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 2007-2014 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and 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. Mr. May maintains an "AV" peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell's Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2015 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2014 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011.

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

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DT: February 23, 2015

RE: In Re Conservatorship of Rita June Sivers
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

THE 20-SECOND RULE

Stu Lockman asked me last week my opinion on the rule, so I thought I would share some thoughts.

Major League Baseball is attempting to shorten games in a few different ways and is attempting to test those ways in minor league baseball and in some extent in spring training. One of the rules would limit the time a pitcher has to deliver a baseball. We all know that pitchers stand on the mound ad nauseam until the batter gets out of the batter's box and then continues to stare at the batter. The rule to be promulgated would say that a pitcher has 12 seconds from the time he

receives the ball when the bases are unoccupied in order to pitch. I presume that they mean that when the bases are occupied, there would not be a limit, otherwise the pitcher would probably get a fresh 20 seconds every time he threw to first base. I also presume that the differential between the 20 seconds and the 12 seconds allow the catcher to get 8 seconds to throw the ball back to the pitcher. I am unclear on this since the pitcher is supposed to have 20 seconds from receipt of the ball until his windup to make the pitch, otherwise the umpire can call a ball. I don't understand the published references to 12 seconds.

There is also the batter's box rule that says that, except for a foul ball or a foul tip or a pitch forcing the batter out of the box or time has been called or there is a wild pitch or a pass ball, a batter cannot get out of the box. And if the batter moves out of the box, without falling into one of the several exceptions, the pitcher can continue his delivery and if the ball is within the strike zone, it would be called a strike. We have all seen batters get outside of the batter's box and constantly readjust their gloves and tightening the Velcro.

It is estimated that if these rules are enforced, that the game would be shortened by 20 minutes.

I think a lot of testing needs to be done before this rule is promulgated. First, will this affect a pitcher's ability to pitch accurately? If the answer is yes, and there are either more strikes thrown which are hit or more balls allowing a base on balls, there is going to be a lot of upheaval in Major League Baseball. I also wonder whether not allowing a rest period between pitches will have an adverse effect on a pitcher's arm. Query whether an umpire would be less likely to call a fourth ball rather than a third ball? I also think that allowing the questioning by a manager as to whether a batter was given a timeout or left the box for a valid reason would lead to time consuming arguments on the field. A manager can't contest balls or strikes, but is this a ball or strike or is it more like a balk, which can be questioned?

Other proposed rules are allowing three timeouts and limiting time on changing pitchers. I think these are reasonable, but hard to enforce. Trying to get a manager to go back to a dugout when they are violating a pitching change time rule or a timeout rule, I think is going to be problematic.

If umpires start calling these rules tight in the beginning of the season and start calling them loose after complaints in the middle or end of the season, that will lead to complications too.

Just like with a spit ball where pitchers will resort to all kinds of chicanery to not get caught, I can see pitchers who want more time falling off the mound and asking for a trainer, giving the relief pitcher more time to warm up. I am sure they can think of many more things. What happens when a manager comes out of the dugout to talk to the umpire about some other issue, must the pitcher still deliver the ball within 20 seconds, etc.

REVIEW OF CASE:

Referenced Files: Conflict of Interest – Prior Representation
Waiver of Conflict of Interest

This matter concerns a petition to modify a guardian and conservatorship. Petitioner-Appellant sought the intervention of the Washtenaw County Probate Court to appoint a guardian and conservator for her mother. In a Guardian Ad Litem Report there was a statement that a power of attorney was revoked. Petitioner-Appellant never challenged that statement. Through a series of court hearings and mediations, the attorney who had previously represented Petitioner, became the Conservator of mom. Petitioner consented to this. Petitioner claimed in the Court of Appeals

that the Lower Court erred because there was a conflict of interest, the current Conservator having represented the Petitioner.

I think the Court of Appeals reached the right decision. But one of the positions that it takes, I think is erroneous. The Court of Appeals found that the current Conservator was representing no one and therefore MRPC 1.9(a) was not violated.

That rule of professional conduct says as follows:

> [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

I think it is fractured reasoning to say that the attorney is not representing "another person in the same or a substantially related matter" simply because she is the fiduciary. In addition to being the fiduciary, she is also the attorney and therefore I think the rule applies.

The Court of Appeals correctly states that there was a waiver either by silence or by consent and thus the Probate Court was correct in denying the Petition to Modify as Petitioner consented to the order appointing Respondent. I think the Court of Appeals should have relied on that alone and not drawn the fine distinction in saying MRPC 1.9(a) did not apply. There is no question that in the initial consultation, that attorney learned facts about the Petitioner which might have been relevant to the subsequent proceedings.

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STATE OF MICHIGAN

COURT OF APPEALS

In re Conservatorship of RITA JUNE SIVERS.

SYDNEY SIVERS,

Petitioner-Appellant,

v

KATHLEEN POELKER, conservator for RITA SIVERS,

Respondent-Appellee.

UNPUBLISHED
December 16, 2014

No. 318742
Washtenaw Probate Court
LC No. 10-000075-CA

Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Petitioner, Sydney Sivers, appeals as of right the probate court's order denying her petition to modify the guardianship and conservatorship of her mother, Rita Sivers. Because the trial court did not clearly err in finding no conflict of interest on the conservator's behalf,[1] it did not abuse its discretion, and we affirm.

I. BASIC FACTS

Rita Sivers was born on June 12, 1923. On June 29, 2009, Rita executed a durable power of attorney for finances, nominating petitioner as attorney-in-fact. On that same date, Rita also executed a durable power of attorney for care, custody, and medical treatment decision making, nominating petitioner as her patient advocate.

In September 2009, Rita began showing symptoms of dementia. Petitioner, through her counsel, Kathleen Poelker, petitioned the probate court to appoint a guardian and conservator. Petitioner nominated attorney Jane Bassett to serve in both capacities.

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[1] Only the conservator issue, which is case No. 10-000075-CA, is before us.

Steven Tramontin was appointed as Rita's guardian ad litem and submitted a report to the probate court. In the report, Tramontin noted that "Rita and Petitioner have a difficult history and relationship. Rita recently revoked Petitioner's Power of Attorney when Petitioner tried to take control of her finances." After meeting with Rita on February 8, 2010, Tramontin opined that it was not clear that Rita met the statutory definitions of an individual in need of a guardian and conservator. He suggested "a more current evaluation" be conducted to make this determination. He also recommended that an attorney be appointed for Rita and that the parties submit to mediation.

In response to the guardian ad litem's report, the probate court appointed Matthew Delezenne to act as an attorney for Rita. After a hearing was held on March 11, 2010, the probate court granted petitioner's requests and appointed Jane Bassett as conservator and guardian for Rita.

In September 2011, Bassett, petitioner (represented by Poelker), and Rita (represented by Novin Nichols) participated in mediation. Following mediation, Bassett petitioned the probate court to accept her resignation as conservator and to appoint Poelker as successor conservator. Bassett, petitioner, and Rita stipulated to entry of an order that allowed Bassett to resign and appoint Poelker as successor conservator.

Apparently, the parties also agreed to the court's appointment of Joelle Gurnoe as successor guardian.[2] But this appointment was short lived because in January 2012, petitioner, through her attorney Suzanne Fanning, filed a petition to modify the guardianship. On February 9, 2012, the probate court discharged Gurnoe and appointed Poelker as successor guardian, thereby making Poelker both Rita's conservator and guardian.

On June 6, 2013, petitioner, through counsel Fanning, petitioned the probate court to remove Poelker as conservator and to appoint herself as successor conservator. In an accompanying brief, petitioner asserted that "[s]he agreed to relinquish her authority under the Durable Power of Attorney on a temporary basis, to her attorney, Jane Basset"[3] and that "it was her mother's express choice that she manage her mother's finances."

Shortly thereafter on June 24, 2013, Fanning moved to withdraw as petitioner's counsel. On September 6, 2013, petitioner's new counsel, Amy Parker, filed an amended petition to modify the conservatorship and guardianship. In the accompanying brief, petitioner once again alleged that she understood that all the guardian and conservator appointments were to be only temporary and that the decision to end the guardianship and conservatorship was hers.

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[2] Because the case on appeal, No. 10-000075-CA, only pertains to the conservatorship, many of the records for the guardianship, No. 10-000074-GA, are not in the lower court record provided to this Court. But the parties on appeal do not dispute that Gurnoe was appointed as successor guardian at this time.

[3] It is not clear why it was alleged that Basset was petitioner's attorney, when it was Poelker who represented petitioner at the outset of these proceedings.

Petitioner argued that the conservatorship should be terminated, allowing her to manage Rita's estate through the never-revoked, 2009 durable power of attorney for financial matters that appointed petitioner as the attorney-in-fact. Alternatively, petitioner argued that she could be appointed as successor conservator. In support of this alternative argument, petitioner contended that Poelker had a conflict of interest due to her prior representation of petitioner and her current position as Rita's conservator. Petitioner also claimed that Poelker breached her fiduciary duty to Rita "by failing to inform petitioner, her former client, of the ability to step down [as] the attorney in fact, and allow the successor [to] act."

Poelker, as guardian and conservator, filed a response to petitioner's request to modify and/or terminate the guardianship and conservatorship. Poelker noted that petitioner's claim, that the 2009 powers of attorney never were revoked, was not supported by the record. She noted that the very first guardian ad litem report, issued in February 2010, noted that Rita had revoked petitioner's power of attorney. Further, Poelker argued that even if Rita had not revoked the powers, petitioner revoked the power through her actions, which demonstrated her unwillingness to act as any attorney-in-fact. Moreover, even if the financial power of attorney had not been revoked, then Poelker, in her response, expressly revoked it under MCL 700.5503(1), which allows a conservator to do so.

Regarding petitioner's conflict of interest claim, Poelker argued that any such claim is disingenuous because once she became appointed conservator (and later guardian), she stopped representing petitioner. Further, Poelker claimed that she never breached any attorney-client relationship with petitioner. Poelker then requested sanctions against attorney Parker, as she asserted frivolous claims in violation of MCR 2.114(D).

At a hearing held on September 26, 2013, the probate court found that the financial power of attorney had been revoked by Rita before the initial guardian and conservator were appointed in 2010. The court also found that there was no conflict to allow Poelker to continue in her role as guardian and conservator. In addition, the court denied petitioner's requests to modify both the guardianship and conservatorship because, when viewing all the information provided to the court, it concluded "granting the petition would not be in the best interests of [Rita]." Finally, the court imposed sanctions against attorney Parker in the form of an "oral reprimand" for her previous claim that the proceedings were like a "runaway train," which the court inferred as meaning that it was part of some misconduct.

II. STANDARDS OF REVIEW

We review a probate court's decision on a petition to modify a conservatorship for an abuse of discretion. *In re Estate of Williams*, 133 Mich App 1, 11; 349 NW2d 247 (1984); see also *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). A court abuses its discretion when it chooses an outcome that falls outside the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App at 128. But the probate court's factual findings are reviewed for clear error. *Id.* Clear error exists when after a review of the entire record, this Court is left with a definite and firm conviction that a mistake was made. *Sinicropi v Mazurek*, 279 Mich App 455, 462; 760 NW2d 520 (2008).

III. ANALYSIS

that petitioner ever attempted to execute her power of attorney after Bassett initially was appointed conservator.

Moreover, even if the power of attorney was never revoked by Rita, it was expressly revoked by Poelker, the conservator. MCL 700.5503(1) provides that in the event a conservator is appointed after the execution of a durable power of attorney, the conservator "has the same power to revoke or amend the power of attorney that the principal would have had if he or she were not disabled or incapacitated." Here, Poelker, acting as conservator, revoked the power of attorney in court filings. Therefore, there is no question that under either theory, any power of attorney was extinguished.[4]

Petitioner also argues that there is a conflict of interest between Poelker and petitioner. Petitioner relies on MRPC 1.9(a), which provides that

> [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Petitioner claims that because she is a former client of Poelker, Poelker cannot now oppose her desires in this matter. This position is untenable. While it is true that Poelker initially represented petitioner in these proceedings, she does not have an attorney-client relationship with anyone in this case right now. Thus, she is not "represent[ing] another person in the same or a substantially related matter." Furthermore, her position as conservator is not "materially adverse to the interests of the former client [petitioner]." The record is clear that when Poelker represented petitioner, petitioner sought the appointment of two different conservators for Rita. In 2010, petitioner sought the appointment of Bassett as conservator. Then in 2011, petitioner expressly agreed to the appointment of Poelker as successor conservator. Therefore, by maintaining Poelker as the conservator, it is clear that petitioner's interests in the prior litigation are not being opposed now. Petitioner claims that she and Poelker had an understanding that any such appointments were only temporary and could be rescinded by petitioner at a later time. But there is no evidence in the record to support this assertion.[5] More importantly, EPIC does not allow for someone to be able to terminate a conservatorship without showing good cause. And

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[4] Petitioner dedicates much of her argument in her brief on appeal to whether the *medical* power of attorney was revoked. But this aspect is only relevant for any guardianship issue—not the conservatorship issue that is before this Court.

[5] Petitioner has filed an affidavit in this Court, but because it was filed after the probate court rendered its decision, it was never considered by the probate court. Consequently, we will not consider it because a party is prohibited from enlarging the record on appeal. See *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000) ("A party is not permitted to enlarge the record on appeal by asserting numerous facts that were not presented at the trial court.").

even then, it is up to the discretion of the probate court to terminate the conservatorship and to appoint a successor conservator. MCL 700.5414.

Moreover, even if Poelker's position as conservator could be viewed as "representation," such representation would nonetheless be allowed because MRPC 1.9(a) allows for such representation if "the former client consents." As previously noted, petitioner stipulated to the appointment of Poelker as conservator, so she consented.

Therefore, because petitioner's claims of Poelker having a conflict of interest were unsubstantiated, the probate court did not abuse its discretion in denying petitioner's petition to modify or terminate the conservatorship.

Affirmed. Respondent, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro