LOST OPPORTUNITY MAY LEAD TO SURCHARGE FOR GUARDIAN

By Charles T. Newland

So your client is appointed as a guardian of a sizable estate and invests the ward's money in the types of property specified in Section 5/21-1.01 – 21-2.15 of the Probate Act. Can your client be liable for a surcharge if there is no actual loss to the estate? The answer is "Yes", according to the Second District Appellate Court in the *Estate of Lieberman,* 391 Ill. App. 3d 882, 909 N.E.2d 915(2nd Dist. 2009), depending on the "characteristics" of the guardian.

However, before discussing *Lieberman,* it is necessary to set forth the pertinent sections of the Probate Act that applied to the court's analysis. Section 5/11-13 (b) of the Probate Act provides:

> "The guardian or other representative of the ward's estate shall have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward."

Section 5/21-2 (a) of the Probate Act provides:

> "It is the duty of the representative to invest the ward's money. A representative is chargeable with interest at a rate equal to the rate on 90-day United States Treasury Bills upon any money that the representative wrongfully or negligently allows to remain uninvested after it might have been invested. Reasonable sums of money retained ininvested by the representative in order to pay for the current or imminent expenses of the ward shall not be considered wrongfully or negligently uninvested".

…

"(c) A representative may invest only in the types of property specified in Sections 21-2.01 through 21-2.15." *755 ILCS 5/21-2 (a), (c).*

The specific types of property that a guardian may invest in are:

Obligations of the United States *755 ILCS 5/21-2.01*; Obligations guaranteed unconditionally by the United States, *755 ILCS 5/21-2.02*; Obligations of corporations owned by the United States or agencies or instrumentalities of the United States, *755 ILCS 5/21-2.03;* Insured accounts, deposits, and certificates *755 ILCS 5/21-2.04;* Municipal bonds *755 ILCS 5/21-2.05*; Savings and time deposits certificates *755 ILCS 5/21-2.06*; Notes secured by real estate *755 ILCS 5/21-2.07*; Corporate obligations *755 ILCS 5/21-2.08;* Real estate *755 ILCS 5/21-2.10*; Life, endowment or annuity policies *755 ILCS 5/21-2.11*; Stock *755 ILCS 5/21-2.12*; Common trust funds *755 ILCS 5/21-2.13;* Mutual funds *755 ILCS 5/21-2.14*; Illinois prepaid tuition contract *755 ILCS 5/21-2.14a;* Investments authorized by General Assembly" *755 ILCS 5/21-2.15.*

So the Probate Act clearly provides the duty of a guardian to invest; what a guardian shall invest in, and the penalty for not investing properly. The question decided by *Lieberman* is: what standard of care applies to guardians where it alleged that the duty to invest was breached?

In *Lieberman,* Northern Trust Company was appointed a co-guardian of the estate of two minors after their father was killed in a car accident and both minors sustained severe and permanent injuries. *Lieberman, 391 Ill.App.3d at 895.* As the result of a personal injury and wrongful death lawsuit, one of the minors received in excess of $13 million dollars and the other minor received in excess of $2.5 million dollars with annuity payments totaling $6 million dollars. *Id.* The co-guardian of one of the minors and the former ward of the other estate (presumably having attained the age of majority) filed objections to the Third and Final Account and prior accounts, allegedly due to a twelve (12) month period in which the defendant, Northern Trust, mismanaged

the wards' estates by leaving over half of one of the estates underinvested, and slightly less than half of the other estate underinvested in cash accounts and in defendant's short-term investment account that yielded a return of about 1% after taxes and guardian fees. *Id.*

After the plaintiffs initial objections were dismissed for failure to state a claim upon which relief could be granted, they filed amended objections with additional language setting forth what the investment would have generated had Northern Trust invested said funds in the same fixed income investments in which it had invested the rest of the assets and also alleged that if The Northern had invested the funds in a simple Dow Jones Industrial Average Mutual Fund, the value would have increased by almost 18% over the same period of time. *Estate of Lieberman, 391 Ill. App. 3d at 885*. In ruling on a second motion to dismiss, the trial court referenced the prudent person standard rule and dismissed the objections finding that the plaintiff did not allege that the defendant's decisions were the result of "bad faith, fraud or gross neglect. *Id. at 897.*

In an opinion written by Justice McLaren, the court reversed the trial court's ruling and remanded the case for further proceedings. In so doing the court stated that it is the duty of the guardian to invest the assets of the ward only in the types of property specified in Sections 21-2.01 through 21-2.15, with the exception of reasonable amounts that maybe necessary to pay for "the current or imminent expenses of the ward". *755 ILCS 5/21-2(a)* The court further stated that, other than for common trust funds, under 21-2.13 and mutual funds under 21-2.14, which specifically require the standard of the prudent investor, a guardian must "manage the ward's property with the same degree of vigilance, diligence and prudence as a reasonable man would use in

managing his own property", thus, applying the lower standard of the prudent man as opposed to the higher standard of the prudent investor, argued for by the plaintiffs. *Estate of Lieberman,* 391 Ill. App. 3d *at 888.* However, even though the court would not apply a professional standard of care under the prudent investor rule, the court stated that "the basic reasonable person standard allows for and incorporates the physical characteristics of the defendant, himself." *391 Ill.App.3d at 889 citing Advincula vs. United Blood Services, 176 Ill.2d 1, 22, 678 N.E.2d 1009 (1996)* Therefore, even under the lower prudent person standard, whether the defendant is a professional investor maybe considered as part of the "circumstances" under which the defendant acted if defendant raises a mistake-in-judgment as a defense. *Estate of Lieberman, 391 Ill. App. 3d at 889.* The court specifically rejected the notion of applying the higher standard of the prudent investor provided in Section 174 of the Restatement (Second) of Trusts, which requires acts to be carried out with the greater degree of skill than that of a man of ordinary prudence. *Id.* Because the legislature specifically included the prudent investor standard to two sections of the Probate Act regarding common trust funds and mutual funds and adopted it for the Trusts and Trustees' Act, the court concluded the higher standard did not apply to the general administration of the wards' estates. *Id. at 901*. However, in applying this analysis to the facts alleged by the plaintiff in *Lieberman*, the court held that the plaintiff stated a valid claim. The court found that since the plaintiff alleged that the defendant knew that the wards did not need substantial sums of money to address their current needs and in viewing those allegations in the light most favorable to plaintiffs, the trier of facts could find that the investment of such a large amount in short-term funds was not reasonable or prudent and could constitute a

breach of fiduciary duty. *Id.* The court went on to state that the defendant did not cite to, nor could they find any statute or Illinois case law to support defendant's contention that any arrangement or proportion of investments in the listed properties under Section 21-2(c) were *per se* prudent. *Id. at 892*.

Finally, the court rejected defendant's argument that the guardian should not be surcharged simply because there was no actual loss suffered by the estates and that "loss" includes lost opportunity to invest in other more profitable types of investment vehicles. *Id 894, citing Estate of Dyniewicz, 271 Ill.App 3d at 625, 648 N.E.2d 1076 (1st Dist. 1995).*

In a separate opinion, Justice O'Malley, specially concurred with the majority as to the end result, but disagreed with its reasoning. Justice O'Malley finds no difference in the reasoning between an ordinary standard of care that takes professional characteristics of the defendant into account as described in *Advincula* and simply applying a professional standard. *Id at 894*. Instead Justice O'Malley believes the reasoning to simply apply the professional standard of the prudent investor can be found in plaintiffs' allegations that the defendant Northern Trust was "a corporate fiduciary which held itself out as having particular experience and expertise with the investment and management of funds for guardianship estates" thereby invoking Section 299A of the Restatement (Second) of Torts that provides: "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities" *Id at 900.* Relying on the reasoning of the Illinois Supreme Court in *Advincula* where the court recognized that it had adopted a

professional standard of care "to measure the conduct of a wide variety of both medical and nonmedical professionals" such as attorneys, dentists, accountants, Justice O'Malley concluded that Illinois law extends a professional standard of care to professional guardians and investors like Northern Trust. *Estate of Lieberman, 391 Ill. App. 3d at 900.* Justice O'Malley would then hold by its silence, the Probate Act incorporates a common-law professional standard of care just as the majority finds the incorporation of the ordinary standard of care for guardians, generally*. Id at 901.* Justice O'Malley also went on to caution against alleging breach of fiduciary duty simply based on hindsight that the guardian could have earned a greater return or another investment might have performed better. *Id at 902.*

CONCLUSION

Based on the majority opinion in *Lieberman*, the guardian can be surcharged for lost opportunity regardless of whether the ward's funds are invested in the identified investments provided in the Probate Act, if, under the prudent person standard the guardian possesses certain characteristics whereby he should of known that investing a substantial portion of the ward's funds that are not needed for current and imminent expenses yield a relatively low rate of return. Since the majority did not set out a heightened standard for professional investors, whether the guardian is a professional is merely a characteristic to be taken into account. Therefore, it is incumbent on attorneys to counsel guardians, regardless of whether they are professionals or not, that a substantial amount of the ward's funds should not be left in cash or low yielding accounts for a significant period of time unless they are needed for imminent or current

expenses. Because the court did not establish a separate and clear standard for professionals versus non-professionals, a non-professional with a certain level of sophistication for investing could, theoretically, be subject to the same liability as a professional.

Charles T. Newland is a partner in the law firm of Newland, Newland & Newland, with offices in the northwest suburbs of Chicago. His practice is concentrated in personal injury, probate, contested estates, and general civil litigation. The firm's website is www.newlandlaw.com and he can be contacted at chuck@newlandlaw.com