STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of KAYLA V. CHENAULT, a Minor.

JANET CHENAULT,

Appellee,

v

CHERYL CHENAULT SHUMAKE, Individually and as Next Friend of KAYLA V. CHENAULT, a Minor,

Appellant.

UNPUBLISHED
August 17, 2010

Nos. 288515;289843
Washtenaw Probate Court
LC No. 07-000598-CY

In re Estate of RICHARD H. CHENAULT II, Deceased.

JANET CHENAULT, Personal Representative of the Estate of RICHARD H. CHENAULT II,

Appellee,

v

CHERYL CHENAULT SHUMAKE,

Appellant.

No. 289845
Washtenaw Probate Court
LC No. 07-0)0712-DA

Before: TALBOT, P.J., and FITZGERALD and DAVIS, JJ.

PER CURIAM.

These consolidated appeals arise from a dispute between appellant Cheryl Chenault Shumake, the former wife of decedent Richard H. Chenault II, and the mother of their minor child, Kayla, and appellee Janet Chenault, who was married to Richard at the time he died in an airplane crash into Lake Michigan on June 4, 2007. After Richard's death, the Washtenaw

County Probate Court appointed appellant as Kayla's conservator in LC No. 07-000598-CY (the "conservatorship action"), and appointed appellee as the personal representative of Richard's estate in LC No. 07-000712-DA (the "decedent case"). In Docket No. 288515, appellant appeals as of right from the probate court's October 3, 2008, order removing her as Kayla's conservator. In Docket Nos. 289843 and 289845, appellant appeals as of right from the probate court's December 22, 2008, order requiring her to pay appellee's attorney fees and costs of $45,000 as a penalty for appellant's civil contempt. The court found that appellant was in contempt for filing a wrongful death action in Texas after the court had previously entered an order authorizing appellee, as the personal representative of Richard's estate, to retain a specified law firm for the purpose of filing a wrongful death action in Michigan. We affirm the probate court's order removing appellant as conservator. However, because we conclude that this Court lacks jurisdiction to review the contempt determinations, we dismiss appellant's appeals from the orders of contempt.

Appellant's principal claim in each appeal is that the probate court erred in finding her in civil contempt for violating the probate court's October 4, 2007, order in the decedent case, which granted appellee's petition to approve a contingency fee agreement and appointed the Michigan law firm of Schaden, Katzman, Lampert & McClune ("Schaden Katzman") "as counsel to pursue claims for wrongful death." The probate court found that appellant violated the October 4, 2007, order by retaining Texas counsel and filing a separate wrongful death action, as Kayla's next friend, in Texas. The court relied on its contempt determination in the decedent case to justify its decision to remove appellant as Kayla's conservator in the conservatorship action. Before considering this issue, we shall first address this Court's jurisdiction to review the contempt rulings.

Although neither party raises a jurisdictional issue, "[t]he question of jurisdiction is always within the scope of this Court's review." *Walsh v Taylor*, 263 Mich App 618, 622; 689 NW2d 506 (2004). A court has a continuing duty to sua sponte question its subject-matter jurisdiction. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 399; 651 NW2d 756 (2002).

MCR 7.203(A)(2) provides that this Court has jurisdiction of an appeal of right from a judgment or order from which an appeal of right has been established by law or court rule. At the time these appeals were filed, MCR 5.801(B)(1)(a) – (bb) established an appeal of right from final probate court orders resolving various specified matters.[1] An interested person's right to appeal is limited to the portion of the order subject to this Court's jurisdiction. *Comerica Bank v City of Adrian*, 179 Mich App 712, 729-730; 446 NW2d 553 (1989); *In re Butterfield Estate*, 100 Mich App 657, 667-669; 300 NW2d 359 (1980). Civil contempt orders and orders imposing

[1] MCR 5.801(B) was amended, effective April 1, 2010, to renumber subrule (B)(1) to subrule (B)(2) and add a provision to new subrule (B)(1) providing for an appeal of right from a "final order affecting the rights or interests of a party to a civil action commenced in the probate court under MCR 5.101(C)." The amendment also expanded the types of orders falling within former subrule (B)(1). The amendments are not applicable to this case. For purposes of this opinion, we cite to the court rule in effect at the time these appeals were filed.

contempt penalties or remedies are not within the list of final probate court orders appealable of right to this Court under MCR 5.801(B)(1).

Proceedings for contempt committed outside the presence of a court are generally governed by MCR 3.606 and the Revised Judicature Act, MCL 600.1701 *et seq*. But Michigan courts have both statutory and inherent authority to punish contempts of court. *In re Contempt of Dougherty*, 429 Mich 81, 91 n 14; 413 NW2d 392 (1987). A court may seek to compel a contemptor to comply with a court order that requires or prohibits certain actions through coercive measures permitted by civil contempt, such as a fine or jail term, or to exercise criminal contempt powers by punishing a contemptor for past conduct that affronts the court. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 711-713; 624 NW2d 697 (2000). In either case, a court must order a person found to be in contempt to indemnify any person who suffers actual loss or injury, including attorney fees, resulting from the contemptuous conduct. MCL 600.1721; *In re Contempt of Henry*, 282 Mich App 656; 682; 765 NW2d 44 (2009); *Taylor v Currie*, 277 Mich App 85, 100; 743 NW2d 571 (2007).

In this case, the probate court's October 3, 2008, order removing appellant as Kayla's conservator in the conservatorship action is an order appealable of right to this Court under MCR 5.801(B)(1)(a), but it does not afford a basis for an appeal of right in the decedent case. We reject appellant's claim that the first December 22, 2008, order entered in the decedent case may be treated as an order amending the October 3, 2008, order in the conservatorship action. Although MCR 7.208(A) precludes amendment of the "order appealed" after a claim of appeal is filed, appellant does not cite any authority in support of the proposition that an order entered in one case may be viewed as amending an order in a separate case. Therefore, this issue may be considered abandoned. *McIntosh v McIntosh*, 282 Mich App 471, 484; 768 NW2d 325 (2009); *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). In any event, the only orders appealed in the decedent case were the two December 22, 2008, orders reflecting the probate court's determination that appellant was in civil contempt in the decedent case and imposing penalties for her contempt. Although the first December 22, 2008, order contained a provision requiring appellant to assign the Texas cause of action to appellee, in her capacity as personal representative of Richard's estate, and the record indicates that appellant previously executed the assignment, as Kayla's next friend, before the December 22, 2008, orders were entered, only orders resolving the "assigning . . . of the assets of an estate" are appealable as of right under MCR 5.801(B)(1)(g).

Because the December 22, 2008, order does not involve any assignment of assets of Richard's estate and the sole purpose of the assignment was to purge appellant's contempt in the decedent case, we conclude that this Court lacks jurisdiction to consider appellant's appeal of the contempt determinations in the decedent case. Absent certification by the probate court of a controlling question of law pursuant to MCR 5.801(F), appellant should have filed an appeal from the probate court's final contempt orders in the circuit court pursuant to MCR 5.801(C).[2]

[2] We recognize that the second December 22, 2008, order entered by the probate court, which required appellant to pay attorney fees and costs to appellee's attorneys as a penalty for her contempt, indicates that it was entered in both the conservatorship action and the decedent case. Nonetheless, considering that the probate court only awarded attorney fees and cost for the (continued…)

Nonetheless, considering that the probate court relied on its contempt findings in the decedent case to justify its decision to remove appellant as Kayla's conservator in the conservatorship action, we shall consider appellant's challenges to the contempt rulings in this context.

In general, an appeal from a probate court decision is "on the record, not de novo." MCL 600.866(1); *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). The probate court's factual findings are reviewed for clear error, while questions of law, such as an issue of statutory construction, are reviewed de novo. *Id*. "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). Any dispositional rulings are reviewed for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App at 128. An abuse of discretion occurs when the probate court "chooses an outcome outside the range of reasonable and principled outcomes." *Id.*

The removal of a conservator is governed by the Estates and Protected Individuals Code ("EPIC"), MCL 700.1101 *et seq*. A conservator is a fiduciary. MCL 700.1104(e). The probate court "may appoint a conservator or make another protective order in relation to a minor's estate and affairs if the court determines that the minor owns money or property that requires management or protection that cannot otherwise be provided, has or may have business affairs that may be jeopardized or prevented by minority, or needs money for support and education and that protection is necessary or desirable to obtain or provide money." MCL 700.5401(2). Pursuant to MCL 700.5414, a probate court "may remove a conservator for good cause." A probate court's decision regarding a petition to remove a fiduciary is reviewed for an abuse of discretion. *In re Williams Estate*, 133 Mich App 1, 13; 349 NW2d 247 (1984); see also *In re Humphrey Estate*, 141 Mich App 412, 422-423; 367 NW2d 873 (1975) (permissive word "may" denotes discretion).

A court's issuance of a contempt order is also discretionary. *Porter v Porter*, 285 Mich App 450, 454; 776 NW2d 377 (2009); *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). The court sits as a fact finder in determining whether an alleged contemptor committed contempt. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App at 712-713. Although contempt of court has been defined as a "willful act, omission or statement tending to impair the authority or impede the functioning of a court," *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995), for purposes of civil contempt, a court need only find that the alleged contemptor was neglectful or violated a duty to obey a court order. MCL 600.1701; *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 501; 608 NW2d 105 (2000).

We note that the standard of proof for civil contempt is identified in *Porter*, 285 Mich App at 457, and *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App at 712-713, as the preponderance of the evidence standard. Other cases refer to a more stringent "clear and unequivocal" evidence standard for civil contempt, see *In re Contempt of Robertson*, 209 Mich App at 438-439, and *In re Contempt of Calcutt*, 184 Mich App 749, 757; 458 NW2d 919 (1990),

(…continued)

contemptuous conduct in the decedent case, appellant has not established any reviewable adverse decision in the conservatorship action arising from that order.

but those cases rely on *People v Matish*, 384 Mich 568; 184 NW2d 915 (1971), which appears to have involved criminal contempt.

Regardless of which standard is applied in this case, appellant has not shown any basis for disturbing the probate court's finding of contempt, or its use of that finding to justify appellant's removal as Kayla's conservator for good cause. The probate court found that appellant was in contempt for violating the court's October 4, 2007, order in the decedent case. That order, on its face, does not require any person to do or refrain from taking any action. Rather, it grants appellee's motion to appoint the Schaden Katzman law firm "as counsel to pursue claims for wrongful death," and approves appellee's contingency fee agreement with the Schaden Katzman firm. The order becomes meaningless if it does not bind appellee, as the personal representative of Richard's estate, to use the appointed law firm to pursue a wrongful death claim. Further, the probate court correctly determined that appellant, as conservator for Kayla, was also bound by the order.

At the time of the proceedings below, MCL 700.1403 provided:[3]

> *In a formal proceeding* that involves a trust or estate of a decedent, minor, protected individual, or incapacitated individual or in a judicially supervised settlement, the following apply:
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> * * *
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> (b) A person is bound by an order binding others in each of the following cases:
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> (ii) *To the extent there is no conflict of interest between the persons represented, an order that binds a conservator binds the person whose estate the conservator controls*; an order that binds a guardian binds the ward if no conservator of the ward's estate has been appointed; an order that binds a trustee binds beneficiaries of the trust in proceedings to probate a will, to establish or add to a trust, or to review an act or account of a prior fiduciary, or in proceedings that involve a creditor or another third party; *and an order that binds a personal representative binds a person interested in the undistributed assets of a decedent's estate in an action or proceeding by or against the estate.* If there is no conflict of interest and a conservator or guardian has not been appointed, a parent may represent his or her minor child. [Emphasis added.]

"Formal proceedings" is defined as "proceedings conducted before a judge with notice to interested persons." MCL 700.1104(h). "Interested persons" include, but are not limited to, "the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against . . . the estate of a decedent . . . ; and a fiduciary representing an interested person. . . ." MCL 700.1105(c). Included in a "proceeding" is "an application and a petition, and may be an action at law or a suit in equity." MCL

[3] MCL 700.1403 was later amended by 2009 PA 46.

700.1106(r). A "petition" is "a written request to the court for an order after notice." MCL 700.1106(p).

Here, the October 4, 2007, hearing was a proceeding conducted by the probate court, with notice to appellant, who was an interested party by virtue of her appointment as Kayla's conservator and Kayla's interest in Richard's estate. Indeed, appellant's counsel appeared at the hearing, in part, to contest appellee's choice of counsel for the wrongful death action, or to at least allow a co-counsel arrangement. Because the probate court appointed the Schaden Katzman law firm to pursue the wrongful death action at a "formal proceeding," it follows that as long as the potential wrongful death action was an undistributed asset of Richard's estate, and not an asset subject to Kayla's control through her conservator, the probate court properly relied on MCL 700.1403(b)(ii) to find that appellant was bound by the October 4, 2007, order.

In this regard, the EPIC defines an "estate" as including certain rights to collect amounts from others necessary to pay claims, allowances, and taxes, and "the property of the decedent, trust, or other person whose affairs are subject to this act as the property is originally constituted and as it exists throughout administration." MCL 700.1104(b). "Property" means "anything that may be the subject of ownership, and includes both real and personal property or an interest in real or personal property." MCL 700.1106(u). There is no specific mention of a wrongful death action in the EPIC's general definitions, but personal property in Michigan generally includes a "chose of action." *Comm'r of Ins v Arcilio,* 221 Mich App 54, 64; 561 NW2d 412 (1997). Further, the EPIC addresses wrongful death actions in MCL 700.3924, which provides, in pertinent part:

> (1) For the purpose of settling a claim as to which an action is not pending in another court for damages for wrongful death or for a claim existing under this state's laws relating to the survival of actions, if a personal representative petitions the court in writing asking leave to settle the claim and after notice to all persons who may be entitled to damages as provided in section 2922 of the revised judicature act of 1961, being section 600.2922 of the Michigan Compiled Laws, the court may conduct a hearing and approve or reject the settlement.
>
> (2) The proceeds of a court settlement of a cause of action for wrongful death shall be distributed in accordance with all of the following:
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> * * *
>
> (g) If a claim for wrongful death is pending in another court, the procedures prescribed in section 2922 of the revised judicature act of 1961 are applicable to the distribution of proceeds of a settlement or judgment.

In addition, it has long been the law in Michigan that the right of action for the wrongful death of a decedent constitutes an asset of the decedent's estate. *Grand Trunk W R Co v Kaplansky,* 270 Mich 135, 151; 258 NW 423 (1935). The personal representative is granted the "chose of action" by virtue of the wrongful death act, now contained in MCL 600.2922. See *In re Haque,* 237 Mich App 295, 309; 602 NW2d 622 (1999). The wrongful death act essentially acts as a filter through which the underlying claim may proceed. *Thorn v Mercy Mem Hosp Corp,* 281 Mich App 644, 656; 761 NW2d 414 (2008). Essential to the action is a requirement

that the decedent must have been able to maintain the action. *Id.* A child does not have a separate cause of action against the alleged tortfeasor. *Hebert v Cole*, 115 Mich App 452, 458; 321 NW2d 388 (1982).

As set forth in MCL 600.2922(2), "[e]very action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased." We do not disagree with appellant's assertion that this provision would not apply to a wrongful death action brought under another state's statute. Where statutory language is clear and unambiguous, a court must assume that the Legislature intended its plain meaning and enforce the statute as written. *Halton v Fawcett*, 259 Mich App 699, 702; 675 NW2d 880 (2003). We agree that there is nothing in MCL 600.2922(2) that would prohibit Kayla, through a next friend, from filing a wrongful death action in Texas. But a wrongful death action in one jurisdiction may present concerns regarding the effect of a judgment in another jurisdiction. "Ordinarily, where the real parties in interest are the same, a judgment in an action for damages for the wrongful death of a person operates as res judicata in an action under a statute of another jurisdiction to recover damages of the same character and for the same death." 22 Am Jur 2d, Death, § 152; see also *Parmater v Amcord, Inc*¸ 699 So 2d 1238 (Ala, 1997) (settlement of Iowa wrongful death action by personal representatives of the decedents' estates, arising out of a plane crash, precluded filing of a wrongful death action in Alabama by the mother of one of the decedents and her children, as a special administrator appointed in Iowa for the limited purpose of pursuing claims in Alabama).

Even within a single jurisdiction, wrongful death actions may present questions with respect to which state law to apply. See *Burney v P V Holding Corp (On Remand)*, 218 Mich App 167, 173-175; 553 NW2d 657 (1996) (personal representative's domicile under MCL 600.2922 was considered Alabama because the decedent, who died in Alabama while a passenger in a car rented by a defendant in Michigan, was an Alabama resident; therefore, Alabama had an interest in having its guest passenger statute applied to the wrongful death action, although this Court held that Michigan's owners' liability act, and not the Alabama statute, should be applied); *Branyan v Alpena Flying Service, Inc*, 65 Mich App 1; 236 NW2d 739 (1975) (MCL 600.2922, and not limitations on wrongful death damages available under Virginia law, applied to accident occurring in Virginia that involved decedents who were Michigan residents).

Regardless of the possible effect of multiple litigations, the probate court's October 4, 2007, order in this case, appointing the Schaden Katzman law firm to pursue the wrongful death action, plainly treats the right to pursue the wrongful death action as an asset of Richard's estate, consistent with how such an action is treated under Michigan's wrongful death act. Indeed, the probate court aptly found that appellee, as the estate's personal representative, had duty to "garner all the assets of the estate and to maximize the recovery for all of the heirs-at-law, the-next-of-kin."

Although Texas's wrongful death act differs by giving a specific group of survivors a cause of action, *Yowell v Piper Aircraft Corp*, 703 SW2d 630, 632 (Tex, 1986), the probate

court's October 4, 2007, order did not recognize that Kayla, through a next friend or some other representative, could pursue an independent wrongful death action, or what might be considered a separate survival action, in any jurisdiction.[4] If appellant believed that the probate court erred in treating the wrongful death action as an asset of Richard's estate and, accordingly, erred in appointing appellee's choice of counsel to pursue it, she should have appealed the October 4, 2007, order. She was not at liberty to simply ignore it. A party may not disregard an order based on a subjective belief that it is wrong. *Porter*, 285 Mich App at 465. "A party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date." *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998).

Giving effect to the trial court's treatment of the wrongful death action as an asset of Richard's estate, we conclude that appellant has not supported her position that MCL 700.1403(b)(ii) is inapplicable to the probate court's order appointing the Schaden Katzman law firm to pursue the wrongful death action. Further, appellant has not supported her claim that a patent "conflict of interest" existed between the interests of Kayla and appellee, which precluded application of MCL 700.1403(b)(ii). "This Court will not search the record for factual support for a party's claim," or consider an issue that is given only cursory consideration. *McIntosh*, 282 Mich App at 484; see also MCR 7.212(C)(7). To the extent that appellant's argument regarding the existence of a conflict of interest is directed at the dispute regarding appellee's choice of counsel, we find no conflict.

A probate court may review the propriety of a personal representative's employment of an attorney. MCL 700.3721. A conflict of interest does not arise merely because a dispute arises that is within the probate court's ordinary function to resolve. See *In re Kramek Estate*, 268 Mich App 565, 576; 710 NW2d 753 (2005); but see *Roberts v Gateway Motel of Grand Rapids, Inc*, 145 Mich App 671, 679; 377 NW2d 895 (1985) (personal representative should not be forced to assert claims of an interested party that might harm the entire wrongful death action, but should bring the matter to the court's attention so that an appropriate order governing the conduct of the trial may be entered).

We also disagree with appellant to the extent she suggests that she could avoid the probate court's October 4, 2007, order by stepping outside her role as Kayla's conservator to provide "advice" to Kayla as her mother, or to file the Texas action as Kayla's next friend. The

[4] Unlike Michigan's wrongful death act, which combines survival and wrongful death actions, *In re Haque*, 237 Mich App at 307-308 n 8, Texas has separate acts for wrongful death, Tex Civ Prac & Rem Code § 71.001 *et seq.*, and survival, Tex Civ Prac & Rem Code 71.021 *et seq.*, actions. In a survival action, only the estate's personal representative generally has the capacity, as distinguished from standing, to bring a survival claim, although there are circumstances, such as where administration of the decedent's estate is unnecessary, when an heir may bring the action. See *Austin Nursing Ctr, Inc v Lovato*, 171 SW3d 845, 850-851 (Tex, 2005). And while a wrongful death action in Texas does not benefit the estate, by statute, circumstances also exist for an estate administrator to pursue it. Tex Civ Prac & Rem Code § 71.004(c); *Hill v Bartlette*, 181 SW3d 541, 549 (Tex App, 2005).

appointment of a conservator is one of the checks on parental authority provided by statute to protect a minor's interests. *Woodman v Kera, LLC*, 280 Mich App 125, 147; 760 NW2d 641 (2008) (opinion of Talbot, J.), lv gtd 483 Mich 999 (2009). Even in Michigan, it is recognized that a conservator and next friend serve different purposes. A "conservator" is a "person appointed by a court to manage a protected individual's estate," MCL 700.1103(h), whereas a "next friend" commences an action on behalf of a minor plaintiff and represents that minor under court supervision. *In re Powell Estate*, 160 Mich App 704, 713; 408 NW2d 525 (1987). In general, however, unless limited pursuant to MCL 700.5427, a conservator's powers include the authority to "[p]rosecute or defend an action, claim, or proceeding in any jurisdiction for the protection of estate property and of the conservator in the performance of a fiduciary duty." MCL 700.5423(2)(aa). Further, if a minor has a conservator, the conservator "may" bring a civil action in Michigan. MCR 2.201(E)(1)(a). But the rule has not been construed as suggesting, by negative inference, that a court shall not appoint a next friend if there is a conservator. *In re Powell Estate*, 160 Mich App at 715-716. Indeed, in *In re Powell*, this Court concluded that a next friend appointed *before* the appointment of a conservator may continue to represent a minor in a lawsuit. *Id.* at 715.

Therefore, potentially, the appointment of a conservator does not preclude the appointment of a next friend. Thus, the probate court here was incorrect to the extent that it suggested that only a conservator could file a civil action. But this error was harmless under MCR 2.613(A) and MCR 5.001(A), because appellant was appointed as Kayla's conservator before the Texas action was filed. Although appellant filed the Texas action as Kayla's next friend, her control over Kayla's assets, including any potential cause of action, arose from her status as Kayla's conservator, and her duties as a conservator were not extinguished by the filing of the Texas action. Cf. *Enochs v Brown*, 872 SW2d 312, 316-317 (Tex App, 1994), overruled on other grounds in *Roberts v Williamson*, 111 SW3d 113, 120 (Tex, 2003) (under Texas law, where court-appointed conservator exists at the time a lawsuit is filed, the conservator had exclusive right to represent the child, as next friend in the lawsuit, but a parent could request appointment of a guardian ad litem for the child).

Similarly, while the probate court erred in determining that Michigan law would govern the filing of a wrongful death claim, regardless of where it was filed, that error was also harmless because the evidence showed that the appointed law firm did in fact file the wrongful death action in Michigan pursuant to MCL 600.2922, and this case involves only the narrow issue of who had authority to pursue the wrongful death action. The action was filed on the same day that appellant filed her action in Texas, both individually and as Kayla's next friend. Appellant's Texas complaint sought "damages for wrongful death and survival pursuant to Tex. Civ. Prac. & Rem. Code Ann, § 71.001, et seq., and § 71.021, et seq."

Based on the record, the probate court reasonably concluded that appellant undermined the probate court's authority by hiring Texas counsel to file a Texas action after the probate court ordered the appointment of the Schaden Katzman law firm for the specific purpose of pursuing the wrongful death action. Although the probate court also commented that there was "gamesmanship here and forum shopping and *a disregard of the spirit of the court order*, if not the actual letter of the court order" (emphasis added), the evidence is clear and unequivocal that appellant was bound by the October 4, 2007, order and that she violated it. Accordingly, we uphold the probate court's finding that appellant was in contempt. Although the probate court

expressed other concerns regarding appellant's performance as a conservator, its contempt determination was the basis for its decision to remove appellant as conservator and that decision was not an abuse of the court's discretion.

We disagree with appellant's argument that appellee did not have standing to petition for appellant's removal as Kayla's conservator. Appellant's reliance on MCL 700.5431 in support of this argument is misplaced. That statute governs a petition to "terminate the conservatorship," not the removal of a conservator. We also reject appellant's claim that MCR 5.125(C)(25) governs who may bring a petition to remove a conservator. That court rule addresses who is an "interested person" entitled to notice of the petition, not who may bring the petition. The latter issue is governed by the EPIC, which provides in MCL 700.5415(1)(d) that a "person interested in the welfare of an individual for whom a conservator is appointed" may file a petition to remove the conservator.

Nonetheless, because MCR 5.125(D) and (E) are also inapplicable to the determination of who may file the petition, the probate court erred in considering these rules, along with the statutory definition of "interested person" in MCL 700.1105(c), to determine that appellee had standing to petition for appellant's removal. See *In re Makarewicz*, 204 Mich App 369, 375; 516 NW2d 90 (1994) (under the former Revised Probate Code, definition of "interested person" was a "restricted" term of art, but was not used in provision applicable to person interested in the welfare of a person for whom a conservator is appointed); see also *In re Martin*, 237 Mich App 253, 255-256; 602 NW2d 630 (1999) (under former Revised Probate Code, where mother was deceased and incarcerated father permitted children to reside with two individuals, the individuals could file petitions for guardianship as persons interested in the children's welfare). Despite the probate court's error, it reached the correct result in determining that appellee had standing to file a petition to remove appellant as Kayla's conservator. This Court will affirm a lower court's decision when the court reaches the right result for a wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). Here, the record indicates that appellee in fact relied on MCL 700.5415 as the basis for her petition to remove appellant as Kayla's conservator. Her counsel argued at the removal hearing that appellee was interested in Kayla's welfare as both her stepmother and as the personal representative of Richard's estate, of which Kayla was a beneficiary. And while the probate court did not specifically address whether appellee's status as Kayla's stepmother was enough to establish standing, it found that appellee's status as the personal representative of Richard's estate was sufficient.

"A personal representative is charged with the fiduciary responsibility to see to the estate's best interests, for the ultimate advantage of those beneficially interested in the estate." *In re Merry Estate*, 174 Mich App 627, 633; 436 NW2d 421 (1989); see also MCL 700.1104(e) (defining "fiduciary" to include a personal representative) and MCL 700.1212 ("fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary"). Because appellee's duties as personal representative of Richard's estate provided her with an interest in Kayla's welfare, and mismanagement of Kayla's estate by her conservator with respect to Kayla's interest in the wrongful death action could negatively impact that welfare, the probate court reached the right result in holding that appellee's status as personal representative was sufficient to establish her standing to seek appellant's removal as Kayla's conservator.

In sum, appellant has not established any basis for relief in the conservatorship action and, in particular, from the October 3, 2008, order removing her as conservator, which is properly within our jurisdiction to review. Although we also conclude that we lack jurisdiction to review the December 22, 2008, contempt orders in the decedent case, this does not end our inquiry. Pursuant to MCR 5.801(E) "[i]f an appeal of right within the jurisdiction of the circuit court is filed in the Court of Appeals, the Court of Appeals *may* transfer the appeal to the circuit court, which shall hear the appeal as if it had been filed in the circuit court" (emphasis added). Pursuant to MCR 7.216(A)(10), "[t]he Court of Appeals may . . . dismiss an appeal or an original proceeding for lack of jurisdiction or failure of the appellant or the plaintiff to pursue the case in conformity with the rules." The use of the word "may" denotes permissive action. *In re Humphrey Estate,* 141 Mich App at 422-423.

Because we have discretion to transfer or dismiss the appeal, we have considered appellant's arguments concerning the decedent case. In light of our decision to uphold the probate court's contempt finding as justification for its decision to remove appellant as Kayla's conservator, we conclude that appellant's challenge to the validity of the assignment of the Texas action, which she executed as Kayla's next friend to purge her contempt, is moot. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).[5] To the extent appellant argues that she was entitled to a court order before executing the assignment, we consider this issue abandoned for failure to cite any authority requiring that a probate court enter an order requiring action to purge the contempt before completing the contempt proceedings. *McIntosh*, 282 Mich App at 484; see also *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (appellant's failure to address a necessary issue precludes appellate relief).

In addition, appellant has inappropriately characterized the personal representative's authority in the Texas lawsuit, as specified in the first December 22, 2008, order, in isolation, rather than in the context of the assignment. Under both Texas and Michigan law, an assignee stands in the shoes of the assignor. *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998); *Holy Cross Church of God in Christ v Wolf*, 44 SW3d 562, 571-572 (Tex, 2001); *Embrey v Royal Ins Co*, 22 SW2d 414, 415 (Tex, 2000).

Similarly, appellant has misconstrued the portion of the first December 22, 2008, order, holding her "personally responsible" for the attorney fees and costs in the Texas lawsuit. We find no support for appellant's claim that the probate court intended an "automatic" award of future attorney fees. The challenged ruling established appellant's personal liability, but the court reserved a determination of the amount of attorney fees, consistent with the evidentiary hearing conducted on October 31, 2008, and December 22, 2008, and the second order entered on December 22, 2008, required appellant to pay $45,000.

[5] We also note that, as appellant concedes, the Texas action was dismissed, at least with respect to any claim brought as Kayla's next friend. Whether appellant had an individual cause of action in Texas is not relevant to the probate court's contempt finding or our review of the contempt proceedings. Under these circumstances, we fail to see how further review of the assignment by the circuit court could provide meaningful relief.

Finally, while appellant challenges the award of $45,000 for attorney fees and costs as a penalty for her contempt on the ground that she acted in good faith, we deem this issue abandoned because appellant has not shown that she presented a "good faith" defense to the probate court, or cited any authority in support of the proposition that her alleged good-faith reliance on counsel's advice properly may serve as a defense. *McIntosh*, 282 Mich App at 484; *Prince*, 237 Mich App at 197. We note that appellant's counsel argued at the December 22, 2008, hearing that sanctions for "bad faith" were not before the probate court. Counsel further conceded that there was "[n]o question you have authority to award attorneys' fees as a part of that [contempt] damage. We don't contest that that is consistent with Michigan law." Based on this concession, appellant's present challenge to the probate court's determination that an award of attorney fees was justified is waived. *Cadle Co v City of Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009).

In light of the foregoing analysis, we conclude that a transfer pursuant to MCR 5.801(E) is not warranted. Rather, pursuant to MCR 7.216(A)(10), we dismiss the appeals from the trial court's contempt orders.

Affirmed in part and dismissed in part.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Alton T. Davis