

IN THE SUPREME COURT OF NEBRASKA

In re Guardianship and
Conservatorship of Marie J.
Trobough, a protected person,

Lori Bain, individually and as
Personal Representative of the
Estate of Marie J. Trobough,
Suzanne Maciorowski, Jamiee
Trobough, and Jacqueline Beaver,

Appellants,

 V_0

Lynne Timmerman Fees, Special
Conservator,

Appellee.

Nos. S-05-984 and S-05-991.

MEMORANDUM OPINION
AND
JUDGMENT ON APPEAL

FILED

MAY 18 2006

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-
LERMAN, JJ., and HANNON, Judge, Retired.

McCORMACK, J.

NATURE OF CASE

This opinion addresses two separate appeals from two separate orders issued by the county court on the same date in an ongoing conservatorship proceeding. The current appeals attempt to revisit numerous orders entered by the county court in the past three years. Appellant Lori Bain has previously attempted to place many of these issues before this court in several appeals from non-final orders, which were summarily dismissed, see Case Nos. S-04-0177, S-04-0178, S-04-0816, as well as in an appeal which resulted in our opinion in *In re*

Guardianship & Conservatorship of Trobough, 267 Neb. 661, 676 N.W.2d 364 (2004) (*Trobough I*). For reasons we will explain below, in the two appeals addressed in this opinion (Case Nos. S-05-0984 and S-05-0991), we find only one justiciable issue. On that issue, we affirm.

BACKGROUND

Gloria Trobough Clippinger was the guardian and conservator for her mother, Marie J. Trobough. At the time of Clippinger's appointment, Trobough was living in an assisted living facility in Omaha, Nebraska. Clippinger moved Trobough and some of Trobough's personal property into her home in Memphis, Tennessee, and cared for her there until Trobough's death on January 10, 2003.

Soon after Trobough's death, Bain, Clippinger's niece, began to dispute Clippinger's handling of the conservatorship estate. The estate consisted of many antiques, with the bulk of its value lying in an extensive doll collection. These disputes continue to this date, and there has yet to be a full and final accounting of the conservatorship estate.

On November 21, 2003, while *Trobough I* was pending with this court as to Clippinger and the conservatorship proceedings, it appears that the court appointed Lynne Timmerman Fees as "successor conservator," although such order is not contained in the record. The record does contain an order dated December 4,

2003, wherein the court, upon Bain's motion, amended the November 21 order in its entirety, and appointed Timmerman Fees as special conservator and ordered "that Gloria Clippinger is removed as conservator." The record does not contain any corresponding final accounting or discharge of liability as to Clippinger. The amendment ordered Timmerman Fees to take possession of all assets of the conservatorship, including the personal property located in Memphis, and to transfer such property to Omaha pending the appeal. On December 5, a more detailed order was issued regarding the transfer of property from Memphis. (File stamped, not signed.)

On December 11, Timmerman Fees moved for an order regarding disputed property and for an order regarding Timmerman Fees' assessment that Theriault's of Annapolis, Maryland, would be an appropriate dealer to sell the dolls that were of higher value, while Ford and Ford of Lincoln, would be an appropriate dealer to sell the other dolls and personal property. On December 16, 2003, the court issued an order for storage of personal property. Therein, the court found that an emergency existed because the personal goods were not insured, and ordered that the special conservator should have the authority to have the goods packed and stored in the following manner: (1) to employ Theriault's or another national auction company, to pack and store some of the dolls of higher value to be determined after

consultation by the special conservator with the parties and Theriault's appraiser, and (2) to employ Ford and Ford of Lincoln to pack and store the remaining items.

On March 24, 2004, the court entered an "Order of Instruction" decreeing that Timmerman Fees should retain all property of the conservatorship, and that all property was to remain in its then present location, pending all appeals. That same date, the court also filed an order approving various fees and costs to be paid to Timmerman Fees from the conservatorship funds. The court also approved payment of \$2,250 to Theriault's (to be reimbursed if the 23 dolls were eventually sold by Theriault's), reasonable expenses of Ford and Ford in connection with the Memphis trip, and \$100 per month to Chet's Moving and Storage of Lincoln. Finally, the court decreed that "For good cause shown, the special conservator's storage contract with Theriault's shall be kept confidential until she obtains a storage contract from Ford & Ford of Lincoln, Nebraska."

On April 9, 2004, the court ruled on whether there was any improper gifting of Trobough's personal property by the original conservator, Clippinger. The court listed various items as having been validly gifted before Clippinger's appointment, and various other items as having been validly gifted after Clippinger's appointment. The court found a few contested items to be items never owned by Trobough, but instead by Clippinger,

and it validated certain gifts made by Trobough to other relatives. It also set aside several gifts due to lack of transfer of possession, and one item improperly gifted after Trobough's death due to lack of authority, and ordered such items turned over to Timmerman Fees.

The court's April 9 order further decreed that:

this court's prior Order, allowing the Special Administrator to sell any and all personal property is hereby rescinded and the Special Administrator is ordered to retain all of the above described property, as well as the remaining personal property of Marie Trobough, currently being held under the Order of this court, in safekeeping.

The court continued, "that all the rest and remainder of the above named ward's personal property, and other assets of the Conservatorship, are to be retained by the Special Administrator, and to be delivered to the Personal Representative in the estate of Marie J. Trobough."

On April 13, 2004, the court issued another "Order of Instruction," in which the court found that an emergency existed due to the fact that the dolls in storage in Lincoln were uninsured and subject to breakage, deterioration, and natural hazards. Theriault's had agreed to come to Lincoln and, under full insurance coverage, inventory, pack, ship, and store the collectible dolls there for a flat fee of \$2,500 for

climate-controlled storage and insurance for whatever period necessary and \$6,000 for packing, transportation, and inventory. In the event that they would ultimately sell the dolls, these amounts would be reimbursed against a sales commission of 10 percent, free and clear of expenses. The court ordered that Timmerman Fees forthwith employ Theriault's for these purposes and approved the sum of \$8,500 to Theriault's. Timmerman Fees was further ordered to "employ a professional in the business of antiques and collectibles to, under full insurance coverage, inventory, pack, ship and store the remaining property presently located in Lincoln, Nebraska."

On April 21, the court issued an order nunc pro tunc amending its April 13 order in the following regard:

The Special Conservator is to forthwith employ Theriault's of Annapolis, Maryland to, under full insurance coverage, inventory, pack, ship and store the collectible dolls and doll-related accessories presently located in Lincoln, Nebraska, for whatever period is necessary, at its storage facility near Annapolis, Maryland. "Full insurance coverage" shall mean insurance for packing, shipping, hazard and storage, and can include a 10% deductible.

On June 1, 2004, the court issued an order of instruction and approval of special conservator fees and accounting. Therein, the court set for hearing motions by Timmerman Fees to have her actions approved, by Bain for surcharge, and by

Clippinger for an order to show cause. The court approved insurance obtained by Timmerman Fees for items held in Omaha and in Annapolis as being the best coverage she could obtain after diligent efforts. The court approved a transfer of \$30,000 to the special conservator account, approving her accounting filed for that amount. The court approved fees and costs of \$8,106.92 to be paid from the special conservator account, as well as \$1,471.86 for payment of an invoice from Auction Solutions.

On August 9, 2004, the Honorable Jeffrey L. Marcuzzo recused himself without stating the reason for such action or making reference to a prior motion by Bain on January 21 for his removal. A replacement judge was assigned.

On May 10, 2005, the court denied a motion by Bain to remove special conservator Timmerman Fees, the court finding that the evidence was simply insufficient to convince the court that any of the grounds cited by Bain rose to the level of misfeasance or malfeasance or breach of fiduciary duty warranting removal.

The court addressed allegations by Bain against Timmerman Fees regarding the alleged failure to properly insure the conservatorship property. The court explained:

While this court would not agree that Fees exercised the best of judgment in pinning down exactly what kind of insurance was in existence at the various stages of packing, and unpacking, and movement, et cetera, there is

no evidence of any damage sustained to any of the personal property, nor does the evidence convince the court that excessive insurance premiums have been charged to the estate.

The court further explained that the "real culprit" was the timing and number of moves, and, in the end, all the property except the dolls was located in Omaha and all the property was properly insured.

The court also addressed Bain's various allegations regarding Timmerman Fees' decision to move the higher value dolls to Theriault's in Maryland. The court noted that while it appeared contrary to Timmerman Fees' statutory obligation to hold and retain the conservatorship property to have originally planned to sell them for the benefit of the estate, Judge Marcuzzo had likewise been considering going forward with the sale. Moreover, as a point of fact, the sale never occurred. The court otherwise found the decision to move the dolls to Theriault's for a future sale upon approval of the personal representative to be "a wise choice."

However, the court stated that it was uncertainty concerning the present terms and arrangements of the storage with Theriault's that caused the court "its only real concern with respect to the actions of Fees as Special Conservator." The court found the evidence less than satisfactory with respect to

what the present arrangement was, what further amounts Theriault's would charge, if any, for future storage, and whether those storage charges would vary depending on whether Theriault's eventually served as the seller entity of the dolls. Accordingly, the court could not yet determine whether the conservatorship or probate estate would eventually suffer unnecessary storage costs. Until evidence was sufficient to make such determination, the court declined to find this as grounds for Timmerman Fees' removal. Moreover, the court refused to find the prior failure to disclose grounds in itself for removal since it may have been part of the confidentiality injected into prior court orders entered by Judge Marcuzzo. The court found no evidence that the failure to disclose was deliberate or resulted in any damage or loss.

The court did clarify that since a personal representative had been appointed for Trobough's estate, the only reason for the continued services of the special conservator was to account for the present terms with Theriault's. The court accordingly ordered Timmerman Fees to obtain in writing exactly what obligations, if any, the conservatorship estate had incurred or might incur with respect to such storage. Upon receipt of that report, the court explained that it would enter whatever order was necessary regarding the continued storage of the doll collection. Timmerman Fees was further directed by the court to

file any necessary supplements to her final accounting so that a hearing could be had to approve the final accounting.

The May 10 order also addressed a motion by Bain to vacate all or portions of prior orders by the court entered on December 18, 2003, January 14, 2004, January 26, 2004, February 5, 2004, March 24, 2004, April 13, 2004, April 21, 2004, and June 1, 2004. The court denied the motions to vacate except that it vacated the March 24 order in two respects. First, the court explained that insofar as the order mandated that all conservatorship property remain in its present location pending all appeals, it was no longer appropriate since a personal representative had since been appointed and all of the conservatorship estate should instead be transferred to the personal representative. The court accordingly directed the special conservator to take the action necessary to transfer all tangible personal property to the personal representative. Second, the court vacated the March 24 order insofar as it mandated confidentiality of the storage contract and location of the conservatorship property, the court finding no reason to preserve such confidentiality.

On May 31, 2005, pursuant to the May 10 order, Timmerman Fees submitted a report concerning the terms of the agreement with Theriault's. Timmerman Fees explained that the time period which Theriault's would store the doll collection was extended

indefinitely at a flat fee of \$2,250, to be refunded if the collection was sold through Theriault's. The cost for Theriault's to inventory, pack, photograph, transport, and indefinitely store the remaining dolls and accessories in the Trobough collection that had been stored in Lincoln was \$8,500, to be refunded if this entire collection was sold through Theriault's. Timmerman Fees described that Theriault's had agreed to lower its normal commission of 25 percent to 10 percent, for the sale of the entire Trobough collection. In addition, Theriault's had agreed to add insurance coverage for an additional 15 percent of the value of the dolls stored, together with their usual 75 percent fine arts insurance, for a total insurance coverage of 90 percent of estimated value. The insurance coverage plan had already been approved by prior court orders, as well as the packing and storage fees.

On July 18, 2005, the court issued an order subsequent to an evidentiary hearing in connection with the period of time that Clippinger served as guardian and conservator. Therein, the court determined that Clippinger should be surcharged for various missing items that were under Clippinger's care unless such items could be produced. Accordingly, the court ordered that future surcharge proceedings should be undertaken with respect to those items listed by the court. The court also found that various alleged gifts made by Trobough during the

conservatorship without court approval were at least voidable. The court accordingly directed Clippinger to file, within 30 days, a written report detailing each alleged gift made during the conservatorship, the date thereof, and the donee. The court explained that upon receipt of said report, it would hold a specific hearing to determine whether any such gifts should be allowed, whether appropriate attempts should be made to recover the "gifted" items, or whether Clippinger should be surcharged for these items. All other aspects of the accountings filed by Clippinger for the period of time she served as conservator were approved. The record does not contain the mandated report by Clippinger, nor does it contain any resolution of the surcharge issues discussed in the court's July 18 order.

On July 18, 2005, the court also issued a separate order on a May 20 motion by Bain to alter or amend and motion for new trial with regard to the court's order on May 10. The court reiterated that it found none of the acts by special conservator Timmerman Fees warranted her removal, and it generally denied Bain's motion with the exception of some minor changes to the wording of the May 10 order.

Bain's first notice of appeal was filed August 16, 2005, and appeals from the July 18 denial of Bain's motion to alter, amend, and for new trial with respect to the May 10 order. That appeal is docketed as Case No. S-05-0984. Her second notice of

appeal was filed one day later on August 17, 2005, and purports to appeal the court's July 18, 2005, order pertaining to Clippinger's actions as conservator. That appeal is docketed as Case No. S-05-0991.

ASSIGNMENTS OF ERROR

In the appeal docketed as Case No. S-05-0991, Bain makes the following 10 assignments of error, that the county court erred in:

- (1) approving Clippinger's accounting which failed to include cash in the amount of \$2,900 received by Trobough for the sale of personal property during a time when Clippinger was conservator and in not surcharging Clippinger for that amount;
- (2) approving Clippinger's accounting which included payment of her attorney fees in the amount of \$1,549.55, even though approval of said fees was never obtained, and not surcharging Clippinger for that amount;
- (3) approving Clippinger's accounting which included unsubstantiated cash disbursements totaling \$6,300 and not surcharging Clippinger for that amount;
- (4) failing to void a maintenance agreement between Clippinger and Trobough, due to lack of notice, and failing to surcharge Clippinger in the amount of \$56,000 (the amount received pursuant to such agreement);

(5) failing to rule that all gifts made by Trobough while Clippinger was serving as her conservator were void and that all property purportedly gifted by Trobough was property of this estate;

(6) not receiving testimony by Bain regarding the value of missing items;

(7) not finding that Trobough had a 2 to 3 pound coffee can full of "turn of the century silver dollars" when Clippinger was serving as her conservator and failing to surcharge Clippinger in the amount of \$9,600 (the alleged value of the coins);

(8) failing to find that Clippinger failed to establish that Trobough had made any valid gifts to Clippinger or other members of Clippinger's family;

(9) not removing Clippinger for cause; and

(10) not voiding Clippinger's purchase of the personalty of \$5,000 (the court instead finding that the purchase had already been voluntarily rescinded by Clippinger).

In the appeal docketed as Case No. S-05-0984, Bain makes 17 assignments of error, that the county court erred as follows:

(1) during the May 27, 2004, hearing by receiving into evidence exhibits for which no witness was sworn to lay foundation and authenticate the exhibits;

(2) by authorizing the special conservator to sell the personal property of this estate in the January 14, 2004, order;

(3) by finding, in its May 10, 2005, order, that the special conservator's ex parte communications with Judge Marcuzzo did not present grounds for removal because there was insufficient evidence to find that their purpose was to discriminate against a particular party or that they were detrimental or prejudicial to any of the parties;

(4) in failing in its May 10 order to find that Timmerman Fees' failure to comply with the court's April 13, 2004, order requiring her to obtain full insurance coverage when the personal property of the estate was packed and transported and stored constituted mismanagement of the estate and were thus grounds for her removal;

(5) in failing to find in its May 10 order that Timmerman Fees' efforts to gain authority to sell the doll collection with Theriault's and her continued efforts to sell the personal property of the estate did not constitute mismanagement of the estate and grounds for her removal;

(6) in finding, on May 10, that Theriault's was an appropriate place to sell the personal property of the estate;

(7) in failing to find, on May 10, that the special conservator mismanaged the estate when she sought to transport the personal property from Lincoln, Nebraska;

(8) in finding, on May 10, that the special conservator did not breach her fiduciary duty when she failed to timely disclose

the terms of her contract with Theriault's and made numerous misrepresentations to the court regarding the same during the March 24, 2004, hearing;

(9) in finding, on May 10, that Bain had not proven that Timmerman Fees deliberately failed to disclose the terms of her contract with Theriault's;

(10) in failing to vacate, in its May 10 order, that portion of the December 18, 2003, order that authorized the special conservator to pack and store the personal property of the estate to any location outside of Nebraska;

(11) in failing to vacate, in its May 10 order, the entirety of the order entered by the court on and after January 14, 2004;

(12) in failing to vacate, by its May 10 order, the entirety of the order filed by the court on January 26, 2004,

(13) in failing to find, on May 10, that Timmerman Fees had mismanaged the estate and breached her fiduciary duties when she moved for evidentiary hearings on the gifting and surcharge issues when the May 13, 2003, order was under appeal and thus the county court lacked jurisdiction over those issues;

(14) in failing to vacate, on May 10, all orders which allowed fees paid to the special conservator and which authorized the special conservator to expend monies of the estate;

(15) in finding, on May 10, that Timmerman Fees' selection of Theriault's as the entity to conduct the sale of the doll collection of Trobough's estate was a wise choice;

(16) in failing to vacate, in its May 10 order, the earlier orders that had been entered by Judge Marcuzzo after he had participated in numerous ex parte communications with Timmerman Fees and possibly others, had prejudged issues pertaining to the case, and had appeared to be biased against Bain, and;

(17) that Judge Marcuzzo erred in continuing to preside over this case following the January 23, 2004 hearing at which he acknowledged that he had participated in numerous ex parte communications about this case, after he appeared to be biased against Bain and after he had prejudged the issue regarding the sale of the estate's personalty by authorizing Timmerman Fees to sell the personalty in his January 14, 2004 order.

Timmerman Fees cross-appeals, asserting that the county court erred in its May 10 order by ordering that the special conservator facilitate the transfer of the conservatorship estate to the personal representative while significant issues remained to be decided in the conservatorship.

STANDARD OF REVIEW

An appellate court reviews conservatorship proceedings for error appearing on the record made in the county court. In re

Guardianship & Conservatorship of Trobough, 267 Neb. 661, 676 N.W.2d 364 (2004).

When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

ANALYSIS

JURISDICTION

We first address this court's jurisdiction over the issues presented by Bain in these two appeals. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

For an appellate court to acquire jurisdiction over an appeal, there must be a judgment rendered or a final order entered by the court from which the appeal is taken. See *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005); Neb. Rev. Stat.

§ 25-1911 (Cum. Supp. 2004). An appellate court is without jurisdiction to entertain appeals from nonfinal orders. *State of Florida v. Countrywide Truck Ins. Agency, supra*.

The matters before us are not contained in a final judgment, as the conservatorship proceedings are still ongoing. See *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000) (a "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist). Thus, in order to have jurisdiction over any matter now presented by Bain, such matter must fall within one of the three types of final orders which may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. See *In re Guardianship of Sophia M.*, *supra*. It is clear that the matters presented by Bain do not fall within either the first or third categories of final orders. The question, therefore, is what matters, if any, affected a substantial right and were made during a special proceeding.

Conservatorship proceedings are special proceedings. See *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708

N.W.2d 262 (2006); *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003). We must, however, consider whether any of the matters presented in Bain's appeals affect a substantial right.

(1) CASE No. S-05-0991

First, we address Case No. S-05-0991. Except for her 9th assignment of error (not removing Clippinger for cause), all the errors assigned in this appeal involve disputed particulars of the county court's July 18 order regarding Clippinger and her fees granted, surcharges requested by Bain, and determinations as to whether various disputed items should be considered property of the conservatorship. The July 18 order does not represent a final accounting and discharge of the conservator's liability. Instead, the order explicitly contemplated a future surcharge proceeding, until which time Clippinger was given the opportunity to produce various missing items. It also contemplated a subsequent proceeding as to various "voidable" gifts, after Clippinger filed a report as to the details of these alleged gifts.

We have previously determined that orders made during probate proceedings allowing fees, partial distribution of the estate, approving accountings, or adjusting or correcting accounts for an executor or an administrator are not final, appealable orders until discharge of the administrator or

executor and a final settlement of his or her accounts upon such discharge. See, *In re Estate of Lehman*, 135 Neb. 592, 283 N.W. 199 (1939); *In re Estate of Hansen*, 117 Neb. 551, 221 N.W. 694 (1928); *In re Estate of Wilson*, 97 Neb. 780, 151 N.W. 316 (1915). Where an order approves an executor's account, but requires further collections and reports and continuing proceedings for further decrees, such order is not final. *In re Estate of Hansen, supra*. We hold that the same is true of orders made during the progress of a conservatorship before a final discharge and accounting.

We cannot find, in any of the distinct issues addressed by the July 18 order, any substantial right affected. Rather, that order is a classic example of an order that determines less than all the issues, reserving some issues for later determination, and is, therefore interlocutory. See *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989). If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court. *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999); *In re Estate of Lehman, supra*. We lack jurisdiction to address these matters.

Bain's 9th assignment of error asserts that the county court erred in not removing Clippinger for cause. However, at the time of the July 18 order from which Bain appeals, Clippinger had already been removed as conservator by orders issued a year and a half earlier. While Clippinger has not yet been released from liability and a final accounting has not been issued as to her conservatorship, the December 4, 2003, order "removed" her as conservator. Thus, other than reports and liability pursuant to the final accounting and discharge, Clippinger has not and will not continue to exercise any powers as conservator. This assignment of error is moot and is raised by a notice of appeal filed several months after the alleged error. As will be explained below, an order refusing to remove a conservator for cause is a final, appealable order. Bain's notice of appeal is untimely as to this issue, and we do not consider it.

(2) CASE No. S-05-0984

Having failed to find any matter in appeal No. S-05-0991 over which this court has jurisdiction, we next address Case No. S-05-0984.

Bain's 17 assignments of error can be placed into three categories: (1) issues relating to Judge Marcuzzo's failure to recuse himself between January 23, 2004 and August 9, 2004; (2) issues relating to Timmerman Fees' alleged impropriety as

special conservator; and (3) that the county court erred during the May 27, 2004, hearing by receiving into evidence exhibits for which no witness was sworn to lay foundation and authenticate the exhibits.

We first consider those alleged errors relating to Judge Marcuzzo's failure to recuse himself until August 9, 2004. Bain asserts that Judge Marcuzzo should have recused himself as of January 23, 2004, and therefore any actions taken between that time and the time of his actual recusal on August 9 were void. As such, Bain asserts that the county court erred in denying her motion to vacate Marcuzzo's orders dated January 26, February 5, March 24, April 13, April 21, and June 1, 2004.

A judge's failure to recuse him or herself does not affect a substantial right. Rather, the parties' interest can adequately be protected in an appeal from a final judgment. See *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005). We conclude that matters relating to Judge Marcuzzo's delay in recusing himself are not yet properly before us, there being no final judgment, nor a final order presented in that regard.

With regard to the alleged error as to the court receiving certain exhibits in its May 27, 2004, hearing, it is difficult to fathom how such issue is properly before us. We do not believe any substantial right was affected by the order

receiving the various exhibits in question. But even if we were to assume that a final, appealable order was involved, then the appeal from such order would be out of time. There is no evidence that this issue was revisited by the May 10, 2005, order, which, as altered and amended by the order of July 18, 2005, is the order timely appealed from.

Finally, we consider whether we have jurisdiction over issues presented in connection with the county court's refusal to remove Timmerman Fees as special conservator. An order removing or refusing to remove a conservator affects a substantial right and is made in a special proceeding. Accordingly, such order is a final, appealable order. See *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005) (trustee); *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992) (personal representative); *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989) (personal representative); *In re Estate of Pope*, 75 Neb. 550, 106 N.W. 659 (1906) (special administrator).

Because the order refusing to remove Timmerman Fees as special conservator was timely appealed from, it is properly before this court. We thus have jurisdiction to address this order and those issues bearing on its correctness. See *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005). We now consider whether the county court erred in concluding that there were

insufficient grounds for Timmerman Fees' removal as special conservator.

THE SPECIAL CONSERVATOR

Pursuant to Neb. Rev. Stat. § 30-2644 (Reissue 1995), a conservator may be removed by the court "for good cause, upon notice and hearing." "Good cause" for removal of a conservator exists when (1) removal would be in the best interests of the protected person's estate, (2) if the conservator or person seeking his or her appointment intentionally misrepresented material facts in a proceeding leading up to the appointment, (3) if the conservator has disregarded a court order, (4) if the conservator has become incapable of discharging the duties of the office, (5) if the conservator has mismanaged the estate, or (6) if the conservator has failed to perform any duty pertaining to the office. *In re Conservatorship of Estate of Marsh*, 5 Neb. App. 899, 566 N.W.2d 783 (1997).

In reviewing the county court's decision not to remove Timmerman Fees for cause, our inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004).

On appeal, Bain discusses four alleged malfeasances by Timmerman Fees in her role as special conservator: (1) her

original intent to sell conservatorship assets after the death of the ward, (2) her request for certain hearings despite the fact that an appeal was pending before this court at that time, (3) her failure to properly inform the parties and the court as to the terms of the storage agreement with Theriault's, and (4) her failure to obtain full insurance coverage for the packing, shipping, and transporting of estate property from Lincoln. We will address each of these in turn.

(1) INTENT TO SELL CONSERVATORSHIP ASSETS

First, Bain focuses on the fact that the original order by the court directed Timmerman Fees to return the estate's property to Nebraska, but that despite such order, Timmerman Fees motioned the court for authority to sell the estate's personal property. The court originally granted such authority, but subsequently vacated that order, and none of the conservatorship property has been sold by Timmerman Fees.

Bain relies on Neb. Rev. Stat. sec. 30-2654(e) (Reissue 1995), which states that it is the duty of the conservator, following the death of the ward, to retain the property to be delivered to the personal representative. Bain then expends much effort in setting forth the meaning of the word "retain," and how selling the property would be in contravention of the conservator's duty to "retain" it.

We find such discussion largely irrelevant due to the fact that the property was not actually sold. The record does not show that Timmerman Fees was ever motivated by self dealing, bias, or any other improper motive in her attempt, with the court's permission, to sell Trobough's property. There is sufficient evidence to support the county court's conclusion that such former attempts failed to establish good cause for Timmerman Fees' removal.

(2) FRIVOLOUS MOTIONS

Second, Bain asserts that Timmerman Fees "mismanaged the estate" by filing motions which resulted in evidentiary hearings during the pendency of *Trobough I*, because Timmerman Fees failed to withdraw such motions after Bain objected that the county court was divested of subject matter jurisdiction. Bain points out that Timmerman Fees responded to Bain's objections by stating that she did not have sufficient knowledge of the law and would leave to the county court the decision of whether it continued to have jurisdiction over the motions. Ultimately, portions of the court's orders resulting from the motions were vacated by this court.

The decision to grant hearing on the motions while *Trobough I* was pending was ultimately the county court's, and Timmerman Fees' acquiescence hardly rises to the level of mismanagement of the estate.

(3) REPRESENTATIONS OF THERIAULT'S CONTRACT

Third, Bain asserts that good cause for removal is found in her alleged misrepresentations as to the contract with Theriault's. At the time of the May 10 order, the court did express concern over uncertainty about the terms and arrangements of the storage contract. However, the court generally found that Theriault's would be an appropriate entity to sell the dolls. Timmerman Fees' decision, with court approval, to have the dolls stored at Theriault's was ultimately for the purpose of saving the estate unnecessary expenses in moving the collection back and forth, by placing them directly with the entity most likely to care for the collection properly until sale and most likely to obtain a favorable price for the items when eventually sold.

On May 31, 2005, pursuant to the May 10 order, Timmerman Fees submitted a report concerning the terms of the agreement with Theriault's. The details of this report have already been set forth, and we cannot find in the arrangement any indicia of mismanagement by Timmerman Fees. To the extent that these terms were previously unclear, no prejudice resulted. Nor does the prior lack of clarity indicate any other basis to find the county court's decision not to remove Timmerman Fees arbitrary, capricious, or unreasonable. As the county court explained, the failure to disclose the terms may have been part of the

confidentiality injected into prior court orders, and did not appear to be deliberate malfeasance by Timmerman Fees. We do not find error on the record in the county court's decision not to find good cause for Timmerman Fees' removal on the basis of any lack of disclosure as to the storage contract.

(4) FAILURE TO INSURE DURING TRANSFER

Finally, Bain makes a brief argument regarding Timmerman Fees' alleged failure to comply with the April 13, 2004 order authorizing Timmerman Fees to transfer the conservatorship property to Omaha from Lincoln, but to do so under full insurance coverage. Bain asserts that Timmerman Fees failed to take reasonable steps to obtain such coverage and knowingly violated the order. In support of this assertion she states:

There is a factual issue as to when Fees learned that Auction Solutions had no coverage for property damage. There is a factual issue about when Fees learned Murphy's Moving's insurance would not cover items in boxes packed by others. The testimony given was inconsistent on these issues. But, the testimony does reflect that at all times since April, 2004, Fees has known that the personal property of this estate was not and is not under full insurance coverage and rather than complying with the April 13, 2004 order requiring "full insurance coverage," Fees simply had the court sign additional orders excusing her from this requirement.

(Brief for appellants at 34). The county court stated that while it was not fully satisfied with Timmerman Fees' efforts, any inadequacies were not sufficient to warrant her removal. The court explained that it believed that the "real culprit" was the timing and number of moves. The record does not point to Timmerman Fees as the party responsible for the need for so much movement of the property. Rather, this seems to have been the result of unforeseen inadequacies in storage arrangements and the litigious nature of these proceedings.

Again, we do not find the county court's decision on this issue to be arbitrary, capricious, or unreasonable. The property having safely arrived at its current location, there is no evidence of any harm to the conservatorship estate. Disagreements between interested parties have made the management of the conservatorship property unusually complicated, and we do not find error on the record in the county court's conclusion that Timmerman Fees' management of the movement of the property, while inadequate, did not rise to the level of mismanagement warranting her removal for good cause.

CROSS-APPEAL

Finally, we address Timmerman Fees' cross-appeal. Timmerman Fees purports to cross-appeal that portion of the May 10 order which directs her to facilitate the transfer of the conservatorship estate to the personal representative. Timmerman

Fees asserts that under the rationale of *Trobough I*, such order is in error because issues remain as to what property is properly within the conservatorship.

Unlike the order appealed from in *Trobough I*, the aspect of the May 10 order which Timmerman Fees appeals is not a final appealable order. As already discussed, the May 10 order does not close the conservatorship estate, nor does it affect a final discharge and accounting of the conservator. We do not find any substantial right affected by an order directing the conservator to transfer the property of the conservatorship to the personal representative.

Moreover, we note that since the order in question refers to the "estates of the Conservatorship estate," to the extent that the parties dispute whether certain items are within the estate, Timmerman Fees can properly ask the court for direction in determining what items are subject to transfer.

CONCLUSION

The only issues presented by these two appeals over which this court has jurisdiction are those pertaining directly to the county court's denial of Bain's motion to remove Timmerman Fees as conservator. We find no error on the record in this regard, and therefore affirm the decision of the county court as to Timmerman Fees' continuance as special conservator.

The appeal in Case No. S-05-0991 is dismissed for lack of jurisdiction. As to Case No. S-05-0984, that portion of the county court's order refusing to remove Timmerman Fees as conservator is affirmed.

The parties are afforded 10 days from the date of this opinion to file affidavits pursuant to Neb. Ct. R. of Prac. 9F (rev. 2001).

JUDGMENT IN CASE NO. S-05-0984
AFFIRMED.

APPEAL IN CASE NO. S-05-0991
DISMISSED.

WRIGHT, J., not participating.

CONNOLLY, J., concurring.


At oral argument, it was stated that the value of the gross estate was \$450,000 and that applications for payment of attorney fees totaled \$384,000. Borrowing from and somewhat abusing Shakespeare, the system feasts while the decedent weeps. The combatants might consider the adage: A reasonable settlement is better than the best-tried lawsuit.

THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand
and caused to be affixed the Seal of this Court, in the City of
Lincoln.




Clerk/Deputy Clerk

SUPREME COURT NO.	S-05-0984, S-05-0991
TRIAL TRIBUNAL NO.	52-45
DATE OPINION FILED	May 18, 2006
DATE OPINION CERTIFIED	May 18, 2006