

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

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In re Estate of GEORGE C. ADAMS, Deceased.

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BANK ONE,

Petitioner-Appellant,

v

MARY C. ADAMS,

Respondent-Appellee.

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FOR PUBLICATION

June 24, 2003

9:10 a.m.

No. 236421

Washtenaw Probate Court

LC No. 94-105359-IE

Updated Copy

August 15, 2003

Before: Fitzgerald, P.J., and Hoekstra and O'Connell, JJ.

O'CONNELL, J. (concurring in part and dissenting in part).

I concur with the majority opinion except the portion of the opinion that addresses the award of attorney fees and costs. With regard to this award, I would affirm the probate court's order in part, but remand this case for imposition of actual appellate costs and attorney fees.

In addition to actual appellate costs, I would require that petitioner reimburse the beneficiaries for the entire amount of attorney fees originally charged. This reimbursement would be a sanction for grossly over-billing the trust. This sanction should be a clear message that trustees have a duty to deal fairly, wisely, and prudently when dealing with the property of another. See MCL 700.7302; *Weathervane Window, Inc v White Lake Constr Co*, 192 Mich App 316, 325-326; 480 NW2d 337 (1991). Stated another way, those trustees who fail to act in a professional, fiduciary manner should be held personally responsible for their unprofessionalism. Trust estates are not the personal assets of the trustee; the trustee's job is to maintain the trust, not to exploit it or turn the trust assets into a windfall for himself. See *id.* at 325.

The trustee in this matter was called on to administer assets that ultimately totaled \$3,083,416. The trustee charged costs and attorney fees of \$754,513. This did not include the final four months' work, the final accounting, which was disallowed, or the costs of this appeal.<sup>1</sup>

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<sup>1</sup> Initially, petitioner billed the trust \$458,415 in administrative fees. This amount was reduced by the arbitrator to \$324,905.

In an unusual and finely worded opinion, the learned arbitrator stated, "The arbitrator is forced to the conclusion that the fees and expenses relating to the administration of the trust were unreasonable."

Moreover, the probate court entered an order prohibiting petitioner from further dissipating the trust assets without first receiving written approval from the beneficiaries. The probate court also ordered the trustee to file a final accounting within ten days. In addition, the probate court ordered petitioner to reimburse the beneficiaries a total of \$118,510 for unreasonable administration fees. Unfortunately for petitioner, it did not file the final accounting until four months later; thus, petitioner was in direct violation of a court order. See, generally, MCL 600.1715; *In re Contempt of Rochlin*, 186 Mich App 639, 646; 465 NW2d 388 (1990) (civil contempt for violation of a court order is "the failure of the contemnor to perform some act still within his power to perform, punishable by an indefinite coercive sentence"). Furthermore, since no appeal was taken from the probate court's order determining that the trust was over-billed by \$118,510, this order conclusively establishes that the trust was over-billed. Cf. *Knoth v A Harvey's Sons Mfg Co*, 212 Mich 415, 421; 180 NW 367 (1920).

MCL 700.7302 states:

Except as otherwise provided by the terms of the trust, the trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills.

Over-billing the trust in the amount of \$118,510 and failing to adhere to the court's order constitutes a breach of the trustee's duty to prudently administer this trust. See *Weathervane Window, supra*. These actions on the part of the trustee, in my opinion, constitute misconduct and a violation of MCL 700.7302.

The circuit court possesses inherent authority independent of statute or court rule to sanction misconduct by a party or an attorney appearing before it. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639-641; 607 NW2d 100 (1999). We review for an abuse of discretion the probate court's exercise of its inherent authority to sanction misconduct. *Id.* at 642; *Brenner v Kolk*, 226 Mich App 149, 159-160; 573 NW2d 65 (1997) (also noting that "this Court . . . recognize[s] a court's authority to sanction litigant misconduct"). A probate court abuses its discretion when the result is so palpably and grossly contrary to fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Persichini, supra* at 632; *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).

Failing to timely file the final accounting in violation of a court order and over-billing a trust constitutes misconduct of the highest order. Thus, the probate court did not abuse its discretion in assessing costs and attorney fees for this misconduct. See *Persichini, supra*. As I previously stated, if I were the probate judge, I would have disallowed all the attorney fees billed to the estate as a sanction for this egregious misconduct. See, generally, e.g., *Moser v Moser*,

184 Mich App 111, 116-117; 457 NW2d 70 (1990) (abuse-of-discretion standard of review in a divorce case permits this Court to reverse if it would have reached a different result).<sup>2</sup>

Circuit courts have a duty to sanction those attorneys who behave in an unprofessional manner. See Code of Judicial Conduct, Canon 3(B)(3) ("[A] judge should take . . . appropriate disciplinary measures against a . . . lawyer for unprofessional conduct . . . "). I believe that this duty extends both to the parties to the proceeding and those affected by court decisions. See, generally, *Brenner, supra*; Code of Judicial Conduct, Canon 3(A)(2) ("[A] judge . . . should enforce reasonable rules of conduct in the courtroom."). One published opinion serves notice to all that the courts of this state will not tolerate such unprofessional behavior.

I would affirm the decision of the probate court in part and remand this case for further proceedings consistent with this opinion.

/s/ Peter D. O'Connell

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<sup>2</sup> The majority states that the trustee was already sanctioned when it had to return money that was legally trust property to the trust. I prefer to call this restitution of funds that were misappropriated but not earned. Compare *Michigan Bell Tel Co v Sfat*, 177 Mich App 506, 513; 442 NW2d 720 (1989) ("By definition, a sanction is 'a penalty or punishment provided as a means of enforcing obedience to a law,'" (citation omitted), and Black's Law Dictionary (7th ed) (restitution is defined as the "[r]eturn or restoration of some specific thing to its rightful owner or status"). I also note that the trustee clearly was not previously sanctioned for violating the court order. See MCL 600.1715; *In re Contempt of Rochlin, supra*.