YOUR LEGAL ADVISORS

*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 2007-2017, 2019 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*® 2020 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2018 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Additionally, Mr. May was selected by a vote of his peers to be included in *DBusiness* magazine's list of 2017 Top Lawyers in the practice area of Trusts and Estates. Kemp Klein is a member of LEGUS a global network of prominent law firms.

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

For those interested in viewing previous Probate Law Case Summaries, go online to: http://kkue.com/resources/probate-law-case-summaries/.

He is the published author of "Article XII: A Political Thriller" and<br>"Sons of Adam," an International Terror Mystery.

**DT**: May 8, 2020

**RE:** ***In re Conservatorship of Thibodeau***

STATE OF MICHIGAN COURT OF APPEALS

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**"Alan, you cannot write about baseball all your life"**

- **Mrs. Pollinger**
- **12th Grade English Comp**
- **Mumford High - 1959**

KEMPKLEIN LAW FIRM

## **Baseball Musings**

I received great positive feedback on my rendition of the 1955 Al Kaline inning and the 1968 Mickey Lolich World Series inning. I seem to have struck a chord among baseball devotees.

As many of you know, I have Tiger home programs going back to 1912. Some are scored, and I have gone down in my basement to look at my collection and relive some of these moments.

For now, I am sticking with things I have seen. When I run out of those, I'll try recreating things I saw on TV, but for now I am just refreshing pleasant memories.

In 1953, my grandparents temporarily moved up from Washington D.C. My Grandfather, Alan Samuel was an avid baseball fan and still followed the Senators despite their lowly league position. He regaled me with taking my mother to Senator games to see the great Walter Johnson. When I would bring up great performances to my mother, she would become defensive and say, "you never saw the Big Train."

In 1953, however, I saw the greatest inning I ever saw pitched. This performance, and others like it, are called the "Immaculate Inning."

The Tigers were lowly in 1953. For 51 years we used to brag that the Bengals never finished in last place. They did in 52 and they entered 1953 with no George Kell. Of course, we had the Big Moose, Walt Dropo and Ray Boone at third. No Kaline (he did get into 20 games which was why he was not Rookie of the Year in 54). The big star was Harvey Kuenn.

We had tickets to a summer game that was rained out and we kept our rain checks. I begged my father to trade the rain checks in for a Labor Day double header.

I had to beg because although my dad and "pops" loved baseball, they didn't like the prospect of satiating me with 18 innings thereof. I prevailed and we went to see the locals battle the White Sox.

The Tigers took the first game 6-2 with Ned Garver pitching. Garver had been a 20-game winner with the Brownies and was sort of a star.

In the second game, lefty speed baller Billy Hoeft pitched. The Tigers were losing, going into the seventh inning and it was vital that the Chi-Sox didn't extend their lead.

They didn’t because of the immaculate inning.

Jim Rivera led off for the Sox. I liked Jungle Jim. We all knew his story. Ten years in an orphanage, then to the army where he was falsely accused of raping an officer’s daughter. He was Court Marshalled and spent four years in the Pen for attempted rape. The young liaress was examined and found to still be a virgin.

He was an old rookie and fast as hell. In 55, he would lead the league in stolen bases. In 53, he led the league in triples. Boom strikes out on three pitches.

Next Mike Fornieles, the pitcher. Boom strikes out on three pitches. Next, the great shortstop, Chico Carrasquel. Down on three pitches.

Three batters nine pitches. That’s the immaculate inning.

Hoeft did it for the first time since 1928.

The Tigers went ahead and the bottom of the seventh, my father’s reaction, “Can we leave now?”

My Grandfathers reaction, “I saw the Big Train do that once,” I checked, Johnson never did what Hoeft did.

**Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases**

**<u>REVIEW OF CASE</u>:**

**RE:** *In re Conservatorship of Thibodeau*

- Sanction – Inherent Power
- Sanctions – for "Proceedings" – Guardianship and Conservatorship
- Error of Law
- Preservation of Issue on Appeal

Appellee had health problems and wanted to remove herself as a co-guardian and not become conservator.

All consented but for attorney one. The objecting attorney claimed the proposed order lacked clarity. The Appellee was forced to move the issue formally.

The lower Court found that the proposed order did not lack clarity and sanctioned the objecting party and her attorney.

Inter alia the Court of Appeals in affirming said:

1. The Court Rules regarding sanctions apply to Probate guardian and conservatorship proceedings, as they are nowhere excluded under chapter 5. They apply to proceedings as well as actions.

2. The Probate Court has inherent power to sanction irrespective of statute or Court Rule.

3. It was not clear whether the sanction was ordered because of mere merit lacking opposition or a "document" filed in opposition.

4. An issue not raised below may be considered if the result would be manifest injustice.

5. An error of law by the lower Court is an abuse of discretion

6. There was no merit to the Appellants allegation of lack of clarity.

Lessons learned

1. You don't want to read your name in a Court of Appeals decision saying you were frivolous. Pay the fine and walk away unless you really believe you have been treated unjustly.

2. Read, listen and leave yourself open to some Compromise.

4845-9330-9628

*If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.*

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# STATE OF MICHIGAN

# COURT OF APPEALS

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*In re* Conservatorship OF RICHARD THIBODEAU.

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ANTOINETTE R. BARONE,

Petitioner-Appellee,

v

SHARON BROUSSEAU and ACCETTURA & HURWITZ,

Appellants,

and

TERRANCE GILSENAN, as Conservator for RICHARD THIBODEAU, LAURA BRENNAN, DENNIS DUNCANSON, JOHN DOWNS, LINDA LINARDE, LARRY LALONDE, LEO LALONDE, MARY NAGY, KELLY LUQUIRE, ANN B. YATES, JAMES FANTE, BETTY FANTE, CHERI BRUNET, SHARON THIBODEAU, GEORGE HEITMANIS, and ST. JOSEPH AGENCY,

Other Parties.

UNPUBLISHED
April 23, 2020

No. 347980
Macomb Probate Court
LC No. 2018-227467-CA

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*In re* Guardianship OF RICHARD THIBODEAU.

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PETER N. ZINGAS,

Petitioner,

and

SHARON BROUSSEAU and ACCETTURA & HURWITZ,

Appellants,

v

ANTOINETTE R. BARONE,

Appellee,

and

ST. JOSEPH AGENCY, MICHAEL MOODY, CHERIE BRUNET, LAURA BRENNAN, DENNIS DUNCANSON, JOHN DOWNS, LINDA LINARDE, LARRY LALONDE, LEO LALONDE, ANN YATES, HEITMANIS LAW GROUP, PLLC, as Guardian of RICHARD THIBODEAU, and MARY L. NAGY,

Other Parties.

No. 347985
Macomb Probate Court
LC No. 2018-226609-CA

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Before: SAWYER, P.J., and LETICA and REDFORD, JJ.

PER CURIAM.

In these consolidated appeals, Sharon Brousseau and the Accettura & Hurwitz law firm appeal as of right from the probate court's order awarding attorney fees to Antoinette R. Barone. We affirm.

## I. BACKGROUND

After Richard Thibodeau's stay at St. John's Hospital in Macomb, Michigan, the hospital petitioned to have the probate court appoint a guardian for him because of his diminished cognitive and physical capacity. The probate court appointed Barone and her sister Mary Nagy, Thibodeau's second cousins, as his co-guardians. Barone petitioned for her appointment as conservator of Thibodeau's estate. The probate court adjourned the hearing concerning conservatorship several times and ultimately appointed Terrance Gilsenan as temporary conservator until the hearing could be held. In his work as conservator, Gilsenan identified Sharon Brousseau and Cheri Brunet, the adopted daughters of Thibodeau's brother, as interested parties. Gilsenan informed Brousseau and Brunet of the probate proceedings and Brousseau retained Wendy Turner, an attorney with the Accettura & Hurwitz law firm.

Over several months, Barone's relationship with Gilsenan grew contentious. At Gilsenan's request, the probate court suspended Barone and Nagy as co-guardians and appointed the Heitmanis Law Group as Thibodeau's temporary guardian until a hearing could be held on

November 26, 2018. Initially, Barone sought reappointment as guardian and maintained her petition to be appointed as conservator. The expense and stress of this litigation, however, took its toll on Barone's health, and in January 2019, her counsel sought guidance from the probate court regarding how Barone could withdraw from consideration as a possible guardian or conservator for Thibodeau. At the probate court's direction, Barone's counsel prepared a proposed order stipulating the withdrawal of her brief requesting reappointment as Thibodeau's guardian or conservator, withdrawal of her objections to the Heitmanis Law Group serving as Thibodeau's guardian, the cancellation of evidentiary hearings, the scheduling of a hearing for the modification of the guardianship, and allowing Barone's counsel to withdraw. Barone's counsel circulated the proposed order among the parties for their consent. All of the parties consented except Brousseau's counsel, Turner, who claimed that the proposed order's language lacked clarity.

Barone unsuccessfully attempted to explain the order to Turner, but Turner continued her refusal to consent to the proposed order. Turner's refusal forced Barone to move for entry of an order allowing Barone to withdraw items she filed and permitting Barone's counsel to withdraw as her counsel. Barone also requested that the probate court award her under MCR 2.114(F)[1] and MCR 2.625 the attorney fees she incurred related to the motion because of Turner's refusal to consent to the proposed stipulated order. Brousseau opposed Barone's motion and argued that attorney fees were not permissible because it was Barone's own actions that had brought about the necessity of the motion. Barone replied that she wished to withdraw from the proceedings because she had no interest in serving as Thibodeau's guardian or conservator.

The probate court held a hearing with all relevant parties present to dispose of several issues related to the proceedings, including Barone's motion. All parties agreed that Barone and her counsel were allowed to withdraw from the proceedings. The probate court and Turner engaged in discussion concerning the precise nature of Brousseau's concerns which Turner represented focused on whether Barone sought to strike filings from the record. Turner asserted that she thought the language of Barone's proposed order lacked clarity. However, Turner admitted that once Barone filed the motion to withdraw, Turner understood that Barone only sought withdrawal from the proceedings and did not seek to strike or remove any documents from the record. The other parties expressed their beliefs that Barone's original proposed order made clear her intentions. The probate court granted Barone's motion to withdraw and ordered "Brousseau and/or her counsel Accettura & Hurwitz" to pay Barone's attorney fees because Barone had the right to withdraw from the proceedings and if the parties all stipulated to the proposed order, a hearing would not have been necessary to resolve the matter, especially after Barone clarified the proposed order by filing the motion.

## II. STANDARD OF REVIEW

We review a court's decision whether to award attorney fees for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). The lower court's underlying factual findings are reviewed for clear error, while questions of law are reviewed de

[1] MCR 2.114 was repealed effective September 1, 2018. The provisions for the award of sanctions and costs under MCR 2.114 for frivolous claims or defenses are now provided under MCR 1.109(E).

novo. *Id*. (citations omitted). We also review for an abuse of discretion the amount of sanctions and "the amount awarded as reasonable attorney fees." *Peterson v Fertel*, 283 Mich App 232, 239; 770 NW2d 47 (2009). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (citation omitted). "A court by definition abuses its discretion when it makes an error of law." *In re Waters Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). "This Court reviews for a clear error a trial court's decision regarding sanctions based on frivolous pleadings or claims" pursuant to former MCR 2.114. *Home-Owners Ins Co v Andriacchi*, 320 Mich App 52, 75; 903 NW2d 197 (2017). Any underlying factual findings by the trial court are reviewed for clear error. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 35; 666 NW2d 310 (2003).

## III. ANALYSIS

As a preliminary matter, we consider Barone's assertion that appellants failed to preserve this issue for appellate review. Generally, an issue is not properly preserved if it is not raised, addressed, and decided by the trial court. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005) (citation omitted). A party cannot raise, and this Court will not consider, an issue raised for the first time on appeal. *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 170; 761 NW2d 784 (2008).

Barone asserts that appellants did not argue before the probate court that it lacked authority by statute or court rule to award Barone attorney fees. Barone claims that appellants deprived her of an opportunity to address the argument and appellants similarly deprived the probate court the opportunity to address or decide that aspect of the issue regarding attorney fees raised on appeal. Although appellants argue on appeal a matter of statutory and court rule interpretation that they did not raise below, the record reflects that Barone requested an award of attorney fees in the probate court and appellants opposed her request in a response brief, and during the hearing on Barone's motion, argued that an award of attorney fees to Barone was not warranted in this case. The probate court disagreed with appellants and awarded Barone attorney fees. Although appellants did not include legal analysis in the brief submitted to the probate court, they did not waive or forfeit the right to appeal the attorney fees award or provide this Court legal analysis related to the issues raised on appeal. Moreover, 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). Further, the fact that appellants "may not have fully briefed and argued this issue in their lower court pleadings, or that they now cite authority that the [lower] court did not consider, does not preclude them from raising the issue on appeal." *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Because the question before us is primarily one of law and the few facts required for its resolution are contained within the record before us, we will consider this issue.

We review de novo issues concerning the proper interpretation of court rules and statutes. *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002). When

interpreting court rules, we apply "the same principles that govern the interpretation of statutes." *In re McCarrick/Lamoreaux (On Remand)*, 307 Mich App 436, 446; 861 NW2d 303 (2014) (quotation marks and footnote omitted). Proper statutory interpretation requires examination of the specific statutory language to determine the legislative intent. *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003). "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Id*. (quotation marks and citation omitted). In *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009), our Supreme Court explained that correct interpretation of a statutory scheme requires (1) reading the statute as a whole, (2) reading the statute's words and phrases in the context of the entire legislative scheme, (3) considering both the plain meanings of the critical words and phrases along with their placement and purpose within the statutory scheme, and (4) interpreting the statutory provisions "in harmony with the entire statutory scheme." "Moreover, courts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute." *Id*.

"Our purpose when interpreting court rules is to give effect to the intent of the Michigan Supreme Court. The language of the court rule itself is the best indicator of intent. If the plain and ordinary meaning of a court rule's language is clear, judicial construction is not necessary." *In re McCarrick/Lamoreaux*, 307 Mich App at 446 (quotation marks and citations omitted).

Appellants first argue that the probate court abused its discretion by awarding attorney fees to Barone because the court rules on which Barone relied do not provide for an award of attorney fees in guardian or conservator proceedings. We disagree.

Ordinarily, under the American rule, "attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Our Supreme Court, however, explained in *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006) (citations omitted) that "trial courts possess the inherent authority to sanction litigants and their counsel . . . ." "This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id*. In *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639-640; 607 NW2d 100 (1999), this Court explained that, under MCL 600.611, circuit courts "have jurisdiction and power to make any order proper to fully effectuate" its jurisdiction and judgments including the inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney. The probate court in this case, therefore, had authority to sanction appellants regardless whether specifically authorized by court rule or statute.

Appellants assert that under the court rules, two types of actions exist in probate court: civil actions, which are commenced with the filing of a complaint; and proceedings, which are commenced with the filing of a petition. MCR 5.101(A), (B) and (C). Under these definitions, actions concerning the appointment of a guardian or conservator are classified as proceedings, because these actions are commenced with the filing of a petition, MCR 5.401(A). Appellants argue that neither former MCR 2.114(F) nor MCR 2.625(A)(2) apply in guardian or conservator proceedings. We disagree.

MCR 5.400 *et seq*., governs guardianship and conservatorship proceedings. MCR 5.401 specifies that the "other rules in chapter 5 also apply to these proceedings unless they conflict with rules in this subchapter." MCR 5.001 provides that procedure "in probate court is governed by the rules applicable to other civil proceedings, except as modified by the rules in this chapter."[2] MCR 1.109, which has replaced MCR 2.114, applies to guardian and conservator proceedings because no exception or modification of its provisions are specified in MCR 5.001 *et seq*. MCR 1.109(E)(2), requires "[e]very document filed shall be signed by the person filing it or by at least one attorney of record." Further, Under MCR 1.109(E)(5), the signature of the person filing a document constitutes a certification by the signer that:

> (a) he or she has read the document;
>
> (b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

MCR 1.109(E)(6) authorizes probate courts to impose appropriate sanctions on a party or her counsel and to order the payment of the other party's attorney fees. In addition to such sanctions, MCR 1.109(E)(7) authorizes probate courts to require a sanctioned party to pay costs under MCR 2.625(A)(2) which provides in relevant part:

> if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.

MCL 600.2591(1) provides:

> Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

When read together, the court rules unequivocally establish a probate court's authority to impose sanctions upon a party and the party's attorney, and also specifically authorize such party and the party's attorney to pay costs. The probate court's authority under the court rules coupled with its inherent authority permitted it to sanction appellants in this case. We find no merit to appellants' arguments to the contrary.

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[2] MCR 5.001(B)(2) states that "[r]eferences to 'pleadings' in the Michigan Court Rules also apply to petitions, objections, and claims in probate court proceedings."

The record in this case establishes that appellants' opposition to Barone's request to stipulate to the provisions of the proposed stipulated order lacked merit. Further, because appellants refused to simply stipulate to the relief Barone had entitlement to receive, appellants' conduct forced Barone through her counsel to prepare and file a motion to obtain that relief. Appellants then opposed Barone's motion despite its clarity regarding the relief sought and Barone's entitlement to obtain such relief. Brousseau's opposition to Barone's motion to withdraw was not grounded in fact, or warranted by existing law. At the hearing on Barone's motion, Brousseau's counsel stated that she had not consented to Barone's stipulated order because she believed the order's language also indicated that Barone sought to strike several filings from the probate court file. Examination of Barone's proposed stipulated order, however, does not support such a contention.

Further, Brousseau's counsel admitted that, after reading Barone's motion, she understood that Barone sought only to withdraw from consideration as a potential guardian or conservator for Thibodeau. Brousseau thereafter had no objection to Barone withdrawing from the proceedings. Nevertheless, Brousseau, by her counsel, opposed Barone's motion. Moreover, the record reflects that Brousseau provided no legal basis for opposing Barone's motion. The probate court challenged Brousseau's counsel in this regard and she admitted that after reading Barone's motion she understood that Barone did not seek to strike any filings from the probate court's file.

The probate court appropriately found that appellants' conduct lacked justification and warranted the imposition of sanctions. The probate court, therefore, did not abuse its discretion by imposing sanctions upon appellants.

Affirmed. As the prevailing party, Barone may tax costs. MCR 7.219.

/s/ David H. Sawyer
/s/ Anica Letica
/s/ James Robert Redford