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## **PROBATE LAW CASE SUMMARY**

**BY:** Alan A. May



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He was selected for inclusion in the 2007 through 2010 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 compilation of *The Best Lawyers in America*. He has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

He is a member of the Society of American Baseball Research (SABR).

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**DT:** January 26, 2011

**RE:** Frances A. Fox Revocable Living Trust a/k/a FOX TRUST  
STATE OF MICHIGAN COURT OF APPEALS

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### **ALL STAR BASEBALL STATS:**

How about an all star team of the worst fielders?

By errors, one could choose the following:

#### **INFIELD:**

First base	-	Cap Anson, 583 errors
Second base	-	Fred Pfeffer, 857 errors
Third base	-	Arlie Latham, 822 errors
Shortstop	-	Herman Long, 1,070 errors

It is conceded by most contemporary baseball enthusiasts that Derrick Jeter, though he will get into the Hall of Fame, is certainly the worst fielder in baseball today, or second to Manny Ramirez.

OUTFIELD:

		Tom Brown, 490 errors
		Dummy Hoy, 394 errors
		Jessie Burkett, 383 errors
Catcher	-	Pop Snyder, 679 errors
Pitcher	-	Tim Keefe, 166 errors

Fielders are often judged by runs saved and runs lost. On this basis, the five worst out fielders are:

Garrett Anderson, -12.49  
Russell Branyan, -12.51  
Joey Gathright, -12.63  
Jeromy Burnitz, -13.27  
Brady Clark, -13.98

The five worst infielders by runs lost are:

Felix Lopez, -14.25  
Chon Figgins, -14.51  
Juan Castro, -14.72  
Marcus Jiles, -15.22  
Tony Batista, -16.53

Looking at fielding percentage – Thurman Munson holds the worst fielding percentage, as a catcher, and Dr. Strangeglove, Dick Stewart, holds the worst at first base. Steve Sax checks in at second base and Jose Offerman checks in at shortstop.

Bobby Bonilla would be playing third base and the outfield would be composed of Ben Greive, Greg Luzinski and Jose Canseco.

Pitcher, Melido Perez, once made 10 errors in a season.

Who’s your dog?

REVIEW OF CASE:

Reference Files: Standard on Appeal  
Accountings and Attorneys

This short unpublished Opinion is really a little jewel.

On the bottom of the first page the court states its opinion regarding two standards of appeal relative to attorney fees. Although it might be somewhat confusing at first a careful reading shows that the Court of Appeals is saying that the facts underlying the services of an attorney are reviewed for clear error, and the reasonableness of an attorney fee and a decision to award an attorney fee is reviewed for an abuse of discretion. Although both of these standards of appeal are onerous for an Appellant, the distinction is real. Did the attorney render a service on such-and-such a date as the attorney alleged? This would be an underlying fact, subject to the clear

error standard. After it would be determined that the attorney did render the service, the judge in Probate Court would go on to determine reasonableness, and necessity, etc. Assuming that the judge would have awarded an attorney fee for this service, the Court of Appeals would review that for abuse of discretion.

This Decision also goes on to say that absent explicit language in a Trust (my interpretation of their ruling and not their language), if there are two fiduciaries, each can hire their own attorney and each can be paid from a Trust.

Finally, if a Probate Court approves an accounting and there is evidence or testimony that more than one disbursement is subsumed in one line item or there is a net after the deduction of an expense listed in the ‘Receipt’ column, the approval of the account by the Probate Court will not be overturned.

AAM:jv:680287v2  
Attachment

STATE OF MICHIGAN  
COURT OF APPEALS

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IN RE FRANCES A. FOX REVOCABLE LIVING  
TRUST, a/k/a FOX TRUST.

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MARY F. KUS, Trustee,

Appellee,

v

CYNTHIA FOX-JANKE,

Appellant.

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UNPUBLISHED  
November 16, 2010

No. 292879  
Clinton Probate Court  
LC No. 08-026825-TV

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Appellant appeals as of right from the probate court's order approving the final accounting of the Frances A. Fox Revocable Living Trust (trust). We affirm.

The grantor of the trust passed away in June 2006. Appellant and appellee, two of the grantor's daughters, were originally named as co-trustees and they retained the same counsel. After differences arose in management and decisions regarding distribution, appellee hired separate counsel to represent her in her capacity as co-trustee in July 2008. On October 8, 2008, appellee was named sole trustee. The probate court approved the final accounting and distribution plan, and ordered that appellee was entitled to have her attorney fees paid from the trust.

Appellant first argues on appeal appellee was not entitled to have her attorney fees paid from the trust for services rendered prior to October 8, 2008, because her decision to hire separate counsel was in violation of the trust agreement. We disagree.

The findings of fact underlying an award of attorney fees are reviewed for clear error, *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007), while underlying questions of law are reviewed de novo, *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005), and the decision whether to award attorney fees and the determination of the reasonableness of the fees are within the trial court's discretion and will be reviewed on appeal for an abuse of discretion, *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008); *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). A finding is clearly

erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 760 NW2d 234, (2009). An abuse of discretion occurred when the decision was outside the range of reasonable and principled outcomes. *Smith*, 481 Mich at 526.

MCL 700.7401(2)<sup>1</sup> provided as follows:

[E]xcept as otherwise provided in the trust instrument, a trustee possesses all of the following specific powers:

\* \* \*

(w) To employ an attorney to perform necessary legal services or to advise or assist the trustee in the performance of the trustee's administrative duties, even if the attorney is associated with the trustee, and to act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.

Here, the trust instrument does not include any explicit statement regarding trustees' retention of counsel.

MCL 700.7406<sup>2</sup> stated in pertinent part:

(1) If there are more trustees and the trust instrument expressly makes provision for the execution of any of the trustees' powers by both or all of them or by any 1 or more of them, the provisions of the trust instrument govern.

\* \* \*

(3) Subject to subsection (1), if 2 or more trustees own securities, their acts with respect to voting have 1 of the following effects:

(a) If only 1 trustee votes, in person or by proxy, that trustee's act binds all of the trustees.

(b) If more than 1 trustee votes, in person or by proxy, the act of the majority so voting binds all of the trustees.

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<sup>1</sup> This statute was amended by 2009 PA 46, effective April 1, 2010.

<sup>2</sup> The statute currently reads: "A trust is void to the extent its creation was induced by fraud, duress, or undue influence." 2009 PA 46, effective April 1, 2010. The section quoted in the body of the opinion was valid at the time of the ruling below.

(c) If more than 1 trustee votes, in person or by proxy, but the vote is evenly split on a particular matter, each faction is entitled to vote the securities proportionately.

(4) Subject to subsections (1) to (3), all other acts and duties shall be performed by both of the trustees if there are 2 or by a majority of the trustees if there are more than 2. A trustee who has not joined in exercising a power is not liable to a beneficiary or another person for the consequences of the exercise of that power. A dissenting trustee is not liable for the consequences of an act in which the dissenting trustee joins at the direction of the other trustees, if the dissenting trustee expressed dissent in writing to a cotrustee at or before the time of joinder.

The trust has an explicit provision regarding the management by co-trustees. Pursuant to MCL 700.7406(1), the section of the trust governs. Section 8.5.3 of the trust states:

**Management by Co-Trustees.** If there should be appointed by the Grantor or a court of competent jurisdiction more than one Successor or Substitute Trustee to serve at the same time as Co-Trustees, then the consent of a majority of such Trustees, or the agreement of both Co-Trustees if not more than two shall be serving at the same time, shall be required for administration of this trust. Any deadlock shall be resolved by the drawing of lots.

Thus, the agreement of the parties was required for the administration of the trust. It is clear from the record that there were disputes between the parties regarding trust administration. Appellant construes the law to mean that the parties must agree on every decision, including retention of an attorney. Logically, though, the statutes recounted above do not impose such a restriction.

Section 8.5.3 of the trust provided for the drawing of lots to resolve any disputes regarding trust administration. When disputes arose, appellee retained her own counsel, pursuant to her powers as trustee under MCL 700.7401(2)(w). "MCL 700.7201(2)(w) specifically authorizes a trustee to retain counsel and to act on advice so received, provided the trustee does so in a reasonable and prudent manner." *Temple*, 278 Mich App at 134. Appellant did not allege that appellee failed to act reasonably and prudently in retaining or following the advice of counsel, only that she failed to receive appellant's consent. Appellant agrees that trustees are permitted to hire counsel, but argues that *Temple* does not apply to co-trustees. Therefore, appellant contends, the provisions of the trust govern and appellee violated the provision by not drawing lots. However, there is nothing in *Temple* or in MCL 700.7401 that exempts a co-trustee from the power to retain counsel. In fact, the statute provides that "a trustee" possesses the power to do so. MCL 700.7401(2)(w). The statute's plain meaning and clear language must be enforced as written. *People v Gillis*, 474 Mich 105, 115; 712 NW2d 419 (2006).

Because drawing lots would not resolve the issues between the parties, appellee acted reasonably and prudently in seeking advice of separate counsel to administer the estate and to resolve problems with appellant.

Next, appellant argues that she was entitled to fees for her services as fiduciary of the trust. Appellee does not explain what kinds of fees she is owed, how much, or what duties she fulfilled, but merely refers to the fact that she provided invoices to appellee. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

Next, appellant claims that fees paid to the receiver were not reflected in the final account. Both appellee's attorney and the receiver stated that the receiver had been paid in full. Although there is no explanation on the final account, appellee's counsel stated that the line item for the sale of the farm accounts for the receiver's fees.

Although appellant objected to the line items regarding loan repayments to the trust by appellee and her brother, it is unclear why. It appears that the amounts were included in the total sum to be distributed.

The trial court did not err in approving the final account, and did not abuse its discretion in awarding attorney fees.

Affirmed.

/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald  
/s/ Henry William Saad