Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.

PROBATE LAW CASE SUMMARY

BY: Alan A. May

Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007 through 2010 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 compilation of *The Best Lawyers in America*. He has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

He is a member of the Society of American Baseball Research (SABR).

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DT: May 17, 2011

RE: Alan A. May, Conservator of the Estate of Edward Carroll, a Protected Person
v
Automobile Club Insurance Association
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

With Justin Verlander pitching his second no hitter early in May, I decided to do an analysis of when no hitters are pitched.

For the purposes of this article I started with the birth of the American League and didn't include any American Association. The first no hitter in the modern era (starting in 1901) was thrown by Christy Mathewson. It was thrown in the month of July. The last no hitter was by Justin Verlander thrown May 7, 2011. Thus 228 no hit games in the modern era. One as by Don Larsen in the World Series.

Thirty-four (34) were thrown in April, 41 in May, 36 in June, 30 in July, 30 in August and 57 in September/October.

It looks like we get fewer no hitters as we get into the dog days of summer and then we get a rise when minor leaguers start to play. If you look at 30 day periods within the months, there were over 60 no hitters thrown between April 15th and May 15th, here one might look to the adage of "pitchers ahead of hitters."

If you want to look for no hitters keep awake between April 15th and May 15th, sleep during the summer and wake up September 1st; if hitting, however, interests you do the reverse.

REVIEW OF CASE:

Reference Files: First Party Benefits
Conservator Fees

I seldom review my own cases. Carroll, however, is of such importance that it calls for attention.

Too often conservators seek reimbursement for the costs of maintenance of Wards, including their fees, and deserve first party benefits. Too often the fiduciary is turned down. Too often the fiduciary is out gunned by the insurance industry, which has desire to whittle away at the *Heinz* Decision for many years.

Larry Snyder, of Kemp Klein, was not out gunned. He took a denial of reasonable fees to the Probate Court and he lost. He appealed, and the attached is a unanimous decision, which defines the right of a fiduciary of an insured and the obligations of the insurer. These duties now clearly require the payment of fiduciary fees. It is worthy of note that it's the Appellee who demanded publication of this Opinion.

The Appellee said conservator fees need not be paid because they do not relate to the care, recovery or rehabilitation arising out of the accident. The Probate Court called the services rendered 'conservator's duties' and agreed with Appellee's theory.

First the instant Court of Appeals created a Kierkegaard "either/or." Were my services related to the care, rehabilitation and recovery of the Ward? Or, were they ordinarily and necessary services that the Ward would have performed?

To come down on the either side and determine my services to be "care" within the meaning of the act, the Court of Appeals said the following. First they cited the *Heinz* case:

> "If you are so injured as to require the services of a guardian then the services are reasonable and necessary for care."

This court admitted that the reference to conservatorship in *Heinz* was dicta but said that there no substantive difference between guardianship and conservatorship. (Query) What about other fiduciaries such as trustees? They may be performing the same type of replacement services (but under a different vehicle). The Court of Appeals went on to say that my Ward couldn't handle his own affairs.

Then the court held that these services are not normal services but professional services and are related to his care. Though the court didn't say so directly, by implication they used a "but for argument." "But for" the accident my services would not be necessary. Later they do use the

words "casually connected" to determine that this was care; that the individual couldn't have performed himself without cost.

The court then distinguished food, which wasn't an allowable expense within *Griffith* because the Ward had to eat anyway and there was not a special diet. This court said 'that even *Griffith* saw that some "care" might not lead to recovery or rehabilitation.'

To Larry Snyder all the Wards who need a conservator are thankful for your services and to any of you out there who are getting pushed around call Larry Snyder.

AAM:jv:#688713
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

ALAN A. MAY, Conservator of the Estate of EDWARD CARROLL, a Protected Person,

Petitioner-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Respondent-Appellee.

FOR PUBLICATION
April 26, 2011
9:05 a.m.

No. 292649
Macomb Probate Court
LC No. 2008-195574-CA

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

M. J. KELLY, J.

Petitioner Alan A. May, acting as the conservator of the Estate of Edward Carroll, appeals as of right the Probate Court's opinion and order apportioning the fee for his services between Mr. Carroll's estate and respondent Auto Club Insurance Association. The order obliged Auto Club to pay $99.00 and Carroll's estate to pay the remaining $6,816.70 of Mr. May's fee. On appeal, May argues that the trial court erred to the extent that it determined that only $99.00 of the fee was for a reasonably necessary service for Carroll's care and recovery under MCL 500.3107(1)(a). Because Mr. Carroll would not have needed a conservator but for the injuries he sustained in an automobile accident, May maintains that Auto Club must pay the full amount of the conservator's fees as a reasonably necessary service for Carroll's care. We agree that Auto Club was obligated to pay the entire fee for May's services as a reasonably necessary expense for Carroll's care. For that reason, we reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

Mr. Carroll was involved in an automobile accident in 1982 that left him in a seriously debilitated condition. In the petition for appointment of a conservator, it is stated that he suffered a closed head injury and the guardian ad litem's report indicates that Carroll was hospitalized for two and one-half years following the accident. Auto Club was Carroll's no-fault insurer. For approximately 26 years, Auto Club paid $7000 to $8500 per month to Carroll's wife for the 24-hour care she gave to Carroll. Carroll's wife died in November 2008. Just prior to Mrs. Carroll's death, the Carrolls' daughter committed him to a psychiatric ward. Upon his release, she placed him in an adult foster care home.

Carroll's daughter sought a formal guardianship, but he had concerns with her handling of his finances. A lawyer filed a petition for the appointment of a conservator on Carroll's behalf and, in December 2008, the probate court appointed May to be Carroll's conservator.

On March 19, 2009, May filed a petition for fees. He averred that Auto Club refused to pay his conservator fee of $6816.70. He attached an itemized billing to the petition and asked the court to approve the fee and order Auto Club to pay it. Auto Club opposed the petition, arguing that the fees were not allowable expenses under MCL 500.3107(1)(a) of the no-fault act, see MCL 500.3101 *et seq.*, because they did not relate to Carroll's care and recovery arising out of the accident. In a subsequent reply, Auto Club indicated that Carroll had moved to assisted living and that the conservator fees related to efforts to rent or sell Carroll's residence, liquidate his personal property, and sell his car.

In its June 2009 opinion and order, the probate court stated that the majority of May's claims involved "marshalling assets, paying bills, meetings, and administrative and legal services on Mr. Carroll's behalf." The court further noted that under MCL 500.3107(1)(a), personal protection benefits were payable for "allowable expenses", which were expenses related to a person's care, recovery, or rehabilitation. The court concluded that, although the majority of the fees were related to conservator duties, the services were for the most part not related to Carroll's care, recovery, or rehabilitation, as required under MCL 500.3107(1)(a). The court determined that Auto Club was obligated to pay $99.00 dollars of the fees, and that Carroll's estate was liable for the remainder.

This appeal followed.[1]

II. PERSONAL PROTECTION INSURANCE BENEFITS

A. STANDARD OF REVIEW

On appeal, we must determine whether the trial court erred when it concluded that the majority of Mr. May's fees for serving as Mr. Carroll's conservator did not constitute "reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation" under MCL 500.3107(1)(a). We must also determine whether May's fees were, in the alternative, replacement services within the meaning of MCL 500.3107(1)(c), which are barred because Carroll incurred the expenses more than three years after the date of his accident.[2] This Court reviews de novo the proper

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[1] This Court originally held this appeal in abeyance pending our Supreme Court's decision in *Wilcox v State Farm Mut Automobile Ins Co.* See *In re Carroll*, unpublished order of the Court of Appeals, entered June 23, 2010 (Docket No. 292649). However, on November 9, 2010, the Supreme Court vacated its earlier order and denied leave to appeal. See *Wilcox v State Farm Mut Automobile Ins Co*, 488 Mich 930 (2010).

[2] We note that Auto-Club raised the argument that the conservator's fees were for replacement services within the meaning of MCL 500.3107(1)(c) for the first time on appeal. Although this

interpretation of statutes such as MCL 500.3107. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

B. EXPENSES FOR CARE, RECOVERY, OR REHABILITATION

A person injured in an automobile accident is entitled to a variety of personal protection insurance benefits—often referred to as PIP benefits—from his or her insurance carrier under MCL 500.3107. An injured person is entitled to "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). In addition, the injured person is entitled to expenses, "not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services" that he or she "would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent." MCL 500.3107(1)(c). At issue here is whether May's services as a conservator were reasonably necessary for Carroll's "care, recovery or rehabilitation" under MCL 500.3107(1)(a), or whether the services were for "ordinary and necessary services" that Carroll would have performed within the meaning of MCL 500.3107(1)(c).

Although this Court has not directly addressed whether a conservator's services are compensable as services reasonably necessary for an injured person's care, recovery or rehabilitation, this Court has addressed whether a fee for services by a guardian were compensable under MCL 500.3107(1)(a). In *Heinz v Auto Club Ins Ass'n*, 214 Mich App 195, 196; 543 NW2d 4 (1995), the guardian and conservator of a person injured in an automobile accident sought to recover the fees and expenses associated with the guardianship under MCL 500.3107(1)(a). On appeal, the defendant insurer argued that MCL 500.3107(1)(a) applied only to medical care. *Id.* at 197. This Court determined that MCL 500.3107(1)(a) was not so limited:

> In short, § 3107(1)(a) provides for the payment of expenses incurred for the reasonably necessary services for an injured person's care. It is clear to us that if a person is so seriously injured in an automobile accident that it is necessary to appoint a guardian and conservator for that person, the services performed by the guardian and conservator are reasonably necessary to provide for the person's care. Therefore, they are allowable expenses under § 3107. [*Heinz*, 214 Mich App at 198.]

Because the question in *Heinz* involved only the fees charged by the guardian, the court's references to conservators was arguably dicta. Nevertheless, the court in *Heinz* clearly concluded that the term "care", as used in MCL 500.3107(1)(a), was not restricted to medical

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Court will normally not consider issues that were not properly preserved by raising them in the lower court, we "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Because the facts are sufficient to determine this question of law, we shall address this issue.

care alone. Rather, it concluded that the type of care provided by a guardian could constitute "care" within the meaning of MCL 500.3107(1)(a). And we conclude that there is little basis for distinguishing the "care" provided by a guardian from that provided by a conservator.[3]

MCL 700.5306 governs the appointment of a guardian for an incapacitated person. To appoint a guardian, the court must find that a person is incapacitated and "that the appointment is necessary as a means of providing continuing *care* and supervision of the incapacitated individual[.]" MCL 700.5306(1) (emphasis added). Moreover, the guardian must "make provision for the ward's care, comfort, and maintenance" and must "secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time." MCL 700.5314(b). If the guardian's ward does not have a conservator, the guardian may institute support proceedings and "receive money and tangible property for the ward's support, care, and education." MCL 700.5314(d). If the ward has a conservator, the guardian must "pay to the conservator, for management as provided in this act, the amount of the ward's estate received by the guardian in excess of the amount the guardian expends for the ward's current support, care, and education[]" and must "account to the conservator for the amount expended." MCL 700.5314(f).

A probate court may appoint a conservator if the court determines that the "individual is unable to manage property and business affairs effectively," in relevant part, because of "mental illness, mental deficiency, physical illness or disability" and the individual has "property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money." MCL 700.5401(3). A probate court may also "appoint a conservator" for "an individual who is mentally competent, but due to age or physical infirmity is unable to manage his or her property and affairs effectively and who, recognizing this disability, requests a conservator's appointment." MCL 700.5401(4).

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[3] This Court has addressed the recovery of conservator expenses in two other cases. But those cases are distinguishable from the issue present here. In *Shields v State Farm Mut Auto Ins Co*, 254 Mich App 367; 656 NW2d 853 (2002), this Court noted the holding of *Heinz*. However, the issue in that case concerned whether the holding applied to conservator fees where the conservator was appointed due to a minor's status and not because of injuries incurred in an accident. *Id.* at 370-371. In *Freeman v Colonial Penn Ins Co*, 138 Mich App 444; 361 NW2d 356 (1984), the question was whether a conservator, who managed the investments of his ward, could collect work loss benefits under MCL 500.3107(1)(b). The *Freeman* Court made a reference to "'work loss benefits' for the replacement services of plaintiff", but was not addressing compensation for replacement services under MCL 500.3107(1)(c).

In the present case, May petitioned the probate court, as Carroll's nominee, for a conservatorship for Mr. Carroll. He represented that Carroll could not manage his property and business affairs due to physical illness or disability and a closed head injury. Similar to a guardianship, the conservatorship was necessary as part of Carroll's "care", because he could no longer manage his own affairs as a result of a closed head injury.

Auto Club makes two arguments against treating a conservatorship as "care" under *Heinz*. It argues that a conservatorship is really a replacement service under MCL 500.3107(1)(c) or that it no longer constitutes an "allowable expense" for a service for an injured person's care under MCL 500.3107(1)(a) after our Supreme Court's decision in *Griffith*. Neither of these arguments is availing.

C. REPLACEMENT SERVICES

As already noted, *Heinz* stands for the proposition that the term "care", as used in MCL 500.3107(1)(a), is not limited to medical care. Under *Heinz*, the term "care" encompasses guardian services which, under MCL 700.5306(1), are for the purpose of providing "continuing care and supervision of the incapacitated individual." In contrast, conservator services are for an individual who is unable to "manage property and business affairs." While a guardianship would qualify as a service for a person's "care", a closer question is whether the service of managing property and business affairs is "care."

This question is complicated by the definition of what have traditionally been recognized as replacement services: "*ordinary* and necessary services in lieu of those that . . . an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent." MCL 500.3107(1)(c) (emphasis added). Before an accident, an injured person would presumably manage his or her own property and business affairs without compensation. Thus, the duties of a conservator could be construed to be a replacement service. However, this is not a situation involving ordinary living activities that can be performed by family, friends, or unskilled laborers. This is not a case where Mr. Carroll might be able to hire a family member or friend to write checks and pay his bills at his direction. Rather, Carroll is so incapacitated by his injuries that he cannot manage his own affairs and cannot offer direction to those who might act on his behalf; indeed, he had to petition a court to appoint and approve a conservator—complete with fiduciary responsibilities—to manage his affairs. Under these circumstances, the services provided transcend "ordinary" services akin to cooking, cleaning or doing yard work and thus are not replacement services within the meaning of MCL 500.3107(1)(c). Instead, we conclude that the services are extraordinary professional services related to Carroll's care. See *In re Geror*, 286 Mich App 132, 135-136; 779 NW2d 316 (2009) (holding that services provided by a lawyer to a disabled person were compensable under MCL 500.3107(1)(a) because the services were provided to ensure that the disabled person was receiving necessary care and—as such—were also related to the injured person's "care.").

D. ALLOWABLE EXPENSES AFTER *GRIFFITH*

Since the decision in *Heinz*, our Supreme Court examined the type of expenses that are allowed under MCL 500.3107(1)(a) in *Griffith*, 472 Mich 521 (2005). The *Griffith* Court addressed whether food expenses fall within the provisions of MCL 500.3107(1)(a) as expenses for an injured person's "care." *Griffith*, 472 Mich at 525. In that case, the insured was living at home but had been incapacitated as the result of an automobile accident. The Court held that whether an expense was allowable depended on whether it was causally connected to an accidental bodily injury arising out of an automobile accident under MCL 500.3105(1). *Griffith*, 472 Mich at 531. The Court determined that the plaintiff failed to establish that the costs were for an accidental bodily injury where the diet was not different from an uninjured person's diet, was not part of a treatment plan, and was not related to the injuries. *Id.* at 531-532. Further, the Court held that whether these ordinary food expenses were allowable expenses under MCL 500.3107(1)(a) depended on whether they were reasonably necessary for *an injured person's* care, recovery, or rehabilitation. The Court concluded that the care, recovery, or rehabilitation at issue had to be related to the injury. *Griffith*, 472 Mich at 534. The Court noted that recovery and rehabilitation were intended to restore a person to his pre-injury state and were therefore necessary because of the injuries sustained. *Id.* at 534-535. As for care, it noted that some expenses might be necessary because of an accident but might not restore a person to his pre-injury state. The Court concluded that the food expenses at issue were not related to the injured person's care:

> Griffith's food costs here are not related to his "care, recovery, or rehabilitation." There has been no evidence introduced that he now requires different food than he did before sustaining his injuries as part of his treatment plan. While such expenses are no doubt necessary for his *survival*, they are not necessary for his recovery or rehabilitation from the injuries suffered in the accident, nor are they necessary for his care because of the injuries he sustained in the accident. Unlike prescription medications or nursing care, the food that Griffith consumes is simply an ordinary means of sustenance rather than a treatment for his "care, recovery, or rehabilitation." In fact, if Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now. We conclude, therefore, that his food costs are completely unrelated to his "care, recovery, or rehabilitation" and are not "allowable expenses" under MCL 500.3107(1)(a). [*Griffith*, 472 Mich at 535-536.]

Here, Mr. Carroll had a closed head injury that prevented him from being able to manage his own affairs—that is, Carroll's need for a conservator was causally related to the injuries Carroll sustained in an accident. Admittedly, even if Carroll had not been in the accident, he would have needed to pay his bills and manage his accounts and assets. The question therefore becomes whether the conservator's actions were needed for Carroll's care, recovery, or rehabilitation *from the injury*. Unlike the case in *Griffith*, petitioner here was not seeking payment of the actual expenses that he would have incurred—such as the cost of food—nor was he seeking to recover the cost of engaging a real estate agent to sell his home or the cost of advertisements. These expenses would likely have been incurred regardless of the accident. Instead, the claim here is for the *service* of having a conservator *manage* these matters; and this

would not have been necessary but for the accident-related injury. The conservator's services here are more akin to attendant care provided by a nursing assistant who handles an injured person's intimate hygiene needs; although the injured person would normally have handled those needs on his or her own, as a result of the injury he or she is no longer able to do so. Because expenses incurred to have someone perform those hygiene services are reasonably incurred for the injured person's care, recovery, or rehabilitation, the nursing assistant's services are compensable under MCL 500.3107(1)(a). See *Reed v Citizens Ins Co*, 198 Mich App 443, 453; 499 NW2d 22 (1993). Similarly, because the need for the conservator was causally connected to Carroll's injury and the expense is reasonably necessary for his "care," it too is compensable under MCL 500.3107(1)(a). Accordingly, *Griffith* does not bar recovery of the conservator's fee.

The expenses for the service provided by the conservator were not expenses for ordinary and necessary replacement services—they were expenses incurred for Mr. Carroll's care under MCL 500.3107(1)(a). For that reason, the probate court erred when it concluded that Auto-Club was not liable to pay the full amount of the conservator's fee.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, petitioner may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Jane M. Beckering
/s/ William C. Whitbeck