

DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

Merkle v. Guardianship of Jacoby

862 So. 2d 906 (Fla. Dist. Ct. App. 2003) · No. No. 2D02-2748 · Decided December 24, 2003

SUMMARY

The Florida Second District Court of Appeal held that an order requiring a guardian to refund fees paid from a guardianship estate was effectively a surcharge. Because the guardian had not received formal notice or waived that notice, the court reversed the refund order and remanded for further proceedings without addressing the merits of the alleged excessive compensation.

CASE DETAILS

|                       |                                                                                                                         |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------|
| COURT                 | District Court of Appeal of Florida, Second District                                                                    |
| WRITING FOR THE COURT | Wallace; Northcutt; Stringer                                                                                            |
| JURISDICTION          | Florida                                                                                                                 |
| DECIDED               | December 24, 2003                                                                                                       |
| DOCKET                | No. 2D02-2748                                                                                                           |
| DISPOSITION           | reversed_and_remanded                                                                                                   |
| PROCEDURAL POSTURE    | The guardian appealed an order requiring him to refund \$3,931.12 to the guardianship estate as excessive compensation. |
| PRECEDENTIAL VALUE    | published opinion                                                                                                       |
| PARTIES               | LeRoy H. Merkle, Jr. v. Guardianship of Robert J. Jacoby, an incapacitated person                                       |

TOPICS

- guardianship procedure
- guardianships
- probate procedure
- appellate procedure
- remedies

PRACTICE AREAS

- guardianships
- probate
- appellate procedure

QUESTIONS PRESENTED

1. Whether an order requiring a guardian to refund money to the guardianship estate because of allegedly excessive compensation constitutes a surcharge.

2. Whether a court may enter such a surcharge order without serving formal notice on the guardian or obtaining a written waiver of formal notice.

## HOLDINGS

1. An order requiring a guardian to refund money to the guardianship estate because of an alleged breach of fiduciary duties is tantamount to an order surcharging the guardian.
2. A guardian may not be surcharged absent service of formal notice required by Florida Probate Rule 5.025(d), unless the guardian has waived formal notice in writing under Florida Probate Rule 5.180(a).

## KEY QUOTATIONS

*“Unless the guardian has waived the right to formal notice in writing pursuant to Florida Probate Rule 5.180(a), it is error to surcharge a guardian absent service of formal notice as required by rule 5.025.”* (907)

*“Our decision in this case is based on procedural grounds. We express no opinion on the merits of the circuit court's proposed refund.”* (908)

## FACTUAL BACKGROUND

LeRoy H. Merkle, an attorney and guardian of Robert J. Jacoby, regularly paid himself guardian's and attorney's fees from the ward's limited assets without prior court orders approving the fees. After Jacoby died, Merkle filed a final accounting and petition for discharge. The circuit court later found that Merkle had paid himself excessive compensation and ordered him to refund \$3,931.12 to the guardianship estate without prior notice or a hearing.

## PROCEDURAL HISTORY

Merkle was appointed guardian in 1996 and paid himself guardian and attorney fees without prior court approval, although the payments were disclosed in annual accountings. After the ward died, Merkle filed a final accounting and petition for discharge. The circuit court entered a refund order without serving formal notice or conducting a hearing, and Merkle appealed.

## DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

Reverse the refund order and remand for further proceedings consistent with the opinion.

## CASES CITED

- Lawyers Surety Corp. v. Saltz, 658 So. 2d 1152, 1153 (Fla. 2d DCA 1995)
- Taylor v. Mercedes, 760 So. 2d 282, 283 (Fla. 4th DCA 2000)