STATE OF MICHIGAN

COURT OF APPEALS

In re JOHN F. ERVIN Testamentary Trust.

J.P. MORGAN CHASE BANK, N.A.,

Petitioner-Appellee,

v

MARY JANE PEARSON EVANS,

Respondent-Appellant,

and

ANDREA EVANS,

Respondent,

and

ERVIN INDUSTRIES, INC., JOHN PEARSON, NANCY P. RODOLPH, and ANN E. JORGENSON,

Respondents-Appellees.

UNPUBLISHED
October 28, 2010

No. 289293
289793
293724
Washtenaw Probate Court
LC No. 61-447121-TT

In re JOHN F. ERVIN Testamentary Trust.

J.P. MORGAN CHASE BANK, N.A.,

Petitioner-Appellee,

v

ANDREA EVANS,

No. 289302
289861
Washtenaw Probate Court
LC No. 61-447121-TT

Respondent-Appellant,
and

MARY JANE PEARSON EVANS,

Respondent,
and

ERVIN INDUSTRIES, INC., JOHN PEARSON, NANCY P. RODOLPH, and ANN E. JORGENSON,

Respondents-Appellees.

Before: M. J. KELLY, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

These consolidated appeals arise from petitioner JP Morgan Chase Bank's (JP Morgan) administration of the John F. Ervin Testamentary Trust (the Ervin Trust). Ervin was the grandfather of appellant Mary Jane Pearson Evans (Jane Evans) and her siblings, appellees John Pearson, Nancy P. Rodolph, and Ann E. Jorgensen. Each of the four siblings is an income beneficiary of one of four subtrusts of the Ervin Trust. Jane Evans' daughter, appellant Andrea Evans, is a remainderman beneficiary of the four subtrusts. Appellee Ervin Industries, Inc. is a corporation originally founded by John Ervin, and its stock comprises the principal asset of the four subtrusts. In Docket Nos. 289293 and 289302, Jane Evans and Andrea Evans appeal as of right the probate court's order granting JP Morgan's petition to resign as trustee and allowing the income beneficiary of each subtrust (or a person or institution designated by that beneficiary) to serve as successor trustee of his or her subtrust. In Docket Nos. 289793 and 289861, Jane Evans and Andrea Evans appeal as of right the probate court's subsequent order implementing JP Morgan's resignation and the appointment of the successor trustees. In Docket No. 293724, Jane Evans appeals as of right the probate court's opinion and order awarding JP Morgan attorney fees and costs. Because we conclude that there were no errors warranting relief with regard to the probate court's orders allowing the resignation of JP Morgan as trustee and appointing the income beneficiaries as successor trustees of their subtrusts, we affirm those orders. However, because we conclude that the trial court failed to adequately address the reasonableness of its award of additional attorney fees for the 2001 to 2005 period and for the entire award with regard to the 2006 to 2008 period, we vacate those awards and remand for further proceedings.

I. APPOINTMENT OF SUCCESSOR TRUSTEES

A. STANDARD OF REVIEW

Jane Evans and Andrea Evans do not contest JP Morgan's decision to resign as trustee. Rather, they raise several arguments challenging the probate court's decision to allow the income beneficiaries of each subtrust to serve as the successor trustee of his or her subtrust, instead of

appointing a new independent financial institution as successor trustee. We review a probate court's decisions involving the removal of a trustee and appointment of a successor trustee for an abuse of discretion. *In re Duane V Baldwin Trust*, 274 Mich App 387, 396-397; 733 NW2d 419 (2007). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Id.* at 397. We review the probate court's findings of fact for clear error. *Id.* at 396.

B. STANDING

Initially, we reject Ervin Industries' argument that Jane Evans lacks standing to challenge the appointment of the successor trustees for each sibling's subtrust. Michigan has a "limited, prudential" standing doctrine, which recognizes a litigant's standing "whenever there is a cause of action." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, ___ Mich ___; ___ NW2d ___ (2010).[1] Absent a cause of action conferred by statute, a court may, in its discretion, find a litigant has standing, "if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Id.* Although Jane Evans does not have a direct interest in her siblings' subtrusts, she has a legally protected beneficial interest in her own subtrust, which she contends will be affected if all four subtrusts are not managed by a single corporate trustee. Further, the four subtrusts share a common asset—stock in Ervin Industries. As Jane Evans recognizes, a sibling-trustee's exercise of the voting rights of the respective shares in one subtrust could potentially affect the management of Ervin Industries and, correspondingly, the value and income-producing potential of its stock, thereby affecting her subtrust. Indeed, it is for this reason that Jane Evans argues that administration of the four subtrusts by an independent financial institution is appropriate. Because Jane Evans premises her appeal on her contention that the probate court's decision to allow the other income beneficiaries to serve as successor trustees of their respective subtrusts will potentially affect her interest in her own subtrust, we conclude that Jane Evans has standing to challenge the probate court's decision.

C. SUCCESSOR TRUSTEE

Jane Evans argues that the probate court abused its discretion and improperly deviated from the testator's original intent by appointing the income beneficiaries as successor trustees, instead of appointing another independent financial institution as a successor trustee. A court may accept the resignation of a trustee under terms established by the court "and upon such

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[1] In *Lansing Sch Ed Ass'n*, our Supreme Court overruled the doctrine of standing laid out in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001) and *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004). Ordinarily, decisions of appellate courts are given retroactive effect unless limited retroactivity is preferred. *Chow v O'Keefe*, 217 Mich App 102, 104; 550 NW2d 833 (1996). Here, we give retroactive effect to and apply the new test for standing stated in *Lansing Sch Ed Ass'n*, but we note that, had we applied the prior test, we would nevertheless have concluded that Jane Evans had standing.

terms as the rights and interests of the persons interested in the execution of the trust may require." MCL 555.25. When a trustee has resigned or is removed, the court may appoint new trustees within its discretion. MCL 555.27.

Jane Evans argues that the probate court's appointment of the four income beneficiaries as successor trustees constitutes an unlawful modification of the trust, contrary to the testator's intent. "The cardinal rule of law and the predominant rule in the construction and interpretation of testamentary instruments is that the intent of the testator governs if it is lawful and if it can be discovered." *In re Dodge Trust*, 121 Mich App 527, 539; 330 NW2d 72 (1982). If the language of the testamentary instrument is not ambiguous, the testator's intention is derived from the document's language. *Id.* at 539-540. Generally, a court has no authority to modify trust provisions in the absence of a compelling reason for the modification. 76 Am Jur Trusts, § 67, p 112.

Jane Evans relies on *Post v Grand Rapids Trust Co*, 255 Mich 436; 238 NW 206 (1931), in which our Supreme Court reversed a trial court's decision to allow, contrary to the express terms of a trust, the trustees of that trust to advance trust funds to a beneficiary to help pay for his college education:

> Such deviation can only be permitted under extraordinary circumstances when an exigency arises which it is believed testator did not anticipate. We may not speculate as to what testatrix's motives were, or whether the postponement of payments to the grandchildren was due to a lack of foresight or wisdom on her part. The circumstances in this case do not present such an unusual exigency as to warrant a deviation from the express terms of the will. Even if we are in full sympathy with the position of appellees, we may not disregard lawful conditions of a will and make a new will for the testatrix. [*Id.* at 438.]

Michigan's probate courts have equitable jurisdiction over proceedings involving the administration, distribution, modification, reformation, or termination of a trust. MCL 700.1302(b). Exigent circumstances, unforeseen by the settlor, can provide a basis for a court to exercise its equitable powers to modify a trust. *Young v Young*, 255 Mich 173, 179; 237 NW 535 (1931). A probate court exercising its equitable powers "may act in opposition to the provisions of a trust, and it may do whatever is necessary, not only for the preservation of trust property but, also, whatever is necessary for the protection of the rights of beneficiaries and the promotion of their interests." *Evans v Grossi*, 324 Mich 297, 305; 37 NW2d 111 (1949). A probate court may also approve modification of a trust where all the identified and competent beneficiaries agree to the modification in writing, and the agreement is just and reasonable. MCL 700.7207(1), (3).[2]

[2] MCL 700.7207 has since been amended by 2009 PA 46, which became effective April 1, 2010. However, a similar provision is now codified at MCL 700.7412.

The probate court's order appointing the income beneficiaries as successor trustees did not modify any substantive provisions of the trust and, therefore, did not require the consent of all beneficiaries or exigent circumstances justifying a deviation from the terms of the trust. The probate court's decision did not alter any of the trust provisions relative to the distribution of the trust principal and income. Instead, it involved the selection and appointment of a successor trustee. The need to replace a trustee in the event an acting trustee was no longer willing or able to act was foreseeable. We agree that the four separate trusts in this case, each managed by its own primary beneficiary, differs from the original structure of a single trust managed by a single independent financial institution, principally because it detracts from the unity of interest inherent in the original trust structure. However, that unity was substantially eroded in 1987, when the beneficiaries agreed to the creation of the four separate subtrusts. Although those four subtrusts were under the management of one trustee, the creation of four separate subtrusts created an atmosphere for the beneficiaries to disagree about management decisions, placing the corporate trustee in a situation where decisions preferable to some beneficiaries might be adverse to others. The possibility of dissension was thus created more than 20 years earlier, and not by the probate court's decision to allow the income beneficiaries to serve as successor trustees. Further, the trustees are still required to administer the subtrusts in accordance with the original trust provisions, as modified in 1987.

Jane Evans argues that the probate court erred in finding that there was no longer any purpose in continuing an institutional trustee's services, and in finding that the individual beneficiaries had sufficient business experience to serve as trustees of their own subtrusts. She denies that her prior history of litigation against the corporate trustee and Ervin Industries justified removal of the corporate trustee, and that no corporate entity was willing to serve as trustee. As discussed previously, the probate court's appointment of the income beneficiaries as successor trustees did not involve a substantive modification of the terms of the trust. Thus, these arguments are essentially a challenge to the probate court's exercise of discretion in its choice of a successor trustee. The principal effect of appointing the income beneficiaries as successor trustees was that it allowed them to exercise, as trustees, the voting rights of the Ervin Industries stock held by the trust. However, all the income beneficiaries already own Ervin Industries stock, with which they exercise voting rights outside the trust. Further, the income beneficiaries each have a continuing interest in acting in the best interests of Ervin Industries to preserve its stock value for themselves and their children. Jane Evans' suggestions that her siblings may use their power to raid the corporation's assets for their own gain, or that they will improperly use their voting power to make their own management decisions contrary to the best interests of Ervin Industries, are based entirely on speculation and unsupported by any actual evidence or offer of proof.

Similarly, Jane Evans' contention that Nancy Rodolph and Ann Jorgenson are not suitable to serve as successor trustees of their respective subtrusts because they lack sufficient business knowledge and experience to effectively exercise the voting rights of the Ervin Industries stock held by the subtrusts is also unfounded. First, Rodolph and Jorgenson have already been exercising voting rights of stock owned outside the trust for several years. Second, their husbands, both of which have significant business experience, were appointed as successor co-trustees of their respective spouses' subtrusts.

Further, although the trust gives a trustee discretion to invade the principal for the benefit of an income beneficiary if the income is insufficient for the income beneficiary's support, that contingency has never arisen in the 25-year history of the trust. In addition, the probate court appointed an independent special institutional trustee to act should such a situation arise.[3] Thus, the appointment of the income beneficiaries as successor trustees will not allow them to improperly invade the trust principal for a purpose not intended by the settlor.

Andrea Evans argues that the appointment of the income beneficiaries as successor trustees creates an inherent conflict of interest, because they could exercise their voting rights in the stock held by the subtrusts to maximize their interests as income beneficiaries to her detriment and to the detriment of the other remainderman beneficiaries. She relies on *In re Butterfield Estate*, 418 Mich 241; 341 NW2d 453 (1983), in which our Supreme Court found a potential conflict of interest where trustees also served as corporate directors, because their duties to the beneficiaries might be contrary to their duties to the corporation's creditors and shareholders. *Id.* at 257. The Court noted in a footnote that "[a] direct conflict of interest is not presented by this dual capacity because none of the trustees is either an income beneficiary or a remainderman." *Id.* at 257 n 10. The Court cited *Jennings v Speaker*, 1 Kan App 2d 610, 616-617; 571 P2d 358 (1977), in which the Kansas Court of Appeals found a conflict of interest where the trustees, who were the remaindermen under a trust, voted themselves to the corporation's board of directors. That court found that this situation created a conflict of interest because "any earnings retained by the company and not paid out as dividends will enrich them personally as remaindermen." *Id.* at 614-615.

The conflict in *Jennings* arose because the trustees held the positions of both remaindermen and corporate directors, which is not the situation here. Further, neither *In re Butterfield* nor *Jennings* establishes that trust beneficiaries are automatically disqualified from serving as trustees merely because their interests may differ from those of other beneficiaries. Here, although Andrea Evans argues that there is a potential for the income beneficiaries to exploit their positions as trustees to manage the subtrusts in a manner contrary to the remaindermen's interests, she presented no evidence or offer of proof showing that this concern was actual. Moreover, the fact that her siblings' own issue are also remaindermen under the trusts tends to undercut this argument. The siblings, who are in their 50s and 60s, have an interest in preserving the financial stability and future of Ervin Industries, and thus a disincentive to shortchange the future of Ervin Industries for immediate gains. Furthermore, pursuant to the probate court's order, each sibling is required to post a bond for the full amount of each trust's value, thereby providing a remedy should they violate their fiduciary duties. Lastly, it was not unreasonable for the probate court to conclude that continued administration by a corporate trustee would not serve the best interests of all beneficiaries, both income and remaindermen,

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[3] The probate court appointed Bank of Ann Arbor as "the separate institutional corporate 'special trustee' for" each subtrust, "for the limited purpose of exercising the discretionary power to decide whether to distribute any of the principal . . . to the income beneficiary."

given Jane Evans' and Andrea Evans' lengthy history of unsuccessful litigation against the corporate trustee.

The greatest potential for an actual conflict of interest existed by virtue of the discretion afforded to a trustee to invade the trust principal for an income beneficiary's support, if the trust income was otherwise insufficient to support the income beneficiary. The probate court addressed this concern, however, by appointing a special corporate trustee to act in that situation. Because the income beneficiary was not given discretion to invade the trust principal, there is no actual conflict of interest in this regard.

Considering all the circumstances, including the imposition of terms designed to protect the remaindermen's beneficial interests, we cannot conclude that the probate court's decision to allow the income beneficiaries to serve as trustees of their respective subtrusts was outside the range of reasonable and principled outcomes.

D. REQUEST FOR DISCOVERY AND AN EVIDENTIARY HEARING

We also disagree with appellants' arguments that the probate court erred by failing to allow them to participate in discovery and by failing to conduct an evidentiary hearing before appointing the income beneficiaries as successor trustees. Although the probate court was authorized to allow discovery with respect to "matters raised in any petitions or objections pending before the court," MCR 5.131(B), appellants failed to show that discovery was necessary. They also failed to show that there were disputed questions of fact requiring an evidentiary hearing.

Appellants argue that there was a disputed question of fact concerning whether another financial institution was available to serve as corporate trustee. Although Jane Evans proposed that CitiTrust be appointed as a successor trustee, she did not present any evidence showing that CitiTrust was willing to serve in that role. In contrast, Ervin Industries presented evidence that Comerica Bank had declined to serve as trustee because of Jane Evans' litigation history, and that the Bank of Ann Arbor had consented only to act as the special trustee. Jane Evans also argues that an evidentiary hearing should have been held to determine whether the other income beneficiaries were suitable to serve as trustees. This argument, however, is based on her contention that her siblings' status as income beneficiaries render them unsuitable to serve as successor trustees. It is not based on any evidence or offer of proof establishing a genuine issue of disputed fact regarding the competency of her siblings to act as successor trustees. Because appellants failed to show that there were disputed questions of fact for which discovery or an evidentiary hearing was necessary, the probate court did not err in deciding the matter without an evidentiary hearing or discovery.

We also reject Andrea Evans' argument that the failure to hold an evidentiary hearing violated her right to due process. "Whether a party has been afforded due process is a question of law." *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). The essence of the right of due process is the principle of fundamental fairness. *In re Adams Estate*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003). The concept of due process is flexible, and analysis of what process is due in a particular proceeding depends on the nature of the proceeding, the risks involved, and the private and governmental interests that might be affected. *In re Brock*,

442 Mich 101, 111; 499 NW2d 752 (1993). The basic requirements of due process in a civil case include notice of the proceeding and a meaningful opportunity to be heard. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). While the opportunity to be heard does not require a full trial-like proceeding, it requires a hearing such that a party has the chance to learn and respond to the evidence. *Id.*

In this case, Andrea Evans had ample notice of JP Morgan's petition to resign as trustee and its proposal to allow the income beneficiaries to serve as successor trustees. The proposal was first presented to all beneficiaries in written correspondence dated September 19, 2007. JP Morgan filed its formal petition after that, and Andrea Evans had the opportunity to respond to the petition. Indeed, several scheduled hearings were adjourned before the probate court eventually held a hearing on JP Morgan's petition in June 2008. Following the hearing, the probate court granted JP Morgan's petition to resign and appointed each income beneficiary as trustee of his or her separate trust, but gave each the discretion to name a corporate trustee. As previously discussed, Andrea Evans did not demonstrate that there were disputed questions of fact for which discovery or an evidentiary hearing was necessary. Although Andrea Evans disagrees with the probate court's decision, there is no basis in the record for finding that her due process rights were violated.

E. RECONSIDERATION

Lastly, we find no merit to Andrea Evans' argument that the probate court erred in denying Jane Evans' motion for reconsideration, in which Andrea Evans concurred. A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). Here, the motion merely presented the same issues the probate court previously ruled on, except for a jurisdictional issue appellants do not raise on appeal, and procedural issues we have already determined are without merit. The probate court did not abuse its discretion in denying the motion.

II. ATTORNEY FEES

In an August 6, 2009, order, the probate court awarded JP Morgan attorney fees of $187,590 for the period 2001 through 2005, which was added to a previous award of $375,000 for the same period, and "new" attorney fees of $263,250 for the period 2006 through 2008. The court ordered that the attorney fees were to be paid from the income of Jane Evans' individual trust. Jane Evans now challenges the awards for both periods.

This Court reviews for an abuse of discretion a trial court's determination of the reasonableness of attorney fees, but reviews for clear error the findings of fact on which the trial court bases its award. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008); *Taylor v Currie*, 277 Mich App 85, 99; 743 NW 2d 571 (2007).

A. AWARD FOR 2001 TO 2005 PERIOD

In 2006, the probate court awarded JP Morgan (then known as Bank One) attorney fees and costs of $375,000 against Jane Evans. JP Morgan had originally requested total fees and costs of $562,590. Both parties appealed the probate court's order. In a prior appeal, this Court upheld the probate court's award of $375,000, and remanded for further proceedings regarding JP Morgan's claim that it was entitled to the balance of its requested amount, $187,590. *In re Ervin Testamentary Trust*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2008 (Docket No. 270498):

> This Court has explained that generally, a court should hold an evidentiary hearing when one party is challenging the reasonableness of the attorney fees claimed, unless a sufficient record has been created to allow the court to review the issue. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). In support of its request for approximately $562,000 in attorney fees and costs incurred in defending Evans' prior actions in probate and federal court, Bank One submitted materials setting forth the work undertaken in both the probate court and federal litigations, the total hours spent performing that work, the hourly rates of those performing the work, and the total amount billed to Bank One for that work. Bank One also provided affidavits establishing that the hourly rates charged were consistent with market rates and opining that the fees and costs charged were reasonable given the professional standing of Bank One's counsel, the reasonableness of the hourly rates charged, the complexity of the litigation and the results achieved.
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> * * *
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> Based on our review of the record, we conclude that, contrary to Evans' assertions, the probate court did not abuse its discretion by awarding Bank One $375,000 in attorney fees and costs, considering both the amount of attorney fees and costs incurred by Evans during the course of, and the repetitive nature of the issues raised in, the successive actions. However, we also conclude that the trial court did not adequately explain its decision to reduce the attorney fees and costs requested by Bank One to that amount. Upon remand, the trial court should review the documentation in support of that request, hold a hearing if necessary, reconsider its award in this regard and articulate the reasons for its award.

To the extent that Jane Evans now challenges the probate court's 2006 award of $375,000 in attorney fees and costs, that award is not subject to review in this appeal because the prior decision with respect to that award is the law of the case. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009).

We agree, however, that the probate court erred by awarding JP Morgan the $187,590 "balance" of its requested fees for the 2001 to 2005 period without requiring detailed billing records and without conducting an evidentiary hearing to determine the reasonableness of the remaining requested attorney fees.

At the proceedings on remand, in addition to requesting the balance of its requested fees for the 2001 to 2005 period, JP Morgan also filed a second petition requesting "new" attorney fees of $263,259 incurred from 2006 through 2008. Jane Evans requested that JP Morgan be required to supply detailed billing records showing the various tasks performed and the time spent on those tasks for which fees were requested, to enable her to evaluate the reasonableness of the requested fees. The probate court granted Jane Evans' request with respect to the requested new fees for the 2006 to 2008 period, but denied the request for the earlier period. In addition, the probate court held an evidentiary hearing to determine the reasonableness of the requested fees for the 2006 to 2008 period, but did not hold an evidentiary hearing with respect to the requested fees for the 2001 to 2005 period.

We agree that, because Jane Evans was challenging the reasonableness of the remaining requested fees for the 2001 to 2005 period, the probate court erred by awarding JP Morgan those fees without requiring it to provide supporting documentation for the requested fees and without conducting an evidentiary hearing to determine their reasonableness, as it did for the requested new fees for the 2006 to 2008 period. In *Smith*, the lead opinion[4] stated:

> The fee applicant must submit detailed billings records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hours with evidentiary support. If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence. [481 Mich at 532.]

We disagree with JP Morgan's argument that *Smith* is not applicable to the remaining requested fees for the 2001 to 2005 period, either because this Court had already determined in the prior appeal that those fees were reasonable and there were no remaining factual issues for the probate court to decide on remand, or because *Smith* should not be applied retroactively.

First, contrary to what JP Morgan argues, this Court did not decide in the prior appeal that the remaining requested fees of $187,590 were reasonable, or that there were no remaining factual issues to decide on remand. If that had been the case, it would have been unnecessary to remand the case. Rather, this Court determined that a remand was necessary because the probate court "did not adequately explain its decision to reduce the attorney fees and costs requested by [JP Morgan]." *In re Ervin Testamentary Trust*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2008 (Docket No. 270498). This Court did not express any opinion regarding whether the remaining requested fees were reasonable. In addition, this Court stated that, "[u]pon remand, the trial court should review the documentation in support of [the

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[4] YOUNG, J., concurred with TAYLOR, C.J. in the lead opinion. CORRIGAN, J., authored a concurring opinion in which MARKMAN, J., joined. The areas of disagreement between the lead opinion and the concurrence are areas not relevant to this appeal. The portions of *Smith* that are relevant to this appeal received the votes of four justices, and are thus binding upon this Court.

requested fees], hold a hearing if necessary, reconsider its award in this regard and articulate the reasons for its award." *Id.* Under *Smith*, because Jane Evans was disputing the reasonableness of the hours billed and the hourly rates charged, an evidentiary hearing was "necessary." In addition, JP Morgan was required to provide the detailed billing records contemplated by *Smith*, both to properly support its requested fees and to enable Jane Evans to contest them for reasonableness.

Second, it is unnecessary to address whether *Smith* applies retroactively because we disagree with JP Morgan's argument that this case involves a retroactive application of *Smith*. This case does not involve the application of *Smith* to attorney fees that were awarded before *Smith* was decided. Rather, the challenged attorney fees were awarded in August 2009, more than a year after the Supreme Court decided *Smith*. Thus, it was proper to apply *Smith* to the requested fees. Indeed, the probate court indicated in its opinion and order that it applied *Smith* in evaluating the remaining requested fees for the 2001 to 2005 period. But because the probate court did not require JP Morgan to submit the detailed billing records contemplated by *Smith* in support of its fee request, or conduct an evidentiary hearing on the issue despite the existence of a factual dispute over the reasonableness of the hours billed and the hourly rates charged, we cannot uphold the probate court's award. Accordingly, we vacate the attorney fee award of $187,590 for the 2001 to 2005 period and remand for further proceedings consistent with *Smith.*

B. AWARD FOR 2006 TO 2008 PERIOD

A trial court may award a prevailing party its reasonable attorney fees under certain limited circumstances. See *Smith*, 481 Mich at 526-528. One such circumstance is where a petitioner unsuccessfully challenges the administration of a trust and it would be inequitable to assess the trustee's attorney fees against the trust as a whole. See *In re Hammond Estate*, 215 Mich App 379, 387-388; 547 NW2d 36 (1996). However, even when a probate court orders payment of such attorney fees, it may only order the payment of attorney fees that were reasonable. And the party requesting its fees bears the burden of proving that the requested fees are reasonable. *Smith*, 481 Mich at 528.

In determining whether a request for fees is reasonable, trial courts must first determine the hourly fee "customarily charged in the locality for similar legal services." *Id.* at 530. In the present case, JP Morgan presented evidence and testimony concerning the rates for high-end firms that specialize in complex litigation; it did not present evidence concerning the rates charged by smaller or less well-known firms that may also handle complex trust litigation. And our Supreme Court has specifically cautioned against determining the reasonableness of fees on the basis of what some well-to-do clients are willing to pay to large firms: "reasonable fees are different from the fees paid to the top lawyers by the most well-to-do clients." *Id.* at 533. That is, a fee is not necessarily reasonable just because some clients are willing to pay a premium for the prestige and support behind a large and respected firm. Hence, the fact that JP Morgan did not object to the fees at issue does not by itself establish that the fees were reasonable. Nor were they necessarily reasonable just because there was evidence that other lawyers successfully get large institutional clients to pay similar rates per hour. Rather, the deciding factor is whether the fees are those *customarily* paid for *similar* legal services—that is, the rates customarily paid by the full range of clients (not just well-to-do institutional clients) to the full range of lawyers and firms (not just the largest or most prestigious firms) for similar legal services. Moreover, JP

Morgan presented evidence concerning the rates approved by a specific and specialized court—bankruptcy court—for what is customarily paid for the services of a lawyer in trust litigation. Yet, the rates charged for complex bankruptcy matters might vary considerably from the rates charged for complex trust litigation. Indeed, the rates charged in complex bankruptcy litigation might be significantly higher based on market conditions that are not at issue for trust matters—namely the number of firms that actually provide legal services for businesses undergoing complex bankruptcy reorganization. Finally, JP Morgan's evidence focused primarily on Detroit firms rather than the firms present in the locality at issue—Ann Arbor specifically and Washtenaw County more generally. And what firms situated in Oakland or Wayne Counties customarily charge might be considerably different than what firms situated in Washtenaw County customarily charge.

In this case, there is no indication that the nature of the litigation was such that it required premium talent or the services of the largest and most prestigious firms. Yet the trial court accepted JP Morgan's evidence without question and implicitly found that the hourly rate actually charged was that which was customarily charged in Washtenaw for complex trust services. Because the evidence presented by JP Morgan was skewed to reflect the premium fees charged by the largest firms from different localities and for an area of law that was different from that actually involved in this case, there was no evidence from which the trial court could properly determine the hourly rate customarily charged for similar legal services in the locality. For that reason, we conclude that the trial court abused its discretion in awarding fees on the basis of an hourly rate for which the evidence was insufficient to determine its reasonableness.

We also cannot agree with the trial court's implicit finding that the actual number of hours billed was reasonable. The party requesting attorney fees must present detailed billing records and the trial court must examine those records to determine the reasonableness of the number of hours billed. *Id.* at 532. A trial court must exclude those hours that were excessive, redundant or otherwise unnecessary as unreasonable—that is, the opposing party cannot be compelled to pay for padded billing. *Id.* at 532 n 17. In this case, the billing records strongly suggest that JP Morgan's lawyers billed for excessive and unnecessary hours. From November 2006 to February 2007, JP Morgan's attorneys billed more than 120 hours for researching and drafting a single appellate brief. The sheer number of hours billed over this period suggests excessive billing, but when the staggering number of hours is considered in light of the actual work product, one is left with the definite and firm conviction that the trial court erred when it found that these hours were reasonably billed. Indeed, one entry for December 25, 2006—that is, Christmas day—shows that an associate attorney billed six hours for revisions to the brief's statement of facts alone. Yet the facts of the case should have been well-known to the drafting attorney after several years of litigation. Nevertheless, the facts—along with the introduction—required a further five hours of revisions in January 2007 for a total of 11 hours in revisions. More disturbing is that the work product itself appears to have been drafted in significant part from prior pleadings. These billing entries strongly suggest excessive billing and call into question the entire bill.

Because the trial court clearly erred to the extent that it found that the hourly billing rates actually charged to JP Morgan were those customarily charged in the locality for trust litigation and clearly erred when it found that the hours charged—at least with regard to the drafting of the appellate brief—were not excessive or redundant, we conclude that the trial court abused its

discretion when it awarded the full amount of the fees requested for 2006 through 2008. For that reason, we also vacate the trial court's order to the extent that it awarded JP Morgan its fees for the 2006 to 2008 period and order the trial court to conduct a new hearing on remand to determine whether and to what extent the fees requested were reasonable.

Affirmed in part, vacated in part, and remanded for further proceedings regarding the reasonableness of the requested attorney fees. We do not retain jurisdiction. None of the parties having prevailed in full, none may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Donald S. Owens