dan Clark had been appointed as Reynolds's conservator, Kohorst negotiated a settlement between Bollinger and Clark. In exchange for dismissal of the application, the trust was terminated and trust assets were transferred to Clark as conservator.

Kohorst eventually sought payment for attorney fees based upon a claimed settlement recovery of $500,651.71 in assets, including a $106,000 "annuity w/ Allied." Kohorst asserted it had obtained a "net recovery" of $440,651.71. A total of $147,571.04 in attorney fees was eventually approved by the district court, and the Clarks appealed.

In that appeal, we determined the Clarks were bound by the June 2003 order, and further that the order had established, either explicitly or implicitly, the validity of the contingent fee agreement, that Kohorst had made a "recovery" under the agreement, and that the "net recovery" was adequate to support a contingent fee award of $85,000. However, we reversed the October 2003 order to the extent it awarded Kohorst $61,883.90 in additional fees because

> [i]t is clear from the October 2003 order that the district court did not independently consider the question of whether the Kohorst Law Firm was entitled to the additional . . . fees and costs. Rather, the court felt it was bound to award the fees and costs, because the June 2003 order had approved both the contingency fee agreement and the $85,000 in fees already paid. . . . .
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> However, in the June order the court did not, either explicitly or implicitly, find or conclude that the Kohorst Law Firm had achieved a "net recovery" in an amount that would justify or support any fees above or in addition to the $85,000. Nor did the June

> 2003 order speak to the contents of any recovery, including whether any specific assets, such as the Allied policy, were in fact a part of any "recovered" trust assets.

We accordingly remanded the matter to the district court for the limited purpose of determining whether Kohorst had "attained a 'net recovery' under the contingency fee contract adequate to support an award of attorney fees over and above $85,000," and, if so, to "ascertain the amount of any such recovery, and approve a contingency fee award for any fees earned beyond the previously approved $85,000." Upon remand, the district court ordered that Kohorst was to be paid additional attorney fees as directed in the October 2003 order. It determined, without elaboration, that "[t]he Allied Annuity is a recovered asset for purposes of calculating the attorney fees."

On appeal, the Clarks contend that (1) "the trial court erred in awarding additional attorney fees based on the contingent fee contract," and (2) "there was no 'recovery' of the Allied annuity." The first contention focuses on whether the contingent fee agreement was valid, and whether Kohorst achieved a "recovery." However, these issues were decided adversely to the Clarks in *Reynolds I*. As such they are law of the case and binding upon not only the district court but this court in a subsequent appeal. *See State v. Grosvenor*, 402 N.W.2d 402, 405 (Iowa 1987). We accordingly address only the Clarks' second contention, specifically that the Allied annuity was not part of any "recovery" because it was never a trust asset. On this point, we agree with the Clarks.

Under the particular facts of this case, the reasonable interpretation of the contingent fee agreement indicates that "recovery" contemplated a return of any of Reynolds's assets that had been misappropriated by Bollinger or were otherwise within his control. Moreover, the stipulated judgment, upon which Kohorst itself insists the "recovery" is based, is expressly limited to a return of "trust assets." However, there is no evidence that the Allied annuity was a trust asset or in any way within Bollinger's control as trustee.[2] Rather, the record indicates that Howard Reynolds was both the owner and annuitant of the Allied annuity, and that the trust was only a contingent beneficiary, Reynolds having reserved the right to change the beneficiary designation.

Contrary to Kohorst's assertion, the trust's status as contingent beneficiary did not render the Allied annuity a trust asset. Kohorst's other bases for asserting that the Allied annuity was a trust asset are equally unpersuasive. Because there is no evidence the Allied annuity was a trust asset, or in any way recovered by Kohorst under the contingent fee agreement, Kohorst was not entitled to recover attorney fees based on the annuity's $106,000 value. The portion of the $61,883.90 fee award that is based on the annuity is accordingly reversed. The remainder of the fee award is affirmed, and this matter is remanded for entry of an amended order consistent with our decision.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[2] Nor is there is any evidence that Bollinger, as trustee or otherwise, ever misappropriated or otherwise exercised any control over the Allied annuity.