



*Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.*

## PROBATE LAW CASE SUMMARY

**BY:** Alan A. May Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.



He was selected for inclusion in the 2007-2018 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and 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. Mr. May maintains an “AV” peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell’s Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2017 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2016 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Kemp Klein is a member of LEGUS a global network of prominent law firms.

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

For those interested in viewing previous Probate Law Case Summaries, go online to: <http://kkue.com/resources/probate-law-case-summaries/>.

He is the published author of “Article XII: A Political Thriller.”

**DT:** April 24, 2018

**RE:** *In re John M. Wright and Elaine Wright Trust*  
STATE OF MICHIGAN COURT OF APPEALS

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**“Alan, you cannot write about baseball all your life.”**

- Mrs. Pollinger
- 12<sup>th</sup> Grade English Comp
- Mumford High - 1959

## **BASEBALL LORE**

Happy Birthday David Sylaj!

To one of the best Law Clerk's on the planet Earth, we wish a happy birthday and recall what happened on May 6<sup>th</sup> throughout the history of baseball to help David celebrate his birthday.

Many people think that the first decision on the reserve clause was with Lou Brock, but back on David's birthday in 1902, a court in St. Louis ruled that the National League reserve clause was unfairly restrictive on three players who jumped to the St. Louis Browns. This helped the players, but the two leagues resolved their differences at the expense of the players for the future.

In the next year 1903, our own Detroit Tigers played the Chicago White Sox. Between the two teams they committed 18 errors, setting a record. (In 1884, in the Minor Leagues, two teams in Texas committed 66 errors).

Just as David Sylaj brought the American and National League together in 1902, he continued to bring them together on May the 6<sup>th</sup>, 1913. On that day the Federal League opened its premiere season after raiding the American and National Leagues. The American and National Leagues were driven closer.

On May 6<sup>th</sup>, 1915, Babe Ruth played for the Red Sox. As everyone knows, he was going to be traded to the Yankees, but on that date, May 6<sup>th</sup>, 1915, Babe Ruth hit his first Major League homerun.

In 1934 on May 6<sup>th</sup>, the Tigers were involved in another game. This one against the Boston Red Sox. The Boston Red Sox had 4 consecutive triples in one inning. Not a record, but still an unusual circumstance.

In 1938, the New York Giants had an outfielder by the name of Bob Seeds. Towards the end of the year they sent him down to AA to play for the Newark Bears. On May 6<sup>th</sup>, Seeds hit 4 homeruns in one game consecutively and the next day hit 3 homeruns. He finished the season with Newark with a .335 batting average and his batting average for the Giants that year was .291.

May 6<sup>th</sup>, 1949. Remember little Bobby Shantz? 1949 was his rookie season and he pitched a no hitter and win over the Tigers, but he didn't get credit for a no hitter because his nine hitless innings were thrown as a relief pitcher. Yep, the Tigers lost.

Someone must have remembered this because a few years later on May 6<sup>th</sup>, 1951, Cliff Chambers threw a no hitter while pitching for Pittsburg against the Boston Braves. As did Bobo Holloman on May 6<sup>th</sup>, 1953.

Happy Birthday David.

**Caveat: MCR 2.119, MCR 7.212 and  
7.215 take effect May 1, 2016 on propriety  
of citing unpublished cases**

**REVIEW OF CASE:**

Issues:

- Statutory Interpretation.
- Attorney Fees versus Fiduciary Services
- Breadth of Agreement.
- Travel Expenses.
- Inviting Error.
- Trust Document versus Code

Appellant, an attorney and co-fiduciary, sought reversal of the lower court's decision denying him travel reimbursement from Florida and attorney fees for helping himself as Trustee. Inter Alia the Court of Appeals said:

1. The Court of Appeals gave a good definition of statutory interpretation with supporting citations; discerning legislative intent; when unambiguous apply as written.
2. Pleading the wrong statutory section before the lower court and having the court rule upon it is inviting error which can't be raised on appeal.
3. When the trust conflicts with EPIC, the trust prevails except when EPIC says otherwise. Reasonability of fees is one such exception.
4. Just because you are a fiduciary who is an attorney doesn't mean you get paid as an attorney for those fiduciary services which were mandated as an administrative duty by statute.
5. Expending money for travel expenses which benefit yourself cannot be reimbursed out of the Trust.
6. An agreement on a topic favoring one party doesn't inure to the benefit of a non-party.

STATE OF MICHIGAN COURT OF APPEALS Case  
–continued–

For the practitioner:

1. When you are an attorney fiduciary be careful to bifurcate legal from administrative services.
2. There may be overlap. For instance, what should or should go on an Inventory. Sometimes it requires legal training to make that decision.
3. When your taking a trip, document the trip and its purpose and what you do.
4. If you don't have good relationships with your siblings, before you act, at least write them and tell them what you're going to do and why you're going to do it, giving them a chance to concur or object.

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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*In re* JOHN M. WRIGHT AND ELAINE M.  
WRIGHT TRUST.

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CRAIG L. WRIGHT and GARY J. WRIGHT,

Appellees,

v

JOHN R. WRIGHT,

Appellant.

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UNPUBLISHED

April 10, 2018

No. 337941

Genesee Probate Court

LC No. 12-194740-TV

Before: SERVITTO, P.J., and MARKEY and O'CONNELL, JJ.

PER CURIAM.

John R. Wright (John) is a beneficiary and a former trustee of the John M. Wright and Elaine M. Wright Trust (the Trust). John appeals as of right an order allowing a reconstructed third account and a reconstructed fourth and final account submitted by appellees, Craig L. Wright (Craig) and Gary J. Wright (Gary), requiring John to reimburse the Trust for certain expenses and denying John's request for attorney fees. On appeal, John challenges the probate court's refusal to allow him to recover travel expenses and attorney fees he allegedly incurred while serving as trustee of the Trust. We affirm.

I. BACKGROUND

John M. Wright (Jack) and Elaine M. Wright (Elaine) were the parents of John, Craig, and Gary. Jack and Elaine created the Trust on April 13, 2012. Following certain distributions or bequests, John, Craig, and Gary are each entitled to a one-third distribution of the Trust assets following the death of Jack and Elaine. Elaine died on June 26, 2012, and Jack died on May 5, 2017. We note that, according to accountings in the record, the value of the Trust assets exceeds \$2 million, whereas the amount of the expenses contested in this appeal is less than \$8,000.

II. DISCUSSION

A. TRAVEL EXPENSES

John argues that the probate court erred by disallowing John's claimed travel expenses. We disagree. A probate court's decision is reviewed on the record, not de novo. *In re Lundy Estate*, 291 Mich App 347, 352; 804 NW2d 773 (2011). "This Court reviews the probate court's factual findings for clear error and its dispositional rulings for an abuse of discretion." *Id.* An abuse of discretion occurs when the lower court's decision falls "outside the range of reasonable and principled outcomes." *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 has been committed." *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000) (quotation marks and citation omitted). "The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *In re Duke Estate*, 312 Mich App 574, 581; 887 NW2d 1 (2015) (quotation marks and citation omitted).

"This Court reviews de novo issues of statutory interpretation as questions of law." *Lundy*, 291 Mich App at 352. The primary goal of statutory interpretation "is to discern the intent of the Legislature as expressed in the text of the statute. Where the language is clear and unambiguous, our inquiry ends and we apply the statute as written." *Grimes v Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006) (citations omitted).

We also review de novo the proper interpretation of a trust. *In re Stan Estate*, 301 Mich App 435, 442; 839 NW2d 498 (2013). The objective in interpreting a trust is to discern and effectuate the settlor's intent. *Id.* We must enforce the plain and unambiguous terms of a trust as written. *Brown Trust v Garcia*, 312 Mich App 684, 694; 880 NW2d 269 (2015).

John first argues that the probate court erred by disallowing John's travel expenses because Gary recovered travel expenses in an earlier accounting. We disagree. MCL 700.7111(1) provides that "interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust." Matters that may be resolved by such a settlement agreement include "[t]he approval of a trustee's report or accounting." MCL 700.7111(3)(b). John concedes that all interested persons agreed to allow Gary reimbursement for the expenses of traveling from his home in Colorado to visit Jack. The parties did not reach an agreement regarding John's claimed travel expenses in the subsequent accounting at issue. Further, the probate court found that John's travel expenses were incurred only for John's own benefit and were necessitated solely by John's relocation to Florida. The probate court made no similar finding with respect to Gary's travel expenses. Aside from John's uncorroborated assertions, the record contains little information regarding the circumstances surrounding Gary's travel expenses and their purported similarity to the circumstances surrounding John's travel expenses. The agreement to allow Gary's travel expenses in an earlier accounting does not necessarily mean that the probate court was required to approve John's travel expenses claimed in a later accounting. Therefore, John's contention that the probate court acted inconsistently with regard to travel expenses is devoid of merit.

Next, John argues that the probate court erred by ruling that John could not be reimbursed for travel expenses because he had not charged the Trust for the related administrative services. John suggests that the probate court believes that a trustee's expenses are not properly incurred

under MCL 700.7709(1)(a) if the claim for expenses is not accompanied by a fee for the associated administrative services. MCL 700.7709(1) authorizes reimbursement for expenses as follows:

(1) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for both of the following:

(a) Expenses that were properly incurred in the administration of the trust.

(b) To the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

John's argument lacks merit because he attributes to the probate court a rationale that the probate court did not articulate. An argument that does not address the lower court's true rationale fails to establish entitlement to relief on appeal. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004). Although the probate court noted that John did not charge the Trust for the administrative activities performed during his visits to Michigan, the probate court did not disallow travel expenses for this reason. Instead, the probate court stated that John's travel expenses were solely necessitated by his relocation to Florida and that the travel expenses were not properly borne by the Trust when they were incurred only for John's benefit. Accordingly, John has not identified an error in the probate court's decision.

Next, John argues that the probate court erred by denying John his requested travel expenses solely on the ground that the expenses were generated by travel from out of state. John argues that traveling from out of state does not preclude a conclusion that travel expenses were "properly incurred" for the purpose of seeking reimbursement under MCL 770.7709(1)(a). John's argument on this point lacks merit because again he attributes to the probate court a rationale that the probate court did not express. The probate court did not deny the travel expenses solely because they involved travel from out of state or because the expenses of traveling from out of state can never be "properly incurred in the administration of the trust" for the purpose of reimbursing a trustee for expenses under MCL 770.7709(1)(a). Hence, to the extent that John has failed to address the probate court's rationale, he has not established entitlement to relief.

John asserts that the probate court reached contradictory conclusions by finding that John performed activities beneficial to the Trust during his visits to Michigan but that the travel expenses were incurred only for the benefit of John and not the Trust. John's argument is flawed because the probate court's findings were not contradictory. The propriety of administrative services performed by a trustee is a separate question from whether claimed expenses are properly reimbursable. That is, the probate court's finding that John performed activities beneficial to the Trust while in Michigan does not necessitate the conclusion that John's travel expenses were "properly incurred in the administration of the trust" under MCL 770.7709(1)(a). The probate court found that John's travel expenses were solely necessitated by John's relocation to Florida and that such expenses were only incurred for John's benefit. Craig's testimony supported the probate court's findings. Craig noted that John chose to live on the Trust property in Florida rather than at a cottage owned by the Trust in Au Gres, Michigan. John made numerous trips to Michigan from Florida, including three trips from August to October of 2015.

Craig characterized these trips as “excessive” because John could have stayed at the Au Gres, Michigan property. John made a fourth trip from Florida to Michigan in March 2016. Craig said this trip was for John’s partner to see the snow, adding that there was no need for John to check on the Au Gres property during this trip. Although John suggests that he resided in the Florida property to prepare it for sale, the record supports the conclusion that John’s travel between Michigan and Florida was excessive and that John could have stayed at the Au Gres property to reduce travel expenses. Accordingly, we discern no clear error in the probate court’s finding that the travel expenses at issue were incurred only for the benefit of John rather than the Trust.

John further asserts that the probate court ignored ¶ 2.5 of the Trust, which states that “[e]ach Trustee is entitled to reimbursement for reasonable out-of-pocket expenses and may receive reasonable compensation for services performed.” The probate court’s finding that John’s travel expenses were solely necessitated by his relocation to Florida and were only incurred for John’s benefit implies that John’s claimed travel expenses were not reasonable. John identifies no basis for concluding that his travel expenses could be deemed “reasonable” under the Trust provision in light of the probate court’s findings. In sum, the trial court did not abuse its discretion by not permitting John to recover claimed travel expenses.

## B. ATTORNEY FEES

John argues that the probate court erred by denying his request for attorney fees. We disagree.

[W]ith respect to an award of attorney fees, we review underlying findings of fact for clear error, while questions of law are reviewed de novo. But we review the court’s decision whether to award attorney fees and the determination of the reasonableness of the fees for an abuse of discretion. The court does not abuse its discretion when its decision is within the range of reasonable and principled outcomes. [*Temple*, 278 Mich App at 128 (citations omitted).]

John argues that the probate court erred by relying on MCL 700.7904(1) as the governing authority when denying John’s request for attorney fees. MCL 700.7904(1) provides:

In a proceeding involving the administration of a trust, the court, as justice and equity require, may award costs and expenses, including reasonable attorney fees, to any party who enhances, preserves, or protects trust property, to be paid from the trust that is the subject of the proceeding.

John argues that this provision was primarily intended to apply to attorney fee requests made by other persons, such as a beneficiary of the trust. Although John is a beneficiary of the trust, he contends that he was acting as a trustee when the contested legal expenses were incurred. John asserts that the governing statutory provisions concerning his attorney fee requests are MCL 700.7709(1) and MCL 700.7817(w). As stated earlier, MCL 700.7709(1) authorizes reimbursement of a trustee for properly incurred expenses and to prevent unjust enrichment of the trust. MCL 700.7817(w) provides that a trustee has the following power:

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.

John has waived any error arising from the probate court's reliance on MCL 700.7904(1) because John invited the error by citing MCL 700.7904(1). " 'Invited error' is typically said to occur when a party's own affirmative conduct directly causes the error. . . . Appellate review is precluded because when a party invites the error, he waives his right to seek appellate review, and any error is extinguished." *Cassidy v Cassidy*, 318 Mich App 463, 476; 899 NW2d 65 (2017) (quotation marks and citation omitted). In John's response to Craig and Gary's objections to John's third and fourth accountings, John cited MCL 700.7904(1) in support of his request for attorney fees. Hence, the probate court's citation to MCL 700.7904(1) was in response to John's reliance on that provision. Therefore, John invited the error, thereby waiving his right to seek appellate review, and any error was extinguished.

Moreover, in denying John's attorney fee request, the probate court applied MCL 700.7817(w). Only after applying MCL 700.7817(w) did the probate court add a final sentence applying MCL 700.7904(1), an understandable effort on the part of the probate court to address the very statutory provision that John himself had cited in support of his request. Similarly, John's argument that the probate court overlooked a provision in the Trust permitting the retention of an attorney fails because that provision echoes the language of MCL 700.7817(w). Thus, John has failed to establish that the probate court's analysis was incomplete.

John argues that the terms of the Trust take precedence over the provisions of the Michigan Trust Code. MCL 700.7105(2)(g) provides that the terms of a trust prevail over provisions of the Michigan Trust Code, MCL 700.7101 *et seq.*, except, as relevant to this case, for "[t]he power of the court under [MCL 700.7708(2)] to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high." MCL 700.7708(2) provides, in relevant part:

If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if either of the following apply:

\* \* \*

(b) The compensation specified by the terms of the trust would be unreasonably low or high.

John argues that MCL 700.7105(2)(g) does not apply to this case because the probate court did not find that John's legal expenses were unreasonable. Although the probate court did not find that John's requested compensation was unreasonably low or high, the amount was not the basis for the probate court's declination to award John's requested attorney fees. Rather, the probate court found no "meaningful difference between the administrative fees, which had never before been assessed to the Trust, and the legal fees reflected in [John's] proposed fourth account." Therefore, MCL 700.7105(2)(g) is inapplicable, and it makes no difference whether the terms of the Trust prevail over provisions of the Michigan Trust Code.

Finally, John avers that the probate court erred by failing to discern any difference between trustee administrative fees, which have never been assessed, and the proposed legal fees that John seeks in his fourth accounting. John contends that the legal fees requested in his fourth accounting are unrelated to ongoing administrative activities of the Trust but are instead attributable to John's responses to Craig and Gary's various demands and objections. It is not clear from the record that the activities for which John was seeking compensation as an attorney were activities that required the service of an attorney as opposed to the administrative duties of a trustee. Accordingly, we discern no error in the probate court's determination that there was no "meaningful difference between the administrative fees, which had never before been assessed to the Trust, and the legal fees reflected in [John's] proposed fourth account."

Additionally, providing requested information to trust beneficiaries is part of a trustee's regular administrative duties. MCL 700.7814(1) provides:

A trustee shall keep the qualified trust beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a trust beneficiary's request for information related to the administration of the trust.

A "trustee's duty to keep and render a full and accurate accounting of his trusteeship" is strictly enforced. *In re Goldman Estate*, 236 Mich App 517, 523; 601 NW2d 126 (1999). Craig testified that any additional work John performed in providing information resulted from John's failure to prepare accountings properly from the start. John responded by questioning the motivations of Craig and Gary in requesting information and noting that Craig and Gary reached the same amount in the accountings. The probate court heard the testimony, reviewed the accountings, and approved the reconstructed third and fourth accountings submitted by Craig and Gary in lieu of John's proposed third and fourth accountings. Thus, the probate court credited Craig's testimony concerning the deficiencies in John's accountings. John's activities in responding to Craig and Gary's requests for information fell within his administrative duties as a trustee. Therefore, the probate court did not err by finding John's activities for which he sought legal fees indistinguishable from his administrative duties as trustee.

John further contends that it makes no difference whether the activities for which he is seeking attorney fees are deemed legal or administrative because MCL 700.7817(w) authorizes a trustee "[t]o 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 . . . ." (Emphasis added.) John fails to articulate how he could hire himself to assist himself in performing administrative duties that he was already required to perform as a trustee. John cites no authority in support of such an interpretation of the statutory language. A party may not simply announce a position and leave it to this Court to make his arguments and find authority to support his position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Failure to adequately brief an issue constitutes abandonment. *McIntosh v McIntosh*, 282 Mich App 471, 484; 768 NW2d 325 (2009). We find no authority supporting John's interpretation of MCL 700.7817(w) as permitting a trustee to hire himself and compensate himself as an attorney to assist himself in performing administrative tasks that he is required to perform as a trustee.

We affirm.

/s/ Deborah A. Servitto  
/s/ Jane E. Markey  
/s/ Peter D. O'Connell