# STATE OF MICHIGAN

# COURT OF APPEALS

*In re* Conservatorship of RITA JUNE SIVERS.

SYDNEY SIVERS,

Petitioner-Appellant,

v

KATHLEEN POELKER, conservator for RITA SIVERS,

Respondent-Appellee.

UNPUBLISHED
December 16, 2014

No. 318742
Washtenaw Probate Court
LC No. 10-000075-CA

Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Petitioner, Sydney Sivers, appeals as of right the probate court's order denying her petition to modify the guardianship and conservatorship of her mother, Rita Sivers. Because the trial court did not clearly err in finding no conflict of interest on the conservator's behalf,[1] it did not abuse its discretion, and we affirm.

## I. BASIC FACTS

Rita Sivers was born on June 12, 1923. On June 29, 2009, Rita executed a durable power of attorney for finances, nominating petitioner as attorney-in-fact. On that same date, Rita also executed a durable power of attorney for care, custody, and medical treatment decision making, nominating petitioner as her patient advocate.

In September 2009, Rita began showing symptoms of dementia. Petitioner, through her counsel, Kathleen Poelker, petitioned the probate court to appoint a guardian and conservator. Petitioner nominated attorney Jane Bassett to serve in both capacities.

[1] Only the conservator issue, which is case No. 10-000075-CA, is before us.

Steven Tramontin was appointed as Rita's guardian ad litem and submitted a report to the probate court. In the report, Tramontin noted that "Rita and Petitioner have a difficult history and relationship. Rita recently revoked Petitioner's Power of Attorney when Petitioner tried to take control of her finances." After meeting with Rita on February 8, 2010, Tramontin opined that it was not clear that Rita met the statutory definitions of an individual in need of a guardian and conservator. He suggested "a more current evaluation" be conducted to make this determination. He also recommended that an attorney be appointed for Rita and that the parties submit to mediation.

In response to the guardian ad litem's report, the probate court appointed Matthew Delezenne to act as an attorney for Rita. After a hearing was held on March 11, 2010, the probate court granted petitioner's requests and appointed Jane Bassett as conservator and guardian for Rita.

In September 2011, Bassett, petitioner (represented by Poelker), and Rita (represented by Novin Nichols) participated in mediation. Following mediation, Bassett petitioned the probate court to accept her resignation as conservator and to appoint Poelker as successor conservator. Bassett, petitioner, and Rita stipulated to entry of an order that allowed Bassett to resign and appoint Poelker as successor conservator.

Apparently, the parties also agreed to the court's appointment of Joelle Gurnoe as successor guardian.[2] But this appointment was short lived because in January 2012, petitioner, through her attorney Suzanne Fanning, filed a petition to modify the guardianship. On February 9, 2012, the probate court discharged Gurnoe and appointed Poelker as successor guardian, thereby making Poelker both Rita's conservator and guardian.

On June 6, 2013, petitioner, through counsel Fanning, petitioned the probate court to remove Poelker as conservator and to appoint herself as successor conservator. In an accompanying brief, petitioner asserted that "[s]he agreed to relinquish her authority under the Durable Power of Attorney on a temporary basis, to her attorney, Jane Basset"[3] and that "it was her mother's express choice that she manage her mother's finances."

Shortly thereafter on June 24, 2013, Fanning moved to withdraw as petitioner's counsel. On September 6, 2013, petitioner's new counsel, Amy Parker, filed an amended petition to modify the conservatorship and guardianship. In the accompanying brief, petitioner once again alleged that she understood that all the guardian and conservator appointments were to be only temporary and that the decision to end the guardianship and conservatorship was hers.

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[2] Because the case on appeal, No. 10-000075-CA, only pertains to the conservatorship, many of the records for the guardianship, No. 10-000074-GA, are not in the lower court record provided to this Court. But the parties on appeal do not dispute that Gurnoe was appointed as successor guardian at this time.

[3] It is not clear why it was alleged that Basset was petitioner's attorney, when it was Poelker who represented petitioner at the outset of these proceedings.

Petitioner argued that the conservatorship should be terminated, allowing her to manage Rita's estate through the never-revoked, 2009 durable power of attorney for financial matters that appointed petitioner as the attorney-in-fact. Alternatively, petitioner argued that she could be appointed as successor conservator. In support of this alternative argument, petitioner contended that Poelker had a conflict of interest due to her prior representation of petitioner and her current position as Rita's conservator. Petitioner also claimed that Poelker breached her fiduciary duty to Rita "by failing to inform petitioner, her former client, of the ability to step down [as] the attorney in fact, and allow the successor [to] act."

Poelker, as guardian and conservator, filed a response to petitioner's request to modify and/or terminate the guardianship and conservatorship. Poelker noted that petitioner's claim, that the 2009 powers of attorney never were revoked, was not supported by the record. She noted that the very first guardian ad litem report, issued in February 2010, noted that Rita had revoked petitioner's power of attorney. Further, Poelker argued that even if Rita had not revoked the powers, petitioner revoked the power through her actions, which demonstrated her unwillingness to act as any attorney-in-fact. Moreover, even if the financial power of attorney had not been revoked, then Poelker, in her response, expressly revoked it under MCL 700.5503(1), which allows a conservator to do so.

Regarding petitioner's conflict of interest claim, Poelker argued that any such claim is disingenuous because once she became appointed conservator (and later guardian), she stopped representing petitioner. Further, Poelker claimed that she never breached any attorney-client relationship with petitioner. Poelker then requested sanctions against attorney Parker, as she asserted frivolous claims in violation of MCR 2.114(D).

At a hearing held on September 26, 2013, the probate court found that the financial power of attorney had been revoked by Rita before the initial guardian and conservator were appointed in 2010. The court also found that there was no conflict to allow Poelker to continue in her role as guardian and conservator. In addition, the court denied petitioner's requests to modify both the guardianship and conservatorship because, when viewing all the information provided to the court, it concluded "granting the petition would not be in the best interests of [Rita]." Finally, the court imposed sanctions against attorney Parker in the form of an "oral reprimand" for her previous claim that the proceedings were like a "runaway train," which the court inferred as meaning that it was part of some misconduct.

## II. STANDARDS OF REVIEW

We review a probate court's decision on a petition to modify a conservatorship for an abuse of discretion. *In re Estate of Williams*, 133 Mich App 1, 11; 349 NW2d 247 (1984); see also *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). A court abuses its discretion when it chooses an outcome that falls outside the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App at 128. But the probate court's factual findings are reviewed for clear error. *Id.* Clear error exists when after a review of the entire record, this Court is left with a definite and firm conviction that a mistake was made. *Sinicropi v Mazurek*, 279 Mich App 455, 462; 760 NW2d 520 (2008).

## III. ANALYSIS

The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, governs the proceedings. The probate court has exclusive subject-matter jurisdiction over "a proceeding that concerns a guardianship, conservatorship, or protective proceeding." MCL 700.1302(c). Under MCL 700.5401(3), the court may appoint a conservator if an individual is unable to manage property and business affairs effectively for reasons including mental illness or mental deficiency. MCL 700.5415(1)(d) allows for "[a] person interested in the welfare of an individual for who a conservator is appointed" to file a petition to remove the conservator and appoint a successor conservator. And after a hearing that establishes good cause, the court may remove a conservator and may appoint a successor conservator. MCL 700.5414.

Petitioner argues that the court abused its discretion in denying her petition because "there is an ongoing conflict of interest" either between Poelker (the conservator) and Rita (the ward) or between Poelker and petitioner, who is Poelker's former client.

Petitioner claims that there is a conflict of interest between Poelker and Rita because, in opposing petitioner from becoming conservator, Poelker is acting against the wishes of Rita. At the outset, we note that this is not a "conflict of interest." A conflict of interest involves more than a purported disagreement on a course of action—it, instead, is defined as "incompatibility between one's private interests and one's . . . fiduciary duties." *Black's Law Dictionary* (9th ed). Thus, the "conflict" described by petitioner does not amount to a "conflict of interest." Regardless, petitioner's claim has no merit. Petitioner premises her argument on the assertion that Rita's wishes are best described by the durable power of attorney she executed in favor of petitioner in 2009. Along with this line of rationale, petitioner claims that the probate court clearly erred in determining that the financial power of attorney was revoked by Rita. The only reference to this revocation is contained in the guardian ad litem's report issued on February 12, 2010, where it states that "Rita recently revoked Petitioner's Power of Attorney when Petitioner tried to take control of her finances." Because this was the *only* evidence on this topic (either for the assertion or against the assertion), we are not left with a definite and firm conviction that the trial court erred. In other words, we cannot conclude that the probate court clearly erred when the only evidence on this issue supports the probate court's finding.

It also is noteworthy in our view that petitioner, the one who sought the initial appointment of a conservator, never raised any objections and never sought any corrections or clarifications when this assertion was made by the guardian ad litem. In fact, petitioner's acquiescence to this assertion, when it clearly, negatively impacted her rights, is tantamount to an admission that the assertion was true.

> Silence, when the assertion of another person would naturally call for a dissent if it were untrue, may be equivalent to an assent to the assertion. This, however, fixes the party, by adoption, with the other person's assertion, and thus it ceases to be a question of conduct evidence, and involves a genuine admission in express words. [*People v Solmonson*, 261 Mich App 657, 665; 683 NW2d 761 (2004) (quotation marks omitted).]

Thus, petitioner's silence in the face of such a statement can be treated as an assent to that assertion. Further supporting our view is the fact that there is no evidence on the record to show

that petitioner ever attempted to execute her power of attorney after Bassett initially was appointed conservator.

Moreover, even if the power of attorney was never revoked by Rita, it was expressly revoked by Poelker, the conservator. MCL 700.5503(1) provides that in the event a conservator is appointed after the execution of a durable power of attorney, the conservator "has the same power to revoke or amend the power of attorney that the principal would have had if he or she were not disabled or incapacitated." Here, Poelker, acting as conservator, revoked the power of attorney in court filings. Therefore, there is no question that under either theory, any power of attorney was extinguished.[4]

Petitioner also argues that there is a conflict of interest between Poelker and petitioner. Petitioner relies on MRPC 1.9(a), which provides that

> [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Petitioner claims that because she is a former client of Poelker, Poelker cannot now oppose her desires in this matter. This position is untenable. While it is true that Poelker initially represented petitioner in these proceedings, she does not have an attorney-client relationship with anyone in this case right now. Thus, she is not "represent[ing] another person in the same or a substantially related matter." Furthermore, her position as conservator is not "materially adverse to the interests of the former client [petitioner]." The record is clear that when Poelker represented petitioner, petitioner sought the appointment of two different conservators for Rita. In 2010, petitioner sought the appointment of Bassett as conservator. Then in 2011, petitioner expressly agreed to the appointment of Poelker as successor conservator. Therefore, by maintaining Poelker as the conservator, it is clear that petitioner's interests in the prior litigation are not being opposed now. Petitioner claims that she and Poelker had an understanding that any such appointments were only temporary and could be rescinded by petitioner at a later time. But there is no evidence in the record to support this assertion.[5] More importantly, EPIC does not allow for someone to be able to terminate a conservatorship without showing good cause. And

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[4] Petitioner dedicates much of her argument in her brief on appeal to whether the *medical* power of attorney was revoked. But this aspect is only relevant for any guardianship issue—not the conservatorship issue that is before this Court.

[5] Petitioner has filed an affidavit in this Court, but because it was filed after the probate court rendered its decision, it was never considered by the probate court. Consequently, we will not consider it because a party is prohibited from enlarging the record on appeal. See *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000) ("A party is not permitted to enlarge the record on appeal by asserting numerous facts that were not presented at the trial court.").

even then, it is up to the discretion of the probate court to terminate the conservatorship and to appoint a successor conservator. MCL 700.5414.

Moreover, even if Poelker's position as conservator could be viewed as "representation," such representation would nonetheless be allowed because MRPC 1.9(a) allows for such representation if "the former client consents." As previously noted, petitioner stipulated to the appointment of Poelker as conservator, so she consented.

Therefore, because petitioner's claims of Poelker having a conflict of interest were unsubstantiated, the probate court did not abuse its discretion in denying petitioner's petition to modify or terminate the conservatorship.

Affirmed. Respondent, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro