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

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DT: May 9, 2011

RE: Jessie Lee Simmons, Jr. (Conservatorship)
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

When the major league teams had broken spring training and were coming north, I had occasion to comment about those who would move up in the career standings regarding homeruns. Now I would like to look at lifetime batting averages.

When a starting pitcher is limited to 118 pitches, or there about, and relief pitchers are trained from the cradle, lifetime batting averages in the 21st Century seldom, if ever, reach the plateau of years gone by. Breaking into the top 20 is a real achievement.

Power hitters are also of a disadvantage. Only Williams, Ruth and Gehrig are in the top 20 for lifetime batting averages and only Ruth and Williams, of the three are in the top 20 homerun hitters.

Albert Pujols is making a splendid effort and ranks 25th and Ichiro Suzuki ranks 22nd with a .329 and .331 lifetime average.

All this shows just how special Miguel Cabrerea is.

To be ranked in a category that is not absolute, such as homeruns, one measures lifetime averages on the basis of a minimum of 5000 at bats. Miguel has 4,577 and will probably pass 5000 this year. He is currently sporting a .352 yearly average and a lifetime average of .314. This would rank him in 58th place among all the people who have ever played baseball. That's pretty special. Of similar active players we have Todd Helton who has 336 lifetime homeruns and a lifetime batting average of .324. His batting average is still well above the average first baseman despite the fact that he's 38 years old and he also been blessed to play only for one team, the Colorado Rockies, which shows his value to them. Also, only one day this year did his average drop below .300 and that was to .299.

Have you noticed that all the local commentators who demanded that Miguel Cabrerea go to Betty Ford are silent? These self proclaimed conscious's of propriety would not only have robbed us of Miguel Cabrerea, Babe Ruth and Mickey Mantle, but the man, never to have made an out in baseball; the midget, Eddie Gaedel.

REVIEW OF CASE:

Reference Files: Appointment of Conservator
Standard of Review

Although one might review this matter with the words res ipsa loquiter, it raises some important points.

Appellant was removed as conservator because of misfeasance. (Query: Under the circumstances she deserved no status in the title and should have only been referred to as Ella Louise Simmons.) Eric Braverman became successor conservator. Eric resigned and sought to appoint Les Braverman. Appellant sought back in (one really wonders why – or does one?) Appellant brought forth two things in her favor, priority and the Ward's desideratum. Appellant, in the Lower Court, argued the inapplicability of MCL 700.5106 (2); saying that a professional fiduciary should not be appointed if there was a family member who was willing to serve. The Ward was a Veterans Administration ("VA") recipient. The VA representative testified that Appellant's past performance gave them pause. The Probate Court appointed Les and the Court of Appeals affirmed.

> The portion of EPIC, MCL 700.5106 (2), dealing with professional conservator, says in pertinent part:
>
> "If the court finds the professional conservatorship should be appointed:
>
> If the court finds on the record all of the following:

> (b) There is no other suitable person that is competent, suitable and willing to serve in the fiduciary capacity in accordance with section 5212, 5313 or 5409."

The Court of Appeals could have merely stressed the word all and read the commas in section (b) to be cumulative and found the person not competent or suitable based on prior removal. The Court of Appeals, however, gave a more thorough analysis and went beyond a question of statutory interpretation fitting the facts to the law.

They said:

> "The probate court's selection of a conservator is reviewed for an abuse of discretion. *In re Williams Estate*, 133 Mich App 1,11; 349 NW 2d 247 (1984). The court abuses its discretion when its decision results in an outcome falling outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The probate court's factual findings are reviewed for clear error but questions of law are reviewed de novo. *In re Temple Marital Trust*, 278 Mich App 122, 128, 748 NW2d 265 (2008). A find is 'clearly erroneous' when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the firm and definite conviction that a mistake has been committed." In re Powell Estate, 160 Mich App 704, 710; 408 NW2d 525 (1987) (citations omitted)."

First, that is a good summary.

Second, without determining that the Appellant was unsuitable or incompetent the Court of Appeals is basically saying it is not an abuse of discretion to use the past history of the Appellant in determining her suitability. The Court of Appeals is, therefore, looking at this as a matter of fact rather than a matter of law. Her removal didn't bar her, her past actions, which led to her removal, made her unsuitable.

The Court of Appeals does not mention the allegation of Appellant that the Ward wanted her to be her conservator, but one could see, under many circumstances not present here that this would be more of a determining factor.

As the annotator has said many times history is not only something in the past, but something that seems to follow you forward.

The unfortunate thing is that third party payers still recognize the status of a family member, even one determined to have committed some financial abuse who has been removed as a conservator. The annotator comes across this many times and to those third parties, the decisions of the Probate Court are not only not binding, but to them of little import. This is a shame.

AAM:jv:Doc 688309v2

STATE OF MICHIGAN

COURT OF APPEALS

In re Conservatorship of JESSIE LEE SIMMONS, JR.

ELLA LOUISE SIMMONS, Conservator for JESSIE LEE SIMMONS, JR., a Protected Individual,

Appellant,

v

LESLIE C. BRAVERMAN,

Appellee.

UNPUBLISHED
April 14, 2011

No. 297232
Wayne Probate Court
LC No. 00-724720-CA

Before: DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Appellant Ella Simmons appeals as of right from a probate court order accepting the resignation of conservator Eric Braverman and appointing appellee Leslie Braverman in his place. We affirm.

Ella Simmons is the mother of Jessie Simmons, a military veteran. She was appointed as her son's conservator several years ago. In 2004, she was appointed as fiduciary by the Department of Veterans Affairs (VA) to manage Jessie's VA payments. In December 2005, the VA awarded Jessie $68,980.48 in past-due "special monthly compensation based on Aid and Attendance" for the period between December 1989 and April 2005. It appears that the Aid and Attendance benefit was intended to reimburse Jessie's estate for past expenditures for his care. Appellant apparently believed it was intended as compensation for the caregiver and because she had been serving as Jessie's caregiver, she took the money for herself and claimed it on the 21st annual account as an estate expense. In October 2007, the probate court determined that appellant had misused the Aid and Attendance payment and ordered her to reimburse the estate. The court also removed appellant as conservator and appointed Eric Braverman as her replacement. In a prior appeal, this Court affirmed that decision. *In re Simmons Estate*, unpublished opinion per curiam of the Court of Appeals, issued December 23, 2008 (Docket No. 281904).

In the meantime, appellant apparently took funds from the estate to purchase a house and have it renovated to accommodate Jessie's needs, but she titled the house in the names of herself and her daughter. Once again, appellant was ordered to reimburse the estate. Sometime in the spring of 2009, the parties apparently resolved their differences regarding appellant's expenditures of estate funds. Appellant was again discharged as conservator, she was allowed to keep the Aid and Attendance payment as compensation for serving as Jessie's caregiver between 1989 and 2005, appellant and her daughter were ordered to convey a life estate in the house to the estate, and they were both released from liability for any claims resulting from appellant's actions as conservator through February 2009.

In October 2009, Eric Braverman sought to resign as conservator and recommended that appellee be appointed. Appellant objected and asked that she be reappointed instead, which was Jessie's preference. The probate court held a hearing at which Thomas Maher, a VA representative, testified that the VA would have concerns if appellant were appointed in light of her past problems in managing Jessie's benefits. Appellant testified that she had been a very good conservator, had never done anything wrong, and had been removed as conservator in 2007 because the VA falsely claimed to know nothing about the Aid and Attendance payment. The probate court determined that appellant did not understand the fiduciary duty owed to Jessie's estate and was not able to manage the estate assets appropriately. It therefore concluded that appointment of a professional conservator was in Jessie's best interests and appointed appellee.

The probate court's selection of a conservator is reviewed for an abuse of discretion. *In re Williams Estate*, 133 Mich App 1, 11; 349 NW2d 247 (1984). The court abuses its discretion when its decision results in an outcome falling outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The probate court's factual findings are reviewed for clear error but questions of law are reviewed de novo. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the firm and definite conviction that a mistake has been committed." *In re Powell Estate*, 160 Mich App 704, 710; 408 NW2d 525 (1987) (citations omitted).

MCL 700.5106(2) provides that a probate court may appoint a professional conservator under the following circumstances:

> The court shall only appoint a . . . professional conservator as authorized under subsection (1) if the court finds on the record all of the following:
>
> (a) The appointment of the . . . professional conservator is in the . . . protected individual's best interests.
>
> (b) There is no other person that is competent, suitable, and willing to serve in that fiduciary capacity in accordance with section 5212, 5313, or 5409.

Only § 5409 is applicable here. It authorizes the court to appoint an individual, a corporation, or a professional conservator to serve as conservator and sets forth the order of priority to be given various persons. Appellant, as Jessie's mother, has priority over appellee. MCL 700.5409(1)(e). However, the probate court could pass over appellant in favor of appellee

if it found that appellant was not suitable to serve as conservator and that appointment of a professional conservator was in Jessie's best interests. MCL 700.5106(2); MCL 700.5409(1)(h) and (2).

A conservator may only expend or distribute estate income or principal without court approval "for the support, education, care, or benefit of the protected individual" or his dependents. MCL 700.5425. A conservator owes a fiduciary duty to the protected individual to manage his estate in a prudent manner and without self-interest. MCL 700.5416 ("a conservator shall act as a fiduciary and observe the standard of care applicable to a trustee"); MCL 700.7803 (a trustee "shall act as would a prudent person in dealing with the property of another"); *In re Green Charitable Trust*, 172 Mich App 298, 312-313; 431 NW2d 492 (1988) (noting that "to be prudent includes acting with care, diligence, integrity, fidelity and sound business judgment.")

This Court previously determined that appellant was properly removed as conservator because she "breached her fiduciary duty as a conservator" when she appropriated the Aid and Attendance payment for herself. The fact that the parties subsequently agreed that appellant could retain that payment as part of a global settlement did not vitiate that determination. The evidence presented at the hearing indicated that appellant had again breached her fiduciary duty as conservator when she used estate funds to purchase a home titled in the name of herself and her daughter. Such evidence supported the probate court's finding that appellant did not understand the fiduciary duty owed to Jessie to manage his funds in a prudent manner for his benefit, not for her own. Given that, the probate court could properly find that appellant was not suitable to serve as Jessie's conservator and there being no other suitable candidate with a higher priority, the court could properly find that appointment of a professional conservator was in Jessie's best interests. Accordingly, the probate court did not err in appointing Leslie Braverman as conservator instead of appellant.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens