

SUPERIOR COURT
Washington Unit

STATE OF VERMONT

CIVIL DIVISION
Docket No. 21-CV-00602

Paul Thomas,
Appellant)
)
)
v.)
)
)
Bruce Thomas, et al.
Appellees)

ORDER RE: MOTION TO DISMISS

At issue is an appealed order for compensatory damages issued by the Washington Probate Court against Appellant Paul Thomas. The order was issued as part of a proceeding to remove Appellant as guardian of his now-deceased mother, Miriam Thomas. The procedural history, in relevant part, is that Appellant was appointed to serve as Miriam's guardian on January 27, 2010, by the Orange Probate Court. This was done over the objections of Appellant's siblings, Appellees Bruce, Elizabeth, and Bryce Thomas. On September 28, 2016, the Appellees filed a motion to remove Appellant as guardian, pursuant to 14 V.S.A. § 3077, and additionally filed a proposed V.R.P.P. 67 notice and order to temporarily remove Appellant as guardian pending the final outcome of the § 3077 motion. On March 21, 2018, the Orange Probate Court issued an order under Rule 67, concluding that Appellant had been deficient as guardian and removing him. Appellant was replaced by Appellee Stephen Ankuda, an attorney. The ongoing case was transferred to the Washington Probate Court on May 14, 2018. Miriam died on April 15, 2019, and Appellee Ankuda was appointed to be the administrator of her estate.

The Washington Probate Court conducted several days of liability hearings as part of the Rule 67 hearing between August and September 2020. On January 25, 2021, the Probate Court issued an order, finding that Appellant was liable to Miriam's estate for \$1,013,981. The order also found that, as administrator of Miriam's estate, Appellee Ankuda was the successor in interest to the Rule 67 proceeding. Appellees never filed a complaint for damages or sought the liability hearings in question, which were held on the Probate Court's initiative. Appellant, pro se, appealed the findings and order to this Court.

On November 3, 2021, Appellant, now represented by counsel, moved to dismiss the proceeding, arguing that the Probate Court lacked jurisdiction to order damages in a guardianship removal proceeding; that Appellee lacked standing to maintain a Rule 67 proceeding; and that the order for damages was improper as Appellees had never pled a liability claim. Appellee Ankuda filed a memorandum in opposition, arguing that the Probate Court has the power to order damages via its sanctioning and surcharge powers via Rule 67 and 14 V.S.A. § 917, among other bases; that as the successor financial guardian to Appellant, Appellee Ankuda has standing to participate in hearings regarding Appellant's alleged malfeasance; and that no specific

pleading was necessary for the Probate Court to exercise its sanction and surcharge powers. Finally, Appellant replied to Appellee's memorandum, arguing that the sanction and surcharge powers do not allow the Probate Court to impose compensatory damages, and quoting court transcripts where Appellees allegedly agreed that determining civil liability was outside the scope of the guardian removal proceeding.

The Court now considers Appellant's motion to dismiss.

Standard of Review

Appeals from the probate division are reviewed *de novo*. *In re Estates of Allen*, 2011 VT 95, ¶ 8, 190 Vt. 301.

A motion to dismiss for lack of subject matter jurisdiction may be made under V.R.C.P. 12(b)(1). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." V.R.C.P. 12(h)(3). Subject matter jurisdiction cannot be waived, and lack of subject matter jurisdiction of a lower court may be first raised on appeal. *Town of Charlotte v. Richmond*, 158 Vt. 354, 357-58 (1992).

Analysis

Probate courts have "special and limited jurisdiction created, and restricted, by statute." *In re Proctor*, 140 Vt. 6, 8 (1981). If the probate courts have not been explicitly granted jurisdiction, that jurisdiction does not exist—"nothing is presumed in favor of its jurisdiction, and he who seeks to take advantage of its proceedings must show affirmatively its jurisdiction." *Probate Court for District of Fair Haven v. Indemnity Ins. Co. of North America*, 106 Vt. 107, 171 A. 336, 336 (1934) (citation omitted). If it is determined that a probate court has overstepped its jurisdiction, its orders are void. *Id.*

Probate courts have the enumerated power to appoint guardians. 4 V.S.A. § 35(6). They likewise may modify guardianships or remove guardians, on motion of the ward or a person interested in the ward's welfare. 14 V.S.A. § 3077(a). In addition to appointing and removing guardians, probate courts also retain supervisory power over guardians during their tenure, pursuant to V.R.P.P. 67. If the probate court finds that the fiduciary is deficient in its duties and orders the fiduciary to come into compliance, "[i]f the fiduciary fails to perform the duties required within the time specified, or fails to appear for a conference, the court shall hold a hearing on sanctions after notifying all parties." V.R.P.P. 67(4). "Although any sanction authorized by law can be imposed, the rule specifically provides for suspension of the fiduciary and appointment of a special fiduciary." V.R.P.P. 67, Reporter's Notes. However, Rule 67 "does not preclude contempt proceedings, or surcharge or other sanctions, as provided by law." V.R.P.P. 67(4). Like § 3077, V.R.P.P. 67 contains no provision allowing the probate court to award damages for guardian malfeasance.

Though probate courts have power over the appointment and affairs of guardians, neither § 3077 nor V.R.P.P. 67 nor any statute controlling the affairs of guardians explicitly grant them the authority to evaluate damage claims against guardians. While not specifically concerning guardianships, there is Vermont caselaw standing for the proposition that probate courts do not

have jurisdiction over equitable claims arising from fiduciary misbehavior that are independent from the probate court's specific powers to regulate appointed fiduciaries. See *In Re Proctor*, 140 Vt. at 8-9 ("The fundamental question is whether this fiduciary duty gives rise to jurisdiction in the probate court to demand an accounting for the expenditure of these funds. . . . We do not read 14 V.S.A. § 2327, however, as being a broad grant of independent jurisdiction. The section merely allows a probate court to invoke certain equitable remedies required to deal adequately with those matters properly before it. And, as we have previously stated, those matters are restricted to overseeing the affairs of officials, such as testamentary trustees and executors, appointed by the court itself, and property in the trustees' hands.").

Appellees contend that the Probate Court has the power to impose damages in guardian removal cases. They point to V.R.P.P. 67(b)(4)'s allowance for sanctions and surcharges in addition to removal and argue that 14 V.S.A. § 917 applies to guardians.¹ Under § 917, probate courts may "restrain a person from performing specified acts or the exercise of any powers or discharge of any duties of office, or make any other order to secure proper performance of duty. It may exercise the powers of contempt; tax costs, including surcharge; order a party to pay to other parties the amount of reasonable expenses, including reasonable attorney's fees, or losses incurred because of an act or omission; and remove or suspend a fiduciary." 14 V.S.A. § 917. Appellees argue that this language provides the authority for the Probate Court to order compensatory damages for a guardian's malfeasance.

In order to determine whether the Probate Court had the jurisdiction to order damages based on Appellee's citations, the Court must interpret the statutes at issue. When performing statutory interpretation, the Court's goal is to implement the legislature's intent. *Wright v. Bradley*, 2006 VT 100, ¶ 7, 180 Vt. 383. To determine the legislature's intent, the Court must first consider the plain meaning of a statute's words. *Wesco v. Sorrell*, 2004 VT 102, ¶ 14, 177 Vt. 287. If that plain meaning is clear, the analysis stops there. *Id.* However, plain meaning does not require the Court to evaluate the statute in a vacuum, but should instead "examine and consider fairly, not just isolated sentences or phrases, but the whole and every part of the statute, together with other statutes standing in pari materia with it, as parts of a unified statutory system." *State v. Berard*, 2019 VT 65, ¶ 12, 220 A.3d 759; see also *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) ("It is a fundamental canon of statutory interpretation that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). "The Court will not insert an implied condition into a statute unless it is necessary in order to make the statute effective." *Doncaster v. Hane*, 2020 VT 22, ¶ 19, 212 Vt. 37 (citation and quotation omitted).

Examining the relevant language of Rule 67, the Court finds that its accommodation for sanctions and surcharges does not encompass compensatory damages after the removal of a guardian. The Court finds it clear that the allowance of sanctions, surcharges, or contempt proceedings in the context of Rule 67 are meant to serve coercive or punitive purposes while a person is still a fiduciary – a hearing on sanctions is only held when a fiduciary fails to perform his duties, V.R.P.P. 67(b)(4), and sanctions imposed pursuant to Rule 67 are explicitly intended

¹ This also appears to be the basis by which the Probate Court claimed its authority to order damages, in conjunction with its ability to order damages in breach of trust actions. Appellant's Ex. 5, p. 37.

as an intermediary step before the removal of a fiduciary. V.R.P.P. 67, Reporter's Notes. In the present case, the damages were ordered close to three years after Appellant had been removed as Miriam's guardian and over a year after Miriam died, and therefore served none of the purposes V.R.P.P. 67 contemplates.

The Court reaches a similar conclusion with § 917. Assuming *arguendo* that § 917 applies to guardians, the Court finds that it does not allow the Probate Court to order compensatory damages for guardian malfeasance as part of a removal proceeding. Like Rule 67, § 917 is concerned with the regulation of fiduciaries. While it does contain provisions allowing the probate courts to impose monetary fees, the abilities to exercise those powers—i.e., contempt, tax costs, and payment of expenses, attorney's fees, or losses²—are clearly intended to serve the statute's regulatory purpose by “secur[ing] proper performance of duty.” 14 V.S.A. § 917. In other words, a fee levied in accordance with § 917 must have the purpose of regulating the behavior of a fiduciary. There is nothing in the language to indicate that it is intended to encompass equitable awards to aggrieved parties after a fiduciary has been removed and is no longer subject to the probate courts' regulatory powers, and the Court does not find that such power is necessarily implied in order to affect § 917's purpose. See *Hane*, 2020 VT 22, ¶ 19. In its order, the Probate Court made it clear that the damages served a compensatory purpose, not a regulatory one. The fees levied against Appellant were specifically characterized as liabilities and damages, and the Probate Court explained in its order that the “primary objective” of the damages was “to make whole the beneficiaries of an estate, when its fiduciaries have breached their obligations.” Findings and Order (March 21, 2018), p. 37. Additionally, the damages were calculated like compensatory civil damages and were imposed years after Appellant had been removed as guardian and the ward died. Accordingly, the Court finds that the damages were intended to be a compensatory remedy to Appellees, served no regulatory purpose within the meaning of § 917, and, as a result, the Probate Court lacked the jurisdiction to order them.

The Appellees' secondary arguments are likewise unavailing. Appellees' citations to the *Corpus Juris Secundum* for the principle that guardians are liable to estates for harms they incur are not persuasive in this context. While the principles may be sound, and a fiduciary may certainly be sued for self-dealing or fraud in civil court, the *CJS* does not carry the force of statute, and the fact stands that Vermont probate courts have limited jurisdiction that must be statutorily enumerated. Nothing in the relevant statutes granted the Probate Court the ability to order compensatory damages incidental to a proceeding that, up until the Probate Court-initiated liability hearings after Appellant's removal, was strictly concerned with removing Appellant as guardian.

Appellees also point to 14 V.S.A. § 3076, which limits the ability of a guardian to receive fees or reimbursements absent annual reports being approved by a probate court. While the Court agrees that probate courts may review a guardian's annual accounts and approve or deny expense and reimbursement requests, it does not find that this authority extends to allow the imposition of

² The Court finds that the arguably wide scope of “losses incurred” is limited to losses incurred by the opposing party as part of litigation, not broader claims of damages. In context, the sanction is a subset of “reasonable expenses,” alongside attorney's fees. 14 V.S.A. § 917. To read the provision as giving the probate courts full power to impose civil damages against a party on the basis of non-compliance with probate rules oversteps the boundaries of “reasonable expenses.”

civil damages after a guardian has been terminated. As previously established, the order for damages was issued close to three years after Appellant was removed as guardian. Additionally, the damage calculation considered expenses and payments made by Appellant during years in which the annual accounts had been approved by the Probate Court; those accounts were only reopened for appraisal after Appellant had been removed as guardian. In this context, the Court finds the damage order cannot reasonably be based on the Probate Court's supervisory powers over annual accounts and expense requests during a guardian's tenure.

The Court also does not find that the damages can stand as a remedy for breach of trust, as the Probate Court framed them. See Appellant's Ex. 5, p. 37. Appellees never filed a complaint for breach of trust, nor was Appellant offered an opportunity to contest such a claim—instead, the damages were imposed in connection with a Rule 67(b) order as part of a guardianship removal proceeding. It is also not readily apparent that a breach of trust would even apply to the current circumstances. While probate courts have the jurisdiction to order damages in breach of trust actions, 14A V.S.A. § 1001(b)(3), such an action may only be brought against a trustee. See § 1001(a). Guardians are not the same as trustees, and Title 14A distinguishes between the two roles. See 14A V.S.A. § 103; see also *Richard v. Passumpsic Sav. Bank*, 111 Vt. 181, 183 (1940) ("A guardian of the property of a person who is under an incapacity is a trustee in the broad sense of the term. He is under a duty to his ward to deal with the property for the latter's benefit. A guardian like a trustee is a fiduciary. He is not, however, a trustee in the strict sense. He is entrusted with the possession and management of his ward's property but he does not take title to it."). While damages are a possible remedy for breaches of trust, § 1001(b)(3), in guardianship removal proceedings probate courts may only "terminate or modify the guardianship, appoint a successor guardian, or restrict the powers of a guardian, consistent with the court's findings and conclusions of law." 14 V.S.A. § 3077(b). Nowhere are probate courts granted the authority to order damages as a remedy in a guardianship removal proceeding, and the Court shall not insert a remedy into the statute where none exists. See *State v. Fox*, 122 Vt. 251, 255 (1961) ("The courts are not at liberty to supply that which the lawmakers have advertently omitted.").

Finally, while it does not affect the legal analysis, it also bears mentioning that there is ample evidence that Appellees were aware and agreed that the removal proceedings did not encompass civil damages during the litigation. Transcripts indicate that the Probate Court informed the Appellees prior to filing their September 2016 motion that substantive claims against Appellant lie beyond the scope of a removal proceeding:

THE COURT: Here's the problem. The problem is that there's sufficient there for the Rule 67b. The question is -- yeah, go ahead -- is there more than there. And it seems like there is more than that. It seems like there's questions that have to be answered about potential fraud, potential self-dealing, you know, those kinds of issues, which I think go beyond the rule of 67b.

Appellant's Ex. 7, p. 151.

The attorney for Appellees Bruce, Bryce, and Elizabeth agreed with the Probate Court's analysis and indicated that a pleading would be forthcoming to address potential civil claims. *Id.*, p. 155.

No pleading was ever filed, and in their motion to remove Appellant as guardian, Appellees explicitly stated that their “preference is not to litigate a civil fraud claim against Guardian as part of the present proceedings on removal.” Appellant’s Ex. 2, p. 6, ¶ 18. To date, no civil claims have been brought in connection with Appellant’s guardianship; the sole reference to monetary liability was a bare, one-sentence request at the end of Appellees’ motion to remove asking the Probate Court to order Appellant to reimburse the estate in conjunction with his removal. *Id.* Taking this context into consideration, it cannot come as a surprise to Appellees that the removal proceeding would not result in a civil damages award.

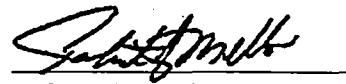
In light of the preceding, the Court finds that the Probate Court did not have the jurisdiction to order compensatory damages for Appellant’s alleged malfeasance as guardian as part of a removal proceeding. As a result, the order must be vacated.

As the Court has found that the Probate Court lacked subject matter jurisdiction to do what it did, the Court does not address the alternate arguments for dismissal for lack of standing and failure to plead a liability claim.

ORDER

For the foregoing reasons, Appellant’s Motion to Dismiss is GRANTED, the Probate Division’s order of January 25, 2021, requiring the Appellant to pay the estate \$1,013,981 in compensatory damages is VACATED, and this matter is remanded to the Probate Division for such further actions, if any, as may be needed in this matter.

SO ORDERED this 3rd day of February, 2022



Robert A. Mello
Superior Judge