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).

For those interested in viewing previous Probate Law Case Summaries, click on the link below. http://www.kempklein.com/probate-summaries.php

DT: June 1, 2011

RE: In re Gregory Allen, Jr.
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL LORE:

EARTHY PHENOMENON	*vs.*	RELIGIOUS CONNOTATIONS
Donie Bush		Clarence Cross
Sunset Jimmy Bone		Max Bishop
Cyclone Miller		H. Church
Hard Rock Allenson		Steve Christmas
Charlie Sands		Mark Christman
Eddie Lake		Luke Easter

EARTHY PHENOMENON	*vs.*	RELIGIOUS CONNOTATIONS (continued)
Mandy Brooks		Faithful Fred Abott
Bill Clay		Hezekiah Allen
Jackson Beach		Maurice Archdeacon
Grover Land		Preacher Roe
Jim Field		John Baptist Bergh
Steve Stone		Conrad Cardinal

REVIEW OF CASE:

Reference Files: Attorney Fees
Guardian Ad Litem Fees
Abuse of Discretion

This is a matter where the Court of Appeals felt the lower court abused its discretion in an issue of attorney fees. It is a good discussion about fees, the applications of the burden involved, the assessment of costs and the role of a Guardian Ad Litem.

Appellee was the guardian of an incapacitated adult. She asked the court for permission to use some of her Ward's money for a variety of things.[1] The Probate Court appointed a Guardian Ad Litem (Appellant) who recommended inter alia a special needs trust. He charged $3,000 for preparing the Trust. The Appellee asked to see a statement. The Probate Court said:

> "In its opinion $3,000 was reasonable for a special needs trust, if you made the attorney go to the trouble of giving you a bill I am going to let him bill at what he would bill "a regular client" and you and not the trust will pay the bill."

All of which happened.

The Court of Appeals said that you can't penalize someone for asking for a bill, which you have the right to do (*Krueger Estate*, 176 Mich App 241). This was punitive. It was, therefore, an abuse of discretion. Determining a fee of $3,000 to be reasonable, with no proofs before it, was an abuse of discretion. Determining in advance the normal hourly rate for a greater amount was an abuse of discretion.

Tendering a bill, showing an hourly rate, is not the only thing that is necessary for an attorney to sustain his burden of proof of reasonableness. Also, you can't charge an opponent with fees for the fee(s) of an attorney, which fee was incurred in sustaining his own burden of proof.

This is a good result.

But Query: What business does a Guardian Ad Litem ("GAL") have in writing a Trust for someone else's client without retention by the client? A GAL has statutory immunity. The statutory immunity was never intended to give a GAL, acting as an attorney for someone other than himself, protection against liability. Supposed the Trust did not qualify as a D4A Trust?

[1] Query: What was a guardian, for an adult, doing with money in the first place? This does not appear to be a DDP guardian of the estate.

Why not apply *In re Sloan*? Assuming arguendo that *Sloan* doesn't apply to GAL's per se, clearly it would apply to a GAL acting as an attorney.

The Appellant, as an individual, was not a party. The court had no jurisdiction to make an interested party, or a non party, pay someone else's attorney fee. Also, if they did have jurisdiction to make a guardian pay the attorney fee, as the special needs trust already had the money, that amounts to assessing personal liability for this guardian – odd?

AAM:jv:Doc:689872
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re GREGORY ALLEN, JR.

BRETT A. HOWELL,

Appellee,

v

RITA ALLEN,

Appellant.

UNPUBLISHED
April 26, 2011

No. 296350
Genesee Probate Court
LC No. 09-187184-TV

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Appellant Rita Allen, the mother and guardian of Gregory Allen, Jr., an incapacitated adult, appeals as of right, challenging the probate court's orders awarding attorney fees and costs to appellee Brett A. Howell, Gregory's court-appointed guardian ad litem (GAL). We vacate the probate court's orders and remand for further proceedings.

Allen argues that the probate court abused its discretion by awarding attorney fees without first determining the reasonableness of the fees, and by ordering her to pay a portion of the fees, apparently as a sanction for objecting to the amount of the requested fees and the lack of an itemized statement from appellee. We review the probate court's decision to award attorney fees and its determination of the reasonableness of the fees for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008); *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

Allen is the court-appointed guardian for Gregory, her adult son, who was severely injured in a car accident as an infant and was awarded a monthly payment pursuant to a settlement with the responsible driver. In 2009, Allen petitioned the probate court to allow her to use some of Gregory's assets to repair her kitchen floor and cabinets, which had been damaged by water, to make them more accessible to Gregory, who uses a wheelchair. The value of Gregory's assets was approximately $116,000 in 2009.

The probate court appointed appellee as Gregory's GAL with respect to Allen's petition and to investigate whether a special needs trust should be established for Gregory. Appellee

accepted the appointment and submitted a report, which recommended the establishment of a special needs trust before the court approved the use of any of Gregory's assets. Appellee petitioned the court to authorize him to establish the special needs trust and to appoint Allen as the trustee. Appellee also requested attorney fees of $3,000 and other court costs. Allen responded, questioning the need for the trust, objecting to some sections of the proposed trust, and objecting to the requested attorney fees, arguing that the amount was excessive for the work appellee performed.

At a hearing on appellee's petition, the probate court indicated that appellee was "an expert on this" and remarked that it had seen other attorneys ask triple the requested amount for a special needs trust. Allen's attorney observed that appellee had not provided an itemized statement showing his hourly rate and the hours billed for the services performed in the case. The court instructed appellee to submit an itemized statement and further indicated that if the amount of fees in the itemized statement exceeded $3,000, any amount beyond $3,000 would be charged to appellee rather than Gregory's estate. The court explained:

> Mr. Howell is an accommodation to the court, does this--these kinds of cases. He, um, usually charges a flat fee--a flat fee a lot of time is like ten percent. Or maybe fifty percent of what a bill would be if he was charging a regular client, in the real world. Your client, as is their right, is insisting on an honest statement. . . . [I]f I'm gonna put him through that to do this, then I'm gonna have him bill as he would a regular client. Three thousand will be paid by the trust. Anything over 3,000 will be paid for by your client.

The probate court issued an order that stated, in pertinent part:

> The Court is familiar with the costs associated with establishing a special needs trust and finds $3,150.00 [$3,000 in attorney fees and $150 in filing costs] to be reasonable. . . .
>
> THE COURT FURTHER FINDS that a figure much greater than $3,150.00 could be billed by the guardian ad litem, Attorney Brett Howell, which could also be reasonable.

The court also ordered appellee to produce an itemized statement of all work completed and indicated that it would allow $3,150 in attorney fees and costs to be paid by the trust, and any additional amount "that reflects actual work completed" would be charged to Allen.

Appellee thereafter provided an itemized statement that listed 24.25 hours at an hourly rate of $225, and requesting parking costs of $176, for a total requested amount of $5,632.25. The court then issued a second order finding the requested fees and costs to be "reasonable" and ordering Allen to pay appellee $2,632.25.

In Michigan, attorney fees are recoverable only if authorized by statute, court rule, or contract. *In re Temple Marital Trust*, 278 Mich App at 129. Under MCL 700.5305(2), a guardian ad litem appointed by the court to represent an incapacitated individual may be compensated when he or she has stated on the record or in a written report that all statutory duties listed under MCL 700.5305(1) have been completed. If not otherwise compensated, a

guardian ad litem appointed in a protective proceeding involving an individual under a disability or a minor "is entitled to reasonable compensation from the estate." MCL 700.5413. Only reasonable fees, not actual fees, may be awarded. *Smith*, 481 Mich at 528 n 12. If the reasonableness of a fee request is challenged, the court should conduct an evidentiary hearing. *Miller v Meijer, Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996). The trial court may consider the actual amount of fees requested, but the amount requested should not control the court's decision. *In re Martin (After Remand)*, 205 Mich App 96, 109; 517 NW2d 749 (1994), rev'd on other grounds 450 Mich 204 (1995). The burden of proof regarding the reasonableness of the requested fees rests on the party seeking compensation. *Smith*, 481 Mich at 528-529.

In *Smith*, our Supreme Court set forth a method for determining a "reasonable attorney fee" under the case evaluation rule, MCR 2.403(O)(6). The Court's analysis took into account the purpose of that court rule, which is the "encouragement of settlements . . . as it deters protracted litigation with all its costs and also shifts the financial burden of trial onto the party who imprudently rejected the case evaluation." *Id.* at 528. Thus, the court rule contains a sanction aspect for "imprudently" rejecting a case evaluation. Despite shifting the financial burden, the Court found that the rule "only permits an award of a *reasonable* fee, i.e., a fee similar to that customarily charged in the locality for similar legal services, which, of course, may differ from the *actual* fee charged or the highest rate the attorney might otherwise command." *Id.* (emphasis in original).

In this case, there is no sanction element in the statutes permitting the recovery of reasonable attorney fees. MCL 700.5305(2); MCL 700.5413. Appellee is an attorney who was appointed as the GAL to represent the interests of the ward, a developmentally disabled adult. Appellee is entitled to "reasonable compensation" under the statutes. Although the relevant statutes have a different purpose than MCR 2.403(O)(6), the Supreme Court's analysis in *Smith* demonstrates how a court should determine the reasonableness of requested attorney fees.

The *Smith* Court first noted that the party requesting fees bears "the burden of proving the reasonableness of the requested fees." *Smith*, 481 Mich at 528-529. The trial court should "consider the totality of special circumstances," applying as appropriate the six factors listed in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), and the eight factors listed in Michigan Rules of Professional Conduct (MRPC) Rule 1.5(a). The factors overlap and include "the professional standing and experience of the attorney," "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly," and "the expenses incurred." *Id.* at 529-530, quoting *Wood*, 413 Mich at 588, MRPC 1.5(a).

The *Smith* Court held that, in determining whether requested attorney fees are reasonable, the trial court should

> begin its analysis by determining the fee customarily charged in the locality for similar legal services . . . . In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case . . . . The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. . . . [*Id.* at 530-531.]

The Court "emphasize[d]" that "'the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" *Id.* at 531, quoting *Blum v Stenson*, 465 US 886, 895 n 11; 104 S Ct 1541; 79 L Ed2d 891 (1984). This "satisfactory evidence" of customary fees "can be established by testimony or empirical data found in surveys and other reliable reports." *Id.* at 531-532. Mere "anecdotal statements" are not sufficient. *Id.* at 532.

To determine "the reasonable number of hours expended in the case," the attorney requesting fees "must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness." *Id.* The burden of establishing the reasonableness of the hours reported lies with the attorney requesting fees. If the other party raises a factual dispute regarding the reasonableness of the hourly rates or the hours billed, "the party opposing the fee request is entitled to an evidentiary hearing to challenge" the evidence submitted by the attorney requesting fees and to present contrary evidence. *Id.* Only after the trial court has determined a reasonable fee by multiplying the reasonable hourly rate by a reasonable number of hours billed, should the court "consider the other factors and determine whether they support an increase or decrease in the base number." *Id.* at 533. To facilitate appellate review, the trial court "should briefly address on the record its view of each of the factors." *Id.* at 529 n 14.

In this case, the probate court abused its discretion in several respects. In the first order, the court determined that the requested $3,000 fee was "reasonable" without knowing what hourly rate appellee was charging or how many hours he was billing. At this point, appellee had not submitted a detailed statement of the hours he had worked or a statement of his hourly rate. Further, there had been no "satisfactory evidence" of customary fees, which could include "testimony or empirical data found in surveys and other reliable reports." *Smith,* 481 Mich at 531-532. There was only the court's subjective empirical statement that, "based upon the Court's experience with the establishment of special needs trust" the $3,000 in attorney fees was reasonable and even a larger figure "reflecting actual work completed" "could also be reasonable." The court did not even suggest what, in its experience, would be an average or median hourly rate charged by an attorney in the same locale with appellee's skills and experience level or an average number of hours for the work that appellee performed. Given the limited information provided, the probate court abused its discretion in determining that the $3,000 in fees originally requested by appellee was "reasonable" for the work performed.

The probate court also abused its discretion when it determined that the attorney fees and costs of $5,632.25, requested in appellee's itemized bill, was a "reasonable" amount. Before the itemized bill was even submitted, the court in its first order indicated that a figure much larger than $3,150 in fees and costs "could also be reasonable." Two days after the itemized bill was submitted, the court found that the $5,632.25 in fees and costs requested by appellee was "reasonable." Again, this determination was not based on any "satisfactory evidence" in the form of testimony or empirical evidence supported by surveys or reliable reports of customary hourly rates billed by attorneys with similar experience and skills in the same locale for similar work. Moreover, the court stated in its first order that there would be an amount "in excess of the Court's determination of reasonable attorney fees and costs" and stated that it would award additional fees and costs as long as it "reflects actual work completed." Although it is proper for

a court to consider the actual amount of fees requested, that amount should not control the court's determination of reasonableness. *In re Martin (After Remand)*, 205 Mich App at 109. The party requesting the fees still bears the burden of proving the reasonableness of the requested fees. *Smith*, 481 Mich at 528-529. Here, the court accepted the amount requested in appellee's itemized statement without a fact-based finding that the hours and rate requested were "reasonable."

The court further abused its discretion in ordering Allen, the incapacitated adult's guardian, to pay $2,632.25 in attorney fees and costs. Under MCL 700.5413, appellee was entitled to "reasonable compensation" from Gregory's estate. When Allen's attorney questioned the reasonableness of appellee's requested fees and noted that appellee had not even provided a statement, the probate court ordered appellee to provide a statement, but commented that the actual amount would probably be much higher than $3,000. The court acknowledged that it was Allen's right to have "an honest statement," but then indicated that if the court had to put appellee "through that to do this, then I'm gonna have him bill as he would a regular client. Three thousand will be paid by the trust. Anything over 3,000 will be paid for by your client."

The court's comments indicate that it was being punitive and imposing a sanction on Allen for insisting that appellee provide an itemized fee statement. Although acknowledging that it was Allen's right to have a detailed statement of appellee's hours, the court apparently believed that asking appellee to provide one was an imposition on him. As noted in *In re Krueger Estate*, 176 Mich App 241, 250; 438 NW2d 898 (1989), "[a]n interested party has a right to question the amount of expenses and fees, both administrative and legal. When a question regarding fees is raised, it is not unreasonable to require the provider of the services to set forth the basis on which the fee was charged." The court cited no authority for otherwise ordering Allen to pay portions of appellee's fees. The court abused its discretion in ordering Allen to personally pay any fees.

Finally, Allen argues that the probate court abused its discretion in awarding attorney fees in excess of the fees requested by appellee or supported by the record. Allen points to appellee's original petition as GAL, which requested $3,000 in attorney fees and did not request any fees associated with the petition to use assets. Allen argues that appellee's billing statement nonetheless included $1,203.75 in attorney fees related to the petition to use assets. In light of our conclusion that the probate court abused its discretion in awarding attorney fees without ascertaining whether the rate and number of hours were reasonable, it is unnecessary to address this argument. Moreover, the probate court order appointing appellee as GAL indicates that the appointment is necessary because of the filing of the petition to use funds for construction costs and to investigate whether a special needs trust should be set up for Gregory. The court specifically ordered appellee to make a recommendation regarding the petition to use funds. Therefore, the expenses regarding appellee's work in connection with the petition were properly included in his itemized statement.

We vacate the probate court's orders awarding attorney fees to appellee and requiring Allen to pay a portion of the fees, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Allen, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Donald S. Owens