

STATE OF MICHIGAN  
COURT OF APPEALS

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BRIAN M. KELLY TRUST, DENNIS KELLY,  
Trustee, and SEAN KELLY, Trustee,

UNPUBLISHED  
March 8, 2007

Petitioners/Counter-Respondents-  
Appellants/Cross-Appellees,

v

ADKISON, NEED, GREEN & ALLEN, PLLC,  
PAUL GREEN, and JOHN YUN,

No. 268550  
Oakland Probate Court  
LC No. 2003-288141-CZ

Respondents/Counter-Petitioners-  
Appellees/Cross-Appellants.

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Before: Borrello, P.J., and Jansen and Cooper, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I concur in parts I, II, and III.A of the majority opinion. I write separately, however, because I disagree with the majority’s analysis in part III.B. The majority assumes that respondents, as probate attorneys, owed the legal duty to maximize the rate of return on the Charles Schwab IRA, or at least to promptly move the volatile IRA assets into more stable and conservative holdings. I cannot agree.

Whether a duty exists in a legal malpractice action is a question of law. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). In general, it is the duty of the trustee “to administer a trust expeditiously for the benefit of the beneficiaries[.]” MCL 700.7301. The trustee occupies a fiduciary relationship with respect to the trust beneficiaries, and “[e]xcept 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.” MCL 700.7302.

Under the prudent investor rule, the trustee must “invest and manage fiduciary assets solely in the interest of the beneficiaries.” MCL 700.1506. The trustee “may delegate investment and management functions,” provided that he or she “exercises reasonable care, skill, and caution” in (1) “[s]electing an agent,” (2) “[e]stablishing the scope and terms of the delegation,” and (3) “[p]eriodically reviewing the agent’s actions in order to monitor the agent’s performance and compliance with the terms of the delegation.” MCL 700.1510(1)(a)-(c). If the trustee complies with these requirements, the agent replaces the trustee as the new fiduciary,

MCL 700.1510(3), and the trustee cannot be held personally liable to the beneficiaries for the agent's investment or management decisions, MCL 700.1510(2).

In this case, there was no credible evidence that the trustees specifically delegated their investment and management duties to respondents. Moreover, even if there were evidence of such a delegation to respondents, the record does not support a conclusion that the trustees "exercise[d] reasonable care, skill, and caution" in "[e]stablishing the scope and terms of the delegation." MCL 700.1510(1)(b). This is borne out by the fact that respondents were expressly retained only as probate attorneys, and not as investment advisors or financial planners. Moreover, although petitioner's proposed expert opined that respondents, as probate attorneys, had the duty to move the volatile IRA assets into a more stable and conservative investment within 48 hours, I have located no support for this proposition in our statutes or case law. In the absence of specific evidence that the trustees delegated their investment and management duties pursuant to MCL 700.1510(1), I conclude that respondents owed no duty to prudently invest or manage the assets of the IRA. Respondents' sole duty was to exercise due care in the *rendering of legal services*, by acting "as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances." *Simko v Blake*, 448 Mich 648, 658; 532 NW2d 842 (1995). The duty to prudently invest and manage the trust assets was separate from the duty to provide legal services, and it belonged to the trustees alone rather than to respondents.

/s/ Kathleen Jansen