STATE OF MICHIGAN

COURT OF APPEALS

RUTH A. BUKO, Court Appointed Attorney for BRENDA S. CUPP, a Protected Individual,

Petitioner-Appellee,

and

DANA BROWNING, as Guardian of BRENDA S. CUPP,

Petitioner-Appellant,

v

JON B. MUNGER, as Trustee of the BRENDA S. CUPP IRREVOCABLE SPECIAL NEEDS TRUST,

Respondent-Appellee,

and

ELEVERT WILSON and LAUREN M. UNDERWOOD, as Court Appointed Special Fiduciary,

Intervenors.

UNPUBLISHED
December 21, 2010

No. 290708
Oakland Probate Court
LC No. 2007-313285-CA

Before: K. F. KELLY, P.J., AND WILDER AND GLEICHER, JJ.

PER CURIAM.

Petitioner-appellant, Dana Browning, appeals as of right the probate court's February 10, 2009, order awarding attorney fees and costs to petitioner-appellee, Ruth A. Buko, and the February 10, 2009, order transferring conservator funds into a Michigan D4A special needs trust and closing the Michigan conservatorship. Browning also raises claims of error related to prior orders of the court. We vacate the probate court's January 9, 2008 order removing Browning as co-conservator, vacate the portions of the two February 10, 2009 orders that mandate the transfer

of conservator funds into a Michigan D4A special needs trust, and remand for resolution of the attorney fee issue in accordance with this opinion.

First, Browning argues that the probate court erred in appointing Buko as attorney for the ward, Brenda S. Cupp. Browning further contends that the probate court continued in its error by failing to discharge Buko when it became clear as the months wore on that her services were unnecessary. We agree with the latter argument. The trial court's decision to appoint an individual to represent the rights of the ward is reviewed for an abuse of discretion. *In re Williams Estate*, 133 Mich App 1, 11; 349 NW2d 247 (1984).

According to Dr. David Drasnin's psychological report, Cupp is on the lower end of intellectual and cognitive functioning and requires close supervision for most activities of daily living. Cupp was involved in a car accident in June 2007 and sustained a head injury that may have exacerbated her already existing impairments. In that regard, Browning, Cupp's sister, petitioned for, and was awarded, temporary guardianship over Cupp on August 22, 2007. The next day, Browning took Cupp to Kentucky to live with Browning and her husband. A few weeks later, Buko contested the guardianship. Buko was Cupp's attorney in a concurrently pending no-fault case. The probate court ultimately appointed Buko to represent Cupp in the guardianship proceedings. The court also granted Buko's petition to appoint a temporary conservator for Cupp. At a November 26, 2007 trial on the guardianship and conservatorship petitions, the probate court appointed Browning and public administrator, Jon Munger, as co-guardians and co-conservators of Cupp.

MCL 700.5305 addresses the court-appointment of an attorney for incapacitated individuals. MCL 700.5305(3) provides, in relevant part: "If the individual alleged to be incapacitated wishes to contest the petition, to have limits placed on the guardian's powers, or to object to a particular person being appointed guardian and if legal counsel has not been secured, the court shall appoint legal counsel to represent the individual alleged to be incapacitated."

MCL 700.5305(3) supports the conclusion that the probate court did not abuse its discretion in its initial appointment of Buko. At least early on in the proceedings, the probate court could have reasonably believed that Cupp wished to contest the guardianship proceeding. Buko informed the court that Cupp, her client in the concurrently pending no-fault case, informed her that she was absolutely opposed to a guardianship or conservatorship. Additionally, Buko advised the court that Cupp informed her that she (Cupp) did not want any help from Browning and did not want to live in Kentucky with Browning. Buko also asserted that Cupp wanted Buko as her lawyer. Buko informed the court that Cupp "mildly has some difficulties," but with the help of her friends, she was doing well. For her part, Cupp advised the court that she wanted to live in Michigan and keep her apartment here, but she was willing to go back and forth to Kentucky to visit. Insofar as Browning suggests that Cupp's alleged agreement to enter into the guardianship should have been given more weight, Cupp's wishes should certainly be taken into account, but they should not be dispositive in light of Cupp's intellectual and cognitive disabilities. After all, Cupp's disabilities were precisely why Browning moved for a guardianship in the first place.

Based on the information available to the probate court in October 2007 when it appointed Buko as Cupp's attorney, the court reasonably concluded that Cupp was contesting the guardianship proceeding. Under such circumstances, the probate court "shall" appoint counsel to

represent the incapacitated individual. MCL 700.5305(3). Accordingly, the probate court did not abuse its discretion when it initially appointed counsel to represent Cupp. As for the probate court's decision that Buko was suitable to be the person appointed, the decision seems reasonable given that Buko was already serving as Cupp's counsel in the no-fault case, and Buko repeatedly represented to the court that Cupp wanted Buko to serve as her attorney.

We are persuaded that the probate court did abuse its discretion, however, in failing to discharge Buko when it knew or should have known that her services were no longer necessary or desired. On November 6, 2007, Steve Kirschner, Cupp's guardian ad litem, submitted to the court a report stating that Cupp was doing very well in Browning's care. She was healthier and happier than she was at the beginning of the guardianship proceedings. Kirschner believed that Cupp needed a guardian and Browning should continue to serve that role. According to Kirschner, Cupp expressed a desire that Browning remain her guardian and also indicated that she did not want Buko as her lawyer. At a hearing on November 7, 2007, Kirschner reiterated his belief that Browning "has really helped" Cupp, and Cupp did not have a problem with the guardianship. Cupp herself spoke up at the hearing and stated: "I'm going to make my sister my guardian, and I no longer need Ruth Buko's services any more and I'm done with this." A few weeks later, on November 26, 2007, at the trial on the guardianship and conservatorship petitions, the probate court determined that Browning and Munger should serve as co-guardians and co-conservators.

As of the time of the trial on November 26, 2007, Buko's services were neither necessary nor desired. Neither Cupp nor her guardian ad litem were contesting the guardianship. The probate court itself implicitly acknowledged that Browning was a suitable guardian when it appointed her as co-guardian and co-conservator at trial. Following that appointment, if Cupp needed legal services, Browning was ready and willing to acquire them for her. Regardless, the probate court declined Cupp's and Browning's requests to discharge Buko until July 23, 2008. Considering the totality of the circumstances, we find that the probate court abused its discretion by failing to discharge Buko as of the conclusion of the guardianship and conservatorship trial on November 26, 2007.[1]

Next, Browning contends that the probate court erred in removing Browning from her role as co-conservator. We agree. The trial court's decision regarding removal of a fiduciary is reviewed for an abuse of discretion. *Matter of Estate of Williams*, 133 Mich App at 13.

Jon Munger, co-conservator at the time, petitioned the court for removal of Browning as a co-conservator on the basis that she acted erratically at Dr. Collette Belanger's office during Cupp's independent medical examination, and Munger heard second-hand that Browning intended that the money in Cupp's estate would not be used to pay Buko's legal fees. The probate court removed Browning as co-conservator and left Munger in place as sole conservator. The probate court did not articulate its reasoning behind the decision. MCL 700.5414 provides,

[1] Buko's status as Cupp's attorney in the no-fault case would have continued unhindered.

in pertinent part: "The court may remove a conservator for good cause, upon notice and hearing, or accept a conservator's resignation."

Regarding Browning's alleged misbehavior at Dr. Belanger's office, there was an emergency hearing held on November 16, 2007, to discuss the incident. Testimony was adduced from Cupp's friend, Tara Arwood, that Browning acted belligerently and overly aggressively at Cupp's IME and refused to permit Cupp to undergo the IME so long as Buko, Arwood and another of Cupp's friends, Cecilia Arnette, were present. For her part, Browning admits that she was upset during the incident, but contends that her anger was justifiable given that it was completely inappropriate to permit Cupp to undergo the IME while Arwood and Arnette - individuals whom Browning maintained were taking advantage of Cupp –were present in the examination room. The probate court stated that it would make a ruling at the November 27, 2007, trial on the guardianship and conservatorship petitions, and at trial, the probate court concluded that Browning should serve as a co-guardian and co-conservator with Munger. The probate court was well apprised of the IME incident at the time of its ruling, but still appointed Browning to serve as co-conservator. Accordingly, given this fact, the IME incident was not sufficient good cause to remove Browning from her co-conservatorship position a mere five weeks after her appointment.

Next, the only other basis alleged to support Browning's removal was that Munger heard "second-hand" that Browning would not pay Buko's attorney fees. Browning never admitted to this statement. Even if she did, this statement, in and of itself, does not justify Browning's removal. The propriety of Buko's appointment as Cupp's attorney in the guardianship and conservatorship proceedings was hotly contested. From the beginning, Browning maintained that Buko's services were not necessary. Moreover, as we discuss below, the award of fees and costs to Buko warrants further scrutiny on remand. In other words, Browning's contest of Buko's requested fees is neither unlawful or unreasonable. Accordingly, the probate court abused its discretion in finding that good cause existed to remove Browning as co-conservator.

Next, Browning asserts that the probate court erred in reopening the conservatorship case after voluntarily transferring jurisdiction to Kentucky. We agree. Jurisdiction is a question of law that is reviewed de novo. *City of Riverview v Sibley Limestone*, 270 Mich App 627, 636; 716 NW2d 615 (2006).

Cupp began living with Browning in Kentucky on August 23, 2007. By December 2007, Cupp had decided not to renew the lease on her Michigan apartment and to reside in Kentucky permanently. Consequently, Browning initiated guardianship and conservatorship proceedings in Kentucky,[2] and the probate court closed the Michigan proceedings and transfered jurisdiction

[2] "The court at the place where the ward resides has concurrent jurisdiction over resignation, removal, accounting, or another proceeding relating to the guardianship with the court that appointed the guardian . . . ." MCL 700.5218(1).

to Kentucky. On April 17, 2008, two orders of discharge were entered, one pertaining to the guardianship case and the other pertaining to the conservatorship case. Each order stated: "IT IS ORDERED On the court's own motion: Jurisdiction is transferred to Kentucky." On May 5, 2008, the probate court granted Buko's motion to reopen the conservatorship case.

Browning argues that the probate court erred in reopening the case since neither Cupp nor her assets were in Michigan at the time that the case was re-opened, and thus, the probate court did not have jurisdiction to re-open the case. In a case that can be applied by analogy, *Saba v Gray*, 111 Mich App 304, 312; 314 NW2d 597 (1981), this Court held that once a trial court grants a change of venue, it loses jurisdiction over the case and is not empowered to reverse its decision to change venue.[3] Although there was no mention of venue in the instant case, the principle in *Saba* is arguably applicable because it speaks to the issue involved in the instant case – whether a transferor court is empowered to take any action on a case after jurisdiction of that case is transferred (whether by way of a change in venue or by way of an actual transfer of jurisdiction like in the instant case) to another court. Based on the principle set forth in *Saba*, we conclude that the probate court erred in reopening the case because it did not have authority to do so.

Moreover, Munger's argument that the case was administratively closed, and thus, can readily be re-opened pursuant to MCR 5.144(B)[4] is not persuasive. The orders closing the cases mentioned nothing about an administrative closure. The docket sheet also gives no indication that the closures were administrative. On these facts, it would be difficult to conclude that the closure was administrative in nature.

Because the probate court did not have jurisdiction over this case after transferring it to Kentucky, it erred in subsequently ordering the transfer of funds from the conservatorship to a Michigan D4A special needs trust. Browning urges this Court to invalidate the transfer of assets from the conservatorship to the D4A special needs trust in Michigan. Because Munger does not object to this remedy and the Kentucky order directing that the funds in the Michigan conservatorship be transferred to the Kentucky special needs trust was entitled to full faith and credit by Michigan courts, US Const, art IV, § 1, we vacate the portions of the probate court's orders for the transfer of Michigan conservator funds into a Michigan D4A special needs trust.

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[3] *Saba* indicated that there was a way in which the transferor court could retain its authority to reverse its decision to transfer the case. "The transferor court may enter an order granting the change of venue effective a reasonable number of days (such as 20) from the date the order is entered. See GCR 1963, 408. During this interim period, the transferor court would continue to have jurisdiction over the case and, if a motion for rehearing was made within this period, the trial court would be empowered to reverse its earlier decision." *Saba*, 111 Mich App at 312.

[4] MCR 5.144(B) provides, in relevant part: "Upon petition by an interested person, with or without notice as the court directs, the court may order an administratively closed estate reopened."

Finally, Browning argues that the probate court erred in awarding attorney fees and costs to Buko without ensuring that its award was properly substantiated. We agree. This Court reviews the probate court's decision to award attorney fees for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001).[5]

Buko initially sought $31,085.45 in costs ($5,045.45) and attorney fees ($26,040 for 114.8 hours of work, most of which at an hourly rate of $275) for her services in the guardianship and conservatorship proceedings. She subsequently submitted an updated bill reducing her hourly rate to either $200 or $215 – the record contains conflicting reports. The probate court referred the attorney fee issue to Lauren Underwood, the court-appointed special fiduciary, for investigation. In her report, Underwood indicated that the fact that Buko received $12,500 in attorney fees in the concurrently pending no-fault action should be considered when making the instant attorney fee determination. Underwood recommended that the court award Buko $4,730 in attorney fees (22 hours x $215 per hour) and $2,463.74 in costs. Underwood found that the hourly rate of $215 was reasonable in that it was consistent with the hourly rate for attorneys of similar experience, but Underwood provided no information regarding Buko's experience. Underwood also opined that compensating Buko for 22 hours would be fair, citing that Buko presented detailed billing records, the time expended seemed reasonable for the services performed, and Buko worked diligently on behalf of Cupp. Underwood's analysis was brief and not terribly in depth. With little explanation for its ruling, the probate court adopted Underwood's recommendation to award Buko $4,730 in attorney fees and $2,463.74 in costs.

"If not otherwise compensated for services rendered, a visitor, guardian ad litem, attorney, physician, conservator, or special conservator appointed in a protective proceeding, is entitled to reasonable compensation from the estate." MCL 700.5413. "In determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case." *Smith v Khouri*, 481 Mich 519, 537; 751 NW2d 472 (2008). The court may consider making adjustments up or down to this base number in light of the other factors listed in *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573,

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[5] We disagree with Buko's contention that Browning lacks standing to pursue this issue on appeal. Browning is Cupp's guardian in the Kentucky proceeding, and she also is the trustee of Cupp's special needs trust in Kentucky. Pursuant to a Kentucky order, Munger was directed to transfer the funds within the Michigan conservatorship to the Kentucky special needs trust. In the event that Buko is entitled to attorney fees, that award of fees would apparently come out of Cupp's Kentucky trust. As Cupp's guardian and trustee of her Kentucky trust, Browning has an interest, in a representative capacity, in the attorney fee issue. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, ___ Mich ___; ___ NW2d ___, 2010 Michigan LEXIS 1657 (2010); *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc*, 479 Mich 280, 294-295; 737 NW2d 447 (2007) (discussing the requirements for standing).

588; 321 NW2d 653 (1982), mod *Smith*, 481 Mich 519, and MRPC 1.5(a).[6] *Id.* In order to aid appellate review, the court should briefly indicate its view of each of the factors. *Id.*

The probate court determined that the $215 hourly rate was standard in its court. *Smith,* 481 Mich at 537. Although the trial court approved an award for 22 hours of Buko's services, the record is unclear, in both Underwood's report and the probate court's verbal ruling, regarding which of the 114.8 hours billed by Buko were determined by the probate court to be reasonable under *Smith.* Furthermore, both Underwood and the probate court failed to address the bulk of the factors in *Wood* and MRPC 1.5(a). We conclude that the probate court erred in failing to ensure that its attorney fee award was adequately substantiated in accordance with *Smith*. Consequently, we remand the attorney fee issue for a reevaluation in light of *Smith*. Buko's recovery should be limited to the time period of August 22, 2007, when the guardianship proceedings were initiated, to November 26, 2007, when the probate court knew or should have known that Buko's services were no longer necessary or desired. The probate court should bear in mind that Buko received attorney fees in the related no-fault proceeding, and her recovery in this case should not be duplicative. The probate court must take care to ensure that any fees or costs it awards pertain to the guardianship and conservatorship cases, not the no-fault case.

We vacate the probate court's January 9, 2008, order removing Browning as co-conservator, vacate the portions of the two February 10, 2009, orders that mandate the transfer of conservator funds into a Michigan D4A special needs trust, and remand for resolution of the attorney fee issue in accordance with *Smith* and this opinion. As prevailing party, Browning may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher

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[6] The *Wood* factors are as follows: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Wood*, 413 Mich at 529. The factors listed in MRPC 1.5(a) are as follows: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.