STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WAYNE

In the Matter of:

KEVIN T. SIMON — File No: 2006-709272-CA

A Protected Individual — Hon: Milton L. Mack, Jr.

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OPINION DENYING MOTION FOR SUMMARY DISPOSITION

On August 31, 2006, Joanne M. Morrison, filed a Petition for Appointment of Conservator for her brother, Kevin T. Simon. A stipulated order was entered on October 24, 2006, between the interested persons and their attorneys, appointing Paul E. Varchetti as the Conservator for Kevin T. Simon. Mr. Varchetti was the attorney for Mr. Simon. Ms. Morrison was reimbursed for her costs and attorney fees for bringing the action for conservatorship.

Mr. Simon filed a Petition to Terminate the Conservatorship on March 21, 2011. His conservator, and former attorney did not object to the petition. Ms. Morrison, the original petitioner, did object. Following an independent medical examination, and shortly before the hearing date, Mr. Simon withdrew his petition and stipulated that a similar Petition for Termination could not be filed for 180 days.

Ms. Morrison then filed her Petition for Reimbursement of Attorney Fees and Costs. Mr. Simon objected and filed this Motion for Summary Disposition pursuant to MCR 2.116(C)(10) claiming that Ms. Morrison may not recover any fees. Mr. Simon argues that Ms. Morrison was not an interested party; that she was instead a volunteer and that others were already legally required to perform the actions which she undertook. Who that might be was not identified.

Ms. Morrison states that she is an interested person pursuant to MCR 5.125(C)(25) and that her services were necessary and beneficial to her brother's estate.

A Motion for Summary Disposition brought pursuant to MCR 2.116(C)(10) tests whether there is no genuine issue as to any material fact. Such a motion must specifically identify those issues. Such a motion must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b). While Mr. Simon claims the motion is brought pursuant to MCR 2.116(C)(10), he appears to argue that Ms. Morrison has failed to state a claim on which relief can be granted as provided by MCR 2.116(C)(8). Mr. Simon is really claiming that

Ms. Morrison simply may not bring an action to recover fees, regardless of whether her efforts benefited Mr. Simon and his estate.

It is abundantly clear that Ms. Morrison was an interested person pursuant to MCL 700.1105(C) and MCR 5.125(C)(24) and (25). In addition, she was the original and only petitioner. This is significant in that pursuant to MCL 700.5431, when a protected person seeks termination of a conservatorship, the same "procedures as in an original proceeding" apply. As such, if Ms. Morrison wanted the conservatorship to continue, the burden of proof was on her to show that her brother needed a conservator because he met one of the conditions set forth in MCL 700.5401(3)(a) or (b). The conservator chose not to defend the petition brought by Mr. Simon. It may be that as Mr. Simon's former attorney felt that he might have an ethical issue that would prevent him from objecting.[1]

The real question for the court is whether an interested person who retains counsel to argue for the continuation of a conservatorship may have those fees paid by the protected person's estate. The necessity and reasonableness of the fees and costs are clearly questions of fact. Ms. Morrison was the only person advocating for continuation of the conservatorship and she was successful in continuing the protection of her brother. Therefore, she makes a strong case for "necessity". At a minimum, there is a question of fact as to "necessity" and "reasonableness" for reimbursement of the requested fees.

MCL 700.5413 states as follows:

> 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.

Although this does not specifically mention lawyers who are not appointed in a protective proceeding, justification to do so can be found in the Reporter's Comment, which states:

> This section is nearly identical to RPC Sec. 474, MCL 700.474, and is similar to UPC Sec. 5-413. The additional provisions contained in UPC Sec. 5-413, authorizing compensation for an attorney whose services result in a protective order or order beneficial to the protected individual's estate, was not included, but the drafters believe the court possesses the authority to award compensation to such an attorney in an appropriate case. (emphasis added)

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[1] See *Alpha Capital Management, Inc v Rentenbach*, 287 Mich App 589, 604-606; 792 NW2d 344 (2010) which cited *INA Underwriters Ins Co v Nalibotsky*, 594 F Supp 1199, 1206 (ED Pa. 1984).

The court finds that the forgoing is a sufficient basis to permit payment of attorney fees in this case. Further, to refuse to pay the reasonable fees and expenses of an interested person who takes action to protect a ward may well lead to the dissipation of the ward's assets. To decline to reimburse Ms. Morrison for her reasonable expenses in this matter would invite another Petition to Terminate the Conservatorship that would be unopposed, exposing Mr. Simon to the dissipation of his assets.

Further support for the authority of a court to authorize payment can be found in *In re Temple Trust*, 278 Mich App 122; 748 NW2d 265 (2008) and *Becht v Miller,* 279 Mich 629; 273 NW 194 (1937). These cases stand for the proposition that a beneficiary who retains an attorney may be reimbursed for attorney fees and expenses from the estate if it can be shown that the services rendered were beneficial to the estate as a whole rather than the personal interest of the beneficiary. That doctrine is limited to cases where the services were distinctly beneficial to the estate and became necessary either by reason of laches, negligence or fraud of the legal representative of the estate.

The Supreme Court in *Becht,* upheld the payment of attorney fees of a legatee who brought an action that secured funds the executrix had wrongfully withheld, finding that the attorney's services were beneficial to the estate and the contest was not solely for the purpose of settling individual differences between the residuary legatees. The Supreme Court relied on *Bean v Bean,* 74 NH 404 (68 Atl 409, 124 Am St Rep 978) (1907) where the executrices, while under a duty to protect and conserve an estate, claimed ownership of the property in question. The *Bean* court held that intervention by a legatee was "reasonably necessary and prudent" and the trial court did not commit error by finding that the legatees were "equitably entitled to reasonable compensation" out of the trust.

In this case, it would appear the services rendered by counsel for Ms. Morrison were distinctly beneficial to Mr. Simon's estate and were of no personal benefit to her. While it might be harsh to say that the conservator was negligent in declining to defend the Petition to Terminate, it is clear that he chose not to defend. The practical effect is the same: a defense is not offered. Had Ms. Morrison not prevailed in preserving the conservatorship, it is doubtful the court would authorize payment from Mr. Simon's estate. Likewise, had the conservator defended the action, there would be no "necessity" for Ms. Morrison to intervene.

Because the court finds that it is authorized under the circumstances of this case to authorize reimbursement of the fees and costs incurred by Ms. Morrison, the court will deny the Motion for Summary Disposition.

Milton L. Mack, Jr.
Judge of Probate

Dated: DEC 11 2012